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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

89348-9

NO. 301290

SUPREME COURT OF THE STATE OF WASHINGTON

KERRY A. CLARK, et al.,

Petitioners,

v.

MIKE WALCH, et al.,

Respondents.

PETITION FOR REVIEW

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STATE OF WASHINGTON

Douglas W. Nicholson, WSBA #24854
Lathrop, Winbauer, Harrel,
Slothower & Denison, LLP
Attorneys for Respondents
P.O. Box 1088/201 W. 7th Avenue
Ellensburg WA 98926
(509) 925-6916

ORIGINAL

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A. IDENTITY OF PETITIONERS

Kerry A. Clark and Patricia L. Clark, husband and wife, and the W. L. Clark Family, LLC, a Washington limited liability company (collectively "Clarks") ask this Court to accept review of the Court of Appeals' unpublished decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS' DECISION

Petitioners seek review of the decision of the Court of Appeals (Division Three), filed July 23, 2013 (No. 301290-III). Petitioners' motion for reconsideration was denied by the court's order filed August 27, 2013. A copy of the decision is found in the attached Appendix A, at pages A-1 through A-14. A copy of the single page order denying petitioners' motion for reconsideration is found in the attached Appendix B.

C. ISSUES PRESENTED FOR REVIEW

No. 1: Does the attorney fees provision in a private condemnation action, RCW 8.24.030, which is to be broadly interpreted, preclude a trial court from exercising its discretion to award attorney's fees for the successful defense of common law easement claims asserted as alternative theories of relief along with the statutory easement claim? (This issue can also be stated as follows: Does RCW 8.24.030, mandate that a trial court segregate the fees in-

curred in defending against common law easement claims, and award fees only for the work done in defending against the statutory easement claim?)

Sub-Issue: In a private condemnation action, if fees are capable of being segregated among the statutory easement claim and the common law easement claims, does it necessarily follow that they must be segregated, even though the trial court found that the underlying claims all involved a common core of facts and related legal issues?

No. 2: Where the only substantive issue at trial is whether the condemnors can claim a statutory easement by necessity, and the condemnees prevail on this issue, which is upheld on appeal, along with the trial court's award of attorney's fees on that claim, are the condemnees entitled to recover their attorney's fees on appeal even though the award of fees on the common law claims was reversed?

No. 3: In a private condemnation action, where the condemnees prevail across the board on every issue presented for review except the award of attorney fees on the common law easement claims, are they the "substantially prevailing party" for purposes of awarding fees on appeal?

D. STATEMENT OF THE CASE

1. Segregation of Fees Under RCW 8.24.030.

The trial court's Memorandum Decision regarding attorney's fees, and its order thereon, were incorporated into the trial court's final judgment in favor of respondents. CP at 446, 456, 459, 464, and 468. In its decision regarding fees, the trial court found:

[W]hile defendants have left no stone unturned in defending the claims foisted upon them by the plaintiffs, there was a common core set of facts as outlined above. . . . [T]he legislature intended broad application of RCW 8.24.030. Beckman v. Wilcox, 96 Wn. App. 355, 365 (1999). Here, the three theories in the plaintiffs' cause of action were all interrelated and all arose from the same set of facts. Plaintiffs needed to demonstrate that they had no other practical way of accessing their property. One way was to demonstrate they had no implied easement. A second way was to demonstrate they had no prescriptive rights to otherwise be established because the court had previously dismissed their claim.

CP at 443 (emphasis added).

As a predicate to the above findings, the trial court stated:

[A]s part of the easement by necessity claim, the plaintiffs had the burden of proving that no implied easement or prescriptive easement existed to otherwise allow them access to their property. In fact, the defendants claim the plaintiffs argued they had met the burden of not showing [an] implied easement by demonstrating to the court there has never been a common grantor that would have allowed them to pursue the implied easement claim. Moreover, the defendants claim a common core of facts and related legal theories

persists in relationship between the prescriptive easement and easement by necessity claims because both easement claims were over identical routes, which the plaintiffs claim to be 'existing roads' over and across defendants' properties, that ***the defendants' defenses included establishing the roads in question never existed or were not on their property and that had the plaintiffs established the alleged roads in fact existed such a fact would have enhanced the claim for easement by necessity and undermined the defendants' defenses.***

CP at 441 (emphasis added); *see also* the trial court's Findings of Fact and Conclusions of Law at CP 450, 452-53.

Walches (the respondents herein) filed suit on August 9, 2010, alleging three alternative easement theories over two identical routes. Walches claimed both routes were "over and across existing roads, thirty feet (30') in width, commonly referred to as Dalle Road and the Burlington Northern and Sante Fe Railroad Corridor Road, which roads crossed the real property of Defendants". CP at 1, 5-7. Trial of this case commenced on May 10, 2011. CP at 246. Walches did not dismiss their implied easement claim until January 14, 2011, less than four months before trial, when they were faced with Clarks' motion for partial summary judgment dismissal of both the implied and the prescriptive easement claims. CP at 777-785, 987. Walches' prescriptive easement claims remained pending until February 8, 2011, when the trial court entered its order dismissing them on partial summary judgment. CP at 995-1002.

In dismissing Walches' prescriptive easement claims, the trial court found: "***Here, there is no evidence anybody used the road described in the complaint as the `Dalle Road Extension`***". CP at 992 (emphasis added). Nonetheless, at trial, in order to bolster their claim of a statutory easement claim over the alleged Dalle Road extension, Walches resurrected their assertion that an actual road existed over this route.

In their trial brief, during trial, and even after trial, Walches claimed the Dalle Road extension had been used in the past to haul heavy equipment; thus, using this route as access for their superload lowboys would not interfere with Clarks' use of their property. Walches even introduced a never-implemented site plan for the Clarks' Swiftwater Business Park in their effort to show a "road" actually along this route. CP at 214-15, 217 (Walches' trial brief); CP at 238-39 (Walches' post-trial memorandum); CP at 1075-1094 (Clarks' motion to strike Walches' post-trial memorandum statements of an alleged existing road); Ex. 53; VRP (Vol. I) at 16-19, 43, 45-46, 51-52, 61-65; VRP (Vol. II) at 24-27, 61-62, 64, 92-93, 126-27, 145-47.

Disproving the existence of the alleged Dalle Road extension was an inherent part of Clarks' defense to both Walches' statutory and prescriptive easement claims over that route. In their amended answer to the complaint, at

trial, during post-trial proceedings, and on appeal, Clarks asserted the equitable defenses of estoppel, laches, and waiver. These defenses were based upon Walches' silence and delay in asserting their easement claims, knowing meanwhile that Clarks were constructing improvements to their properties in the same location as the alleged Dalle Road extension. CP at 74, 1030-45; VRP (Vol. II) at 56-58, 149-52; Clarks' appellate brief at 34-38.

Regarding their implied easement claim, Walches themselves acknowledged there was a common core of facts and related legal theories between this claim and their statutory easement claim. In their trial brief, Walches cited *Roberts v. Smith*, 41 Wn. App. 861, 707 P.2d 143 (1985) for the proposition that "the condemner's burden to prove reasonable necessity for ingress and egress includes the burden to disprove the existence of an implied easement of necessity where there is some credible evidence that such an easement exists." CP at 225. Walches then argued they "have met this burden by demonstrating to the Court that there has never been a common grantor which fact Clark and Folkman have stipulated is true." *Id.*

2. Determining the Substantially Prevailing Party.

The Court of Appeals affirmed the trial court's judgment that Walches failed to establish a statutory easement by necessity (Op. at 8); affirmed the trial

court's award of attorney fees under RCW 8.24.030 for the defense of the statutory easement claim (*id.* at 12); affirmed the trial court's decision on the reasonableness of the total fee award on all three easement claims, finding that "Walches imposed significant costs on their neighbors who properly proved their defense costs . . . and cannot now claim it was unreasonable for both respondents to fully contest the action at great expense to all" (*id.* at 11); denied Walches' request for attorney fees (*id.* at 9); rejected Walches' argument that recovery of fees under CR 11 cannot be addressed due to the failure of Clarks to cross appeal (*id.* at 12); found that Clarks properly raised CR 11 as an alternative basis for affirming the fee award on the common law claims (*id.*); and reversed the trial court's award of attorney fees under RCW 8.24.030 on the common law claims, *but left open* whether the fees could be recovered under CR 11 on remand (*id.* at 12). The amount of fees attributable to the common law claims is \$45,155, which is substantially less than the \$76,767.50 in fees and costs affirmed on appeal. CP at 268, 464.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Case Meets the Requirements For Review.

This petition involves issues of first impression in Washington, which are matters of substantial public interest that should be determined by this

Court under RAP 13.4(b)(4). Petitioners can find no published Washington case addressing the following issues: (1) whether a trial court has the discretion under RCW 8.24.030 to award attorney's fees for the successful defense of common law easement claims asserted as alternative theories of relief along with the statutory easement claim; and (2) if it is possible to segregate fees incurred on the statutory easement claim from those incurred on the common law easement claims, does RCW 8.24.030 mandate fee segregation, even though the trial court finds that all claims involve a common core of facts and related legal issues? The resolution of these issues has state-wide significance, since it will define the otherwise unsettled issue regarding the scope of a trial court's discretion in awarding fees under RCW 8.24.030 in all private condemnation actions in which multiple theories of recovery are alleged.

In addition, although both decisions are unpublished, there appears to be a conflict between Division Three's decision in this case and Division One's decision in *Kahne Properties v. Brown*, 145 Wn. App. 1051 (2008). In *Kahne Properties*, Division One of the Court of Appeals held that the trial court did not err by failing to segregate fees incurred in defending against the private condemnation claim from those incurred in defending against the common law claims. In that case, the court further held that, in order to reverse the trial

court's fee award, "Kahne must show that the court manifestly abused its broad discretion" to award fees under RCW 8.24.030. By contrast, Division Three's decision supports the proposition that the trial court has no such discretion:

We agree with the Walches that RCW 8.24.030 does not apply to the common law claims. The statute applies to any actions 'brought under the provisions of this chapter.' RCW 8.24.030. It does not thereby extend to all related claims. . . . There were three distinct legal theories subject to different discovery and legal research efforts. It was not impractical to segregate.

Opinion at 11.

Thus, under Division Three's analysis, a trial court has no discretion and must, as a matter of law, segregate fees in any private condemnation action in which ancillary common law easement claims are asserted. Under RAP 13.4(b)(2), this Court should take the opportunity to resolve the conflict between Division One's broad interpretation of RCW 8.24.030 as granting the trial court discretion to award fees on common law claims, and Division Three's narrow interpretation holding otherwise. Although the decisions are unpublished, the issue presented will no doubt present itself again for judicial resolution; therefore, this Court should establish precedent to guide the lower courts.

2. Because the Legislature Intended RCW 8.24.030 to be Broadly Construed to Allow the Trial Court Wide Discretion in Awarding Fees in a Private Condemnation Action, Fee Segregation is Not Required.

"The legislative history, the use of the term 'any action,' and the other statutory language indicates that the Legislature intended broad application of RCW 8.24.030." *Beckman v. Wilcox*, 96 Wn. App. 355, 365, 979 P.2d 890 (1999). "In a condemnation action, a trial court has discretion to grant an award for attorney fees in light of the circumstances in each case." *Kennedy v. Martin*, 115 Wn. App. 866, 872, 65 P.3d 866 (2003). Such circumstances include whether a party's actions caused an increase in the costs of litigation. *Noble v. Safe Harbor Trust*, 167 Wn.2d 11, 23, 216 P.3d 1007 (2009).

"Moreover, RCW 8.24.030 gives the trial court discretion 'without regard to whether the condemnee has prevailed in the action or on any particular issue.'" *Kennedy*, 115 Wn. App. at 872 (quoting *Sorenson v. Czinger*, 70 Wn. App. 270, 279, 852 P.2d 1124 (1993)). "RCW 8.24.030 is unlike other attorney fee statutes, which allow attorney fees only to a prevailing party." *Id.* at 872-73. "In other words, there does not need to be a successful condemnation before the awarding of attorney fees, only an action." *Id.* at 873.

"An action is defined as a 'lawsuit brought in a court.'" *Id.* (quoting *Beckman*, 96 Wn. App. at 364 (quoting *Black's Law Dictionary 28 (Sixth Ed.*

1990))). As a matter of law, a private condemnation lawsuit must be brought under the provisions of chapter 8.24 RCW, regardless of whether common law easement claims are added as alternative theories of recovery. Nothing in the plain language of the statute requires a *per se* segregation of fees in such cases.

The above authorities establish that the trial court has broad discretion in awarding fees under RCW 8.24.030, which should include the discretion to award fees on the common law easement claims. Division Three's conclusion - "that RCW 8.24.030 does not apply to the common law claims" (Op. at 11) -- turns on a narrow interpretation of RCW 8.24.030, which is contrary to the Legislature's intent that it be broadly interpreted. *Beckman*, 96 Wn. App. at 365. In interpreting a statute, the court's role is to "discern and implement the Legislature's intent." *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012).

Narrowly reading RCW 8.24.030 as allowing fees only on the statutory easement claim would preclude a trial court from ever awarding fees on ancillary common law claims, no matter how related they are in a given case. By contrast, affirming the trial court's interpretation of RCW 8.24.030 would be consistent with Division Two's decision in *Kennedy*, 115 Wn. App. at 873, holding that "an action", as used in RCW 8.24.030, is broadly defined as "a

lawsuit brought in court", and with Division Three's broad interpretation of the statute in *Sorenson*, 70 Wn. App. at 78-79. "*Sorenson's* and *Kennedy's* interpretations of RCW 8.24.030 are persuasive." *Noble*, 167 Wn.2d at 20. Affirming the trial court would also comport with *Noble's* opinion that, in determining a fee award under RCW 8.24.030, a trial court may consider whether a party's actions caused an increase in the cost of litigation. *Id.* at 23.

Collectively, *Kennedy*, *Sorenson*, and *Noble* stand for the proposition that RCW 8.24.030 does not contain a *per se* mandate that fees must be segregated whenever common law easement claims are concurrently alleged in a private condemnation lawsuit. They instead make clear a trial court has broad discretion in deciding whether to award any fees, their amount, and on which claims, depending upon the particular facts before it.

3. Just Because Fees Are Capable of Being Segregated Does Not Mean That They Must be Segregated Under RCW 8.24.030.

Although the trial court awarded fees on all claims because it found they involved a common core of facts and related legal theories (CP at 441, 443, 450, 452-53), the Court of Appeals erroneously found the trial court awarded fees on all claims because it was "impractical to segregate covered and non-covered claims." Op. at 11. From this incorrect premise, the Court of Appeals stated, "It was not impractical to segregate the claims. The respondents

did in fact segregate the request. Indeed, the trial court also awarded fees to the respondents based on each category of claims." *Id.* Thus, in addition to holding that "RCW 8.24.030 does not apply to the common law claims" (*id.*), the court postulated the blanket proposition that, if it is possible to segregate fees, they must be segregated and awarded only on the statutory easement claim. *Id.* This assumption is misplaced and not supported by RCW 8.24.030.

RCW 8.24.030 does not contain a per se fee segregation requirement. Nor should it. To hold otherwise would encourage attorneys to not segregate their fees, rather than make a good faith effort to assist the trial court in exercising its discretion to award all or part of the fees under RCW 8.24.030. Also, failing to segregate might frustrate the trial court and result in the denial of any fees, since the decision to award fees under RCW 8.24.030 is entirely discretionary. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 8, 282 P.3d 1093 (2012).

The better approach would be to allow the trial court, on a case-by-case basis, to determine whether the statutory and common law easement claims should be segregated. Establishing a bright-line rule -- requiring fees to be segregated whenever segregation is possible -- contradicts the Legislature's intent, and the letter and spirit of the statute as reflected in case precedent.

Adopting such a rule would, for purposes of any private condemnation

action, all but eliminate the existing general rule -- that fees need not be segregated where the claims allowing fees share a common core of facts and related legal theories with those that do not. Every distinct cause of action has its own separate elements, each of which must be proven or disproven. It is hard to imagine a case in which, if required, fee segregation could not, in some manner, be accomplished for work done on separate claims.

In determining whether fee segregation is appropriate under RCW 8.24.030, therefore, the focus should not be on whether fee segregation is possible. Instead, ***the focus should be on whether a trial court abuses its discretion in finding that, based upon the facts before it, the statutory and common law easement claims are sufficiently intertwined so that segregation is not required***, even if segregation is possible. The above-cited cases support this approach.

Another case in point is *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). In *Ethridge*, the plaintiff prevailed at trial on her claims under the Mobile Home Landlord Tenant Act ("MHLTA"), under the Consumer Protection Act ("CPA"), and on her claim for tortious interference with business expectancy. The trial court awarded plaintiff her attorney fees and costs on all claims under the CPA's attorney fees provision. Upholding the trial court's fee

award, the Court of Appeals concluded, "the court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact pattern, but allege different bases for recovery." *Id.* at 461. "*Ultimately, the fee award must be reasonable in relation to the results obtained.*"

Id. (citations omitted) (italics added). The *Ethridge* Court held:

Here, *Ethridge* prevailed on all three theories alleged in the complaint: MHLTA, CPA, and tortious interference. Each claim involved the same core of facts -- Hwang's unreasonable rejection of prospective buyers at the park. ***Proof of the tortious interference claim involved the same preparation as the other claims*** -- establishing that Hwang acted unreasonably. ***Because nearly every fact in this case related some way to all three claims, segregation of the fee request was not necessary and the trial court did not abuse its discretion in awarding fees as it did.***

Id. (emphasis added).

Ethridge stands for the proposition that no fee segregation is required, even if segregation is possible, when the facts are related in some way, the claims involve the same trial preparation, and the ultimate fee award is reasonable in relation to the results obtained. Such is the case here.

As in *Ethridge*, Clarks prevailed on all three easement theories alleged by Walches; thus, in the end, the fee award was reasonable in relation to the results obtained. Walches asserted three easement claims over identical routes; thus, all three claims involved related facts requiring substantially overlapping

analysis and trial preparation. The trial court found that, in defending against each claim, Clarks had to establish that no roads ever existed providing access over their property to Walches' property. CP at 441, 443; CP 449-53. The trial court's findings and conclusions on the commonality of the facts and legal theories are fully supported by the record and the law, as discussed above.

An additional authority of note is *Brown v. McAnally*, 97 Wn.2d 360, 644 P.2d 1153 (1982), which allows the condemnation of a private way of necessity over an existing road, as long as the use claimed by necessity is not incompatible with the existing use. *Id.* at 368. From the inception of this case through post-trial proceedings, Walches sought to establish the existence of an actual road along the alleged Dalle Road extension that was used to haul heavy equipment, similar to their intended use of their superload lowboys. Had Walches succeeded, this would have greatly enhanced the odds of the trial court locating the easement by necessity along this route, which was the route they sought at trial. *See, e.g.*, CP 214-15, 217, 234.

In summary, the trial court properly exercised its discretion in finding that Walches' three easement claims were so intertwined as to allow Clarks to recover their fees under RCW 8.24.030 on all claims. The facts, the legal issues and analysis, and the discovery needed to defend against each claim were

substantially and reasonably related. "The appellate function begins and ends with a determination of whether the findings are supported by substantial evidence. Under such circumstances, we are not to substitute our judgment for that of the trial court, even though we may believe an erroneous conclusion was reached." *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 101, 330 P.2d 1068 (1958); accord *Thomdike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence supports the trial court's decision here.

4. The Trial Court Properly Exercised its Discretion in Awarding Fees on the Common Law Easement Claims.

"In order to reverse an attorney fee award made pursuant to a statute or contract, an appellate court must find the trial court manifestly abused its discretion. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law." *Noble*, 167 Wn.2d at 17.

The trial court found Walches' conduct increased the cost of litigation. CP at 443. The Court of Appeals agreed: "The Walches imposed significant costs on their neighbors who properly proved their defense costs, including the claims that were not subject to reimbursement under the statute . . . The Walches sought an easement across commercial property owned by two parties

and cannot now claim it was unreasonable for both respondents to fully contest the action at great expense to all." Op. at 11.

The trial court, which presided over this case from its inception through post-trial proceedings, carefully analyzed the record before it, and found that the defense of all three easement claims involved a common core of facts and related legal theories. The trial court properly applied RCW 8.24.030 to the facts and circumstances before it, and its decision was not manifestly unreasonable or based on untenable grounds or reasons.

5. Under RCW 8.24.030, Attorney Fees May be Awarded to Clarks on Appeal Even if They Did Not Substantially Prevail.

In *Sorenson*, 70 Wn. App. 270 at 279, the court stated that RCW 8.24.030 "grants the trial court discretion to award reasonable fees and costs without regard to whether the condemnee has prevailed in the action or on any particular issue." *Id.* at 279. The court held the trial court erred in accepting the alternative way of necessity proposed by Mr. Czinger (*id.* at 274-75), and in finding RCW 8.24.010 does not authorize the private condemnation of land for utilities (*id.* at 277-78). Despite reversing the trial court's judgment in favor of Mr. Czinger (the condemnee), and remanding the case, the Court held: "Because RCW 8.24.030 does not limit the award of fees and costs to a prevailing party, [the trial court's] award [of fees to Mr. Czinger] is affirmed, and Mr.

Czinger's request for attorney fees on appeal is granted." *Id.* at 279.

Sorenson is squarely on point. The trial court awarded attorney fees to Clarks on their successful defense of Walches' statutory easement claim. Under *Sorenson*, therefore, they should also be awarded their fees on appeal.

6. Because They Substantially Prevailed, Clarks Should be Awarded Their Reasonable Attorney Fees on Appeal.

"If neither party wholly prevails, then the party that substantially prevails on its claims is the prevailing party." *Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 975 P.2d 532 (1999). Determining the substantially prevailing party "depends upon the extent of the relief afforded the parties." *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010) (citations omitted).

In *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 146 P.3d 395 (2006), a case directly on point, Division Two held that Weir was the "substantially prevailing party" under RAP 14.2, "because he prevails on the underlying property ownership claim and the lis pendens damages and fees claim. The Center has prevailed only on its argument that the RESPA attorney fee provision does not apply due to the merger with the statutory warranty deed." *Id.* at 915. Even though the *Weir* Court affirmed the trial court's judgment in part, and reversed it in part, it granted Weir's request for fees on appeal. *Id.*

Clarks are the "substantially prevailing party" in this case. They prevailed on every issue presented, except for the award of attorney fees, and they substantially prevailed on the overall amount of fees and costs awarded (the court upheld \$76,767.30 of the total award of \$121,922.50.) CP at 268, 464; Op. at 10, 13.

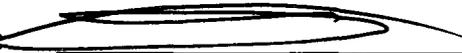
F. CONCLUSION

This Court should accept review, reverse the Court of Appeals and find that the trial court did not abuse its broad discretion in awarding Clarks their attorney's fees on the common law easement claims. Because the Court of Appeals found that the total fee award granted by the trial court was reasonable (Op. at 11), it is further requested that the trial court's award of fees be reinstated, and that Clarks be awarded their reasonable attorney's fees on appeal.

DATED this 20th day of September, 2013.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By: 

Douglas W. Nicholson, WSBA #24854
Attorney for Respondents Clark

CERTIFICATE OF SERVICE

I certify that on the 20th day of September 2013, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

Attorneys for Appellants:

Chris Montgomery
Montgomery Law Firm
PO Box 269
Colville WA 99114-0269

Via First-Class Mail

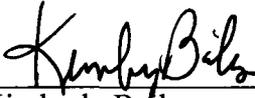
Richard T. Cole
1206 N. Dolarway, Ste. 108
PO Box 638
Ellensburg WA 98926

Via First-Class Mail

Attorney for Respondents Folkman:

Bill Williamson
Williamson Law Office
PO Box 99821
Seattle WA 98139-0821

Via First-Class Mail



Kimberly Bailes

Appendix A

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MIKE WALCH and MARCIA WALCH,)	
Husband and wife,)	No. 30129-0-III
)	
Appellants,)	
)	
v.)	
)	
KERRY A. CLARK and PATRICIA L.)	UNPUBLISHED OPINION
CLARK, husband and wife; W.L. CLARK)	
FAMILY, LLC, a Washington Limited)	
Liability Company; ROBERT C.)	
FOLKMAN and PATRICIA W.)	
FOLKMAN, husband and wife,)	
)	
Respondents.)	

KORSMO, C. J. — This is an action to attempt to obtain an easement by necessity across commercial property for the benefit of other commercial property owners. The trial court dismissed the common law theories of relief at summary judgment and then rejected the statutory theory after bench trial. We affirm the trial court’s rulings concerning the easement and partially affirm the attorney fees award. We remand for the court to segregate its fee award and consider respondents’ CR 11 argument. Whether respondents are entitled to attorney fees on appeal will be determined by the outcome of the remand.

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respondents are entitled to attorney fees on appeal will be determined by the outcome of the remand.

FACTS

Mike and Marcia Walch own Rainier Skyline Excavators, Inc. (RSE), a company that designs and builds portable hydraulic track drive skyline excavators. In 2000, the Walches became interested in buying some property in Cle Elum, Washington. They wanted to use the property, which included a pond known as the Dalle Pond, to demonstrate, display, and sell RSE's machinery as well as to manufacture excavators. Many components used to assemble the excavators must be transported on extra-long lowboy trailers, called superloads. These superloads can be up to 165 feet in length and can carry several hundred thousand pounds.

The Walches purchased the property in May 2004. The real estate contract identifies the Walches' access to the property by way of an existing easement over the property located to the east of the Walches' property, then continuing east over and across the Burlington Northern Santa Fe (BNSF) railroad corridor, and then proceeding north over and across the BNSF railroad crossing to Owens Road, "so long as the railroad shall allow." Ex 1. At that point, Owens Road becomes a public right-of-way owned by the city of Cle Elum (City).

The City has a private agreement with the Owens family to use Owens Road south of the BNSF railroad crossing to access the City's sewage treatment plant. A trucking

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company and several private residents all use the BNSF crossing on Owens Road for access to their respective properties, but they do not have permits from BNSF to cross the railroad right-of-way.

The respondents in this action, the Clarks and the Folkmans, own property located to the west of the Walches' property, in the Swiftwater Business Park. All the property owned by the parties in this action is presently zoned by the City as being within its Industrial District.¹

On August 9, 2010, the Walches filed suit for a 30-foot easement across the respondents' properties. The Walches alleged that a road existed at this location, and that they used this road to access the property when they were deciding whether to purchase.² The Walches claimed an easement implied from prior use and/or prescription or, alternatively, an easement by necessity pursuant to RCW 8.24.010.

The trial court dismissed the common law claims for prescriptive easement or implied easement by prior use before trial. However, the statutory claim proceeded to bench trial, where the Walches claimed they were entitled to an easement by necessity because their property was effectively landlocked for several reasons: (1) they had no legal, insurable access over the railroad right-of-way, and (2) as a practical matter they

¹ See chapter 17.36 of the Cle Elum Municipal Code.

² The respondents disputed this claim, and the trial court found that there was no evidence that a road ever existed at this location.

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could not physically enter or exit the property because the super-lowboy trailers could not use Owens Road.³

Mr. Walch testified that he had not taken any steps to submit any land use applications for the property because he did not want to do any studies or plans until they had legal access to the property. He also acknowledged that he had not hired any engineers to examine the route feasibility or made any attempts to obtain an estimate of the cost of improving Owens Road for the use of the super-lowboys. Additionally, he testified that the Walches could not get their access insured because they do not have a BNSF permitted easement for access to their property. The Walches had not sought a permit to cross the railroad at Owens Road.

City administrator Matt Morton testified that the Walches had never submitted any land use applications, their intended use of the property would be a conditional use, there was no guarantee that the Walches would be permitted to use the property for RSE, and it was premature to give an opinion on whether the City would grant a permit of any kind. He also testified that the Dalle Pond on the Walch property is classified as a category three wetland, which could further complicate the land use permit process.

³ In particular, they alleged that the superloads could not negotiate the turns at Owens Road, which also was too narrow, and the trailers would get high centered on the railroad tracks.

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The trial court dismissed the Walches' RCW 8.24.010 claim without prejudice, finding that the Walches had physical access to their property over the BNSF railroad crossing and that until such access was denied or withdrawn the Walches could make use and enjoyment of their property for those uses authorized by the City within the industrial zone. The court concluded that the property was not landlocked and there was no guarantee that RSE could be situated on the property.

Respondents requested attorney fees and costs under RCW 8.24.030 for defending all three easement claims. Finding that the claims all involved the same underlying set of facts and were so interrelated that segregation of fees was not required, the trial court awarded attorney fees for defending all three claims. The Walches then timely appealed to this court.

ANALYSIS

The Walches challenge the court's statutory easement ruling and the attorney fee awards. All parties seek attorney fees on appeal. We will first discuss the easement ruling before turning to the fee arguments.

Easement

The trial court determined that the Walches had "not established a reasonable necessity for a private way of necessity because their property is not landlocked and because they have no guarantee that a future use of their property would include situating

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the RSE, Inc. manufacturing business on the property.” Clerk’s Papers (CP) at 251. We agree with both of those assessments and affirm the denial of the easement.

This matter was tried on the authority of RCW 8.24.010 that provides:

An owner, or one entitled to the beneficial use, 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 . . . on, across, over or through the land of such other . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity The term “private way of necessity,” as used in this chapter, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress.

This statute is “not favored in law and thus must be construed strictly.” *Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982). To condemn a private way of necessity, the Walches needed to show that access over the respondents’ property was reasonably necessary for the proper use and enjoyment of their property. *See id.*

The landowner’s necessity does not have to be absolute, but it must be reasonably necessary under the facts of the case. *State ex rel. Polson Logging Co. v. Superior Court*, 11 Wn.2d 545, 562-63, 119 P.2d 694 (1941). It is insufficient to show that the proposed route is more convenient or advantageous than another route. *State ex. rel Carlson v. Superior Court for Kitsap County*, 107 Wash. 228, 232, 181 P. 689 (1919). The party seeking to condemn the private way bears the burden of proving the reasonable necessity, including the absence of alternatives. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

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However, “a potential condemnor should not be prevented from condemning a private way of necessity merely because the condemnor may enjoy the permissive user of a ‘way.’” *Brown*, 97 Wn.2d at 368. The Walches primarily rely upon this quote from *Brown*, arguing that although they currently have access to the property, they have no legally protected access and are entitled to pursue their private condemnation action. We agree. The existence of an access route does not bar a private condemnation action under the statute.⁴ *Id.* at 366-68. Existing access, however, is evidence that can be considered in adjudging the *necessity* of the proposed private condemnation action. That is how the trial court treated the matter.

The existing access is strong evidence that the property is not currently landlocked. There also was evidence that the Walches had not undertaken efforts to determine the feasibility of obtaining permission from BNSF railroad or of improving the existing access route to accommodate the superloads RSE would need to use. In light of these facts, the trial court did not err in determining that the property was not landlocked.

The trial court also determined that necessity had not been established because it was only speculative that RSE would be able to use the property for its intended

⁴ The Walches seek to extend *Brown* and apply the statute to condemn a new route rather than obtain legal standing to their existing route. In light of our agreement with the trial court that the Walches did not prove the necessity for private condemnation, we do not address the propriety of their proposed route or of their argument for extending *Brown*.

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purposes. The testimony showed that a conditional use permit would be necessary to address zoning related restrictions on the property and there also were environmental concerns to address. Given these hurdles, it was understandable that the superloads might never need to access the property.

In *Brown*, the would-be condemners received approval of their proposed development on various conditions that included the need to obtain an easement permitting access to the property. *Id.* at 364-65. The Walches approached the matter from the opposite perspective by attempting to obtain their access before seeking approval of their development plans. While there is no legal impediment to using this approach, the uncertainty of the property's future use is a proper fact for the trier of fact to consider in assessing the necessity of the proposed private condemnation.

The record supported the trial court's determination that the Walches had not established the necessity of their proposed private condemnation. The property was not currently landlocked and it was uncertain whether future access would be inadequate. We thus affirm that aspect of the judgment.

Attorney Fees

The Walches attack the trial court's ruling assessing fees against them for defense of the common law claims as well as the reasonableness of the fee award. All parties seek attorney fees on appeal and the respondents also suggest alternative bases for upholding the fee award. We conclude that the trial court erred in not segregating the fee

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awards, the fees were otherwise reasonable, and we remand for consideration of the CR 11 claim that was raised, but not decided, at trial. The Walches are not awarded any fees for the appeal; whether respondents obtain appellate attorney fees is dependent upon the outcome of the remand. We approach the fee question in a slightly different manner than it was presented by the parties.

RCW 8.24.030. Attorney fees in a private condemnation action are governed by *RCW 8.24.030*, which provides in relevant part:

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.

This court reviews a trial court's award of attorney fees for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Attorney fees should be awarded only for services related to causes of action that allow for fees. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). If fees are authorized for only some of the claims, the fee award must properly reflect a segregation of time spent on issues for which fees are authorized from time spent on other issues. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d

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988 (1994). However, if the claims are so related that no reasonable segregation can be made, the court does not need to require segregation. *See id.* at 673.

In awarding attorney fees, Washington courts apply the lodestar method and the trial court must enter findings of fact and conclusions of law supporting its decision to award fees. *Mahler*, 135 Wn.2d. at 434-35. The findings are necessary for an appellate court to review the award. *Bentzen v. Demmons*, 68 Wn. App. 339, 350, 842 P.2d 1015 (1993). Where a trial court fails to create the appropriate record, remand for entry of proper findings and conclusions is the appropriate remedy. *Mahler*, 135 Wn.2d at 435.

The Walches asserted three easement claims: an easement by necessity under RCW 8.24.010, a prescriptive easement, and an implied easement by prior use. The latter two common law claims were dismissed by agreement at summary judgment. After prevailing at trial, the respondents presented requests for attorney fees that segregated the fees related to the statutory action from those related to the common law claims, but argued on various theories that they were also entitled to attorney fees for defending the common law claims.

The Walches contend on appeal that the court erred by finding that the claims were too interrelated to segregate and that the fee award was excessive. We agree that the claims could be segregated and reverse the trial court's finding that it was not appropriate to segregate. However, we see no abuse of discretion in assessing the amount of attorney fees for the defense of the statutory claim.

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Initially, we agree with the Walches that RCW 8.24.030 does not apply to the common law claims. The statute applies to any actions “brought under the provisions of this chapter.” RCW8.24.030. It does not thereby extend to all related claims. However, the trial court still has authority to grant the entirety of a fee request when it is impractical to segregate covered and noncovered claims. *Hume*, 124 Wn.2d at 673.

While that is how the trial court treated the requests here, it was not impractical to segregate the claims. The respondents did in fact segregate their requests. Indeed, the trial court also awarded fees to the respondents based on each category of claims. There were three distinct legal theories subject to different discovery and legal research efforts. It was not impractical to segregate. The trial court erred in concluding otherwise.

The Walches also challenge the reasonableness of the total fee award. We see no abuse of discretion. The Walches imposed significant costs on their neighbors who properly proved their defense costs, including the claims that were not subject to reimbursement under the statute. The Walches do not challenge the hourly rate charged by respective counsel. The court reviewed the time slips and properly applied the lodestar formula to calculate the fee award. The fees awarded each respondent were reasonable. The Walches sought an easement across commercial property owned by two parties and cannot now claim it was unreasonable for both respondents to fully contest the action at great expense to all.

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The attorney fee awards for the defense of the statutory claim are affirmed; the awards under the statute for the defense of the common law claims are reversed.

Common Law Theories. Respondents also sought CR 11 sanctions in the trial court on the common law claims, arguing that they were brought without proper investigation. The trial court did not address this argument in light of its decision to grant fees under the statute. On appeal, the respondents reprise this argument as an alternative basis for affirming the fee award. The Walches contend that the argument cannot be addressed due to the failure of the respondents to cross appeal.

Only a party who has been aggrieved by a trial court action can appeal. RAP 3.1. The respondents were not aggrieved; the trial court awarded attorney fees on the common law claims. They had no basis for seeking affirmative relief. Instead, they properly raised the issue as an alternative basis for affirming the trial court. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206-07, 985 P.2d 400 (1999).

This court is not in a position to decide the CR 11 issue in the absence of finding by the trial court. Since we have reversed the fee award under the statute for the common law claims, we remand this issue to the trial court for consideration of the respondents' CR 11 argument related to those claims.

Attorney Fees on Appeal. Finally, all parties seek attorney fees on appeal. The Walches seek fees for responding to the CR 11 argument. However, as that argument

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was properly brought to this court, the Walches have not prevailed on that issue and there is no basis for awarding fees to them.

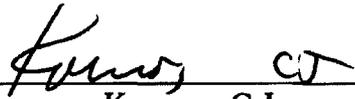
Respondents seek their attorney fees based on either RCW 8.24.030 or for responding to a frivolous appeal. This appeal was not frivolous. The Walches presented a debatable issue concerning the necessity of their private condemnation action. The statute does provide a basis for awarding fees to the respondents. However, at this point they have not substantially prevailed. While they have won on the merits of the private condemnation action, their attorney fee award has been reduced, at least temporarily.

If, on remand, respondents prevail on their CR 11 argument and regain their fees for the common law claims, the trial court also should award respondents their reasonable attorney fees for defending the appeal in this court. If they do not prevail on the CR 11 claim, then no party will receive any fees for the appeal.

Affirmed in part, reversed in part, and remanded.

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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Korsmo, C.J.

WE CONCUR:



Brown, J.



Kulik, J.

Appendix B

FILED
August 27, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MIKE WALCH and MARIA WALCH, husband and wife)	
)	No. 30129-0-III
)	
Appellants,)	
)	
v.)	ORDER DENYING
)	MOTIONS FOR
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 W. FOLKMAN, husband and wife.)	RECONSIDERATION
)	
)	
Respondents.)	

THE COURT has considered respondent Folkmans' Motions for Reconsideration & Modification of Ruling (RAP 12.4; RAP 17.7) and Motion for Attorney Fees and Costs, and respondent Clarks' Motion for Reconsideration of Decision on Attorney Fees, and is of the opinion the motions should be denied. Therefore,

IT IS ORDERED the motions for reconsideration of this court's opinion of July 23, 2013, are denied.

DATED: August 27, 2013

PANEL: Judges Korsmo, Brown, Kulik

FOR THE COURT:



KEVIN M. KORSMO
Chief Judge