

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Nov 06, 2013, 8:34 am
BY RONALD R. CARPENTER
CLERK

E CDF
RECEIVED BY E-MAIL

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.

PETITIONERS REPLY TO FOLKMANS' ANSWER TO WALCHES'
PETITION FOR REVIEW BY THE SUPREME COURT.

Chris A. Montgomery, WSBA #12377
Richard T. Cole, WSBA #5072
Attorneys for Petitioners
Montgomery Law Firm
344 E. Birch Ave.
P.O. Box 269
Colville, WA 99114
(509) 684-2519
FAX (509) 684-2188

 ORIGINAL

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	ii-iii
II.	IDENTITY OF PETITIONERS	1
III.	COURT OF APPEALS DECISION.....	1
IV.	ISSUES PRESENTED FOR REVIEW	2
V.	WHY REVIEW SHOULD BE ACCEPTED	3-5
VI.	CONCLUSION	5

TABLE OF AUTHORITIES

Table of Cases

Adams v. Cullen, 44 Wn.2d 502, 507, 268 P.2d 451 (1954) 4

Bays v. Haven, 55 Wn. App. 324, 329, 777 P.2d 562 (1989)..... 3

Brown v. McAnally,
97 Wn.2d 360, 367-68, 644 P.2d 1153 (1982) 5

Evich v. Kovacevich,
33 Wn.2d 151, 157-58, 204 P.2d 839 (1949) 3

Fossum Orchards v. Pugsley,
77 Wn. App. 447, 451, 892 P.2d 1095 (1995)..... 4

Northern Pacific R. Co. v. Concannon, 239 U.S. 382 (1915) 3

Northern Pacific R. Co. v. Ely, 197 U.S. 1 (1905) 3

Northern Pacific R. Co. v. Townsend,
190 U.S. 267, 47 L. Ed. 1044, 23 S. Ct. 67 3

Ruvalcaba v. Kwang Ho Baek,
175 Wn.2d 1, 282 P.3d 1083 (2012)..... 4

State of Washington v. M.C. Ballard,
156 Wash. 530, 287 P.27 (1930) 3

Walch et al. v. Clark et al., No 30123-III 1

Woodward v. Lopez,
174 Wn. App 460, 300 P.3d 416 (2013)..... 3

Statutes & Rules

RCW 8.24.010 et seq. 2

Article I, Section 16 of WA State Constitution 2

Other

RP Vol. 1 4-5, 16, 126, 127 & 130, Exs. 1, 9, 54, & 58.....4

IDENTITY OF PETITIONERS

Petitioners for Supreme Court Review, Mike Walch and Marcia Walch, were the Appellants at the Court of Appeals and the Plaintiffs at trial. Petitioners Walch submit this Reply to Respondent Folkmans' Answer filed October 22, 2013.

COURT OF APPEALS DECISION

The decision at issue is the unpublished opinion, *Walch et al. v. Clark et al.*, No. 30123-III, filed July 23, 2013.

ISSUES PRESENTED FOR REVIEW

The Folkmans' Answer misstates the issues presented for review:

Issue No.1. Walches seek the application of RCW 8.24.010 et seq., *not an exception* as stated by Folkmans. Folkmans assert Walches purportedly have *a revocable permissive use agreement* – none exists. And finally, Burlington Northern Santa Fe (BNSF) holds a granted right of way, a fee ownership of the land, not an easement.

Issue No. 2. Walches do not seek to "*manufacture a legal fiction*" under Article I, Section 16 of the Washington State Constitution and such language is inflammatory and an unfair statement of the issue. Moreover, a revocable permit would not give permanent legal access to the Walches' land; revocable is revocable. No one has a permit for the elevated crossing.

Issue No. 3. Walches have not *voluntarily landlocked* their parcel. They did not create the landlocked situation. Moreover, the lack of legal access precludes *any* use of the land, not just a single beneficial use.

WHY REVIEW SHOULD BE ACCEPTED

Walches and Folkmans agree that this Court should accept review. Folkmans mischaracterize *State of Washington v. M.C. Ballard*, 156 Wash. 530, 287 P.2d 27 (1930) as dealing with railroad easements. The holding in that case, applying the federal statute, made clear that BNSF could not alienate, nor could title be acquired, to the outer one hundred feet of the two-hundred-foot right of way existing on either side of the center line of the railroad. 156 Wash. at 533 (citing *Northern Pacific R. Co. v. Ely*, 197 U.S. 1 (1905) and *Northern Pacific R. Co. v. Concannon*, 239 U.S. 382 (1915)). Whether by grant, permit or adverse possession, Walches can never acquire a permanent legal right to cross the portion of the railroad or its corridor that Folkmans' claim is the permissible access to the Walches' land.

In the context of implied easements, the Court of Appeals in *Woodward v. Lopez*, 174 Wn. App 460, 300 P.3d 417 (2013) addressed the definition of necessity:

Absolute necessity is not required to establish an implied easement. *Evich v. Kovacevich*, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949). "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989). "Although prior use is a circumstance contributing to the implication of an easement, if the land

cannot be used without the easement without disproportionate expense, an easement may be implied on the basis of necessity alone.” *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995) (citing *Adams*, 44 Wn.2d at 507-09).

This is precisely the situation faced by the Walches. To the East is the inalienable railroad corridor and crossing, without *any* permits (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1, 9 & 54).¹, to the North is the inalienable BNSF railroad and corridor, to the South is the Interstate, and to the West is the Clark and Folkman lands giving access to a permitted, railroad crossing with safety lights and guards (RP Vol. I, at 29). Walches have never expected to obtain the Western access for free; they simply sought a right of way pursuant to the statute.

Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 282 P.3d 1083 (2012) is readily distinguishable. Therein, the landowners severed their property and voluntarily landlocked themselves. In the present case, the parcel is landlocked due to the nature of the surrounding property. Access is blocked by federal public interests to the North, South and East, a situation the Walches did not create. Reasonable necessity has been established by the Walches.

¹ The City of Cle Elum does have a private agreement with the Owens Family to use Owens Road South of the BNSF railroad crossing from the North line of Section 36 to the City of Cle Elum’s sewage treatment plant (RP Vol. I, p. 126; Ex. 58). Nonetheless, no written agreement exists as to the railroad corridor and crossing.

Moreover, it is wrong to state Walches' position as seeking to bypass RCW 8.24.010 and *Brown v. McAnally*, 97 Wn. 2d 360, 644 P.2d 1153 (1982). In *Brown*, the court ruled that the trial court had exceeded its authority in using the private condemnation statute to create a way of necessity, because the scope of the way far exceeded that which was necessary for ingress and egress and instead was for the purpose of establishing a public county road. Walches have merely established that, because public federal land interests block legal access to their property from the North, South and East, it is reasonably necessary to condemn a private right of way to the West to make *any* use of their property. They do not seek to rewrite the statute, but merely demonstrate that the location of the Walches' land and the status of the surrounding parcels established a reasonable necessity to condemn a right of way to the West.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Discretionary Review be granted.

DATED this 5th day of November, 2013

Respectfully submitted,



Chris A. Montgomery, WSBA #12377
Richard T. Cole, WSBA #5072
Attorneys for Petitioners
Mike and Marcia Walch

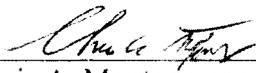
CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on November 6, 2013, as follows:

<u>Party</u>	<u>Method of Service</u>
Douglas W. Nicholson Attorney at Law P.O. Box 1088 Ellensburg, WA 98926	<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Postage Prepaid <input type="checkbox"/> Certified Mail <input type="checkbox"/> Postage Prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> ABC/Legal <input type="checkbox"/> Messenger <input type="checkbox"/> UPS Next Day Air <input type="checkbox"/> By Fax <input type="checkbox"/> Hand delivered by: <input checked="" type="checkbox"/> Email to: dnicholson@lwhsd.com
<u>Party</u>	<u>Method of Service</u>
Bill H. Williamson Williamson Law Office P.O. Box 99821 Seattle, WA 98139-0821	<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Postage Prepaid <input type="checkbox"/> Certified Mail <input type="checkbox"/> Postage Prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> ABC/Legal <input type="checkbox"/> Messenger <input type="checkbox"/> UPS Next Day Air <input type="checkbox"/> By Fax <input type="checkbox"/> Hand delivered by: <input checked="" type="checkbox"/> Email to: williamsonb@msn.com

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 6th day of November, 2013, at Colville, Washington.



 Chris A. Montgomery, WA RA # 12327

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, November 06, 2013 8:35 AM
To: 'Chris Montgomery'
Cc: dnicholson@lwhsd.com; williamsonb@msn.com; rick@colelaw.net
Subject: RE: Mike Walch, et al v. Kerry A. Clark, et al - Supreme Court No. 89348-9

Received 11/6/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Chris Montgomery [mailto:mlf@cmlf.org]
Sent: Wednesday, November 06, 2013 8:33 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: dnicholson@lwhsd.com; williamsonb@msn.com; rick@colelaw.net
Subject: RE: Mike Walch, et al v. Kerry A. Clark, et al - Supreme Court No. 89348-9

*MONTGOMERY LAW FIRM
A Multi-Service Law Firm
344 East Birch Avenue
P.O. Box 269
Colville, Washington 99114-0269
(509) 684-2519 Telephone
(509) 684-2188 Fax
mlf@cmlf.org e-mail*

Dear Supreme Court Clerk and Counsel,

There was an error in the Table of Authorities for the Adams citation. That has been corrected. Accordingly, I am submitting a corrected Petitioners Walches' Reply to Folkmans' Answer to Walches' Petition for Review by the Supreme Court. Please disregard my earlier filing from today. Sorry for any confusion. The Certificate of Service is attached as the last page. Thanks!

Very truly yours,

MONTGOMERY LAW FIRM

By: Chris A. Montgomery

CONFIDENTIALITY NOTICE: This e-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copy, distribution, or use of this e-mail or any attachments is prohibited. If you have received this e-mail in error, please notify our Firm by returning it to the sender at mlf@cmlf.org or delete this copy from your system. Thank you!