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No. 71534-8-I

COURT OF APPEALS  
DIVISION ONE  
OF THE STATE OF WASHINGTON

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MCCAULEY FALLS, LLC, a Washington limited liability company;  
ABACULO, LLC a Washington limited liability company,  
Respondents,

v.

KING COUNTY, a political subdivision of the State of Washington,  
Respondents,

v.

STEVEN NICHOLS AND LINDA NICHOLS, husband and wife,  
Appellants/Intervenors

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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BRIEF OF THE APPELLANTS

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## **I. INTRODUCTION**

Appellants Steve and Linda Nichols, (hereinafter “Nichols), are the owners of approximately 40 acres directly South of Road No. 978 in unincorporated King County, North of Duvall. The John McGee Road (Road No. 978) abuts and lies within their property, and is the Nichols’ access to State Route 203.

The Nichols’ real property is affected by a Stipulation and Decree Quieting Title obtained by Respondents, McCauley Falls, LLC (hereinafter “McCauley Falls”) and Abaculo, LLC (hereinafter “Abaculo”), vacating a portion of King County Public Road No. 978, and creating an easement 15-20 feet in width out of a 60 foot, 100 year old public right of way. The Nichols have been denied the opportunity to join the law suit and have also been denied their request to vacate the decree for further proceedings.

## **II. ASSIGNMENTS OF ERROR**

1. The Trial Court abused its discretion by its denial of the Nichols’ Motion for Order to Show Cause to Vacate the Stipulation and Decree entered March 28, 2012, and For Permissive Joinder (CP 14) and its subsequent denials of the Appellants’ two Motions for Reconsideration (CP 40 and 43);

2. The Trial Court erred in its failure to permit joinder of indispensable parties;

3. The Trial Court erred in its failure to require the vacation of the road be done according to state statute and county ordinance;

4. The Trial Court erred in law by reducing the right of way from 60 feet to 20 feet and prohibiting the county from altering the road;

5. The March 28, 2012 Stipulation and Decree Quieting Title is not supported by the Findings of Fact and Conclusions of Law.

### **III. STATEMENT OF THE CASE**

#### **A. Background Information**

**McCauley Falls, LLC.** The Respondent, McCauley Falls, LLC, is the owner of the 80 acre parcel adjoining John McGee Road (Road No. 978) to the east identified as King County Tax Parcel No. 062607-9034. The owner of McCauley Falls, LLC involves the same owners as Duvall Quarry, LLC, McCauley Falls, LLC's predecessor in interest to the property at issue herein, whose owner is believed to be Joe and Lee Jackels or Jackels Investment Group.

**Abaculo, LLC.** The Respondent, ABACULO, LLC, is the owner of the seven contiguous parcels consisting of approximately 74 acres adjoining Road No. 978 to the West. ABACULO, LLC acquired its interest in the 74 acres in 2010 from McCauley Falls, LLC, who purchased the property from Galloping Gadgets, LLC.

**Steven and Linda Nichols.** The Appellants, Steven and Linda Nichols, are the owners of approximately 40 acres directly South of Road

No. 978 identified as King County Tax Parcel Numbers 072607-9001 and 072607-9042. The John McGee Road (Road No. 978) abuts and lies within their property.

McCauley Falls and Abaculo brought suit against King County to vacate a portion of the 60 foot wide Road No. 978, without joining the Nichols, who and their predecessors in interest, had used for nearly a hundred years, and which King County had maintained for decades.

By chance, 10 months after the March 2012, decree the Nichols learned of the entry of the decree affecting a public road they had been granted a special use permit by the county to maintain the road, for which they paid \$2,377.10 to King County.

**Road Formation.** Prior to 1914, King County surveyed and established a county road which subsequently, by court order, was established as Road No. 978. (CP 18)

**County Maintained Road.** For decades, King County maintained the ditches, installed culverts and graveled and graded Road No. 978. (CP 18)

**County Issued Right of Way Permit.** In September 2000, when the Nichols commenced developing their property to commence construction of their home, King County required application by the Nichols for a Right-Of-Way Use Permit for maintenance of Road No. 978, at the expense of the Nichols of \$2,377.10. The application for the Right-Of-Way Use Permit identifies at least 5 culverts between 20 to 25 feet in length in diameters of 12 to 36 inches. (CP 15)

**King County Prosecuting Attorney's 1997 Letter.** In October 1997, Deputy Prosecuting Attorney Leesa A. Barrow, addressed correspondence to the Nichols' attorney attaching a map showing the

location of Road No. 978. Therein, she states categorically the location of John McGee Road, as a county road. (CP 15)

**Duvall Quarry, LLC Grading Permit Application.** In the late 1990's the 80 acres now owned by McCauley Falls was zoned "minerals and mining" and therefore, that parcel's previous owner, Duvall Quarry sought a permit for mining of gravel. With its application, Duvall Quarry, submitted a 1999 survey of the existing Road No. 978 showing Road No. 978 extending approximately 125 feet into the Nichols' real property. The surveyor relied upon King County's 1913 survey No. 443 for establishing Road No. 978, and the surveyor further relied upon King County Assessor Subdivision Map 2536 identifying John McGee Road (Road No. 978), SCC 100924. (CP 18)

**Correspondence with John Briggs, DPA.** In 2006 and 2007, the attorney for the Nichols exchanged correspondence with King County Deputy Prosecuting Attorney John Briggs concerning the Nichols' interest in Road No. 978. The correspondence concerned the style of warning signs to the public regarding maintenance of the road, making John Briggs aware of the Nichols' interest in Road No. 978. John Briggs is the same attorney who represented King County in the instant case and stipulated to a decree without trial or exchange of formal discovery. (CP 18)

**Duvall Quarry, LLC v. Galloping Gadgets, LLC 2003 Lawsuit.** In 2003, Duvall Quarry, LLC (who is the predecessor in interest to McCauley Falls, LLC with interlocking ownership) sued Galloping Gadgets, LLC claiming placement of encroaching farm buildings to the John McGee Road-No. 978-and property owned by Duvall Quarry, LLC, King County Superior Court Cause No. 03-2-18612-1 SEA. In Finding of Fact No. 3, the court made the following

finding of fact prepared by attorney William B. Foster (who filed the Complaint in this suit),

*That the property of the Plaintiff is adjacent to and to the East of the Defendant's property. **That the two parcels are separated by an established King County right-of-way known as Road No. 978.** That the centerline of King County right-of-way known as Road No. 978 is shown on Exhibit 1 admitted into evidence herein.*

(emphasis added.)

The object of the above referenced lawsuit was to give Duvall Quarry, LLC the right to force Galloping Gadgets, LLC to remove the encroaching farm buildings located on Road No. 978. In doing so, the court, in the decree prepared by attorney William B. Foster, decreed as follows:

*In the event the Defendant fails and/or refuses to remove the improvements constructed on the property of the Plaintiff and/or the **right-of-way**, the Plaintiff may remove the improvements, and the Defendant shall pay to the Plaintiff the cost of removal of said improvements, the reasonable cost of which shall be determined by further Order of the Court.*

(emphasis added) (CP 12)

Duvall Quarry, LLC never forced the removal of the encroaching farm buildings and apparently used the Decree as a leverage to acquire the 74 acres from Galloping Gadgets, LLC in 2005, and thereafter, McCauley Falls, LLC sold the 74 acres (with buildings in place) to Abaculo, LLC, in 2010. (CP 18)

The significance of the 2003 Judgment and Decree is that it decrees that Road No. 978 is a county right-of-way. (CP 18)

The attorneys who represented Duvall Quarry, LLC in that 2003 lawsuit are the same attorneys representing McCauley Falls, LLC in the instant action.

**McCauley Falls and Abaculo v. King County.** On August 16 2010, attorneys for McCauley Falls and Abaculo filed the Complaint For Declaratory Relief and Quiet Title in the instant matter. (CP 1) The only named Defendant was King County, despite the fact that Plaintiff McCauley Falls and the Defendant, King County, were aware of all of the facts identified above. No notice of the Complaint was in any way provided to Nichols nor was the Summons in this matter published to put the Nichols on notice of these proceedings.

The Nichols are people who would have an interest in a declaratory judgment action (RCW 7.24.020 and RCW 7.28.010).

**No Implementation of Statutory Vacation Procedure.** McCauley Falls and Abaculo brought the instant Quiet Title/Declaratory Judgment action without notice to necessary or interested parties, or the public, which would have occurred had the statutory and code provisions and procedures mandated by King County Code 14.40-ROAD VACATION and the state enabling statute, RCW 36.87-ROADS AND BRIDGES-VACATION been followed. In summary, the King County Code and State Statute require the following procedures for a freeholder to petition to vacate a public road:

1. Petition for Vacation of County Road submitted;
2. County Road Engineer in the Department of the Transportation shall make recommendations;

3. Road Vacation Report Form circulated for County comments;
4. Notice of Public Hearing (by publication and posted sign) given with 20 days notice;
5. Review by King County Hearing Examiner or County Council; and
6. Right to appeal.

There is nothing in the court records to demonstrate any discovery was conducted in the instant action to support the findings the road was never opened to the public to establish the finding of fact. No hearings or trial occurred. The stipulated findings, conclusions and decree were presented to Court Commissioner Nancy Bradburn Johnston.

The Complaint was filed without reference to the so called Historic Road, (the “as built roadway”) but the findings of fact, conclusion and decree failed to address the specific interest of the Nichols and the public in the Historic Road other than by the signed conclusion of law number 2 the county cannot change the 15-20 foot configuration of the Historic Road, which is the county maintained Road 978. (CP 1 and 13)

The stipulated Conclusion of Law number 2 states in part:

2. The Historic Road is a currently unmaintained county road. King County shall have no right to expand or otherwise alter the Historic Road from its present configuration...

That Conclusion of Law is presumably supported by Finding of Fact number 4, which reads in part:

4. As early as 1890, a road was established over a portion of Plaintiffs' property. Subsequent to construction of the road, the County carried out intermittent limited maintenance of the road ("Historic Road").

The Historic Road is described in Exhibit C to the Stipulated Findings and Conclusions of Law as being only "20 feet in width," but is not described as such in the complaint (CP 1 and 13)

The County maps going back decades show the Historic Road as a county right of way, reinforced by correspondence from the King County Prosecutor that the Historic Road is a county road, and the denial of the right to alter the Historic Road is contrary to law. (CP 18)

The Nichols presented a Motion to King County Superior Court for an Order to Show Cause to Vacate the Stipulation and Decree and for Permissive Joinder, which request to vacate the decree was denied. (CP 14) The Nichols presented two Motions for Reconsideration, both of which were denied. (CP 40 and CP 43)

#### **IV. SUMMARY OF ARGUMENT**

The trial court abused its discretion in denying the Nichols' Motion for Order to Show Cause, as such, this case should be remanded to the trial court with instructions the Nichols should be joined in the lawsuit as they are indispensable parties.

Further, the case should be remanded with instruction requiring application to vacate the road be done according to state statute and county ordinance and disallowing the reduction of the right of way from 60 feet to 20 feet.

Finally, the trial court should be ordered to enter a decree which is supported by the Findings of Fact and Conclusions of Law, after trial.

## **V. ARGUMENT**

### **A. Standard of Review.**

The standard of review is de novo consideration of the pleadings filed herein.

“Where as here, the record on both trial and appeal consists of affidavits and documents, and the trial court has neither seen nor heard testimony requiring it to assess the credibility or competency of witnesses, nor had to weigh the evidence, the appellate court stands in the same position as did the trial court in reviewing the record.”

*Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35.36, 769 P.2d 283 (1989).

### **B. Abuse of discretion by trial court.**

The Appellate Court shall determine whether the trial court abused discretion in vacating the judgment and decree entered in violation of county ordinance, state statute and common law.

“Under an abuse of discretion standard, the reviewing court will find error only when the trial court’s decision (1) adopts

a view that no reasonable person would take and is thus “manifestly unreasonable,” (2) rests on facts unsupported in the record and is thus based on “untenable grounds,” or (3) was reached by applying the wrong legal standard and is thus made for “untenable reasons.”

*State v. Sisouvahn*, 175 Wn.2d 607 (2012), quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

**C. Failure to join indispensable parties.**

Pursuant to Court Rule 19-Joinder of Persons Needed for Just Adjudication, the Nichols herein are a necessary party.

Court Rule 19(a) reads as follows:

**(a) Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action. (CR 19(a)).

Stated another way, “A party is a necessary party if the party's absence from the proceedings would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence

would either impair that party's interest or subject any existing party to inconsistent or multiple liability.” *Serres v. Washington Dept. of Ret. Sys.*, 163 Wash. App. 569, 588, 261 P.3d 173, 183 (2011) *review denied*, 173 Wash. 2d 1014, 272 P.3d 246 (2012) citing *Coastal Bldg. Corp. v. City of Seattle*, 65 Wash.App. 1, 5, 828 P.2d 7 (1992). In this matter the right of the Nichols for access and use of a 60 foot right of way was taken away without notice.

At the very least, the Nichols herein have a prescriptive easement over Road No. 978 by their open, notorious, continuous, uninterrupted use of Road No. 978, over a uniform route, adverse to the owner of the land sought to be subjected, and with the knowledge of such owner use of the road for over 10 years. They and their predecessors in interest have used and maintained the road for decades.

In addition, at the time the Respondents brought suit to quiet title to Road No. 978, the interest and position of the Nichols with respect to Road No. 978 was well known to the owners of McCauley Falls, LLC, its attorney, William B. Foster, and King County Deputy Prosecuting Attorney, John Briggs, however, the Nichols were not joined as a party. (CP18)

Because the Respondents did not follow RCW 36.87- ROADS AND BRIDGES-VACATION and KCC 14.40-ROAD VACATION, the Nichols never received notice of the action to vacate Road No. 978 and therefore were denied the right to challenge the vacation, a right assured by the King County Code and state statute. By side-stepping the proper road vacation method found in the King County Code and RCW 36.87, including the statutory right of the requirement to obtain county road engineer reports and notice to the public and surrounding landowners, the Respondents effectively denied the Nichols the right to challenge this

vacation and their right to appeal on a writ of review under RCW 7.16.120- Special Proceedings- Certiorari.

**D. The state road vacation enabling act was available to the Respondents.**

The Respondents have always known Road No. 978 is a county right of way, as stated in their recorded deeds and surveys on the property, and correspondence and lawsuits involving Road No. 978. The only proper means of vacating a county road is controlled by Chapter 36.87 RCW- Roads and Bridges- Vacation and KCC 14.40- Road Vacations.

If the county were to determine the road useless, the county legislative authority must do the following:

1. By resolution, reported in its minutes, declare “its intention to vacate and abandon the same or any portion thereof;”
2. Require a report from the county road engineer concerning “such vacation and abandonment;”
3. Direct the county road engineer to make many findings concerning the road, particularly as would affect the public;
4. Schedule a hearing;
5. Provide notice of the hearing to the public by publication and posting on the road at issue;
6. Assures rights of appeal to a hearing examiner and writ of certiorari, now a writ of review.

Should the county not elect to take the initiative to declare a road vacant and abandoned, a majority of adjoining landowners may petition the county council to vacate and abandon the road showing (1) the road is useless and (2) the public will benefit from the vacation. Thereafter,

the county council can require a bond be posted to pay the cost of the county road engineers report or pay a fee. Upon receipt of “freeholder’s petition” the road engineer must prepare a report and the county must hold a hearing on the report only after publication and posting of notice of the time and place of the hearing. If the road vacation is granted, the abutting landowners are required to pay a fee for the appraised value of the road.

King County Code Section 14.40- Road Vacation, is similarly direct, and in fact cites in King County Code 14.40.010 the state enabling statute, RCW Chapter 36.87.

The relevant text of the King County Code and enabling statute are set forth in full below:

**KCC 14.40.010 Authority.** Petitions for the vacation of county roads may be granted by the council in accordance with the provisions of RCW Chapter 36.87 as amended by Chapter 185, Laws of 1969 First Extraordinary Session, except as provided herein, and King County shall receive compensation as provided for in this chapter. (Ord. 6471 § 1, 1983: Ord. 4390 § 1, 1979: Ord. 129 § 1, 1969).

**KCC 14.40.015 Procedure.**

A. The zoning and subdivision examiner shall hold public hearings on vacations which have been recommended for approval by the department of transportation, and provide a recommendation to the King County council, as prescribed by RCW 36.87.060.

B. In the event the report by the department of transportation recommends denial of the vacation petition, the following shall be the operating procedure:

1. Written notification shall be transmitted to the petitioner by the department of transportation

citing the rationale for the denial and indicating that the denial may be appealed to the zoning and subdivision examiner for hearing and recommendation to the council. A copy of the notice of denial shall be filed with the council clerk's office.

2. The notice of denial shall be final unless the petitioner files a written appeal including a two hundred dollar administrative fee with the council clerk within thirty calendar days of the issuance of the notice of denial. The petitioner's written appeal shall specify the basis for the appeal and any arguments in support of the appeal.

3. Any appeal filed by a petitioner shall be processed by the zoning and subdivision examiner in the same manner as vacations recommended for approval. (Ord. 14199 § 201, 2001: Ord. 10691 § 1, 1992: Ord. 6471 § 2, 1983: Ord. 4390 § 1, 1979: Ord. 129 § 1, 1969).

**RCW 36.87.010 - Resolution of intention to vacate.**

When a county road or any part thereof is considered useless, the board by resolution entered upon its minutes, may declare its intention to vacate and abandon the same or any portion thereof and shall direct the county road engineer to report upon such vacation and abandonment.

**RCW 36.87.020 - County road frontage owners' petition — Bond, cash deposit, or fee.**

Owners of the majority of the frontage on any county road or portion thereof may petition the county legislative authority to vacate and abandon the same or any portion thereof. The petition must show the land owned by each petitioner and set forth that such county road is useless as part of the county road system and that the public will be benefited by its vacation and abandonment. The legislative authority may (1) require the petitioners to make an appropriate cash deposit or furnish an

appropriate bond against which all costs and expenses incurred in the examination, report, and proceedings pertaining to the petition shall be charged; or (2) by ordinance or resolution require the petitioners to pay a fee adequate to cover such costs and expenses.

**RCW 36.87.030 - County road frontage owners' petition — Action on petition.**

On the filing of the petition and bond and on being satisfied that the petition has been signed by petitioners residing in the vicinity of the county road or portion thereof, the board shall direct the county road engineer to report upon such vacation and abandonment.

**RCW 36.87.040 - Engineer's report.**

When directed by the board the county road engineer shall examine any county road or portion thereof proposed to be vacated and abandoned and report his or her opinion as to whether the county road should be vacated and abandoned, whether the same is in use or has been in use, the condition of the road, whether it will be advisable to preserve it for the county road system in the future, whether the public will be benefited by the vacation and abandonment, and all other facts, matters, and things which will be of importance to the board, and also file his or her cost bill.

**RCW 36.87.050 - Notice of hearing on report.**

Notice of hearing upon the report for vacation and abandonment of a county road shall be published at least once a week for two consecutive weeks preceding the date fixed for the hearing, in the county official newspaper and a copy of the notice shall be posted for at least twenty days preceding the date fixed for hearing at each termini of the county road or portion thereof proposed to be vacated or abandoned.

**RCW 36.87.060 - Hearing.**

(1) On the day fixed for the hearing, the county legislative authority shall proceed to consider the report of the engineer, together with any evidence for or objection against such vacation and abandonment. If the county road is found useful as a part of the county road system it shall not be vacated, but if it is not useful and the public will be benefited by the vacation, the county legislative authority may vacate the road or any portion thereof. Its decision shall be entered in the minutes of the hearing.

(2) As an alternative, the county legislative authority may appoint a hearing officer to conduct a public hearing to consider the report of the engineer and to take testimony and evidence relating to the proposed vacation. Following the hearing, the hearing officer shall prepare a record of the proceedings and a recommendation to the county legislative authority concerning the proposed vacation. Their decision shall be made at a regular or special public meeting of the county legislative authority.

**RCW 36.87.070 - Expense of proceeding.**

If the county legislative authority has required the petitioners to make a cash deposit or furnish a bond, upon completion of the hearing, it shall certify all costs and expenses incurred in the proceedings to the county treasurer and, regardless of its final decision, the county legislative authority shall recover all such costs and expenses from the bond or cash deposit and release any balance to the petitioners.

**RCW 36.87.080 - Majority vote required.**

No county road shall be vacated and abandoned except by majority vote of the board properly entered, or by operation of law, or judgment of a court of competent jurisdiction.

**RCW 36.87.090 - Vacation of road unopened for five years — Exceptions.**

Any county road, or part thereof, which remains unopen for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby vacated, and the authority for building it barred by lapse of time: PROVIDED, That this section shall not apply to any highway, road, street, alley, or other public place dedicated as such in any plat, whether the land included in such plat is within or without the limits of an incorporated city or town, or to any land conveyed by deed to the state or to any county, city or town for highways, roads, streets, alleys, or other public places.

The instant lawsuit avoids all of the safeguards required by the foregoing statutes and code provisions, and allows the Respondents to grab the road without paying the appraised value for the acreage.

**Nichols are Abutting Landowners.**

Steven and Linda Nichols are abutting landowners to Road No. 978 because Road No. 978 continues into their property with no intervening land. Road No. 978 also is an access mechanism to the Petitioner's property from SR 203. *See Kemp v. Seattle*, 149 Wash. 197, 270 P. 431 (1928) which holds for the proposition that a property abuts a street when there is no intervening land between it, even if the street terminates at the property line of a party. Cited by *Bay Indus., Inc. v. Jefferson County, Bd. of Com'rs of Jefferson County*, 33 Wash. App. 239, 240, 653 P.2d 1355, 1357 (1982). This case also held that in granting a vacation, it was denial of due process and equal protection not to preserve

an easement for an adjoining landowner in the same position as the Petitioners herein.

In *Bay Industries*, the court stated as follows:

Finally, appellant [abutting end of road owner who did not join in petition to vacate] contends that the Board's conditions for vacating the road violated its right to equal protection of the law because it was treated differently from all others in what should have been the same class—the abutting landowners.<sup>2</sup> We agree.

The rational relation test applies to the Board's action here.<sup>3</sup> Under that test, in the context presented here, conditions imposed by the Board must meet two requirements: (1) they must apply alike to all members within the designated class; and (2) a reasonable ground must exist for distinguishing between those within the class and those outside it. *Standing v. Dept. of Labor & Indus.*, 92 Wash.2d 463, 598 P.2d 725 (1979); *Balancsik v. Overlake Memorial Hosp.*, 80 Wash.2d 111, 492 P.2d 219 (1971). The condition in question prescribed that “an easement for ingress and egress shall be secured by each petitioner to each and every other petitioner requiring access through their property to County Road No. 18–3.50.” “Petitioners” purported to be the designated class, and the condition applied alike to all members. However, no reasonable ground existed for distinguishing between the petitioners and appellant. **It was not reasonable to deny appellant an easement simply because it failed to petition the Board to vacate the road. Nor did the property rights of the respective parties provide a reasonable ground for distinction.** All owned property abutted on the road. All also had access to their property by County Road No. 18–3.50. There was no legitimate reason for distinguishing between those who received an easement and the one who did not. The Board's action was fatally flawed by this violation of the equal protection requirement.

(emphasis added)

*Bay Indus., Inc. v. Jefferson County, Bd. of Com'rs of Jefferson County*, 33 Wash. App. 239, 242-43, 653 P.2d 1355, 1358 (1982).

The quiet title decree in the instant case does not assure the Nichols' right of use of the road and access to their property, if the quiet title is upheld.

**E. Roads maintained by the county for seven years and used by the public for 10 years are public highway.**

What the trial court failed to understand is that roads maintained by the county are public roads. RCW 36.75.070-Highways worked seven years are county roads. (See CP 39 and 42)

All public highways in this state, outside incorporated cities and towns and not designated as state highways, which have been used as public highways for a period of not less than seven years, where they have been worked and kept up at the expense of the public, are county roads.

The Nichols, their predecessors in interest, and the public used the as built road (so called "Historic Road") for more than 10 years, making the road a public highway. RCW 36.75.080. The decree in this case turns the as built Historic Road into a 15-20 foot easement only.

And whether the use has been public use adverse or permissive "in such a case, evidence is required indicating that the use was indeed adverse or permissive" in construing RCW 36.75.080. *Standing Rock Homeowners v. Misich*, 106 Wn. App 231, 23 P 3<sup>rd</sup> 530 (Div III, 2001)

**F. The trial court erred in law by permitting reduction of the right of way from 60 feet to 20 feet.**

As cited to the trial court at the time of the hearing of the show cause, (Restatement of Property, Servitudes, 4.1 and 4.8) the right of way shifts to the area built and maintained by the property owner.

Moreover, that rule has been applied in Washington, *Curtis v. Zuck*, 65 Wash App. 377, 829 P2d 187 (1992) and *Barnhart v. Gold Rum, Inc.*, 68 Wash. App. 417, 843 P2d 545 (1993) citing *Curtis v. Zuck*, 65 Wash App. 377, 829 P2d 187 (1992).

The following quotations from *Barnhart* illustrate the application of the rule the right of way shifts to the area built:

The undisputed evidence supports a finding the location of the platted right of way shifted to the existing road, due to the long period of use which predated the parties' ownership.  
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The Respondents in *Curtis* filed suit to eject the defendants from the platted street and to quiet title to that portion of their property affected by the encroachment of the gravel road. The trial court refused. Instead, it divested the Respondents of their easement over the platted street occupied by the defendants and granted the defendants a prescriptive easement over the gravel road encroaching on the plaintiffs' property.

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Similarly, the existing road here has long been used as a substitute for the platted right of way. The Barnharts' predecessor in interest, Mrs. Harris, clearly evidenced an intent to abandon the right to use a roadway in the platted location. She used a house and other permanent structures in that area and constructed an alternate route for access to lot 31. See 1 Washington State Bar Ass'n, Real Property Deskbook, 15.46 at 15-25 (2d ed. 1986) (citing *Schumacher v. Brand*, 72 Wash. 543, 546-47, 130 P. 1145 (1913)). Mrs. Harris' activity also continued a claim by adverse possession to the portion of the platted road right of way on which the improvements encroached. Since her claim continued for the statutory period, it ripened to title. As in Curtis, these facts are sufficient to support a finding of the location of the easement shifted to the existing road.

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**G. The March 28, 2012 Decree is not supported by the Findings of Fact and Conclusions of Law.**

The complaint filed by McCauley Falls, LLC and Abaculo, LLC does not deal with the Historic Road. The reference to the "Historic Road" is not made by the McCauley Falls, LLC and Abaculo, LLC until the Findings of Fact and Judgment and Decree. The result affects the Nichols' right to use the so called "Historic Road." (CP 39) Conclusion of Law Number 2 is absent in the Decree, in which the conclusion states:

- 1) The Historic Road is a county road;

- 2) The County shall have no right to expand or alter the Historic Road (15-20 to 60 feet).

The Decree concerning the Historic Road only appeared in the findings, and conclusions and not the decree, materially affecting and limiting the Nichols' and the public interest in the shifted road, by argument to only 15-20 feet.

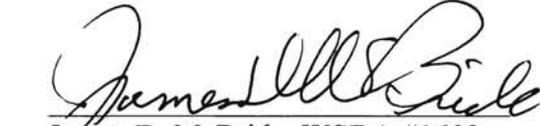
## **VI. CONCLUSION**

The Decree Quieting Title should be vacated. The case should be remanded with instruction requiring the vacation of the road be applied for according to state statute and county code and disallowing the reduction of the right of way from 60 feet to 20 feet.

And, the trial court should be required to take evidence to support entry of Findings of Fact and Conclusions of Law which would support the Decree.

Pursuant to RCW 7.28.083-Adverse Possession-Reimbursement of taxes or assessments-Payment of unpaid taxes or assessments-Awarding of costs and attorneys fees, the Nichols move for an award of costs and attorney's fees.

Respectfully Submitted this 1 day of MAY, 2014.

  
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**COURT OF APPEALS  
DIVISION ONE  
OF THE STATE OF WASHINGTON**

MCCAULEY FALLS, LLC, a  
Washington limited liability  
company; ABACULO, LLC a  
Washington limited liability  
company,

Respondents,

vs.

KING COUNTY, a political  
subdivision of the State of  
Washington,

Respondents,

vs.

STEVEN NICHOLS and LINDA  
NICHOLS, husband and wife,  
Intervenors/Appellants.

Case No.: 71534-8-1

**AFFIDAVIT OF MAILING**

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 MAY -2 AM 9:57

I, SARA J. RUSSELL, being duly sworn first upon oath, depose  
and say that:

I am a citizen of the United States of America, over the age of 21  
years and competent to be a witness herein.

On the 2<sup>nd</sup> day of May 2014, I deposited copies of the Brief of the Appellants in the United States Mail, first class mail, postage prepaid to:

John Furse Briggs  
516 3<sup>rd</sup> Avenue, Room W400  
Seattle, WA 98104-2388

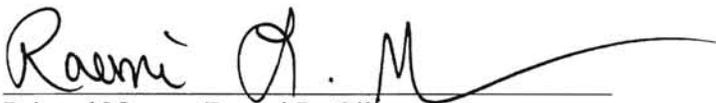
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Lynnwood, WA 98036-6771

Dated this 2<sup>nd</sup> day of May 2014.

  
SARA J. RUSSELL

SUBSCRIBED AND SWORN to before me this 2<sup>nd</sup> day of May 2014.

  
Printed Name: Raemi L. Gilkerson  
NOTARY PUBLIC in and for the State of WA,  
Residing at: Lynnwood, WA  
My Commission Expires: 11/20/17

