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Case #: 1034105

COA No. 39510-3-III

**SUPREME COURT OF THE
STATE OF WASHINGTON**

DAVID LYONS and LYONS FAMILY RANCH, LLC a
Washington limited liability company.
Respondents

v.

DANIEL CLARK, BARBARA CLARK, and the marital
community thereof, and WALLA WALLA HISTORIC
CEMETERIES, a Washington Nonprofit Corporation,
Appellants.

PETITION FOR REVIEW

Appeal from the Superior Court of Walla Walla County
The Honorable Brandon L Johnson, 21200450-36

Daniel N. Clark, WSBA #9675
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For the Appellants

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II. IDENTITY OF PETITIONER

Appellants Walla Walla Historic Cemeteries, Daniel N. Clark, and Barbara Clark are the appellants and counterclaimants in this action for injunction and damages filed against them by respondents in Walla Walla County Superior Court.

III. CITATION TO COURT OF APPEALS RULINGS

Appellants hereby petition the Supreme Court for review of the July 9, 2024 decision of the Court of Appeals, Division III, terminating review of their appeal and affirming the decisions of the trial court, and the Court of Appeals July 13, 2024 denial of appellants' Motion for Reconsideration, which are found in the Appendices.

IV. ISSUES PRESENTED FOR REVIEW

1. Do defendants who are sued for injunctive relief and damages have standing to defend themselves under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of Article I, Section 3 of the Washington State Constitution?
2. Do defendants who are enjoined from accessing public property have standing to litigate their right to access?
3. Do defendants whose access to public property is obstructed by private parties have standing to seek recourse through injunctive relief?
4. Does a defendant holding a certificate of authority from the Washington State Department of Archaeology and Historic Preservation for the care, maintenance, protection, and restoration of an abandoned cemetery have standing to seek recourse through injunctive relief against a private party obstructing its access to the cemetery?

5. Does a defendant holding a certificate of authority from the Washington State Department of Archaeology and Historic Preservation for the care, maintenance, protection, and restoration of an abandoned cemetery have standing to litigate issues relating to the rights of access by the party and the public to the abandoned cemetery?

6. Do members of the public and relatives of the deceased have a right of access to publicly dedicated burial grounds?

7. Do the access rights of members of the public, relatives of the deceased, and the nonprofit care authority appointed by the Department of Historic Preservation include vehicle access to a cemetery for elderly or disabled persons unable to walk to the cemetery, and for the transportation of equipment necessary for cemetery maintenance?

8. Do the public, relatives of the deceased, and the nonprofit care authority appointed by the Department of Historic Preservation have a right to access an abandoned

cemetery over the only apparent route used to access it for over 160 years?

9. Does the holder of a servient estate have the right to deny all vehicle and safe pedestrian access to the dominant estate, or to restrict it to limited times of the year and only upon specific permission by the servient owner?

10. Does the failure to provide for equal access to an abandoned cemetery by elderly persons or persons with disabilities violate the Americans with Disabilities Act, 42 USC, Chapter 126, and the Washington State Law Against Discrimination, RCW Chapter 49.60?

11. Is a person who in good faith asserts and exercises a right of access to an abandoned cemetery over the route across a servient estate used historically to access it, and who before doing so provides the servient landowner with a detailed statement of the law, “a person (who) knowingly enters...unlawfully on the premises of another” and is thereby guilty of criminal trespass under RCW 9.52.080?

V. STATEMENT OF THE CASE

On November 26, 2018, appellant Walla Walla Historic Cemeteries (WWHC) was awarded a Certificate of Authority by the Washington State Department of Archaeology and Historic Preservation (DAHP) for the care, maintenance and protection of the abandoned Lyons Creek Cemetery in Walla Walla County. (CP 7-13)

The cemetery land had been homesteaded by John and Lucinda Hendrix, who received a U.S. patent for 160 acres in Section 23, Township 7 North, Range 38 West, EWM in 1872. The first burials there were in 1871, and the cemetery was deeded by the homesteaders to the Hendrix Cemetery Association in 1877. (CP 27-31, 32-46, Ex A)

The cemetery is the burial site of a variety of early Walla Walla settlers, many of whose descendants still live in the area or travel there to visit their graves. (CP 25-26) The cemetery is particularly well-known as the burial ground of William Davies, leader of a religious sect known as “The Kingdom of

Heaven” whose son was widely known as “the Walla Walla Jesus,” together with some of his followers who came to the Walla Walla area between 1867-1881 and settled in the vicinity of the cemetery. Photos of their monuments are in Appendix D, E, and F. (CP 32-46, p.2)

Along with the cemetery ground itself, which is located on the southwest corner of the northwest quarter of Section 23, the Hendrixes deeded the cemetery association a right-of-way from the cemetery along the section line north across Lyons Creek to what is now Meiners Road but was then Coyote Ridge Road. Appendix B is a photo of the easement route. (CP 7-13, Ex B)

Coyote Ridge Road at that time crossed Lyons Creek several hundred yards to the east of the section line, also on the Hendrixes’ land. (See photo of Coyote Ridge Road crossing in Appendix C.) Lyons Creek has a deep stream bed which, except at Coyote Ridge Road Crossing, is impassable by vehicles as by most pedestrians.(CP 108-110, 113-114, 115-116, 111-112,

119-120, 17-22, 170-175)

In 1980, the eastern portion of Coyote Ridge Road including its Lyons Creek crossing was vacated by the Walla Walla County Commissioners at the request of respondents' family members, who had acquired the Hendrix property in 1909. The remaining western portion of Coyote Ridge Road was then renamed Meiners Road, which it had previously intersected. (CP 108-110, 121-124)

Because the only vehicle access to the cemetery across Lyons Creek from the current county road is along the old Coyote Ridge roadway and its crossing of the creek, which is also the only safe pedestrian access, appellants had been utilizing that roadway to reach the south bank of Lyons Creek, then proceeding to the cemetery along the south bank of the creek to the deeded access easement. (CP 113-114, 117-118, 119-120, 164, Ex B, 170-175)

On receiving the Certificate of Authority for the Lyons Creek Cemetery from Washington State in November 2018,

appellants contacted respondents, as holders of the servient estate across which the cemetery has always been accessed from the county road, and were advised by respondents to use the Coyote Ridge Road crossing of the creek and to then continue down the south bank of the creek. (See photo in Appendix C of the Coyote Ridge Road route recommended by respondents and used by appellants to the deeded easement line on the south bank of the creek.)

On April 19, 2019 Daniel Clark, who is a founder, director and officer of appellant Walla Walla Historic Cemeteries, together with other WWHC board members, toured the cemetery with respondent David Lyons who led them over the Coyote Ridge Road crossing and then west along the south bank of the creek before turning south directly to the cemetery. (CP 170-175)

In October 2019, respondents informed appellants that they would allow pedestrian access to the cemetery only with respondents' permission on every occasion, and only during the

summer after crops are harvested and before fall seeding or soil preparation, that they would not allow vehicle access at any time, and that they would pursue trespassing charges against anyone who had not signed a release of liability and received their written permission. (CP 157-162)

Since appellants' care and maintenance work at the densely vegetated cemetery requires equipment too heavy to be carried, appellant WWHC's volunteers continued to use vehicles to transport their equipment and volunteers for work there.

Respondents additionally placed locks on two gates on the Coyote Ridge roadway leading from Meiners Road, placed other barriers across the road bed, at times deeply ploughed the access route from the Coyote Ridge crossing to the deeded right-of-way as well as over the deeded right-of-way itself making it impassable, and removed stakes from the corners of the cemetery placed there by appellants' licensed surveyors. (CP 98-107, 170-175)

On October 11, 2021, respondents filed this action seeking damages for trespass and an injunction against appellants Walla Walla Historic Cemeteries and Daniel Clark individually, as well as his spouse Barbara Clark, prohibiting them from accessing the cemetery by vehicle at any time, or on foot at any time without respondents' permission. (CP 1-6).

On October 12, 2021, appellants filed an answer and counterclaim for an injunction against respondents to prevent obstruction of the easement route, vandalism at the cemetery, and further farming of portions of the cemetery ground, as well as damages for harassment as a result of respondents' false reports of criminal trespass against appellants. (CP 7-13)

After issuing a temporary restraining order against appellants, the court on November 18, 2021 issued a preliminary injunction prohibiting all vehicle access to the cemetery by appellants, as well as all pedestrian access on any route other than the deeded roadway easement without respondents' permission. (CP 164-169)

Following the filing of motions for partial summary judgment by each of the parties, at a hearing on January 3, 2023, the court held that appellants had no standing to litigate any of the issues raised, and that their counterclaims for injunction and damages against respondents should be dismissed. (RP 28-36)

Appellants filed a Motion for Reconsideration on January 6, 2023, and on January 25, 2023 the court entered an order granting plaintiffs' Motion for Summary Judgment and dismissing Defendants' counterclaims. (CP 144-151,154-156)

On January 30, 2023, appellants filed a Notice of Appeal with the Court of Appeals, Division III, and on August 7, 2023, the Walla Walla Superior Court entered Findings, Determination and Direction re Order Granting Plaintiffs' Motion for Summary Judgment, which were then filed with the Court of Appeals. On August 12, 2023, national cemetery law scholar Ryan Seidemann presented a motion for leave to file an amicus curiae brief supporting the appeal by appellants, which

was granted by the Court of Appeals.

On July 9, 2024, the Court of Appeals issued its opinion affirming the decisions of the trial court in its determination that the appellants lacked standing to litigate any issues relating to easement rights, and in the dismissal of its counterclaims.

On July 13, 2024, appellants filed a Motion for Reconsideration, which was denied by the Court of Appeals on August 13, 2024.

IV. ARGUMENT

1. The decisions of the Superior Court and the Court of Appeals overlook the due process rights of defendants under both the U.S. Constitution and the Washington State Constitution to defend themselves against legal proceedings brought against them and to seek relief from unlawful actions taken against them, which are issues of substantial public interest that should be decided by the Supreme Court.

a. Right to Defend

The lower courts' opinions hold that appellants and defendants have no standing to litigate claims and remedies sought against them by respondents because only the State of Washington through its Department of Archaeology and Historic Preservation has such power as to issues regarding historic cemeteries.

When respondents sued Walla Walla Historic Cemeteries, together with Daniel Clark who is a volunteer and officer of the group and his wife Barbara Clark, who had no connection to the nonprofit organization, seeking an injunction and damages against them, the lower courts erroneously concluded that these defendants had no right to defend themselves.

This interpretation of the standing requirement and its application to defendants is unheard of in American jurisprudence, and would be a violation of the Due Process clause of the Fourteenth Amendment to the U.S. Constitution as

well as Article I, Section 3 of the Washington State Constitution which provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

The standing requirement is normally referred to as the “Standing to Sue,” and there appear to be no cases denying standing to a named defendant in either a civil or criminal case. See 59 Am Jur 2d, Parties, pp.414-434.

b. Standing to Seek Recourse

As to the right of the appellants to seek injunctive and other relief by way of a counterclaim for the allegedly unlawful actions of respondents in interfering with their access rights to this historic cemetery, the traditional requirements of Standing to Sue apply.

As the court’s opinion correctly states,

A party has standing if it “has a distinct and personal interest in the outcome of the case.” *Erection Co. v. Dep’t of Lab. & Indus.*, 65 Wn. App. 461, 467, 828 P.2d 657 (1992), *aff’d*, 121 Wn.2d 513, 852 P.2d 288 (1993). Alternatively stated, a party has standing if it demonstrates “a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as

distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.” Primark, Inc. v. Burien Gardens Assocs., 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

In this case, one of the appellants and counterclaimants is “a preservation organization that has been incorporated for the purpose of restoring, maintaining, and protecting an abandoned cemetery” and has been appointed by the State of Washington with “authority to maintain and protect an abandoned cemetery” pursuant to RCW 68.60.030, which states that such an appointment may be made upon application “by a preservation organization that has been incorporated for the purpose of restoring, maintaining, and protecting an abandoned cemetery.” (CP 7-13) A second appellant and counterclaimant is a local historian and author, as well as an officer and active volunteer with the preservation organization charged with the maintenance and protection of the Lyons Creek Cemetery at issue in this case. (CP 208-110) The third appellant is the wife of the second appellant, who has been an active public official

of the City of Walla Walla, having served for two terms as mayor and twenty-two years as a city council member, and who recognizes the importance of historical preservation and visits to historic sites for residents and others interested in the community and its culture. (CP 115-116)

Each of these appellants has been restrained and enjoined from visiting the Lyons Creek graveyard for nearly three years, during which they have been unable to pursue responsibilities there. (CP 249-250, 164-169, 306-311)

Under these circumstances, each clearly has standing to seek recourse, as well as the rights of access discussed below.

2. The lower courts have overlooked the rights of the public and relatives of the deceased to ingress and egress to a burial ground, as determined by a longstanding decision of the Washington State Supreme Court, and this is an issue of substantial public interest that should be decided by the Supreme Court.

Consistent with the longstanding law of access to cemeteries by family members of the deceased and the public as set out in the Amicus Curiae brief filed by national cemetery law expert Ryan Seidemann of Louisiana, in the 1911 case of *Roundtree v. Hutchison*, 57 Wash. 414, 107 Pac. 345, the Washington Supreme Court recognized the right of relatives and others in the area to access an historic graveyard and to seek injunctive relief to accomplish that.

After describing the case as “a bill in equity to restrain the defendant from desecrating a burial ground, and to establish the right to ingress and egress.” the Roundtree court stated:

The tract in controversy was used by the entire neighborhood as a place for the interment of the bodies of the dead... Sacred memories cluster around this burial spot, unkept as it is, and its desecration shocks the moral sense of mankind....

The respondents have relatives buried there and have brought this suit on behalf of themselves and all others of Boistfort precinct, which includes the burial ground. Equity will therefore afford them injunctive relief.

3. The lower courts have overlooked or misconstrued the rights of an appointed cemetery authority to access and litigate access to a cemetery for which it has been granted authority by the State for maintenance and protection, which is an issue of substantial public interest that should be decided by the Supreme Court.

In construing the provisions of RCW 68.60.030, the lower courts have failed to consider the authority and responsibility of a cemetery preservation organization in that section for “the care, maintenance, restoration, protection, and historical preservation of the abandoned cemetery,” as well as the necessity of access and the right of legal recourse to carry out those duties.

In construing the word “protection,” the appellate court refers to RCW 68.60.040 providing certain criminal penalties, which it states “seems to reference gates, fences, or enclosures built around a cemetery to protect it from intruders,” while the

full section states as follows to provide much broader

protection:

(1) Every person who in a cemetery unlawfully or without right willfully destroys, cuts, mutilates, effaces, or otherwise injures, tears down or removes, any tomb, plot, monument, memorial, or marker in a cemetery, or any gate, door, fence, wall, post, or railing, or any enclosure for the protection of a cemetery or any property in a cemetery is guilty of a class C felony punishable under chapter 9A.20 RCW.

(2) Every person who in a cemetery unlawfully or without right willfully destroys, cuts, breaks, removes, or injures any building, statuary, ornamentation, tree, shrub, flower, or plant within the limits of a cemetery is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

Appellants' counterclaim alleges unlawful farming of portions of the cemetery by respondents, the removal of survey stakes from cemetery corners, displacement of row markers and a cemetery bench, interruption of care and maintenance activities by false reports of criminal trespass, and placement of obstacles across the easement route.

In addition, the lower courts have overlooked the provisions of RCW 68.60.080 specifically addressing caretaker and public access, which provides:

It is lawful to enter an abandoned cemetery for purposes of:

- (1) Burials pursuant to RCW 68.60.070 and associated rules;
- (2) Care and maintenance activities authorized under RCW 68.60.030; and
- (3) Visitation of graves.

Appellants' inability to access the cemetery with volunteers as well as equipment to maintain and restore the gravestones and access to them is continuing to harm the cemetery, which it is the appellants' responsibility to care for, defeating all of the legislative purposes embodied in RCW 68.60.

Further, the lower courts have overlooked the public statements of DAHP on its website with regard to cemetery authority access and enforcement authority, including guidance found at <https://dahp.wa.gov/archaeology/cemeteries/cemetery-preservation-guidance>, which reads in part:

.... DAHP does not have funds for maintenance of historic cemeteries or legal authority to acquire cemeteries or enforce laws protecting cemeteries.... For more information contact: Guy Tasa, State Physical Anthropologist.

To emphasize this, in issuing a certificate to Walla Walla Historic Cemeteries a year later for another Walla Walla area cemetery for which access was then being contested, DAHP specifically included with its certificate the statement that “the cemetery authority shall be solely responsible for obtaining access to the cemetery for its care, maintenance, and restoration actions, including but not limited to enforcement of easement rights relating to ingress and egress.” (CP 143)

This was confirmed by Guy Tasa of DAHP on November 17, 2021, in a phone conversation with defendant Daniel Clark regarding the Lyons Creek Cemetery, in which Tasa explained that DAHP considers the certificate holder to have the rights of the original cemetery association to which the cemetery was deeded, other than new burials, and expects the certificate holder to litigate all access issues, detailed in the Declaration of

Daniel Clark filed with the court. (CP 108-110)

4. The lower courts have overlooked and misconstrued the facts and law relating to the practical elements of ingress and egress, as required by a longstanding decision of the Washington Supreme Court and the law of landlocked parcels, which are issues of substantial public interest that should be decided by the Supreme Court.

The determinations of the lower courts have completely overlooked the substantial and undeniable evidence that vehicle traffic to the cemetery has been necessary since its creation in the 1870s, and the complete lack of evidence of there ever having been a bridge over the deeded roadway easement over Lyons Creek, without which vehicle passage has been impossible there, and pedestrian crossing unsafe. (CP 108-120, 135-151, 157-162, 164-177)

At the time of the establishment of the cemetery by the original landowner and the deed of title to a cemetery

association, the nearest accessible public roadway to the cemetery was at the Coyote Ridge Road crossing of Lyons Creek, also on the Hendrix land and several hundred yards to the east of the deeded roadway along the section line. (See photos in Appendix A, B, and C). As a result, vehicle access to the county road from the cemetery has always been along the deeded roadway down to Lyons Creek, and then east along the south bank of the creek to the Coyote Ridge Road crossing of the creek. (CP 435-437)

Though this portion of the county road was vacated in 1980 at the request of the respondents' family, respondents have continued to use and advise that crossing to access the cemetery and other lands on the south side of the creek as the only feasible and safe route over the deep stream bed. (CP 17-22)

The lower courts have also failed to apply these facts to the law of landlocked parcels, and cemetery access to the nearest county road. It is clear from the affidavits in support of

defendants' Motion for Summary Judgment as to Access that the only safe and practical crossing of Lyons Creek to reach the cemetery from the nearest county road is at the old Coyote Ridge Road crossing that is also on the property of the original grantor. (CP 108-120, 135-151, 157-162, 164-177)

As the plaintiffs and respondents have correctly cited,

An implied easement (either by grant or reservation) may arise (1) when there has been unity of title and subsequent separation; (2) When there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity...that the quasi easement exist after severance. *Adams v. Cullen*, 44 Wn.2d 502,268 P.2d 451 (1954)." (CP 32-46, p.10)

In *Hellberg v. Coffin Sheep Co*, 66 Wash 2d 664, 665-66, 404 P.2d 770 (1965), in ruling for appellants the court noted with regard to the existence of another road besides the access sought by appellants in that case that "there is no other practicable road.... We are satisfied from the record that Hellberg is entitled to access his property over the old Coffin road, either on the basis of a way of necessity or on the basis of

an implied easement appurtenant to the land...”

Here, it is apparent that, during the Hendrixes’ ownership as well as thereafter, access to the cemetery from the nearest county road has been practical only over the Coyote Ridge Road crossing, which was also on the Hendrixes’ land, so the first criterion, unity of title and subsequent separation, is present. It is also apparent that the Hendrixes themselves used that crossing as the only practical access to reach the cemetery during their ownership, so the second criterion is met. It is further clear that over the years transport to the cemetery of heavy monuments as well as coffins, mourners and visitors of varying ages took place by vehicle and foot traffic, which was of necessity done over the Coyote Ridge route, both during the Hendrix ownership and with respect to later burials, the last of which was in 1919, rather than by fording the deep stream bed. (CP 108-120, 135-151, 157-162, 164-177) Since there was and is no other safe and practical crossing, the third criterion, the necessity of the continued use of the easement after severance,

is also met.

This easement of necessity is in addition to the deeded right-of-way and also to the established right of public access to cemeteries described in 14 Am Jur 2d, Cemeteries §37 as follows: “Persons entitled to visit, protect, and beautify graves must be accorded ingress and egress from the public highway next or nearest to the cemetery, at seasonable times and in a reasonable manner.”

As respondents agree, summary judgment is intended to avoid needless trials when there are no genuine issues of material fact. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566, 6 P.2d 972 (1977). There are no genuine issues of fact when "reasonable minds could reach but one conclusion." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wash.App. 625, 628, 784 P.2d 1288 (1990). The Court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A party is entitled to judgment as a matter of law when, "as a matter of law... there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party." *Indus. Indem. Co. of Nw. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990).

This being the case, appellants' motion for summary judgment as to the enforceable access route should have been granted by the lower court.

5. The Court of Appeals also overlooked or misconstrued the facts and law regarding access by elderly and disabled persons to the cemetery and other public facilities, which are issues of substantial public interest that should be decided by the Supreme Court.

The court's opinion has completely failed to address the rights of elderly and disabled persons to cemetery access. In addition to the rights of the general public, any failure to

provide for equal access by elderly persons or persons with disabilities would violate both the Americans with Disabilities Act, 42 USC, Chapter 126, including Sections 12102, 12131-32, and the Washington State Law Against Discrimination, RCW Chapter 49.60.

It is undisputed that elderly and disabled persons are not able to cross Lyons Creek safely or at all at the deeded easement's crossing, which doesn't allow vehicle crossing and is treacherous by foot. In addition, because of the distance from the county road to the cemetery, access by elderly and disabled persons on foot by any route is often impossible, as shown by a variety of affidavits filed in the trial court, while lack of maintenance at the cemetery makes individual graves inaccessible in any event. (CP 176-177, 115-116), 111-112). 119-120), 25-26); 117-118)

6. The appellate court has overlooked or misconstrued the elements of criminal trespass in dismissing the appellants' counterclaim for damages against

respondents for false claims of criminal trespass, which is an issue of substantial public interest that should be decided by the Supreme Court.

A person who in good faith asserts and exercises a right of access to an abandoned cemetery over the historic route used to access it, after providing the servient landowner with a detailed statement of the law, is not “a person (who) knowingly enters...unlawfully on the premises of another” and is thereby guilty of criminal trespass under RCW 9A.52.080.

In its opinion the Court of Appeals states that the trial court found that “Defendants have admitted to driving over Plaintiffs’ fields and newly planted crops” and that “Defendants’ vehicular trespasses destroy Plaintiffs’ crops and may encourage others to drive over Plaintiffs’ fields.”

In fact, the only route Daniel Clark has ever used for vehicle access to the Lyons Creek Cemetery is over the deeded roadway easement from the cemetery to Lyons Creek, and from there along the south bank of the creek to the Coyote Ridge

Road crossing to access the county road. (CP 17-21) In doing so, he has not driven over the respondents' fields but solely over the lawfully established easements to the landlocked cemetery under an express claim of right which was communicated to respondents, though respondents have regularly planted on and obstructed such easements by cultivation and other means.

Respondents have falsely reported appellants to the Walla Walla County Sheriff's office for criminal trespass. As respondent David Lyons is a practicing attorney, and had received written notice of appellants' claim of a legal right to access to the abandoned cemetery, he was put on notice that such access over the claimed easement rights of way by appellants was not knowingly unlawful, and his criminal complaints are actionable harassment. (CP 108-110) In addition, reports of criminal damage to the crops planted over the lawful easement routes are similarly without foundation.

VII. CONCLUSION

Under both statutory and common law, members of the public as well as the holder of a Certificate of Authority from the Washington State Department of Archaeology and Historic Preservation have the right to practical access to the Lyons Creek Cemetery for purposes of visitation and for care, maintenance, and protection of the cemetery. Because this cannot be done without regular, safe vehicle and pedestrian access, appellants clearly have standing to litigate this issue and to enforce these rights, in addition to pursuing their counterclaims.

Since the Coyote Ridge Road route is the only safe and practical crossing of Lyons Creek to this landlocked cemetery, appellants are entitled to summary judgment confirming their rights as well as the public's right to vehicle and pedestrian access to the cemetery over the Coyote Ridge Road route free of obstruction or other interference by respondents, who as

holders of the servient estate established by the cemetery's original grantor must allow access.

In addition, appellants' counterclaim against respondents for harassment damages for filing false criminal trespass complaints should be reinstated.

This document contains 4975 words, excluding parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of August, 2024.

s/DANIEL N. CLARK, WSBA #9675

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For the Appellants

VIII. APPENDICES

A. Court of Appeals Opinion, July 9, 2024

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

DAVID LYONS and LYONS FAMILY
RANCH LLC, a Washington limited liability company
Respondents,

v.

DANIEL CLARK, BARBARA CLARK,
and the marital community thereof, and
WALLA WALLA HISTORIC CEMETERIES,
a Washington nonprofit corporation,
Appellants

No. 39510-3-III

UNPUBLISHED OPINION

COONEY, J. — Walla Walla Historic Cemeteries was granted a certificate from the Washington State Department of Archaeology and Historic Preservation to care for and maintain the abandoned Lyons Creek Cemetery (Cemetery). The Cemetery, which is owned by the State of Washington, is landlocked by the Lyons Family Ranch. An easement to access the Cemetery was identified in the original deed conveying the Cemetery, but there is an easier route to traverse called the “Coyote Ridge Route.”

After Daniel Clark, the founder, director, and officer of Walla

Walla Historic Cemeteries, repeatedly drove vehicles over the Lyons Family Ranches' wheat fields to access the Cemetery, David Lyons and the Lyons Family Ranch LLC (collectively the Lyons) sued Walla Walla Historic Cemeteries, Barbara Clark, and Mr. Clark (collectively the Clarks) for trespass and injunctive relief.

The Lyons were granted an order that restrained the Clarks from accessing the Cemetery by vehicle or through any route other than the one described in the deed. Later, the Lyons brought a motion to dismiss the Clarks' counterclaims. In concluding that the Clarks lacked standing to litigate or enforce any easement rights, the trial court granted the motion. The Clarks appeal. Finding no error, we affirm.

BACKGROUND

Lyons Family Ranch, LLC, owns the Lyons Family Ranch (Farm) in Walla Walla County, Washington. David Lyons is the sole manager of the Lyons Family Ranch, LLC. The Lyons family has owned the Farm since 1909. The Farm is operated as a productive wheat farm.

In 1873, the Hendrix family homesteaded the land that the Farm now occupies. In 1877, the Hendrix family deeded a portion of their land to the "Hendrix Cemetery Association" for a cemetery, referred to as the Lyons Creek Cemetery. Clerk's Papers (CP) at 31, 48. The deed included an easement to access the Cemetery. The Cemetery is landlocked on all sides by the Farm. The Hendrix Cemetery Association and the Cemetery have long since been abandoned. At some point, the State assumed ownership of the Cemetery pursuant to RCW 68.60.020.¹

¹ Chapter 68.60 RCW is the State's statutory scheme governing

In 2018, the Department of Archaeology and Historic Preservation issued a “Certificate of Authority” to Walla Walla Historic Cemeteries for the “Care and Maintenance of the Lyons Creek Cemetery” pursuant to RCW 68.60.030 (Maintenance Certificate). CP at 10 (boldface and italics omitted). Mr. Clark is the “founder, director and officer” of Walla Walla Historic Cemeteries.² Id. at 108. Thereafter, the Clarks contacted the Lyons regarding the best route to access the Cemetery. The Lyons showed the Clarks an alternate route from the one described in the deed, referred to as the Coyote Ridge Route. In April 2019, the parties accessed the Cemetery on foot via the Coyote Ridge Route. The Lyons maintain that access via the Coyote Ridge Route required advance permission from them and that vehicle access to the Cemetery over any route has never occurred nor been permitted by the Lyons.

Shortly after the Lyons showed the Clarks the Coyote Ridge Route, a conflict arose regarding when, where, and by what mode of transportation the Clarks were permitted to cross the Lyons’ fields to access the Cemetery. The Lyons claimed that the Clarks twice damaged their wheat crops when the Clarks drove over their fields without their permission. The Clarks admitted they drove over the Lyons’ fields to reach the Cemetery via a route other than the one described in the deed.

As a result of the Clarks’ alleged trespass and damage to the Lyons’ crops, the Lyons sued the Clarks and Walla Walla Historic Cemeteries. The Lyons requested damages and an order restraining the Clarks from driving over their fields. The

abandoned and historic cemeteries and historic graves.

² Ms. Clark is not a member of or volunteer for Walla Walla Historic Cemeteries but after being served with the lawsuit at issue here, she visited the Cemetery.

Clarks answered the complaint and filed a counterclaim requesting, among other relief, that the Lyons be “enjoined from further acts of vandalism at the cemetery” and “enjoined from further obstruction of the roadway easement of the cemetery.” Id. at 9. The Clarks also alleged that the Lyons “falsely accused counterclaimants of criminal trespass.” Id. at 8.

The Lyons brought a motion for a temporary order restraining the Clarks from “trespassing over Plaintiffs’ productive farmland.” Id. at 184. The Clarks opposed the motion and requested their own injunction, seeking to enjoin the Lyons from “further vandalism” and “further farming encroachment” at the Cemetery. Id. at 266. The court granted the Lyons’ motion and denied the Clarks’. The court found that, “Defendants have admitted to driving over Plaintiffs’ fields and newly planted crops” and “Defendants’ vehicular trespasses destroy Plaintiffs’ crops and may encourage others to drive over Plaintiff’s fields.” Id. at 307. The court enjoined the Clarks from “Walking over Plaintiffs’ fields by any route other than the route described in the 1877 Deed” and from “Driving any vehicle over Plaintiffs’ fields.” Id. at 308.

Thereafter, the Lyons brought a motion for summary judgment dismissal of the Clarks’ counterclaims. In their motion, the Lyons noted that though not properly pleaded, the Clarks repeatedly asserted that the Coyote Ridge Route is an easement by necessity and they are therefore entitled to use it to access the Cemetery via vehicle. The Lyons argued that the Clarks and Walla Walla Historic Cemeteries lack standing to litigate over access to the Cemetery because they have no ownership interest in the Cemetery nor the land surrounding it. Instead, the Lyons argued the State “is the only ‘real party in interest’ with standing to assert legal claims.” Id. at 42.

The Clarks responded with their own motion for summary

judgment on cemetery access. The Clarks argued that the public and the holder of a Maintenance Certificate have a right to access the Cemetery for visitation, care, and maintenance. The Clarks requested a judgment “confirming their right and the public’s right to vehicle and pedestrian access to the cemetery over the traditional Coyote Ridge Road access route without obstruction or the need for permission by adjoining landowners.” Id. at 106.

Additionally, the Clarks filed the care and maintenance agreement for another cemetery that, unlike the Maintenance Certificate before us, included a paragraph stating that “[Walla Walla Historic Cemeteries] shall be solely responsible for obtaining access to the [Stubblefield] Cemetery for its care, maintenance, and restoration activities, including but not limited to enforcement of easement rights relating to ingress and egress.” Id. at 143. The Clarks produced no such agreement for the care and maintenance of the Lyons Creek Cemetery and Mr. Clark admitted one did not exist.

A hearing was held on the competing motions for summary judgment. Ultimately, the trial court concluded that neither the Clarks nor Walla Walla Historic Cemeteries had standing to litigate over or enforce any easements related to accessing the Cemetery via the Lyons’ land. The court relied on RCW 68.60.060 that states, “Any person who violates any provision of this chapter is liable in a civil action by and in the name of the department of archaeology and historic preservation.” The court reasoned that “applying the rules of statutory construction to this chapter the state has expressly delineated certain powers to the association and expressly withheld certain powers for itself.” Rep. of Proc. (RP) at 29. The court noted that “[RCW 68.60.]030 . . . lists out what a certificate holder can do [that] does not include bringing an action with regard to ingress and egress for easement rights.” Id. at 31. Ultimately, the court

granted the Lyons' motion for summary judgment and dismissed all of the Clarks' counterclaims with prejudice.

The Clarks appealed. After their appeal was filed, the Clarks brought a motion for findings and determination of finality of order granting summary judgment before the trial court. They requested the determination of finality pursuant to CR 54(b) and Rules of Appellate Procedure (RAP) 2.2(d). The court granted the motion and issued its findings, determination and direction regarding order granting plaintiffs' motion for summary judgment. The court determined there was "no just reason for the delay of the appeal of th[e] Order [on the Lyons' motion for summary judgment]." CP at 515.

ANALYSIS

On appeal, the Clarks argue the trial court erred in: (1) holding they lacked standing to seek access to the Lyons Creek Cemetery, (2) holding they had no right to seek an injunction against the Lyons to prevent further farming and vandalism of the Cemetery ground, (3) failing to grant their motion for summary judgment that would have affirmed the rights of the defendants and the public to access the Lyons Creek Cemetery over the Coyote Ridge Route, and (4) dismissing their counterclaim against the Lyons that sought damages for false complaints of criminal trespass.

In response, the Lyons argue, in part, that this appeal should be dismissed due to a lack of finality and the Clarks' failure to comply with RAP 2.5.

WHETHER THIS APPEAL SHOULD BE DISMISSED

The Lyons argue that this appeal should be dismissed due to lack of finality and the fact that the Clarks did not ask for, nor

should they be granted, discretionary review.

RAP 2.2(a)(1) states that a party may appeal from the “final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.” The Clarks appealed the order granting the Lyons’ motion for summary judgment. It is undisputed that, though the Clarks’ counterclaims were dismissed by the trial court’s order on summary judgment, the Lyons’ original claims are still pending before the trial court.

The Clarks point to RAP 2.2(a)(3) that states an appeal may be taken from “[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.” However, this provision is inapplicable because, as stated above, the Lyons’ claims for damages resulting from the Clarks’ trespass and attorney fees and costs remain pending before the trial court.

The Clarks next direct us to RAP 2.3(b)(1) and (2) that allow this court to accept discretionary review “of any act of the superior court not appealable as a matter of right” under certain circumstances. RAP 2.3(a). These provisions establish standards for granting discretionary review. Regardless of whether this appeal meets these standards, the Clarks have not sought discretionary review.

Though the Clarks’ appeal lacks procedural compliance with the RAPs, we elect to review it on the merits. Under RAP 1.2(c), we “may waive or alter the provisions of any of these rules in order to serve the ends of justice.” In light of RAP 1.2(a)’s directive to construe our rules “liberally” in order to “promote justice and facilitate the decision of cases on the merits,” we grant discretionary review. We note, however, that interlocutory appeals such as this will generally be remanded

when procedures are not followed.

WHETHER WALLA WALLA HISTORIC
CEMETERIES, THE CLARKS AS INDIVIDUALS,
AND/OR THE CLARKS ON BEHALF OF THE
PUBLIC HAVE STANDING TO SEEK ACCESS TO
THE CEMETERY

The Clarks argue that they have standing to seek access to the Cemetery as individual members of the public and on behalf of the public at large, and that Walla Walla Historic Cemeteries also has standing to seek access to the Cemetery. Essentially, the Clarks argue they have standing to litigate the parameters of the existing deeded easement allowing access to the Cemetery as well as the existence, or lack thereof, of another easement. The Lyons posit that, because the State undisputedly owns the Cemetery, only the State has standing to litigate over and enforce its easement rights. We agree with the Lyons. We review orders on summary judgment *de novo*, engaging in the same inquiry as the trial court. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is only appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). The moving party bears the initial burden of establishing that there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton Condo. Apt.-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

When considering a motion for summary judgment, evidence is considered in the light most favorable to the nonmoving party. *Keck*, 184 Wn.2d at 370. If the moving party satisfies its

burden, then the burden shifts to the nonmoving party to establish there is a genuine issue for the trier of fact. Young, 112 Wn.2d at 225-26. While questions of fact typically are left for trial, they may be treated as a matter of law if “reasonable minds could reach but one conclusion.” Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

Further, a nonmoving party may not rely on speculation or having its own affidavits accepted at face value. Seven Gables Corp. v. MGM/UA Entm’t Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, a nonmoving party must put “forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” Id. “The doctrine of standing prohibits a litigant from asserting another’s legal right[s].” West v. Thurston County, 144 Wn. App. 573, 578, 183 P.3d 346 (2008). Whether a party has standing is a question of law we review de novo. Id. If a plaintiff lacks standing, their claims cannot be resolved on the merits and must necessarily fail. Ullery v. Fullerton, 162 Wn. App. 596, 604-05, 256 P.3d 406 (2011). A party has standing if it “has a distinct and personal interest in the outcome of the case.” Erection Co. v. Dep’t of Lab. & Indus., 65 Wn. App. 461, 467, 828 P.2d 657 (1992), aff’d, 121 Wn.2d 513, 852 P.2d 288 (1993). Alternatively stated, a party has standing if it demonstrates “a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.” Primark, Inc. v. Burien Gardens Assocs., 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

The trial court decided that Walla Walla Historic Cemeteries and the Clarks lacked standing under RCW 68.60.060, but that

statute is inapplicable. RCW 68.60.060 states:

Violations—Civil liability. Any person who violates any provision of this chapter is liable in a civil action by and in the name of the department of archaeology and historic preservation to pay all damages occasioned by their unlawful acts. The sum recovered shall be applied in payment for the repair and restoration of the property injured or destroyed and to the care fund if one is established.

The statute relates to damages and civil liability for a violator of any provision of chapter 68.60 RCW, but lacks applicability to easement rights or who possesses standing to litigate abandoned and historic cemetery access. Regardless, we can affirm on any ground supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, it is undisputed that the State owns the Cemetery and the Lyons own the Farm surrounding the Cemetery. Thus, the only parties with a property interest in the Cemetery and the land surrounding it are the State and the Lyons. Additionally, there is no agreement between the State and the Clarks authorizing them to sue on the State's behalf to protect or enforce its easement rights. This is notable because the record reflects that for other abandoned cemeteries, the State has authorized the caretaking entity to enforce easement rights on the State's behalf. In contrast, the Maintenance Certificate for the Lyons Creek Cemetery simply reads: "Department of Archaeology & Historic Preservation grants a Certificate of Authority to the Walla Walla Historic Cemeteries for the Care and Maintenance of the Lyons Creek Cemetery." CP at 10 (boldface and italics omitted).

Further, the only parties with a distinct interest in access to the Cemetery by way of an easement are the State and the Lyons. Neither Walla Walla Historic Cemeteries, the Clarks, nor the

public possess any property interest in the Cemetery. Instead, Walla Walla Historic Cemeteries has a revocable certificate entrusting it with the care and maintenance of the Cemetery. If Walla Walla Historic Cemeteries is unable to care for the Cemetery due to access issues, the State, as the owner of the Cemetery, is the entity suffering damage. No benefit will accrue the Clarks or Walla Walla Historic Cemeteries if they are allowed to enforce the State's easement rights. Only the State would be benefitted.

Importantly, the Clarks, Walla Walla Historic Cemeteries, and the public are not denied access to the Cemetery. Indeed, the court's temporary injunction recognized that the parties were not enjoined from using the "route described in the 1877 Deed." *Id.* At 308. The Clarks want a more convenient access to the Cemetery via the Coyote Ridge Route, but, in the absence of an agreement authorizing another party to enforce the State's easement rights, that is something only the State and the Lyons may litigate.

Walla Walla Historic Cemeteries and the Clarks, as individuals and on behalf of the public, lack standing to litigate the State's easement rights. Summary judgment was properly granted in the Lyons' favor.

WHETHER WALLA WALLA HISTORIC
CEMETERIES HAS STANDING TO SEEK AN
INJUNCTION ENJOINING THE LYONS FROM
FARMING AND VANDALIZING THE LYONS
CREEK CEMETERY

The Clarks argue Walla Walla Historic Cemeteries has standing to obtain an injunction enjoining the Lyons from farming and vandalizing the Cemetery. The Lyons respond that they have not vandalized or farmed the Cemetery but even if they had,

only the State possesses standing to seek an injunction. We agree with the Lyons.

One requesting injunctive relief must show a clear equitable or legal right and a well-grounded fear of immediate invasion of that right. *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 673, 137 P.2d 105 (1943). As discussed in the prior section, only the State, as the owner of the Cemetery, possesses a clear equitable or legal right to the Cemetery. Walla Walla Historic Cemeteries holds a revocable Maintenance Certificate for the care and maintenance of the Cemetery pursuant to RCW 68.60.030. That statute restricts Walla Walla Historic Cemeteries' authority "to the care, maintenance, restoration, protection, and historical preservation of the abandoned cemetery." RCW 8.60.030(1)(a).

Though the term "protection" is not defined, according to RCW 68.60.040³ titled "Protection of Cemeteries--Penalties," it seems to reference gates, fences, or enclosures built around a cemetery to protect it from intruders.³ (Boldface omitted.) Further, RCW 68.60.060 states that "[a]ny person who violates any provision of this chapter is liable in a civil action by and in the name of the department of archaeology and historic preservation to pay all damages occasioned by their unlawful acts." (Emphasis added.) There is nothing in chapter 68.60 RCW that confers on a Maintenance Certificate holder any

³ RCW 68.60.040(1) provides:

Every person who in a cemetery unlawfully or without right willfully destroys, cuts, mutilates, effaces, or otherwise injures, tears down or removes . . . *any gate, door, fence, wall, post, or railing, or any enclosure for the protection of a cemetery* or any property in a cemetery is guilty of a class C felony punishable under chapter 9A.20 RCW. (Emphasis added.)

legal or equitable right to the Cemetery for which they are entrusted to maintain. Instead, only the State has rights in the Cemetery and only the State has standing to request an injunction enjoining a party from vandalizing a cemetery. Walla Walla Historic Cemeteries does not have standing to seek an injunction enjoining the Lyons from vandalizing or farming the Cemetery.

WHETHER THE COURT ERRED IN DENYING THE CLARKS' MOTION FOR SUMMARY JUDGMENT

The Clarks argue that the court erred by denying their motion for summary judgment affirming their right to access the Cemetery by way of the Coyote Ridge Route. Because we conclude that the Clarks and Walla Walla Historic Cemeteries lack standing to request an injunction or enforce the State's easement rights, the court did not err by denying their motion. The Clarks brought a motion for summary judgment on cemetery access. Their requested relief was "summary judgment pursuant to CR 56 as to their right and the public's right to year-round vehicle and pedestrian access to Lyons Creek Cemetery . . . and for an injunction prohibiting plaintiffs from obstructing those rights." CP at 396.

The court denied the Clarks' summary judgment motion and granted the Lyons' summary judgment motion on the basis that the Clarks and Walla Walla Historic Cemeteries lacked standing. As previously discussed, neither the Clarks nor Walla Walla Historic Cemeteries have standing to litigate over or enforce the State's easement rights or to request an injunction.

WHETHER THE COURT ERRED IN DISMISSING THE CLARKS' COUNTERCLAIM FOR DAMAGES FOR FALSE COMPLAINTS OF CRIMINAL TRESPASS

The Clarks argue that their counterclaim for damages for false claims of criminal trespass was improperly dismissed. The Lyons respond that the Clarks' claim was properly dismissed on summary judgment. We agree with the Lyons.

In the Clarks' answer to the Lyons' complaint, they asserted that "plaintiffs have on two occasions falsely accused counterclaimants of criminal trespass." Id. at 8. This claim, as well as all of the Clarks' other counterclaims, were dismissed with prejudice on summary judgment. Dismissal of the Clarks' claim for false claims of criminal trespass was proper.

First, the Clarks presented no evidence to support their counterclaim for false claims of criminal trespass. Instead, the focus of the litigation was on access to the Cemetery. Second, prior to the trial court granting summary judgment dismissal of the Clarks' counterclaims, the court granted the Lyons' motion for a temporary restraining order restraining the Clarks from "[d]riving any vehicle over Plaintiffs' fields" or "[w]alking over Plaintiffs' fields by any route other than the route described in the 1877 Deed." Id. at 308. The court found, in that order, that "Defendants have admitted to driving over Plaintiffs' fields and newly planted crops" and that "Defendants' vehicular trespasses destroy Plaintiffs' crops and may encourage others to drive over Plaintiffs' fields." Id. at 307 (emphasis added).

Based on the court's order granting the Lyons' temporary restraining order, the court found that the Clarks had trespassed on the Lyons' property. In other words, the Lyons' trespass claims were not false. The Clarks presented no other evidence to support their counterclaim for false claims of criminal trespass and there was no issue of material fact related to that claim. The Clark's counterclaim was properly dismissed.

Affirmed.

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.

Cooney, J.

I CONCUR:

Staab, A.C.J.

FEARING, J. (dissenting) — I would not reach the merits of this case because the case is not before us on appeal or on discretionary review. Therefore, I dissent.

Daniel and Barbara Clark and the Walla Walla Historic Cemeteries (collectively Clarks) filed a notice of appeal from the superior court's order granting David Lyons' and Lyons Family Ranch, LLC's (collectively Lyons) partial summary judgment motion and denying the Clarks' summary judgment motion. Nevertheless, some of the Lyons' causes of action remain pending before the superior court. Respondents Lyons ask this court to dismiss this proceeding and remand to the superior court without any decision. I would grant this request because the Clarks have no right to appeal. RAP 2.2.

The Clarks never filed, with this court, a motion for discretionary review. After the Lyons requested dismissal, the Clarks asked in their reply brief for such review. I agree with the majority that the Clarks do not satisfy any of the criteria listed in RAP 2.3(b).

The majority, after concluding that the Clarks have no right to an appeal and have no grounds for discretionary review, decides to address the summary judgment orders on their merits anyway under RAP 1.2(a) and (c). The two subsections of RAP 1.2 declare:

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

....

(c) Waiver. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

(Boldface omitted.) (Emphasis added.) RAP 1.2(a) does not apply since the majority is not liberally interpreting RAP 2.3.

Instead of interpreting RAP 2.3, the majority ignores RAP 2.3. This court has never employed RAP 1.2(c) to decide the merits of a case when the case is not before us on appeal and lacks a basis for discretionary review. This court generally waives application of the rules on appeal for “technical violations.” *Green River Community College Dist. No. 10 v. Higher Education Personnel Board*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979); *Stiles v. Kearney*, 168 Wn. App. 250, 260, 277 P.3d 9 (2012); *Eller v. East Sprague Motors & R.V.’s, Inc.*, 159 Wn. App. 180, 188, 244 P.3d 447 (2010); *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002); *Hitchcock v. Department of Retirement Systems*, 39 Wn. App. 67, 72 n.3, 692 P.2d 834 (1984). The violations of RAP 2.2 and 2.3 in this instance are more than technical.

The majority fails to analyze why prematurely deciding the merits of this case serves the ends of justice. The majority fails to distinguish between this case and other cases wherein a party wishes immediate appellate review of a superior court decision that does not completely resolve all of the claims before it and wherein a party fails to present grounds for discretionary review. I fear that the majority now opens a gate that allows any litigant, seeking interlocutory review before the court, to gain such review.

I dissent.

Fearing, J.

B. Court of Appeals Order Denying Reconsideration, August 13, 2024

COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON

DAVID LYONS and LYONS FAMILY RANCH LLC,
a Washington limited liability company,
Respondents,

v.

DANIEL CLARK, BARBARA CLARK, and the marital
community thereof, and WALLA WALLA HISTORIC
CEMETERIES, a Washington nonprofit corporation,
Appellants.

No. 39510-3-III

ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellants' motion for reconsideration, and the record and file herein, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 9, 2024, is hereby denied.

PANEL: Judges Cooney, Fearing, Staab FOR THE COURT:

TRACY A. STAAB
Acting Chief Judge

C. STATUTES:

RCW 9A.52.080

Criminal trespass in the second degree.

(1) A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

(2) Criminal trespass in the second degree is a misdemeanor.

RCW 49.60.030

Freedom from discrimination—Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

RCW 68.60.030

Preservation and maintenance corporations—Authorization of other corporations to restore, maintain, and protect abandoned cemeteries.

(1)(a) The department of archaeology and historic preservation may grant, by nontransferable certificate, the authority to maintain and protect an abandoned cemetery upon application made by a state or local governmental organization, such as a city or county, or by a preservation organization that has been incorporated for the purpose of restoring, maintaining, and protecting an abandoned cemetery. Such authority is limited to the care, maintenance, restoration, protection, and historical preservation of the abandoned cemetery, and does not include authority to make burials. In order to activate a historical cemetery for burials, an applicant must apply for a certificate of authority to operate a cemetery from the funeral and cemetery board.

(b) Those organizations that are granted authority to maintain and protect an abandoned cemetery are entitled to hold and possess burial records, maps, and other historical documents as may exist. Organizations that are granted authority to maintain and protect an abandoned cemetery are not liable to those claiming burial rights, ancestral ownership, or to any other person or organization alleging to have control by any form of conveyance not previously recorded at the county auditor's office within the county in which the abandoned cemetery exists. Such organizations are not liable for any reasonable alterations made during restoration work on memorials, roadways, walkways, features, plantings, or any other detail of the abandoned cemetery.

- (c) Should the maintenance and preservation corporation be dissolved, the department of archaeology and historic preservation shall revoke the certificate of authority.
- (d) Maintenance and preservation corporations that are granted authority to maintain and protect an abandoned cemetery may establish care funds.
- (2) Except as provided in subsection (1) of this section, the department of archaeology and historic preservation may, in its sole discretion, authorize any Washington nonprofit corporation that is not expressly incorporated for the purpose of restoring, maintaining, and protecting an abandoned cemetery, to restore, maintain, and protect one or more abandoned cemeteries. The authorization may include the right of access to any burial records, maps, and other historical documents, but may not include the right to be the permanent custodian of original records, maps, or documents. This authorization must be granted by a nontransferable certificate of authority. Any nonprofit corporation authorized and acting under this subsection is immune from liability to the same extent as if it were a preservation organization holding a certificate of authority under subsection (1) of this section.
- (3) The department of archaeology and historic preservation must establish standards and guidelines for granting certificates of authority under subsections (1) and (2) of this section to assure that any restoration, maintenance, and protection activities authorized under this subsection are conducted and supervised in an appropriate manner.

RCW 68.60.040

Protection of cemeteries—Penalties.

(1) Every person who in a cemetery unlawfully or without right willfully destroys, cuts, mutilates, effaces, or otherwise injures, tears down or removes, any tomb, plot, monument, memorial, or marker in a cemetery, or any gate, door, fence, wall, post, or railing, or any enclosure for the protection of a cemetery or any property in a cemetery is guilty of a class C felony punishable under chapter 9A.20 RCW.

(2) Every person who in a cemetery unlawfully or without right willfully destroys, cuts, breaks, removes, or injures any building, statuary, ornamentation, tree, shrub, flower, or plant within the limits of a cemetery is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

(3) Every person who in a cemetery unlawfully or without right willfully opens a grave; removes personal effects of the decedent; removes all or portions of human remains; removes or damages caskets, surrounds, outer burial containers, or any other device used in making the original burial; transports unlawfully removed human remains from the cemetery; or knowingly receives unlawfully removed human remains from the cemetery is guilty of a class C felony punishable under chapter 9A.20 RCW.

RCW 68.60.060

Violations—Civil liability.

Any person who violates any provision of this chapter is liable in a civil action by and in the name of the department of archaeology and historic preservation to pay all damages occasioned by their unlawful acts. The sum recovered shall be applied in payment for the repair and restoration of the property injured or destroyed and to the care fund if one is established.

RCW 68.60.080

Abandoned cemetery—Lawful entry purposes.

It is lawful to enter an abandoned cemetery for purposes of:

(1) Burials pursuant to RCW 68.60.070 and associated rules;

- (2) Care and maintenance activities authorized under RCW 68.60.030; and
- (3) Visitation of graves.

42 U.S. Code Chapter 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

a) FINDINGS

The Congress finds that—

- (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
- (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
- (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional

exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b)PURPOSE It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S. Code Chapter 126 §12102 - Definition of disability

As used in this chapter:

(1) **DISABILITY** The term “disability” means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) **MAJOR LIFE ACTIVITIES**

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) **REGARDED AS HAVING SUCH AN IMPAIRMENT**

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment

with an actual or expected duration of 6 months or less.

(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY

The definition of “disability” in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services;
or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of

ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph—

(I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

42 U.S. Code Chapter 126 § 12131 - Definitions

As used in this subchapter:

(1) **PUBLIC ENTITY** The term “public entity” means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) [1] of title 49).

(2) **QUALIFIED INDIVIDUAL WITH A DISABILITY**

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S. Code Chapter 126 § 12132 - Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

D. CONSTITUTIONAL PROVISIONS

U.S. Constitution, Fourteenth Amendment, Due Process Clause

Section I: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Washington State Constitution, Article I, Section 3

ARTICLE I

DECLARATION OF RIGHTS

SECTION 3 PERSONAL RIGHTS.

No person shall be deprived of life, liberty, or property, without due process of law.

Appendix E. Photo of cemetery with vehicle access from Lyons Creek (CP 163)



Appendix F Photo of deeded roadway (CP 164, Ex A)



Appendix G. Photo of Coyote Ridge Road route to deeded roadway easement and Lyons' preferred pedestrian extension (CP 164, Ex B)



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2024, I caused to be served a true and correct copy of the foregoing Petition for Review of Appellants on the following named person(s) via Court of Appeal E-Serve Portal:

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Signed on August 27, 2024 at Walla Walla, Washington.
s/ DANIEL N. CLARK, WSBA #9675

CLARK LAW OFFICE

August 27, 2024 - 2:20 PM

Transmittal Information

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