

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CARROLLS WATER ASSOCIATION, Respondent

v.

MARK HORN, Petitioner

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	ASSIGNMENT OF ERROR	1
	ISSUES PERTAINING TO ASSIGNMENT OF ERROR	1
B.	IDENTITY OF PETITIONER	2
C.	ISSUES PRESENTED FOR REVIEW	3
D.	STATEMENT OF THE CASE	4
E.	ARGUMENT	5
F.	ATTORNEY FEES AND COSTS	19
G.	CONCLUSION	20

1. TABLE OF AUTHORITIES

1	U.S. CONST. amend. V	6
2	WA CONST. art. I, § 16.	6

Table of Cases

1	<i>Beckman</i> , 96 Wash.App. at 365-66, 979 P.2d 890	17
2	<i>Black's Law Dictionary</i> 7th Edition, 973 (1999).	12
3	<i>Brown v. Safeway Stores, Inc.</i> , 94 Wn.2d 359, 364, 617 P.2d 704 (1980).	5, 15
4	<i>Brown v. McAnally</i> , 97 Wash.2d 360, 366-67, 644 P.2d 1153 (1982)	16
5	<i>Citizens v. Murphy</i> , 151 Wn.2d 226, at 236;	5, 15
6	<i>In re City of Anacortes</i> , 81 Wn. 2d 166, 500 P.2d 546 (1972).	9
7	<i>City of SeaTac v. Cassan</i> , 93 Wn. App. 357, 361, 967 P.2d 1274 (1998),	6
8	<i>Eisenbarth v. Mark Horn</i> , Cowlitz County Cause No. 05-2-01969-8,	8
9	<i>Horn v. WESCO Properties, Inc.</i> , Cowlitz County Cause No. 98-2-00980-3	7
10	<i>Horn v. WESCO Properties, Inc.</i> , Cowlitz County Cause No. 07-2-00438-7	8
11	<i>Intalco Aluminum v. Dep't of Labor & Indus.</i> , 66 Wn. App. 644, 663, 833 P.2d 390 (1992).	15
12	<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).	15

13	<i>Kennedy</i> , 115 Wash. App. at 872, 63 P.3d 866 (citing <i>Beckman v. Wilcox</i> , 96 Wash. App. 355, 367, 979 P.2d 890 (1999))	16, 18
14	<i>Mielke v. Yellowstone Pipeline Co.</i> 73 Wn. App. 621, 624, 870 P.2d 1005 review denied 124 Wn.2d 1030 (1994)	9
15	<i>San Gabriel Valley Water Co. v. Montebello</i> 84 Cal App.3d 757, 148 Cal Rptr 830 (1978)	18
16	<i>Sorenson v. Czinger</i> , 70 Wash. App. 270, 279, 852 P.2d 1124 (1993)	17
17	<i>Spaeth v. Plymouth</i> 344 NW 2d 815 (Minn. 1984)	18
18	<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).	5
19	<i>Costich</i> 152 Wn.2d at 474, 98 P.3d 795.	6
20	<i>State v. Koloske</i> 100 Wn.2d 889, 676 P.2d 456 (1984)	10
21	<i>State v. Martinez</i> 18 Wn. App. 85, 566 P.2d 952.	10
22	<i>Thompson v. King Feed & Nutrition Serv., Inc.</i> , 153 Wn.2d 447, 453, 105 P.3d 378 (2005)	15
23	<i>Winston-Salem v. Ferrell</i> 79 NC App. 103, 338 SE 2d (1986).	18

TABLE OF RULES & STATUTES

1	FRCP 71A(e)	7
2	RCW 8.24	16
3	RCW 8.24.010	16
4	RCW 8.24.030	16,17, 18
5	RCW 8.25(3)	9

A. ASSIGNMENT OF ERROR

1. The trial court error when it refused to allow Mr. Horn to reference the history of the case and the issues relating to the taking and illegal placement of the waterline on his property.
2. The trial court error by not recording the entire trial, along with each sidebar.
3. The trial court error by refusing to follow the mandate as to where the actual boundary line lay, causing jury confusion.
4. The trial court error giving jury instruction 14, which eviscerated the testimony of the property owner.
5. The trial court error in not allowing attorney fees and expert witness fees to Condemnee, Mr. Horn?

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Can a trial court that has a long history with the case refuse to allow testimony about, and any reference to, the long litigation history of a tumultuous dispute over the placement of a waterline on the wrong property after the placing party had notice they were on the wrong side of the boundary line? (Assignment of Error 1)
2. Can the trial court, when it has absolute control over the recording of the procedure and the side bar discussions, simply not turn the recording on so that everything is placed on the record when it is clear the discussion is about the previous decision of the Court of Appeals and the refusal of the Washington State Supreme Court to hear the matter further? (Assignment of Error 2)
3. Can the condemnee obtain a new trial when part of the proceeding is not on the record as the recording device was not turned on when court resumed? (Assignment of Error 2)

4. Can the trial court refuse to follow the previous decision by the Court of Appeals and the denial of the Washington State Supreme Court to hear the matter, so that it became a issue of jury confusion? (Assignment of Error 3)
5. Can the trial court refuse to answer questions from the jury, the refusal of which may have led them to become confused as to where the pipeline actually lay and whether or not Mr. Horn was gaining property? (Assignment of Error 3)
6. Can the trial court allow jury instruction 14 which clearly is meant to eviscerate the testimony of the property owner as to the value of his property, so the only value of the property allowed to be considered by the jury is that of the Plaintiff's witness. (Assignment of Error 4)
7. Can the trial court ignore the long litigation history of the case and not allow attorney fees and expert witness fees to the condemnee for his having to fight for 10 years to get compensation for the taking of his property. (Assignment of Error 5)

B. IDENTITY OF PETITIONER

Respondent-Appellant, Mark Horn, is a property owner who repeatedly tried to get compensation for the taking of his property for over ten (10) years. He has had to fight, file appeals, and litigate until he has spent as more money than the property taken is worth. He now asks this Court to issue an order for a new trial based on the apparent bias and abuses of discretion of the trial judge and the lack of recording the proceedings.

C. ISSUES PRESENTED FOR REVIEW

Issue One

Did the trial court abuse its discretion by restricting evidence to be presented at trial for damages due to condemnation of Mr. Horn's land.

Issue Two

Did the trial court abuse its discretion by not recording some of the side bar conference in which the discussion was the property line and the previous decision by the court of appeals.

Issue Three:

Did the trial court abuse its discretion in refusing to follow the mandate as to where the actual boundary line lay, causing jury confusion?

Issue Four:

Did the trial court error giving a jury instructions which eviscerated the testimony of the property owner?

Issue Five:

Did the trial court error in not allowing attorney fees and expert witness fees to Condemnee, Mr. Horn?

D. STATEMENT OF THE CASE

This case arises out of a trespass and unlawful placement of a waterline on Mr. Horn's property, the subsequent invalid transfer of an easement in Mr. Horn's land, and subsequent condemnation of an easement in Mr. Horn's land by Carrolls Water Association. This matter has been the subject of a 10 year litigation history involving a number of suits, countersuits, and appeals. Mr. Horn now asks for a review of the jury verdict, confusion of the jury, allowed by the Trial Judge, and repeated unrecorded portions of the transcript with respect to the trial in this condemnation matter held in Cowlitz County Superior Court on January 7, 2009, and January 8, 2009. Mr. Horn seeks a new trial.

In this appeal, Mr. Horn contends that the trial court abused its discretion by 1) prejudicially limiting Mr. Horn's ability to present relevant evidence as to the damages portion of this matter, and 2) failing to keep an accurate record of the proceedings, and 3) refusing to follow a mandate from the Supreme Court and allowing the jury to become confused, and 4) failing to respond to jury questions which would have displaced any confusion over the property.

E. ARGUMENT

Issue One.

Did the trial court abuse its discretion by restricting evidence to be presented at trial for damages for condemnation of Mr. Horn's land?

A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To show an abuse of discretion, the complaining party must establish that it was prejudiced by the deviation. See *Citizens v. Murphy*, 151 Wn.2d 226, at 236; *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 364, 617 P.2d 704 (1980).

To recover damages for an entities failure to follow property condemnation procedures, a party must generally show that actual damages have resulted. Here, Mr. Horn was barred from testifying as to damages he suffered, including attorney fees and costs associated with the many legal proceedings he has had to institute in order to obtain justice in this case. (RP 143-151; 155-167; 168-203). The trial judge here refused to allow any testimony about whether or not the actual line was straight (as the Court of Appeals ruled and the

Washington State Supreme Court mandated) made no difference at all. (RP 81) and then in recorded Sidebar (RP 81-85) This issue is in fact highly relevant to the case as moving the line as Mr. Hampton and Mr. Davis did (RP 41;42;44;45;103), essentially credited Mr. Horn with receiving more land because of the apparent jutting out of the line onto lot 4. (RP 108; 134-135)

Further, Mr. Horn defense was not allowed to reference the history of this case and where the quarter section line has been established (RP 78, 79, 81-85), how much land Mr. Horn owned (RP 134 -135) or any other issues which surround this controversy.

The trial court's refusal to allow references to the illegality of the installation of a waterline across Mr. Horn's property go to the heart of the just compensation issue. Mr. Horn is entitled to compensation for the trespass and unconstitutional taking of his property. *See* U.S. CONST. amend. V; *see also* WA CONST. Art. I, § 16. Compensation is due for damage "caused to the remainder by reason of the taking...." *City of SeaTac v. Cassan*, 93 Wn. App. 357, 361, 967 P.2d 1274 (1998), questioned on other grounds by *Costich*, 152 Wn.2d at 474, 98 P.3d 795. Here, the court specifically

disallowed certain damages, and stopping the testimony of Mr. Horn. (RP 143-151).

Mr. Horn has a right to present defenses and evidence as to the amount of compensation to be paid for the property. FRCP 71A(e) provides, in pertinent part:

“...A defendant waives all the defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property....”

Here, we have a matter pertaining to the trial on the issue of just compensation. The trial court refused to allow the Mr. Horn to present evidence of other directly relevant cases, parties and wrongdoings with respect to this issue, i.e. history of the case was disallowed.

Relevant evidence stems from the following previous matters in which Mr. Horn has appeared. Each of these previous matters directly touch and concern the issue of just compensation for the “taking”. These proceedings are as follows:

- 1) *Horn v. WESCO Properties, Inc.*, Cowlitz County Cause No. 98-2-00980-3, establishes the following facts:
 - a. When the property was taken by WESCO.

- b. That WESCO failed to show that Mr. Horn presented survey information that was inaccurate.
- c. A Mandate on No. 28890-7-II, issued by the Washington State Supreme Court, Division II, affirming judgment in favor of Mr. Horn in Cause No. 98-2-00980-3 on August 1, 2003. The court of appeals found that Mr. Horn's property line cannot be moved and as such the waterline installed by WESCO Properties is "illegal", quoting Cowlitz County Superior Court Judge Warne.

2) *Horn v. WESCO Properties, Inc.*, Cowlitz County Cause No. 07-2-00438-7, establishes the following facts on the illegality of the waterline and improper transfer of water rights by WESCO to CARROLLS:

- a. CARROLLS has been using the waterline since 2007.
- b. Gene Benedick of WESCO is the person who signed the Easement over to CARROLLS on January 15, 2004, via Quit Claim Deed.
- c. An Order for Partial Summary Judgment filed on October 19, 2007, established that: Wesco improperly installed the waterline on the Plaintiff's property."

3) *Eisenbarth v. Mark Horn*, Cowlitz County Cause No. 05-2-01969-8, establishes the following facts pertaining to the north-south boundary line between Mr. Horn's property and Mr. Eisenbarth's property, situated along the western edge of Mr. Horn's property and eastern edge of Mr. Eisenbarth's property.

- a. The establishment of this boundary line concerns the issue of just compensation with respect to the

calculation of the actual number of acres of Mr. HORN's property affected by the taking.

- b. This case is currently on Appeal to the Washington State Supreme Court because this court has moved the boundary line, allowing some of MR. Horn's property to be wrongfully given to Mr. Eisenbarth, and a final decision with respect to this issue has not yet been rendered

Mr. Horn has a right to put forth evidence of the property line established by the Supreme Court and the illegality of the waterline into evidence for damages in this action. No such testimony was allowed. (RP 78,-90) In addition, Mr. Horn should have been allowed to put forth evidence relating to his damages as a result of the placement of the waterline on his property before just compensation was given. RCW 8.25(3). Further, Mr. Horn should have been allowed to present testimony regarding the trespass on his property by Plaintiffs as a party is liable for trespass if he or she intentionally or negligently intrudes onto the property of another. *Mielke v. Yellowstone Pipeline Co.* 73 Wn. App. 621, 624, 870 P.2d 1005 review denied 124 Wn.2d 1030 (1994) citing RESTATEMENT (SECOND) OF TORTS §§ 158, 165, 166 (1965). In addition, interest is allowable in an action for eminent domain and starts to

run from the time possession of the property actually was taken. *In re City of Anacortes*, 81 Wn. 2d 166, 500 P.2d 546 (1972).

Complete relief cannot be adjudicated without all of the facts involved in this unconstitutional taking being considered by Jury and the Trial Court. The Trial Court has committed an obvious error, or in the alternative a probable error, in the abuse of its discretion.

Issue Two.

Did the trial court abuse its discretion by not recording some of the side bar conference in which the discussion was clearly about the property line and the previous decision by the court of appeals.

The use of a narrative report of a . . . trial under the provision of the Rules of Appellate Procedure is sufficient when such a report affords adequate and effective review of . . . issues on appeal. *State v. Martinez* 18 Wn. App. 85, 566 P.2d 952. The unrecorded sidebar conference, such as was held in *Koloske*, presents another difficulty in that sidebars are held to keep from continually removing the jury. *State v. Koloske* 100 Wn.2d 889, 676 P.2d 456 (1984) *Koloske* cited the dangers of such unrecorded sidebars. Here, the recorded transcript is insufficient to allow the Court to review the issues and

make a determination as to the discretion of the trial court, among other issues, and a portion of the trial itself went unrecorded.

The trial transcript is replete with missing recorded sidebars (RP 96, 131, 150) and, at one point, the recording was not switched back after the hall conference. (RP 54), leaving open the question of what went on in the proceeding, what relevant statements may have been made that are now missing, what judge's ruling is missing and how could all of this affect the outcome of this matter.

The record shows that the unrecorded sidebars were about the property line and the previous decision by the Court of Appeals regarding that property line. (RP 93-95 with unrecorded sidebar at 96 and RP 130 with unrecorded sidebar at 131) The previous decision by the Court of Appeals, upheld by the refusal of the Washington State Supreme Court to hear the issue is relevant to the case at bar as those decisions become the law of the case, which has been clearly ignored by the trial court in this case. (RP 84-85 99-101)

However, there is nothing in the record to indicate what the unrecorded proceedings after the hall conference were about (RP 54)

because the audio recording not being switched back after the hall conference were about, leaving this area of the trial open to speculation. The trial court abused its discretion in not seeing that all the proceeding were recorded.

Issue Three.

Did the trial court abuse its discretion in refusing to follow the mandate as to where the actual boundary line lay, causing jury confusion?

A mandate, issued by the Washington State Supreme Court denying review of the Court of Appeals decision in a previous case involving this very line and these very parties is a direct ruling for the lower court to follow the decision the appellate court has made in the case, unless new evidence or an intervening change in the law dictates a different result. Bryan A. Garner, *Black's Law Dictionary* 7th Edition, 973 (1999). The decision of the Court of Appeals and the denial of the Washington State Supreme Court to review that decision, makes that mandate the law of this case. However, the record here clearly shows the Trial Judge did not want to follow that mandate. (RP 81-85) In one of the recorded sidebars, the trial judge clearly stated “ The Court says the legal description places the easement on Lot 4. Further the court states the easement is on Lot 18, the fact they call it 4 is not relevant, because it has

already been decided. (RP 81-82) Further, the trial judge misunderstood where the easement was situated, or he didn't think it mattered. (RP 86) What did matter was whether or not the jury thought Mr. Horn was receiving additional property, which he was not, but seemed unclear throughout the proceedings.

Each piece of property is unique in nature and each piece, because of its uniqueness, requires specific consideration. Here, the trial judge said "we're talking about a piece of dirt. This is the same piece of dirt. Whether it's on lot 18 or Lot 4 doesn't make any difference. It's this piece of dirt, which, as a matter of law, *has been added to Lot 18*. (RP 85;134-135). This is a totally incorrect statement of the facts of the case, what the history of the case shows, and directly conflicts with the decision of the Court of Appeals and the Mandate setting the boundary line. (emphasis added). Counsel for Mr. Horn attempted to correct the court, the legal description must state with specificity what is described, so that it gives notice to all. (RP 85). The court did not want to hear it.

Here, the trial judge allowed testimony and a legal description which did not even describe the correct property where the easement was to be placed, allowing confusion for the jury as to where the easement actually lay and whether or not Mr. Horn was actually receiving additional property. (RP 107) When the trial court allowed this testimony, it was

ignoring the mandate and the previous Court of Appeals decisions about where the property line actually was drawn.

The court allowed the legal description submitted by Witnesses Ken Davis and Cal Hampton, to be entered as an exhibit, over objection of counsel. (RP 103-109). That legal description pertained to Lot 4, belonging to Wesco Properties, and not lot 18, belonging to Mr. Horn. (Exhibit 7, RP 132-135). Mr. Davis submitted a report which had an overlay on the cover showing a 'jutting out' of Mr. Horn's property. (RP 137 and Ex. 21). Mr. Horn testified his property did not 'jut out' from the property line onto Lot 4. (RP 134-135) Mr. Horn testified he believed the value of the property where the easement actually was asserted was \$31,000, (RP 138). His opinion was based on the property in Carrollton Crest Estates, the development using the waterline on his property to supply their water.

Issue Four.

Did the trial court error in giving a certain jury instructions?

Jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be

applied. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005) . "Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial." *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). "In determining whether an instruction could have confused or misled the jury, the court examines the instructions in their entirety." *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 663, 833 P.2d 390 (1992).

To show an abuse of discretion, the complaining party must establish that it was prejudiced by the deviation. *See Citizens v. Murphy*, 151 Wn.2d 226, at 236; *Brown v. Safeway Stores, Inc.* 94 Wn.2d 359, 364, 617 P.2d 704 (1980). Here, the judge allowed an instruction (Jury Instruction 14) which did not allow the jury to consider property values of Carrollton Crest Estates, the property being serviced by the waterline laid across Mr. Horn's property, to equate a value for the property taken from Mr. Horn. The jury instruction given clearly prejudices Mr. Horn's case. Mr. Horn testified as to what he determined the value of his property was. (CP 138) and he determined that value by using property contained inside Carrollton Crest Estates. (RP 139-140). By allowing that particular jury instruction, Mr. Horn's testimony became irrelevant when deciding what his property was worth. Thus, leaving the jury to have one source of

valuation for the property, the value given it by Mr. Davis, who had appraised the wrong property (Ex 21), had used the wrong legal description. (RP 11)

Allowing a jury instruction which went against the testimony of the property owner as to the value of his property basically gutted his case. The court abused its discretion in allowing that particular jury instruction. It was highly prejudicial to Mr. Horn and did not allow the jury to consider other options to determine the value of the property.

Issue Five:

Did the trial court abuse its discretion by not awarding attorney fees and expert witness fees to Condemnee, Mr. Horn?

In Washington, chapter 8.24 RCW governs a condemnation proceeding for a private way of necessity. *Brown v. McAnally*, 97 Wash.2d 360, 366-67, 644 P.2d 1153 (1982) (RCW 8.24.010 implements the right to condemn a "private way of necessity" established in Washington Constitution Article 1, § 16). Nonetheless, the statute grants trial courts considerable discretion in awarding fees and costs. RCW 8.24.030 provides: "In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable

attorneys' fees and expert witness costs *may* be allowed by the court to reimburse the condemnee." (Emphasis added.) Rather than mandating an award of fees and costs based on statutory standards, the legislature merely stated that the trial court "may" award fees and costs. That the trial court "may" award fees and costs necessarily grants the court discretion to decide what equitable grounds support an award and the amount of the award. *See Kennedy*, 115 Wash. App. at 872, 63 P.3d 866 (citing *Beckman v. Wilcox*, 96 Wash. App. 355, 367, 979 P.2d 890 (1999)) (a trial court has discretion to award fees in light of the circumstances in each case). Moreover, although the statute limits the recipients to condemnees, it does not limit the parties against whom the court may award fees and costs.

Courts have exercised broad discretion in awarding fees and costs under RCW 8.24.030. For example, the trial court may order one condemnee to pay the fees and costs of another condemnee. *Kennedy*, 115 Wash. App. at 874, 63 P.3d 866. The trial court may award a condemnee attorney fees and costs even though the condemnee has lost the feasible alternative issue. *Sorenson v. Czinger*, 70 Wash. App. 270, 279, 852 P.2d 1124 (1993) (statute grants the trial court discretion in awarding fees and costs without regard to who has prevailed). And the trial court may award attorney fees and costs against a condemnor who voluntarily dismisses its condemnation action. *Beckman*, 96 Wash. App. at 365-66, 979 P.2d 890

(statutory language suggests that the legislature intended broad application of RCW 8.24.030).

Nothing in the language of RCW 8.24.030 or in the case law . . . prevents a court from requiring the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees." *Kennedy*, 115 Wash. App. at 873, 63 P.3d 866.

RCW 8.24.030 grants trial courts broad discretion in awarding attorney fees. With this in mind, Mr. Horn should be allowed to recover attorney fees incurred as a result of having to become involved in the extensive litigation to date. The trial court should have looked beyond the mechanical process to answer the question of who was responsible for the litigation with Horn. Clearly, the full responsibility for the costs of litigating the case rests on Carrolls Water Association.

A prevailing property owner may recover reasonable fees paid to experts, such as surveyors, appraisers, and engineers. *San Gabriel Valley Water Co. v. Montebello* 84 Cal App.3d 757, 148 Cal Rptr 830 (1978) *Spaeth v. Plymouth* 344 NW 2d 815 (Minn. 1984) and *Winston-Salem v. Ferrell* 79 NC App. 103, 338 SE 2d (1986). Pre-litigation expenses, such as those incurred in ascertaining the extent of one's property rights or in attempt to amicably settle the dispute, are also recoverable. *Spaeth*, noting

the test is not whether expenses were incurred before or after plaintiff's decision to file suit, but whether expenses were reasonably necessary to prosecute the action.

Here, Horn should be awarded all attorney fees and expert witness fees incurred, extending back to 1998 and continuing to date, including the costs and expenses of this appeal.

F. ATTORNEY FEES AND COSTS

Appellant is entitled to recover “out of pocket litigation expenses as part of the attorneys’ fee.” *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d at 407. *See also Davis v. City and County of San Francisco*, 976 F.2d at 1556 (“[A]ttorneys’ fees awards can include reimbursement for out-of-pocket expenses including the travel, courier and copying costs that Apelles’ attorneys incurred here.”); *Chalmers*, 796 F.2d at 1216 n.7 (explaining that “out of pocket expenses incurred by an attorney which would normally be charged to a fee paying client are recoverable as attorney’s fees”). Here, appellant has paid copy and mailing costs, transcript costs and filing fees to proceed with this appeal and \$5,500 in attorney fees to date, not including the ten (10) year costs and attorney fees, and expert witness fees.

This award should be considered in its entirety and not reduced. These costs and fees were reasonable to defend Mr. Horn's position. *See Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994) (discussing whether the expenses "were necessary and reasonable in this case").

Appellant has been placed in a position which mandated he file an appeal with this court. That appeal has cost him the filing fee, costs for copies and service of documents on the other party and the court, and the attorney fees relating to this appeal. Respondent requests fees under RAP 18.1.

G. CONCLUSION

The trial Judge in this case deliberately limited what evidence could be considered by the jury. Additionally, the judge was not diligent in seeing that all aspects of the proceeding were properly recorded. He refused to recognize the decision by the Court of Appeals and the Mandate refusing to further hear the matter by the Washington State Supreme court. He allowed the jury to be confused as to what property Mr. Horn owned and where the easement actually lay.

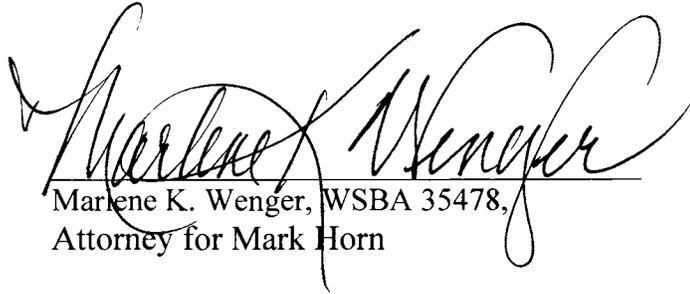
This trial judge actually allowed a jury instruction which eviscerated the testimony of the landowner and made his property worth virtually a pittance, compared to the property of Carrollton Crest Estates,

the development using the waterline wrongfully across Mr. Horn's property.

Mr. Horn requests a new trial for determination of the value of property taken or, in the alternative, compensation for his attorney fees and expert witness fees, with interest, dating from the 1998 lawsuit forward, less any money already recovered for timber trespass.

Dated: This 31 day of August, 2009.

Respectfully submitted,



Marlene K. Wenger, WSBA 35478,
Attorney for Mark Horn

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY C
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**CARROLLS WATER ASSOCIATION, a
Washington corporation**

Respondent,

vs.

MARK HORN,

Appellant.

Cowlitz County Cause: 07-2-01946-5

39093-1-II
Court of Appeals #39039-1-II

Certificate of Service

I, MARLENE WENGER, Attorney for the Defendant, Mark Horn, declares as follows:

That on August 31, 2009, I personally mailed a copy of the Appellant Brief, Certificate of Service to Donald Frey, Attorney for Plaintiff. I have previously provided a copy of the transcript to Mr. Frey.

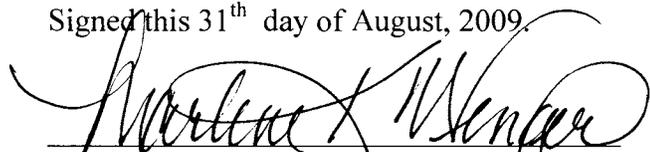
I also certify that I mailed a copy of the Appellate Brief to Mr. King on this date.

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Seattle WA 98104

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this 31th day of August, 2009.


MARLENE K. WENGER, WSBA #35478
Attorney for Defendant, MARK HORN