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BY RONALD R. CARPENTER

**SUPREME COURT
OF THE STATE OF WASHINGTON**

CLERK

FRED NOBLE and FAITH NOBLE, Husband and Wife,

Petitioners,

v.

SAFE HARBOR FAMILY PRESERVATION TRUST, a Washington
Trust,

Respondent/Owner,

and

TILLICUM BEACH, et al,

Additional Respondents.

FILED
NOV 21 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON
ajp

Answer to PRU
~~BRIEF OF RESPONDENT TILLICUM BEACH~~

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ORIGINAL

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I. ISSUES PRESENTED FOR REVIEW

This Petition for Review presents four issues:

1. Does this matter present a significant question of law under the Constitution of the State of Washington or of the United States or an issue of substantial public interest (RAP 13.4[b][3],[4])?

2. Under any possible circumstances, can a first condemnee (Safe Harbor) be required to pay the attorney fees of the alternate condemnee (Tillicum Beach), where the first condemnee has only generally alleged an alternate more suitable site, and has not actually named the alternate condemnee as the owner of that site?

3. If the answer is yes, did the trial court abuse its discretion by assessing those fees and related costs against Safe Harbor?

4. Should this Court award to Tillicum Beach its attorney fees and costs, for responding to the Safe Harbor Petition for Review to the Supreme Court?

II. STATEMENT OF THE CASE

“Brown” is the condemnor, who wants access to her landlocked property.

“Blue” is the condemnee. He is named by Brown as the owner of the original proposed way of necessity route.

“Green” is the alternate condemnee. She is brought into the lawsuit as the owner of a proposed “more suitable” alternate route.

Brown needs to have an access road to her property. She sues Blue for a private way of necessity. Blue then answers by saying that there is a more suitable route. Even though Blue did not name or join the owner of the property he claims is more suitable, or describe this "more suitable" route, the parties know that this proposed route must be over property owned by Green.

As a matter of strategy, Blue intentionally avoids actually naming Green in his answer as the owner of the alternate route, or describing any route over Green's property. This is because Blue believes that if he does not actually plead the particulars of the alternate route, and name and join Green, he cannot be required to pay the legal fees of Blue.

As a matter of strategy, in a supplemental pleading, Brown names and joins Green, the owner of the land where this alternate route lies. In that pleading, Brown says that the route over Blue's property is the route that is more suitable, and that the route over Green's property is not suitable.

Brown does this because she believes that if she does not name Green, and bring her into the lawsuit, then the first lawsuit (without Green as a party) might well result in a finding that the route over Green's property is the more suitable route. This would, of course, be binding on Brown's claim against Blue, but it would not be binding against Green, a non-party.

Brown would then have to bring a second lawsuit against

Green, and if that happens, she knows that an outcome could be that the most suitable route is over the property of Blue, and Brown would as a result never have any access to her property.

Green has no choice in the matter. However, Green would much rather have one litigation that would cover all of the possibilities. Green believes she would be in a much better position to argue her case than Brown, preferably in one lawsuit that involves all three owners. Green also does not want to be in the position of having to be the respondent in a second lawsuit after a court, in the first lawsuit, without Green as a party, (hypothetically) rules that the more suitable route is across Green's property. Green reasonably has concerns about what a judge would do in the second lawsuit, under those circumstances.

In our case, the Nobles are the condemnors (Brown), who need access to their property; Safe Harbor is the original condemnee (Blue), which owns property underlying the most suitable route, according to the unchallenged findings of the trial court; and Tillicum Beach Homeowners' Association (Green) is the alternate condemnee, which owns property underlying a route that was found not to be suitable for many reasons, again, in unchallenged findings of the trial court.

III. ARGUMENT

A. Does this matter present a significant question of law under the Constitution of the State of Washington or of the United States, or an issue of substantial public interest (RAP 13.4[b][3],[4])?

This Court accepts review in cases where a Court of Appeals decision conflicts with a Supreme Court decision; where there are conflicting decisions from the Courts of Appeals; in matters of constitutional rights; and where there are issues of substantial public importance. RAP 13.4. In its Petition for Review, Safe Harbor has alleged that this Court should accept review of this case because it presents constitutional issues, and issues of substantial public interest.

First, the Petition for Review argues that because the rights of the Nobles to petition for a private way of necessity derive from a provision of the Washington State Constitution, Article 1, Section 16, the issues therefore present a significant question of law under either the Federal or State Constitution. Many legal issues ultimately trace back to the Constitution in some way. The connection between this constitutional provision, and the claims of Safe Harbor, is not apparent to Tillicum Beach. It does not perceive what the constitutional issue is.

The law itself is constitutional. E.g., *State v. Superior Court of Cowlitz County*, 77 Wash. 585 (1914). The constitutional provision and the statute, RCW ch. 8.24, work together: “[s]ince the constitutional provision is not self-executing, RCW 8.24 fleshes out

the constitution and more fully declares the conditions under which private property may be condemned for a private way of necessity.”
Brown v. McAnally, 97 Wn.2d 360, 367 (1982).

The Petition for Review, for the first time, characterizes the claim of Safe Harbor with regard to the imposition of fees and costs against Safe Harbor as a constitutional issue. No such argument was made at the trial court or appellate court. CP at 120; Brief of Appellant, Reply Brief of Appellant, No. 35227-3-II. There was one constitutional argument made in support of a Motion by Safe Harbor to reconsider a summary judgment entered by the Court, but that argument was not connected to the constitutional claims made in the Petition for Review.

In fact, the arguments at the trial court and on appeal about attorney fees were similar to the arguments actually discussed in the body of the Petition for Review currently before this Court. These had to do with the claim that, based on RCW ch. 8.24 and case law, Safe Harbor should not have to pay the attorney fees and costs of Tillicum Beach.

In its decision about accepting review, this Court may consider whether an argument has been made below. Certainly, it can hear an argument not raised below if it chooses, especially where the argument is about a constitutional issue not made previously. Here, it could decide to review this matter as a constitutional issue, but again, Safe Harbor has not made it clear why it is a constitutional issue, except

that a provision of the State Constitution is the starting point for analysis.

One problem with the claim that this is a constitutional issue is that Tillicum Beach has never had the opportunity to understand that claim, and present evidence and/or argument about it at the trial court level, or argument at the appellate court level. Some constitutional claims are best reviewed in the light of evidence adduced at trial addressing the particular issues. Since the constitutional claim was not at issue before the trial court, Tillicum Beach did not address it factually, if indeed a factual response would have been probative. If this issue had been raised to the trial court, it would have been evaluated, clarified, and addressed, by argument and/or evidence. None of that happened.

Tillicum Beach believes that there is no significant constitutional question at issue in this matter, and even if there is, it was not properly developed below because it was not previously raised.

Second, even if this Court determines that this is not a significant question of law under the Constitution of the State of Washington or of the United States, and/or that it should not hear it under these circumstances even if it is; this matter could be heard if it involves an issue of substantial public interest that should be determined by the Supreme Court. Tillicum Beach does not perceive this as a matter of substantial public interest, beyond that it is a

reported decision that reaches a result that flows from other decisions, but adds to those decisions by applying them to a slightly different set of facts. RAP 13.4(b)(4) was discussed in *State v. Watson*, 155 Wn.2d 574, 577, ¶ 7 (2005):

We may grant review and consider a Court of Appeals opinion if it “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). This case presents a prime example of an issue of substantial public interest. The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue. Although the Court of Appeals reasoning would require remand only if the policy letter were kept “secret,” it invites unnecessary litigation on that point and creates confusion generally.^{FN2} *See id.* Further, the court’s treatment of communications as ex parte in later proceedings has the potential to chill policy actions taken by both attorneys and judges—they may fear that their statements or actions in various public roles would later be treated as ex parte communications.

This “substantial public interest argument” has also not been previously raised, and again, Tillicum Beach does not perceive either the basis for such a claim, or what response would have been appropriate at the trial court or appellate court levels, if any. Since the issue was not raised below, Tillicum Beach has had no opportunity to evaluate, clarify and address whatever that issue is, by evidence and/or argument.

Tillicum Beach respectfully requests that this Court deny the Petition for Review of Appellant Safe Harbor. A discussion of the issues raised by Safe Harbor follows.

B. Under any circumstances, can a condemnee (Safe Harbor) be required to pay the fees and costs, including attorney fees, of the alternate condemnee, where the condemnee has only generally alleged an alternate more suitable site, and has not actually named the alternate condemnee as the owner of that site?

RCW 8.24.030 is the starting point (assuming that the State Constitution is not a factor in the analysis). It says that “[i]n any action brought under the provisions of this chapter for the condemnation of land of a private way of necessity, reasonable attorney’s fees and expert witness costs may be allowed by the court to reimburse the condemnee.” The Legislature did not provide any other standards or direction.

As the Court of Appeals said below, in *Noble v. Safe Harbor*, ___ Wn. App. ___, 169 P.3d 45 (2007), this means what it says: the trial court has the discretion to award the fees and costs. Only condemnees (not condemners) can be awarded fees and costs; there is no limit on which party can be ordered to pay fees and costs.

In this regard, Tillicum Beach cannot add significantly to the analysis of either the original trial court decision, or the Court of Appeals opinion.

Safe Harbor continues to argue that its strategic choice to allege a more feasible alternate route, without naming and joining the owner

of the land over which that route lies, insulates it from an award of attorney fees against it in favor of Tillicum Beach. The Court of Appeals ruled in response, “[t]hat Safe Harbor did not join Tillicum does not immunize it from responsibility for Tillicum’s attorney fees under RCW 8.24.030.” *Noble v. Safe Harbor*, 169 P.3d 45 at 48, ¶ 12.

This claim of “immunization” remains the basis for Safe Harbor’s arguments in support of its Petition for Review to this Court. In response, it is helpful to examine the case that Safe Harbor relies on, *Kennedy v. Martin*, 115 Wn. App. 866, 872-74 (Div. II, 2003). In that matter, a condemnee actually named and joined an alternate condemnee. This would have been the same as the facts of our matter, if Safe Harbor had actually joined Tillicum Beach, instead of just claiming that there was a more suitable alternate route, which everyone knew was over Tillicum Beach property. The decision of the Court of Appeals in *Kennedy v. Martin* was that the trial court could award fees “in any action,” and therefore it could award fees against a condemnee who brought an alternate condemnee into the proceedings, even where the result of the underlying action, as in that case, was against the alternate condemnee: “there is no impediment to a court’s requiring a condemnee to pay attorney fees to a potential condemnee.” *Id.* at 874.

This language, and the entire opinion, directly support Tillicum Beach’s position. Safe Harbor reads the opinion to limit the potential award of fees and costs against condemnees so that they cannot be

made to pay attorney fees and costs if they do not actually name the alternate condemnee, but do everything but. Tillicum Beach respectfully disagrees.

The reality for practitioners is that the statutory scheme might be a little clearer in certain regards. In particular, the “immunization” issue created by Safe Harbor’s refusal to actually name and join Tillicum Beach can be argued, as Safe Harbor does here, to set up the possibility of two separate trials, with a result of no access at all for the Nobles.

However, the statute and cases seem to provide enough guidance on this point, as the Court of Appeals ruled below. Sometimes, depending on the circumstances, a condemnee can be made to pay the fees and costs of an alternate condemnee, even if the condemnee did not actually name and join the alternate condemnee. This rule certainly helps practitioners who might otherwise face the possibility of two successive trials, as Safe Harbor’s position could cause. Under this rule, everyone is heard in one trial, and the trial court grants fees and costs as it sees fit.

C. If it is possible to assess fees and costs against an alternate condemnee in the position of Safe Harbor in this matter, should the trial court’s decision to do so be overturned?

1. Legal Standard.

If an award of fees and costs can be entered against Safe Harbor, and in favor of Tillicum Beach, the legal standard is abuse of

discretion. E.g., *Kennedy v. Martin, supra*, 115 Wn. App. 866 at 874. “A trial court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds.” *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339 (1993).

2. Basis for Trial Court’s Decision.

The Petition for Review itself provides a sample of the reasons why the trial court determined that Tillicum Beach’s fees and costs should be paid by Safe Harbor. In its Petition for Review, Safe Harbor repeats a number of claims to this Court that were made at trial and on appeal that are not supported. In fact, they are directly contradicted by the unchallenged Findings of Fact entered by the Trial court. Yet Safe Harbor continues to repeat them as fact.

Safe Harbor’s problem in this regard, for the purposes of its Petition, is not just that the “facts” they allege are untrue; rather, Safe Harbor’s primary problem is that there were no assignments of error to the Findings of Fact and Conclusions of Law made to the Court of Appeals, and those Findings and Conclusions directly refute Safe Harbor’s representations made to this Court. The entered Findings and Conclusions are verities on appeal.

For example:

a. Safe Harbor would like to create the impression that the Nobles habitually used the Tillicum Beach route for access to their property, so it is a better route for the Nobles to continue to use. Safe Harbor claims in its Petition for Review that prior to the trial,

“the Nobles used Tillicum Beach’s property to access Mr. Noble’s parents’ lot, from which they would access their property;” and “the Nobles had over many months used Tillicum Beach’s property as their sole means of accessing their property.” The language from Safe Harbor’s trial brief on this point is, “[a] roadway within Tillicum Beach leads very close to the Petitioner’s [the Nobles’] property. The Petitioners have continued to use this access way off and on for over the past six years since acquiring their property, and have used that road way as their sole means of access since February of 2005.... Since that time the Petitioners, who continue to visit their property quite frequently, have accessed their property solely through the Tillicum Beach and/or Mr. Nobles’ parents’ property....” CP at 96, page 3.

This suggests something other than what the evidence proved. Finding of Fact No. 11 states, “[f]or a prolonged period of time, [the Nobles] have not been able to use their home on Hood Canal, except occasionally by foot over an area that the owners of Tillicum Beach are polite about, but clear, that the Nobles are not welcome to use this means of access over the long term. As a matter of neighborly accommodation, Tillicum Beach has agreed to suffer the occasional trespass until this matter can be decided by the Court.” The evidence supporting this Finding of Fact was that there was a fence between the Tillicum Beach property of Mr. Noble’s parents, and the Nobles’ property. Their access was created by pulling a few boards out of the

fence, creating a hole in the fence, which they ducked through on foot once in a while. Tr. 06/01/06 at 12-14.

This Finding is amply supported by many different parts of the trial record. It is just not true that the Nobles used the Tillicum Beach route for access to their house, in the way that Safe Harbor claimed at trial, and continues to claim in its Petition for Review.

If this Court requires citation to the record regarding Safe Harbor's claims in this regard, and the rebutting evidence presented by Tillicum Beach, Tillicum Beach would be happy to comply.

b. The Petition for Review cites to the dissenting opinion at the Court of Appeals regarding Mr. Stokes' (Safe Harbor's spokesperson's) believability. The dissenting opinion perceived the record to support the conclusion that Mr. Stokes was an older person with a hazy memory, and not intentionally deceptive. *Noble v. Safe Harbor*, 169 P.3d 45 at 52, ¶ 32, n.4. The trial court's Finding of Fact No. 23 says, after trial, and considering all of the testimony of Mr. Stokes, "Mr. Stokes was not a credible witness." If Safe Harbor wished to challenge the Finding that Mr. Stokes was not a credible witness, it could have done so at the Court of Appeals. It did not. Such findings are rare, and when made, telling. For the purposes of this case on appeal, Mr. Stokes was not a credible witness. Again, many citations to the record on this point are available if needed.

c. According to the Petition for Review, "Safe Harbor's assertion that there was an alternate available route was not

based on any testimony of Mr. Stokes, but was instead based on the simple geographic fact that the Nobles' property is bordered by Tillicum's property, as well as the undisputed fact, acknowledged by the Nobles at trial, that the Nobles had over many months used Tillicum Beach's property as their sole means of accessing their property."

First, the second part of this claim, regarding the Nobles' use of the Tillicum Beach property for access is, again, not an accurate representation of the circumstances, as discussed above.

Second, the notion that Safe Harbor's claims were not based on any particular circumstances except geography has never before been advanced by Safe Harbor at any level, and is entirely and completely at odds with what happened at trial, and the unchallenged Findings of Fact. Throughout, Mr. Stokes claimed that the proposed route over his property would severely burden him, and have no effect on Tillicum Beach. A review of the trial record shows how much work was needed to go into disproving his claims. *See, e.g.,* Exhibits 1-51; CP at 96 (Trial Brief of Safe Harbor), pages 4-5.

Several Findings of Fact directly reject Stokes' complaints and claims about his particular circumstances, and why he thought that they should lead to a finding in his favor: Finding of Fact No. 17 (Stokes' concerns about security issues); Finding of Fact No. 18 (Stokes' belief that he will be inconvenienced); Finding of Fact No. 19 (Stokes' concern about loss of privacy); Finding of Fact No. 20

(Stokes' concern about autonomy); Finding of Fact No. 21 (Stokes' concern about diminution in property values); and Finding of Fact No. 22 (Stokes' concerns about physical disruption to his property). Other claims by Stokes that resulted in Findings adverse to Safe Harbor were addressed at Finding of Fact No. 13 (Tillicum Beach route would have had to cross a drainfield, well, water line and shed); Finding of Fact No. 26 (multiple current uses of the Tillicum Beach property that would be interfered with); and Finding of Fact No. 27 (no other possible property to replace those uses). These findings were of contested issues of fact. Otherwise, they would not have been entered.

It is frustrating for Tillicum Beach to now read the claim that Safe Harbor only pointed out to the trial court that geographically, an alternate route existed, which was already being used for access. What the record reflects is exactly the opposite. Safe Harbor made many claims about the burdens to its property, and the lack of burdens to the Tillicum Beach property, that required much time and effort to refute, and which were all disproved at trial, culminating in the trial court's conclusion that Mr. Stokes was not a credible witness.

As Tillicum Beach argued to the Court of Appeals in its Brief on Appeal, "[w]ithin certain very broad limits, parties have the right to make claims in litigation that turn out to be not accepted by the trier of fact. However, sometimes there are consequences. In this matter, the question is, who was responsible for the involvement of Tillicum

Beach? Given the scope of the unfounded claims, beginning with the original claim that there was an (unnamed) more feasible alternative, and the work it took to respond, this Court should consider that the responsible party is Safe Harbor.”

D. Should this Court award to Tillicum Beach its costs and fees, including attorney fees, for responding to the Safe Harbor Petition for Review?

“...RCW 8.24.030 allows attorney fees in any action to reimburse the condemnee,” and therefore the condemnee should be awarded its attorney fees on appeal. *Noble v. Safe Harbor, supra*, 169 P.3d 45 at 52, ¶ 35 (dissent). Other decisions have affirmed the award of attorney fees on appeal following an award at trial in private way of necessity condemnation actions. *Beckman v. Wilcox*, 96 Wn. App. 355, 368 (1999); *Shields v. Garrison*, 91 Wn. App. 381, 389 (1998); and *Sorenson v. Czinger*, 70 Wn. App. 270, 279 (1993); *see also*, RAP 18.1. A request for an award of fees was also made by Tillicum Beach to the Court of Appeals. RAP 18.1. This request was granted by the Court of Appeals on November 14, 2007. The amount of the award has not yet been set.

IV. CONCLUSION

1. Does this matter present a significant question of law under the Constitution of the State of Washington or of the United States or an issue of substantial public interest (RAP 13.4[b][3],[4])? Tillicum Beach does not believe that either applies; has not had an

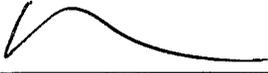
opportunity to address these issues below; and does not understand the nature of these claims as made in the Petition for Review.

2. Under any possible circumstances, can a first condemnee (Safe Harbor) be required to pay the attorney fees of the alternate condemnee (Tillicum Beach), where the first condemnee has only generally alleged an alternate more suitable site, and has not actually named the alternate condemnee as the owner of that site? The statutory scheme, and the case law, all support that the trial court has the discretion to make such an order.

3. If the answer is yes, did the trial court abuse its discretion by assessing those fees and related costs against Safe Harbor? In this case, based on the evidence at trial, the trial court entered Findings of Fact and Conclusions of Law, which have not been challenged on appeal. The trial court did not abuse its discretion by awarding fees and costs against Safe Harbor in favor of Tillicum Beach.

4. Should this Court award to Tillicum Beach its attorney fees and costs, for responding to the Safe Harbor Petition for Review to the Supreme Court? Tillicum Beach believes that this would be appropriate, under all the circumstances. A small homeowners' association should not find itself at risk for attorney fees, given the circumstances of this matter.

Respectfully submitted this 20th day of November, 2007.

By: 

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Attorney for Tillicum Beach

APPENDIX

	Page
1. Washington State Court of Appeals, Division II, Order Amending Opinion, filed 11/14/07.....	A-1

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FRED NOBLE and FAITH NOBLE, husband
and wife,

Respondents,

v.

SAFE HARBOR FAMILY PRESERVATION
TRUST, a Washington trust,

Appellant

And

TILLCUM BEACH, INC.,

Respondent.

No. 35227-3-II

ORDER AMENDING OPINION

The opinion in this matter was filed on October 9, 2007, but we failed to address the parties' requests for attorney fees and costs. We now amend the opinion to do so:

On page #8, line 9, the following text shall be inserted:

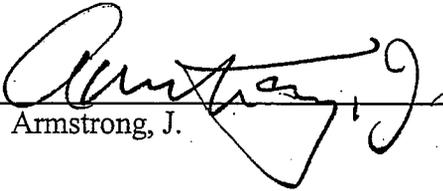
III. ATTORNEY FEES ON APPEAL

Safe Harbor and Tillicum request attorney fees and costs on appeal under RCW 8.24.030. RAP 18.1(a) allows recovery of attorney fees and costs on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees

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or expenses.” The trial court found (1) that Paul Stokes, the only witness to offer evidence on behalf of Safe Harbor, was not credible, a finding that binds us, and (2) that Safe Harbor (through Paul Stokes) was responsible for involving Tillicum as a potential alternate condemnee. Because of these findings, we award Tillicum its attorney fees on appeal against Safe Harbor. And, balancing the equities between the Nobles and Safe Harbor, we deny Safe Harbor its attorney fees on appeal.

IT IS SO ORDERED.


Armstrong, J.

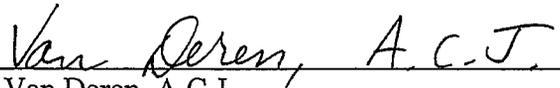
I concur:


Penoyar, J.

I now amend my dissent by inserting the following text on page 16, line #9:

I would also impose Tillicum’s fees on appeal against the Nobles as condemnors, as the statute contemplates.

IT IS SO ORDERED.


Van Deren, A.C.J.