

No. 35227-3-II

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

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
COURT OF APPEALS
DIVISION II
07 MAR -9 PM 3:41
STATE OF WASHINGTON
BY WJ
DEPUTY

BRIEF OF RESPONDENT TILlicum BEACH

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ORIGINAL

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I. ISSUES, STATEMENT OF CASE

The issues are adequately framed by Safe Harbor, except as they are argumentative. The Statement of the Case offered by Safe Harbor is generally accurate. It is not accurate, however, when it claims that “the Nobles used Tillicum Beach’s property to access Mr. Nobles’ parents’ lot, from which they would access their property,” if the intent is to suggest general access, or anything more than very occasional walking use of this route by the Nobles, through an opening in the fence. *See*, CP 106, FOF 11; RP 70, lines 3 through 15; Tr. Ex. 51; CP 55, Page 2, ¶4; Tr. Ex. 33, page 2, ¶3; RP 20, line 22 through RP 21, line 2.

II. ARGUMENT

A. Summary

The issue at trial was which of two possible routes was the more feasible alternative for a private way of necessity allowing access to the Nobles’ lot. The totality of the evidence presented at trial was such that there was only one possible conclusion. The route over the Safe Harbor property was already established, had been used for the same purpose for decades, would not have imposed any of the burdens claimed by Mr. Stokes, the testifying witness for Safe Harbor, and simply needed the removal of the fence he placed on the then-existing easement road in order for it to be

available again. E.g., CP 106 (Findings of Fact and Conclusions of Law), FOF 17 through 22.

On the other hand, the only possible route across the Tillicum Beach development would have required an easement road over already crowded community use areas, through existing structures on the Tillicum Beach side, and then, on the Noble side, over either an existing drainfield, well, water lines and/or shed. E.g., CP 106 (Findings of Fact and Conclusions of Law), FOF 13, 26, and 27.

This litigation was dominated by Safe Harbor's claims to the contrary of these unchallenged Findings of Fact having to do with the feasibility of the Tillicum Beach route. Both the other parties, the Nobles and Tillicum Beach, were required to respond to these Safe Harbor claims, which proved virtually entirely unsupported. A very brief summary of the relevant record follows.

The best analysis of Safe Harbor's claims came from the trial court, at Findings of Fact No. 23: "Mr. Stokes was not a credible witness." CP 106.

B. The Factual Record Demonstrates that Safe Harbor's Claims Were Unsupported

1. Documentation of Claims Made by Safe Harbor

a. Tr. Ex. 49, Deposition of Paul Stokes, May 10, 2005

Pages 36-37, lines 23 to end of 36, line 1 on 37:

(Discussion of where easement could be placed on Safe Harbor property), followed by: Q: No, I'm talking about on your property. A: **I don't want it on my property.** Q: I know you don't. A: **So it's not going to be on my property"** (emphasis added) .

b. CP 5, Declaration of Paul Stokes, filed March 18, 2005

Pages 2-4, beginning at line 18:

Mr. Noble's parents' property is located within a community known as "Tillicum Beach" and is located directly to the south and adjacent to the petitioner's property. A roadway within Tillicum Beach leads directly to Mr. Noble's parents' driveway. **Shortly after the Petitioners [the Nobles] purchased their property, they created a gateway in their southern fence to accommodate and connected their property to Mr. Noble's parents' driveway. I had previously made a backhoe as a hobby project. Observing the petitioners' efforts I offered my assistance with the backhoe, which they accepted. I thus used the backhoe to clear and level the driveway from Mr. Noble's parents' property to the Petitioners' property.**

The Petitioners have continued to use this access way off and on over the past six years since acquiring their property. Even during the time the Court had granted them an injunction to use our property, Mrs. Noble usually used this south driveway when arriving at the Petitioners' property alone, presumably because it is so much easier to access their property from Mr. Noble's parents' property as there are no gates from the main roadway to be opened and closed. Similarly, furthermore, Mr. Noble's several brothers and his parents have always used the south access to gain entrance to the Petitioners' property.

Emphasis added.

- c. **CP 96, Second Document, "Safe Harbor's Reply Memorandum in Support of Motion for Summary Judgment," filed with "Safe Harbor's Trial Brief" on June 1, 2006**

Pages 4-5, beginning at line 16:

By contrast, there is already a paved roadway running through Tillicum Beach almost up to the Petitioners' property line that is used by all of the residents of Tillicum Beach. The property over which an easement to the Nobles' property would run is not over any residential lots, but instead is exclusively over property owned and managed by Tillicum Beach. By contrast to the impact **an easement over Safe Harbor's property would have on the use of its residential lot, an easement over Tillicum Beach's property would not interfere in any way with the individual residents' use or enjoyment of their own lots.**

While it is not up to Safe Harbor to determine exactly where an easement over Tillicum Beach's property should be located, **pages 49 and 50 of Tillicum Beach's response documents depicts where such an easement could be located with minimal impact on Tillicum Beach.** Page 49 is a drawing prepared by Tillicum Beach resident Larry Knutsen that depicts Lot 22, owned by Fred Nobles' parents, as well as Tillicum Beach's property to the east up to the water line. The drawing shows a small tool shed located an indeterminate distance from the eastern edge of Lot 22. The photograph on page 50 shows this same area, with boats being stored to the east of the tool shed. There is nothing but open space between the tool shed and Lot 22.

The Court could therefore condemn an easement from the existing roadway depicted on the page 49 drawing directly to the north, along Tillicum Beach's property directly to the east of Lot 22 and west of the tool shed, to the Nobles' property. If the tool shed is less than ten feet from Lot 22, it could be moved east a few feet to provide adequate space. **The ten foot easement could be graveled without having any detrimental impact to Tillicum Beach and its residents' ability to store boats or use the open space to the east of the shed.**

Emphasis added.

These claims were all demonstrably untrue. First, again, Paul Stokes, in his deposition, said, "so, it's not going to be on my property," which fully explains this litigation. He did not want the easement on his property, so it was not going to be on his property.

Second, again, in the trial court's Findings of Fact and Conclusions of Law, CP 106, at FOF No. 23, the court had this to say about Mr. Stokes: **"Mr. Stokes was not a credible witness"** (emphasis added).

2. Summary of Claims Made by Safe Harbor, and Responses

Among the claims referenced above that were made by Mr. Stokes, and the responses from the trial record, include the following:

- a. Claim: The Nobles opened a gateway in Mr. Noble's parents' fence so that they could access their own property through Tillicum**

Beach, and continuously used this access up to trial.

Response: A gate was created by removing a number of boards from a fence. This was used for foot traffic on a very limited basis. Tillicum Beach objected, but did allow the continued very occasional use pending the litigation, as a matter of neighborly accommodation. CP 106, FOF 11; Trial Testimony of Scott Smith, Tr. 170, lines 3 through line 15; Tr. Ex. 51 (letter from Tillicum Beach to the Nobles); CP 55 (Second Declaration of Scott Smith), page 2, ¶4; Tr. Ex. 33 (Second Declaration of Larry Knudsen, page 2, ¶3).

b. Claim: Mr. Stokes himself actually used a backhoe to help the Nobles create a driveway for themselves on their side of the gate in the fence.

First, no one at Tillicum Beach ever saw anything like this. Tr. Ex. 33 (Second Declaration of Larry Knudsen), page 3, ¶8. Second, this would have been impossible, given the fact that the immediate area consisted of “one or more of the Nobles’ drainfield, well, water lines and shed,” CP 106, FOF 13; CP 15, lines 21 through 17, line 22 (trial testimony of Faith Noble), referring to Tr. Ex. 57 (sketch by Faith Noble). Third, the trial court viewed the area; presumably, if it had seen anything like what Mr. Stokes claimed, its Findings of Fact would have reflected that there was a graded area on the Nobles’ side of the fence. In fact, nothing like

what Mr. Stokes said in his sworn declaration ever happened or could have happened. He chose not to testify about this at trial.

c. Claim: A ten-foot easement across Tillicum Beach common property “could be created without having any detrimental impact to Tillicum Beach and its residents’ ability to store boats or use the open space to the east of the shed.”

To the contrary, there was a great deal of unrebutted testimony and evidence that the opposite was true. There was simply no alternative space for Tillicum Beach. The shortage of space was already critical, and was going to become worse because of factors unrelated to the proposed way of necessity. CP 106, FOF 25-27; RP 156, line 18 through RP 162, line 18; and RP 163, line 21 through RP 166, line 24 (trial testimony of Scott Smith).

3. Conclusions Regarding Claims Made by Safe Harbor

These are just a few examples of the unsupported claims made by Mr. Stokes. *See*, CP 112 (Brief in Support of Motion for Award of Attorney Fees), pages 2 through 4, for a discussion of other such claims.¹ The proper conclusion is that this litigation was driven by false claims that Mr. Stokes made to reach his goal of

¹ The claims discussed all relate to the burden of an easement road on Tillicum Beach property. Mr. Stokes also claimed that the burden of an easement road on the Safe Harbor property would be significant. RP 122-106; the trial court rejected these claims as well, at CP 106, FOF 14-23.

making sure the easement was not placed on his property. These claims made by Mr. Stokes were central to his position that an easement road would be no burden on Tillicum Beach property. It is interesting to note that these claims were made from the very beginning of the litigation, before Tillicum Beach was even a party, CP 5 (Declaration of Paul Stokes), all the way through Safe Harbor's Trial Brief, CP 96. Most of the work done on behalf of Tillicum Beach was prior to the trial. CP 111 (attached invoices).

Yet by the time of trial, Safe Harbor seemed to have abandoned these claims. Mr. Stokes' direct testimony, RP 122-129, was brief, only nine pages of the transcript. He never made any of the claims about Tillicum Beach (or about his backhoe) that he had made earlier. The record suggests that the reason why was that there never was any support for those claims, and Mr. Stokes chose not to make them at trial because they were, by the time of trial, so obviously untrue.

Within 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.

C. Washington Law Allows Shifting of Fees to the Party Actually Responsible for the Involvement of Tillicum Beach

Safe Harbor argues on appeal that the only way that it can be “responsible” for Tillicum Beach’s participation is by being the party that actually names Tillicum Beach as an alternate condemnee, and specifies an alternate site. Below, Safe Harbor did not name Tillicum Beach, solely as a matter of strategy. Safe Harbor believed that if it did name Tillicum Beach, it could be responsible for Tillicum Beach’s attorney fees, but if it did not, it could not be responsible for those fees. App. B. at 7.

The problem for Safe Harbor is that it is responsible for Tillicum Beach’s attorney fees, because it is the party actually, in reality, responsible for bringing Tillicum Beach into the litigation. As this Court said recently, “There is nothing in the language of RCW 8.24.030 or in the case law that prevents a court from **requiring the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees.**” *Kennedy v. Martin*, 115 Wash. App. 866, 871 (Div. II, 2003) (emphasis added); *see also, Sorenson v. Czinger*, 70 Wash. App. 270 (Div. III, 1993).

Safe Harbor argues that this Court’s opinion in *Kennedy v. Martin*, *supra*, gives a named condemnee, such as Safe Harbor, a choice, between (1) asserting the defense of a more feasible route, without joining the alternate condemnee, which would carry the risk

of the trial court considering its failure to name and serve as evidence against its claim, but insulate it from an attorney fee award against it; and (2) asserting the defense of a better route, and joining the alternate condemnee, which would carry with it the risk of an award of attorney fees against it, in favor of the alternate condemnee.

This Court, in *Kennedy v. Martin*, never said that. What it did say was as cited above: there is nothing to prevent a court from assessing an award of fees against the responsible party (Safe Harbor), in favor of the condemnee (Tillicum Beach).

This was the context of the strategic decision by Safe Harbor to not join Tillicum Beach. Safe Harbor argues that since it did not join Tillicum Beach, it could not **as a matter of law** be accountable for Tillicum Beach's fees.

If Safe Harbor were allowed to allege an alternate route across Tillicum Beach, but did not have to join Tillicum Beach, or specify the route; and the Nobles did not name or join Tillicum Beach, either; the trial would have been about Safe Harbor and the Nobles presenting evidence that the more feasible alternative would have been across either the Nobles' property or Tillicum Beach. Tillicum Beach would not have been a party. Tillicum Beach's arguments, made at trial below, would have been made by the Nobles, who, although represented by capable and experienced

counsel, did not have the same access to witnesses and evidence that Tillicum Beach itself enjoyed, nor did it have the same incentive.

It is possible that such a trial, undertaken in the absence of Tillicum Beach, would have resulted in a finding that the more feasible alternate route was across the Tillicum Beach development. Then the Nobles would have had to sue Tillicum Beach to establish a way of necessity. At that trial, Tillicum Beach would have presented its arguments that the most feasible alternate route would have been across the Safe Harbor property. On the evidence adduced at the trial below, *see*, CP 106 (Findings of Fact and Conclusions of Law), there is little doubt that the trial court would have agreed, and ruled in favor of Tillicum Beach on its “more feasible alternate route” defense.

This would have left the Nobles with two judgments, neither of which would allow them to access their property even though the need for a way of necessity is inarguable.

There is some additional guidance available. First, the attorney fee provision of RCW 8.24.030 is to be read broadly. *Sorenson v. Czinger, supra*, 70 Wash. App. 270, at 279 (“The statute grants the trial court discretion to award reasonable fees and costs without regard to whether the condemnee has prevailed in the action or on any particular issue”); *Beckman v. Wilcox*, 96 Wash. App. 355, 365 (Div. II, 1999) (“The legislative history, the use of the term ‘any action,’ and the other statutory language indicates that the

Legislature intended broad application of RCW 8.24.030.”) These, then, led to the language from *Martin* cited above: “There is nothing in the language of RCW 8.24.030 or in the case law that prevents a court from requiring the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees.” *Kennedy v. Martin, supra*, 115 Wash. App. 866 at 871.

Second, the statute itself seems understandable. It provides that, “[i]n any action brought under the provision 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.” RCW 8.24.030. The current matter is certainly an “action,” and it is brought under the provisions of RCW ch. 8.24. The trial court has found, without exception or objection or assignment of error, that the amount ordered was reasonable. Finally, we know, from *Kennedy v. Martin, supra*, 115 Wash. App. 866 at 874 that when the statute says that condemnees can be reimbursed, this includes alternate condemnees. What the statute says, then, is that under these circumstances, Tillicum Beach can be reimbursed by Safe Harbor for its reasonable attorney fees and expenses.

The standard for review in this matter is abuse of discretion. *Kennedy v. Martin, supra*, 115 Wash. App. 866 at 872. The only basis for reversal would be that a trial court may not as a matter of

law award an alternate condemnee its fees against the original condemnee, in these circumstances.

III. CONCLUSION

As this Court said in *Kennedy v. Martin*, *supra*, 115 Wash. App. 866 at 871, a court can require “the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees.” Did this Court mean by “the party responsible,” that the only criterion for responsibility is actually naming and joining an alternate condemnee, or did it mean to include the party actually, in reality, responsible for involving the alternate condemnee in the litigation?

Tillicum Beach believes that the better rule is to make the party who is in reality responsible for the involvement of an alternate condemnee also be responsible for its attorney fees and costs. Safe Harbor argues essentially that it has put the Nobles in a box by its strategic choice to claim an alternate route, but not name or join Tillicum Beach. In essence, this would mean that Safe Harbor was free to make any claims regardless of whether or not they had any basis in fact, in the hope that the claims would be believed, and the only pocketbook at risk was that of the Nobles.

The claims that Safe Harbor made throughout the litigation, and through witnesses and evidence at trial, were thoroughly unsupported by the record, and directly contrary to all of the other

available evidence, including the site visit by the trial judge. There was simply no credible evidence whatsoever that the Tillicum Beach route was the more feasible alternative; there was, on the other hand, a great deal of evidence, virtually all of which was uncontradicted, that the Safe Harbor route was in fact the more feasible route. Tillicum Beach believes that the law should, and does, provide for appropriate consequences for the strategic choices and claims of Safe Harbor, in the form of the award of attorney fees and costs against it, and in favor of Tillicum Beach.

A fair question might be, why does Tillicum Beach care? First, if this matter is remanded with instructions to enter the fee award against the Nobles, the trial court might be asked to make a re-determination of what attorney fees are appropriate, given that the Nobles were not the party responsible for the unsupported claims. The determination of the amount of fees as reasonable has already been made; Tillicum Beach is not aware of any authority to guide the trial court regarding a re-determination.

Tillicum Beach asks this Court to affirm the trial court's award of attorney fees. However, if it does not, Tillicum Beach respectfully requests that if the matter is remanded, the trial court be directed to enter the fee already determined to be reasonable as an award against the Nobles.

The second reason is practical. The record reflects that Safe Harbor has posted an appeal bond.

IV. ATTORNEY FEES

Tillicum Beach asks for an award of its reasonable fees on appeal against Safe Harbor, and, in the alternative, against the Nobles. This request is based on RCW 8.24.030 (reasonable attorney fees may be allowed in these circumstances), as well as the cases construing the same, including in particular *Kennedy v. Martin, supra*, 115 Wash. App. 866, 871, and the arguments made in the body of this Brief.

DATED this 9th day of March, 2007.

Respectfully submitted,

By: 
ROBERT D. WILSON-HOSS
WSBA# 8620
Attorney for Tillicum Beach

APPENDIX

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The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of said court this 17th day of Aug 2006

PAT SWARTOS

County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Mason.
By P. Thale Deputy

RECEIVED & FILED

JUL 17 2006

PAT SWARTOS, Clerk of the Superior Court of Mason Co. Wash.

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IN THE SUPERIOR COURT OF WASHINGTON FOR MASON COUNTY

FRED NOBLE and FAITH NOBLE,
husband and wife,

Plaintiffs,

v.

SAFE HARBOR FAMILY PRESERVATION TRUST, a Washington Trust, Original Respondent/Owner;

and

TILLICUM BEACH, et al.,
Additional Respondents

No. 05-2-00241-1

FINDINGS OF FACT AND CONCLUSIONS OF LAW - DETERMINATION OF ROUTE OF WAY OF NECESSITY
~~(PROPOSED)~~ T.A.S

DAVIS ROBERTS & JOHNS

AUG 14 2006

RECEIVED

This matter came before the Court for trial to the bench on June 8, 2006.

The Petitioners, Fred and Faith Noble, were represented by Robert Beale of McGavick Graves, P.S.; the Respondent, Safe Harbor Family Preservation Trust, was represented by Michael W. Johns of Davis, Roberts & Johns; and Additional Respondent Tillicum Beach was represented by Robert D. Wilson-Hoss of Hoss and Wilson-Hoss, LLP. The individuals named in the caption as

10/4

1 owners of Tillicum Beach lots were not served, did not appear, and were not
2 separately represented.
3

4 The Court heard the testimony presented by the parties, considered the
5 exhibits, and attended to the argument of counsel. Based thereupon, the Court
6 now enters the following,
7

8 FINDINGS OF FACT.

9 1. The Nobles own the following described real property: 10

11 A tract of land situated in Government Lot 2, and being a part of
12 Indian Lot or Tract No. 2 in said Government Lot 2, Section 26,
13 Township 22 North, Range 4 West, W.M., particularly described as
14 follows:

15 Beginning at a point on the South line of said Government Lot 2,
16 which is 172 feet East from the centerline of the existing pavement of
17 Primary State Highway No. 9 (Olympic Highway); thence due North 86.5
18 feet; thence Northeasterly 113 feet, more or less, to a point on the Easterly
19 line of said Government Lot 2, which is 134 feet Northerly from the
20 Southeast corner of said Government Lot 2; thence Southerly, along the
21 Easterly line of said Government Lot 2, 134 feet to the Southeast corner of
22 said Government Lot 2; thence West, along the South line of said
23 Government Lot 23, to a POINT OF BEGINNING.

24 2. Safe Harbor Family Preservation Trust owns the following described 25 real property: 26

27 A tract of land situated in Government Lot 2, and being a part of
28 Indian Lot or Tract No. 2 in said Government Lot 2, Section 26, Township
22 North, Range 4 West, W.M., particularly described as follows:

Beginning at the intersection of the South line of said Government
Lot 2 with the Easterly right-of-way line of Primary State Highway No. 9,
(Olympic Highway); thence East, along the South line of said
Government Lot 2, to a point thereon which is 172 feet East from the
center line of the existing pavement of said State Highway; thence due
North 86 ½ feet; thence Northeasterly 113 feet; more or less, to a point on
the Easterly line of said Government Lot 2 which is 134 feet Northerly
from the Southeast corner of said Government Lot 2 which is 134 feet

1 Northerly from the Southeast corner of said Government Lot 2; thence
2 Northerly, along the Easterly line of said Government Lot 2, 80 feet;
3 thence Westerly to a point on the Easterly right-of-way line of said
4 Primary State Highway No. 9 (Olympic Highway), which is 101 feet
5 Northerly thereon from the point of beginning; thence following along the
6 Easterly right-of-way line of said State Highway and in a Southerly
7 direction to the point of beginning.

8 3. Tillicum Beach is a nonprofit homeowners' association; as such, it
9 owns the following described real property as common property of the
10 association:

11 All of the community recreation areas (private), and community
12 area (private), of the Plat of Tillicum Beach as recorded in Volume 5 of
13 Plats, page 86, together with the existing well and utilities, except that part
14 described as follows:

15 Beginning at the Southeast corner of Lot 7 of the Plat; running
16 thence N 80° 59' 04" E 19.4 feet; thence N 30° 07' 58" W 6 feet; thence
17 Northwesterly to a point on the East line of said Lot 7, N 5° 58' 40" E
18 31.78 feet of the point of beginning of this description; thence S 5° 58' 40"
19 W along said East line to said point of beginning.

20 4. The parties all agree that the Nobles' property is landlocked, in that
21 there is no useable, legal easement for ingress and egress, and that the Nobles
22 are entitled to condemn a private way of necessity. The Nobles' original
23 pleading named Safe Harbor as Respondent, and asked for the appropriation of
24 a private way of necessity across Safe Harbor property.

25 5. In its responsive pleading, Safe Harbor claimed that an alternate route
26 existed that should be used as the access to the Nobles' property. It did not
27 specify the placement of the route, but it intended that the route go over and
28 across Tillicum Beach Lane and the Tillicum Beach common area.

1 6. Safe Harbor did not name or serve either Tillicum Beach itself, or any
2 of the owner/members of lots in the Tillicum Beach development.
3

4 7. The Nobles responded that the proposed alternate site was intended to
5 be across Tillicum Beach property, but that this was not the more equitable
6 route. They named and served Tillicum Beach itself, and named individual lot
7 owners/members, but did not serve the owners/members. The owners/members
8 did not appear individually and were not individually represented by counsel.
9
10

11 8. The properties at issue are located on Hood Canal in Mason County.
12 The Nobles' property is a residential lot abutting Hood Canal on the east,
13 bordered by Safe Harbor's property on the west and the north, and bordered on
14 the south by parcels within the Tillicum Beach community, including one
15 owned by Tillicum Beach, and at least one lot owned by an individual lot
16 owner within Tillicum Beach, the Nobles, Sr. (Fred Nobles' parents).
17
18

19 9. There is a recorded easement in favor of the Nobles' property, across
20 the Safe Harbor property. This recorded easement cannot be used at this time.
21 Issues between the Nobles and Safe Harbor regarding the recorded easement
22 and the area of previous use have been litigated previously before another
23 department of this Court, and in the Court of Appeals.
24
25

26 10. The only possible route through the Tillicum Beach development
27 would include part of Tillicum Beach Lane, as well as the Tillicum Beach
28

1 common property used for boat storage and other water-dependent uses, as
2 well as a childrens' play area. The latter is a triangular area, one side of which
3 is 102.11 feet, running along the line with the Nobles' property.
4

5 **Benefits to Nobles**

6
7 11. The primary benefit to the Nobles of either route is access to their
8 lot. For a prolonged period of time, they have not been able to use their home
9 on Hood Canal, except occasionally by foot over an area that the owners of
10 Tillicum Beach are polite about, but clear, that the Nobles are not welcome to
11 use this means of access over the long term. As a matter of neighborly
12 accommodation, Tillicum Beach has agreed to suffer the occasional trespass
13 until this matter can be decided by the Court.
14
15

16
17 12. The location that is chosen for the route significantly affects the
18 benefits to the Nobles. They prefer that the easement be placed on the Safe
19 Harbor property in the same place that was used as an easement for the same
20 purposes for about 25 years of the total time that the Stokes owned the Safe
21 Harbor property.
22

23
24 13. The alternate route, proposed by Safe Harbor, which is across
25 Tillicum Beach property, would be over an area where one or more of the
26 Nobles' drainfield, well, water lines and shed would need to be relocated, and
27 a new driveway constructed.
28

1 **Burdens - Safe Harbor Property**

2 14. The Safe Harbor property was purchased by the Stokes in 1972 with
3 an operating motel. The Stokes operated the motel until 1980. Since that time,
4 the property has been used as a residence.
5

6 15. The Stokes deeded the property to the Safe Harbor Family
7 Preservation Trust, which is a trust for the benefit of their children. They
8 continue to reside there. They do not want an easement on the property.
9
10

11 16. The Stokes are in their eighties, and they would like to sell the
12 property and move as soon as possible.
13

14 17. Mr. Stokes is concerned about security issues that would arise if the
15 Nobles were granted an easement over the Safe Harbor property. These
16 include the safety of his dogs and grandchildren. Some of these issues would
17 be resolvable or addressable by the use of an electric gate.
18

19 18. Mr. Stokes believes he will be inconvenienced by not being able to
20 park equipment in the area of the easement. There is ample room for parking
21 even with the easement in place.
22

23 19. Mr. Stokes is concerned about the loss of privacy that an easement
24 would cause. He acknowledged that he would not notice people driving across
25 the proposed easement area when inside his residence, but he would be able to
26 see them if he were in his office, which is located in one of the old motel
27
28

1 buildings.

2
3 20. The Court believes that Mr. Stokes is concerned that he will no
4 longer have complete control over his property if the easement is placed across
5 it, but he already has a recorded easement across his property; it is not useable
6 because of the position of the Skokomish Tribe with respect to protection of
7 salmon habitat.

8
9 21. Mr. Stokes is concerned that the easement will lessen the value of
10 his property. If the Court finds the easement by necessity should be placed on
11 his property, it must also require the payment to him of just compensation,
12 which is the difference in fair market value between the property without the
13 easement, and the property with the easement. This will account for the
14 diminution in fair market value caused by the easement.

15
16 22. The physical disruption to the Safe Harbor property of an easement
17 where requested by the Nobles will be minimal. The area of the easement is
18 the same area now used by the Stokes to travel from Highway 101 to their own
19 home. The area is already paved and in use as a way of travel. The only
20 physical damage to the property will be the removal of a portion of a fence
21 which was erected by Mr. Stokes to block the existing roadway to the Nobles'
22 property. No new construction would be required, and no permits required, to
23 resume the prior usage.

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23. Mr. Stokes was not a credible witness.

Burden - Tillicum Beach Property

24. Tillicum Beach is a private residential community established in 1963, consisting of 22 lots and several common areas.

25. The members of Tillicum Beach who have testified by affidavit all object to the use of Tillicum Beach property for the easement to the Nobles' property. There are two primary reasons: the interference with the privacy and autonomy that was and is an essential part of the development, and the interference with the uses already made of the area proposed for the easement. The Tillicum Beach Board of Directors, after consultation with its members, strongly opposes the placement of the easement across Tillicum Beach property.

26. The Tillicum Beach common area where the easement would be sited is adjacent to the shoreline of Hood Canal. It is used to park trailers when boats are put into the water, and as a childrens' play area. It contains a tool shed, for storage of lawn mowers and community tools, which may need to be expanded in the future because of the loss of other space used for such purposes. It also contains an area to store large boats, and a fixed structure for the storage of up to 18 smaller boats. The area is also used for overflow parking, car and boat washing, running small motors in fresh water to flush

1 out salt water, and cleaning shellfish. Members of Tillicum Beach use this area
2 for a variety of water-related uses.
3

4 27. There is no place within the Tillicum Beach development to relocate
5 these uses. There is no other alternate site outside of the development to which
6 these uses can be relocated. Space is at a premium at Tillicum Beach. New
7 development, and transfers of existing lots to new, multiple-family owners,
8 will likely make the problem even worse in the future.
9
10

11 28. Tillicum Beach and its members are concerned about the safety of
12 the many children who play in the area of the proposed driveway. They are
13 also concerned about security, and the loss of their privacy.
14

15 29. In its pleadings, Safe Harbor claimed that an alternate route is
16 preferable, but did not name or serve either Tillicum Beach itself, or Tillicum
17 Beach member/owners. The individual member/owners have interests
18 sufficient to require that they be made a part of this lawsuit, if a final
19 determination of all necessary interests is to be made. Since they are not part
20 of this lawsuit, a final determination of all interests is not possible. This is
21 additional evidence of the necessity of the original route selected by the
22 Nobles.
23
24
25

26 **Finding - Benefit and Burden**

27 30. An easement placed on the Safe Harbor property would be
28

1 significantly less of a burden to that property than it would be to the Tillicum
2 Beach property if it were placed on the Tillicum Beach property.
3

4 31. An easement placed on the Safe Harbor property would also be of
5 greater benefit to the Nobles, as they would not be required to undertake any
6 new construction, or move any of their existing improvements, including one
7 or more of their well, septic system, drainfield, and shed.
8

9 Based on the foregoing Findings of Fact, the Court now enters the
10 following:
11

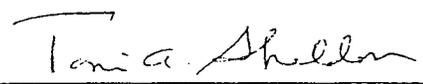
12 CONCLUSIONS OF LAW.

13
14 1. This matter is properly before this Court. Jurisdiction and venue are
15 proper herein.
16

17 2. An easement over the Safe Harbor property would be significantly
18 less of a burden to the Safe Harbor property than an easement over the
19 Tillicum Beach property would be to the Tillicum Beach property, and the
20 benefit to the Nobles of an easement over the Safe Harbor property would be
21 significantly greater than the benefit to them of an easement over the Tillicum
22 Beach property. Therefore, balancing all of the equities, this Court should
23 enter its judgment in favor of the Nobles, and Tillicum Beach, and against
24 Safe Harbor, establishing a private way of necessity in favor of the Nobles'
25 property across the Safe Harbor property.
26
27
28

1 3. This Court should enter its Decree of Appropriation in favor of the
2 Nobles of a way of necessity across the Safe Harbor property over and across a
3 strip 10 feet wide from Highway 101 to the westerly line of the Nobles'
4 property, as more specifically shown on Trial Exhibit 35. Said Decree should
5 be entered immediately upon the deposit into the registry of the Court by the
6 Nobles of the amount deemed by this Court to be fair compensation for the
7 same.
8
9

10
11 Dated this 17 day of July, 2006

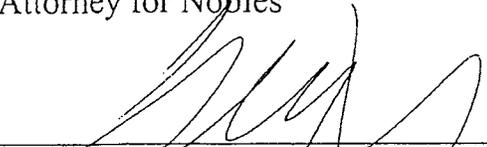
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13 
14 _____
15 Toni A. Sheldon, Judge

16 Presented by:

17 
18 _____
19 Robert D. Wilson-Hoss, WSBA #8620
20 Attorney for Tillicum Beach

21 Approved for Entry:

22 
23 _____
24 Robert L. Beale, WSBA #1887
25 Attorney for Nobles

26 
27 _____
28 Michael Johns, WSBA #22054
Attorney for Safe Harbor

MR. STOKES/Direct by Mr. Johns

1 THE COURT: And what is your mailing address?

2 MR. STOKES: 21380 North Highway 101, Shelton,
3 Washington 98584.

4 THE COURT: Mr. Johns, you may inquire.

5 DIRECT EXAMINATION BY MR. JOHNS

6 Q. Mr. Stokes, you live at the property out on Highway 101
7 that we visited this morning.

8 A. That's correct.

9 Q. Okay, right north of the Tillicum Beach Community.

10 A. Yes, Sir.

11 Q. And how long have you lived out there?

12 A. For 33 years.

13 Q. Okay. And what was the property at the time that you
14 purchased it?

15 A. A motel, active motel.

16 Q. Okay. And I take it at some point - it's no longer an
17 active motel.

18 A. No.

19 Q. And do you know when that ceased?

20 A. I'm not too sure. I think it was around 1980 or '81,
21 something in there.

22 Q. Since that time, what has been the use of the property?

23 A. Just a personal, you know, personal use, our own use. We
24 use it for storage and we have shops out there and so
25 forth.

A-12

MR. STOKES/Direct by Mr. Johns

1 Q. Okay. And there's a number of buildings on the property
2 - maybe just for ease, I'd refer you to a drawing. No.
3 35, I'll hand you Exhibit 35, which is - it's a map. I
4 saw you had your glasses here. Alright, just referring
5 to the - there's a northerly building here. There's a
6 southerly building. Is there any other buildings on this
7 property besides those that are listed there?

8 MR. BEALE: Excuse me counsel, what exhibit?

9 MR. JOHNS: 35.

10 MR. BEALE: Thank you.

11 A. No, it's - let's see.

12 Q. On the . . .

13 A. Well, let's see.

14 Q. There would be a residence that's not depicted, that's
15 over on the - would be on the right side.

16 A. Okay, and there's a garage and the workshop to the east
17 of the - what it says northerly buildings.

18 Q. Okay. What current use do you make of the northerly
19 building that's listed there?

20 A. Well, I have a gymnasium in one, and I have a little
21 library in this - in the middle one. And the other one
22 has storage.

23 Q. So there's three.

24 A. Three separate apartments or - yeah, apartments - not
25 apartments, but units.

MR. STOKES/Direct by Mr. Johns

1 Q. In the north building.

2 A. Yes, Sir.

3 Q. Okay. How many units are on the south building?

4 A. There is - now there is four units. There used to be
5 five.

6 Q. And what use do you make of the south building?

7 A. There is - I have an office and a shop, storage area. My
8 wife has a shop and a storage area.

9 Q. Okay, so you have an office in a portion of the south
10 building?

11 A. I do on the north - on the western portion.

12 Q. And your wife does as well then, separate office.

13 A. Separate office. It's divided by that little space in
14 between the two.

15 Q. Okay. Prior - at some point during the prior litigation,
16 the Court had awarded the Nobles the right to use the
17 portion of your property that's depicted there as the
18 easement per usage pending the completion of that
19 lawsuit, is that correct?

20 A. That's correct.

21 Q. What impact did that use have on your use of your
22 property?

23 A. Well, it circumscribed our safety for our dogs. We had -
24 at that time, we had two dogs, and we babysitted my son's
25 big German Shepard and was - as a result, we had put up a

MR. STOKES/Direct by Mr. Johns

1 fence all around the property and we put up a gate. And
2 then people coming in and out, they wasn't always too
3 circumspect about closing the gates, so we had to be very
4 careful when we let our dogs out. And as soon as people
5 came in or out, rush out and try to grab our dogs and
6 make sure they didn't rush out because sometimes we had
7 one big dog that just wanted to get out bad, and he'd
8 take any opportunity. Almost got killed in fact because
9 he slipped out when somebody had opened the gate and got
10 out in the road, and I grabbed him just before he got
11 hit.

12 Q. Do you still have dogs there at the property?

13 A. I do. I have two now.

14 Q. And do you let them run free in the yard area at times?

15 A. I do now, yes.

16 Q. And do you believe you'd be able to do that if you had an
17 easement granted through that property for the benefit of
18 the Nobles?

19 A. No, it would be right back to the same thing we had
20 before.

21 Q. Even if they were committing to try to open and shut the
22 - keep the gates shut after they went through them.

23 A. Well, can we be assured of that? I mean, you know,
24 besides it's not just the Nobles that are using it.

25 Other people come in and out, and we have no control of

MR. STOKES/Direct by Mr. Johns

1 whether they want to shut the gate or don't want to shut
2 the gate. There's no restriction of --

3 Q. The guests of the Nobles.

4 A. -- the guests of the Nobles.

5 Q. What other impacts does that easement - or did it have or
6 would you anticipate would have in the future across your
7 property and your use of the property?

8 A. And our use of the property? Well, there's another
9 thing. There's a safety factor. We also have great-
10 grandkids that come down occasionally. They're young,
11 between about seven and nine, and they play out in there,
12 run with their tractors - their tricycles and so forth.
13 So we're not too sure when people are gonna come in and
14 come out and how circumspect they're gonna be when they
15 do come in.

16 Q. Any other issues as to the impact of your use of the
17 property?

18 A. Well, you know, there's a safety feature too. I mean
19 it's a - people can come in at any time of day or night,
20 and there's - actually I have my office out there.
21 Oftentimes I work late at night just for the only reason
22 is to make sure that people don't come in and out,
23 particularly on weekends. So the result - it makes it
24 kind of a scary situation sometimes.

25 Q. So security issues then are a concern to you?

MR. STOKES/Direct by Mr. Johns

1 A. Very, very much so.

2 Q. Is that kind of an isolated property out there?

3 A. It is isolated, yes.

4 Q. How so?

5 A. Behind trees, we have out in the front. We - the
6 neighbors to the north of us are seldom there. The
7 neighbors to the south are seldom there. And so I mean
8 it's a . . .

9 Q. Are you talking about Tillicum Beach properties?

10 A. Tillicum Beach property, they come and go. It's vacation
11 property, so they don't live there. I think one family
12 does, but most of them don't. And the result, why the
13 ones to the north of those, a consortium of fourteen or
14 more families who use it as a time-sharing thing, they
15 come down sometimes and sometimes they don't.

16 Q. Any other impacts an easement across that portion of your
17 property would have on your enjoyment of your property?

18 A. Well, yeah, the idea that I cannot park my - any of my
19 equipment or if I - I can't park my car up there by
20 number one because it's impingement upon their so-called
21 courtesy access there. And the - actually down in number
22 two, I have to go down, and if I park right in number
23 two, it impinges on that courtesy access. I have to go
24 down past number five before I can actually park my car
25 and be outside of their purview there, so.

MR. STOKES/Direct by Mr. Johns

1 Q. Anything else you can think of?

2 A. Well, like I say, both of us are - my wife and I are past
3 our 80th decade, and I don't want to have to go out there
4 and start trying to battle people coming in in the middle
5 of the night or people wandering through the place
6 deciding they want to go down on the beach. And, like I
7 say, we live there permanently, and the other people
8 don't.

9 Q. Do you think this would impact the privacy of your home?

10 A. Oh, yeah, very definitely. We can't, we can't - fact of
11 the matter, there was one case where they complained
12 because I had a backhoe that I was working on at the
13 time, and it happened to be on their so-called easement.
14 And they - somebody opened the gate and came rushing up.
15 I moved the backhoe, but then they utilized that as
16 saying I tried to block them. So the thing is - I don't
17 know, I guess to be aware, it's not a comfortable
18 situation.

19 Q. You heard - maybe heard some testimony earlier about
20 whether you would even notice people driving across from
21 any windows in your house. Would you notice people
22 driving across your property?

23 A. Not with the way it's set up now. I would notice them,
24 but my wife or somebody in the forward bedroom would not
25 notice them because of the trees there.

MR. STOKES/Direct by Mr. Johns

1 Q. How would you notice it?

2 A. Because I have a - as a mentioned, I have an office out
3 there, and the windows open up on the courtyard there.

4 Q. Okay. Anything else you can think of that we haven't
5 covered?

6 A. Well, I guess the fact that we no longer have control of
7 our property. If we have people coming in and out at any
8 hour of the day or night without any, without any advance
9 notice or anything, we're kind of on the tenterhooks
10 there waiting for something to happen.

11 Q. Okay.

12 A. The fact is one time I had a guy come in, drive around my
13 place, and I couldn't figure out what he was doing or
14 anything else. I followed him out [brief inaudible], and
15 it was some guy half drunk that said he was looking for a
16 dog. So I mean, this is about 12:00 o'clock at night.

17 Q. So without the gates secured, you would be afraid of
18 people coming in to trespass on your property?

19 A. Yeah.

20 Q. I don't have any further questions.

21 THE COURT: Mr. Beale, you may inquire.

22 MR. BEALE: Thank you, Your Honor.

23 CROSS EXAMINATION BY MR. BEALE

24 Q. These concerns about dogs getting out and people coming
25 in can be resolved if there's a gate that's kept locked,

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Hearing Date: **March 21, 2005**
Time: 1:30 p.m. 2005 MAR 18 P 12: 24

MASON CO. WA.
PAT SWARTOS, CO. CLERK
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON**

FRED NOBLE and FAITH NOBLE,)
husband and wife,)
)
) Petitioners,)
)
) vs.)
)
) SAFE HARBOR FAMILY)
) PRESERVATION TRUST, a)
) Washington trust)
)
) Respondent/Owner.)
)

NO. 05-2-00241-1
**DECLARATION OF PAUL
STOKES**

Paul Stokes declares, subject to the penalties of perjury under the laws of the State of Washington, as follows:

I am one of the trustees of the Respondent in the above-entitled action. If sworn to testify I would be competent to testify to all the facts contained in this declaration.

DECLARATION OF PAUL STOKES
Page 1

DAVIS ROBERTS & JOHNS, PLLC
7525 PIONEER WAY, SUITE 202
GIG HARBOR, WASHINGTON 98335
TELEPHONE (253) 858-8606
FAX (253) 858-8646

5

ORIGINAL

1
2 The Petitioners purchased their property, which they use only use as a
3 vacation or weekend home, in 1998. At that time there was no access to their
4 property through our property, as we had terminated the use of our property by
5 the petitioner's predecessor in interest, Jack Enderson, in 1997. At that time
6 we erected a barrier between our properties. Mr. Enderson in response filed a
7 lawsuit in Mason County Superior Court, in which he claimed the right to cross
8 over the portion of our property depicted on the survey map attached to the
9 Petition in this matter as "easement by usage".
10

11 Mr. Enderson ultimately decided to drop his claim and instead sell his
12 property to the Petitioners. In order to view the property the Petitioners had to
13 access the property through that of Mr. Noble's parents, as our barrier erected
14 against Mr. Enderson's use was at that time still up and our gates accessing
15 Highway 101 generally remained locked. The Petitioners continued to use the
16 access through Mr. Noble's parents' property after purchasing the property.
17

18 Mr. Noble's parents' property is located within a community known as
19 "Tillicum Beach" and is located directly to the south and adjacent to the
20 petitioner's property. A roadway within Tillicum Beach leads directly to Mr.
21 Noble's parents' driveway. Shortly after the Petitioners purchased their
22 property, they created a gateway in their southern fence to accommodate and
23 connected their property to Mr. Noble's parents' driveway. I had previously
24
25

26 DECLARATION OF PAUL STOKES
Page 2

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FAX (253) 858-8646

1
2 made a backhoe as a hobby project. Observing the petitioners' efforts I offered
3 my assistance with the backhoe, which they accepted. I thus used the backhoe
4 to clear and level the driveway from Mr. Noble's parents' property to the
5 Petitioners' property. .

6
7 The Petitioners have continued to use this access way off and on over
8 the past six years since acquiring their property. Even during the time the
9 Court had granted them an injunction to use our property, Mrs. Noble usually
10 used this south driveway when arriving at the Petitioners' property alone,
11 presumably because it is so much easier to access their property from Mr.
12 Noble's parents' property as there are no gates from the main roadway to be
13 opened and closed. Similarly, Furthermore, Mr. Noble's several brothers and
14 his parents have always used the south access to gain entrance to the
15 Petitioners' property.
16

17 The Petitioners previously claimed the right to use the "easement per
18 usage" in Mason Co. Cause No. 99-2-00923-5. The Court and Court of
19 Appeals ultimately rejected and dismissed the Petitioners' claims, as evidenced
20 by the Order Implementing Mandate and Judgment entered January 27, 2005,
21 a copy of which is attached hereto as Exhibit A. We accordingly on February 3,
22 2005 provided written notice to the Petitioners through counsel that we would
23 be terminating the usage that they had enjoyed of our property pursuant to the
24
25

26 DECLARATION OF PAUL STOKES
Page 3

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FAX (253) 858-8646

1
2 Court's earlier orders under Cause No. 99-2-00923-5. In the more than one
3 month since that time the Petitioners have continued to access their property
4 exclusively through the driveway crossing Mr. Noble's parents' property without
5 any difficulty.

6 The Petitioners chose to purchase their property with full knowledge that
7 they did not have an access route across our property. The Petitioners at that
8 time enjoyed, and continue to this day to enjoy, full access to their property
9 through the neighboring property of Mr. Noble's parents. They simply have no
10 need to use our property for any reason.

11
12 As we are now in our eighties, my wife and I have been in contact with
13 realtors to explore the possibility of selling our property. Our property can be
14 subdivided into two lots. The realtors we have been in touch with have
15 confirmed that the ability to do this greatly increases the value of the property.
16 If the Court was now to impose an easement upon our property at the location
17 sought by the Petitioners the property could not be subdivided, because the
18 new easement would be right in the middle of the new lot to be created, making
19 it impossible to build on the lot. This would have a dramatic impact on the
20 value of our property.
21
22

23 If any formal easement way is to be granted to the Petitioners by
24 condemnation, the natural and best location for that easement would be over
25

26 DECLARATION OF PAUL STOKES
Page 4

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Mr. Noble's parents' property, as there is already a roadway in place over that property and the impact on that property would be far less than it would on our property.

DATED this 18th day of March, 2005.



PAUL STOKES

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2005 NOV -9 P 2:35

MASON CO. WA.
PAT SWARTZ, CO. CLERK

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IN THE SUPERIOR COURT OF WASHINGTON FOR MASON COUNTY

FRED NOBLE and FAITH NOBLE,
husband and wife,

No. 05-2-00141-1

SECOND DECLARATION OF
SCOTT SMITH

Plaintiff,

v.

SAFE HARBOR FAMILY
PRESERVATION TRUST, a
Washington Trust, Original
Respondent/Owner;

and

TILLICUM BEACH, et al., Additional
Respondents

1. I am the President of Tillicum Beach, the homeowners' association for the development. I am personally familiar with the facts set forth below.

2. Attached to this Declaration are accurate copies of the Articles of Incorporation, Bylaws, and Covenants for Tillicum Beach, as well as the deed from the developer to the common beach area and other common areas.

A-26

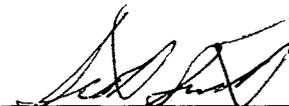
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55

1 3. The association sent a survey to its members about the proposed easement
2 across Tillicum Beach property. There are 24 lots, and we received responses from
3 owners of 19 of those lots. It is fair to say that the unanimous opinion was that the
4 easement would be a significant detriment to the community. Not only do the members
5 feel very strongly about their ability to use the common area for a variety of purposes,
6 but the surveys, and the Board's investigation, also show that they unanimously feel
7 threatened by a loss of their sense of living in a closed community, of, generally, their
8 privacy.
9

10
11 4. As a Board, we have never authorized the Nobles to use the Tillicum Beach
12 road, nor the common beach area. We know that there is the occasional trespass; for
13 example, I believe that they have gone through the development once in the past year,
14 to mow the lawn. We are not pleased, but we do not intend to ask the Court for an order
15 prohibiting their occasional use, because this will be decided by the Court, and it just
16 isn't worth it to sue over. The Noble parents are members, and we are hoping that the
17 issue will be decided so that there is no more conflict over the use of the Tillicum
18 Beach property, and the Nobles go through where the easement has always been.
19
20
21

22 I declare under penalty of perjury under the laws of the State of Washington that
23 the foregoing is true and correct. Signed at Vancouver, Wa on the 5th
24 day of November, 2005.
25

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SCOTT SMITH

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IN THE SUPERIOR COURT OF WASHINGTON FOR MASON COUNTY

FRED NOBLE and FAITH NOBLE,
husband and wife,

Plaintiff,

v.

SAFE HARBOR FAMILY
PRESERVATION TRUST, a
Washington Trust, Original
Respondent/Owner;

and

TILLICUM BEACH, et al., Additional
Respondents

No. 05-2-00141-1

SECOND DECLARATION OF
LARRY KNUTSEN

1. I am a property owner at Tillicum Beach in Mason County,
Washington. I have owned property here since 1978. I have served as a Board
member, and officer, including President and Vice-President, of Tillicum Beach. I
am personally familiar with the facts set forth herein.

2. Prior to retirement, I was a professional engineer. Part of my
responsibilities over the years included creating plot maps, showing boundaries of

1 areas of land, as well as features within those boundaries such as buildings, utility
2 lines, and so on. I have prepared such a map showing the area of the Tillicum Beach
3 common beach area. An accurate copy of that map is attached hereto. It shows the
4 line of ordinary high tide, which is the bulkhead, and a line parallel to that line, 100
5 feet inland. The bulkhead is approximately three feet high. It also shows the various
6 features on the lot. It shows the footprints of the former cabin, as well as the new
7 house under construction. It is an accurate representation of the area.

10 3. I live at Tillicum Beach. The Nobles have only rarely used the parents' lot
11 for access, and only once I know of in the past about one year. That was to mow
12 their lawn. We are not happy with their use of Tillicum Beach Lane, but the uses are
13 only occasional, and the court will decide sooner or later.

15 4. Attached to my statement are pictures of the area. These are accurate
16 depictions of what they purport to show.

18 5. On November 4, 2005, I went online to the web site of Sharon Prather, the
19 broker for Northwest Properties. Attached to my statement are accurate copies of the
20 web pages about her site in general, and her advertisements having to do with the
21 Safe Harbor/Stokes property.

23 6. On the week of October 24, I surveyed the area up the canal from Tillicum
24 Beach to Hoodsport. I was looking for any alternate sites where members could
25 store their boats, and launch and delaunch them. My search took me about 3.5 miles
26 north of Tillicum Beach. There is simply nothing available. Most of our boats are 8-

1 12 feet, without trailers. Even if storage and a ramp were free, it would be virtually
2 useless to our owners. They would need a towing rig and trailer. A launch that is,
3 for example, 2 miles from the development would then require a small boat to go
4 that 2 miles in open water just to get back to the beach.

6 7. At the same time, I surveyed the same area, looking for common driveways,
7 which are driveways shared by more than one property. I found 12 obvious shared
8 driveways in the about 3.5 miles to Hoodsport.

10 8. I am aware that Paul Stokes said he used his backhoe to level and grade a
11 driveway for the Nobles to use. I am wondering what he is referring to, since by all
12 appearances nothing like that was ever done. I have investigated this claim, and none
13 of the other members saw or heard such activity.

15 10. It is not possible to drive down Tillicum Beach Lane, and turn left onto the
16 property of the Noble parents, and go straight through to the Nobles' house, without
17 going on the Tillicum Beach lot. The former small house has been torn down, and the
18 foundation and framing are up for the new house. There is a new septic system, as well,
19 right in front of the gap in the fence to the Nobles' property. There is even less room
20 on the lot now than before, and it would be impossible to drive through that lot to the
21 Nobles' lot.

24 11. The need for boat storage and other uses at the common beach area will only
25 increase in the future. Waterfront is too expensive now for many single families, so we
26 are seeing multiple families buying one lot. There are three examples of this so far in
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our community; on one lot, the two families are often there at the same time, with twice as many boats, ski-doods, and so on.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Shelton, WA on the 28th day of November, 2005.


Larry Knutsen

1 **I. The Case as Presented to the Court**

2
3 **A. Factual Claims Made by Stokes**

4 Any litigant has the right to make factual claims both before and during trial. In
5 response, opposing parties investigate, research, and prepare responses. Where the
6 factual claims are not only unfounded, but the litigant fails to present any evidence in
7 support of them at trial, then the Court should consider these failures in determining a
8 reasonable attorney fee to award to the opposing party.

9 Among the claims made pre-trial by Stokes, and at trial by both Stokes and his
10 expert witness, include the following:

11 1. *That the Nobles have consistently used Tillicum Beach Lane and the*
12 *property of Mr. Nobles' parents for access to their property.* This was a central part of
13 the Stokes' case throughout the proceedings. Overwhelming evidence was introduced
14 that this claim was absolutely false.

15 2. *That the value of the Stokes property included commercial uses, a value*
16 *that should be used both in determining the most equitable route, as well as in setting*
17 *compensation.* This was also a central tenet of Stokes' argument, made repeatedly at
18 pre-trial hearings. It was not abandoned until an email from counsel for Stokes on May
19 26, 2006.

20 3. *That there is ample alternate space for Tillicum Beach's uses that would*
21 *have been interrupted by a private way of necessity, so Tillicum Beach would not be*
22 *adversely affected.* The evidence conclusively established, beyond any doubt, that there
23 is no alternative space available either within or without Tillicum Beach.

24 4. *That the proposed Tillicum Beach route would also not interfere with the*
25 *uses of the individual lots owned by Tillicum Beach members.* Again, the evidence to
26 the contrary was overwhelming and unrefuted.

1 5. ***That the route over the Stokes property would have to include a 10-foot***
2 ***setback on both sides of the actual easement.*** The Stokes' expert made this claim in his
3 testimony, but could not provide any source for this notion. The evidence shows that
4 there is no such requirement; in addition, why would there be a 10-foot setback on either
5 side of the easement? The Stokes own the land ten feet on either side of the easement.

6 6. ***That there was no room on his property for an easement.*** Not only was
7 there room, as clearly demonstrated by the site visit, but it had been used as an easement
8 for decades; nothing had changed since the termination of the previous easement.

9 7. ***In an earlier statement, Stokes testified under oath that he personally***
10 ***had used his backhoe to help the Nobles build a road on their property using the***
11 ***Tillicum Beach Lane route.*** See, Declaration of Paul Stokes, document no. 5, at page 2,
12 line 22: ***“Shortly after the Petitioners (Nobles) purchased their property, they created***
13 ***a gateway in their southern fence to accommodate and connected their property to Mr.***
14 ***Nobles’ parents’ driveway. I had previously made a backhoe as a hobby project.***
15 ***Observing the petitioners’ efforts I offered my assistance with the backhoe, which they***
16 ***accepted. I thus used the backhoe to clear and level the driveway from Mr. Nobles’***
17 ***property to the Petitioners’ property.”*** This statement is completely unconnected to
18 reality, as the site visit revealed, and as other evidence challenged. Stokes did not repeat
19 this statement at trial, but it was part of the basic position he took, which is that the
20 Nobles used the Tillicum Beach Lane route regularly and with no adverse effects. One
21 wonders what he did to avoid the well, septic system and drainfield, and other features
22 on site? This whole line of evidence demanded very significant investigation, research
23 and presentation in response.

24 There are other examples, but the point has perhaps been adequately presented.
25 The best context for these claims comes from the words and actions of Paul Stokes
26 himself. As already argued to the court, in his deposition, Trial Exhibit 49, Paul Stokes
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A-33

1 said, at pages 35-36, that the easement road was not going to go through his property,
2 because "I don't want it on my property, ...so it's not going to be on my property."

3 And Trial Exhibit 45 contains the deeds to the Stokes property from 1947
4 forward. The 1947 deed was the one that created the easement. In that deed, and the
5 seven subsequent transfer documents, up to and including the transfer to Stokes, the
6 easement is clearly specified. Then, after Stokes bought the property, he and related
7 parties made five deeds among themselves, starting in 1979.

8 Although all of the preceding deeds called out the easement, none of the deeds
9 from Stokes or related parties contains any reference to it. Coincidence?

10 **B. Arguments Made by Stokes**

11 Stokes also made certain legal arguments that were not supported by the evidence
12 or the law, which required investigation, research and presentation in response. These
13 included that the purchase offers received were probative of either the most equitable
14 route, and/or compensation; that fair market value included commercial potential; that
15 the Mason County Resource Ordinance, at 17.01.110 (D)(2) applied to the placement of
16 the road, when it plainly does not; and that *Lakemoor v. Swanson*, 24 Wn. App. 10,
17 *review den.*, 93 Wn.2d 1001 (1979), did not hold that individual members must be
18 named and served before their individual interests could be controlled by a judgment;
19 among others.

20 **C. Strategic Choices Made by Stokes**

21 Stokes made at least two strategic choices that significantly affected the
22 proceedings. First was the choice to not name and serve either the association itself
23 (which forced the Nobles to do so), and they also did not name and serve the individual
24 members. Whatever the strategic reasons, the results are controlled by the case law, as
25 previously discussed. Second was the choice not to identify a particular route, which
26 complicated the entire proceedings.

27 **A-34**

Kennedy v. Martin, 115 Wash.App. 866, 872-74 (Div. II, 2003):

Attorney Fees

[11] In Washington, we follow the American rule in awarding attorney fees. *Panorama Vill. v. Allstate Ins. Co.*, 144 Wash.2d 130, 143, 26 P.3d 910 (2001). Under this rule, “a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute, or recognized ground of equity providing for fee recovery.” *City of Seattle v. McCoy*, 112 Wash. App. 26, 30 (2002) (citation omitted). Here, RCW 8.24.030 is the relevant statute. It provides in part: “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.” RCW 8.24.030.

[12][13][14][15] In a condemnation action, a trial court has discretion to grant an award for attorney fees in light of the circumstances in each case. *Beckman v. Wilcox*, 96 Wash. App. 355, 367 (1999), review denied, 139 Wash.2d 1017 (2000). We review the reasonableness of such an award for abuse of discretion. *Beckman*, 96 Wash.App. at 367. A trial court abuses its discretion when it exercises discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. *Beckman*, 96 Wash.App. at 367. Moreover, RCW 8.24.030 gives the trial court discretion “without regard to whether the condemnee has prevailed in the action or on any particular issue.” *Sorenson*, 70 Wash.App. at 279. Thus, to prevail in their appeal from the court's order requiring that they pay the Cammacks' attorney fees, the Martins must demonstrate that the court abused its discretion.

[16] The Martins assert that because condemnation statutes are strictly construed, the statute allowing attorney fees should also be strictly construed. They then argue that a strict construction of RCW 8.24.030 prevents the court from awarding attorney fees to potential condemnees such as the Cammacks.

We award the Cammacks their attorney fees on appeal, under RCW 8.24.030 and RAP 18.1.

The Martins conclude that unless the statute strictly allows potential condemnees to collect attorney fees, such fees cannot be awarded. A potential condemnee may only be awarded fees if he does not prevail in the condemnation action, thus becoming a condemnee. Under the Martins' view, only condemnees are entitled to their attorney fees.

[17][18][19] But a party need not prevail in a condemnation action to be awarded attorney fees under RCW 8.24.030. *See Beckman*, 96 Wash.App. at 361-62. RCW 8.24.030 is unlike other attorney fees statutes, which allow attorney fees only to a prevailing party. *Beckman*, 96 Wash.App. at 361 (citing RCW 4.84.250, .270). A prevailing party cannot exist until there is an entry of judgment. *Beckman*, 96 Wash.App. at 361. But under RCW 8.24.030, an entry of judgment is not required before attorney fees can be awarded. *Beckman*, 96 Wash.App. at 361-62. In other words, there does not need to be a successful condemnation before the awarding of attorney fees, only an action. *Beckman*, 96 Wash.App. at 363, 979 P.2d 890. An action is defined as a “lawsuit brought in a court.” *Beckman*, 96 Wash.App. at 364 (citing Black's Law Dictionary 28 (6th ed.1990)). Thus, a condemnor was held obligated to pay attorney fees even when he voluntarily abandoned the action. *Beckman*, 96 Wash.App. at 364. Under *Beckman*, the result of the condemnation action does not control the condemnee's right to request attorney fees. When the Martins joined the Cammacks, they made the Cammacks a potential condemnee. The Cammacks were required to hire an attorney and defend. The Cammacks prevailed and are entitled to attorney fees.

The Martins also argue that a condemnee (Martins) cannot be required to pay attorney fees for a potential condemnee (Cammacks) because it deprives them of just compensation for the easement imposed on their property. But there is nothing in the language of RCW 8.24.030 or in the case law that prevents a court from requiring the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees.

The Martins seek to limit *Beckman*'s holding to require that a plain reading of the statute obligates a condemnor to pay a condemnee attorney fees. The Martins argue that *Beckman* should not be relied on because it obligates a condemnor to pay attorney fees and here, a condemnee was required to pay attorney fees to another condemnee. The Martins, however, fail to show that *Beckman* requires that only a condemnor can be required to pay attorney fees. *Beckman* did not specifically limit payments to condemnors but was merely applying the statute to the facts in that case by pointing out that a condemnor who initiates an action may be obligated to pay attorney fees regardless of whether the condemnor prevailed.

The statute establishes that a condemnee or a potential condemnee may recoup their attorney fees; it does not state who is required to pay those fees. See RCW 8.24.030. The plain reading of the statute allows awards “in any action” with fees payable to the “condemnee” without mention of who may be required to pay. RCW 8.24.030. We hold that there is no impediment to a court's requiring a condemnee to pay attorney fees to a potential condemnee.

In this case, Kennedy brought an action against the Martins, who brought a third party

complaint against the Cammacks. RCW 8.24.030 allows attorney fees “in any action.” The trial court did not abuse its discretion when it ordered the Martins, a condemnee, to pay the attorney fees of a potential condemnee, the Cammacks, under RCW 8.24.03, and we affirm.

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FRED NOBLE and FAITH
NOBLE, husband and wife,

NO. 35227-3-II

Petitioners,

DECLARATION OF SERVICE

v.

SAFE HARBOR FAMILY
PRESERVATION TRUST, a
Washington Trust,

Original Respondent/Owner;

and

TILlicum BEACH, et al.,

Additional Respondents.

FILED
COURT OF APPEALS
DIVISION II
07 MAR -9 PM 2:41
STATE OF WASHINGTON
BY [Signature]
DEPUTY

I, GAVIN PHILLIPS hereby declare: That I am over the age of 18 years, a citizen of the United States and of the State of Washington, and not a party to the above-captioned case; and

That on the 9th day of MARCH, 2007, I caused a copy of the Brief of Respondent Tillicum Beach to be served via ABC Legal Messenger Service for delivery on the 9th day of MARCH, 2007, to the following:

Michael W. Johns
Davis Roberts & Johns, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335

Robert L. Beale
McGavick Graves, PS
1102 Broadway, Suite 500
Tacoma, WA 98402.

DECLARATION OF SERVICE - 1

ORIGINAL

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

This Declaration was completed at Shelton, Washington on this 9th day of MARCH, 2007.

A handwritten signature in cursive script, appearing to read "Gavin Phillips", written over a horizontal line.

Gavin Phillips
Paralegal for
Robert D. Wilson-Hoss