

NO. 35227-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SAFE HARBOR FAMILY PRESERVATION TRUST,
a Washington trust,

Appellant,

v.

FRED NOBLE and FAITH NOBLE, husband and wife,
and
TILlicum BEACH, et al,

Respondents.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY W
DEPUTY

BRIEF OF APPELLANT

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ORIGINAL

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I.

ASSIGNMENTS OF ERROR

Appellant Safe Harbor Family Preservation Trust (hereafter referred to as "Safe Harbor") assigns error to the Findings of Fact, Conclusions of Law and the Decree entered in the above entitled matter on July 17, 2006, the Memorandum Decision Re: Attorney's Fees and Costs filed August 11, 2006, the Judgment – Attorney Fees filed September 11, 2006 and the Order and Judgment Granting Respondent Safe Harbor Attorney's Fees Against Petitioners filed September 18, 2006, and specifically as follows:

1. The Memorandum Decision Re: Attorney Fees conclusion that Safe Harbor was responsible for involving Respondent Tillicum Beach as a potential alternative condemnee and thus responsible for Tillicum Beach's attorney's fees and costs incurred in this matter.
2. The Judgment – Attorney's Fees awarding Tillicum Beach judgment against Safe Harbor for its attorney's fees and costs incurred in this matter.
3. The Memorandum Decision Re: Attorney Fees conclusion that Safe Harbor's award of attorney's fees and costs against Respondents Fred and Faith Noble (hereafter

collectively referred to as “the Nobles”) should be reduced by 70% to deduct fees and costs incurred due to Tillicum Beach’s involvement in the litigation.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in concluding that Safe Harbor was responsible for involving Respondent Tillicum Beach as a potential condemnee when Safe Harbor never named Tillicum Beach as a party and where the Nobles specifically sued Tillicum Beach, adding it as a party to the litigation?
2. Did the trial court err in reducing the attorney’s fees and costs awarded to Safe Harbor by 70% to deduct fees and costs incurred due to the involvement of Tillicum Beach in the litigation when Tillicum Beach was added as a party exclusively by the Nobles?
3. Is Safe Harbor entitled to its attorney’s fees and costs incurred in this appeal?

II.

STATEMENT OF THE CASE

In 1972, Paul and Agnes Stokes, the trustees of Safe Harbor, purchased the Safe Harbor property. The Stokes operated the property as a motel until 1980, and have used it as a residence

since 1980. The Stokes deeded the property to Safe Harbor, which is a trust for the benefit of their children. (CP 125)

There is a recorded easement in favor of the Nobles' property across Safe Harbor's property, but the easement cannot be used. (CP 123) A number of years before the present litigation arose, Safe Harbor prevented the Nobles from using Safe Harbor's property to access the Noble property. Safe Harbor and the Nobles litigated various issues involving the recorded easement and the area the Nobles had used to access their property in a previous lawsuit. (CP 123) Ultimately, the Court of Appeals in an unpublished decision under *Safe Harbor Family Preservation Trust v. Noble*, 120 Wash.App. 1060, issued March 23, 2004, ruled that because the Nobles' record easement could not be developed, the Nobles would have to condemn an easement to access their property under Chapter 8.24 RCW.

In March 2005 the Nobles filed this lawsuit requested that the Court condemn a private way of necessity over Safe Harbor's property. (CP 181-189) On June 2005 Safe Harbor filed its answer to the Nobles' petition. (CP 177-180) In its answer Safe Harbor raised the following defense: "There is a feasible alternative route available to the Petitioners." (CP 179) Safe Harbor did not in its

answer identify a particular alternate route or assert any claim against a third party.

On July 21, 2005, the Nobles filed a motion for leave to amend their petition in order to add a claim against Tillicum Beach to obtain a way of necessity over its property. (CP 165-176) To support their motion the Nobles filed the declaration of their counsel, who stated that

It now appears from responses received from original Respondents, as well as deposition testimony, that original Respondents are taking the position that a way of necessity should be granted across property owned by Tillicum Beach Inc. rather than property owned by original Respondents. In order to prevent two trials and assure that there is not an inconsistent result, it is imperative that Tillicum Beach, Inc. and all owners of lots within the plat of Tillicum Beach be joined as additional parties' defendant.

(CP 163-164)

Tillicum Beach is located directly to the south and adjacent to the Nobles' property. Fred Noble's parents own a house within Tillicum Beach that abuts the Nobles' property. After Safe Harbor prevented the Nobles from using its property, the Nobles used Tillicum Beach's property to access Mr. Noble's parents' lot, from which they would access their property. (RP 11-12, 20-21).

Rather than require the Nobles to note and attend a hearing on their motion to amend, at the Nobles' request Safe Harbor

consented to the Nobles' motion. (CP 151-162) Though the Nobles named all of the individual members of Tillicum Beach as defendants, they did not serve any of the members, who thus were not parties to the litigation. (CP 120-121)

The Nobles thereafter used Tillicum Beach as a surrogate to litigate with Safe Harbor over which route should be condemned. In effect, the Nobles sued both potential condemnees and then let them litigate among themselves who should bear the burden of providing access to the Nobles, with the result that Tillicum Beach incurred approximately \$40,000.00 in attorney's fees and Safe Harbor incurred approximately \$22,000.00 in attorney's fees. (CP 16-20)

Trial was held on June 1, 2006. At the conclusion to trial, the Trial Court determined that it would be less burdensome for the Nobles' way of necessity to be imposed upon Safe Harbor's property. (CP 111-130) After entry of the Decree of Appropriation, Tillicum Beach brought a motion for an award of its attorney's fees and costs against Safe Harbor, asserting that Safe Harbor was "responsible" for it being a party to the litigation. (CP 92-110)

The only actions of Safe Harbor that the Trial Court was able to identify to support its conclusion that Safe Harbor was

responsible for involving Tillicum Beach were (1) that Safe Harbor had asserted its defense that there was an alternative way available to the Nobles and (2) that it had consented to the Nobles' amendment of their complaint to add claims against Tillicum Beach rather than require the Nobles to bring a motion to amend its complaint. Nonetheless, despite the fact that the Nobles were the parties that had sued and served Tillicum Beach and were the only parties to assert any claims against Tillicum Beach, the Court still awarded Tillicum Beach its fees and costs against Safe Harbor, rather than the Nobles. (CP 12-20)

The Trial Court further reduced the attorney's fees and costs it awarded Safe Harbor against the Nobles by 70%, finding that the majority of the attorney's fees it incurred were as a result of Tillicum Beach's involvement in the case. (CP 12-20)

III.

ARGUMENT

A. Safe Harbor Was Not "Responsible" For Involving Tillicum Beach In This Litigation And Is Not Responsible For Tillicum Beach's Attorney's Fees and Costs Incurred Herein.

"The condemnor has the burden of proving the reasonable necessity for a private way of necessity, including the absence of a

feasible alternative.” Sorenson v. Czinger, 70 Wn.App. 270, 276, 852 P.2d 1124 (1993). Thus, in its answer to the Nobles’ petition, Safe Harbor raised the following defense: “There is a feasible alternative route available to the Petitioners.” Safe Harbor did not in its answer identify a particular alternate route or identify or assert any claim against a third party.

Safe Harbor initially contemplated bringing a third party complaint against Tillicum Beach to support this defense. However, the law does not require a condemnee to do so. In Kennedy v. Martin, 115 Wn.App. 866, 63 P.3d 866 (2003), the Washington Court of Appeals expressly held that a condemnee in the position of Safe Harbor is not obligated to add another potential condemnee as a party. To do so may result in the condemnee being held responsible for the third party’s attorney’s fees.

In Kennedy, a condemnee defendant had brought a third party complaint against another potential condemnee. After the trial court imposed the easement over the first condemnee, the trial court awarded the second condemnee its attorney’s fees against the first condemnee, who had added the second condemnee as a party.

On appeal the first condemnee argued that by law it was required to bring the claim against the second condemnee to allow the Court to determine which property should bear the burden of the easement. The Appellate Court rejected that argument, stating as follows:

Under this statute, the condemnor has the burden to show that a private way of necessity exists and that the route selected is the most reasonable alternative. Sorenson, 70 Wash.App. at 276, 852 P.2d 1124. Once necessity is established, the potential condemnee may demonstrate the existence of a feasible alternative. *Sorenson*, 70 Wash.App. at 276 n. 2, 852 P.2d 1124. The burden then shifts to the condemnor to show that the chosen route is more equitable. Sorenson, 70 Wash.App. at 276 n. 2, 852 P.2d 1124 (*citing Wagle v. Williamson*, 61 Wash.App. 474, 481, 810 P.2d 1372 (1991))...Failure to join an owner of the parcel upon which a proposed alternate route will run does not preclude consideration of the alternative route. Sorenson, 70 Wash.App. at 276, 852 P.2d 1124.

But Sorenson also indicated that if the selection of the alternative route requires the joinder of non-parties, that can be evidence of necessity. 70 Wash.App. at 276, 852 P.2d 1124. Specifically, in Sorenson, the court stated that:

Nevertheless, evidence showing an alternative route would require the condemnation of property whose owners were not parties to the proceeding was held sufficient to show the necessity for the route selected by condemnor.

Here, the Martins argue that Sorenson required them to join the Cammacks. They assert that condemnees are in a precarious position because the failure to join a third party who owns an alternative route establishes that the condemnor's selected easement route meets the necessity requirement. Thus, the Martins concluded that they had no

choice: in order to assert that an alternative route existed, they had to join the Cammacks. We disagree.

The Sorenson court relied on Stephens and Wheeler for its claim that a party need join the owner of an alternate route to establish necessity. 70 Wash.App. at 276, 852 P.2d 1124. But under RCW 8.24.025, which controls here, the failure to join a party does not prevent the court from considering an alternative route of a non-party if the evidence shows that it is feasible. Sorenson, 70 Wash.App. at 276, 852 P.2d 1124. The Sorenson analysis allows the joining of other parties to be considered as a factor when determining the necessity of the alternative route, but it does not establish an absolute joinder requirement. See 70 Wash.App. at 276, 852 P.2d 1124. Nothing in Sorenson requires the joinder of the owners of the parcel containing the condemnee's proposed alternative route. While the selection of the route may be sufficient to show the necessity of the route where property is landlocked, it does not relieve the condemnor's burden to show the absence of a feasible alternative. See Sorenson, 70 Wash.App. at 276, 852 P.2d 1124 ("The condemnor has the burden of proving the reasonable necessity for a private way of necessity, including the absence of a feasible alternative."). The Martins did not appeal the trial court's finding of a private way of necessity over their property. And the Martins have not demonstrated the necessity of joining the Cammacks. Thus, the trial court did not err in requiring the Martins to pay the Cammacks' attorney fees on these grounds.

Kennedy v. Martin, 115 Wn.App. 866, 869-871, 63 P.3d 866 (2003).

Thus, the Court in Kennedy clarified that a named condemnee who believes there is another feasible route over the property of a third party has a choice: (1) It can assert the defense but not add the third party as an additional, thereby running the risk

that the trial court will determine that the failure to join the third party is sufficient to show the necessity for the route selected by the condemnor; or, (2) it can assert the defense and bring a third party complaint against the third party, but then run the risk of having to pay the third party's attorney's fees. Safe Harbor chose not to bring any claim against or add Tillicum Beach or the Nobles' parents as parties, accepting the risk that their absence might defeat its defense.

The Nobles were of course aware that there was another possible route over which they might obtain a way of necessity. They had used Tillicum Beach's property on a number of occasions to access their property off and on over a number of years. After learning that Safe Harbor had no intention of adding Tillicum Beach as a party, the Nobles made a conscious decision to add Tillicum Beach and its individual residents as defendants so they could assert a claim for an easement over the property of Tillicum Beach. The Nobles were under no obligation to do so, and in fact under the law as enunciated in Kennedy were entitled to the benefit of any inference resulting from Safe Harbor's failure to add Tillicum Beach.

Because the Nobles added Tillicum Beach as a party, Tillicum Beach was forced to participate in the litigation and incur

significant legal fees and costs of its own. Not surprisingly, at the conclusion of the litigation Tillicum Beach sought to recover those fees and costs. What was surprising, however, is that rather than simply request an award of fees from the Nobles, who were the parties that had sued it and were the only parties to assert claims against it, Tillicum Beach filed a motion and incurred substantial additional fees to request an award of fees and costs against Safe Harbor.

Tillicum Beach, in an effort to provide some basis for its attempt to seek fees from Safe Harbor rather than from the Nobles, asserted that the Nobles were “forced” to add Tillicum Beach as a party. There is no factual support for such an assertion, which is also wholly at odds with the law. As noted above, the Kennedy Court expressly stated that nothing requires the joinder of the owners of the parcel containing the condemnee's proposed alternative route. Further, the Kennedy Court noted that any adverse inference or impact that might accrue by virtue of failing to add the third party would be charged against Safe Harbor, not the Nobles. There thus was absolutely no requirement that the Nobles add Tillicum Beach.

As the condemnors, the Nobles always had the burden of proving the reasonable necessity for a private way of necessity, including the absence of a feasible alternative. As the condemnors, the Nobles knew they would be responsible for Safe Harbor's attorney's fees and costs as provided by statute. See RCW 8.24.030. Similarly, the Nobles knew that by adding Tillicum Beach as a party, they would also be obligated to pay those attorney's fees and costs by statute. Nevertheless, the Nobles made the voluntary decision to add Tillicum Beach and then allowed Safe Harbor and Tillicum Beach to bear the majority of the burden of litigating over where the Nobles' way of necessity should be located. They made this decision for their own benefit, in order to shift the burden of incurring cost and attorney's fees from themselves to Tillicum Beach.

The Nobles' counsel also quite candidly stated in his declaration supporting the Nobles' amended petition that the Nobles had an additional reason for adding Tillicum Beach as party – to ensure that his clients would not be prejudiced by an “inconsistent result” if the Nobles proceeded against each potential condemnee one at a time. At oral argument on Tillicum Beach's motion for attorney's fees, the Nobles' counsel explained that he

asserted the claim against Tillicum Beach because he felt he could not subject his clients to the risk that the Nobles might fail to meet their burden of establishing the absence of a feasible alternative against Safe Harbor due to the availability of another route over Tillicum Beach's property. He feared that if the Court found a feasible alternative route was more appropriate, the Nobles would then have been required to file another action to condemn a way of necessity over Tillicum's property and a different judge might rule in favor of Tillicum Beach, leaving the Nobles without any access. (RP 197-198).

Of course any condemnor in the Nobles' position - where there are two or more neighboring parcels over which a way of necessity could be located - would run a risk that in proceeding against only one potential condemnee at a time it might obtain successive unfavorable verdicts. Thus any condemnor in the Nobles' position might very well conclude, as did the Nobles, that the better course would be to name both potential condemnees in the same lawsuit. Doing so may be prudent. But doing so remains a voluntary choice and one that can only benefit the condemnor, not any of the potential condemnees.

The Nobles' decision to add Tillicum Beach was thus a voluntary decision made solely for their own benefit. Their decision was made with full knowledge that RCW 8.24.030 provides that each condemnee would be entitled to recover their attorney's fees against the Nobles - the condemnors and the parties responsible for bringing each condemnee into the litigation. After weighing the potential risk of proceeding against only one condemnee, the Nobles decided the better course was to add Tillicum Beach and incur the additional costs rather than risk the chance of ultimately failing to obtain any way of necessity.

Nor is there any merit to the Trial Court's apparent conclusion that Safe Harbor bears some responsibility for Tillicum Beach's attorney's fees and costs because it consented to the Nobles' request to amend their complaint to add Tillicum Beach. While it is true that Safe Harbor could have refused to consent and thereby required the Nobles to go to the trouble and expense of noting and attending a hearing on their motion for court authorization to amend their petition, Safe Harbor was not prejudiced by the Nobles' request and thus would have had no valid basis for doing so. It thus consented to the amendment. Collegial

agreements by counsel to reasonable requests by opposing counsel should be encouraged by the Courts, not penalized.

Pursuant to the clear law set forth in RCW 8.24.030 and as enunciated in Kennedy, supra, the Nobles as the condemnees are responsible for adding Tillicum Beach as a party and are solely responsible for Tillicum Beach's attorney's fees and costs. The Trial Court thus erred in awarding Tillicum Beach judgment against Safe Harbor for any portion of Tillicum Beach's attorney's fees and costs.

B. The Trial Court Erred In Reducing Safe Harbor's Award of Attorney's Fees by 70% For Fees Incurred Because Of Tillicum Beach's Involvement In The Litigation.

"{A} reviewing court will not overturn a decision to grant or deny attorney's fees absent a showing of a manifest abuse of discretion." Lay v. Hass, 112 Wn.App. 818, 826, 51 P.3d 130 (2002). A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). Untenable reasons include errors of law. Estate of Treadwell v. Wright, 115 Wn.App. 238, 251, 61 P.3d

1214 (2003); Lawrence v. Lawrence, 105 Wn.App. 683, 686, 20 P.3d 972 (2001).

Though the Court ruled against Safe Harbor in determining that the Nobles' way of necessity should be located on Safe Harbor's property, and further in determining the amount of compensation to be awarded Safe Harbor, Safe Harbor was still entitled to recover its reasonable attorney's fees and costs. RCW 8.24.030 provides that the court may award such attorney's fees and costs to the condemnee. As the Court of Appeals stated in Sorenson, 70 Wn. App. at 279, such fees may be awarded without regard to whether the condemnee has prevailed in the action or on any particular issue.

In Sorenson, the Court of Appeals reversed the trial court's decision in the condemnee's favor and determined the trial court had erred in considering an alternative route advanced by the condemnee. However, the Court of Appeals granted the condemnee its attorney's fees on appeal, noting that RCW 8.24.030 does not limit an award of fees to a prevailing party. The purpose of the statute is to reimburse the condemnee for the expenses it reasonably incurs in responding to the petitioner's request to use its land.

The Trial Court found that the hourly rates of Safe Harbor's counsel were reasonable. (RP 19). The Trial Court found that Tillicum Beach's attorney's approximately 200 hours were reasonable. (RP 17) In reviewing the number of hours spent by Safe Harbor's attorneys, which came to less than 120, the Trial Court appeared to find they were reasonably incurred. (RP 19-20) However, as discussed in the preceding section of this Brief, the Trial Court erroneously concluded that Safe Harbor was responsible for adding Tillicum Beach as a party to the litigation. It then compounded this error by determining that Safe Harbor's award of attorney's fees should be reduced as a result of Tillicum Beach's involvement.

The Trial Court clearly and erroneously believed that it should not award fees to Safe Harbor on issues on which it did not prevail, and further that it should not be awarded any fees incurred as a result of Tillicum Beach's involvement because it was responsible for that involvement. As noted above, Safe Harbor was not responsible for adding Tillicum Beach. And as Sorenson clearly provides, regardless of whether or not Safe Harbor prevailed on the issues, as the condemnee it is entitled to an award of the attorney's fees it reasonably incurred in this matter, including the additional

fees incurred as a result of the Nobles' voluntary decision to sue Tillicum Beach.

This matter should therefore be remanded and the Trial Court should be directed to award Safe Harbor all of the attorney's fees and costs it incurred in this matter.

C. Safe Harbor Is Entitled To An Award of Its Attorney's Fees and Costs Incurred In This Appeal.

Pursuant to RAP 18.1, Safe Harbor requests it be awarded its attorney's fees and costs incurred in this appeal.

RCW 8.24.030 provides the Court with the authority to award reasonable fees to Safe Harbor as the condemnee, without regard to whether it prevailed in the action or on any particular issue. Sorenson, supra. The purpose of the statute is to reimburse a condemnee for the expenses it reasonably incurs in responding to the petitioner's request to use its land, including those fees incurred on appeal. Id.

Safe Harbor is thus entitled to an award of the attorney's fees it incurred in this matter and requests that this Court award it judgment against the Nobles for all of its reasonable attorney's fees and costs incurred herein.

IV.

CONCLUSION

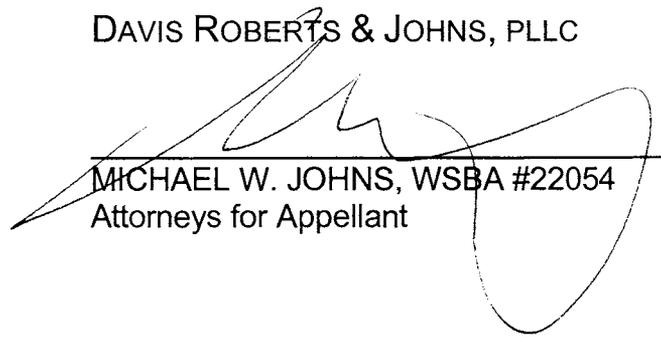
Safe Harbor did not assert any cause of action against Tillicum Beach, nor did it add Tillicum Beach as a party. Instead, the Nobles made the voluntary decision to add Tillicum Beach for their own benefit. As the party responsible for adding Tillicum Beach as a party, the Nobles are responsible under RCW 8.24.030 for Tillicum Beach's attorney's fees and costs incurred herein. The Trial Court thus erred in awarding judgment against Safe Harbor for any portion of Tillicum Beach's attorney's fees and costs.

The Trial Court also erred in reducing Safe Harbor's attorney's fees and costs by 70% due to Tillicum Beach's involvement in the litigation. Safe Harbor was not responsible for that involvement and is entitled to attorney's fees and costs reasonably incurred in response to the Nobles' condemnation petition, regardless of whether or not it prevailed at trial. In addition, Safe Harbor is entitled to an award of its attorney's fees

and costs incurred in this appeal.

Respectfully submitted this 5th day February, 2007.

DAVIS ROBERTS & JOHNS, PLLC



MICHAEL W. JOHNS, WSBA #22054
Attorneys for Appellant

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

SAFE HARBOR FAMILY
PRESERVATION TRUST, a
Washington trust,
Appellant,

NO. 35227-3-II

AFFIDAVIT OF DELIVERY

vs.

FRED NOBLE and FAITH
NOBLE, husband and wife, and
TILlicum BEACH, et al,
Respondents.

STATE OF WASHINGTON)
) ss.
County of Pierce)

PAMELA M. GIBSON, being first duly sworn on oath,
deposes and says:

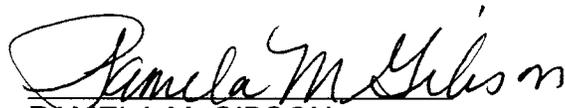
That on the 6th day of February, 2007, she delivered to:

Robert D. Wilson-Hoss
Hoss and Wilson-Hoss
236 West Birch Street
Shelton, WA 98584

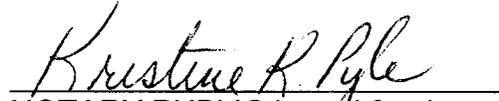
ORIGINAL

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Tacoma, WA 98401-1317

the following items: **Appellant's Brief**, by depositing the same in a
receptacle for ABC Legal Messenger Service to be delivered on
February 7, 2007.


PAMELA M. GIBSON

SIGNED AND SWORN to before me this 6th day of
February, 2007.


NOTARY PUBLIC in and for the
State of Washington, residing at
Yelm, WA
My Commission Expires: 9-4-09

