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THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

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PETITION FOR REVIEW

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OF THE DECISION OF  
DIVISION II OF THE COURT OF APPEALS

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NO. 35227-3-II-7-II

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FRED NOBLE and FAITH NOBLE, husband and wife,

Respondents,

v.

SAFE HARBOR FAMILY PRESERVATION TRUST,  
a Washington trust

Appellant,

TILlicum BEACH, et al,

Additional Respondents.

---

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ORIGINAL

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**I.**  
**IDENTITY OF PETITIONER**

The Petitioner is Appellant Safe Harbor Family Preservation Trust (hereafter referred to as "Safe Harbor").

**II.**  
**CITATION TO COURT OF APPEALS DECISION**

Safe Harbor seeks review of the Court of Appeals' Published Opinion filed October 9, 2007 and attached at Appendix A.

**III.**  
**ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals err when it affirmed the Trial Court's judgment awarding attorney's fees against Safe Harbor in favor of Respondent Tillicum Beach when Safe Harbor neither sued nor brought any cause of action against Tillicum Beach?
2. Did the Court of Appeals err when it affirmed the Trial Court's judgment reducing Safe Harbor's attorney's fees awarded against the Nobles by 70% based on Tillicum Beach's involvement in the litigation when Safe Harbor neither sued Tillicum Beach nor made any claims against it?
3. Did the Court of Appeals err in failing to award Safe Harbor its attorney's fees and costs incurred in this appeal?

**IV.**  
**STATEMENT OF THE CASE**

In 1972, Paul and Agnes Stokes, the trustees of Safe Harbor, purchased the Safe Harbor property. The Stokes created Safe Harbor and deeded the property to the trust for the benefit of their children. (CP 125) Fred and Faith Noble (collectively the “Nobles”) own adjoining property and have a recorded easement across Safe Harbor’s property, but the easement cannot be used. (CP 123) In an earlier case, Safe Harbor and the Nobles litigated various issues involving the easement. (CP 123) In an unpublished decision, the Court of Appeals ruled that since the Nobles’ recorded easement could not be developed, the Nobles would have to condemn an easement to their property under Chapter 8.24 RCW. See Safe Harbor v. Noble, 120 Wn.App. 1060 (2004).

In March 2005 the Nobles filed their petition to condemn a private way of necessity over Safe Harbor’s property. (CP 181-189) In its answer to the petition, Safe Harbor raised the following defense: “There is a feasible alternative route available to the Petitioners.” (CP 179) Safe Harbor did not assert any claim against a third party.

On July 21, 2005, the Nobles filed a motion for leave to amend their petition and add a claim against another adjoining lot owner, Tillicum Beach, as an additional condemnee. (CP 165-176)

The Nobles supported the motion by declaration stating as follows:

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 property within Tillicum Beach and abutting 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)

After adding Tillicum Beach as a party, the Nobles used it as a surrogate to litigate with Safe Harbor over which route should be condemned. As a consequence both potential condemnees were forced to litigate between themselves as to who should bear the burden of providing access to the Nobles. After trial, the Court

concluded that it would be less burdensome to grant a way of necessity over Safe Harbor's property. (CP 111-130) Tillicum Beach then 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) Despite the fact that the Nobles were the parties that had sued Tillicum Beach and were the only parties to assert any claims against Tillicum Beach, the Court awarded Tillicum Beach its fees against Safe Harbor. (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 resulted from Tillicum Beach's involvement in the case. (CP 12-20)

The Court of Appeals on October 9, 2007 issued its published opinion affirming the Trial Court's rulings. Judge Marywave Van Deren filed a dissent to that opinion.

## V.

### ARGUMENT

RAP 13.4(4) provides that a petition will be accepted by the Supreme Court if it involves a significant question of law under the Constitution of the State of Washington or if it involves an issue of

substantial public interest that should be determined by the Supreme Court. Both criteria are met in this case.

Washington State Constitution Article 1 Section 16 provides that "private property shall not be taken for private use, except for private ways of necessity." The Washington Supreme Court has determined that this provision grants Washington citizens the affirmative right to take private property for private ways of necessity. State v. Superior Court of Cowlitz County, 77 Wash. 585, 590, 137 P. 994 (1914).

Pursuant to the terms of the Washington State Constitution, the Washington Legislature in 1895 enacted Chapter 8.24 RCW, Private Ways of Necessity, which specifies that the "procedure for the condemnation of land for a private way of necessity ... shall be the same as that provided for the condemnation of private property by railroad companies ..." RCW 8.24.030. That statute further provides that "[i]n any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorney's fees and expert witness costs may be allowed by the court to reimburse the condemnee."

The Nobles elected to sue both Safe Harbor and Tillicum Beach to avoid the possibility of multiple lawsuits. The Trial Court and Court of Appeals determined that RCW 8.24.030 authorized the Court to award attorney's fees and costs incurred by one condemnee, Tillicum Beach, against another condemnee, Safe Harbor, based solely on the fact that Safe Harbor raised as one of its defenses the availability of an alternate route. Under the Courts' logic, where there are two or more feasible alternate routes for a way of necessity, a condemnor should sue the owner of only one of the routes. Then, after that owner predictably asserts the existence of an alternate route, the condemnor can sue the owners of any alternate route and shift the burden of paying the attorney's fees of the later added owner(s) onto the first named owner. Nothing in Chapter 8.24 RCW allows for such perverse fee shifting. Moreover, it punishes a condemnee for simply stating the law.

**A. Safe Harbor Was Not "Responsible" For Involving Tillicum Beach In This Litigation.**

"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). In light of that clear case law, Safe Harbor

raised the following defense: "There is a feasible alternative route available to the Petitioners."

Safe Harbor could have brought a third party complaint against Tillicum Beach and argued that property provided a more feasible route. However, the law does not require a condemnee to do so. Moreover, to do so may result in the condemnee being held responsible for the third party's attorney's fees. See Kennedy v. Martin, 115 Wn.App. 866, 63 P.3d 866 (2003). In Kennedy, a condemnee defendant 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. 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, holding that while the failure to add the second potential condemnee as a party could be evidence of necessity, it would not preclude consideration of the alternative route and the condemnor would still have the affirmative burden of showing that the route selected is

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

In view of the Kennedy Court's clear statement of the law, Safe Harbor did not bring any claim against or add Tillicum Beach or the Nobles' parents as parties. The Nobles were of course aware that there was another possible route over which they might obtain a way of necessity since they were using Tillicum Beach's property to access their own property. As articulated in Kennedy, supra, the Nobles had the affirmative burden of proving that the selected route over Safe Harbor's property was more equitable and less burdensome than a similar route over Tillicum Beach. Rather than meet that burden themselves and after learning that Safe Harbor had no intention of adding Tillicum Beach as a party, the Nobles made the conscious, voluntary decision to add Tillicum Beach so they could also assert a claim for an easement over the Tillicum Beach property. The Nobles were under no obligation to do so, and in fact under the law articulated in Kennedy, they 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. Not surprisingly, at the conclusion of the litigation Tillicum Beach sought to recover the fees and costs it incurred. 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, Tillicum Beach filed a motion for an award of fees and costs against Safe Harbor.

Tillicum Beach, in an effort to provide some basis for its unusual attempt to seek fees from Safe Harbor rather than from the Nobles (the son and daughter-in-law of one of its members), 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. Safe Harbor's statement of the law did not add to, increase or change the Nobles' legal burden. There thus was absolutely no requirement that the Nobles add Tillicum Beach.

Nevertheless, the Nobles made the voluntary decision to add Tillicum Beach for their own benefit. The Nobles' counsel quite candidly stated in his declaration cited above that the Nobles added 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 in separate actions. At oral argument on Tillicum Beach's motion for attorney's fees, the Nobles' counsel further 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 and thus lose the case against Safe Harbor and thereafter be required to bring another action against Tillicum Beach. (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 decisions. 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 it remains a voluntary choice and one that can only benefit the condemnor.

Ignoring all of the above, the majority of the Court of Appeals concluded that “[c]learly, the full responsibility for the costs of litigating the claimed alternative feasible access rests with Safe Harbor and the Stokes”. (Opinion at p.8) The sole basis articulated by the majority for this conclusion was that “Safe Harbor’s claim that the Nobles had a better route over Tillicum’s property was based solely on evidence Paul Stokes provided by affidavit...The trial court heard the evidence, visited the site, and concluded that Paul Stokes was not a credible witness.” (Opinion at p.7)

There are three significant flaws in the Court of Appeals’ analysis. First, if there truly was no basis for Safe Harbor’s claim that an alternate route was available, that would mean that the Nobles would easily be able to meet their burden of showing the route they selected was the most equitable. It would not mean that the Nobles would have carte blanche to sue a third party and shift responsibility for the fees incurred by that third party onto Safe Harbor. Second, as discussed more fully by the Dissent at 14-15 of the Opinion, Mr. Stokes’ affidavit was provided in response to an ancillary motion for immediate use brought by the Nobles. The affidavit was not part of Safe Harbor’s answer to the petition, nor was it part of the record at trial. Third, and most importantly, Safe

Harbor's assertion that there was an alternate available route was not based on any testimony of Mr. Stokes, but was instead based on the simple geographic fact that the Nobles' property is bordered by Tillicum's property, as well as the undisputed fact, acknowledged by the Nobles at trial, that the Nobles had over many months used Tillicum Beach's property as their sole means of accessing their property. (RP 11-12, 20).

Given the undisputed fact that there were two alternative routes available to the Nobles, the Nobles bore the burden of establishing that their chosen route over Safe Harbor's property was the most equitable. Rather than meet that burden themselves, calling Tillicum Beach residents as witnesses if necessary, the Nobles chose to sue Tillicum Beach and add it as a party. Pursuant to the clear law set forth in RCW 8.24.030 and as enunciated in Kennedy, supra, the Nobles as the condemnors are responsible for 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%.**

"[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).

Safe Harbor was entitled to recover its reasonable attorney's fees and costs even though the Court granted the easement to the Nobles over Safe Harbor's property. 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 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 and that the purpose of the statute is to reimburse the condemnee for

the expenses it reasonably incurs in responding to the petitioner's demand for an easement over its land. Sorenson, supra at 278-9.

The Trial Court found that the rates and time spent by Safe Harbor's counsel were reasonable. (RP 19-20). However, the Trial Court erroneously concluded that Safe Harbor was responsible for adding Tillicum Beach as a party to the litigation and compounded this error by determining that Safe Harbor's award should be reduced as a result. As Sorenson clearly states, regardless of whether or not Safe Harbor prevailed on the issues, as a condemnee it is entitled to an award of the fees it reasonably incurred in this matter, including the additional fees incurred as a result of the Nobles' voluntary decision to sue Tillicum Beach.

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. See Sorenson, supra. The purpose of the statute is to reimburse a condemnee for expenses it reasonably incurs in responding to the petitioner's

demand to use its land, including those fees incurred on appeal. Id.  
Safe Harbor is thus entitled to recover the attorney's fees it incurred  
in this matter, including on appeal.

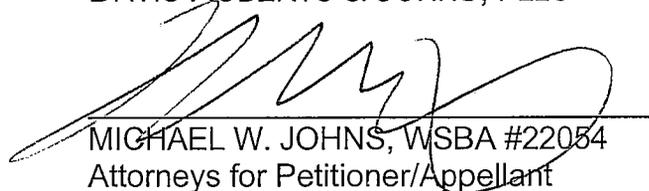
**VI.**

**CONCLUSION**

The Court of Appeals' decision shifts the burden from the  
condemnor to the innocent condemnee whenever two or more  
feasible alternatives for access exist. The Nobles made the  
voluntary decision to add Tillicum Beach for their own benefit.  
Neither RCW 8.24.030 nor case law support the taking of private  
property and charging the condemnee rather than the condemnor  
for the litigation cost associated with the taking. The Court of  
Appeals' decision presents a significant question of law under the  
Washington Constitution and an issue of substantial public interest.  
For those reasons, Appellant Safe Harbor respectfully requests that  
the Supreme Court accept this petition for review.

Respectfully submitted this 7<sup>th</sup> day of November, 2007.

DAVIS ROBERTS & JOHNS, PLLC

  
MICHAEL W. JOHNS, WSBA #22054  
Attorneys for Petitioner/Appellant

# **APPENDIX “A”**

FILED  
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BY \_\_\_\_\_

DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

FRED NOBLE and FAITH NOBLE, husband  
and wife,

Respondents,

v.

SAFE HARBOR FAMILY PRESERVATION  
TRUST, a Washington trust,

Appellant

And

TILLICUM BEACH, INC.,

Respondent.

No. 35227-3-II

PUBLISHED OPINION

ARMSTRONG, J. -- Fred and Faith Noble petitioned to condemn a private way of necessity across Safe Harbor Preservation Trust property based on our holding in *Safe Harbor Family Pres. Trust v. Noble*, No. 29134-7-II, 2004 Wash. App. LEXIS 502 (March 23, 2004) (*Safe Harbor I*). In answer, Safe Harbor (Paul and Agnes Stokes) alleged that a feasible

alternative route existed over the Nobles' adjoining landowners, Tillicum Beach, Inc. (Tillicum). The Nobles then joined Tillicum as a potential condemnee. The trial court found that an existing way over Safe Harbor property was the least burdensome and granted the Nobles an easement over Safe Harbor property. Thereafter the trial court found that Safe Harbor was responsible for Tillicum's involvement, and ordered: (1) Safe Harbor to pay Tillicum's attorney fees of \$39,920 and costs of \$226.20; and (2) the Nobles to pay Safe Harbor's attorney fees; however, the trial court reduced Safe Harbor's attorney fees by 70 percent (in order to award them only fees spent in litigating against the Nobles) to \$6,596.25. Safe Harbor appeals the order requiring it to pay Tillicum's attorney fees and the order reducing its claimed attorney fees against the Nobles. We affirm.

#### FACTS

In *Safe Harbor I* we set forth the facts:

In the mid-1940s, Ernest and Beulah Worl subdivided their property off Highway 101 on the Hood Canal into two lots. On one lot they created a 10-foot-wide ingress and egress easement for the benefit of the other lot. They recorded this easement.

In 1972, Paul and Agnes Stokes acquired the servient estate once owned by the Worls. They deeded the property to Safe Harbor in 1985. The Stokeses continued to live on the property, which is now in trust for the benefit of their children.

In 1998, the Nobles acquired the dominant estate once owned by the Worls.

The record easement has not been used since 1972, if ever. Instead, the Nobles and their predecessors have entered off Highway 101 through a gate and crossed a paved courtyard on Safe Harbor's property [(easement by usage)] to access their own. The trial court specifically found that there was no evidence explaining why the access used was outside the record easement.

The Stokeses erected a barrier across the courtyard access sometime before the Nobles purchased their property. The barrier was in place when the Nobles purchased their lot and they noticed it, but they never asked the Stokeses about it or discussed using Safe Harbor's property to access their own.

*Safe Harbor I*, at \*2-3. We also explained that because the Skokomish Tribe would not issue the Nobles a development permit for their record easement, the Nobles only recourse was an action to privately condemn a way of necessity. *Safe Harbor I*, at \*7.

The Nobles petitioned to condemn a private way of necessity across Safe Harbor's property. Safe Harbor answered that the Nobles had "a feasible alternative route" over Tillicum's property; Safe Harbor also counterclaimed for damages because the Nobles' condemnation action prevented Safe Harbor from finalizing a sale of its property. Clerk's Papers (CP) at 177-79. The Nobles then successfully moved to amend the original petition to join adjacent landowner Tillicum as an additional party defendant.

The trial court ruled that the Nobles' proposed route over Safe Harbor property was less burdensome than the route over Tillicum's property, it granted the Nobles an easement for ingress and egress over the proposed route, and awarded Safe Harbor \$3,300 for its loss of the property's use.

Tillicum moved for attorney fees and costs against Safe Harbor, arguing that:

Where the factual claims [of a litigant] are not only unfounded, but the litigant fails to present any evidence in support of them at trial, then the [trial court] should consider these failures in determining a reasonable attorney fee to award to the opposing party.

CP at 92-93. The trial court ordered Safe Harbor to pay Tillicum's attorney fees and costs, explaining that:

Clearly in this case, [Safe Harbor] was responsible for involving [Tillicum] as a potential alternate condemnee in this action.

Under [*Kennedy v. Martin*, 115 Wn. App. 866, 65 P.3d 866 (2003),] RCW 8.24.030[,] and a balancing of the equities present in this case, the court will grant the request of [Tillicum] for an award of attorney fees and costs from [Safe Harbor].

CP at 16. The trial court also awarded Safe Harbor attorney fees and costs from the Nobles, but it reduced the award because:

for purposes of an award of attorney fees, time stated on the billings to [Safe Harbor] should be reduced by 70 percent representing a conservative estimate of the time spent involving [Tillicum] as an alternate condemnee and the time spent regarding issues related to the potential sale of the [Safe Harbor] property.

CP at 19-20.

On appeal, Safe Harbor essentially argues that the trial court erred in ordering it to pay Tillicum's fees and reducing its award of fees and costs against the Nobles because (1) the Nobles joined Tillicum as a party and, thus, should be liable for Tillicum's fees, and (2) Safe Harbor had a right to raise the affirmative defense that the Nobles had a more feasible access route over Tillicum's property.

## ANALYSIS

### I. TILLICUM'S ATTORNEY FEES

The right to an easement by way of necessity arose out of English common law. *Horner v. Heersche*, 202 Kan. 250, 253, 447 P.2d 811 (1968) (quoting *Collins v. Prentice*, 15 Conn. 39 (1842)). The majority of states still use the common-law approach to establish an easement by way of necessity. *Horner*, 202 Kan. at 252; see also *Adams v. Planning Bd. of Westwood*, 64 Mass. App. Ct. 383, 389-90, 833 N.E.2d 637 (App. Ct. 2005); *Stock v. Ostrander*, 233 A.D.2d 816, 817-18, 650 N.Y.S.2d 416 (App. Div. 1996); *Carstensen v. Chrisland Corp.*, 247 Va. 433, 438, 442 S.E.2d 660 (1994). In common-law matters of equity, a trial court has broad discretion to create an equitable remedy. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (quoting *In re Foreclosure of Liens*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994)).

In Washington, chapter 8.24 RCW governs a condemnation proceeding for a private way of necessity. *Brown v. McAnally*, 97 Wn.2d 360, 366-67, 644 P.2d 1153 (1982) (RCW 8.24.010 implements the right to condemn a “private way of necessity” established in Washington Constitution article 1, section 16). Nonetheless, the statute grants trial courts considerable discretion in awarding fees and costs. RCW 8.24.030 provides: “In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys’ fees and expert witness costs *may* be allowed by the court to reimburse the condemnee.” (Emphasis added.) Rather than mandating an award of fees and costs based on statutory standards, the legislature merely stated that the trial court “may” award fees and costs. That the trial court “may” award fees and costs necessarily grants the court discretion to decide what equitable grounds support an award and the amount of the award. *See Kennedy*, 115 Wn. App. at 872 (citing *Beckman v. Wilcox*, 96 Wn. App. 355, 367, 979 P.2d 890 (1999)) (a trial court has discretion to award fees in light of the circumstances in each case). Moreover, although the statute limits the recipients to condemnees, it does not limit the parties against whom the court may award fees and costs.

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

*Beckman*, 96 Wn. App. at 365-66 (statutory language suggests that the legislature intended broad application of RCW 8.24.030).

Safe Harbor argues that “the clear law set forth in RCW 8.24.030 and . . . enunciated in *Kennedy*” requires the Nobles to pay Tillicum’s attorney fees because the Nobles joined Tillicum in the action.

In *Kennedy*, the trial court ordered one set of condemnees to pay another’s attorney fees after the former joined the latter in the action. *Kennedy*, 115 Wn. App. at 868. On appeal, the first condemnees argued that they should not be penalized for adding the second condemnee because they had a right to establish an alternate path for condemnation. *Kennedy*, 115 Wn. App. at 870. They also argued that only condemnors may incur liability under RCW 8.24.030. *Kennedy*, 115 Wn. App. at 872-73. We rejected both arguments, reasoning that “nothing in the language of RCW 8.24.030 or in the case law . . . prevents a court from requiring the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees.” *Kennedy*, 115 Wn. App. at 873.

Moreover, that Safe Harbor did not join Tillicum does not immunize it from responsibility for Tillicum’s attorney fees under RCW 8.24.030. Safe Harbor’s claim that the Nobles had a better route over Tillicum’s property was based solely on evidence Paul Stokes provided by affidavit. He stated that the Nobles regularly used a driveway over Tillicum’s property to get to their property and that he had helped create the route some years earlier with his backhoe. The Nobles and Tillicum presented testimony that Stokes had never worked on any road over Tillicum’s property and that no road existed over the property, in part because of a blocking drain field. The trial court heard the evidence, visited the site, and concluded that Paul Stokes was not a credible witness.

RCW 8.24.030 grants trial courts broad discretion in awarding attorney fees. We conclude that the trial court did not err in looking beyond the mechanical process of joinder to answer the question of who was responsible for the litigation with Tillicum. Clearly, the full responsibility for the costs of litigating the claimed alternative feasible access rests with Safe Harbor and the Stokes.

## II. REDUCTION OF ATTORNEY FEES

Safe Harbor faults the trial court for reducing its award of attorney fees by 70 percent to reflect the portion of the litigation fees related to Tillicum.

As previously discussed, the trial court has broad discretion to award attorney fees under RCW 8.24.030. *Sorenson*, 70 Wn. App. at 279. A court abuses its discretion only if it is manifestly unreasonable or based on untenable grounds. *Beckman*, 96 Wn. App. at 367. “In all cases . . . it is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the [attorney fees] calculation.” *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 540, 151 P.3d 976 (2007).

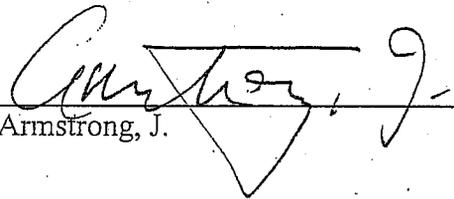
The trial court reduced Safe Harbor’s award of attorney fees and costs by “balancing of the equities.” CP at 18-19. After finding that the hourly rates Safe Harbor claimed were reasonable, the trial court explained:

From a review of the billings attached to the [d]eclaration of [Safe Harbor’s counsel] . . . clearly more than [fifty percent] of the time expended on behalf of [Safe Harbor] was specifically for or due to the involvement of [Tillicum] as an alternate condemnee and a smaller portion of time was spent regarding matters related to the sale of the [Safe Harbor] property. Additionally, the [trial court] will find that the time allocated for many services that may have been necessary without an alternate condemnee, such as, depositions and preparation therefore, trial preparation and trial time were substantially increased due to the inclusion of the proposed alternate condemnee. The [trial court] finds that for purposes of an award of attorney fees, time stated on the billings to [Safe Harbor] should be reduced by [seventy] percent representing a conservative estimate of the time

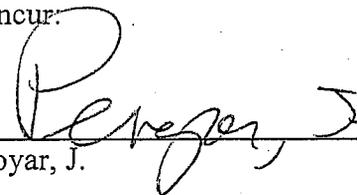
spent involving [Tillicum] as an alternate condemnee and the time spent regarding issues related to the potential sale of the [Safe Harbor] property.

CP at 19-20. Safe Harbor does not argue that the trial court erred in reducing attorney fees and costs based on its counterclaim regarding the potential sale of Safe Harbor; instead, it treats the entire 70 percent reduction as due to Tillicum's involvement. And we have held that the trial court did not err in awarding fees and costs based on Safe Harbor's role in requiring litigation as to a possibly more feasible alternative route over Tillicum's property. Thus, we find no error in the trial court's reduction of fees from the Nobles to Safe Harbor based on the same rationale.

Affirmed.

  
\_\_\_\_\_  
Armstrong, J.

I concur:

  
\_\_\_\_\_  
Penoyar, J.

Van Deren, A.C.J. -- I respectfully dissent. I disagree with the majority that RCW 8.24.030 can be read to require the actual condemnee to pay a potential condemnee's attorney fees and costs when the condemnor, not the actual condemnee, joined the alternative condemnee and requested condemnation of the alternative condemnee's land. I would hold that the trial court abused its discretion in requiring Safe Harbor to pay any portion of Tillicum's attorney fees and costs based on its conclusion that Safe Harbor was responsible for Tillicum's presence in the lawsuit. To hold otherwise unreasonably burdens the condemnee's statutory right to assert alternative routes for condemnation and requires the first named condemnee to prove the alternate route is better or face the imposition of fees for the alternate condemnee, contrary to RCW 8.24.025.

Generally, a trial court may award attorney fees "only when authorized by a contract, statute, or recognized ground of equity." *State Farm Mut. Auto. Ins. Co. v. Johnson*, 72 Wn. App. 580, 593, 871 P.2d 1066 (1994). In order to reverse an attorney fees award, an appellate court must find the trial court manifestly abused its discretion. *Beckman v. Wilcox*, 96 Wn. App. 355, 363, 979 P.2d 890 (1999). "That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons." *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Here, attorney fees are authorized by RCW 8.24.030, which provides in relevant part: "In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable [attorney] fees and expert witness costs may be allowed by the court to reimburse the condemnee." (Emphasis added.) "[RCW 8.24.030] 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.” *Sorenson v. Czinger*, 70 Wn. App. 270, 279, 852 P.2d 1124 (1993).

The Nobles, not Safe Harbor, sued Tillicum to condemn their property for the Nobles’s access. But the trial court reasoned that, because Safe Harbor exercised its legal right to assert a possible alternate route for Nobles’s access, it was responsible for Tillicum’s presence in the lawsuit. The trial court relied on *Kennedy v. Martin*, 115 Wn. App. 866, 63 P.3d 866 (2003) to support its imposition of fees and costs against Safe Harbor. But in *Kennedy*, the condemnee sued the adjacent landowner, requiring it to expend fees to defend the condemnee’s (not the condemnor’s) suit. 115 Wn. App. at 868.

Here, there is no dispute that the Nobles, the condemnor, sued Tillicum to condemn Tillicum’s land for Nobles’s use. Therefore, the Nobles’s tactical decision to assure that the trial court condemned either Safe Harbor’s or Tillicum’s property in the same lawsuit does not implicate *Kennedy*. Thus, the trial court’s reliance on *Kennedy* was misplaced.

Furthermore, *Kennedy* made it clear that alternative condemnees are not necessary parties in condemnation actions and that the burden of proving the best route remains on the condemnor. 115 Wn. App. at 870-71. In *Kennedy*, a condemnee asserted an alternate route and sued the adjacent landowners, joining them in the condemnation action as alternate condemnees. 115 Wn. App. at 867. The trial court awarded both the easement and the adjacent landowners’ attorney fees against the actual condemnee. *Kennedy*, 115 Wn. App. at 867-68. On appeal, the condemnee, relying on *Sorenson*, argued that he had no choice but to join the adjacent landowners. *Kennedy*, 115 Wn. App. at 870. We disagreed, stating that “[f]ailure to join an owner of the [proposed alternate route parcel] does not preclude consideration of the alternate

route,” and “[n]othing in *Sorenson* requires the joinder of the owners of the parcel containing the condemnee’s proposed alternative route.” *Kennedy*, 115 Wn. App. at 870-71.

When a potential condemnee asserts the existence of an alternate feasible route, “[t]he burden then shifts to the condemnor to show that the chosen route is more equitable.” *Kennedy*, 115 Wn. App. at 870. “The enactment of RCW 8.24.025 eliminated the condemnee’s burden to prove oppression or bad faith in the selection among alternative routes to be condemned, shifting the burden to the condemnor to show the chosen route is more equitable than the alternative.” *Sorenson*, 70 Wn. App. at 276 n.2.<sup>1</sup> The majority fails to apply this rule here and implies that the first condemnee has the burden of proving that the best route is the alternative it suggests.

Here, the record demonstrates that Safe Harbor only asserted a possible alternate route through the Tillicum property that the trial court decided was not the optimum route. Awarding fees against Safe Harbor under these circumstances unreasonably burdened its right to assert the existence of an alternate route and erroneously shifted the burden of proof to Safe Harbor to

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<sup>1</sup> In *Sorenson*, the condemnee proposed an alternate route that was almost ten times longer than the condemnor’s suggested route, crossed several other landowners’ property in addition to his own, failed to consider a vertical cliff, and was more costly to build. 70 Wn. App. at 273. As occurred here, the condemnee did not sue the alternate condemnee. Division Three of this court reversed the trial court’s ruling that the alternate route was feasible and remanded for further proceedings, but it affirmed the trial court’s award of attorney fees in favor of the first condemnee and awarded the condemnee attorney fees on appeal. *Sorenson*, 70 Wn. App. at 279.

show that the alternative route was more equitable, contrary to RCW 8.24.025.<sup>2</sup>

The majority agrees with Tillicum that Safe Harbor's decision not to "join Tillicum does not immunize it from responsibility for Tillicum's attorney fees." Majority at 6. The majority reasons that "Safe Harbor's claim that the Nobles had a better route over Tillicum's property was based solely on evidence provided by affidavit from Paul Stokes." Majority at 6. But the assertion of an alternative route was Safe Harbor's affirmative defense to the Nobles's petition that, by statute, shifted the burden to the Nobles to prove impracticality of the alternate route. Safe Harbor had no burden to show that the alternate route was more practical. And, as Safe Harbor noted, "it is not up to Safe Harbor to determine exactly where an easement over [Tillicum] should be located."--Clerk's Papers (CP) at 226.

The majority's decision requires a condemnee to prove that a specific alternate route is better or face being denied its attorney fees and costs and being ordered to pay the alternate condemnee's fees and costs. Thus, the majority's decision modifies RCW 8.24.030 to allow an award of attorney fees and costs against any condemnee who exercises its statutory right to suggest an alternative route in a condemnation action. It makes the first condemnee

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<sup>2</sup> RCW 8.24.025 states:

If it is determined that an owner, or one entitled to the beneficial use of land, is entitled to a private way of necessity and it is determined that there is more than one possible route for the private way of necessity, the selection of the route shall be guided by the following priorities in the following order:

- (1) Nonagricultural and nonsilvicultural land shall be used if possible.
- (2) The least-productive land shall be used if it is necessary to cross agricultural land.
- (3) The relative benefits and burdens of the various possible routes shall be weighed to establish an equitable balance between the benefits to the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run.

“responsible” for involving the alternate condemnee simply by suggesting an alternative route.

Majority at 1.

The majority affirms an attorney fees award against Safe Harbor that is six times the amount of fees awarded to Safe Harbor from the Nobles, who are the only party benefiting from the condemnation lawsuit. Thus, Safe Harbor has been punished for suggesting an alternate route and for the Nobles’s lawsuit against Tillicum, a result contrary to RCW 8.24.030. I would hold that this reading of the legislative provisions is untenable, is manifestly unreasonable, and, therefore, an abuse of the trial court’s discretion.

I believe that the majority also erroneously endorses the trial court’s reference to a “balancing of the equities present in this case” in its award of and reduction of attorney fees, CP at 16, and its conclusion of law stating that “balancing all of the equities, this [c]ourt should enter its judgment” against Safe Harbor.<sup>3</sup> Majority at 7.

It is unclear what the trial court intended with its use of the phrase “balancing the equities” in this context. The phrase “balancing of the equities” applies in cases where a court sits in equity. *See, e.g., Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999) (doctrine of balancing of the equities evoked where the plaintiff sought an injunction). The language of RCW 8.24.025 requires the trial court to strike an “*equitable balance* between the benefits to the land for which the private way of necessity is sought and the burdens to the land

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<sup>3</sup> Throughout the litigation both Tillicum and the Nobles alluded to the facts surrounding the creation of the Nobles’s landlocked parcel. But the rights formerly adhering to the Nobles’s parcel were extinguished by law. *See Safe Harbor I*. And regardless of whether the holders of the formerly dominant parcel can be faulted for failing to improve the former easement of record before environmental concerns made the improvement impossible or whether Safe Harbor can be faulted for its acquiescence in allowing access, fault is not a pertinent issue in condemnation actions. The sole issue before the trial court once “it is determined that there is more than one possible route” under RCW 8.24.025, is which route is the least burdensome.

over which the private way of necessity is to run.” (Emphasis added.) This language is not used in RCW 8.24.030 regarding the award of attorney fees and costs to the condemnee.

Furthermore, four equitable grounds may support the award of attorney fees: (1) bad faith conduct, (2) preservation of a common fund, (3) protection of constitutional principles, and (4) private attorney general actions. *Dempere v. Nelson*, 76 Wn. App. 403, 407, 886 P.2d 219 (1994). The trial court did not rely on any of these grounds nor does the record support an award or reduction of an award of attorney fees and costs based on equity. *See Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 930, 982 P.2d 131 (1999) (concluding that a trial court abused its discretion in awarding attorney fees for bad faith conduct based on its finding that testimony was not credible).

The trial court relied on its conclusion that Safe Harbor was “responsible” for Tillicum’s involvement in the case in its attorney fees’ decision. CP at 16. It accordingly entered an attorney fee award against Safe Harbor that is six times the amount of fees awarded to Safe Harbor from the Nobles. Such a broad reading of the statute allows an absurd result. *See Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 971, 977 P.2d 554 (1999) (When interpreting statutes, we should avoid absurd results or strained consequences).<sup>4</sup>

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<sup>4</sup> Paul Stokes’s affidavit, to which the majority refers, was part of Safe Harbor’s response to Nobles’s ancillary action for *immediate* use of an easement across Safe Harbor’s property in which Stokes declared that he “used the backhoe to clear and level the *driveway from Mr. Noble’s parents’ property to the [Nobles’s] property*. The [Nobles] have continued to use this access way off and on over the past six years since acquiring their property.” CP at 195 (emphasis added). Safe Harbor’s answer to Nobles’s condemnation petition does not incorporate or rely on this affidavit and merely asserts that “[t]here is a feasible alternative route.” CP at 178.

I address only the suggestion of a false statement. The majority states that: [Paul Stokes] stated that the Nobles regularly used a driveway over Tillicum’s property to get to their property and that he helped create the route some years earlier with his backhoe. The Nobles and Tillicum presented testimony that

The trial court also reduced Safe Harbor's attorney fees and costs award by seventy percent. A reduction of attorney fees and costs based on untenable grounds is an abuse of discretion. See *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). Here the trial court stated that, based on "a balancing of the equities present in the case," the reduction was appropriate. CP at 18. The trial court did not find that Safe Harbor's hourly rates were unreasonable nor did it state what equities it considered. The record is clear that the trial court again based the reduction ("more than [fifty percent]") on its earlier finding that Safe Harbor, by asserting an alternate route, was responsible for Tillicum's involvement in the lawsuit; although it was solely the Nobles who sued Tillicum. CP at 19. As previously discussed, I believe such a ruling is based on untenable grounds and, therefore, a reduction of attorney fees based on this finding constitutes an abuse of the trial court's discretion.

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Stokes had never worked on any road over Tillicum's property and that no road existed over the property, in part because of a blocking drain field. The trial court visited the site and concluded that Paul Stokes was not a credible witness.

Majority at 6 (citations omitted).

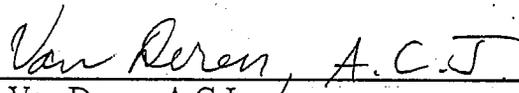
But the trial court's finding of fact states only that "Mr. Stokes was not a credible witness." CP at 127. When the findings of fact are read in their entirety, Stokes's lack of credibility flowed from an 80-plus-year-old man's stubborn defense of his land and his hazy memory of 33 years' presence thereon. The trial court actually found that "Safe Harbor claimed that an alternate route existed. . . . *It did not specify the placement of the route*, but it intended that the route go over [Tillicum.]" CP at 122 (emphasis added).

And the testimony the majority refers to, while disputing Stokes' affidavit, confirms that, before the trial court's site visit, but after the time Paul Stokes said he used his backhoe, a new building and a blocking drain field were constructed over the area Stokes stated he leveled in the ancillary affidavit.

Therefore, evidence of the earlier backhoe use on the Tillicum property was undoubtedly eradicated by the construction of the new building and drain field "right in front of the gap in the fence to the Nobles's property." Br. of Resp't Tillicum at A-30. And Paul Stokes did not testify about the backhoe use at trial nor was it addressed in his deposition or by the trial court's findings of fact.

I would hold that the trial court manifestly abused its discretion and would reverse the award of attorney fees against Safe Harbor, reverse the reduction of fees to Safe Harbor, and remand for the trial court's determination of whether those fees should be awarded against the Nobles.

I would also grant Safe Harbor's request for reasonable attorney fees and costs on appeal under Rules of Appellate Procedure (RAP) 18.1<sup>5</sup> and RCW 8.24.030 because RCW 8.24.030 allows attorney fees "[i]n any action" to reimburse the condemnee. *Sorenson*, 70 Wn. App. at 279.

  
\_\_\_\_\_  
Van Deren, A.C.J.

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<sup>5</sup> RAP 18.1(a) provides:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

# **APPENDIX “B”**

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[RCWs > Title 8 > Chapter 8.24 > Section 8.24.030](#)[8.24.025](#) << [8.24.030](#) >> [8.24.040](#)**RCW 8.24.030****Procedure for condemnation — Fees and costs.**

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this chapter shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies.

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.

[1988 c 129 § 3; 1913 c 133 § 2; RRS § 936-2. Prior: 1895 c 92 § 2.]

**Notes:**Condemnation by corporations: Chapter [8.20](#) RCW.Railroads -- Corporate powers and duties: RCW [81.36.010](#).

Special railroad eminent domain proceedings:

appropriation of railway right-of-way through canyon, pass or defile: RCW [8.20.140](#).extensions, branch lines: RCW [81.36.060](#).railroad crossings: RCW [81.53.180](#).state university -- Rights-of-way to railroads: RCW [26B.20.330](#).


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# APPENDIX “C”

Westlaw

Page 1

West's RCWA Const. Art. 1, § 16

▷

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
CONSTITUTION OF THE STATE OF WASHINGTON  
ARTICLE 1. DECLARATION OF RIGHTS

→§ 16. Eminent Domain

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.

Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Current through amendments approved 11-7-2006

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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**

FRED NOBLE and FAITH NOBLE, husband  
and wife,

Respondents,

v.

SAFE HARBOR FAMILY PRESERVATION  
TRUST, a Washington trust,

Appellant

And

TILLICUM BEACH, INC.,

Respondent.

No. 35227-3-II

**ORDER AMENDING OPINION**

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

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

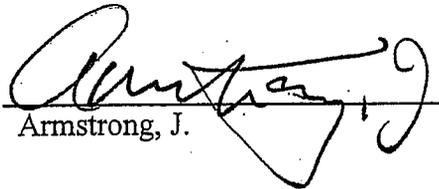
**III. ATTORNEY FEES ON APPEAL**

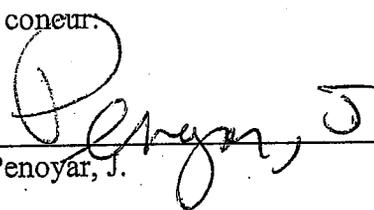
Safe Harbor and Tillicum request attorney fees and costs on appeal under RCW 8.24.030. RAP 18.1(a) allows recovery of attorney fees and costs on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees

#35227-3-II

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

IT IS SO ORDERED.

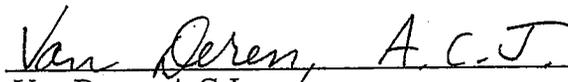
  
Armstrong, J.

I concur.  
  
Penoyar, J.

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

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

IT IS SO ORDERED.

  
Van Deren, A.C.J.