

**FILED**

**FEB 16 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 28799-8**

**Consolidated with**

**NO. 291626**

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

**DIVISION III**

**EDWARD J. VOTAVA,  
Respondent,**

**v.**

**JAN KRYNS,  
Appellant,**

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**KRYN'S REPLY BRIEF**

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## I.

### REFERENCES TO STATEMENT OF THE CASE

A. By reference to the assertions of fact made by Respondent on page 1 of the Votava brief<sup>1</sup> regarding the steel gate maintained by Votava, Appellant Kryns draws the court's attention to the original citations as well as to Plaintiff's Exhibit 13. Assuming that the trees were removed, the Votava gate still barred usage of the road north of the Northeast Quarter of Section 31. Memorandum Decision, Note 2, page 4 found at CP 241.

B. Irrespective of whether it was the center line post or the easternmost post at Allen Road (see pp. 1 – 2 of the Votava brief), that post along with the remainder of the parallel fence (CP, 244; ¶5, Findings of Fact, CP 140), does not interfere with the travelled part of the roadway. Therefore, whether the reference to the middle or the eastern post is accurate, such is immaterial to the outcome of this appeal.

C. Regarding the time of knowledge by Mr. Kryns of the actual location of the road boundaries, the reference on page 406 of the Report of Proceedings specifically designates the Votava survey as the actual date of the knowledge of the boundaries of the roadway. See lines 5 – 8. It was after this realization that it became clear that the telephone boxes, pole and posts maintained by the phone company were all within the complained of twenty feet. RP 406 – 07.

The statement found at page 2 of Respondent's Brief is illuminating...

Votava hired Sewell and Associates to determine the location of the North – South fence relative to the section's boundary line.

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<sup>1</sup> The names "Votava" and "Kryns" are used in a shortened form from time to time to designate the parties.

This conclusion follows without a citation to the record. Nevertheless, one would perforce have to establish by survey the section's boundary line in order to determine any other line (North – South fence) relative to the section's boundary line.

D. Votava argues that the record reflects that Votava testified that during the 1920s, 1930s, 1940s and 1950s, he used the contested road to visit his relative, John Podlas (Votava Brief, 6), referring to RP 103. The only factual references to years are to “the late 1920s or the early 1930s...” on that page. RP 103.

E. At page 7 of Votava's brief, Votava claims that Jan Kryns and his father visited his grandfather North of Section 31, citing to RP 386 and 387.

By direct reference to these pages of the Report of Proceedings, that citation is incorrect. There is no reference to Jan Kryns' father on those pages.

F. At page 7 of Votava's brief, it is argued that the contested road was used by many members of the public for a period of more than 10 years. The factual basis for this assertion refers to Assignment of Error No. 1 which is found at pages 6 and 7 of the brief.

This reference has been addressed at ¶s D & E above.

Further, there is only a reference to the owners of properties in the area, not to any public at large. RP 104 – 05.

G. After referring to actions of Jan Kryns, Votava argues: “This all occurred after he [Kryns] knew the road was a deeded county road,” referring to RP 404 – 405. Votava Brief, 12.

The specific reference was to December, 2006, at the earliest. RP 404 (lines 4 to 11), 405 (lines 3 to 10), 405 (line 25), 406 (lines 1 to 8).

## II.

### RESPONSE TO ARGUMENT OF RESPONDENT

A. **The reasoning of Kryns in his trial memorandum makes sense when the relevant factual determinates are acknowledged.**

Respondent takes the position, as he must, by assuming once the deeds were executed in favor of the county in May, 1915, and the county signed the Resolution on February 7, 1916, that all else has no significance. See Respondent's Brief, 3 – 7.

However, the position of Mr. Kryns is not that in general the road may have been used by residents to reach their homes. Rather, the issue is posited that in order for the rule applied by the court with respect to the award of damages there must be something more so as to put Kryns on notice of the way being in fact a public road and thus open at any time to anyone to use it.

In fact, the court without any hesitation whatsoever remarked in its Memorandum Decision as follows:

**Presumably, since one assumes that the County would follow the provisions of the state law, I must conclude that the County ordered the "survey" and "establishment" but not the "construction" or "improvement" of the Elk – Diamond Lake Road (Emphasis supplied).**

CP 241.

And this is precisely where the original legal authorities cited by the Kryn's trial counsel<sup>2</sup> become relevant. Because there is a lack of the denoted and "presumably" obligation to open the road, what one really is dealing with is the situation where private parties are contesting the effect

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<sup>2</sup> Present counsel became engaged by Mr. Kryns only after the judgment had been entered.

of individual actions rather than the public entitlement that Votava has relied upon during the course of this litigation. CP 6 – 21, 52 – 56, 57 – 67, 83 – 93, 119 – 125, 127 – 130.

Thus, the distinctions that the trial court drew (CP 239 – 240) from the citations by Kryns' counsel in the Trail Memorandum (CP 74 – 77) become unpersuasive when the public road establishment is placed in substantial question. Rather, as available authority by analogy in the case of a less than a firm public road creation, the original argument asserted by Kryns (CP 75 – 77) makes sense and is based upon sound legal reasoning.

If the above reasoning in turn is finally adopted by this court, then the original weighing by the trial court of equities regarding damages (CP 241 – 242) should be accepted by this court as the legally approved method of addressing damages within the context of this case.

**B. This appeal is not violative of RAP 18.9(a).**

Firstly, when present counsel became involved in this case, it was clear that there was no factual basis for having John Kryns (a 98 year old man) and the John P. Kryns Revocable Living Trust in this appeal. As a consequence, present counsel for Kryns proceeded to have both John individually (then having died) and the Kryns Trust removed from this case. Had counsel for Votava not concurred in that action, who knows but that RAP 18.9(a) and CR11 sanctions may have been appropriate against Votava.

Secondly, although Votava seeks to convince this court that this appeal is totally devoid of merit by reference to the issues raised by Kryns in his Opening Brief and in this Reply Brief, it is submitted that the Votava request for attorneys fees on the basis of RAP 18.9(a) is all conceived. Mahoney v. Shinpoch, 107 Wn. 2d, 679, 691, 732 P.2d 510 (1987). In this regard, all doubts are resolved in favor of the appellant, i.e., Kryns. Holiday vs. City of Moses Lake, 157 Wn. App. 347, 357, 236 P.3d 981 (2010).

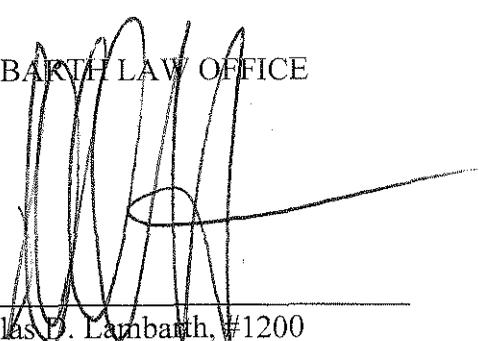
**III.**

**CONCLUSION**

This court should reverse the damage award of the trial court and deny the request by Votava for attorneys fees.

Dated: February 15, 2011.

LAMBARTH LAW OFFICE



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Attorney for Appellant

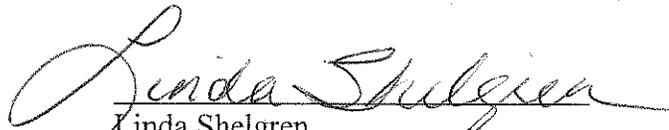
## DECLARATION OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington, that I served the foregoing: **KRYN'S REPLY BRIEF** on:

James Parkins, Esq.  
1304 W. College Ave.  
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Attorney for Respondent

- [X] by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each attorney's last-known address and depositing in the U.S. mail at Newport, Washington on the date set forth below.
- [ ] by causing a copy thereof to be hand-delivered to said attorneys at each attorney's last-known office address on the date set forth below.
- [ ] by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to each attorney's last-known address on the date set forth below; or
- [ ] by faxing a copy of thereof to each attorney at each attorney's last-known facsimile number on the date set forth below.

Done at Newport, Washington, on February 15, 2011.

  
Linda Shelgren