

FILED

DEC 19 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293360-III

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

**CAROL A. FRANKLUND,
PLAINTIFF-APPELLEE**

vs.

**ARVID K. OLSON,
DEFENDANT-APPELLANT**

DEFENDANT-APPELLANT'S OPENING BRIEF

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I. Assignments of Error:

- (a) The trial court committed reversible error by concluding it was discretionary to ignore a twenty-five year permanent fence and the adverse possession of the appellant-defendant concerning a contested driveway, bordered by the fence, which clearly cut off any claims of easement granted by deed; the court then exacerbated the error, concluding the deeded easement would eliminate the ownership rights of the appellant-defendant to the contested driveway..
- (b) The trial court committed reversible error by refusing to find that the evidence of record supported merely a permissive use by the adjoining landowner, plaintiff-respondent Franklund, and refusing to find that she had no ownership rights to the contested driveway for ingress and egress, since her ingress and egress was situated on the opposite side of her real property.

II. Issues:

- (a) *Was there a twenty-five year permanent fence on the plaintiff-respondent's side of the contested*

driveway, and if so, does that fence cut off any claims of the respondent concerning easement on the contested driveway, when the evidence showed her use was permissive?

- (b) *Did the trial court commit error by refusing to acknowledge the contested driveway was owned by the appellant through adverse possession, and the respondent had been granted merely permissive use?*

III. Statement of the Case:

3.1 *There was a twenty-five year permanent fence, and it defined the ownership boundary of Arvid Olson's real property.*

One of the uncontroverted facts in this case is that the appellant controlled, held for his exclusive use, developed and maintained a driveway (the contested driveway) over to the west bordered by a permanent fence that was on the side of his real property closest to the respondent's property, and that fence was on the outside (western) boundary of the contested driveway. The respondent (Franklund) had no evidence to indicate she constructed that permanent fence, nor that it was less than twenty-five years old. Mr. Olson moved onto his

property in 1975. *RP*¹, p. 71, lines 5-8. He allowed permissive use of his driveway (the contested driveway) but only for brief periods of time. *RP*, p. 76, lines 14-25; p. 77, line 1. He possessed, exclusively, the contested driveway. *RP*, p. 81, lines 5-23.

3.2 *The centerline of any easement described in any deed was actually the western boundary of the appellant's real property.* The testimony of surveyor James Bell conclusively established that the legally described western boundary of the appellant's real property was the centerline of any deeded easement between the parties. *RP*, p. 19, lines 21-23.

3.3 *The respondent only used the contested driveway permissively for about one and one-half years.* *RP*, p. 25, lines 18-21. This fact was clearly established by the testimony of the respondent herself. It was after this permissive use that the respondent became aware there was a problem with her continued use of the contested driveway. *RP*, pp. 26-30; 46-47.

3.4 *Exhibits 2, 9 and 27 are instructive to illustrate the established boundaries between the parties' real property.* *RP*, 49-51. The photographs show a historical fence that was a western boundary of the contested driveway, and clearly the Franklund property could not use the contested driveway, until

¹ "RP" is "Report of Proceedings," the transcript of the one-day bench trial.

the plaintiff-respondent destroyed the fence. *RP*, p. 57, lines 23-24.

IV. **Argument:**

4.1 *This case should be controlled by the appellant's exclusive use of the contested driveway, without permission and adversely, with a claim of right, where his use was indeed notorious.* Mere use without permission may not be sufficient to establish adverse use. See *Cullier v. Coffin*, 57 Wn.2d 624, 628, 358 P.2d 958 (1961). In *Cullier*, the claimants asserted a prescriptive easement to use an orchard road owned and used by their neighbors. The claimants did not ask permission and established use for the prescriptive period. The court concluded that unchallenged use was but one circumstance from which an inference of adverse use might be drawn. *Id.* at 627. The court also concluded that the identity of the person who made and used the road was another consideration to be examined. *Id.* The court explained that where the owner shares use of the road with the claimant, there is an inference of neighborly accommodation. *Id.* Significantly, the court held that "[t]he fact that no permission was expressly asked, and that no permission was expressly given, does not preclude a use from being permissive under the circumstances." *Id.* at 626. The court concluded that even though the claimants used the road, no

easement had been established because the record was devoid of evidence demonstrating a purpose to impose a separate servitude on the owner's property. *Id.* at 628. But here, there was more than merely a prescriptive easement: there was a taking, and the appellant's rights vested after the prescriptive period had run, far sooner than Franklund's appearance on the scene. See, for example, the unrefuted testimony of Arvid Olson, establishing he maintained the contested driveway, he improved the contested driveway, and he established his dominion and control over the contested driveway as an exclusive, vested right, years before Ms. Franklund purchased the adjacent property. *RP*, p. 79, lines 4-25; pp. 80-84. Her intermittent use of the contested driveway then became merely permissive use. *RP*, p. 84, lines 3-9.

Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes *prima facie evidence of hostile possession* up to the fence. *Muench v. Oxley*, 57 Wn.2d 539, 358 P.2d 312 (1961). See, also, *Roy v. Cunningham*, 46 Wn. App. 409, 412, 731 P.2d 526 (1986) (upholding a finding of adverse possession based on the objective use of the property up to the fence line, despite the fact that the fence may have originally been erected to control livestock). Through adverse possession Arvid Olson

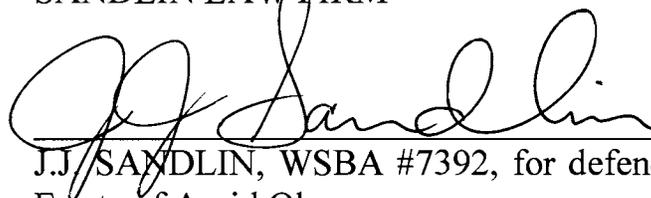
had taken the contested driveway as his own, free and clear of all competing interests, years before Ms. Franklund purchased the adjoining property and attempted to reinstate the deeded easement interest.

4.3 Conclusion

In an action where the litigants focused on the granting deeds for easement rights rather than the actions of the parties, and the fact that a taking had occurred much sooner than when Ms. Franklund purchased the adjacent property, the trial court erroneously concluded that the deeds described an easement that would be enforced. There really was no actual discretion involved in the conclusion, because it was an error of law, based upon the unrefuted facts as presented to the trial court. This action should be reversed and remanded for a new trial to determine the damages, if any, sustained by the appellant as a result of the trespass by Ms. Franklund.

Respectfully submitted this 16th day of December, 2011.

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J.J. SANDLIN, WSBA #7392, for defendant-appellant
Estate of Arvid Olson

Certificate of Service

I declare under penalty of perjury that a true copy of this Appellant's Opening Brief was mailed, via U.S. Mail, December 16, 2011 to opposing counsel, Attorneys Mark David Watson and Peter McGillis Ritchie, at MEYER, FLUEGGE & TENNEY, P.S., 230 South 2nd Street, Yakima, WA 98901-2865 and the original and one copy were mailed to the Clerk of the Court of Appeals, Spokane Division III, at 500 North Cedar Street, Spokane, WA 99201, on December 16, 2011.

Dated this 16th day of December, 2011.

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A handwritten signature in black ink, appearing to read "J. J. Sandlin", written over a horizontal line.

J. J. SANDLIN, WSBA #7392, for appellant-defendant Estate of Arvid Olson