

NO. 287998

Consolidated with

NO. 291626

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

**EDWARD J. VOTAVA, et ux,
Respondent**

vs.

**JAN KRYNS, et ux, et al,
Appellant**

BRIEF OF RESPONDENT

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WSBA # 5308**

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i.

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I.

INTRODUCTION

The appellant, hereinafter "Kryns", appealed from a judgment entered against him September 24, 2009, based upon his continuous, from late December, 2006 until January 7, 2010, wrongful interference with, and obstruction of, the respondent's, hereinafter "Votava" 's, use of a deeded Pend Oreille County road to access his timberland adjacent to the said Elk - Diamond Lake Road,

II.

CORRECTIONS TO KRYNS' STATEMENT OF THE CASE

Votava accepts Kryns' Statement of Facts and Summary of Court Proceedings, with the following corrections:

Kryns' statement, page 7, that, "A steel gate was maintained by Votava on the access road to the North of Kryns wire gates resulting in the blocking of access to the twenty feet of right of way on Section 31 North. RP 275; Exs. 14 & 15." is incorrect.

Correction: The "access road" is only on Section 32, and the claimed "blockage" is not a gate but trees. RP 277-278.

Kryns' statement, page 7, that, "The centerline of the section was marked by a steel post at Allen Road. RP 366-368; Ex 102 &

103. It was this steel post at Allen Road that was considered by Votava as barring him from using the access road. RP 166-170, 177.”, is incorrect.

Correction: The post at Allen Road that marked the “center line of the section” actually marked the North-South boundary line between Sections 31 and 32. It was not the “obstructing post” and it was placed there by Sewell, the surveyor. RP 367-368. The “obstructing post” was placed by Kryns 20 feet to the East of the Sewell post. RP 368.

Kryns’ statement, page 7, that, “The true location of the right of way was not established until Mr. Votava had a survey done by Sewell & Associates on December 6, 2006. RP 406, Ex. 21A.”, is incorrect.

Correction: The true location of the right of way was beyond dispute regarding its location in Sections 31 and 32, as it was comprised of the East 20 feet of Section 31 and the West 20 feet of the Northwest Quarter of Section 32. Exs. 11, 12 and 21A. Votava hired Sewell and Associates to determine the location of the North-South fence relative to the sections’ boundary line.

III.

STANDARD OF REVIEW

In *Standing Rock Homeowners v. Misich*, 106 Wn.App, 231, 242, 23 P.3d 520 (2001) the court stated:

[19, 20] “When the trial court has weighed the evidence, our review is limited to determining whether the court’s findings are supported by substantial evidence and, if so, whether the findings support the court’s conclusions of law and judgment.” *Panorama Vill. Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 423, 425, 10 P.3d 417 (2000) (citing *Brin v. Stuitzman*, 89 Wn.App. 809, 824, 951 P.2d 291, *review denied*, 142 Wn.2d 1018 (1998)).

. “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wn.2d at 641, 644, (870 P.2d 313 (1994)).

IV.

ARGUMENT

A. Responses to Kryns’ Assignments of Error:

Kryns’ Assignment of Error # 1: “In Finding of Fact # 2, the trial court erred in finding that there is a public right of way as described in Finding of Fact #2. CP214.”

RESPONSE: The public right of way in Sections 31 and 32, Township 30 N, Range 44 E.W.M., was established by Right of Way Deeds purchased by Pend Oreille County from Kryns’ and Votava’s

predecessors in title to their respective parcels of land in Section 31 on May 29, 1915; and by the Kryns family's predecessor in title to their parcel of land in Section 32 on May 25, 1915. Exs. 11 and 12.

The Pend Oreille County Board of County Commissioners established the right of way as the Elk and Diamond Lake Road, four and one-half miles in length and 40 feet wide, by Resolution of February 7, 1916. Ex. 5.

Donald A. Ramsey, Pend Oreille County Engineer in charge of that County's roads, RP 299, testified that the subject right of way is not maintained by Pend Oreille County, but it is a Pend Oreille County right of way and it has never been vacated. RP 313 and 314.

RCW Chapter 36.87 provides the authority and procedures for vacating a county road or right of way. No evidence was presented at trial that Pend Oreille County or any Elk-Diamond Lake Road frontage owner(s) had ever sought to vacate the road. Kryns now asserts that the said road was never established, as there is no evidence that the road was ever surveyed, or laid out by the County Engineer.

RCW 36.87.090 provides:

Any county road, or part thereof, which remains unopen for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby

vacated, and the authority for building it barred by lapse of time: PROVIDED, That this section shall not apply to any highway, road, street, alley, or other public place dedicated as such in any plat, whether the land included in such plat is within or without the limits of an incorporated city or town, or to any land conveyed by deed to the state or to any county, city or town for highways, roads, streets, alleys, or other public places. [1963 c 4 § 36.87.090. Prior: 1937 c 187 § 52; RRS § 6450-52.]

Votava submits that this road, as a deeded road, is exempt under the proviso from the foregoing vacation statute. However, if this road is not exempt, Kryns has not met his burden of showing that the road remained unopened for the five year period after the 1916 County Commissioners' resolution. In *Adams v. Skagit County*, 18 Wn.App. 146, 566 P.2d 982 (1977), review denied, 90 Wn.2d 1007(1978), the court had a claim that a street, platted and dedicated to public use in 1891 in an unincorporated town, was never opened before the 1909 exemption provision was added to the Laws of 1889, ch. 19 § 32. The trial court had made no finding of fact whether the street remained unopened for public use for 5 years but concluded that it was vacated in 1896 by operation of the statute. The appellate court stated at 18 Wn.App. 148-49:

The county's cross-appeal challenging this conclusion is well taken. *Brokaw v. Standwood*, 79 Wash. 322, 325-26, 140 P. 358 (1914). On the same essential facts the

Supreme Court in that case said:

For aught that appears in this record, and we are to remember that all of the evidence presented to the trial court is before us, Rainier Street, along in front of respondent's lots, may have, during this entire period, been actually physically open for public use, unobstructed, unenclosed and by nature, well suited for ordinary travel by such means as are in common use upon public highways. Shall we presume to the contrary, in the total absence of proof upon that question? We are of the opinion that we should not do so, and that the burden of showing that such street has remained unopened for public use for the period named in the statute should be upon those who rest their claims upon such a fact.

Ninety-three years have passed since the 1916 Board of Pend Oreille County Commissioners' resolution, and paper records of the County Engineer's action in response to the resolution are not available. There is plentiful objective evidence that the County Engineer did lay out the road, however. Votava testified that during the 1920's, 1930's, 1940's and 1950's, he had used the Elk-Diamond Lake Road to visit his relative, John Podlas, living North of Sections 31 and 32, and that the road was "actually a pretty good road". RP 103. Votava also named the people using the road to get to their homes and property during those time periods as the Clarks, Barthells, Guthries, Eldridges, Jon Kryns, Peter Kryns and Juno Kryns. RP 102-

107.

Kryns testified that he traveled the Elk-Diamond Lake Road with his father in the late 1940's to visit his grandfather who was living North of Section 31; and, that the road has always been there and that is how Eldridge and his uncle "got up there". RP 386 and 387.

Steve Sams, a logger who had recently examined the road, testified that the road, clearly shown in Exs. 101-A, dated July 15, 1955, and 101- B, appeared heavily traveled and needed no current improvements in order to be used by logging trucks. RP 341-346 and 351; Exs. 101- A, 101 - B, 44, 46 and 48.

The failure of Pend Oreille County to maintain its Engineering records did not invalidate or vacate the establishment of the Elk-Diamond Lake Road, as shown by RCW 36.75.100, which provides:

No informalities in the records in laying out, establishing, or altering any public highways existing on file in the offices of the various county auditors of this state or in the records of the department or the transportation commission, may be construed to invalidate or vacate the public highways. [1984 c 7 § 29; 1963 c 4 § 36.75.100. Prior: 1937 c 187 § 11; RRS § 6450-11.]

Kryns' Assignment of Error # 2: "In Finding of Fact # 3, the trial court erred in finding: A North-South right of way road currently exists. . .and has been identified in this matter as part of the Elk-Diamond Lake Road."

RESPONSE: This assignment of error is answered by the foregoing

response to Kryns' Assignment of Error # 1.

Kryns' Assignment of Error # 3: "In Finding of Fact # 4, the trial court erred in finding: The roadway is a county road, defined as "not yet established" by the County Road Standards of Pend Oreille County. CP214."

RESPONSE: Kryns should not be heard to complain that, in considering the nature of the subject road the trial court reviewed the Pend Oreille County Road Standards and Regulations, Resolution No. 2007.41, because Kryns submitted and argued these County Standards to the court in arguing against a finding that the Elk-Diamond Lake Road is a county road. CP 241. The trial court's reference to current county classifications of roads only supports the court's finding that it is a county road, even with less frequent usage. However, the court primarily found that it is a county road based upon the express language of the Right of Way Deeds and the County Commissioners' 1916 Resolution. CP 241.

Additionally, RCW 36.75.080 provides that:

All public highways in this state, outside incorporated cities and towns and not designated as state highways which have been used as public highways for a period of not less than ten years are county roads: PROVIDED, that no duty to maintain such public highway nor any liability for any injury or damage for failure to maintain such public highway or any road signs thereon shall

attach to the county until the same shall have been adopted as a part of the county road system by resolution of the county commissioners. [1963 c 4 § 36.75.080. Prior: 1955 c 361 § 3; prior: 1945 c 125 § 1, part; 1937 c 187 § 10, part; Rem.Supp. 1945 § 6450-10, part.]

The testimony of both Votava and Kryns, referenced in the Response to Kryns' Assignment of Error #1, clearly shows that the Elk-Diamond Lake Road was used by many members of the public, in addition to themselves, as a public highway since the 1920's, for a period of more than 10 years, and is also a county road by prescription under the foregoing statute. *Adams v. Skagit County, supra.*, 149-50.

Kryns' Assignment of Error # 4: "In Finding of Fact # 6, the trial court erred in finding that there is a county road. CP214."

RESPONSE: Votava submits his foregoing responses to Kryns' Assignments of Error #1, # 2 and # 3 in response to this assignment of error.

Kryns' Assignment of Error # 5: "In Finding of Fact # 7, the trial court erred in finding that there is a county road. CP 215."

RESPONSE: Votava submits his foregoing responses to Kryns' Assignments of Error #1, # 2 and # 3 in response to this assignment of error.

Kryns' Assignment of Error # 6: "In Finding of Fact # 9, the trial court

erred in finding: Defendant breached his duty to refrain from wrongfully and intentionally interfering with the plaintiff's legal right to use the road, as a result of which plaintiffs have suffered direct and proximate damages for lost logging profits, due to the falling price of timber since December, 2006, when the plaintiffs first sought use of the road for ingress and egress with their logging truck, in the amount of \$104,049.04, as calculated in plaintiffs' trial Exhibit 19. CP215."

RESPONSE: Votava submits his Memorandum of Authorities in Support of Permanent Injunction and for Damages, CP 83-93, for the various case citations placed before the trial court regarding Kryns' duty to refrain from obstructing the public right of way road. The court in *State Ex Rel York v. B. of C. Com'rs*, 28 Wn.2d 891, 184 P.2d 577 (1947) stated the public's interest in land dedicated to public roads, streets and highways at 28 Wn.2d 898:

Normally, the interest acquired by the public is but an easement (Citations omitted). But whatever the nature of the interest may be, it is held in trust for the public, and the primary purpose for which highways and streets are established and maintained is "for the convenience of public travel". (Citations omitted).

The Court also addressed obstructions of these roads at 28 Wn.2d 903:

The fact that highways are dedicated to public uses implies that they must be maintained primarily as public ways; and . . . "these public ways must be kept free from obstructions, nuisances, or unreasonable encroachments which destroy, in whole or in part, or materially impair, their use as public thoroughfares."

4 McQuillin, Municipal corporations (Rev.2d ed.) 234
§ 1437.

In *Gillis v. King County*, 42 Wn.2d 373, 255 P.2d 546 (1953), the appellants sought vacation of a dedicated street, claiming that they had cleared portions of the street, paid taxes thereon, and constructed buildings on the street; and that building permits were issued by King County for said buildings. The court found that the permits applied only to construction on adjacent lots, but stated at 42 Wn.2d 380:

Were it indisputably established, however, that the King county engineer's office had issued permits authorizing the construction of buildings upon dedicated streets not otherwise vacated, this would not estop the county here. A county holds an easement in such streets in trust for the public. *Cunningham v. Weedin*, (81 Wash. 96, 142 Pac. 453). Public officials have no authority to grant a permit which is in conflict with that easement. *Mueller v. Seattle*, 167 Wash. 67, 8 P.2d 994.

The court in *Thompson v. Smith*, 59 Wn.2d 397, 367 P.2d 798 (1962) had before it an easement, not a public right of way, obstruction problem, and after finding that the servient estate owner had the right to make limited use of the ten-foot strip for road purposes ruled at 59 Wn.2d 411:

. . . we have also upheld the right of the plaintiffs to use the eight-foot graveled road; and those rights, together with the right of their existing access to that road, must be protected; and any attempt to impair or impede its proper use should be severely dealt with.

In this case, the trial court found that Kryns intentionally and continuously obstructed every attempt of Votava to access and use the county road. RP 590 - 592. Kryns admitted in testimony: that he had dug a ditch for a 6" pipe across the road in 2006 and left it open for 3 years, RP 395-396; that for years he had been allowing his cows to roam freely up and down that portion of the Elk-Diamond Lake Road between Sections 31 and 32, and they were not confined to fenced pastures on the Kryns' land, RP 398-405, 400; Exs 108, 50-51; and that he parked his vehicles in the county roadway, RP 401-405, Exs. 44-46, 48. This all occurred after he knew the road was a deeded county road. RP 404-405. And, during all this time Kryns was continuously building fences and gates East-West across the right of way road. RP 399-400.

The award of \$104,049.04 damages was based upon Votavas' calculation of the lost profit and out-of-pocket expense caused by Kryns' preventing Votava from accessing his timberland by the county road from December, 2006 for the next two years, until January, 2008, as log prices fell and the log market disappeared and the lumber mills closed. Exs.19, 22, 23, 24 and 25; RP 215 - 223. The

trial court found that the damages were well proven by the testimony and evidence produced at trial. RP 592-593.

The court in *Puget Power v. Strong*, 117 Wn.2d 400,403, 816 P.2d 716 (1991) set out the general rule of damages in torts:

[1,2] Generally, the measure of damages in tort actions is the amount that will adequately compensate for the loss suffered as a direct and proximate result of the wrongful act. *Burr v. Clark*, 30 Wn.2d 149, 190 P.2d 769 (1948).

The market value of timber is properly fixed by the value at the nearest market, deducting the cost of transportation. This rule is to be applied notwithstanding that the owner did not intend to transport the item to the market and sell it. *Nelson v. Eastern Ry & Lumber Co.*, 166 Wash. 363, 6 P.2d 1111.

Fred Blessing, a forester, testified that the log market had disappeared by early 2008 and provable damages had also ceased because of lack of a market for logs. RP 235 - 250. However, physical damages to Votavas' standing timber has continued and will continue in the form of disease spreading in his forest and the continued growth of his trees, a number of which are already oversized and are not marketable as they are not able to be processed by most of the mills. RP 248 -249.

Kryns' Assignment of Error # 7: "In Conclusion of Law # 2, the trial court erred in concluding: Plaintiffs herein, whose property is served by the said county road, have a clear legal right to the unobstructed use of the traveled portion of the roadway and to improve and maintain the roadway for these purposes. CP 215."

RESPONSE: The trial court's Conclusion of Law # 2 is proper in view of the foregoing authorities and case law cited in response to Kryns' foregoing Assignment of Error # 6.

Kryns' Assignment of Error # 8: "In Conclusion of Law # 3, the trial court erred in concluding: Plaintiffs have a well-grounded fear of defendant's continued invasion of their right to the unobstructed use of the roadway.

RESPONSE: The trial court had the opportunity to observe the several witnesses testify and was required to exercise the court's discretion in determining whether Votavas' fear of continuing obstructive acts by Kryns was well-founded or justified. The court's conclusion was supported by subsequent developments in that less than 3 months after the Conclusion of Law # 3 was entered an Order to Show Cause re: contempt was issued on December 10, 2009. CP 165-166. The hearing on said show cause resulted in the court finding Kryns in contempt. RP 661; CP 183-185.

Kryns' Assignment of Error # 9: "In Conclusion of Law # 4, the trial court erred in concluding: The defendant should be enjoined and required to immediately remove and not re-install fences, fence posts,

wires and/or gates running East-West across the said county road, nor park vehicles or other equipment in the county roadway nor the deeded right of way that may obstruct or impede public access and use of said county road CP215.”

RESPONSE: The referenced testimony of both Votavas and of Kryns, in the foregoing responses to Kryns’ assignments of error, together with the referenced exhibits, constitute substantial evidence in support of the trial court’s findings of fact, conclusions of law and injunction requiring Kryns to remove the obstacles he had placed in the county road and to refrain from placing any new obstacles in the road.

Kryns’ Assignment of Error # 10: “In Conclusion of Law # 5, the trial court erred in concluding: . . .since the existing North-South fence, constructed immediately parallel to the North-South boundary line, does not obstruct the traveled portion of the county roadway it should be allowed to remain where it is currently located, but all gates, fence posts and fencing in the 20 feet of the right of way on the East side of the North-South fence must be permanently removed by defendant and not re-installed except as stated in Conclusion of Law 4 above. CP 216.”

RESPONSE: Votava testified that the North-South fence was primarily on the boundary line between Sections 31 and 32, and the established Elk-Diamond Lake road was on the 20 foot right of way on the East side of the fence. RP 138-140; Ex. 21-A. Josef Votava testified that the North-South fence was essentially up the middle of

the 40-foot wide right of way and the roadway was on the East side of the fence, but Kryns had regularly blocked the roadway with equipment that obstructed and impeded vehicular traffic on the county road. RP 228-223; Ex. 21A. There was no testimony of any person that the North-South boundary line fence obstructed or impeded the passage of vehicles on the Elk-Diamond Lake Road.

The testimony and exhibits at trial, as earlier referenced herein, provided substantial evidence for the trial court's Conclusion of Law No. 5, that the fences, gates and posts installed in and across the roadway obstructed and impeded passage of vehicles on the county road and were also nuisances and unreasonable encroachments impairing the use of the county road as a public thoroughfare, in violation of the principals set out in *State Ex Rel York v. B.of C. Com'rs, supra*, and *Thompson v. Smith, supra*, cited earlier, and must be removed.

Kryns' Assignment of Error # 11: "In Conclusion of Law # 6, the trial court erred in concluding: . . . that the plaintiffs' damages of \$104,049.04, based on loss of logging profits, were proximately caused by the defendant's intentional and unreasonable breach of his duty to plaintiffs to not interfere with plaintiffs' use of the county road; and, because defendants said conduct was continuous after Jan Kryns' acknowledgment that the roadway is a deeded county road in his letter of May 12, 2006, (Plaintiffs' Trial Exhibit # 9), defendant is not entitled to balancing of the equities, under the ruling in *Radach v.*

Gunderson, 39 Wn.App 392, 695 P.2d 128 (1985); and plaintiffs should have judgment against the defendant for \$104,049.04. CP 216.”

RESPONSE: The trial court summed up Kryns’ “intentional and unreasonable breach of duty to not interfere with Votavas’ use of the county road” in the court’s oral ruling of August 6, 2009 wherein the court stated: “. . . the parts of the evidence that show that Mr. Kryns really did not respond to the knowledge that this was a county road right of way and that he needed to have it open for purposes of the Votava getting in and out freely”, RP 590-591, and, “ Mr. Kryns did not remove his obstructions. And furthermore he made an effort each and every time the Votavas came through there to obstruct them. And to block the roadway with a pickup, and with fencing and so forth.” RP 592.

These rulings by the trial court support the Finding of Fact No. 9, as set out in the foregoing Response to Kryns’ Assignment of Error # 6, and the court’s Conclusion of Law No. 6; and the court found that the \$104,049.04 damages suffered by Votava, and set forth in Ex. 19, were a “perfect example of an element of damages that was well -proven” . RP 592-593.

The court in *Bach v. Sarich.*, 74 Wn.2d 575, 445 P.2d 648 (1968), stated that:

[5] The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights. (Citation omitted).

The court in *Radach v. Gunderson*, 39 Wn.App, 392, 695 P.2d 128 (1985) examined the 6 factors to be considered in "balancing the equities" and stated at 39 Wn.App 398:

. . . The protection afforded by this process is not available to one who proceeds with knowledge that his actions encroach on the property rights of others. *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968); *Foster v. Nehls*, 15 Wn.App 749, 551 P.2d 768 (1976); *review denied*, 88 Wn.2d 1001 (1977).

Votava submits that the foregoing testimony and evidence clearly show that Kryns knew in May, 2006 that the road that ran between his property and his father's property was a deeded right of way road owned by Pend Oreille County, yet he continued to utilize it for his own purposes, including: installing fences and gates across the roadway; parking vehicles and equipment on the roadway; allowing his 30 or 40 head of cattle to roam freely on the roadway; thereby impeding, obstructing and preventing Votava from using the county roadway to access his adjacent timberland. RP 590-592. Kryns was not the "innocent defendant" entitled to a balancing of the equities

contemplated in the foregoing case law, as the trial court properly concluded in Conclusion of Law No. 6.

Kryns' Assignment of Error # 12: "In Conclusion of Law # 9, the trial court erred in concluding: Defendant's cited case, Rupert v. Gunter, 31 Wn.App. 27, 640 P.2d 36 (1982), which approved reasonable obstructions in a private easement road to protect the servient private land, does not apply to this deeded public right of way case. RP 216."

RESPONSE: Conclusion of Law No. 9 is supported by the case law cited in Votavas' Response to Kryns' Assignment of Error # 6, which states that, "the public ways must be kept free from obstructions, nuisances, or unreasonable encroachments which destroy, in whole or in part, or materially impair their use as public thoroughfares". *State Ex Rel. York*, *supra*, 28 Wn.2d 898.

Additionally, in the case of private easements, it has been held that the servient landowner retains use of the easement land so long as that use does not materially interfere with the use by the holder of the easement. *Veach v. Culp*, 92 We.2d 570, 575, 599 P.2d 526 (1979). But, in this deeded right of way case, Pend Oreille County is the "servient owner" and Kryns, not being the owner, had no right to use the right of way and right of way road for anything but travel.

B. Responses to: Kryns' Issues pertaining To Assignments of Error

Kryns' Issue A: *The Access Road was never located to the extent required so as to constitute a Public Road.*

RESPONSE: It appears that the establishment of a county road by a board of county commissioners in 1915-1916 could have occurred by two different statutory methods: By original resolution of the board, under RCW 36.81.010 and its predecessor; or, By "freeholders' petition, under RCW 36.81.020 and its predecessor.

It is clear by the language of the Resolution of the Board of County Commissioners for Pend Oreille County, entitled "In the Matter of Elk and Diamond Lake Road" entered February 7, 1916, Ex. 5, that the Board proceeded under RCW 36.81.010, which provides:

The board may by original resolution entered upon its minutes declare its intention to establish any county road in the county and declare it is a public necessity and direct the county road engineer to report upon such project. [1963 c 4 § 36.81.010. Prior 1937 c 187§ 19; RRS § 6450-19.]

The Resolution also specified that the Elk-Diamond Lake Road was to be 4 ½ miles long and 40 feet wide, and to run North along the section line from the Southwest corner to the Northwest corner of Section 32 in township 30, and North again "as nearly as practicable" along the section lines of the Northern sections until it intersected with

State Road No. 25, known as the Mead-Newport Road in Section 17 of the same township 30. Ex. 5. Locating the road was not difficult.

The actions of the Pend Oreille County Engineer in response to the said Resolution are not documented on paper available in the County Engineering offices. However, the road existed in the 1920s and presently exists, according to testimony of both Votava and Kryns, and other witnesses, and the various exhibits and clerk's papers previously discussed herein. CP 17; Exs. 101-A , 101-B, 26-35.

The location of the Elk-Diamond Lake Road was documented by a Pend Oreille County map listing the names of the owners of property along the Elk-Diamond Lake Road as it passed through Sections 31 and 32 as well as Sections 30 and 29 located North of Sections 31 and 32. The owners named in Sections 31 and 32 at the time the map was created are predecessors in title to Votava and Kryns. CP 17; RP 102-107, 110, 178-183.

The map clearly shows the Elk-Diamond Lake Road extended North into the Sections 29 and 30 and other sections North of Sections 29 and 30. CP 17; App. A of Kryns' Opening Brief.

The monuments marking the section 31 and 32 center quarter corners and the Northwest quarter corners of Section 32 were placed

there by surveyors in bygone years. Exs. 21A, 35. It is unknown who ordered the surveyors to place these monuments, but RCW 36.86.050 requires the following (in part):

The board and the road engineer, at the time of establishing, constructing, improving or paving any county road, shall fix permanent monuments at the original positions of all United States government monuments at township corners, section corners, quarter section corners, meander corners, and witness markers, as originally established by the United States government survey, whenever any such original monuments or markers fall within the right-of-way of any county road, RCW 36.86.050

It is clear from the foregoing that the portion of the Elk-Diamond Lake Road that is in dispute was properly located along the boundary line of Sections 31 and 32; and, that monuments were installed on the subject boundary line at Allen Road and the North Boundary lines of Sections 31 and 32 as they were in the right of way of the Elk-Diamond Lake Road. Exs. 21A, 26-35.

The surveying and construction of the Elk-Diamond Lake Road obviously occurred, and the Pend Oreille Board and the County Engineer could have authorized the performance of such work to be done by private individuals as well as by private corporations, under the provisions of RCW 36.75.020 and predecessor statutes.

The foregoing facts provide adequate reason to find that the Pend Oreille County Engineer properly performed his responsibilities more than 90 years ago, and that the lack of paper records in the county offices should not operate to invalidate that work, as provided in RCW 35.75.100.

Kryns argues that: . . .the action be the Board of County Commissioners with the co-joint duty of the County Engineer represents the acceptance and acknowledgment of the existence of a roadway upon the completion of the appointed task of the County Engineer. Absent that completed acceptance, there is no recognizable public roadway located on the ground. Forrester v. Fisher, 16 Wn.2d 325, 337-38, 133 P.2d 516 (1943); see also Spokane v. Catholic Bishop, 33 Wn.2d 496, 513-15, 206 P.2d 277 (1949), and Lopeman v. Hansen, 34 Wn.2d 291, 294-96, 208 P.2d 130 (1949).

RESPONSE: First, there is in this case a recognizable public roadway that has been in use for more than 80 years, as shown by the testimony referenced in Votava's response to Kryns' Assignment of Error # 1; and there is no showing that the County Engineer did not perform his duty in laying out the same.

Secondly, Kryns' cited authorities have no factual relationship to this case: *Forrester v. Fisher, supra*, involved an attempted common-law dedication of a strip of land outside the plat boundary line, and not shown on the plat, as a public street, even though there was no use, or very restricted use, of the land by the general public

and only infrequent, permissive use by neighbors; *Spokane v. Catholic Bishop, supra*, involved the city's claim of a strip of land that was dedicated to the city in a plat that was never recorded, but copies of the unrecorded plat were admitted in evidence. The land containing the strip was purchased in 1928 and built upon in 1940. The court found that the purchaser/appellant had no notice of the public street dedication, and all travel upon the street was permissive, and the city maps did not show the street. Further, the city's need for the street was not convincingly demonstrated and there would be serious consequences to the appellant. None of above facts are similar to this case. *Lopeman v. Hansen, supra*, is another implied common law dedication of a private land "lane" between two fences for a public street, and the court set out the 4 elements that must be shown and found that they were not proven. None of the facts of that case are similar to the facts of this case except that the appellant, asserting the claim that the lane was a public road, requested the removal of gates across the lane. The court stated at 34 Wn.2d 1949:

. . . Appellants have prayed that the present gates be removed. If the lane were a public road they would have a right to this relief, since no one would have a right to maintain an obstruction therein.

Kryns' Issue B: *If the Access Road is not a County Road, then the actions of Jan Kryns do not rise to the level of a violation of a property right.*

RESPONSE: The foregoing responses to Kryns assignments of error, and his Issue A, clearly show that the Elk-Diamond Lake Road is a county road and Kryns' constant actions of obstructing and impeding Votavas' access to and use of the county road for management and logging of his timberland are indeed violations of Votavas' rights and resulted in Votavas' loss and continuing damages

Kryns' Issue C: *With respect to the Injunctive relief, that should remain in place consistent with the court's reasoning in its Memorandum Decision.*

RESPONSE: Votava agrees that the Permanent Injunction entered September 24, 2009 and June 10, 2010 should remain in full force and effect; not just for 60 days as Kryns requests, but permanently.

Votava also agrees with Kryns' assessment that Votava needs use of the "access road" as an entry to his property, and that he may have easements by prescription, prior use, or necessity as Kryns acknowledges, but none of those are needed in view of his right to unobstructed use of the Elk-Diamond Lake Road.

V.

VOTAVAS' REQUEST FOR ATTORNEY FEES

Votava requests this court to award him reasonable attorney fees under RAP 18.9(a), which provides that this court may sanction an appellant for filing a frivolous appeal by awarding attorney fees to the opposing party.

In the case, *Advocates v. Hearings Bd.*, 170 Wn.2d 577, ____ P.3d _____, (2010), the court stated:

[1] RAP 18.9(a) permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. *Reid v. Dalton*, 124 Wn.App. 113, 128, 100 P.3d 349 (2004). An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). All doubts as to whether the appeal is frivolous should be resolved in favor of appellant. *Id.*

Votava submits that Kryns has resisted recognition that the Elk-Diamond Lake Road is a deeded county right of way and exempt from automatic vacation throughout all stages of the legal proceedings from the first hearing through trial and now the appeal. His entire appeal is based upon the single issue of whether it is a county road; but, he

has set out 12 assignments of error involving nearly all of the Findings of Fact and Conclusions of Law, and 3 “issues” based on those assignments of error, knowing that Votava would have to address each assignment of error and issue and provide the references to testimony, clerk’s papers and exhibits supporting each Finding of Fact and Conclusion of Law.

Kryns’ appeal fits perfectly the definition of a frivolous appeal set out in the foregoing case, and Votava requests this court to sanction Kryns by awarding compensatory attorney fees to Votava.

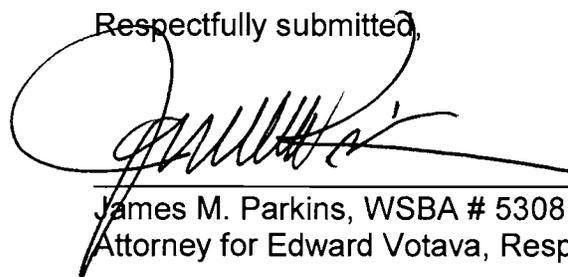
VI.

CONCLUSION

Votava submits that the trial court’s Findings of Fact and Conclusions of Law are supported by substantial evidence, and the Permanent Injunction and Judgment should be affirmed; and, Kryns’ appeal should be dismissed and Votava should be awarded his reasonable attorney fees incurred in defending against the appeal.

DATED 1/18/11

Respectfully submitted,



James M. Parkins, WSBA # 5308
Attorney for Edward Votava, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2011, I caused to be served a true and correct copy of the foregoing Brief of Respondent the method indicated below, and addressed to the following:

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