

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

<b>EDWARD J. VOTAVA and PEARL R.</b>	)	<b>No. 28799-8-III</b>
<b>VOTAVA, husband and wife,</b>	)	<b>(consolidated with</b>
	)	<b>No. 29162-6-III)</b>
<b>Respondents,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>JAN KRYNS and JANE DOE KRYNS,</b>	)	<b>Division Three</b>
<b>husband and wife,</b>	)	
<b>Appellants,</b>	)	
	)	
<b>JOHN P. KRYNS, individually and as</b>	)	
<b>Trustee of KRYNS FAMILY</b>	)	
<b>REVOCABLE LIVING TRUST,</b>	)	<b>UNPUBLISHED OPINION</b>
	)	
<b>Defendant.</b>	)	
	)	

Sweeney, J. — County commissioners have statutory authority to establish county roads. It must be done under the supervision and guidance of the county engineer, again, by statute. The record here amply supports the judge’s conclusions that a county road for public use was properly established. The record further shows that the defendant intentionally interfered with the plaintiff’s use of that road. We therefore affirm the

judgment of the trial court that enjoined further interference and awarded damages.

## FACTS

In 1957, Edward J. Votava and his wife purchased an 80-acre piece of property in Pend Oreille County, Washington. They later acquired another 40-acre piece of property in the same area from Mr. Votava's grandparents. Both parcels are adjacent to property owned by Jan Kryns and his family. A 40-foot-wide dirt access road known as "Elk-Diamond Lake Road" runs north and south between the neighboring properties. The road was deeded to Pend Oreille County as a public right-of-way by the preceding property owners in 1915 and the county resolved that the road was a public necessity in 1916. The deeds were recorded with the county auditor in 1981. Mr. Kryns and his family own both sides of the access road just north of its intersection with Allen Road. The road then continues north to the eastern portion of Mr. Votava's 80-acre parcel. Elk-Diamond Lake Road is the only access to the east end of Mr. Votava's property. A post and wire fence runs immediately parallel to the roadway but does not obstruct travel.

In 2005, Mr. Votava prepared to selectively log his 80-acre parcel. He obtained the required permits from the Department of Natural Resources and sent his son and another logger to survey the property. Mr. Votava's son arrived at Elk-Diamond Lake Road and found that cross-gates and farm equipment blocked the road. He and the other

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logger started opening and closing the gates to access the road. Mr. Kryns showed up and told them to leave. Mr. Kryns eventually called the Pend Oreille County Sheriff's Office to complain about the Votavas's use of the road.

A deputy sheriff arrived and told Mr. Kryns that the access road was a public right-of-way and that he could not stop the Votavas from using it. Mr. Kryns did not remove the obstructions. Mr. Votava himself went to the access road a year later and the sheriff was again called.

In 2006, Mr. Votava had a logging contractor harvest 76,000 board feet of timber on the west end of the 80 acres using alternative access roads. He originally intended to take a total of 350,000 board feet off the entire 80 acres but could not get access to the east end of the property due to obstructions on Elk-Diamond Lake Road placed by Mr. Kryns. Mr. Votava did not log the eastern portion of his 80 acres. Mr. Votava also had 10 or 11 truckloads of timber taken off his 40-acre property because of the high timber prices in effect at the time. The market for timber, however, steadily declined in the area.

In May 2007, Mr. Votava sued Mr. Kryns for damages and injunctive relief based on a claim that Mr. Kryns intentionally obstructed a public right-of-way. Mr. Votava also sought a temporary injunction prohibiting Mr. Kryns from obstructing the road. The trial court denied the request for a preliminary injunction.

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The parties later agreed to a temporary order that required Mr. Kryns to remove all fences and posts blocking access to Elk-Diamond Lake Road except for a single gate that Mr. Votava would be permitted to open and close while passing through.

In April 2009, the case proceeded to a bench trial. The court ruled in favor of Mr. Votava following the trial:

I conclude that the Votavas have a clear legal right to the use of the road as may well the public at large. My reason for this is not only the express language of the Right of Way Deeds and the County's resolution. But we have additional authority in the form of Pend Oreille County's Road Standards and Regulations, Resolution No. 2007-41 (hereinafter "the County Standards").

Clerk's Papers (CP) at 238.

The court granted a permanent injunction against Mr. Kryns but refused to award damages. The court reasoned that it was a concrete barrier placed by the phone company that actually obstructed access to Elk-Diamond Lake Road and caused the lost timber profits—not Mr. Kryns's unlocked wire gates.

Mr. Votava moved for reconsideration on the questions of damages and fees. He argued that the testimony showed that the location of the telephone equipment did not obstruct the roadway—only Mr. Kryns's fences and farm equipment did. Mr. Votava showed that the phone company had agreed to move the equipment if it was in fact obstructing access to the road. Mr. Kryns countered that he was not even aware of the public right-of-way until January 2006, and

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the Votavas had always asked for permission to use the road in the past. The court granted the relief requested by Mr. Votava and awarded \$104,049.04 in damages and \$487.01 in statutory costs and attorney fees.

Mr. Kryns then moved for reconsideration of the damages and fees awards. The court denied the motion as untimely. Mr. Votava moved for an order to have Mr. Kryns held in contempt because he had recently installed another fence in the roadway in violation of the court's order. The court found Mr. Kryns in contempt for installing the additional fence:

What matters is what is in the court order. . . .

And [the order] said defendants shall remove and are permanently enjoined and prohibited from installing any other east-west fences, wires, gates, impediments and obstacles or parking vehicles or other equipment in or on said roadway. . . .

So, he has violated the order. . . . Because among other things, there's a gate right in the middle of the roadway. Again.

Report of Proceedings (RP) at 659. Mr. Kryns appealed.

We remanded the matter to superior court upon the motion of Mr. Kryns to dismiss his deceased father and the Kryns Family Revocable Trust as parties to the case. Commissioner's Ruling, *Votava v. Kryns*, No. 28799-8-III (Wash. Ct. App. June 4, 2010). Those parties were dismissed and amended post-judgment findings of fact and conclusions of law were entered along with an amended judgment. The amended

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judgment incorporates the same award of damages as the original judgment.

Mr. Kryns again appeals.

## DISCUSSION

We review challenges to the trial court's findings of fact for substantial evidence and then determine if the findings support the conclusions of law. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). We will not substitute our judgment for that of the trier of fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

### Findings of Fact and Conclusions of Law

Mr. Kryns first assigns error to nearly all of the trial court's findings of fact and conclusions of law. He fails, however, to offer any specific explanation or argument as to why those findings or conclusions are wrong, with one exception. He contends that the right-of-way at issue here was never properly dedicated as a county road because the statutory requirements to do so were never satisfied. It is, of course, his obligation to explain to us how and why the court's findings and conclusions are in error. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993). This allows Mr. Votava to respond and defend the court's findings and conclusions and it allows us to adequately review them and address his assignments of error. Mr. Kryns

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also challenges the propriety of the court's damage award. And we address that challenge.

The facts essential to address the assignment of error are set out in the court's findings of fact and even a cursory review of this record suggests that they are easily supported by substantial evidence. Whether those facts are sufficient to support the court's conclusion that this road was properly dedicated as a public road is a question of law that we will review de novo. *Wenatchee Sportsmen*, 141 Wn.2d at 176.

#### Dedication of Public Road

A board of county commissioners may by resolution declare its intention to establish any county road and declare it is a public necessity:

The powers and duties vested in or imposed upon the boards with respect to establishing, examining, surveying, constructing, altering, repairing, improving, and maintaining county roads, shall be exercised under the supervision and direction of the county road engineer.

The board shall by resolution, and not otherwise, order the survey, establishment, construction, alteration, or improvement of county roads; the county road engineer shall prepare all necessary maps, plans, and specifications therefor, showing the right-of-way widths, the alignments, gradients, and standards of construction.

RCW 36.75.050.

Pend Oreille County received two right-of-way deeds in 1915 for the tract of land now known as Elk-Diamond Lake Road. Both deeds granted the land for the purpose of

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establishing a county road. The deeds were recorded in 1981. The Pend Oreille County commissioners met and resolved that the road was a public necessity and directed the county engineer to survey the proposed route:

NOW, THEREFORE, BE IT RESOLVED, unanimously by the Board of County Commissioners of Pend Oreille County, Washington, that the laying out and establishment of said road is a public necessity, and the County Engineer is hereby directed to make an examination and survey of the proposed route of said road in accordance with the statutes in such cases made and provided.

Ex. 5. The resolution specified that the Elk-Diamond Lake Road would be 4-1/2 miles long and 40-feet wide. And the resolution laid out the precise legal description of the road between the adjacent parcels of land, matching the descriptions in the 1915 deeds.

The actions of the Pend Oreille County engineer in response to the resolution are not documented in any writing. Mr. Kryns contends that this is fatal to the establishment of a county road. Br. of Appellant at 10.

We conclude that the failure to preserve county engineering records from 1915 does not invalidate the establishment of the Elk-Diamond Lake Road. Indeed, “[n]o 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.” RCW 36.75.100. The informalities are not fatal.

Moreover, this record suggests that



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the road was established and used as a public road. Both Mr. Votava and Mr. Kryns testified that the road was consistently used by the two families, along with various neighbors, in the early 1920s. Mr. Kryns testified that “[t]here was always a road there.” RP at 387. The road was also documented in a Pend Oreille County map that listed the predecessors in title to both Mr. Votava and Mr. Kryns. Finally, the current Pend Oreille County engineer testified that the county recognizes the public right-of-way even though it is not currently maintained by the county. This adequately supports the court’s conclusion of a public road. And there is no showing that the county engineer did not perform his duty in surveying and examining the road pursuant to the directive from the board of county commissioners.

Even if we were to look at this dedication as a common law dedication of a public road, we would be led to conclude that it has been properly dedicated as a public road. *See Forrester v. Fisher*, 16 Wn.2d 325, 338, 133 P.2d 516 (1943) (dedication requires intent to devote land to public use and acceptance by the public). All agree it has been used as such for over 80 years.

Mr. Kryns also argues that the trial court improperly relied upon the Pend Oreille County Road Standards and Regulations (Aug. 28, 2007), Resolution No. 2007-41, for its conclusion that the road had been properly dedicated as a county road. Br. of Appellant

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at 11-12. He argues that the county standards are inapplicable because they were enacted in August 2007—some 90 years after the deeds and the resolution. He argues that the county standards only apply to new construction. Mr. Kryns is correct that the county standards are inapplicable for purposes of determining the existence of a county road. Br. of Appellant at Appendix D. But that is not what the court used them for.

The court used the county standards to show the different definitions of a “private road” and a “county road.” CP at 214. The county standards also helped explain how the county currently characterizes roads. For example, a road may still be considered a county road even though it is privately maintained rather than maintained by the county.

#### Damages

Mr. Kryns also argues that Mr. Votava was not entitled to a damage award because he did not violate any property right where the road was not open to the public. Of course, we have concluded that the road was properly used and dedicated as a public road.

Despite this, Mr. Kryns allowed his cattle to freely roam up and down the county road. He placed a series of wire fences and gates in an east-west direction across the road to separate the cattle. He parked his vehicles in the middle of the road. He dug a ditch for a 6” pipe across the road and left it open for 3 years. And he obstructed the Votavas’s

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efforts to use the road. Even after the court proceedings, he added fencing in violation of a court order.

Mr. Votava's inability to get trucks to portions of the property during the period of 2006 to 2009 ultimately resulted in lost timber profits for Mr. Votava. Mr. Kryns's intentional obstruction of the road proximately caused those losses. The court's damage award is well founded in fact and law.

#### Attorney Fees

Mr. Votava seeks attorney fees on appeal under RAP 18.9(a), arguing that Mr. Kryns's appeal is frivolous. We conclude that the action is not completely without merit and deny fees.

The judgment is affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.