Supreme Court No.: 99331-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79754-9-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

RALPH A. HEINE,

Petitioner,
v.

TIM S. RUSSELL and ROBERTA A. RUSSELL and their marital community; JOHN PURDY, a single man; and NORMAN STOW and SARINA STOW and their marital community, and WILLIE R. KENDALL, a single man,

Respondents,
and

STEVEN RUSSELL and STEPHANIE COLEMAN,

Defendants.

RESPONSE OF JOHN PURDY IN OPPOSITION TO ACCEPTANCE OF REVIEW MEMORANUM OF AMICI CURIAE BERESFORD, JENSEN, HIXSON, SMIRNIOTOPOULOS, AND SOLI

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I. INTRODUCTION

The memorandum filed by the *amici curiae* proponents to support a Petition for Review for Heine does not set forth authorities or error in analysis of the Court of Appeals' decision such as to warrant further review.

II. ARGUMENT

Amici proposed three arguments for further review:

1. Heine, who has initially claimed to be the servient property owner through adverse possession by a predecessor in title (Styles) now claims rights to extinguish the easement rights of others as a co-dominant easement holder and that because of this a new standard of review should be applied by the Court of Appeals as a matter of public policy: we disagree.

2. That the concept of "shifting" easements should apply to this case because this concept was used in two previous Washington cases alleged to have similar facts: we disagree.

3. That previous review in this case to establish a prescriptive easement is warranted: we disagree.

Each of these arguments covers territory already considered by the Snohomish County Superior Court and the Court of Appeals. Each review applied to the established case law to the uncontested facts and found Heine's claims failed to meet the adverse possession/extinguishment of easement or change of easement criteria. The courts have acted to protect the existing easement uses and expectations for the uses to which the easement by the terms

established, for ingress, egress and utilities, of all of the Respondents and Mr. Heine (in continuing capacity as a co-dominant easement holder).

A. Extinguishment of Easement Standards.

Whether Heine is technically a co-dominant property user under the easements for ingress, egress or utilities or an actual property owner as he had claimed was established by Styles' use of the easement parcel – he claims to stand in the shoes of the property owner free and clear of the interest of others sharing easement rights in the easement parcel.

No special rule as *Amici* asserts was applied nor need be applied. The analysis set forth in *City of Edmonds v. Williams*, 54 Wn. App. 632, 774 P.2d 1241 (1989) states at Page 634 "Generally, whether an easement is extinguished by adverse use is determined by applying the principles that govern acquisition of title by adverse possession and an acquisition of an easement by prescription." (Citing 1 *Washington State Bar Ass'n, Real Property Desk Book*, Section 15.48 (2d ed. 1986).

> "Where an easement has been created but no occasion has arisen for its use, the owner of a servient tenement may fence his land and such use will not be deemed adverse to the existence of the easement until such time as (1) the need for the right-of-way arises; (2) a demand is made by the owner of the dominant tenement that the easement be opened; and (3) the owner of the servient tenement refuses to do so." (Citing *Castle Assoc. v. Schwartz*, 63 A.D.2d 481, 490, 407 N.Y.S. 2d 717, 723 [1978]).

In *Beebe v. Swerda*, 58 Wn. App. 378, 793 P.2d 442 (1990), it is stated that the use of an easement during a period of non-use by the dominant estate is not adverse use but is in the nature of a privilege which the owner of the easement is not using the area for purposes inconsistent with the easement.

Mere non-use, no matter how long, will not extinguish an easement. *Thompson v. Smith*, 59 Wn.2d 397, 367 P.2d 798 (1962), at page 407.

During a period of non-use, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the easement's future uses. *City of Edmonds v. Williams*, 54 Wn. App. 632 at P 626, 74 P.2d 1241 (1989).

At the time of Styles' possession of the residential property now owned by Heine, none of the parties to this action had status as servient property owners. They were all dominant property owners. Mr. Purdy, thought by Petitioner Heine to be the servient owner of the property at the time of the Styles ownership of the residence adjacent to the easement parcel, did not acquire status as actual owner until he acquired the property by deed from the owners, the Howlands, recorded November 10, 2016.

Had Purdy been the servient tenant during the Styles' occupancy, he would have had the right to use the land for purposes not inconsistent with its ultimate use for the reserve easement purposes during the period of non-use. *Thompson v. Smith*, 59 Wn.2d 397, 407-08, 367 P.2d 798 (1962). The rules that would have applied in the event that the claimant's use would not be considered adverse until (1) the need for a right-of-way arises; (2) the owner of the dominant

easement demands the easement to be opened; and (3) the owner of the servient estate refuses to do so. *Cole v. Laverty*, 112 Wn. App. 180, at pg. 185, 49 P.2d 924 (2002).

Petitioner sought to modify the non-exclusive mutually held easements by limiting the gravel road located on the western portion of the easement way, ignoring the easement rights of property owners in the neighborhood providing for maintenance of existing water, electric and telephone utilities as well as foreseeable needs to repair, maintain and expand within the easement area the authorized utility uses – benefitting all co-holders of these rights.

Heine in effect has sued the Russells, Stows, Kendall and Purdy to try to take title to the eastern portion of what is now the Purdy parcel, and extinguish the Russells, Stows and Kendall's easement rights and Purdy's use of his property for uses consistent with easement limitations. The impact of the Heine claim is to eliminate legal property rights and expectations of use serving their residential properties.

Washington Courts have long ago held that owners whose titles derive from the same grantor may not extinguish their mutual easement rights by adverse possession. *Burkhard v. Bowen*, 32 Wn.2d 621, 203 P.2d 361 (1949).

In the *Restatement (Third) of Property (Servitudes)*, Section 4.8 (2000), guidance in consideration of movement of easements or adjustments in same are governed by four factors: (1) the utility of the easement must not be significantly lessened; (2) the burden is on the owner of the servient easement holder the full use and enjoyment will not be compromised; and (3) the change in the easement

must not frustrate the purposes for which the easement was created. Heine's claim mitigates against all three of these factors in his attempt to constrict the access road (contrary to Snohomish County Code requirements for legal and emergency access requirements) and frustrating the existing and foreseeable purposes for which the easements were created by unilateral action - certainly not interests to be publicly encouraged.

As set forth in *Restatement (Third) of Property (Servitudes)*, Section 4.1 (M. Law Institute, 2000):

> (1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument or the circumstances surrounding creation of the servitude and to carry out the purpose for which it was created.
>
> (2) Unless the purpose for which the servitude is created violates public policy and unless contrary to the intent of the parties a servitude should be interpreted to avoid violating public policy, among reasonable interpretations that which is more consonant with public policy should be preferred.

While easements may be extinguished through adverse use, the adverse use of the easement must be sufficiently hostile to the interests of the dominant estates' interests so as to put the dominant estate owner on notice.

B. <u>"Shifting" Easement or Easement Modification.</u>

The shifting easement proposed by Heine under the facts presented in this case rests upon a prescriptive easement claim for a limited area of gravel road (at

most, five feet and narrowing to no alleged incursion on the Russell property westerly of the easement parcel). But for establishment of prescriptive rights that Heine claims, there is no roadway easement to shift. Neither the co-dominant interest holders nor Purdy, now as owner of the easement parcel, have joined Heine in his claim. His claim is unilateral.

C. Prescriptive Right.

Both the Superior Court and Court of Appeals found no substantial use of the small triangle of the property such as would establish an easement by prescription nor did the Court deal with the practical impact of shared easement holders who did not join in Heine's claim.

In certain factual circumstances, Washington Courts have found that a use of someone's property will be presumed to be with the owner's permission and therefore not adverse. *Roediger v. Cullen,* 26 Wash. 2d 690, 175 P.2d 669 (1946). And, in *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015), it is stated that an initial presumption of permissive use applies to cases in which there is a reasonable inference of neighborly sufferance or acquiescence.

Why, indeed, should landowners like Purdy and easement holders like the Russells, the Stows, and Kendall, be penalized for sharing use of property with a neighbor?

III. CONCLUSION

As opposed to demonstrating an issue of substantial public interest to be considered upon review, Petitioner's claims as asserted in the *Amici* Memorandum fails to show any substantial or constructive basis under *RAP*

13.4(b) for the Supreme Court accepting review and for the same grounds that the Court of Appeals declined to publish their opinion in this matter.

Respectfully submitted on this 16th day of March, 2021.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at the law offices of Knappe & Knappe, Inc., P.S., Lawyers, over the age of 18 years, not a party to nor interested in the above-entitled action. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the party(s) listed via the Appellate Portal:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct.

DATED this 16th day of March, 2021, at Snohomish, Washington.

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