No. 99331-9

SUPREME COURT OF THE STATE OF WASHINGTON

RALPH HEINE,

Petitioner,

v.

TIM RUSSELL and ROBERTA RUSSELL; JOHN PURDY; NORMAN STOW and SARINA STOW; and WILLIE KENDALL,

Respondents.

RESPONDENTS TIM AND ROBERTA RUSSELL'S ANSWER TO MEMORANDUM OF AMICI CURIAE

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I. INTRODUCTION

The memorandum submitted by amicus tracks the same arguments and authorities already submitted by petitioner Heine. While it is clearly supportive of Heine's position, it offers no new analysis or reasoning as to why review is warranted.

II. ARGUMENT

Amici renew the same arguments, and for the most part cite the same authorities, as Heine did in his petition. But amici do not delve into the facts of the cited authorities, or the facts in the record presented to the Court of Appeals in this case, to show how they match up – because the facts here *don't* match up with the cases on which Heine and amici rely. More important, amici fail to show how any of the RAP 13.4 grounds for review are present here.

A. Applying existing Washington law an extinguishment of easements via adverse possession breaks no new ground, presents no injustice, and does not implicate any issue of substantial public interest.

Amici's first argument is that application of settled Washington law on extinguishment an easement by adverse possession is somehow wrong or unfair, just because Heine – rather than Purdy – is the person claiming adverse possession.

In support of this, amici recite basic easement law (*Amici Memo. at*

3-4), but there is no dispute over that body of law, and Heine has already briefed that for this Court. *Petition at 10.* Amici further characterizes the test for extinguishment of an easement via adverse possession as "a special rule" developed by our courts (*Amici Memo. at 3*-4, citing *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002)). In fact, there is nothing "special" or new about that analysis. It was applied in *City of Edmonds v. Williams*, 54 Wn. App. 632, 634, 636, 774 P.2d 1241 (1989), *Beebe v. Swerda*, 58 Wn. App. 375, 383, 793, P.2d 442 (1990), and the same or very similar rule is found in cases from other jurisdictions such as *Hansen v. Davis*, 220 P.3d 911 (Alaska 2009), *Stonier v. Kronenberger*, 214 P.3d 41, 45-46 (Or. App. 2009), and *Mueller v. Hoblyn*, 887 P.2d 500, 508-09 (Wyo. 1994).

Moreover, amici's discussion of *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995), mirrors that already provided by Heine (*Petition at 11-12*), and like Heine ignores the fact that at oral argument below Heine expressly conceded that he only sought fee ownership if he could extinguish the easement rights of his neighbors over that same area. *Slip Op. at 4; Russell Answer to Petition at 6.*

Most importantly, amici's arguments as to why the Court of Appeals was "wrong" miss the point: the issue is whether they and Heine can show that RAP 13.4's criteria for review are met. In that regard, amici's public

policy argument mirrors Heine's (*Petition at 19).* Amici claims that the Court of Appeals decision makes it easier for a "third party" to extinguish the underlying fee interest via adverse possession, than for a co-dominant estate to extinguish another co-dominant estate's easement rights. But amici do not explain what mystery "third party" this would be, or why this scenario implicates any issue of broad public interest that would warrant review by this Court.

B. The "shifting easement" label is not an actual legal theory in and of itself, does not alter established law, and does not support Heine on the facts of this case.

Amici's second argument, on the so-called "shifting easement" cases, again mirrors what Heine has already submitted (*Petition at 18-20)* and offers no new rationale for why the Court should revisit the 30 year old cases that amici rely on, *Curtis v. Zuck*, 65 Wash. App. 377, 829 P.2d 187 (1992) and *Barnhart v. Gold Run, Inc.*, 68 Wash. App. 417, 843 P.2d 545 (1993). As previously explained (*Russell's Answer to Petition at 18-19*), those cases applied well-established law to facts that showed adverse possession (a house built within the deeded easement), abandonment of the deeded easement, and establishment of a prescriptive easement over another route. Those facts are not presented here, and that is why the trial court and Court of Appeals decisions came out as they did.

And amici likewise parrot Heine's argument that Heine was not

seeking to "extinguish" an easement but merely to "relocate" it, without explaining how this could be so when (1) the roadway was always located *within the deeded easement,* and would – under Heine's argument – *still* be located there, and yet (2) another ~20 feet of deeded easement would simply vanish and become Heine's land, free of any encumbrance. Taking a 30 foot wide easement in which the road has always been located and declaring that the easement it is now only the width of the road is not a "shifting" of an easement, it is the extinguishment of 2/3 of the deeded easement.

Again, at a public interest level, *Curtis* and *Barnhart* broke no new ground, and neither did the Court of Appeals here. The phrase "shifting easement" as used in *Curtis* and *Barnhart* was merely a colloquial label applied to facts which met the established legal analyses for three separate legal doctrines (abandonment, adverse possession, and prescriptive easement) – no "new" legal theory or analysis was developed in either case. Amici's bald statement that "The Court of Appeals decision creates uncertainty by casting significant doubt on what had been settled law" (*Amici Memo. at 8*) is not supported by the *facts* that are presented here and which drove the Court of Appeals decision. Had the facts been as they were in *Curtis* or *Barnhart* then this would be a different case.

C. There is no need to "clarify" the requirements for establishing a prescriptive easement, which are well-settled, and the results of which are always fact-dependent.

Here, too, amici essentially reiterate Heine's arguments as to why the Court of Appeals was "wrong" in determining that Heine and his predecessors had failed to establish a prescriptive easement over the Russell property. *Amici Mem. at 8-9.* Amici cite to cases such as *Lingvall v. Bartmess,* 97 Wn. App. 245, 982 P.2d 690 (1999), where a prescriptive easement over a driveway was found based on Lingvall's tenants having continuously used the driveway for their day to day sole access, and where Lingvall then built another house that continued to use the same driveway as sole access.

Facts matter. The Russells have already explained why the facts in this case led to the result in the Court of Appeals, and why the "seasonal use" cases are inapposite here. *Russell Answer to Petition at 11-13.* The "continuous use" cases such as *Lingvall* are likewise inapposite.

Amici do not and cannot show that the Court of Appeals made up some new law, or otherwise took some action that creates an issue of broad public interest that would warrant review. Nor do amici offer any explanation as to what "clarification" would be warranted or why this Court would change its long-established test for prescriptive easements.

What amici are really arguing is that the Court of Appeals made an

error in applying the evidence to the established law of prescriptive easements. That is insufficient to warrant review under RAP 13.4.

III. CONCLUSION

Amici's memorandum adds nothing to Heine's petition, and fails to show any basis under RAP 13.4(b) for having this Court accept review.

RESPECTFULLY SUBMITTED on 16 March 2021.

_____

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CERTIFICATE OF SERVICE

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DATED March 16, 2021 at Poulsbo, Washington.

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