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 PETITION FOR REVIEW

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I. INTRODUCTION

Respondent John Purdy owns a 30 foot wide parcel of land lying between un-platted residential parcels owned by appellant Ralph Heine and three of his neighbors (respondents Russells, Stows, and Kendall). Each of those properties is benefited by a 30 foot wide access/egress/utilities easement over the Purdy parcel ("Easement"). For decades a gravel access road has been located within the western portion of the Easement.

Heine sued the Russells, Stows, Kendall, and Purdy to try to take title to the eastern portion of the Purdy parcel via adverse possession, and to extinguish the Russells', Stows', and Kendall's easement rights over that area. Heine also sued the Russells to establish a prescriptive easement over their land, so as to locate the road partly on the Russells' land instead.

Heine's claims were soundly rejected by the Snohomish County Superior Court, Hon. Eric Z. Lucas, on cross-motions for summary judgment. The trial court granted summary judgment in favor of the Russells on both of Heine's claims, and subsequently awarded the Russells attorney fees under RCW 7.28.083.

The court of appeals affirmed in all respects in its unpublished decision, which applied well-established Washington law on adverse possession, and prescriptive easements, awarded Russell additional attorney fees under RCW 7.278.083(3) and RAP 18.1. The court of appeals

subsequently denied Heine's motion to publish.

II. ISSUES PRESENTED FOR REVIEW

From Russell's perspective, the issues presented by Heine's petition are restated as follows:

A. Whether the Court should accept review of a decision that applied well established legal theories to the specific facts at hand, did not conflict with any precedent from this court or any other Court of Appeals decision, and which presents no issue of substantial public interest?

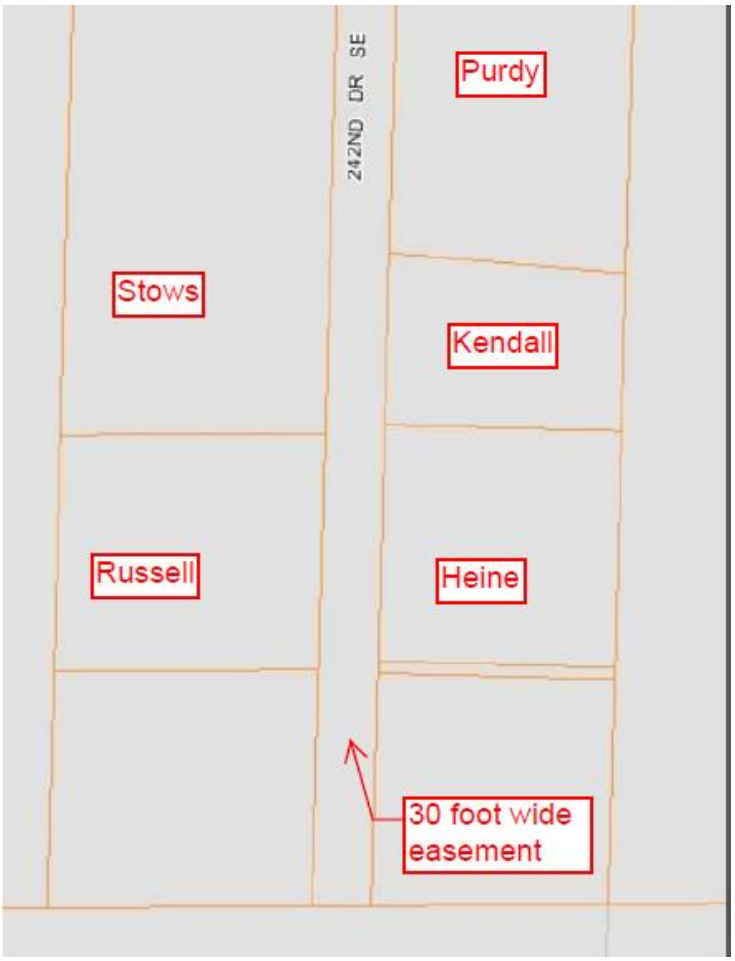
B. Whether the court should accept review so that it can evaluate a legal theory that Heine never pleaded in the trial court, never briefed until *after* oral argument in the Court of Appeals, and which neither the Court of Appeals nor any other court has ever actually applied, and which does not implicate any issue of substantial public interest?

C. Whether the court should accept review just to re-analyze prior Court of Appeals decisions regarding prescriptive easements, which are nearly 30 years old and have already been analyzed in detail in a 2006 decision of this Court?

III. STATEMENT OF THE CASE

The parties share use of a private road located within a 30-foot wide access/egress easement. Respondent Purdy is the owner of the 30-foot wide parcel on which the easement is located. Petitioner Heine and respondent

Kendall live on parcels east of the easement, and respondents Tim and Roberta Russell own a parcel west of the easement. Respondents Stow also live west of the easement parcel, and north of the Russell parcel. Here is how the properties are laid out:



A. Gravel Road and Other Items.

Historically, the gravel road used by the parties for access and egress has been located along the western portion of the Easement, leaving the

eastern portion of the Easement undeveloped for vehicle access. That eastern portion is occupied by grass, landscaping, rocks, trees, some gravel parking areas, etc., maintained by Heine and Kendall, and/or their predecessors. **CP 703-704** The Heine property had a single driveway area, located at the southern corner of the property next to the gravel road.

B. History of non-use of eastern portion of Easement.

With respect to the portion of the Easement *east* of the roadway, the record is clear that the Russells have never sought to use that portion of the Easement for access purposes. **CP 717-20.** There has never been a particular need or desire to do so, and the Russells have never demanded that Heine or Kendall (or their predecessors) remove the landscaping, etc. and allow the Russells to develop that portion of the Easement for access and egress. *Id.*

IV. STANDARD OF REVIEW

Acceptance of review by the Supreme Court is governed by RAP 13.4(b), which states:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Each of these criteria "are straightforward and relatively narrow." *Washington Appellate Practice Deskbook, §18.2(3)* (Wash. State Bar Assn., 4th ed. 2016).

V. ARGUMENT

Heine fails to meet any of the criteria under RAP 13.4. Heine's fundamental problem is that adverse possession and prescriptive easement cases are driven by the particular facts in evidence, and the facts here did not support Heine's claims. Moreover, the law that governs these causes of action is well established in Washington, and no really "new" theory or legal issue is implicated here.

A. The Court of Appeals decision on Heine's adverse possession claim did not conflict with any precedent, and presents no issue of substantial public interest.

Easements, and the doctrines of adverse possession and prescriptive easement, have a long, well developed history in Washington law. Our law recognizes that an easement can be extinguished by adverse possession. The reported cases address situations where the fee owner of the burdened estate was the one claiming extinguishment. Those cases (*Thompson v. Smith*, 59 Wn.2d 397,367 P.2d 798 (1962), and its progeny) apply a high standard to such a claim, because the fee owner retains all rights not inconsistent with the grant of easement rights – and that means that the fee

owner could plant a lawn, pave a driveway, fence in a garden, etc. (in short, all of the things Heine's predecessors the Styles did) in the unused portion of the easement, and those actions would *not* be considered hostile or adverse to the benefited (dominant) parcel. Only a permanent, physical obstruction for the required 10 years would suffice.

Heine could not prevail under this standard, based on the facts, so he argued to the trial court and Court of Appeals that as one of many benefited parcels, with only the limited easement rights he possessed, all *he* had to do to establish adverse possession was to do anything beyond the scope of those easement rights, and in derogation of the fee owner's rights.

While this argument might have some appeal when analyzing Heine's claim vis a vis the fee owner's title (here, respondent Purdy), 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.* The Court of Appeals decision on this issue does not conflict with *Timberlane Homeowners Ass'n. v Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995) because *Timberlane* only addressed a homeowner's claim for adverse possession of a portion of HOA common area against the fee owner (the HOA). *Timberlane* did not address whether rights of other easement beneficiaries would be impacted by the adverse possessor; that issue was not before the court. Here, Heine disclaimed the

claim against Purdy if he could not also extinguish the Russell/Stow/Kendall easement rights, and since the Court of Appeals determined that he failed on the latter, it never ruled on the former – and thus there is no conflict with *Timberlane* or any other case.

Heine attempts to distinguish the *Thompson* line of cases by arguing that they do not address the situation where the person seeking extinguishment is one of several parcels benefited by the easement, rather than the fee owner of the burdened parcel. But even if this specific fact pattern has not been addressed by this Court, it does not involve any new legal analysis, nor does it present an issue of substantial public interest.

First, Heine never produced any authority to support the idea that one easement user can adversely possess the easement and extinguish the rights of the other dominant estates, especially where the other dominant estates have had no reason to make use of the area in question. On the contrary, Washington cases hold that even though a private easement set forth in a plat may be lost by adverse possession on the part of the servient estate, the various dominant owners (the lots served by the easement) cannot extinguish easement rights as to each other: "[S]ince the dedicator of a plat could not defeat a grantee's right to an easement in the street upon which his land abuts, common grantees from him cannot, as among themselves, question the right of ingress and egress over the street as shown in the plat."

Howell v. King County, 16 Wn.2d 557, 559-60, 134 P.2d 80 (1943); *see also Burkhard v. Bowen*, 32 Wn.2d 613, 623, 203 P.2d 361 (1949) (same); *Beebe v. Swerda*, 58 Wn. App. 375, 383-84, 793 P2d. 442 (1990) (citing *Burkhard* as holding "that, among themselves, common grantees from the dedicator may not question the right of ingress and egress over a platted street, and that such a private easement cannot be destroyed even by adverse possession").

Here, the existence of the Easement was not in dispute, nor was the common status of the Heine, Kendall, Stow, and Russell parcels as the dominant estates (benefitted parcels). Each took their Easement rights from a common grantor, the Wagners, the then-owners of the Purdy parcel who created the express grant of easement in 1966. **CP 700** Under *Howell, Burkhard, and Beebe*, Heine could not extinguish the express grant of an Easement that all the dominant owners enjoy.

Second, even if those cases were ignored and one were to assume (as the Court of Appeals did) that Heine *could* extinguish the Russells, Stows, and Kendall's rights in the unused eastern portion of the easement via adverse possession, the Court of Appeals did not need to break any new ground or undercut existing Washington law. This is because "adverse" and "hostile" – whether in the usual *Thompson* setting, or in this case – turns on the nature and impact of the action on the Russells, not on the identity of

the actor who engaged in it. It makes no difference to the Russells who mows the lawn, trims those shrubs, or erects and maintains the fence on the unused portion of the Easement – they have no reason to know or care whether it is Purdy, or Heine, or anyone else. Those are not things the Russells had an exclusive right to do, and so someone else doing those acts does not thereby impair or usurp the Russell's rights – and that usurpation of the title owner's rights and control, at core, is what adverse possession is all about

This is in contrast to the classic adverse possession situation involving fee owners of two adjacent parcels A and B, with A's owner conducting landscaping or similar activities on B's property. Our cases (e.g., *Chaplin v. Sanders*, 100 Wn.w2d 853, 676 P.2d 431 (1984), *Nickell v. Southview Homeowners Ass'n.*, 167 Wn. App. 42, 271 P.23d 973 (2012),. 245, 982 P.2d 6 90 (1999)) show that title can be obtained by adverse possession in those circumstances. Why? Because in those settings, *any* entry upon the others' land, and conducting of activity thereon, without permission, are inherently "adverse" (and "hostile") to the fee owner's rights – because there is only room for one fee owner, A or B, but not both.

Heine's claim rests on a fundamentally flawed premise: that what is adverse in that traditional "fee owner v. fee owner setting" somehow applies in the very different setting of a non-exclusive easement. Whether

Heine took actions that conflicted with Purdy's rights is irrelevant to the issue presented here, which is whether his actions conflicted with and usurped the Russells' rights – and they did not. [1]

Nothing in Washington law suggests that analyzing "adverse" or "hostile" actions turns on *who* is performing them, rather it turns on whether the *actions* necessarily conflict with and usurp the rights of the defendant. The Court of Appeals thus applied well established concepts in Washington law to the facts at hand. Heine has not shown that this "issue of first impression" warrants review by this Court in this particular case, or conflicts with existing Washington case law, or presents some great issue of broad public interest.

B. The Court of Appeals decision on Heine's prescriptive easement claim was driven by the facts – it does not conflict with any controlling precedent from this Court or any Court of Appeals precedent, and raises no issue of public interest.

The Court of Appeals ruling does not conflict with *Nw. Cities Gas Co. v. W. Fuel Co.,* 13 Wn.2d 75, 123 P.2d 771 (1942), as Heine claims, and as required by RAP 13.4(b)(1). *NW Cities Gas* held that

> To establish a prescriptive right of way over the land of another person, the claimant of such right must prove that

[1] Moreover, a contrary rule would require a dominant estate such as the Russells to sue pre-emptively to enjoin another dominant estate (Heine) from keeping the unused easement area landscaped and looking good, acts which benefit not only Heine (who can look at it as his "front yard," as he puts it) but also the entire neighborhood. Our law discourages needless pre-emptive litigation brought simply to prevent a potential or theoretical future problem.

> his use of the other's land has been open, notorious, continuous, uninterrupted, over a uniform route, adverse to the owner of the land sought to be subjected, and with the knowledge of such owner at a time when he was able in law to assert and enforce his rights

NW Cities Gas, 13 Wn.2d at 85. Adversity turns not on the parties' intent, but on the objectively observable acts of the user and the rightful owner's control. *Dunbar v. Heinrich*, 95 Wn.2d 20,27, 622 P.2d 812 (1980).

While Heine claims that the Court of Appeals was wrong in determining that Heine's use of the road was not adverse to the Russells (*Pet. at 14-15),* the only evidence for Heine was Pamela Styles' testimony of twice-yearly visits from propane trucks and occasional movement of a camper/RV **CP 709-10, CP 459.** These are a far cry from the "continuous" or "uninterrupted" use over a "uniform route" that would be adverse to the landowner so as to alert him "at a time when he was able in law to assert and enforce his rights." The rare events Ms. Styles describes are not the use of a "true owner" residing at the Styles/Heine property, who would be expected to use the route daily, or nearly so. A few sporadic transits per year by these other vehicles are not "open and notorious" or "continuous" so as to be sufficient for the Russells to see and be aware of the supposed ongoing use and act to protect their interests. And even if the Russells might chance to observe these rare events, they would have reason to know that the propane truck was going to service the Heine property, as opposed to

visiting the Stow or Kendall properties further up the road.

Although the Court of Appeals might more accurately have rejected Heine's claims based on a fatal defect in the "open, notorious, continuous, and uninterrupted" element of the *NW Cities Gas* test rather than looking to the "adversity" element, the same lack of evidence was fatal to each of those elements – and also would have been fatal to the "with the knowledge of the owner" element, because the Russells cannot be expected to have observed infrequent and isolated events such as a propane truck driving by for 30 seconds a few times each year.

NW Cities Gas itself involved very different facts, with the adverse possessor having laid out and improved the road in question, and then operating heavy trucks hauling loads to and from its coke plant over a 15 year period, and encouraging the public to use the same route to get to its business. *NW Cities Gas*, 13 Wn.2d at 90-91. There is no conflict with either the law or result in *NW Cities Gas*, because the *facts* here are very different.

Nor is there any conflict between the Court of Appeals decision and any other Court of Appeals decision, as required by RAP 13.4(b)(2). The only Washington case Heine cites, *Lee v. Lozier,* 88 Wn.App. 176, 945 P.2d 214 (1997), dealt with use of waterfront docks on Lake Washington, and in those settings, the normal use that a true owner would make would be

seasonal, and much less consistent, than the owner of a road would make where the properties are year-round full time residences and a true owner would operate motor vehicles on amore or less daily basis. The *Lee* court explicitly recognized this distinction, noting "Given the water and air temperatures in the wintertime on Lake Washington, we can only conclude that use of the dock more frequently in summer than winter was entirely consistent with the uses most likely made of similar docks" *Lee,* 945 P.2d at 219. Thus, in ruling against Heine the Court of Appeals did not "implicitly renounce" (*Pet. at 15)* the holding in *Lee* - rather, it recognized that the "summer home"/seasonal use cases are different than the usual roadway case as is presented here.

The foreign cases Heine mentions *(Pet. at 15, fn.5)* offer no guidance. *Johnston v. Bates*, 778 SW.2d 357 (Mo. App. 1989) involved more than "eight to ten times per year" use of a road for deer hunting; in fact, the testimony was the claimant had used it "all the time" for about 15 years, and had blocked off part of the road with a cable and lock, as well as using it on hunting trips. *Johnston*, 778 SW.2d at 363-64. Indeed, the court castigated the defense for selectively quoting the "eight to ten times per year" testimony (just as Heine does here) while ignoring the other testimony that established the claim. *Id.* In *Vandevoort v. McKenzie,* 117 N.C. App. 152, 450 SE.2d 491 (1994), the "several times per year" use was of a

roadway on rural property, and the claimant testified that it was the only access to his property, and in fact he maintained the road and installed a gate with a lock. He also granted other people permission to use the road. *Matakitis v. Woodmansee*, 446 Pa. Super. 433, 667 A.2d 228 (1995) involved tacking of use; although the claimant only used the road three to four times each year after taking title to her parcel, her parents had owned the property for decades before that. "We note that Ray and May gained their prescriptive easement by tacking their parents' period of use of the easement onto their own use." *Matakitis*, 446 Pa.Super. at 444 fn. 1.

In short, the Court of Appeals decision on Heine's prescriptive easement claim turned on the evidence – actually the lack thereof – and correctly applied established Washington law in doing so. There is no "issue of substantial public interest" presented.

C. There is no reason to review a "collective tacking" theory that was never pleaded or agued until *after* oral argument in the Court of Appeals, has never been applied in any reported case, and does not apply here.

Arguments or theories not presented to the trial court will generally not be considered on appeal. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992); *In re Marriage of Tang*, 57 Wn. App. 648, 655, 789 P.2d 118 (1990). The issue must have been advanced below and the trial court provided an opportunity to consider and rule on relevant authority. *Bennett*

v. Hardy, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990). The first time Heine argued "collective tacking" was in a supplemental brief after oral argument, and the Court of Appeals properly rejected the theory because it had not been raised in the trial court. *Slip Op. at 8.* For the same reason, this Court should not consider the new argument now.

Moreover, there is no law actually supporting the "collective tacking" concept. In fact, in *McBurney v. Cirillo*, 889 A.2d 759 (Conn. 2006), which Heine relies on, the Connecticut supreme court flat out rejected the "collective tacking" concept as lacking any legal basis. The case involved several lots whose various owners, over time, had made use of the plaintiff's empty lot as an access way. Those lot owners claimed a prescriptive easement, and the trial court agreed with their argument. The supreme court, after first reviewing the tacking concept, reversed:

> In the present case, the trial court extended the tacking doctrine to allow what is essentially collective tacking by groups of landowners.. . . [**T**]***he court pieced together different time periods and types of uses by owners of different rear lots, with the prior uses of various predecessors in title to the different rear lots. The trial court cited to no authority permitting this collective application of the tacking doctrine, and on appeal, the defendants do not cite to any such authority. Indeed, such an application of tacking would extend the doctrine so far as to render the requirement of privity meaningless. Therefore, because the individual defendants failed to establish successive use by parties in privity, they have failed to satisfy the requirement that such use has been continuous for fifteen years*** pursuant to the requirements of

> § 47-37 and have, therefore, failed to establish that they acquired a prescriptive easement over the second lawn parcel. (emphasis added)

McBurney, 889 A.2d at 778-79. *Flaherty v. Muther*, 17 A.3d 640 (Maine 2011), likewise rejected application of this concept, where the claimant argued that prescriptive use by a few lots in a large development somehow created a prescriptive easement for all of the lots in the entire development.

The "privity" element is central to this "collective tacking" theory, and Washington cases make clear that privity exists when "the prior adverse possessor willingly turns over possession to the succeeding one." *Shelton v. Strickland*, 106 Wn. App. 45, 52, 21 P.3d 1179 (quoting 17 William B. Stoebuck, Washington Practice: Real Estate sec. 8.18 n.1, at 513-14 (1995) (footnote omitted)), *rev.denied*, 145 Wn.2d 1003 (2001).

As stated by Professor Stoebuck:

> To understand tacking, it is useful to recall the concept of "inchoate title,".... Before the statute has run, an adverse possessor has something which, though it is wrongful and cannot stand up against the true owner, is rightful and good against everyone else. This "shadow title," ... is founded in possession; so, it makes sense that it can be transferred by transferring possession. ***There must be a relationship between the successive adverse possessors, one in which, at a minimum, the prior possessor willingly turns over possession to the succeeding one. This relationship the courts usually call "privity," though, to avoid confusion with the several other meanings of that word, the word "nexus" is better***. (emphasis added; footnotes omitted)

Shelton, 21 P.3d at 1183.

Howard v. Kunto, 3 Wn. App. 393, 400, 477 P.2d 210 (1970) put the privity element this way:

> In the final analysis, however, we believe the requirement of "privity" is no more than judicial recognition of the need for some reasonable connection ***between successive occupants of real property*** so as to raise their claim of right above the status of the wrongdoer or the trespasser. We think such reasonable connection exists in this case. (emphasis added)

Shelton, Howard, and *McBurney* all define privity as requiring, at minimum, a transfer of possession rights between successive occupants of a particular piece of property. That is not the case here, where no transfer of rights – even the limited rights of access and egress, which is all the beneficiaries of the 30 foot Easement ever had – ever took place among or between those beneficiaries, and where Heine is not the successor in occupancy to any of those other beneficiaries. Heine's prescriptive easement claim had to stand, or – in this case, fall – based solely on the his and his parcel's predecessors in title's (the Styles) actions.

Finally, Heine's argument that this novel doctrine is necessary "to avoid an absurd result whereby different users end up with differing rights in the same road" *(Pet. at 17)* turns logic on its head – it is entirely normal for different properties to have different rights over the same area or roadway.[2] If Parcel A establishes a prescriptive right, that does not mean

[2] The scenario Heine offers, of owners north of him having such rights over the Russell property but he has none himself, is also purely hypothetical; the Stows and Kendall, the

that Parcel B (whose owner would like to have the same rights, but has not established a prescriptive easement) should somehow benefit, or is somehow stuck with an unfair, "absurd" result just because he does not have what someone else has. The absurd result would be the opposite, where the Russells would have to allow anyone who chooses to use their land for a roadway simply because one other parcel established a prescriptive right at some point in time.

D. Heine fails to show why the Court should review a "shifting easement" theory was never presented to the trial court, and is actually not a new theory at all.

Heine claims that *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), applied a "shifting easement" analysis, and that this Court should now – nearly 30 years later – take the opportunity to review those decisions.

In the Court of Appeals, Heine argued the "shifting easement" theory as a single analysis that mixes and matches elements of adverse possession, abandonment, and prescriptive easement theories, and results in a relocation of the access from the deeded location to some other location. Heine needed the "shifting easement" theory to be a different analysis than the traditional adverse possession and prescriptive easement analyses (the

owners to the north, dismissed any claims for prescriptive easement against the Russells, and the hypothetical issue was never addressed by the trial court or Court of Appeals.

claims he pleaded), so that he could avoid the results those established frameworks produce.

But the Court of Appeals correctly saw *Curtis* and *Barnhart* as decisions made on their own specific facts, with the application of established law (adverse possession, abandonment of easement, and prescriptive easement) to those facts. *Slip Op. at 8.* Although the *Curtis* or *Barnhart* courts may have used the word "shifted" in describing the result in the case, that is a far cry from adopting a new legal theory of "shifting easement" – and neither the *Curtis* nor *Barnhart* opinions suggest that those courts thought they were doing so. Indeed, this Court has already had the opportunity to explore *Curtis* and *Barnhart*, in *Heg v. Alldredge*, 157 Wn.2d 154, 1378 P.3d 9 (2006), where the Court affirmed Washington's longstanding rule that forbids one neighbor from acting to exclude another neighbor from using a non-exclusive easement, whether by framing their claim as adverse possession, abandonment, or both.

Heine fails to demonstrate any reason for this Court to again review these nearly 30 year old precedents, and his naked assertion of "substantial public interest" is unsupported by any analysis or discussion that would demonstrate why this is so. Adverse possession and prescriptive easement cases turn on the *facts*, and the facts before the trial court and Court of Appeals drove the results in both courts.

E. The Russells should be awarded reasonable attorney fees and costs on this appeal under RCW 7.28.083(3) and RAP 18.1(j).

If this court denies Heine's petition, the Russells are entitled to an additional fee award for responding to same. RAP 18.1(j).

VI. CONCLUSION

Heine fails to show any basis under RAP 13.4(b) for having this Court accept review. The legal analysis applied by the Court of Appeals was consistent with established Washington law, and addressed the well-known legal theories on which Heine based his claims. If Heine or his trial counsel misunderstood the evidence, or the legal effect of same, that is no different than what occurs every day in Washington courts, and offers no basis for this Court to step in now and try to salvage his case by applying novel legal theories never argued to the trial court and rejected by the very foreign decisions Heine cites. There is no issue of substantial public interest presented in any of this. Review should be denied.

RESPECTFULLY SUBMITTED on 20 January 2021.

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CERTIFICATE OF SERVICE

I, Deborah Davies, certify that on January 20, 2021, I caused copies of the foregoing document to be served on the party(s) listed below by the method(s) indicated for each:

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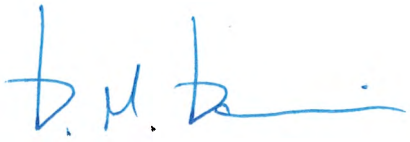
DATED January 20, 2021 at Poulsbo, Washington.



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