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No. 99331-9

SUPREME COURT
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.

APPELLANT RALPH A. HEINE'S ANSWER TO MEMORANDUM OF AMICI CURIAE

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I. INTRODUCTION

That four reputable and experienced practicing lawyers and a highly qualified academic felt compelled to submit a memorandum urging this Court to accept review of the Court of Appeals' decision in this case sends a strong, implicit message that this Court should heed. Beyond that, Amici's substantive message is clear: Ralph Heine's petition for review raises both novel issues that this Court should resolve and issues on which settled law has been called into doubt. The issues meet one or more of the RAP 13.4(b) criteria and merit this Court's attention. This Court should accept review.

II. ANSWERING ARGUMENT

A. This Court should resolve the issue of first impression on adverse possession of an easement by a dominant owner.

All agree that this case raises at least one issue of first impression: the standard for hostility of use that a dominant owner must meet for the statutory period to extinguish or modify an easement by adverse possession. As Amici correctly observe, easements can be extinguished or modified by adverse possession. *Amici Memo.* at 4 (citing *Howell v. King County*, 16 Wn.2d 557, 559–60, 134 P.2d 80 (1943)). At Respondents' urging, the Court of Appeals held that a dominant owner must meet the same, heightened standard that a servient owner must meet, even though a servient owner is in a materially different position than a dominant owner. *Slip Op.* at 5–6.

As Amici astutely observe, that holding "renders the easement less susceptible to adverse possession than the land it benefits." *Amici Memo*. at 6. To correct that problem, the standard should depend on the rights the would-be adverse possessor has in the land. A servient owner (*e.g.*, Respondent Purdy) has the greatest rights: as the owner of the easement land, they can use it in any manner that does not interfere with its ultimate use for the reserved purpose. *Thompson v. Smith*, 59 Wn.2d 397, 407–08, 367 P.2d 798 (1962). Thus, only a permanent obstruction or refusal of a demand to open the easement can be deemed hostile. *See Cole v. Laverty*, 112 Wn. App. 180, 185, 49 P.2d 924 (2002). A dominant owner (*e.g.*, Heine's predecessors, the Styles) has the rights conferred by the easement grant, so uses that "exceed a reasonable exercise" of those rights should be deemed hostile. *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 311, 901 P.2d 1074 (1995). Finally, a stranger has no rights in the land, so the ordinary hostility standard should apply.

Such a rule would be appropriate and fair even though it would require servient and co-dominant owners alike to be mindful of users' rights in guarding against adverse possession. All property owners must police would-be adverse possessors, and doing so is not always straightforward. For instance, there can be multiple adverse users of an ingress-and-egress route, and use by anyone affiliated with a party—such as agents, employees, customers, members, guests, and service providers—counts in establishing a prescriptive easement. *See The Mountaineers v. Wymer*, 56 Wn.2d 721, 722–24, 355 P.2d 341 (1960) (nonprofit members and guests); *Nw. Cities*

Gas Co. v. W. Fuel Co., 13 Wn.2d 75, 81–83, 123 P.2d 771 (1942) (employees and customers). The law does not eliminate the burden of policing merely because of the potential difficulty. Property owners and easement holders alike must remain vigilant to protect their property rights against adverse possession.

The Court of Appeals announced a new rule when it held that the hostility standard is the same for dominant and servient owners. As Amici urge, this Court should accept review to decide whether to adopt or reject that rule.

B. This Court should resolve the inconsistency between the decision here and prior cases on "shifting" easements.

Amici aptly recognize the distinction between extinguishing an easement and shifting its location. Heine concurs with Amici that there is no material difference between his position and that of the claimants in the two "shifting" easement cases: *Curtis v. Zuck*, 65 Wn. App. 377, 829 P.2d 187 (1992), and *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 843 P.2d 545 (1993). In those cases, like here, the claim was that the easement's location *shifted* to an existing road—which was *narrower* than the express easement as described—due to longstanding use. The courts distinguished that result from a claim that an easement was *extinguished*. The courts held that the rule that owners whose titles derive from a common grantor may not *extinguish* their mutual easement by adverse possession did not apply where the claim was that the easement *shifted*. *Barnhart*, 68 Wn. App. at 421–22;

Curtis, 65 Wn. App. at 382. As Amici point out, this Court validated that distinction in *Heg v. Alldredge*, 157 Wn.2d 154, 164, 137 P.3d 9 (2006).

Heine agrees that the Court of Appeals' decision casts doubt on what had been settled law under *Curtis* and *Barnhart*. This Court should accept review to confirm that the result of applying the doctrines of adverse possession and prescriptive easements may be that an express easement's location shifts to the existing location on the ground, and it should apply that rule here.

C. This Court should clarify the requirements to establish a prescriptive easement, rendered uncertain by the decision here.

Amici correctly identify the multiple problems with the Court of Appeals' analysis on the prescriptive-easement issue. Heine agrees that there is "no discernable way to reconcile" the Court of Appeals' analysis of the hostility and continuous-use elements with prior case law from this Court and from the Court of Appeals. *Amici Memo.* 10.

On hostility, Amici aptly observe that driving on another's land is a "classic example" of hostile use that may give rise to a prescriptive easement. *Amici Memo.* 9. There was simply no justification for the Court of Appeals to break with precedent and hold otherwise.

On continuous use, Amicis' analysis shows how the Court of Appeals set aside precedent when it held as a matter of law that the Styles' use was not "use of the same character a true owner might make under the circumstances." *Slip Op.* at 8; *see 810 Props. v. Jump*, 141 Wn. App. 688, 702, 170 P.3d 1209 (2007); *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d

214 (1997). Particularly apt is the *Restatement* comment, quoted by Amici, which encapsulates the principle underlying that precedent: "Seasonal uses, intermittent uses, and changing uses may all meet the continuity requirement so long as they are open and notorious." *Amici Memo.* at 9 (quoting RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17 cmt. i (2000)).

The Styles' intermittent use of their motorhome and twice-yearly visits from propane trucks were at least sufficient to raise a fact question under that standard. Beyond that, multiple oversized service vehicles that used to be able to visit the property regularly—such as garbage and delivery trucks—would have driven to the end of the dead-end road and back, because that is how they would turn around and return to the county road. This Court should accept review and clarify the required showing for a prescriptive easement and thus eliminate the confusion that the Court of Appeals' decision undoubtedly will engender.

III. CONCLUSION

This Court should grant review, reverse the Court of Appeals' decision, grant summary judgment to Heine, and award him fees.

Respectfully submitted this 16th day of March, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 16th day of March, 2021.

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