Supreme Court No. 99331-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79754-9-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

RALPH A. HEINE,

Appellant,

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 PETITION FOR REVIEW

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I. INTRODUCTION

The doctrines of adverse possession and prescriptive easements embody the principle that "at some point legal titles should be made to conform to appearances long maintained on the ground."[1] The Russell respondents destroyed long-maintained appearances when they narrowed a shared access road from 12.5 feet to as little as 6.5 feet by installing a row of sixteen steel bollards and then claimed that the road could expand into Appellant Ralph Heine's yard on the other side to make up the difference:

In affirming the summary judgment that allowed this invasion to stand, the Court of Appeals contravened fundamental principles, broke with precedent, and decided at least one issue of first impression. The decision involves three main issues that warrant review by this Court.

First, on adverse possession, the Court of Appeals both broke with precedent and decided an issue of first impression about the standard for

[1] *Campbell v. Reed*, 134 Wn. App. 349, 361, 139 P.3d 419 (2006) (quoting W. Stoebuck & J. Weaver, 17 WASH. PRAC., REAL ESTATE: PROPERTY LAW § 8.1 (2004)).

establishing adverse or "hostile" use in the context of an easement. The owner of a *servient estate* (land burdened by an easement) may use an unopened easement area in any manner that does not permanently interfere with its future use for its reserved purposes. In contrast, the owner of a *dominant estate* (land benefited by an easement) may use an easement only as authorized. Yet the Court of Appeals held that, to extinguish or modify an easement by adverse possession, a dominant owner—here, Appellant Heine—must meet the same, heightened standard that a servient owner must meet to establish hostility of use. This Court should review that holding because it conflicts with a published Court of Appeals' decision—*Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995)—and involves an issue of substantial public interest that this Court should decide. RAP 13.4(b)(2), (b)(4).

Second, on prescriptive easements, the Court of Appeals held that driving on another's land without permission does not constitute hostile use. That holding conflicts with, at minimum, *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942). The Court of Appeals then adopted a restrictive, bright-line approach to the continuous-use element when it held that regular, though not constant, use of another's land for ingress and egress cannot be continuous. That holding conflicts with *Lee v. Lozier*, 88 Wn. App. 176, 945 P.2d 214 (1997), where the Court of Appeals held that use need not be constant, but need only be of the same character that a true owner might make of the property considering its nature and location. This Court should grant review to resolve these conflicts and

because the Court of Appeals' holdings involve issues of substantial interest that this Court should decide. RAP 13.4(b)(1), (b)(2), (b)(4). Beyond that, this Court should consider whether to adopt the doctrine of collective tacking, which allows tacking of use by concurrent users who are in privity.

The third main issue that warrants this Court's review involves both adverse possession and prescriptive easements. In two prior decisions, the Court of Appeals held that where a road is built and used outside an easement's described location, the easement may "shift" to the existing road if the elements of both adverse possession and prescriptive easements are satisfied. *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 422-23, 843 P.2d 545 (1993); *Curtis v. Zuck*, 65 Wn. App. 377, 380-84, 829 P.2d 187 (1992). The Court of Appeals refused to apply the concept of a shifting easement here for reasons that implicate the two issues set forth above. Whether this Court should adopt the concept is an issue of substantial public interest that this Court should decide. RAP 13.4(b)(4).

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

II. COURT OF APPEALS DECISION

The Court of Appeals issued its decision affirming the summary judgment on October 19, 2020, corrected that decision on November 3, 2020, and denied publication on November 18, 2020. Copies of the court's decision and orders are attached in chronological order as appendices A, B, and C.

III. ISSUES PRESENTED FOR REVIEW

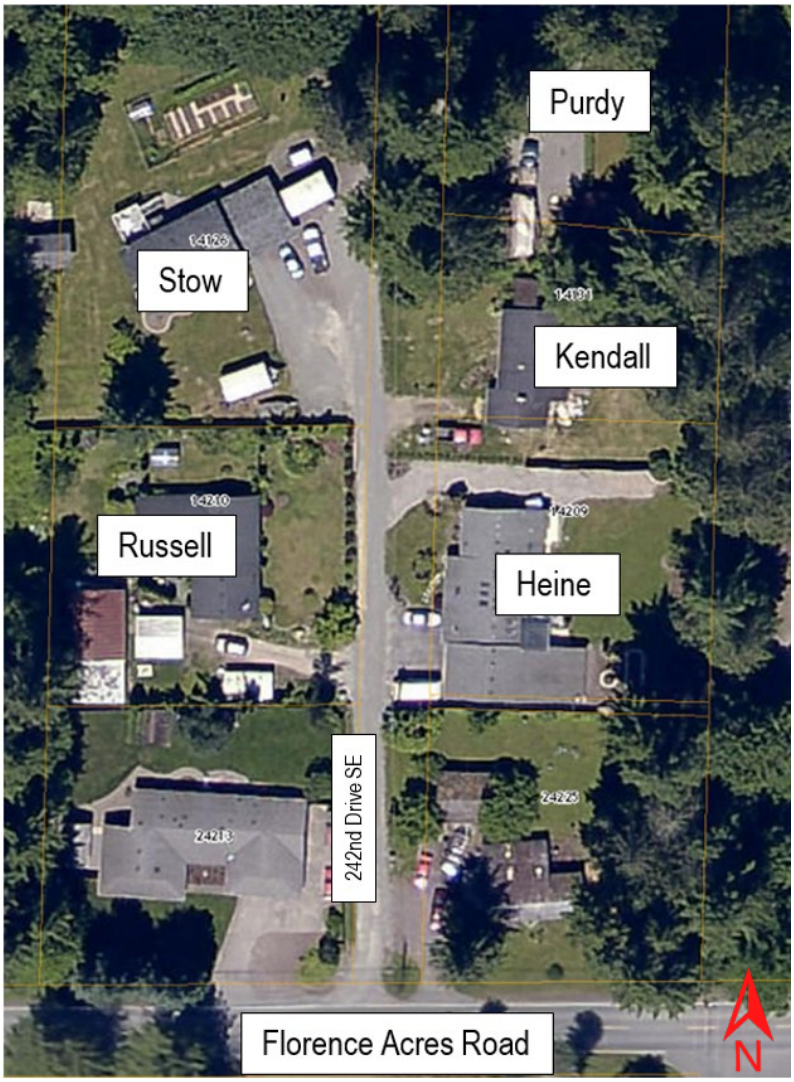
1. *Adverse Possession.* Because a servient owner's right to use an unopened easement area is nearly unrestricted, they must meet a heightened standard of hostile use to extinguish an easement by adverse possession. The Court of Appeals decided, in conflict with *Timberlane*, that a dominant owner is subject to the same, heightened standard. Should this Court grant review and decide whether a dominant owner's use is hostile as to all who claim an interest if the use exceeds a reasonable exercise of the dominant owner's easement rights?

2. *Prescriptive Easement*. The Court of Appeals held, in conflict with *Northwest Cities Gas*, that driving on another's land without permission is not hostile. The court also adopted, in conflict with *Lee*, a blanket rule that regular, though not constant, use of land cannot be deemed continuous. Should this Court grant review to determine whether to confirm and apply the holdings of *Northwest Cities Gas* and *Lee*?

3. *Shifting Easement*. The Court of Appeals held in *Curtis* and *Barnhart* that an easement may shift from a described location to an existing road where the elements for adverse possession and a prescriptive easement are present. This Court has never addressed a similar factual context, which this case presents. Should this Court grant review to determine whether to embrace the concept of a shifting easement?

IV. STATEMENT OF THE CASE

The parties each own property on 242nd Drive SE, a private, unimproved road in Snohomish County that runs north and south and intersects with a county road at its southern terminus. The Heine and Russell properties are on opposite sides of 242nd Drive SE, to the east and west, respectively. The Kendall and Stow properties come next, heading north. Finally, the road dead ends at the Purdy property to the far north. For decades, all parties and their predecessors regularly used the shared road to access their properties.



The above image is based on the same aerial imagery as CP 703 and 704.

Also for decades, the road was about 12.5 feet wide and had static boundaries, including on the Russell side. CP 416, 419, 424, 432, 447, 465-68, 751-53; *see also* Appendix D. Under an express grant of easement, the road was supposed to be located within a 30-foot-wide strip of land owned by John Purdy. *See* CP 700. In reality, for at least 40 years, the road was not located entirely within the 30-foot-wide strip but straddled its western boundary so that the road was mostly within the strip but encroached onto

the Russells' land by as much as 5.5 feet, as shown in the combined survey and aerial photograph below. CP 465-68, 703, 757-58, 765-66.

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CP 703.

The easement grant restricted the land's use by the dominant owners to the purposes of ingress, egress, and utilities. CP 700. As surveyed, the eastern edge of the 30-foot-wide strip is within a few feet of Heine's house. *See* CP 703 (reproduced on the previous page). But Heine and his predecessors used the area between their house and the road's eastern edge as their front yard. Of particular relevance, the Styles—who owned what is now the Heine property for more than 28 years, from 1977 to 2005—fenced the land, landscaped it, cemented a flagpole, maintained a lawn, trees, and shrubs, and parked cars on their asphalt driveway. CP 462-79.

The Styles also used the part of the road that encroached onto the Russells' land—for ingress and egress. Although the Styles' driveway was near the southern end of their property, they regularly used the part of 272nd Drive SE in front of their home that encroached onto the Russells' land. *See* CP 458-59. They parked a motorhome along the northern edge of their property that they would use for travel two to three times per year, amounting to four to six trips up and down the road. *Id*. Beyond that, a propane truck would visit twice annually, contributing another four trips across the Russells' land. *Id*. Even beyond that, garbage trucks and delivery vehicles serviced the Styles' property and could do so only by traversing the entire length of the road turning around, and returning to the county road via the same route. *See* CP 424, 432, 447, 704. In addition, the Styles participated in maintaining the entire length of the road, including the part on the Russells' land. CP 502.

In 2016, after obtaining a survey, the Russells installed a row of sixteen steel bollards in the roadway, embedded in concrete along their deeded eastern boundary line. CP 447, 450, 452, 454, 456, 487-89. This narrowed the road from 12.5 feet down to as little as 6.5 feet. CP 419, 424, 432, 447, 467-68. Garbage trucks and delivery vehicles—as well as emergency vehicles—no longer traverse the road. CP 424-26, 432, 447. The bollards also constricted the access to Heine's driveway and rendered his recreational-vehicle parking area unusable. CP 447, 456. The Russells would claim that the road could expand into Heine's front yard to make up for what they took with their bollards. *See* CP 442-43, 841.

CP 691 (bird's eye view, looking north).

Seeking to have the road put back as it had always been, Heine sued all parties with an interest in the easement-burdened land. He claimed that his predecessors, the Styles, had (1) by adverse possession obtained fee title to the portion of Purdy's 30-foot-wide strip they used as their front yard and (2) by prescriptive use obtained an easement over the Russells' land to the extent the road had encroached onto it. CP 189-201; *see also* CP 843-56, 949-56. The Russells counterclaimed for declaratory relief and to quiet title. CP 827-30. They claimed that they were entitled to develop and improve the entire 30-foot-wide strip for ingress-and-egress purposes. CP 829.

On cross-motions for summary judgment, the trial court dismissed Heine's claims with prejudice, granted the Russells summary judgment on their counterclaims, and awarded the Russells and Purdy prevailing-party fees under RCW 7.28.083(3). CP 127-31, 160-63, 349-53; *see also* CP 964-66. The court ruled that if the Russells ever decide to use the entire 30-foot-wide strip for ingress and egress, Heine must demolish his front yard by removing all landscaping materials from the area at his expense. CP 350-51. This would eliminate not only Heine's yard but his driveway and parking areas—and bring traffic within a few feet of his front door. *See* CP 703.

The Court of Appeals affirmed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Adverse Possession: This Court should grant review because the Court of Appeals' holding on adverse possession conflicts with a published Court of Appeals decision and determines an issue of substantial public interest that this Court should decide.

As with any possessive interest in property, an easement can be extinguished or modified[2] through adverse or "hostile" use by any person for the statutory period. *Lewis v. City of Seattle*, 174 Wash. 219, 225, 24 P.2d 427, 27 P.2d 1119 (1933) (en banc). The nature and extent of use required to qualify as hostile differs depending on the user's rights in connection with the land. Use by one lacking any legal right or permission to use the land is deemed hostile if they exercise dominion over the land in a manner consistent with actions a true owner would take, considering the land's nature and location. *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).

The hostility standard is more demanding when the servient owner claims to have extinguished an unopened easement area by adverse possession. That is because, as the owner of the easement-burdened land, the servient owner is already in possession of the land and is entitled to use it in any manner that does not permanently interfere with the easement's future use for its reserved purposes. *Thompson v. Smith*, 59 Wn.2d 397, 407-08, 367 P.2d 798 (1962). Thus, a servient owner's use of an unopened easement area is deemed sufficiently hostile to put the dominant owner on

[2] Heine's claim is not that the easement was extinguished, but that it shifted to the existing road. *See infra*, § VI.C; *see also Appellant's Opening Br.* at 30-31; *Appellant's Reply Br.* at 10-12.

notice and start the prescriptive period only if the servient owner (1) permanently obstructs the easement or (2) refuses a request by the dominant owner to open the easement. *Cole v. Laverty*, 112 Wn. App. 180, 185, 49 P.3d 924 (2002); *see also Thompson*, 59 Wn.2d at 407-09.

A dominant owner's position is materially different. A dominant owner is entitled to use the easement-burdened land only in the manner authorized by the easement grant. An easement grant thus provides the measure for when a dominant owner's use is hostile. Use that plainly exceeds the scope of that grant puts the world—including the servient owner and co-dominant owners—on notice of the dominant owner's claim to fee title, free of the interfered-with easement rights. Accordingly, the Court of Appeals had previously held that a dominant owner's use is hostile as to the servient owner's fee interest if it exceeds a "reasonable exercise of [the] easement right." *Timberlane*, 79 Wn. App. at 311.

Timberlane is instructive. In that case, each member of a homeowners association had a nonexclusive easement in a common area owned by the association. *Id*. at 306. The Brames, homeowners in the subdivision, fenced in part of the common area, landscaped it, installed a concrete patio on it, and otherwise used the land as their own for more than ten years. *Id*. When the association sued to eject the Brames and quiet title, the Brames counterclaimed based on adverse possession. *Id*. On appeal from a summary judgment for the association, the Court of Appeals reversed and granted partial summary judgment to the Brames. The court reasoned, "Although the use was originally permissive because the

[Brames]…had a nonexclusive easement right to the common area, the construction of a fence and a concrete patio on the property far exceeded a reasonable exercise of that easement right." *Id*. at 311.

Timberlane addressed only the standard for hostility of a dominant owner's use vis-à-vis the servient owner. Because the association in *Timberlane* lacked standing to enforce its members' easement rights, the Court of Appeals did not reach the issue of the Brames' rights vis-à-vis the other dominant owners. *See id*. at 307-09, 312. The court thus did not address the standard for hostility when one dominant owner seeks to extinguish or modify other dominant owners' easement rights.

Here, although Heine is a dominant owner, the Court of Appeals applied the heightened, servient-owner standard to his claim against the servient owner (Purdy) and the other dominant owners (the Russells, the Stows, and Kendall) based on adverse possession by Heine's predecessors, the Styles. The Court of Appeals observed that "a *servient estate owner* can extinguish an easement through hostile or adverse use," but that hostile use by a servient owner is "difficult to prove." *Slip Op.* at 5 (emphasis added). The court further observed that a servient owner "has the right to use [the] land for purposes not inconsistent with its ultimate use as an easement during the period of nonuse." *Id*. at 5-6. The court then applied that standard to the Styles' uses of the disputed area, holding that those uses did not raise a genuine issue of material fact regarding hostility because they "were not inconsistent with the ultimate use of the easement for its dedicated purposes." *Id*. at 6.

As support for its holding, the Court of Appeals relied on this Court's decision in *Thompson*, 59 Wn.2d 397, a case that involved a servient owner's use of easement-burdened land. The dominant owners obtained an injunction directing the servient owner to remove a concrete slab he had constructed partially within an unopened easement for ingress and egress. *Id*. at 403. Vacating that portion of the injunction, this Court held that constructing the slab was within the servient owner's rights as owner of the land and was not inconsistent with its future use for the purposes reserved by the easement. *Id*. at 407-09.

The legal bounds of servient owners' rights should be immaterial here, where the claimant is a dominant owner. As to Heine's claim against Purdy for fee title to the area between Heine's house and the road, the Court of Appeals' decision that the servient-owner standard applies in determining the hostility of dominant owner's use of an unopened easement area conflicts with *Timberlane*, and review is warranted to resolve that conflict. RAP 13.4(b)(2). As to Heine's claim against his co-dominant owners (the Russells, the Stows, and Kendall) concerning their easement rights in that same land, the Court of Appeals in applying the servient-owner standard determined an issue of first impression (the question *Timberlane* did not reach). Both are issues of substantial public interest that this Court should decide. RAP 13.4(b)(4). Easements are commonplace in connection with all types of real property, and establishing the nature of use of easement-burdened land that may ripen into fee title by adverse possession is important for property owners and easement holders alike.

Under the correct standard for hostility, Heine should prevail as a matter of law on his claim to quiet title to his front-yard area—free of any easement for ingress and egress—based on adverse possession by his predecessors, the Styles. The Styles actively used and maintained the disputed area as one would expect a suburban property owner to use their own front yard, and their uses indisputably exceeded the reasonable exercise of their ingress-and-egress rights.[3]

B. Prescriptive Easement: This Court should grant review because the Court of Appeals' holding on prescriptive easements conflicts with decisions by this Court and the Court of Appeals and determines an issue of substantial public interest that this Court should decide.

Under established precedent, use of another's land without permission—such as by driving on it—is hostile for purposes of establishing a prescriptive easement. *See, e.g., Northwest Cities Gas*, 13 Wn.2d at 77-85. The Court of Appeals held that the trips by Heine's predecessors, the Styles, up and down the road each year to access their RV parking area and the additional trips by their service providers were, as a matter of law, "not actions made adversely to the owner of the land [*i.e.*, the Russells]." *Slip Op.* at 8. That holding conflicts with published decisions

[3] Under a standard that uses the dominant owner's rights under the easement grant as the touchstone, the Styles' fencing alone would be sufficient to establish hostile use of the easement. *See ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 759, 774 P.2d 6 (1989) ("A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.").

of this Court, including *Northwest Cities Gas*.[4] This Court should grant review to resolve the conflict. RAP 13.4(b)(1).

Also under established precedent, one's hostile use of another's land need not be constant to put the landowner on notice of a potential claim of a prescriptive easement; it need only be "of the same character that a true owner might make of the property considering its nature and location." *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997). Thus, for instance, use of a dock on summer weekends is sufficiently continuous if such use is consistent with the use made by owners of similarly situated docks.[5] *Id*. at 185-86. The Court of Appeals held that the Styles' uses of the road were, as a matter of law, "not…use of the same character a true owner might make under the circumstances." *Slip Op.* at 8. That conclusion, unadorned by any analysis of the property's nature and location, can only be taken as renouncing the previous holding in *Lee*. This Court should grant review to resolve that conflict. RAP 13.4(b)(2).

In addition, the Court of Appeals' holdings on prescriptive easements involve issues of substantial public interest that this Court should decide. RAP 13.4(b)(4). In general, the nature of use that may ripen into prescriptive rights is important to all property owners and to those who find

[4] The Russells conceded below that the road's encroachment onto their land was not permissive. 10/3/2018 RP 32-33.

[5] Applying the same principle, courts in other jurisdictions have held that use of a road a few times a year may be continuous if it demonstrates use under a claim of right. *See, e.g., Johnston v. Bates*, 778 S.W.2d 357, 363-64 (Mo. Ct. App. 1989) (eight to ten times per year); *Vandervoort v. McKenzie*, 117 N.C. App. 152, 450 S.E.2d 491, 497 (1994) ("several" times per year); *Matakitis v. Woodmansee*, 446 Pa. Super. 433, 667 A.2d 228, 231 (1995) (three to four times per year).

themselves compelled to assert prescriptive rights to protect their means of access or other established uses of land. Beyond that, this Court should grant review to decide another issue of substantial public interest: whether to adopt the doctrine of collective tacking, under which tacking of use by concurrent users may satisfy the elements for a prescriptive easement.

Under existing law, multiple adverse users will acquire an easement in common. W. Stoebuck, J. Weaver, 17 WASH. PRAC., REAL ESTATE § 2.7, *Easements by Prescription* (2d ed., updated May 2019); *see also Curtis*, 65 Wn. App. at 380-84. Also under existing law, a claimant themselves need not have satisfied the elements for a prescriptive easement for ten years. The familiar concept of tacking allows the claimant to rely on use by others in privity with the claimant.[6] *Howard v. Kunto*, 3 Wn. App. 393, 398, 477 P.2d 210 (1970), *overruled on other grounds by Chaplin*, 100 Wn.2d 853.

In the prescriptive-easement context, tacking "usually" arises with successive users—that is, "when an owner of parcel *A* who has been making a prescriptive use upon parcel *B* conveys parcel *A* to a grantee who continues that use." Stoebuck & Weaver, *supra*, § 2.7. But while tacking by successive users is the norm, courts have not ruled out tacking by concurrent users, if privity exists. *See McBurney v. Cirillo*, 276 Conn. 782, 889 A.2d 759, 813-14 (2006) (rejecting tacking by owners of separate lots on the ground that they lacked privity), *overruled on other grounds by*

[6] Tacking applies in the prescriptive-easement context. *See* Stoebuck & Weaver, *supra*, § 2.7; 25 AM. JUR. 2D EASEMENTS AND LICENSES § 53 (updated May 2020).

Batte-Holmgren v. Comm'r of Pub. Health, 281 Conn. 277, 914 A.2d 996 (2007); *Flaherty v. Muther*, 17 A.3d 640, 660-62 (Maine 2011) (same).

In determining whether an easement in common was established through prescriptive use, there is no sound reason why each user must stand alone. The concept of privity is broad enough to encompass relationships such as those between the holders of an express easement in common, who have mutual interests in a road and corresponding easement-burdened land. The "privity" or "nexus" required between users for purposes of tacking "does not have to be more than such a reasonable connection...as will raise their claim of right above the status of wrongdoer or trespasser." *Shelton v. Strickland*, 106 Wn. App. 45, 52-53, 21 P.3d 1179 (2001).

To establish a prescriptive easement, the use must be sufficiently continuous, as well as open and notorious, as to charge the landowner with actual or constructive notice of it. *Downie v. City of Renton*, 167 Wash. 374, 378-79, 9 P.2d 372 (1932). Not only can collective tacking satisfy that purpose, its application will sometimes be necessary to avoid an absurd result whereby different users end up with differing rights in the same road. For instance, absent collective tacking, all owners north of Heine might establish rights to use a restored portion of the road that encroached on the Russells' property—but not Heine. This issue warrants this Court's review.[7]

[7] The Court of Appeals declined to reach the issue of collective tacking because it concluded that the issue was not raised below. Nevertheless, the record is sufficiently developed for this Court to decide the issue, and it should do so, even if only to set forth the legal principles that should apply when the issue arises on remand.

C. Shifting Easement: This Court should grant review because whether to adopt the concept of a shifting easement is an issue of substantial public interest that this Court should decide.

Where a shared road as built and used is either partially or fully outside an easement's described location, the easement may shift to the existing road if the elements of both adverse possession and prescriptive easements are satisfied. That was the result in *Curtis*, 65 Wn. App. 377, and *Barnhart*, 68 Wn. App. 417.

In *Curtis*, a shared-access road straddled an easement's northern boundary as platted, encroaching on the two plaintiffs' lots. *Curtis*, 65 Wn. App. at 379-80. Meanwhile, the owners of the lots south of the road maintained yards, driveways, and other improvements within the easement as platted. *Id*. The plaintiffs sued the owners of the southern lots to eliminate the road's encroachment and quiet title. *Id*. at 380. The trial court rejected their claim on summary judgment and ruled that the defendants had a prescriptive easement where the road encroached and had by adverse possession obtained fee title to the portions of the easement they had used as their own. *Id*. The Court of Appeals affirmed. Applying the doctrines of adverse possession and prescriptive easements, the court held that the easement's location had "shifted" to the existing road. *Id*. at 380-84; *see also Barnhart*, 68 Wn. App. at 420-23 (holding that an easement had shifted to an existing road where the road had "long been used as a substitute for the platted road right of way" and a house and yard had been built partially in the platted right of way).

Notably, both *Curtis* and *Barnhart* distinguished a prior decision of this Court, *Burkhard v. Bowen*, 32 Wn.2d 613, 203 P.2d 361 (1949), in which this Court held that co-dominant owners whose title derived from a common grantor could not extinguish their shared easement by adverse possession. *Id*. at 620-24. In *Curtis* and *Barnhart*, the Court of Appeals distinguished *Burkhard* and held that it applies only where the claimant seeks to extinguish an easement and not where, as in *Curtis* and *Barnhart*, the claim is that the easement's location shifted to an existing road. *Barnhart*, 68 Wn. App. at 421-22; *Curtis*, 65 Wn. App. at 382; *cf. Heg v. Alldredge*, 157 Wn.2d 154, 163-65, 137 P.3d 9 (2006) (distinguishing *Curtis* and *Barnhart* because "the Alldredges seek to exclude Ms. Heg from using her recorded easement rights, not merely alter the location where they exist"). The same is true here: Heine did not question the right of ingress and egress but claimed only that the easement's location shifted to the existing road.

The Court of Appeals gave two reasons why the easement here did not shift as in *Curtis* and *Barnhart*—each flawed. First, the court pointed to its conclusions that Heine could not satisfy the elements of adverse possession or prescriptive easements. *Slip Op.* at 8. Those conclusions implicate the issues discussed above and should not stand. Second, the court reasoned that the easement could not have shifted from the 30-foot strip because it contained water and electric utilities. *Id*. at 9. But the record does not reflect that the entire 30-foot-wide strip is used for utilities. And besides, Heine never claimed that the easement's boundaries changed for

purposes of utilities; he claimed that the easement shifted strictly for purposes of ingress and egress. *See Appellant's Reply Br.* 25-26.

This case mirrors *Curtis* and *Barnhart*, and whether to adopt the principles set forth in those cases is an issue of substantial public interest that this Court should decide. RAP 13.4(b)(4). The "shifting" of an easement is merely an application of the related doctrines of adverse possession and prescriptive easements to a situation, and doing so furthers the purposes of both doctrines. This is the third time a similar factual scenario has come before the Court of Appeals. Yet neither *Curtis* nor *Barnhart* was brought to this Court, and this Court has never addressed a similar factual context. This Court should grant review and embrace the concept of a shifting easement.

VI. CONCLUSION

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

Respectfully submitted this 18th day of December, 2020.

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Attorneys for Appellant Ralph A. Heine

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:

☒ Via Appellate Portal:

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DATED this 18th day of December, 2020.

s/ Patti Saiden
Patti Saiden, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

RALPH A. HEINE, Appellant, v, TIM S. RUSSELL and ROBERTA A. RUSSELL, STEVEN RUSSELL and STEPHANIE COLEMAN, JOHN PURDY, NORMAN and SARINA STOW, and WILL KENDALL, Respondents.	No. 79754-9-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — Ralph A. Heine appeals the trial court's summary judgment dismissal of his claims for adverse possession and prescriptive easement. Heine claims he acquired a prescriptive easement over part of his neighbors' property and that he adversely possessed a portion of an existing nonexclusive access and utilities easement.

Because Heine fails to establish a disputed issue of fact about the requisite elements for adverse possession or prescriptive easement, we disagree and affirm.

FACTS

Ralph Heine purchased his home in June 2009. Heine and his neighbors, Stows and Kendall, all use a gravel roadway to access their homes from the main road. The gravel roadway is located within the western portion of a 30-foot nonexclusive easement that the neighbors share. The easement is for "ingress, egress, and utilities over,

under, along and across" the property. Within the easement area, water and electric utilities serve all of the parties in this action. John Purdy owns the 30-foot wide strip of property on which the easement is located. The annotated aerial photograph below shows the location of the Heine property, the easement, and the recent changes made by the Russells.

In 2005, Robert and Pamela Styles sold their property to Michael Nesbit. Heine purchased the property from a lender in June 2009 after Nesbit vacated the home in the summer of 2008. The Styles owned the property for approximately 30 years. The Styles, Nesbit, and Heine used the eastern portion of the easement as their front yard. After Heine purchased the property, he created an additional driveway at the northwest corner of his property for additional parking.

In October 2016, the Russells extended their front yard about five-and-a-half feet by installing 16 steel bollards in the gravel roadway located in the vicinity of the east boundary line of the easement. This reduced access to the gravel roadway by about half.

Heine sued the Russells in October 2016 to "eject" them from the westerly portion of the gravel roadway, where they had installed the bollards, and to quiet title the disputed property. The Russells counterclaimed to quiet title the full 30-foot nonexclusive easement where Heine's front yard is located.

Heine then amended his complaint to assert a claim for adverse possession of the eastern portion of the easement, which Heine and his predecessors used as their front yard. He claimed a prescriptive easement over the westerly portion of the gravel roadway located on the Russells' land where they had installed the bollards. Finally, Heine alleged claims of trespass, nuisance, and negligent or intentional infliction of emotional distress against the Russells.

Heine and the Russells filed cross-motions for partial summary judgment. The trial court granted the Russells' motion and declared they are entitled to develop and

improve to the full extent of the easement for normal means of access and egress. The court also dismissed Heine's claims for prescriptive easement and title by adverse possession with prejudice. Heine later voluntarily dismissed his tort claims.

Heine appeals.

STANDARD OF REVIEW

Heine claims the trial court should not have dismissed his adverse possession and prescriptive easement claims on summary judgment because the easement's legal location shifted to the existing road after a long period of use.

We review an order granting summary judgment de novo.[1] Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law."[2] We view the evidence in the light most favorable to the nonmoving party.[3]

ANALYSIS

Adverse Possession of Easement

Heine first claims his predecessors acquired title by adverse possession to the unopened portion of the nonexclusive easement over the Purdy's land used and maintained as their front yard. At oral argument, Heine clarified he seeks to establish adverse ownership of the fee title to this part of the easement only if he can also extinguish his neighbors' easement rights over the same property. Because his claim to

[1] Loeffelholz v. University of Washington, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

[2] CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

[3] Loeffelholz, 175 Wn.2d at 271.

extinguish these easement rights fail, we do not address his separate adverse possession claim to the underlying fee interest.

Courts generally use the principles that govern acquisition by adverse possession to determine whether adverse use has extinguished an easement.[4] To acquire property by adverse possession, a party must prove that for a period of at least 10 years their possession of the property was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.[5] And, "the party claiming to have adversely possessed the property has the burden of establishing the existence of each element."[6]

Washington disfavors terminating easements.[7] Mere nonuse, for no matter how long a period, does not extinguish an easement.[8] But, a servient estate owner can extinguish an easement through hostile or adverse use.[9]

"The 'hostility/claim of right' element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property."[10] Hostile use in this context is difficult to prove.[11] Most uses are not hostile.[12] The owner of the burdened property has the right to use that land for purposes not inconsistent with its ultimate use as an easement during the period of nonuse. Where a right of way is established by easement, the land remains

[4] City of Edmonds v. Williams, 54 Wn. App. 632, 634, 774 P.2d 1241 (1989).
[5] ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).
[6] ITT Rayonier, 112 Wn.2d at 757.
[7] City of Edmonds, 54 Wn. App. at 636.
[8] Thompson v. Smith, 59 Wn.2d 397, 407, 367 P.2d 798 (1962).
[9] City of Edmonds, 54 Wn. App. at 634.
[10] Chaplin v. Sanders, 100 Wn. 2d 853, 860-61, 676 P.2d 431, 436 (1984).
[11] Cole v. Laverty, 112 Wn. App. 180, 184, 49 P.3d 924 (2002).
[12] Cole, 112 Wn. App. at 184.

the property of the owner of the servient estate, and he is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement.[13]

Heine claims the Styles' use of some of the unopened portion of the easement as part of their front yard area both unreasonably deviated from their rights to use it for ingress, egress, utilities, and it was adverse to anyone else's use of the land for those purposes and to Purdy's ownership. He claims he can establish hostile use because Styles "fenced, mowed, gardened, planted, and parked on the land, cemented a flagpole, and more." But, those actions were not inconsistent with the ultimate use of the easement for its dedicated purposes. They did not interfere with current use of the easement for underground or overhead utilities, nor did they unreasonably interfere with future use of the property for ingress or egress.

Thompson v. Smith supports this conclusion.[14] There, the servient owner poured a concrete slab over a reserved roadway easement. Because that part of the easement was not in use at the time, our Supreme Court held the concrete slab, which the servient owner used to store vehicles and lumber, did not interfere with future use of the easement. The court noted the respective rights of the dominant and servient owners "'are not absolute, but must be construed to permit a due and reasonable enjoyment of both interests so long as that is possible.'"[15]

Because Heine fails to show an issue of fact about the hostility in the element of adverse possession, the trial court appropriately dismissed his adverse possession claim. As a result, we do not address the respondents' assertion that a dominant estate

[13] Thompson, 59 Wn.2d at 407-08.
[14] 59 Wn.2d 397, 367 P.2d 798 (1962).
[15] Thompson, 59 Wn.2d at 409.

owner cannot extinguish an existing nonexclusive easement and claim title through adverse possession.

Prescriptive Easement

Heine next claims the trial court should not have dismissed his claim for a prescriptive easement over part of the Russell's property occupied by the gravel road before they installed the bollards. To establish a prescriptive easement, the claimant must prove their use of another's land has been for at least 10 years (1) open, notorious, continuous, and uninterrupted, (2) over a uniform route, (3) adverse to the owner of the land sought to be subjected, and (4) with knowledge of such owner at a time when he was able in law to assert and enforce his rights.[16] For purposes of establishing the adversity element of a prescriptive easement, the parties' intent is not relevant.[17] Rather, it is the objectively observable acts of the user and the rightful owner's control.[18]

Heine claims a trier of fact could conclude the evidence demonstrated Styles' use of the gravel road north of their main driveway was of the same character as that of a true owner might make under similar circumstances. So, this evidence created a fact question about Styles' continuous use of the portion of the road north of the main driveway and prevented summary judgment dismissing his claim.

Heine asserts the Styles would "drive their RV on the portion of the gravel road north of their driveway at least twice per year…and usually four to six times per year." He also claimed "the propane trucks that visited the Styles' property twice per year

[16] The Mountaineers v. Wymer, 56 Wn.2d 721, 722, 355 P.2d 341 (1960).
[17] Dunbar v. Heinrich, 95 Wn.2d 20, 27, 622 P.2d 812 (1980).
[18] Dunbar, 95 Wn.2d at 27.

would drive to the end of the gravel road." But, these are not actions made adversely to the owner of the land. Here, the Russells do not demonstrate use of the same character a true owner might make under the circumstances.

For the first time on appeal, Heine asserts a theory of "collective use tacking." With this theory he seeks to rely on his neighbors' use of the gravel road to establish his predecessors' acquisition of a prescriptive easement. Because Heine did not raise this novel theory in the trial court, we decline to consider it.[19] So, the trial court did not err in dismissing this claim.

Shifting Easement

Heine also claims the "easement's location shifted to the existing road after a long period of use," relying on Curtis v. Zuck[20] and Barnhart v. Gold Run, Inc.[21] We disagree.

First, Curtis and Barnhart do not support Heine's position. In Curtis, the landowner, claiming a private easement shifted, established elements for adverse possession since they "occupied the land . . . as it now stands, for at least 13 years."[22] The facts in Barnhart also supported a finding for a shifting easement since the landowner's "claim continued for the statutory period."[23] For the same reason Heine's prescriptive easement claim fails, his shifting easement claim also fails. He fails to show any evidence his predecessors occupied the land for the requisite period for adverse possession or prescriptive easement as it was proved in Curtis and Barnhart.

[19] RAP 2.5(a).
[20] 65 Wn. App. 377, 829 P.2d 187 (1992).
[21] 68 Wn. App. 417, 843 P.2d 545 (1993).
[22] 65 Wn. App. at 383.
[23] 68 Wn. App. at 423.

Second, even if Heine and/or his neighbors used the westerly portion of the gravel road for traveling, Heine's shifting easement claim is inconsistent because "[u]tility uses existed over the [gravel road]." The easement area, specifically in the western portion, included "water and electric utilities…serving all of the parties in this action and the neighborhood." Since the parties benefiting from the easement continuously used the easement area for utilities, the easement did not "shift."

Tort Claim

Heine next claims this court should authorize him to reassert his tort claim. Heine voluntarily dismissed it with prejudice before trial. He provides no persuasive argument or authority supporting his request. So, we deny it.

Attorney Fees

Heine's Request for Attorney Fees

Heine claims the trial court should not have awarded attorney fees to Russell and Purdy. Because Heine does not support this claim with any argument, we will not address it.[24] Heine also requests attorney fees on appeal. Because he is not the prevailing party, we reject his request for attorney fees.

Russells' Request for Attorney Fees

Russell and Purdy request attorney fees under RCW 7.28.083(3). "A party is entitled to attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial and the party is the substantially prevailing party."[25] RCW 7.28.083(3) provides a statutory basis for the award of attorney fees to

[24] RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[25] Hwang v. McMahill, 103 Wn. App. 945, 954, 15 P.3d 172 (2000).

the prevailing party of an adverse possession claim on appeal.[26] Because Russell and Purdy prevail on appeal, we grant their request for reasonable attorney fees and costs subject to their compliance with RAP 18.1(d).

CONCLUSION

We affirm. Heine fails to establish issues of fact about the requisite elements for his prescriptive easement and adverse possession claims.

Leach, J.

WE CONCUR:

[26] Workman v. Klinkenber, 6 Wn. App. 2d 291, 308-09, 430 P.3d 716 (2018).

APPENDIX B

FILED
11/3/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RALPH A. HEINE, Appellant, v. TIM S. RUSSELL and ROBERTA A. RUSSELL, STEVEN RUSSELL, and STEPHANIE COLEMAN, JOHN PURDY, NORMAN and SARINA STOW, and WILL KENDALL Respondent.	No. 79754-9-I ORDER CORRECTING OPINION

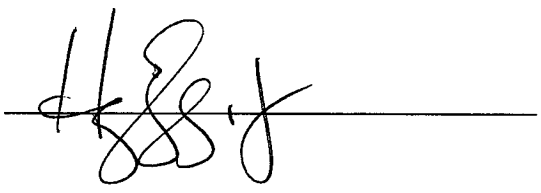
The panel having determined that the opinion should be changed, it is hereby

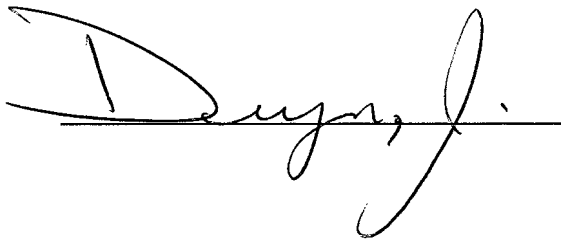
ORDERED that the opinion of this court in the above-entitled case filed October 19, 2020 be changed as follows.

Page 8, line 2 is changed to: Here, Heine does not demonstrate use of the same character a true owner might make under the circumstances.

The remainder of the opinion shall remain the same.

Leach, J.





APPENDIX C

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

RALPH A. HEINE,

Appellant,

v,

TIM S. RUSSELL and ROBERTA A. RUSSELL, STEVEN RUSSELL and STEPHANIE COLEMAN, JOHN PURDY, NORMAN and SARINA STOW, and WILL KENDALL,

Respondents.

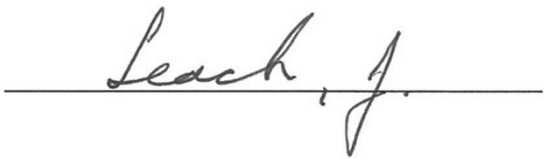
No. 79754-9-I

ORDER DENYING MOTION TO PUBLISH OPINION

The Appellant, Ralph Heine, having filed a motion to publish opinion, and the hearing panel having considered the motion and again finding that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED that the unpublished opinion filed October 19, 2020 shall remain unpublished.

FOR THE COURT:



APPENDIX D

Aerial photographs showing the road in the same location relative to the Russells' hedgerow for 20 years

1995 (CP 751)

2003 (CP 752)

2015 (CP 753)

CARNEY BADLEY SPELLMAN

December 18, 2020 - 11:07 AM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Ralph A. Heine, Appellant v. Tim S. Russell, Respondent (797549)

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