Supreme Court No. 99331-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79754-9-I

COURT OF APPEALS, DIVISION I
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.

NORMAN AND SARINA STOWS' ANSWER TO MEMORANDUM OF AMICI CURIAE

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I. INTRODUCTION

The memorandum submitted by amici curiae Richard Beresford, Howard Jensen, Greg Hixson, Peter Smirniotopoulos, and Sandip Soli (hereinafter, "the Amici") in support of acceptance of review (hereinafter, "the Memo") largely restates Petitioner Heine's legal arguments and does not provide any substantive analysis that differs from Heine's original petition for review. The little additional information it does include fails to elevate this matter to one worthy of review by this Court. The memo does not show that the appellate court's decision was either in direct conflict with established precedent or is an issue of substantial public interest necessitating review under RAP 13.4(b)(2) and (4).

V. ARGUMENT[1]

As a preliminary matter, the Amici do not contend that the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals RAP 13.4(b)(2), which is one of the key reasons that Heine contends this matter should be reviewed by this Court. The sole reason Amici want this issue reviewed is because they contend it is an issue of first impression that will "bring clarity" to the legal area of adverse possession and prescriptive easements. In short, the Memo supports only

[1] The Memo does not include either a Statement of the Case or Assignments of Error as outlined under RAP 10.3(a)(4) and (5). Respondent Stow therefore will not address those Sections here.

the "public interest" prong of Heine's petition, and asks this Court to consider whether the Court of Appeals "right call, as a matter of public policy," in determining that the same standard applies for extinguishing an easement by a dominant or servient estate.

There is little question that certain public policy concerns underlie the doctrine of adverse possession, including: "that title to land should not long be in doubt, that society will benefit from someone's making use of land the owner leaves idle, and that third persons who come to regard the occupant as owner may be protected." *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 761, 774 P.2d 6 (1989). However, it is equally true that not every case of adverse possession, which always depend on the same five elements, reaches the level of "substantial public interest" necessitating Supreme Court review of an issue. Review based on a substantial public interest is generally warranted only where it will avoid unnecessary litigation and confusion on a common issue. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Amici have not demonstrated why the decision by the Court of Appeals would cause unnecessary confusion sufficient to make this case one of substantial public interest requiring review.

A. Amici Mischaracterize the Appellate Court's Opinion as One of "First Impression"

Amici ask this Court to determine if that the Court of Appeals made the right decision by applying the same test for extinguishment of an easement as between servient and dominant estate owners. Amici call the issue one of "first impression" and ignore the fact that the appellate court was just following an established principle covered in the in Restatement (Third) of Property (Servitudes), § 7.7 cmt. a-c. That section of the Restatement discusses the rule for "adverse possession of dominant or servient estate" and notes that adverse use extinguishes the benefit of an easement only to the extent it "unreasonably interferes" with the easement. This was not a new rule developed by the Court of Appeals. The absence of Washington cases applying the rule primarily in cases of servient estate owners seeking to extinguish easement rights of dominant estate holders does not make this issue a question of "first impression." The law is clear that Heine needed to show "interference" with the easement rights of the other dominant estate holders, and he failed to do so. The appellate court correctly concluded that the uses by Heine/the Styles (including fencing, planting, mowing, or gardening) did not interfere with the rights of the other estate owners to use the land for overhead or underground utilities.

Amici mischaracterize the Appellate Court's decision as one

requiring a "permanent obstruction" before a dominant owner can adversely possess an easement, even though that term does not appear anywhere in the appellate court's opinion. Perhaps Amici hope to use that term to create an issue of fact in the Court's mind as to whether this issue presents a question of first impression, but it does not accurately describe the rule cited by the appellate court. The rule is one of unreasonable interference, as described in the Restatement (Third), which may or may not be based on permanent obstruction. The specific level of interference needed to extinguish the Easement in this specific case was clearly within the authority of the appellate court to decide, and there is nothing in the Amici's Memo to suggest that the appellate court's interpretation of "unreasonable interference" in this matter departed from prior courts' interpretation of that term so as to create a source of "confusion" warranting review. Respondents anticipate this Court will reject the self-serving terminology used by the Amici, and focus solely on the actual opinion of the appellate court in declining review.

B. The Shifting Easement Theory Does Not Present an Issue of Public Interest

Amici, like Heine, also raise the "public interest" argument with respect to the shifting easement theory purportedly announced in *Barnhart v. Gold Run, Inc*., 68 Wn. App. 417, 843 P.2d 545 (1993) and *Curtis v.*

Zuck, 65 Wn. App. 377, 829 P.2d 187 (1992). They claim that Heine's situation is not materially different than the claimants in those cases, and blatantly ignore the specific reasons the appellate court thought the facts of this case were distinct from the *Curtis* and *Barnhart* cases, namely, that (1) Heine failed 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*, and (2) the parties benefiting from the easement continuously used the original easement area for utilities as allowed for under the Easement. The appellate court reasonably concluded that Heine could not seek to shift the Easement merely by focusing on the uses of the Easement relating to "ingress/egress," and ignoring the fact that the Easement was continuously used for utilities in its original location.

In short, there are numerous reasons for departing from the result of *Curtis* and *Barnhart*, and the Amici seem to tacitly acknowledge that by stating somewhat vaguely that "the Court of Appeals' decision creates uncertainty by casting significant doubt on what had been settled law." Again, nowhere do the Amici actually say the decision is in direct conflict with *Curtis* and *Barnhart* so as to warrant review under RAP 13.4(b)(2). Rather, the Amici once again try to manufacture a potential source of confusion amount lower courts based on the appellate court's straightforward application of the shifting easement theory to the specific

facts presented in this case, which are facially distinct from the facts in the *Curtis* and *Barnhart* cases.

Amici and Heine may understandably think that the appellate court "got it wrong" in dismissing his shifting easement claim, but they fail to show why the appellate court's decision creates the kind of confusion that would necessitate review by this Court under the public interest prong of RAP 13.4(b). The appellate court applied the basic elements establishing adverse possession and prescriptive use to the specific facts of this case, and found Heine's claim lacking. Even if the appellate court did commit some error in its decision, there is little confusion that will be generated by this case where a future court's analysis will undoubtedly be based on unique facts distinguishable from this matter.

VI. CONCLUSION

The appellate court applied the correct legal standard to Heine's adverse possession claims by taking into account the scope of use under the original Easement, which allows for Heine, the Stows, and their neighbors to use a 30-foot strip of land owned by Respondent Purdy for egress, ingress, and utilities. The appellate court properly concluded that in light of the scope of use under the Easement and the historical use of the eastern portion of the easement, Heine's and his predecessor's use of his property was insufficient to establish hostile use. Further, the appellate

court reasonably distinguished the facts of this case from those in Curtis and Barnhart in making its determination regarding whether the easement had shifted. The fact that the appellate court did not arrive at the conclusions of law that Heine wanted does not entitle Heine to review by this Court. The Amici fail to demonstrate why the appellate court's opinion is going to sow confusion and create unnecessary litigation for future litigants attempting to resolve claims of adverse possession.

For all the reasons stated above, this Court should decline review of this matter.

DATED THIS 16th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify under penalty of perjury and the laws of the State of Washington that on the below date, I caused a true and correct copy of Respondents Stows' Answer to Memorandum of Amici Curiae to be delivered via the method indicated below to the following party(ies):

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March 16, 2021 - 4:55 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99331-9
Appellate Court Case Title:	Ralph A. Heine v. Tim S. Russell, et al.
Superior Court Case Number:	17-2-04187-2

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