IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN B. WELS, JR., Respondent on Review, v. DOUGLAS W. HIPPE, Defendant, and LE ROY HIPPE and CHERYL HIPPE, Petitioners on Review.	)	S063486 Court of Appeals No. A150238 Jackson County Circuit Court No. 101215E3

BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

Petition for review of the decision of the Court of Appeals on appeal from judgments of the Circuit Court for Jackson County,
Honorable Ronald D. Grensky, Judge

Opinion Filed: March 18, 2015
Before: the Court of Appeals, *en banc*
Author of majority opinion: Nakamoto, J., joined by Haselton, C.J. Armstrong, J., Egan, J., Garrett, J. and Flynn, J.
Author of concurring opinion: Lageson, J., joined by Sercombe, J.
Author of dissenting opinion: Devore, J., joined by Ortega, J. Duncan, J., Hadlock, J. and Tookey, J.

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PETITIONERS' ON REVIEW BRIEF ON THE MERITS

Statement of Legal Question on Review.

1. Did the trial court err in concluding that the plaintiff had established a prescriptive easement over an existing roadway by clear and convincing evidence?

2. Did the trial court err in finding that the plaintiff had so interfered with the defendants' use of the roadway that defendants could not rebut the presumption of adversity under the existing case law?

3. Did the Court of Appeals err in ignoring decades of existing case law relative to prescriptive easements over existing roadways, and instead in replacing that case law with a holding which allows an adverse claimant in this particular situation to establish adversity with no notice of any kind to the owner?

4. Was there any legal or policy reason to replace the existing case law with the rule established in the majority decision, which allows the user of an existing roadway to establish adversity simply by believing that he has a right to use the roadway, with nothing further to notify the owner of the roadway of the adversity of the claimant's usage?

Rule of Law Proposed by Petitioners on Review.

The defendants propose that the rule of law previously existing in a line of cases existing for decades should be restored, and the new rule of law established by the Court of Appeals decision should be vacated. Application of the previously

existing rule of law would result in a reversal of the trial court's decision by the appellate court.

Statement of the Nature of the Action.

The plaintiff sued the defendants for a prescriptive easement over a rural roadway over defendants' property. The trial court entered a judgment granting plaintiff a prescriptive easement for three of plaintiff's four parcels, and for costs.

Statement of Facts.

The plaintiff filed one claim for relief against defendants seeking "a declaration of the court determining that he has an easement for ingress and egress to his four separate pieces of real property over and across the property owned by defendants." Plaintiff alleged that he had used the roadway which crosses defendants' land "opening and continuously without consent or permission of defendants or their predecessors." Paragraphs 5 and 3, respectively, Amended Complaint, page 2; ER-2. The defendants denied these claims. Defendants "deny that plaintiff has owned his four tax lots for a period exceeding ten years, and deny that plaintiff has used the roadway across defendants' land as described in paragraph 3 of the complaint." Paragraph 3, Answer to Amended Complaint, page 2; ER-4.

Although the plaintiff did not use the words "prescriptive easement" in his Amended Complaint, the parties agreed that his only claim was one for

prescriptive easement. Opinion, page 1; ER-5. Plaintiff made no claim for easement of necessity, nor any other kind of easement, and the prescriptive easement claim was all the defendants defended on. Tr. 101.

Plaintiff purchased three of his four parcels in on December 23, 1998. Tr. 11-12; Exhibits 4-6. Plaintiff testified that those parcels were accessible by an existing road, but that his seller said nothing to him about access to those parcels. Tr. 13. That road is Lewis Creek Road, a private road. Tr. 22. Plaintiff testified: "I don't remember discussing that with Mr. Governor [the seller] at that time because that's the only road in there. That's the way he drove in there so I presumed that was the access to get in there." Tr. 36. Plaintiff testified that there were two easements noted in the preliminary title report issued prior to his purchase which he thought gave him the right to use the road. He asked the title company about access, and they told him they couldn't give legal advice. Tr. 36.

The trial court asked plaintiff if this was as far as he went with it, and plaintiff responded: "Yes. Because I was under the assumption that because these easements and the statements they made I thought gave me the easement or not easement, the right to go in and out -." Tr. 37. Those easements were over Woods' and Larson's properties. Tr. 37-38.

Plaintiff introduced a copy of the Larson property easement agreement, Ex. 24, and testified that it was this easement and the Woods' easement that led him

to believe he had a right to use the road to access his property. Tr. 40-41. Plaintiff's fourth parcel was purchased by him in 2006. Tr. 50; Ex. 7. The trial court did not grant an easement for this parcel. Opinion, page 3; ER-7. Plaintiff did not file a cross-appeal.

The deeds to plaintiff for the parcels he purchased in December 23, 1998 are Exhibits 4 through 6. Exhibit 4 states in part: "this property does not have legal access to or from a legally dedicated street, road or highway and access therefore cannot be ensured." Tr. 49. Plaintiff testified that this language caused him concern, and that's why he went to look at the Larson easement agreement, Ex. 24. Plaintiff said that he thought the Larson easement overrode the language in Ex. 4 (his deed). Plaintiff did not trace out the Larson easement over a map to see where it was. Tr. 49.

Plaintiff's parcels are the last ones on Lewis Creek Road. Tr. 15. In 2008, less than ten years after he purchased his parcels, Plaintiff was told by the County that he had to have written easements to get to his property before he could get a building permit, because of the need for emergency vehicles to have access. Tr. 17-18. Plaintiff testified that he then went to the various land owners across whose property Lewis Creek Road goes to try to get easements from them, and he did get several of them. Tr. 18, 24. On the way to plaintiff's parcels, the road crosses defendant's parcel, then Larson's, then BLM land, then a parcel owned by Woods,

then more BLM land, and then the plaintiff's parcel. Tr. 18-21; 68-69.

Plaintiff testified that he never had any discussions with defendant about his use of the road across defendant's property prior to 2009. Tr. 24. Plaintiff testified that defendant, himself, and all of the other people along the road used that road to access their property. Tr. 25. On June 18, 2008, plaintiff wrote a letter to defendant's brother and predecessor in interest, asking to be granted an easement, but arguing that he had a right to use the road. Ex. 9; Tr. 26-28; 56. Plaintiff testified that he had believed from the beginning that he had a right to use the road. Tr. 29; Ex. 9. He also wrote the next day to the other defendants. Ex. 11; Tr. 30, 56. Plaintiff testified that this was when he started asking defendants for an easement. Tr. 56.

When defendants acquired their parcel, it was in the names of Douglas W. Hippe, Leroy Hippe and Cheryl Hippe, all with the right of survivorship. Tr. 80; Ex. 102. Douglas W. Hippe has since died, and thus is not a party to this appeal, his interest having passed to the remaining two defendants by right of survivorship. Ex. 103; Paragraph 2, Answer to Amended Complaint, page 1-2; ER-3-4.

Plaintiff testified that he uses his parcels for recreation, at least until he can get a building permit. Tr. 53. Plaintiff testified that he did not build the road over the defendants' property and does not know who did. Tr. 54.

Plaintiff testified that he remembered speaking with the defendant Leroy

Hippe in 2002 or 2003 down near the state highway, but does not remember the conversation itself. Tr. 54-55. Plaintiff did remember a 2004 conversation with defendant Leroy Hippe in which Hippe told him that it was all right for plaintiff to maintain the brush along the road across defendants' property. Plaintiff testified that he told Hippe the brush along the road across Hippe's property was scratching his car, and asked Hippe if it was all right that he cut that brush back, and Hippe said yes, it was. Tr. 54-55. Plaintiff also testified that defendants have never restricted their use of the road across defendants' property, and that at least the Woods and the Larsons also use that road to access their property. Tr. 56.

Plaintiff testified that it is an "understood rule" with all of the other easements from Highway 62 through Larson's property that "you help pay the maintenance of the community road so I have paid some money to have gravel put on the road." Plaintiff has also graded the road by dragging a piece of iron behind his pickup. Tr. 59. There is another owner along that road who is overseeing maintenance, and when something needs doing, she asks all of the neighbors to help. Tr. 60. Defendant Leroy Hippe testified that he performs maintenance on the portion of the road which goes over his property by cutting brush, fill potholes, clean out the ditch, etc. Tr. 82. Defendant testified that the road itself is about 60 to 80 feet from his house. Tr. 83.

Defendant testified that there is a chain across the road where it enters his

property, and that when he is at home, the chain is down, but when he is away, it is up and locked. Other residents who need to use the road when defendant is gone use a key that he gave to them to open the lock. He has given a key to the plaintiff, as well as the Larsons, UPS, and FedEx. The power company has their own lock on the chain for their use. Defendant has given permission to the plaintiff to use the road across his property. Tr. 85.

Defendant testified that he met with the plaintiff sometime between 2003 and 2005, and defendant told plaintiff that "he did have my permission to go through my property. If he had any concerns." Tr. 86. Plaintiff also asked defendant one time for permission to cut an oak limb which was "dragging out into the road" and defendant gave plaintiff that permission. Tr. 87.

Defendants' property is about a mile up the road from Highway 62. Tr. 66. Defendant testified that the plaintiff can also access his property by walking about three-quarters of a mile across government land from another road, as can the defendants. Tr. 70-71. Defendant testified that his access to his property over Lewis Creek Road was by the "goodwill or grace" of the other land owners, and that this was the same access that he allows the plaintiff. Tr. 74. "MR. HIPPE: Apparently that - - the way you read the deeds, I don't, but I cross the roads. I don't know if you deem it as a right, other than say a goodwill, because I made no demand on anybody for that. So I wouldn't say I can - - deem it as a right. I deem

it as a - - what I can do." Tr. 75.

The trial court granted the plaintiff a prescriptive easement over defendants' property for the three of his parcels which he purchased in 1998. Opinion, ER-5-7; Judgment, ER-8-9.

The Court of Appeals affirmed, *in banc*, in a 20 page decision which changed the requirement for proof of adversity in prescriptive easement cases over existing roadways, by eliminating the ability of the owner to rebut adversity by demonstrating that the claimant's usage of the roadway did not interfere with the owner's usage of the roadway. Six judges concurred with the majority opinion, and two more judges concurred in the result but wrote a concurring opinion; five judges dissented, issuing a 32 page opinion in dissent.

Summary of the Argument.

The trial court erred in concluding that the plaintiff had established a prescriptive easement over an existing roadway by clear and convincing evidence. It also erred in finding that the plaintiff had so interfered with the defendants' use of the roadway that defendants could not rebut the presumption of adversity under the existing case law.

The Court of Appeals erred in ignoring decades of existing case law relative to prescriptive easements over existing roadways, and instead in replacing that case law with a holding which allows an adverse claimant in this particular situation to

establish adversity with no notice of any kind to the owner.

There is no legal or policy reason to replace the existing case law with the rule established in the majority decision, which allows the user of an existing roadway to establish adversity simply by believing that he has a right to use the roadway, with nothing further to notify the owner of the roadway of the adversity of the claimant's usage.

The implications of this decision are very broad. By concluding that adversity is totally subjective, and may be proved – well after the fact – merely by the plaintiff's testimony that he "believed he a right to use the property," the majority opinion completely does away with the protection provided to the landowner of being placed on notice that another party is acting adversely to the landowner's interests.

This case involves a very specific and limited type of adverse possession: the claiming of a prescriptive easement over an existing roadway, where the record is uncontradicted that the claimant's use of that roadway did not interfere with the owners' use of that roadway. The law in existence for many years is that this type of adversity – interference with the owner's use of the roadway – is required to obtain a prescriptive easement over an existing roadway. The Court of Appeals ruling does away with this prior law and allows adversity to be established merely by the claimant's holding of an unexpressed opinion that he has a right to use the

existing roadway. No legal or policy reason exists which would justify the overturning of this existing law. The Court of Appeals decision overturning this prior law should be reversed, and the case should be decided using the prior law, as argued in the dissent.

Argument.

Introduction. The majority decision completely overturns over four decades of case law involving prescriptive easements over existing roadways. In particular, as argued in the dissent, this opinion effectively overrules several cases on this subject, both from this court and the Court of Appeals, without actually stating that those cases are overruled. The majority opinion significantly eases the burden on a party claiming a prescriptive easement, allowing that party to demonstrate adversity solely by allowing the claimant to hold the opinion that their use is adverse to the landowner, without ever making the landowner aware of the claimant's belief that his use is adverse.

In part the majority impliedly overrules this ruling from *Woods v. Hart*, 254 Or 434, 436, 458 P2d 945 (1969): "Where one uses an existing way over another person's land and nothing more is shown, it is more reasonable to assume that the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim." The majority opinion dismisses the *Woods* case claiming that the defendants never made this argument.

However this argument was made quite clearly by defendants in their opening brief at page 17. *See also Trewin v. Hunter*, 271 Or 245, 247, 531 P2d 899 (1975), also cited by defendants in their brief.

The Court of Appeals' Decision Is of Great Importance. The introduction to the dissenting opinion very effectively summarizes why this issue is of great importance:

> "This case offers the chance to eliminate or to exacerbate confusion in the law of prescriptive easements. Here, a well-established line of cases collide with what will become a new line of cases. The conflict requires this court to decide whether the law will continue to require that, in order to claim a prescriptive easement over preexisting roads of unknown origin, the claimants must show that their use *interfered* with the owner's use of the road, so as to prove the requisite open, notorious, and adverse use. The majority opinion offers a nascent alternative that will render the long-established rule immaterial. The alternative posited is that the court will now recognize a claimant's testimony about a prior, unexpressed, and subjective belief in the claimant's right to use a road as sufficient evidence—indeed, as so-called 'direct evidence'—of open, notorious, and adverse use of preexisting roads of unknown origin. The result of this subjective theory of adverseness will be to tacitly overrule eight cases in concept and in practice.
>
> "Fearing this alternative to be ill-founded, I respectfully dissent."

Wels v. Hippe, 269 Or App 785, 812 (2015), dissenting opinion of Devore, J.

There Are Factual Errors in the Decision. In addition to the legal errors pointed out in the dissenting opinion, there are also factual errors in the majority opinion, which the defendants pointed out in a Petition for Reconsideration filed April 15, 2015 (which petition was denied). Here defendants summarize those

errors as detailed in the Petition for Reconsideration.

First, the majority erroneously stated that the road in question is the only possible access for plaintiff to his properties. Another logging road exists which exits onto Highway 227. Petition for Reconsideration, page 1; Tr. 61-63.

Second, the majority erroneously stated that the defendants had demanded $70,000 from the plaintiff in exchange for an easement. Instead the defendants demanded either that the plaintiff bring the rest of the road up to fire standards (because plaintiff was going to develop his lots and defendants were concerned about the added fire risk), or pay him $70,000 (which defendants would have used to improve the road beyond his property). Petition for Reconsideration, pages 1-2; Tr. 99-100. This error unfairly painted the defendants in a bad light.

Third, at 269 Or App at 791, the majority opinion makes special note of the fact that defendant had failed to mention in his deposition that he had granted permission to the plaintiff to use the road, as though that "fact" had some significance. At trial defendant testified that he didn't make that statement in his deposition because the question was not asked. Petition for Reconsideration, pages 2-3; Tr. 89.

Fourth, at 269 Or App at 803, the majority opinion states that the plaintiff "had never asked for nor was given permission to use the road on defendants' property," as though this were an uncontroverted fact. In fact the evidence

overwhelmingly supported the conclusion that the defendant had given permission to the plaintiff to both use the road (and had given him a key to the gate), and to cut brush on the road. Petition for Reconsideration, pages 3-4; Appellants' Reply Brief 8-10; Tr. 29, 54-55, 87. If plaintiff truly believed he had a legal right to use the road, he would not have had to ask for permission to cut brush, but he did just that. Tr. 55, 87.

Adversity Is Not Contained within the Element of "Open and Notorious. Both the majority and concurring opinions imply that the element of adversity is contained within the element of the use being "open and notorious," which is certainly not the law. The majority placed stock in the fact that the defendant had conceded that the use was open and notorious, but strongly contested that the use was adverse. 269 Or App at 785. Since the defendants' position all along had been that they knew the plaintiff was using the road because they had given him both permission and a key to the gate, it is wholly illogical to conclude that this somehow made the plaintiff's use adverse. *See* Petition for Reconsideration, pages 4-7.

The majority and concurring opinions thus both err when they conclude that by conceding that the use by plaintiff was "open and notorious" (because the defendants were well aware of it, having given permission), the defendants also conceded that the use was adverse, particularly when the very next statement by

defendants was that they contested adversity. "Defendants concede that plaintiff has used the roadway open and notoriously. Defendants dispute that plaintiff's use has been adverse * * *." Defendants' Trial Memorandum, page 2, lines 23-25. The majority's opinion on this alleged "concession" by defendants is well-rebutted by the dissenting opinion, 269 Or App at 824-825.

And in a supplemental trial memorandum defendants also quoted from *R & C Ranch, LLC v. Kunde*, 177 Or App 304, 311-12, 33 P3d 1011 (2001): "'Where one uses an existing way over another person's land and nothing more is shown, it is more reasonable to assume that the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim.' * * * Following *Woods*, [*Woods v. Hart, supra*] this court has continued to hold that, although open and notorious use for ten years is presumptively adverse, the presumption may be rebutted by proving that the claimant was merely using an existing road that did not interfere with the defendant's use or by proving that the use was permissive in some other way."

The majority opinion in this case is therefore totally inconsistent with this line of cases from both this court and the Court of Appeals. It is important to remember that the plaintiff never denied that the defendants had given him permission to use the roadway. He did say he "didn't remember" the substance of one conversation that he had with defendant (while conceding the conversation

took place), but plaintiff never contradicted defendant's testimony that defendant had specifically given plaintiff both permission and a key to the gate. This fact is discussed in detail in the Appellant's Brief at 6-7, Appellant's Reply Brief at 1-2 and 8-10, and the Petition for Reconsideration at 3-4.

Regarding this prior line of cases, the dissenters state: "Our majority opinion acknowledges *Woods* and *Trewin*, but misses their significance. The majority 'cabins' them as relevant only to presumptions. The majority does not mention *Webb* or *Insko*, on which defendants principally relied." 269 Or App at 825, referring to *Webb v. Clodfelter*, 205 Or App 20, 26, 132 P3d 50 (2006), and *Insko v. Mosier*, 235 Or App 451, 234 P3d 984 (2010).

The Decision Is in Conflict with Multiple Decisions of this Court and the Court of Appeals. As the dissenting opinion points out, the majority decision is inconsistent with several cases of both this court and the Court of Appeals. "The claimants avoided the need to explain why, with their novel conception, three decisions of the Supreme Court and five decisions of this court should be effectively overruled. To overrule those cases *sub silentio* is much easier. It is much easier to assume eight cases on preexisting roads are left untouched, when they are ignored as immaterial in light of another theory of adverseness." 269 Or App at 839. These effectively overruled cases are:

- *Woods v. Hart,* 254 Or 434, 436, 458 P2d 945 (1969*)*

- *Trewin v. Hunter*, 271 Or 245, 247, 531 P2d 899 (1975)
- *Boyer v. Abston*, 274 Or 161, 544 P2d 1031 (1976)
- *Read v. Dokey*, 92 Or App 298, 758 P2d 399 (1988)
- *Hayward v. Ellsworth*, 140 Or App 492, 915 P2d 483 (1996)
- *Webb v. Clodfelter*, 205 Or App 20, 26, 132 P3d 50 (2006)
- *Skidmore v. Clark*, 205 Or App 592, 135 P3d 367 (2006)
- *Insko v. Mosier*, 235 Or App 451, 234 P3d 984 (2010)

Listed in dissenting opinion, 269 Or App at 839.

The Court of Appeals' Decision Is Wrong on the Law. As noted above, the implications of this decision are very broad. By concluding that adversity is totally subjective, and may be proved – well after the fact – merely by the plaintiff's testimony that he "believed he a right to use the property," the majority opinion completely does away with the protection provided to the landowner of being placed on notice that another party is acting adversely to the landowner's interests.

In normal adverse possession cases, this might not have much impact, because in a case where a party has taken exclusive possession of someone else's property, it can normally be assumed that the landowner would realize that such usurpation was adverse. But the special case of the use of an existing roadway is not so clear, as the *Woods* line of cases has held for years. That is exactly why

those cases carved out an exception – acknowledging the practical reality that someone else's use of an existing roadway, by itself, is not necessarily adverse, and should more properly be considered "neighborly" and thus permissive. This decision does away with the *Woods* presumption in its entirety. An exclusive use of another's property certainly implies adversity, which is why the *Woods* line of cases requires for adversity that the claimant interfere with the owner's use of the roadway (much as exclusive use of another's land demonstrates adversity).

Much of Oregon is rural, and there are many roads through non-urban farmland, woodland, and desert. This decision requires every landowner who has rural property, and a roadway over it which may lead to other rural properties, to be much more vigilant in monitoring every use of that roadway to avoid the possibility that a user may later claim that he "thought he had a right to use the road," and thus can obtain a prescriptive easement without the landowner ever really knowing of the user's adverse claim. This is bad policy for Oregon and its citizens, and this decision should be reversed.

The majority's reliance on the First Restatement is unwarranted. In addition, the majority created this new rule that allows a claimant to establish adversity solely by having an unexpressed opinion that their use is adverse, based in part on the majority's view of *Restatement (First) of Property* § 458. 269 Or App at 794, *et. seq.* As the dissenting opinion points out, the more recent

Restatement (Third) of Property (Servitudes) § 2.16 comment g (2000), parallels the line of Oregon cases which the majority opinion effectively overrules. That comment states in part:

> "In states following the majority rule, particular fact situations overcome the presumption of prescriptive use, creating a counter-presumption that the initial use was permissive. * * * Evidence that the use was made in common with the owner of the land, or that the road over which a right of way is claim was constructed by the owner for his own use, may also overcome the presumption of prescriptive use."

Quoted in dissenting opinion, 269 Or App at 817-818.

What the majority opinion does, therefore, is to reject the more recent law on this issue (both the Oregon line of cases and the later *Restatement*) in favor of taking the law back to the majority's interpretation of a much older *First Restatement*. There is absolutely no justification for this. Furthermore, as the majority acknowledges (and attempts to refute), 269 Or App at 811, n.6, the dissenting opinion demonstrates that even the earlier *Restatement* relied upon by the majority supports the rule as stated in the Oregon line of cases for over four decades. Dissenting opinion, 269 Or App at 818 and 829.

The dissenting opinion, 269 Or App at 830-831, discusses the fact (recited by the majority) that some prior Oregon cases have relied upon the *Restatement (First)* for some holdings. However, as the dissent points out, those cases did <u>not</u> rely on the earlier *Restatement* "for a theory that, where there has been no physical

damage to an owner's land and no interference with the owner's use of a preexisting road on his land, a claimant's unexpressed 'claim of right' is somehow 'direct evidence' of adverseness." *Id*. Also none of those cases have criticized or even distinguished the line of Oregon cases, cited above, which states the rule presuming non-interfering use of an existing road to be friendly and not adverse. *Id*.

The defendants agree with the dissenting opinion's conclusion to this discussion: "In other circumstances, claims of noble lineage may lend authority, but, here, we should find no support for a prescriptive easement either in the Restatement or in decisions of the Supreme Court." *Id*. This discussion in the dissent is followed by a thorough discussion of the source of the confusion which led to the erroneous majority opinion. 269 Or App at 831-836. "The source of today's confusion can be traced through several cases from correct statements of law to misapplications of those statements." Dissent, 269 Or App at 831-832. The defendants will not repeat that lengthy discussion here, but it does explain how the majority could have come to the incorrect conclusion that adversity could be proved by a claimant based solely on the claimant's subjective and unexpressed belief.

The majority erred in establishing a completely subjective way for a claimant to establish adversity. In arguing that the majority's erroneous

conclusion is based on confusion about the case law, the dissent discusses *Sander v. McKinley*, 241 Or App 297, 306, 250 P3d 939 (2011),cited by the majority (269 Or App at 787), but which case the trial court did not mention and the plaintiff did not cite or argue on appeal. The dissent explains that the court in *Sander*, purportedly relying on *Kondor v. Prose*, 50 Or App 55, 60, 622 P2d 741 (1981), states that a "claimant's mistaken belief that he or she has the right to use the servient property is sufficient to establish adverse use." *Sander*, 241 Or App at 306. However, as the dissent correctly points out: "Kondor did not actually hold that a mistaken belief was itself 'sufficient to establish adverse use'; the mistaken belief only avoided viewing the use to be in subordination to the owner." 269 Or App at 835. The dissent continues: "The language in Sander, adopting the claimants' novel theory that they were offering an alternate proof of adverseness, would seem to lend support to the majority's conclusion here, if it were not so overshadowed by *Woods, Trewin, Boyer, Webb, Skidmore*, and *Insko*, and if it were not better distinguished and explained on its facts." *Id.*

The dissent clearly describes the practical effect the majority's decision will have on prescriptive easement cases if it is not overruled:

> "Although all cases agree that '[e]asements by prescription are not favored,' *Wood*, 276 Or at 56, they will now be favored, because prescriptive claims will become much easier to win and often impossible to defend. In nearly every case in which people disagree so vigorously as to hire lawyers, take their dispute to court, and spend life savings in litigation, the easement claimants will insist that they

> have a right to use the road in dispute, and that, if somehow mistaken, they have a 'mistaken claim of right' to use the road. If claimants did not believe themselves justified, there would never be lawsuits over prescriptive easements. Because nearly all claimants will come to court to swear that they held a subjective belief in their claims, nearly all prescriptive claims will begin with the element of adverseness established by the simple fact that there is a dispute." 269 Or App at 236-237.

After discussing its concern that this ruling will have its most adverse impact on prescriptive easements over roads of unknown origin (as here), the dissent concludes this about the majority's new rule allowing subjective, unstated beliefs of a claimant to establish adversity: "To suggest that a subjective belief in one's right to use a road is itself, full and complete, open and notorious, 'direct evidence' of adverseness is a contradiction in terms. In most situations, it is an oxymoron, because to prove a subjective belief proves nothing." 269 Or App 838.

Further, the dissent argues: "If adverseness can be proven by accepting the claimant's belated testimony about a prior belief as so-called 'direct evidence' of adverseness, then no one will ever again need to bother with relying on the presumption of adverseness that arises from open and continuous use of a road for a prescriptive period." 269 Or App at 840. And: "But, if an uncommunicated, 'mistaken claim of right' silently transforms ordinary, non-adverse travel over a shared road into adverse use, then an owner cannot know which of the neighbors holds such a subjective belief." 269 Or App at 837. This is exactly the difficult situation created for landowners by the majority decision.

Reply to Response to Petition for Review. Defendants will also address briefly here some of the arguments made by the Respondent on Review ("plaintiff") in his Response to the Petition for Review (hereinafter "Response to Petition"). At page 1 of the Response to Petition, plaintiff argues that the Court of Appeals decided this case under a "claim of right" theory. However, as the dissent points out, the majority opinion misapplies that theory in cases of this kind: where a neighbor is using an existing road without interfering with the owner's use of that road. "To see a neighbor travel over a road, without interfering with the owner's use, does not alert the owner that the neighbor may harbor an adverse claim of right to use the road." Dissent, 269 Or App at 817.

In his Response to Petition at page 1, plaintiff argues that *Woods v. Hart*, *supra*, relied upon by the defendants, "did not purport to set forth an exclusive avenue for proof of adversity." However, the defendants are not arguing that the *Woods* ruling provides an "exclusive avenue for proof of adversity." Instead, *Woods* provides an exception to the general rules of adversity in adverse possession cases, one which applies only to the very specific situation involved here: where neighbor uses an existing roadway without interfering in any way with the owner's use of that roadway. As both the dissent and the prior cases cited by defendants state, in that particular situation it is "more reasonable to assume that the use was pursuant to a friendly arrangement between neighbors rather than to

assume that the user was making an adverse claim." *Woods*, 254 Or at 436. It is this holding which the majority opinion ignores.

At Response to Petition 2 the plaintiff argues that the majority decision is "consistent with prior case law on the issue and does not overrule previous cases concerned with the more common avenue of proving adversity set forth in *Woods* and it's progeny." With all due respect, the majority opinion does just that, as the dissenting opinion clearly demonstrates.

The defendants here were not seeking to change the law of adverse possession, but merely to have applied to this case the exceptions to the general rule which have long been in effect in this one particular situation: the use by a neighbor of an existing roadway, with no interference with the owner's use of that roadway. The majority opinion takes a totally convoluted approach to this case, apparently simply to avoid the application of the exception rule announced by *Woods* and the other cases cited by defendants. In so doing, the majority has turned the entire law of adverse possession "on its head," by eliminating the need for the adversity of the claimant's use to be apparent to the owner.

In an ordinary adverse possession case, a claimant must exercise use of the owner's land which use is not only "open and notorious," but also "exclusive." *Lee v. Hansen*, 282 Or 371, 375, 578 P2d 784 (1978). But in the case of the use of an existing roadway, as here, the plaintiff's use was certainly not "exclusive"

since both the defendants and other drivers have used that road for years. But the majority opinion does even more damage to the general adverse possession rules by allowing the element of "adversity" to be established solely in the mind of the claimant, with no necessity that there be any acts by the claimant which would demonstrate to the owner that the claimant's use was adverse.

In the rules in existence prior to this case, and in a case like this one (use of an existing roadway), that sort of adversity could be established only by the claimant's interference with the owner's use of the roadway. In that way, the owner would thus be placed on notice that the claimant's use of the road was adverse. The majority opinion eliminates that requirement, and substitutes instead the requirement that the claimant merely "think," or be of the opinion, that he has a right to use that road. The owner of the road can never be a mind-reader, but in order to avoid a prescriptive easement under the majority's reasoning, that's exactly what an owner must do: divine by some unknown method that a neighbor using the road is doing so adversely and with a mind to create a prescriptive easement.

At Response to Petition 2 the defendant relies (as the majority did) on *Kondor v. Prose, supra*, and *Sander v. McKinley*, *supra*. However, as the dissent demonstrates, the reliance by the majority and the plaintiff on these cases is misplaced, and is a misreading of those cases. The dissent explains: "the majority

says that defendants gave too narrow of an explanation of *Kondor v. Prose*, 50 Or App 55, 622 P2d 741 (1981); and the majority sees the dissent's explanation of *Sander v. McKinley*, 241 Or App 297, 250 P3d 939 (2011), which follows, as a wholesale rejection of the decision, rather than a reconciliation of it with established principles. 269 Or App at ___. The majority faults these seeming failures, while failing to recognize that defendants' authorities discredit the theory that an unexpressed, subjective belief suffices to transform unremarkable travel into adverse use. The majority sidesteps defendants' authorities, because there seems to be an easy and alternate theory of adverseness that renders defendants' authorities immaterial." 269 Or App at 826. The dissent's thorough discussion of *Kondor* and *Sander* follows at pages 826-836, and later at n.11, at page 842, and won't be repeated here.

The most important point is that the plaintiff's argument relying on the majority's use of the "claim of right" theory, Response to Petition, pages 2-4, misses the fact that the use of that theory in this particular type of case – a neighbor's use of an existing road with no interference with the owner's use – requires the exception created by *Woods* and the other cases cited by defendants and the dissent. The exception is required because of the unfairness created by allowing a claimant to obtain a prescriptive easement over a roadway with no possibility that the owner could ever learn that the neighbor's use was adverse.

That's why those cases added the requirement that the use interfere with the owner's use of the roadway, so that the owner could then take steps to "head off" the ripening of a prescriptive easement. The majority cites no justifiable reason to do away with this necessary and logical requirement for the adversity element in these specific kinds of cases.

The "credibility" argument made by plaintiff at Response to Petition 4-5, does nothing to change the erroneous legal ruling made in the majority decision. In fact the only credibility finding made by the trial court related to one specific conversation between one defendant and the plaintiff, as to whether or not the plaintiff had asked the defendant for permission to use the road. This is briefed more thoroughly in the defendants' Reply Brief at pages 8-10, and won't be repeated here. However even if this conversation never happened, there is no evidence in this record that the plaintiff's use of the road interfered in any way with the defendants' use of the roadway, the factor required by *Woods* for adversity in these cases. In fact, it seems at least possible that the majority went to all the trouble it did to completely upend the adversity requirements in these kinds of cases because it could not find that there was any such interference based on this record. The only way the majority could rule in plaintiff's favor on the adversity issue under the existing case law was to completely change that case law by adopting a totally subjective "claim of right" standard. This ruling, as the

dissent so ably demonstrates, must be reversed by this court.

In this case the trial court judgment should have been overruled. With respect to the specific result in this case, the defendant also agrees with the conclusion of the dissenters: "If not our own decisions in *Read, Hayward, Webb, Skidmore*, and *Insko*, then the decisions of the Supreme Court in *Woods, Trewin*, and *Boyer* should control the resolution of this case. Application of that law should be straightforward, accepting the facts as the trial court found them. No one knows who built Lewis Creek Road. From the start, plaintiff had deeds that told him that there was no legal access to his parcels. Unlike cases in which claimants may establish use of a two-track road across an owner's fields, plaintiff admits that he did not build the road. He just used it. His use of a preexisting road, however, has no significance in suggesting open, notorious, adverse use. See, e.g., *Webb*, 205 Or App at 20. Unlike cases in which the plaintiffs are the lone users of the road, plaintiffs here had nonexclusive use of the road. [citation omitted]" 269 Or App at 841.

After discussing the specific facts of this case, the dissent concludes: "In short, this was the classic situation—or as the majority would say, the default situation—in which neighbors use a road in a cooperative arrangement. In the evidence and the trial court's findings, there was not 'something more.'" 269 Or App at 841. In other words, the plaintiff did not prove the "something more"

beyond ordinary use which the landowner would understand was a friendly use. Even the *Restatement (First)* requires something more for a prescriptive easement. *See* Dissent, 269 Or App 828-830.

The dissent then concludes: "In sum, plaintiff offered no evidence that his use of a road that he shared in common with Larson and Woods was openly and notoriously adverse to defendants. The trial court should have dismissed this claim for a prescriptive easement, because plaintiff failed to offer sufficient evidence by any standard. * * * * * If, in the end, we do not find a better response than a subjective theory of adverseness, then, in cases of preexisting roads, we will prove the truth of the tired axiom that bad facts make bad law. Oregon landowners, lawyers, and courts will suffer from a misconception—the misapplication of a 'mistaken claim of right.'" 269 Or App at 843. The defendants could not agree more.

CONCLUSION

The majority ruling by the Court of Appeals should be reversed, and the trial court judgment should also be reversed, and a decision rendered in the defendants' favor.

Dated: March 31, 2016

Respectfully submitted,

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Certificate of Service and Filing

I hereby certify that on March 31, 2016, I served the foregoing Brief on the Merits of Petitioners on Review on the counsel for the Respondent on Review herein, below, via the court's electronic filing system.

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I also certify that the Brief on the Merits was filed with the Supreme Court on this date by e-filing.

Certificate of Compliance With Petition Length and Type Size Requirements

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I certify that (1) this brief complies with the word-count limitation in ORAP 9.05(3)(a) and the word count of this petition (as described in ORAP 5.05(2)(a)) is 7,475 words.

Type Size

I certify that the size of the type in this petition is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated: March 31, 2016

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