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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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JAMES MAIER and ELIZABETH HENDRIX-MAIER,  
husband and wife

**Appellants/Cross-Respondents,**

v.

NANCY GISKE,

**Respondent/Cross-Appellant.**

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REPLY BRIEF OF APPELLANTS

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Thomas F. Peterson, WSBA #16587  
Socius Law Group, PLLC  
Two Union Square  
601 Union Street, Suite 4950  
Seattle, WA 98101.3951  
206.838.9100

David F. Cooper, WSBA #7328  
Attorney at Law  
P.O. Box 4  
Vashon, WA 98070  
206.463.3608

Attorneys for Appellants/Cross-  
Respondents Maier

**ORIGINAL**

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## I. INTRODUCTION

This case began because the Maiers simply wanted to add a turn-around to their driveway on a portion of the easement that they owned but did not then use. The land over which the easement runs is owned by Max Batres, who is not a party to this action. Nancy Giske, who owns an adjoining property and claimed to be "caretaker" for this part of Max Batres' property, opposed any expansion of the driveway. The parties were not able to work out a resolution of their differences and this lawsuit ensued.

Unfortunately, the trial court's decisions in the case made an unfortunate spat between neighbors worse by also making the case legally convoluted. In ruling on Giske's Motion for Summary Judgment, the court invalidated the Maiers' easement entirely even though the real party in interest, the owner of the property, was not a party to the lawsuit. Further, the court based the summary judgment on a gross misunderstanding of the statute of frauds promoted by Giske. Giske had represented to the court that Washington law requires 1) that a grant of easement must describe the servient estate even if the easement area itself is sufficiently described, and 2) that easements must be recorded "on" the servient property, even though no deeds are recorded "on" property in Washington.

Having erred in striking down the easement on summary judgment, the subsequent trial led to even more anomalous results. The court awarded damages, treble damages, and emotional damages to Giske in

part for removal of plants from the easement area-- an area that Giske did not own or claim, and an area in which, based upon a correct application of the law, the Maiers had a superior ownership interest.

Based primarily on these errors, the Maiers appealed. Giske cross-appealed on the court's rejection of two of Giske's counterclaims. The court correctly ruled that Giske had not carried her burden to prove that she had gained title to a separate triangular area by adverse possession or that the Maiers had caused her bluff to erode.

## II. COUNTER-STATEMENT OF THE CASE ON CROSS-APPEAL

### A. Adverse Possession of the "Mountain Ash Triangle."

The trial court found that Giske's activities in the Mountain Ash Triangle did not rise to the level of hostility or notoriety required for adverse possession. CP 189. Giske simply planted a couple of trees and a few shrubs on the wrong side of the parties' common boundary line. RP 10/13 131-132. The fact that she may have begun the process as early as 1987 is not significant because nothing she did gave any suggestion that she was claiming this area as her own. RP 10/13 70. On the other hand, the Maiers reasonably regarded the area as their own based on the placement of a since fallen down fence. Ex 1, RP 10/13 196.

Giske makes the untenable argument that she "maintained" this area, but after the initial planting, she performed no maintenance. No objective person would confuse her activity as an expression of ownership. BR 42, RP 10/13 131, 132.

B. Bluff Collapse.

At trial Giske attempted to establish that her bluff collapse was caused by the Maiers' activities in rebuilding their beach stairs and cutting back some vegetation along their waterfront bank. The trial judge correctly found that she had presented insufficient evidence in light of the possible conflicting causative elements presented by the Maiers and another witness, Greg Wessel, which included unseasonable rainfall, unusually high tides, Giske's own actions, or other natural causes. CP 190, RP 10/13 168, 207-214, Ex 11.

**III. ARGUMENT**

A. The Court Should Reverse the Grant of Summary Judgment.

1. The Superior Court Erred in Granting Summary Judgment Because the Grant of Easement Does not Violate the Statute of Frauds.

The easement at issue in this case is valid because the deed contains a precise legal description of the easement area. Giske agrees that the applicable standard here is that the conveyance instrument must contain a legal description of the land conveyed "sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient legal description." *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960).

The 1976 Real Estate Contract and Special Warranty Deed from Harriet Schumaker, as Executrix of the Estate of Hilda Giske, to Warren and

Charlotte Luehrs, which created the easement, describes the property conveyed as follows:

That portion of Government Lot 3, Section 16, Township 23 North, Range 3 East, W.M. in King County, Washington, described as follows:

[Metes and Bounds Legal Description]

TOGETHER WITH second class tidelands adjoining;

TOGETHER WITH a non-exclusive easement over a strip of land 15 feet in width and extending from the westerly margin of the above described tract to the east line of said Government Lot 3; the northerly line of said 15 foot strip running north 68°44'27" west from a point of the east line of said Government Lot, distant north 0°19'24" west 422.51 feet from the southeast corner of said Government Lot.

(CP 129-32, CP 25-26).<sup>1</sup>

The last paragraph describes the easement in a manner that is “sufficiently definite to locate it without recourse to oral testimony.” It contains a metes and bounds description of the northern line of the easement area including the east and west boundaries and states that the easement is 15 feet wide. From that description, any surveyor could locate it on the ground.

In response to this unassailable proposition, Giske chants two false mantras as if by repeating them enough times they will become true. First, Giske repeatedly states that Washington authorities “explicitly provide”

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<sup>1</sup> This is the same legal description used in the Deed from the Luehrs to the Whetstones (CP 133-34) and the Whetstones to the Maiers (CP 123-24).

that the “subservient estate must be sufficiently described.” In fact, Giske cites only one case for this proposition and she takes the statement out of context and grossly misinterprets it. Indeed, *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995) does state in the facts section of the opinion that the “subservient estate must be sufficiently described,” but it does so for an entirely different reason than Giske tries to argue here. Further, it is not the holding of the case. In *Berg*, the issue was that neither the easement area nor the larger “subservient estate” over which it supposedly lay was sufficiently described. The Bergs argued that the easement itself need not be precisely described if it is a “floating easement.”

The Bergs argue, however, that the grant of easement complies with the statute of frauds in accord with the analysis in *Netherlands Am. Mortgage Bank v. Eastern Ry. & Lumber Co.*, 142 Wash. 204, 252 P. 916 (1927). They argue that the grant was a “floating easement” and rely on the principle that the easement’s location need not be exactly established in the conveyancing instrument.

*Id.* at 552.

The court agreed that the easement area need not be precisely described if the servient estate is sufficiently described. In so holding, the court stated as follows:

However, in the case of an easement, a “*deed [of easement]* is not required to *establish the actual location* of an easement. But *is required to convey an easement*” which *encumbrances a specific servient estate*. (Citations omitted.) The servient estate must be sufficiently described.

*Id.* at 551 (emphasis in original). Accordingly, if the easement area is not sufficiently described, a specific servient estate must be described.

However, *Berg* does not stand for the proposition that, where the deed does establish the actual location of the easement, as is the case here, it must also describe the larger “subservient estate” of which it is a part. In fact, we are aware of no Washington case or any case in any jurisdiction that holds that, where the easement area is precisely described, the larger servient estate of which it is a part must also be described to satisfy the statute of frauds.

The second false mantra that Giske repeatedly chants is that the Maier deed “provides no description of the servient estate.” In fact, the following language precisely describes the effected portion of the servient estate:

TOGETHER WITH a non-exclusive easement over a strip of land 15 feet in width and extending from the westerly margin of the above described tract to the east line of said Government Lot 3; the northerly line of said 15 foot strip running north 68°44’27” west from a point of the east line of said Government Lot, distant north 0°19’24” west 422.51 feet from the southeast corner of said Government Lot.

(CP 129-132, CP 25-26.)

This legal description describes the servient estate (*i.e.* Max Batres’ property) not the dominant estate or some other unrelated property. Although it does not describe the entire parcel that the grantor owned at that time, there is no requirement under the statute of frauds or

any case that it do so. The key is that this section does not describe the dominant estate, or some parcel of property unrelated to the servient estate, or altogether fail to sufficiently describe the area conveyed. Rather, it describes the part of the servient estate conveyed with sufficient particularity to locate it without recourse to oral testimony. That is all that the statute of frauds and *Berg v. Ting* require. 125 Wn.2d 544; *Bigelow v. Mood*, 56 Wn.2d at 341.

Giske attempts to compare this case to *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006). Yet that case could not be more inapposite. In *Dickson*, the instrument purported to convey an interest in “land lying immediately to the west of the property herein conveyed.” *Id.* at 728. This description was deemed invalid under the statute of frauds because one could not determine the boundaries of the property from this description. By contrast, in this case, the legal description contains a precise metes and bounds legal description of a parcel 15 feet wide and 422.51 feet long. The exact location of the strip is easily locatable on the ground because the deed precisely describes the north line of the 15-foot strip. It so happens, that line is the northern boundary of the servient estate.

Although the legal description in this case alone is sufficient, the Real Estate Contract that created the easement also contained a map that depicts the entire servient estate and the location of the easement on it. CP 132. In that sense, this case is more like *City of Seattle v. Nazarenius*, 60 Wn.2d 657, 374 P.2d 1014 (1962) than *Dickson v. Kates*. Giske cites *Nazarenius* as an example of a case that satisfies the statute of frauds

because, although the legal description was not sufficient, the instrument referenced an attached blueprint which adequately depicted the location of the easement. In this case, there is a precise legal description and a map attached depicting the servient estate and the easement.

Giske responds to our argument that the deed contains a precise metes and bounds legal description of the easement area with the statement, “[b]ut *any* metes and bounds description does not render the description adequate under Washington law.” Br. of Respondent at 22. Giske then makes a statement that is, at best, rhetorical that “the granting language as issue here made *no reference to the servient estate.*” Br. of Respondent at 23. Here, Giske again repeats a mantra that is simply false. On the contrary, the deed describes the northern boundary of the servient estate (*i.e.* Max Batres’ property) and states that this line is the north line of a 15-foot wide easement. This is a metes and bounds description of a portion of the servient estate, not the dominant estate, or some remote property. There could be no clearer reference to the servient estate.

Finally, Giske seems to totally miss the point of our discussion regarding the recording process in Washington. Br. of Respondent at 23-24. Giske seems to forget that she proposed and the superior court adopted the nonsensical language in the order that the 1976 Special Warranty Deed “was not recorded on the servient estate.” This statement seemed to be part of the basis for the court’s conclusion that the conveyance failed to comply with the statute of frauds because that is what Giske vigorously argued. However, as we discuss in the Brief of Appellants at pages 17 to 21 there is

no such thing as recording “on” property because, in Washington, deeds are recorded numerically by date and indexed only by grantor and grantee.

RCW 65.04.050.

We further pointed out that the deed was properly recorded and that, using standard search methods, anybody could determine that the easement encumbered Max Batres’ property. The fact that Max Batres’ title company may have failed to do so is irrelevant. That is what title insurance policies insure against: the possibility that the title company fails to find a properly recorded encumbrance.

In sum, the statute of frauds requires a legal description sufficiently definite to locate it. If the description of the easement area itself is sufficiently definite, there is no requirement that the larger servient estate be also described. *Berg v. Ting* does not require more, and we know of no case anywhere that has expanded the statute of frauds to the degree proposed by Giske. In any event, the description at issue in this case does describe the servient estate. Even though it does not describe all of the property owned by the grantor at that time, the area described is part of the servient estate, not the dominant estate or some other remote property. For these reasons, the court erred in granting Giske’s motion for summary judgment and that order should be reversed.

2. As a Matter of Law, the Scope of the Easement is not Limited by Prior Use, and it has not Been Extinguished by Adverse Possession or Nonuse.

Giske acknowledges that, where a grant of easement is clear on its face, “the extent of the right acquired is to be determined from the terms of the grant.” *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). Although Giske wishes it were not so, the grant in this case is not ambiguous. It contains a precise metes and bounds legal description of a 15-foot by 422.51-foot easement. Accordingly, Giske’s whole argument that the scope of an ambiguous easement is determined by the parties’ subsequent use is inapplicable.

Giske quotes *State ex rel. Northwestern Elec. Co. v. Superior Court In and For Clark County*, 28 Wn.2d 476, 488, 183 P.2d 802 (1947) for the proposition that the Maiers are limited to historical use of the easement. But the very first sentence of the quote defeats Giske’s argument: “Where an easement in land is granted in general terms, without giving definite location and description to it . . . .” *Id.* at 488. In this case, the easement is not general, but rather contains specific dimensions. Giske’s attempts to characterize something so exact as ambiguous is nothing short of baffling. Just because someone says the earth is square, over and over again, does not make it so. In this case, the easement is precisely described, so parole evidence of use is inadmissible to define its scope. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (“The intent of the original parties to an easement is determined from the deed as a whole. . . . If the plain language is unambiguous, extrinsic evidence will not be considered.”) *See also Olson v. Trippel*, 77 Wn. App. 545, 553-55, 893 P.2d 634 (1995).

Finally, Giske states in footnotes 5 and 12 that she made claims regarding adverse possession and abandonment of the easement that should be considered if the summary judgment is reversed. However, she presents no argument in support of these claims or in response to the Maiers' arguments at pages 21 and 22 of the Brief of Appellants. In fact, Giske acknowledged at trial that her son owns the fee to the easement area and that she was not claiming title to it. (CP 57-63.) It is logically impossible for her to extinguish the Maiers easement by adverse possession but not also extinguish Max Batres' title. As for the issue of non-use, it is well established in Washington that mere non-use of an easement does not extinguish it. *City of Edmonds v. Williams*, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989). Accordingly, the Court can dismiss these claims as a matter of law and there is no need for a remand.

B. The Court Should Reverse the Trial Court's Award of Damages.

1. Giske is not Entitled to Damages for Shrubs Planted in the Easement Area.

Giske is not entitled to damages for the cutting of shrubs located on private property that she does not own. Giske in her response makes two arguments in support of her claim for damages from removal or cutting of certain shrubs in the easement area. She argues first that she planted the shrubs and thus owns them, although she concedes they are planted on property now owned by her son and never owned by her. (RP 10/13 35, 42-46). The second argument she makes is that even if she cannot claim an ownership interest in the shrubs, she can claim damages

from their cutting on account of the fact that they are in an access way to her property. This is the argument that the trial court adopted. CP 191.

Ms. Giske considers herself the caretaker of her son's property, over a portion of which runs the subject easement. RP 10/13 43. The record is clear that Ms. Giske's plantings in the easement area were permanent and not subject to harvesting, as, for example, a crop might be. (RP 10/13 43-46). Therefore, she cannot claim ownership of them because, under Washington law, such shrubs become fixtures to a parcel of property owned by someone else.

The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold.

*Lipsett Steel Prods. Co. v. King Cy.*, 67 Wn.2d 650, 652, 409 P.2d 475 (1965). Having planted the shrubs on her son's property without any indication she did not intend to leave them there, the plants become the property of Max Batres.

Second, Giske misinterprets the timber trespass statute, which does not allow damages for the cutting of plants on private property owned by someone else. Giske attempts to rewrite the statute so that it would permit anyone to bring an action against somebody who cuts down or damages trees or shrubs belonging to someone else. For Giske, the clause which begins "in an action by such person" does not refer to the person on whose

land the trees were cut, as a plain reading suggests. However, the statute refers to the “land of another person” and then gives a right of action “by such person.” Under the statute, the party with a claim for timber trespass is the landowner, not the caretaker. Because Giske is not a landowner, she lacks standing under the statute.

Giske next relies on that portion of RCW 64.12.030 which allows recovery for the cutting of timber or shrubs “...on the street or highway in front of any person’s house...”<sup>2</sup> Giske cites *Simmons v. Wilson*, 61 Wash. 574, 112 P. 653 (1911) as support for the proposition that the easement she uses for access qualifies under the statute as a street or highway in front of her house. Her reliance is misplaced. Appellant, tree cutter, in that case argued that the lot owner was not the owner of the underlying land (street) and therefore had no right of action for damage to trees. The Court focused on that issue and held that the respondent, as an abutting owner, did have an ownership interest in the street and as such would have a cause of action whether or not the timber trespass statute existed. In the *Simmons* situation, either the landowner or the municipality can claim damages from a trespasser, because one party owns the land and both are granted that right by statute. Here, Giske did not have any legal interest in

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<sup>2</sup> Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefore, as the case may be. RCW 64.12.030

the easement, and the access-way she claims, as discussed in Appellants' Brief, is not a street or highway in front of her house.

Giske did not own the damaged shrubs once they became fixtures to the property now owned by her son. Her son is the party in interest with respect to those claims. The easement and its use as an access-way for Giske does not qualify as a highway or street under the statute. Thus, the trial court erred when it awarded damages to her for injuries to the shrubs in the easement area.

Finally, to extend the reach of this statute to Giske would make it difficult to know where to stop and subject the Maiers to the possibility of a double recovery if Max Batres were to bring his own action. "Clearly, there is a 'public policy' against 'double' recovery." *Barney v. Safeco Insurance Co.*, 73 Wn. App. 426, 869 P.2d 1093 (1994), overruled on other grounds by *Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 946 P.2d 388 (1997).

2. Giske is not Entitled to Treble Damages.

Giske is not entitled to treble damages for injuries to shrubs in the easement area or in the two-foot strip erroneously awarded to her by the trial court. The Thuja Pyramidalis hedging and the Wax Myrtle were located within the easement area now owned by her son. Exs. 15 and 17. Although all of these shrubs were planted by Giske, her claim to current ownership is defeated by, among other things, the fact that they became fixtures on Max Batres' property.

The third and most important factor is the objective intention of the annexor to make a permanent accession. "[A]ccession . . . is a mode of acquiring ownership by the identification of a lesser thing with a greater, and it involves the loss of ownership by the owner of the lesser thing and its acquisition by the owner of the greater." . . . The intent to make a permanent accession is inferred from the annexor's relationship to the freehold, the nature of the item affixed, and other circumstances of the annexation. . . .

The annexor's relationship to the freehold may be that of owner, tenant, or stranger. "When a property owner attaches the article to the land he is rebuttably presumed to have annexed it with the intention of enriching the freehold." . . . When a tenant erects a building on leased land, absent an agreement to the contrary the improvement becomes a part of the real property as soon as it is constructed and title passes to the owner of the realty. . . . "When a person with no interest in the land affixes an article thereto in the furtherance of his own purposes, the presumption is that he intends to reserve title to the chattel in himself." . . . In summary, if the annexor's relationship to the land is such that by making a permanent accession to the land he will lose title to the chattel, evidence of an intent to retain ownership of the chattel is evidence of an intent not to make a permanent accession to the freehold.

*SSG Corporation v. Cunningham*, 74 Wn. App. 708, 711, 875 P.2d 16 (1994). (Internal citations omitted.)

Here, Giske's status is a little confused. Legally, she may have a right of access along the easement, but that is all. She apparently regards herself as caretaker of the property now owned by her son, but that status is not confirmed by anyone with an actual interest in the property, except, perhaps by acquiescence. RP 10/13 43, 107. She testified that she planted a variety of shrubs in the mid 80's, and the Thuja Pyramidal in 1999 and again in 2004 or 2006. RP 10/13 43, 44, 54, 112. However, regardless of

her status, even were she regarded as a stranger, what is clear from this activity and its duration is that she intended the plantings to be permanently placed. She should be bound by that choice.

3. Giske is not Entitled to Emotional Damages.

Giske is not entitled to emotional damages for damages to shrubs in the easement area for the reasons stated in the Maiers' Brief of Appellants. Additionally, *Birchler v. Costello Land Co., Inc.*, 133 Wn.2d 106, 942 P.2d 968 (1997) cited by Giske in her response, does not support her claims because that case involves damage claims by property owners against the tortfeasor. It does not discuss a situation such as is presented here. Once again, of course, if the Maiers prevail on the easement issue, judgment should be reversed because the Maiers are entitled to trim shrubs located on their easement.

4. No Substantial Evidence Exists to Demonstrate the Maiers Illegally cut Giske's Shore Pine.

It is not disputed that the Maiers trimmed a shore pine located near the common boundary of the parties' properties. RP 10/13 194, 195. There is evidence in the record which indicates that Giske thought the pine was cut on her side of the line. RP 10/13 56, 57, 65. The evidence relied upon is a survey, Ex 1, which Giske admits was not done to establish, confirm or designate boundary lines. RP 10/13 56, 109. Jim Maier's testimony was that he believed he cut only that portion of the shore pine which overhung his property. RP 10/13 195. However, there was no evidence presented to the trial court which established with any degree of certainty the actual and

precise location of the shore pine stump.

Giske argues that substantial evidence in the form of Maier's and Giske's testimony establishes the location of the tree. However, the reality is that both parties were speculating.

A finding of fact cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a finder of fact will not be permitted to conjecture how the accident occurred. *Arnold v. Sanstol*, 43 Wn.2d 94, 99, 260 P.2d 327 (1953).

The experts who might have settled this question, the surveyors, Walters & Associates, were not present at trial, and their product, Ex 1, explicitly states that "This surveyor has not independently analyzed the boundaries of the subject parcels at this point in time." If this were not a close question from a distance perspective, rough agreement about the location might be enough. In this case, however, we are talking about a tree stump which the Walters illustrative diagram places only a few inches to the west of the Maier property. That is just too close a call with too much at stake to establish liability.

It is the rule that a verdict cannot be founded on mere theory, speculation or conjecture. . . . Instead, the law requires verdicts rest upon evidence and, therefore, the opinions of expert witnesses, in order to reach the jury's consideration, must be founded upon facts of the case. . . .

*Lamphiear v. Skagit Corporation*, 6 Wn. App. 350, 355, 493 P.2d 1018 (1972). (Internal citations omitted.)

C. No Substantial Evidence Demonstrates Giske Adversely Possessed the Two-Foot Strip.

Giske's testimony about the placement of the fence by the Whetstones (the Maiers' predecessors in interest) parallel to the south boundary of their property and her subsequent activities in the two-foot strip south of that fence is not sufficient to establish adverse possession. There are two reasons why the trial court erred. First, Giske was not acting for herself when she improved this small strip; she was acting for her parents initially and later for her son. Second, regardless of who has a claim against this property, the use should have been considered permissive, not adverse.

Foundationally, there is nothing in the record to explain why the Whetstones put their fence where they did or that they intended by their actions to give up any of their property to Giske's parents, the then owners of the adjoining easement property. Next, it should be assumed that Giske was acting as "caretaker" for her parents and later her son, when any discussions took place with the Whetstones or when she installed the berm and plantings. RP 10/16 6.

At trial this two foot strip was awarded to Giske, even though it was clearly established that she was not acting for herself in dealing with this property. RP 10/13 35, 43. It is probably safe to assume that she considered it a part of the easement, which was owned during the statutory

period by her parents for whom, again, she was acting as caretaker. RP 10/13 35, 43. RP 10/16 6. If a claim for adverse possession was to be made, it logically should have been made by her son, Max Batres, who is the current owner of the easement property. However, he was not a party to this action.

During her testimony, Giske at first said she and the Whetstones had some sort of an agreement about the location of the fence line. Then she says they had no such agreement and in fact admits that they did not “seed” their property to her. RP 10/13 107-108. To be consistent, her testimony should be interpreted to mean that everything that she did both in the easement area and in the two foot strip were done with the belief that she was acting for and on behalf of her parents and her son, not making a separate claim for herself, and that with respect to the two-foot strip she was simply mistaken about its location and believed it was a part of the easement.

The second basis for reversing the trial court’s decision, is that this case more closely resembles those dealing with permissive use and should be decided under that doctrine.

When one enters into the possession of another's property there is a presumption that he does so with the true owner's permission and in subordination to the latter's title. . . .

A user which is permissive in its inception cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.

*Northwest Cities Gas Co., v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942).

Permission is defined in Black's Law Dictionary 1298 (4th ed. 1968) as: "A license to do a thing; an authority to do an act which, without such authority, would have been unlawful." Permission can be express or implied, and a use which is initially permissive cannot ripen into a prescriptive right unless the claimant makes a distinct and positive assertion of a right hostile to the owner. *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946); *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987). "The inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence. It is not necessary that permission be requested." *Cuillier v. Coffin*, 57 Wn.2d 624, 626, 358 P.2d 958 (1961).

A finding of permissive use is supported by evidence of a close, friendly relationship or a family relationship between the claimant and the property owner. William J. Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 75 (1960). "A friendly relationship between parties is a circumstance more suggestive of permissive use than adverse use and the trial court was free to find use was permitted as neighborly courtesy." *Miller v. Jarman*, 2 Wn. App. 994, 997, 471 P.2d 704 (1970).

Mere use (in this case erecting a berm, planting a few shrubs and leaving it untended) of someone else's property for ten years or more does not establish an adverse claim. *Anderson v. Hudak*, 80 Wn. App 398, 402-

403, 907 P.2d 305 (1995). The use must be (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). What is lacking here from Giske's perspective is any kind of claim of right and more particularly a claim of right from an individual who can claim for herself and not as a caretaker.

D. Giske's Cross-Appeal Should be Denied, and the Superior Court Affirmed.

1. Standard of Review.

An appellate court reviewing a trial court's findings of fact and conclusions of law engages in a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the reviewing court determines if substantial evidence in the record supports the trial court's findings of fact. *Id.* If substantial evidence supports the findings, then the reviewing court determines whether those findings support the trial court's conclusions of law. *Id.* "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). The standard of review of a question of law is de novo. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008).

2. Giske's Possession of Mountain Ash Triangle ("Pie Area") was not Adverse.

The trial court correctly ruled that Giske had not established her title by adverse possession to the area referred to by the court as the "pie area." The "pie area" lies at the northwest corner of the Maier property and the northeast corner of the Giske property. Ex 1. Its dimensions are scarcely discernable from the record. RP 10/13 70-75. We assume from her testimony that Giske planted the mountain ash in 1987. RP 10/13 70. And it is clear that she planted it with only partial benefit of a survey. RP 10/13/71. From the date of planting forward all she did was plant another tree and few other items. RP 10/13 75-76. According to Giske "it's in an area of wild vegetation." RP 10/13 75. Therefore, apparently it did not require any particular care, was not enclosed in by a fence or other obstruction, was not distinguishable from its surrounds, and would certainly not have put anyone on notice of her claim to it. See Ex. 7.

When Giske asserts in her brief that she maintained exclusive control over the area she exaggerates. The reality is that once she planted the tree and a few other things she did nothing else. RP 10/13 75.

In order to establish a claim of adverse possession, there must be possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. . . . Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years. . . . As the presumption of possession is in the holder of legal title. . . the party claiming to have adversely possessed the property has the burden of establishing the existence of each element. . . .

*ITT Rayonier v. Bell*, 112 Wn.2d 754, 758, 774 P.2d 6 (1989). (Internal citations omitted.)

Giske asks this court to ignore the holding in *Anderson v. Hudak*, 80 Wn. App 398, 907 P.2d 305 (1995), a forcefully analogous case, that merely planting a line of trees, without more, will not establish hostile possession. The *Anderson* case, if anything, is a more compelling case from that claimant's perspective, than this case because there the claimant lived on a city lot divided, at least visually, by the line of trees her predecessor had planted. Here we have only have plantings on the wrong side of a fence line consisting of one or two trees and some shrubs, not distinguishable in any way from the surrounds with no attempt, or apparent need, to maintain them. *ITT Rayonier v. Bell*, 112 Wn.2d 754, 774 P.2d 6 (1989), cited by Giske provides no support for her claim. There, the Court held against the claimant principally on the basis that his sporadic objective use of the property could not be proven to have endured for the statutory period. Additionally he was not able to prove that his occupancy was exclusive or at least the type that would be expected of an owner.

Evidence of *use* is admissible because it is ordinarily an indication of *possession*. It is possession that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership. . . .

Possession itself is established only if it is of such a character as a true owner would make considering the nature and location of the land in question. . . . As quoted

in *Wood v. Nelson*, supra, use alone does not necessarily constitute possession. The ultimate test is the exercise of dominion over the land in a manner consistent with actions a true owner would take.

*ITT*, 112 Wn.2d at 759. (Internal citations omitted.)

In addition to the *ITT* case, Giske relies on *Lingvall v. Bartmess*, 97 Wash. App. 245, 982 P.2d 690 (1999) for the proposition that planting shrubs and trees without more is adequate to meet the requirement that “the claimant treat the land as his own against the world throughout the statutory period.” “The nature of possession is determined objectively by the manner in which the claimant treats the land.” *Id.* The *Lingvall* court upheld the claim to a fenced-in triangular area adjacent to a long-used driveway. The claimants planted several trees, cleared away brush, “...landscaped, mowed, and maintained the area continuously and exclusively...” for at least ten years. *Lingvall*, supra. Moreover, the contending parties in *Lingvall* were actually hostile toward each other. The facts in *Lingvall* contrast sharply with the situation in this case where Giske planted a tree and a few shrubs, in a very small area and then left them untended, installed no fencing, and made no attempt to exclude anyone, particularly the Maiers or their predecessors in interest, the Whetstones. That this area was not mowed or otherwise disturbed by the Maiers, as was their adjacent lawn, was best explained by Mr. Maier when he testified that, “As an architect, I have a lot of respect for framing views with vegetation, and that tree is probably more important to us than it is to Nancy.” RP 10/13 196. In other words, they assumed they owned it, they

liked it, and nothing that Giske did affected this belief. The trial court's ruling should stand.

3. Insufficient Evidence was Presented to Establish that the Maiers' Activities on Their Property Caused Loss of Lateral Support to Giske's Shore Front.

The trial judge very carefully weighed the evidence presented by Giske and the Maiers in support and in defense of the claim that the Maiers had caused Giske's bank to collapse and found it was insufficient to support Giske's claim and that the judge would need an expert, presumably in Geology, to come to a different conclusion. RP 10/16 12-15. Her conclusion should be interpreted only as indicating a failure of proof, and suggesting a means of correcting it, not as a statement that expert evidence is absolutely required in such a case.

In an action against one's neighbor for taking or damaging property, the plaintiff has the burden of establishing that a taking or damaging-in the constitutional sense-has taken place. . . . Accordingly, if the record is such that the trial court cannot resolve the critical fact issue, then Bay has failed to sustain his burden of proof. Resolution of that issue must remain in the competent hands of the learned trial judge who, incidentally, viewed the premises during trial.

*Curtis Bay v. Hein*, 9 Wash. App. 774, 515 P.2d 536 (1973). (Internal citations omitted.)

Giske cites *Kelley v. Falangus*, 63 Wn.2d 581, 388 P.2d 223 (1964) as support for her argument that expert testimony is not absolutely required in lateral support cases. Her proposition is correct, but that case does not support her as a close reading strongly suggests that experts were employed

to assist the trier of fact to understand the evidence. “A number of qualified witnesses testified to various facets in issue.” (Emphasis added). *Kelley*, supra at 583. The same assumption is reached after a close reading of *Bjorvatn v. Pacific Mechanical Construction, Inc.*, 77 Wn.2d 563, 464 P.2d 432 (1970), also cited by Giske.

During the excavation and filling operation, the defendants operated on the sewer site heavy earth moving and digging machinery which produced considerable vibration. The court found, however, that the 36-foot deep sewer trench was below the level of the subterranean ground water table; that digging the sewer trench caused a lowering of the water table and increased, as the engineers describe it, the effective load upon compressible soils supporting Bjorvatns' foundation; and that these forces were a proximate cause of the Bjorvatns' house settling anew.

*Id.* at 564. It is not a certainty, but when a trial court refers to the testimony of engineers about a technical subject, it seems likely that it is expert testimony it is relying on.

The problem for Giske in this case was establishing the mechanism for the slumping of her bank which began apparently as early as 2000. RP 10/13 80. She attributes this early slumping to vegetation removal by the Maiers. RP 10/13 80. Jim Maier testified that his bank slumping probably started before he and his wife bought the property in 1999 and had nothing to do with the cutting of any vegetation. RP 10/13 207, 208. Giske points to Ex. 7, taken in 2001, and states that it shows the Maier bank in a devegetated state, when quite clearly it does not. RP 10/13, Ex 7.

Ex. 8 graphically illustrates the Maiers' bank slumping to the east and away from the stair cut and the Giske property and this despite the

existence of some obvious and rather robust vegetation. Ex. 9 is more of the same looking toward the Giske property. Ex. 10 is still more of the same again looking West. Ex 12 shows the rather uniform erosion along the entire Maier property.

Giske next attempts to connect the Maiers stair project with her bank's further slumping in 2005. RP 10/13 81. The Maiers answered this with other possible and perhaps more likely mechanisms. Jim Maier testified that 2005 through 2006 had a winter of unusually high tides and substantial rainfall, and that Giske had made alterations to her bank which over time could have contributed to the problem. RP 10/13 209-214.

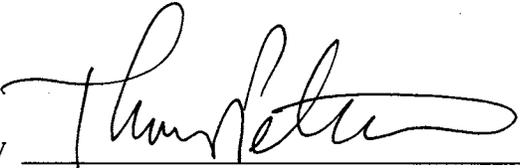
Cause and effect was the problem for Giske. The only person with any real qualifications, Greg Wessell, a geologist, testified as a lay witness only, but was not helpful to Giske's cause. RP 10/13 136, 139, 140, 165-169. Ms. Giske admitted that she is no expert in these matters, and her relations and those of her other witnesses are really nothing more than lay persons' observations and conjecture. RP 10/13 136-137, 148-163. The trial court could only speculate that perhaps the slumping was the result of unusually high tides, high rainfall, Giske's own actions, something the Maiers did or a combination of the above or something else entirely. She could not resolve her uncertainty and Giske offered no one who could assist her. As a result, the trial judge found the evidence insufficient and suggested that Giske needed an expert. The judge was correct insofar as she suggested a potential means to solving Giske's evidentiary problem and her ruling should stand.

### III. CONCLUSION

This Court should reverse the superior court's motion for summary judgment. The 1976 Real Estate Contract and Special Warranty Deed created the easement in full compliance with the statute of frauds. Further, the Court should reverse the trial court's judgment awarding damages to Giske, in particular for cutting of plants located in the easement area. The Court should reverse the trial court's judgment awarding title to Giske to a two foot-strip of property that does not adjoin her property. Finally, the Court should affirm the trial court's dismissal of Giske's counterclaims for adverse possession of the separate triangle and damages due to bluff erosion.

Respectfully submitted this 3<sup>rd</sup> day of June, 2009.

SOCIUS LAW GROUP, PLLC

By   
Thomas F. Peterson, WSBA #16587

By   
DAVID F. COOPER, WSBA # 7328  
Attorney at Law *per telephone authorization 6/3/09*

Attorneys for Appellants/Cross-Respondents  
Maier

**V. CERTIFICATE OF SERVICE**

I certify that on the 3<sup>rd</sup> day of June, 2009, I caused a true and correct copy of this REPLY BRIEF OF APPELLANTS to be served on the following in the manner indicated below:

David S. Mann  
Gendler & Mann LLP  
1424 4th Avenue, Suite 1015  
Seattle, WA 98101  
(206) 621-8868

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*Counsel for Respondent*

By:   
Erin Knobler, Legal Assistant

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