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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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NO. 62737-6

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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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COURT OF APPEALS  
STATE OF WASHINGTON  
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REPLY BRIEF OF CROSS-APPELLANT NANCY GISKE

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## I. INTRODUCTION

After years of relative peace, stability and enjoyment of her long-timed family property, life for Nancy Giske took a dramatic turn in 2000 with the arrival of her new neighbors, appellants James and Elizabeth Maier. While the Maiers claim that they simply wanted to create a new turnaround, Nancy Giske wanted simply to protect her privacy and her property, including her landscaping and bluff. Dissatisfied with Giske's refusal to provide their desired turnaround, the Maiers instead embarked on an incessant series of actions that have caused significant harm to Nancy Giske's property and her use and enjoyment of her property.

Nancy Giske supports most of the trial court's findings and conclusions both at summary judgment and trial. Unfortunately, the trial court committed two errors of law at trial. Nancy Giske submits the following brief reply in support of her cross-appeal.

The trial court erred first in concluding that Nancy Giske needed to actively clear, mow, or otherwise actively manage land she claimed through adverse possession instead of treating it in a native state. Giske treated *all* of her property, including the pie-shaped Mountain Ash triangle, in the same manner. She planted a variety of native plants, trees and shrubs that she believed would support her privacy and shoreline and

then left the plants, trees and shrubs to develop naturally. Nancy Giske's treatment was objectively in stark contrast to that of her neighbors and more than satisfied the "hostile" and "open and notorious" elements of adverse possession.

The trial court erred second in concluding that an expert witness was necessary to Giske's claims that a series of activities by James Maier resulted in undermining the long-stable bluff resulting in its collapse and the loss of ever further vegetation, use and enjoyment.

## II. REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL

### A. The Trial Court Erred as a Matter of Law in Concluding that Nancy Giske Failed to Demonstrate Adverse Possession of the Mountain Ash Triangle

The law on adverse possession is well settled and not significantly disputed by either party. The element of "hostility" is determined "solely on the basis of the manner in which [the possessor] treats the property." *ITT Rayonier v. Bell*, 112 Wn.2d 754, 761, 774 P.2d 6 (1989). The use needs to be "of the character that a true owner would assert in view of its nature and location." *Anderson v. Hudak*, 80 Wn. App. 398, 403, 907 P.2d 305 (1995). The nature of possession "is determined objectively by the manner in which the claimant treats the land." *Lingvall v. Bartmess*, 97 Wn. App. 245, 254, 982 P.2d 690 (1999).

Unfortunately, the trial court (and the Maiers) read “use” too narrowly and concluded, as a matter of law, that Nancy Giske in effect needed to clear, mow or otherwise physically manipulate the property in order to claim “hostile” use. As confirmed by *Lingvall*, the types of activities conducted are only evidence of open hostility. Far more important is whether Nancy Giske treated the land as her own.

It is undisputed, and indeed the trial court confirmed, that Ms. Giske planted the mountain ash in the mid 1980s, and that her “landscaping efforts” included “significant work” along and near her bluff – work which *included*, but was not *limited* to the mountain ash. In fact, Ms. Giske’s testimony confirmed that she planted and cultivated a range of other trees and shrubs over the years, including boxwoods, an Amelanchier, Alaska cedar, juniper, a bay laurel and various other plants. RP 10/13 75; 131-32. That Nancy Giske permitted these and other plants to grow once planted is entirely consistent with her landscaping practices throughout the property. There can be little question that Ms. Giske treated her land as a true owner here.

Similarly, in order to establish the “open and notorious” element, Nancy Giske needed only to show *either* that (1) the true owner had notice, or (2) that “any reasonable person would assume that the claimant

is the owner.” *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984). *Anderson*, 80 Wn. App. at 405. The evidence at trial was undisputed that a reasonable person, upon seeing the property and disputed line, would assume that the property west of and including the mountain ash belonged to Ms. Giske. The property to the west of the mountain ash, and extending in a line all the way to the beach, looked exactly like the rest of Giske’s property. To the east of that line, however, the Maiers and their predecessors in interest had, except for mown grass, “removed all vegetation from the bank.” RP (10/13) at 75. *See also* Ex. 7;<sup>1</sup> RP (10/13) at 68-70; Ex. 23, p. 10.<sup>2</sup> The record is void of any testimony or evidence to the contrary.

The undisputed evidence demonstrates that Ms. Giske met all elements of adverse possession of the mountain ash triangle. The trial court’s belief that Ms. Giske needed to do more to manifest her ownership was erroneous and indeed would have been in direct contradiction to how Nancy Giske nurtured and cared for her native landscape. Giske

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<sup>1</sup> Exhibit 7 is an oblique aerial view of the Maier property in 2001. Giske’s property is to the right. There is a clear line demarcating the two properties. The Maiers’ property is largely cleared and mowed. Giske’s property is covered over with her native landscaping.

<sup>2</sup> The center photo on page 10 of Exhibit 23 is taken from the beach looking south along the line between the Maiers and Giske. The mountain ash is the large white tree. Giske’s property is to the right and is markedly different than the Maiers’ property on the left.

maintained the area to the east of the mountain ash just as she maintained the rest of her yard. Further, any objective viewer would agree. Title to this land ripened, as original title, in Giske's favor no later than 1997, ten years after the planting of the mountain ash.

B. The Trial Court Erred in Concluding that Testimony of an Expert Was Required to Demonstrate the Cause of the Bluff Collapse

Contrary to the Maiers' assertions, Reply Brief of Appellants at 25, the trial court expressly concluded that an expert was required in order for Nancy Giske to demonstrate that Jim Maier's actions caused her bluff collapse. As the trial court concluded:

Nancy Giske has a longstanding right under Washington law to lateral support of her property and to have it supported and protected in its natural condition by the land of his adjoining neighbor.

However, *she has not established with expert testimony* that the actions by the Maiers clearing, excavating and rip rapping along their portion of the bluff has resulted in the loss of lateral support of Nancy Giske's bluff and resulted in significant damage to her property.

CP 191 (Conclusions 6-7) (emphasis added). The trial court erred in concluding that an expert witness was necessary.

While the Maiers attempt to re-argue the facts, the Maiers' "facts" are without support. Nor, more importantly, were the Maiers' version of the facts accepted by the trial court. Indeed, the trial court found at least the following relevant facts:

- Prior to the Maiers purchasing their property the bank had been stable.
- The Maiers' predecessor, Tim Whetstone, protected the bank by allowing the native vegetation to remain in place and with a fence.
- After 2001 the Maiers removed the fence and native vegetation from the bank.
- In September, 2005, Jim Maier, without a permit, began excavating into the bank to relocate a stairway and boat platform. Shortly thereafter the bank adjacent to the excavation began to collapse.
- Maier continued to excavate and pile soil on top of the collapsing bank adjacent to Giske's property.
- Maier then placed, without a permit, riprap along the base of the bluff beneath the newly installed stairs.

CP 189-190 (Findings 27-32); RP (10/16) at 12-14.

Based on these findings of fact, the court believed that the fault was the Maiers' "foolish" activities:

It must be said that the court's instinct tells it that the bluff collapse affecting Ms. Giske's bank probably was initiated by the work the Maiers did on their bank.

CP 190 (Finding 33); RP (10/16) at 14. The trial court's instinct – that the fault was "probably" Maiers' – is certainly supported by the facts and evidence. The trial court should have stopped there – with a finding that Giske had proven that the probable cause of the bank collapse was the Maiers' actions.

The trial court erred as a matter of law, however, in requiring a higher degree of proof – specifically testimony of an expert to provide a post-hoc explanation of the accepted facts. Giske demonstrated that prior to the Maiers' unpermitted actions, the bluff had long been stable. Giske demonstrated that only after the Maiers began excavating into the bluff did the bluff begin to collapse. Giske further demonstrated that after the bluff began to collapse the Maiers continued excavation and indeed piled further soil on top of the collapsing bluff immediately adjacent to Giske's property. Giske met her burden to plead and prove that it was the Maiers' activities that led to the collapse of the long stable bluff. While expert

testimony might have been able to postulate on the mechanics of the collapse, expert testimony was not required to demonstrate a loss of lateral support. *Bjorvatn v. Pacific Mechanical Construction, Inc.*, 77 Wn.2d 563, 567-68, 464 P.2d 432 (1970).

### III. CONCLUSION

This Court should deny the Maiers' Appeal and grant Nancy Giske's appeal remanding this matter to the trial court so that the court can apply the correct legal standards to Giske's claim of adverse possession of the Mountain Ash triangle and claim of loss of lateral support.

Dated this 6<sup>th</sup> day of July, 2009.

Respectfully submitted,

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By:



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MAIER, Husband and Wife,

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COURT OF APPEALS NO.  
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DECLARATION OF SERVICE

STATE OF WASHINGTON        )  
  )        ss.  
COUNTY OF KING            )

I, FLORITA COAKLEY, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Gendler & Mann, LLP, attorneys for respondent/cross-appellant herein. On the date and in the manner indicated below, I caused the Reply Brief of Respondent/Cross-Appellant Giske to be served on:

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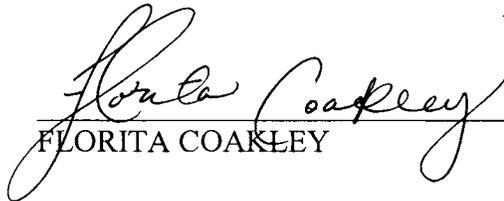
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DATED this 6<sup>TH</sup> day of JULY, 2009, at  
Seattle, Washington.

  
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