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**ALLAN MARGITAN, Appellant**

**vs.**

**SPOKANE REGIONAL HEALTH DISTRICT and SPOKANE  
REGIONAL HEALTH DISTRICT BOARD OF HEALTH,  
Respondents,**

**and**

**MARK AND JENNIFER HANNA, Respondents.**

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**BRIEF OF RESPONDENTS SPOKANE REGIONAL HEALTH  
DISTRICT AND SPOKANE REGIONAL HEALTH DISTRICT  
BOARD OF HEALTH**

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## I. INTRODUCTION

The Superior Court properly determined that SRHD's counsel was not subject to disqualification under the lawyer as witness rule because counsel did not provide testimony during the administrative hearing. The Superior Court's decision to dismiss Margitan's Petition for Review for lack of standing was also proper because Margitan failed to establish that he had suffered an injury-in-fact.

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Allan Margitan (Margitan) sought judicial review of the Spokane Regional Health District's (SRHD<sup>1</sup>) administrative decision regarding Mark and Jennifer Hanna's (Hanna) on-site septic system and drain field. CP 1-6. On September 15, 2014, Spokane Superior Court Judge John O. Cooney dismissed Margitan's Petition for Review on the basis that they lacked standing to bring the Petition. CP 78-79. Specifically, Judge Cooney held that Margitan had not suffered an injury-in-fact and had not been aggrieved or adversely affected by the actions of SRHD. CP 79. Judge Cooney also denied Margitan's request to disqualify SRHD's

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<sup>1</sup> SRHD denotes both Spokane Regional Health District and the Board of Health for Spokane Regional Health District unless otherwise stated.

counsel under the lawyer as witness rule. This appeal followed. CP 118-120.

B. RELEVANT FACTS

On or about June 6, 2002, Hanna submitted Application For On-Site Sewage System No. 02-4270 to SRHD. CP 29, ¶ 1.1. Hanna sought to install a septic tank and drain field on property located at 14418 W. Charles Road in Nine Mile Falls, Washington. CP 29, ¶ 1.1. The proposed septic tank and drain field drawing submitted to SRHD indicated there was a 20 foot easement running along the southern side of Hanna's property. CP 29, 1.2. Based on SRHD's review of the design plan submitted, SRHD issued Permit No. 02-4270 on January 10, 2003. CP 29, ¶ 1.2.

On or about March 11, 2003, Hanna submitted an As-Built drawing for the septic tank and drain field for Permit No. 02-4270. CP 29, ¶ 1.3. The As-Built drawing also reflected that there was a 20 foot easement running along the southern side of Hanna's property. CP 29, ¶ 1.3.

Approximately ten years later, SRHD became aware that instead of a 20 foot easement, Hanna's property was subject to a 40 foot easement along the southern side of the property. CP 29, ¶ 1.4. Based on the

depiction of the location of the drain field on the As-Built drawing, the existing drain field appeared to be located partially within the 40 foot easement. CP 29, ¶ 1.4. WAC 246-272A-0210 requires a horizontal separation of five feet between a drain field and any easement.

SRHD also became aware that litigation was ongoing between Hannas and Margitans to determine the existence and location of other easements on Hanna's property. CP 29, ¶ 1.6. The Superior Court eventually made a determination regarding the existence and location of those other easements. That decision has been appealed to this court and is pending under the caption *Mark and Jennifer Hanna v. Allan and Gina Margitan*, Case No. 331598.

On October 18, 2013, SRHD and Hannas entered into a written, recorded Agreement in which Hannas were required to bring the nonconforming on-site system into compliance. CP 17-18. In part, the Agreement requires Hannas to submit an Application to SRHD to relocate the drain field or otherwise bring the system into compliance within thirty (30) days of the completion of the litigation regarding the existence and location of the additional easements. CP 18, ¶ 2.1. The Agreement further requires Hannas to complete the installation of the system within sixty days of SRHD's approval of the Application. CP 18, ¶ 2.2. SRHD

concluded that there was no imminent public health risk presented as a result of the location of the drain field within an easement. CP 18, ¶ 1.9.

Subsequent to the Agreement between Hannas and SRHD, Margitan alleged that Hanna's drain field is also within ten feet of a pressurized water line running to Margitan's property. CP 30, ¶ 1.10. The pressurized water line is likely contained somewhere within the forty foot easement. CP 30, ¶ 1.10. After an adjudicatory hearing, the SRHD Board of Health found that there was insufficient evidence presented to establish the location of the pressurized water line, and that the public health risk presented by the alleged location of the drain field within ten feet of the pressurized water line was minimal. CP 30, ¶ 1.12. Specifically, a breach of the water line would have to occur near the drain field, the water line would have to lose pressure, and there would have to be contamination of the water line which included pathogens. CP 30, ¶ 1.12. The Board of Health for SRHD found that a loss of water pressure would be observable in the Margitan house, allowing for mitigation of any risk of harm. CP 30, ¶ 1.12. Hanna was directed by the Health Officer to provide additional information as to the precise location of the water line. CP 22-23.

### III. SUMMARY OF ARGUMENT

The Superior Court properly refused to disqualify counsel for SRHD because counsel did not testify during the adjudicative hearing. Further, the Superior Court properly concluded that Margitans had not suffered an injury-in-fact, and therefore did not have standing to seek judicial review of the administrative decision.

### IV. ARGUMENT

- A. MARGITAN'S REQUEST TO DISQUALIFY SRHD'S COUNSEL WAS PROPERLY DENIED BECAUSE COUNSEL DID NOT TESTIFY DURING THE ADMINISTRATIVE HEARING AND THERE WAS NO ABUSE OF DISCRETION.

At the outset of the oral argument on Hanna's motion to dismiss for lack of standing, Margitan asked that counsel for SRHD be disqualified from presenting oral argument on behalf of SRHD because counsel had been sworn at the start of the administrative hearing. RP 7-8. Margitan contended that once sworn, counsel became a witness and was precluded by RPC 3.7(a) from acting as counsel for SRHD. RP 7-8. The Superior Court refused to disqualify SRHD's counsel, stating:

So although [Fossum] was sworn in, it doesn't appear that she acted in the capacity of a witness in this matter. So I'm not going to disqualify her from being able to argue on behalf of the District in this matter.

RP 8, lines 11-14. In its decision on Margitan's request for reconsideration, the court again addressed the issue of disqualification, and held:

The Court reviewed the record from the administrative hearing and found that counsel for the Respondents had been sworn in. However, counsel for the respondents did not testify. Rather counsel for the respondents elicited testimony from witnesses and answered questions presented to them by the Board. Argument of counsel and clarifying responses to questions from the Board is not evidence. Counsel for respondents did not testify in the administrative hearing and should therefore not be disqualified from this matter.

CP 125.

Margitan relies on RPC 3.7(a) as the basis for his argument that the superior court erred in refusing to disqualify counsel. The Superior Court's decision should be affirmed. RPC 3.7(a) does not support disqualification under the facts of this case because (1) SRHD's counsel was not a witness during the administrative hearing and (2) there was no abuse of discretion by the trial court.

RPC 3.7(a) states:

**(a)** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work substantial hardship on the client; or

(4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

An appellate court reviews a trial court's decision regarding disqualification under an abuse of discretion standard. *American States Ins. Co. ex rel.*

*Kommavongsa v. Nammathao*, 153 Wash. App 461, 466, 220 P.3d 1283

(2009), citing *Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*,

124 Wash.2d 789, 812, 881 P.2d 1020 (1994). A trial court abuses its

discretion when the court's decision is based on untenable grounds or it is

contrary to law. *Id.* Generally, compelling circumstances must exist before

a court will disqualify an attorney based on the lawyer as witness rule.

*Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wash.2d

789, 812, 881 P.2d 1020 (1994).

Here, Margitan, Fossum and Perdue were all sworn in at the beginning of the administrative hearing. Margitan contends that being sworn to tell the truth – without more – transforms counsel into witnesses subject to disqualification. As admitted by Margitan, to be a witness requires

providing evidence. After reviewing the administrative record, the Superior Court determined that SRHD's attorney did not provide evidence during the administrative hearing. RP 8; CP 125. Because counsel was not a witness during the administrative hearing, RPC 3.7 is inapplicable.

Assuming for purposes of argument that RPC 3.7 did apply, Margitan has failed to establish that the Superior Court abused its discretion in refusing to disqualify counsel. First, Margitan did not object during the administrative hearing. *Appellant Margitan's Opening Brief*, p. 10. Second, Margitan advised the Superior Court judge that he was not making a motion for disqualification. Margitan stated "It's not really a motion, sir. I'm just bringing to the court's attention that, since they're licensed by the State, under the Bar Association, they have rules of professional conduct". RP 8, lines 17-20. Third, Margitan has not identified any portion of the administrative record in which counsel testified as a witness during the administrative hearing. Finally, Margitan failed to provide sufficient support for his request for disqualification.

A motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and the testimony is or may be prejudicial to the testifying attorney's client.

*American States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wash. App 461, 467, 220 P.3d 1283 (2009), citing *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 624 P.2d 296 (1981). Margitan did not show that counsel provided or would provide testimony or that the testimony could not be obtained elsewhere.

Because counsel did not provide testimony during the administrative hearing and Margitan has failed to establish that the Superior Court abused its discretion in denying his request for disqualification, the Superior Court's decision not to disqualify counsel should be affirmed.

B. MARGITAN'S SECOND ASSIGNMENT OF ERROR ALLEGING THAT RESPONDENTS DID NOT TIMELY RAISE THE ISSUE OF STANDING SHOULD NOT BE CONSIDERED BECAUSE IT IS NOT SUPPORTED BY ARGUMENT IN HIS BRIEF.

In the Assignment of Error and Issues Presented portions of his brief, Margitan's second assignment of error alleges that the Superior Court erred in allowing a cross appellant to raise the issue of standing for the first time in the Superior Court. However, Margitan did not devote any part of the argument in his brief to this issue. The appellate court may elect not to consider assignments of error that are not supported by any reference to the record or any citation of authority. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992)

*McKee v. American Home Prods. Corp.*, 113 Wash.2d 701, 705, 782 P.2d 1045 (1989). SRHD requests that the court decline to consider this issue.

Margitan does raise other issues under the heading second assignment of error. Although unclear from his brief, Margitan appears to allege that (1) because SRHD responded to the Petition for Review through counsel who should have been disqualified, dismissal was warranted; and (2) the Superior Court erred in finding that Hanna's motion to strike was not frivolous and in refusing to award Margitan attorney's fees and costs. Neither of these arguments have merit.

SRHD's response to Margitan's allegation that its counsel was actually a witness subject to disqualification is set forth in paragraph IV.A above and is incorporated herein by this reference. Further, Margitan was the petitioner, not SRHD, and therefore there was nothing for the Superior Court to dismiss against SRHD.

Margitan also challenges the Superior Court's refusal to award attorney's fees and costs pursuant to RCW § 4.84.185 based on its finding that the Respondents' motion to strike was well grounded in fact and law and not frivolous. CP 126. The appropriate standard of review regarding sanctions under the statute is abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wash. 2d 888, 903, 969 P.2d 64, 72 (1998).

RCW § 4.84.185 authorizes the trial court to award to the prevailing party “the reasonable expenses, including fees of attorneys, incurred in opposing” a frivolous action. Sanctions against a party, not that party's attorney, are available under RCW § 4.84.185. *Skimming v. Boxer*, 119 Wash. App. 748, 756, 82 P.3d 707, 711-12 (2004), citing *Havsy v. Flynn*, 88 Wash.App. 514, 521, 945 P.2d 221 (1997). Here, the Superior Court specifically found that the motion to strike was well grounded in fact and law and not frivolous. Margitan has failed to provide any information indicating that the Superior Court’s decision was made on untenable grounds or that it was contrary to law. Absent evidence that the court’s decision on the motion for sanctions was an abuse of its discretion, the Superior Court’s decision should be affirmed.

C. THE SUPERIOR COURT PROPERLY DISMISSED MARGITAN’S APPEAL FOR LACK OF STANDING.

In order to seek judicial review of SRHD’s decision pursuant to the Administrative Procedures Act (APA), Margitan must demonstrate that he has standing; that is, that he is aggrieved or adversely affected by SRHD’s decision. RCW § 34.05.530; *KS Tacoma Holdings, LLC v. Shorelines Hearings Board*, 166 Wn.App. 117, 127, 272 P.3d 876 (2012). A party’s standing to participate in an administrative proceeding is not coextensive

with standing to challenge an administrative decision in court. *Patterson v. Segale*, 171 Wn.App. 251, 289 P.3d 657 (2012).

A person is “aggrieved or adversely affected” only where all of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person’s asserted interests are among those that the agency was required to consider when it engaged in the agency action; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW § 34.05.530. SRHD does not dispute the existence of the second element. The first and third elements are collectively referred to as the “injury-in-fact” test. *Allan v. Univ. of Wash.*, 140 Wash.2d 323, 327, 997 P.2d 360(2000). An “injury-in-fact” is an invasion of a legally protected interest. *Id.*, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In order to demonstrate prejudice, Margitan must show that he has been specifically and perceptively harmed by SRHD’s decision. *Trepanier v. City of Everett*, 64 Wash. App. 380, 824 P.2d 524 (1992). In cases where injury is threatened, rather than currently existing, there must be evidence of an “immediate, concrete, and specific injury to himself”. *Id.* Conjectural or

hypothetical injuries will not support a finding of standing. *Id.* For the reasons set forth below, the Superior Court's determination that Margitan lacked standing should be affirmed.

1. Standard of Review and Burden of Proof.

The issue of standing is reviewed de novo by the appellate courts. *Knight v. City of Yelm*, 173 Wash.2d 325, 336, 267 P.3d 873 (2011). The person challenging the administrative decision bears the burden of establishing his or her standing to contest the decision. *KS Tacoma Holdings, LLC v. Shorelines Hearings Board*, 166 Wn.App. 117, 127, 272 P.3d 876 (2012).

2. SRHD'S Agreement Requiring Hannas To Relocate The Drain Field After The Conclusion of Litigation Regarding The Existence And Location of Other Easements On Hannas' Property Does Not Create An Injury-In-Fact Sufficient To Confer Standing.

It is undisputed that WAC 246-272A-0430 precludes placement of a drain field within an easement. SRHD has ordered, and Hannas have agreed, that the drain field must be moved out of the easement. CP 17-18. Because civil litigation to determine the existence and location of other easements on Hanna's property was pending, SRHD and Hannas entered into a recorded agreement requiring the drain field to be relocated after the litigation is concluded. CP 17-18; ¶¶ 2.1-2.4. Essentially then, Margitan must prove

that he has a legally protected interest to have the drain field moved immediately. Margitan does not have such an interest.

WAC 246-272A-0430 gives the health officer great latitude to address correction of nonconforming on-site sewage systems.

When a person violates the provisions under this chapter, the . . . local health officer . . . may initiate enforcement or disciplinary actions, or any other legal proceeding authorized by law including, but not limited to, any one or a combination of the following:

- (a) Informal conferences . . . to explore facts and resolve problems;
- (b) Orders directed to the owner and/or operator of the OSS and/or person causing or responsible for the violation of the rules of chapter 246-272A WAC;
- (c) Denial, suspension, modification, or revocation of permits, approvals, registrations, or certification;
- (d) The penalties under chapter 70.05 RCW and RCW 43.70.190; and
- (e) Civil or criminal action.

Orders issued pursuant to this section may include setting a compliance schedule within which corrective measures to effect compliance with WAC 246-272A must be taken. WAC 246-272A-0430(3)(a). Here, SRHD has required that the drain field be moved once the courts have decided whether

there are other easements and if so, where those easements are located.

Under the plain language of the code section, Margitan does not have a legally protected interest to have the drain field moved immediately. Where there is no legally protected interest, there is no injury-in-fact, and consequently there is no standing.

3. There is Insufficient Evidence in The Record to Support A Finding That The Drain Field is Within Ten Feet of The Pressurized Water Line And Therefore There is No Injury-In-Fact.

Margitan's second alleged injury-in-fact arises out of his assertion that Hanna's drain field is located too close to his pressurized water line. WAC 246-272A-0210 requires a horizontal separation of ten feet between a drain field and a pressurized water line unless there is additional mitigation. During the administrative hearing, Margitan did not present sufficient evidence as to the actual location of the water line within the forty foot easement. Given that the easement is forty feet wide, it is entirely possible that the horizontal separation is met. Consequently, the Board could not determine whether there was a violation of WAC 246-272A-0210. CP 31, ¶ 2.6.

Absent a finding that the drain field is a non-conforming system because it is within ten feet of a water line, the alleged injury-in-fact must be characterized as the potential harm. In cases of a threatened injury, the

appellant must establish an “immediate, concrete and specific injury to himself”. *Patterson v. Segale*, 171 Wn.App. 251, 258, 289 P.3d 657 (2012). Where the injury claimed is conjectural or hypothetical, there is no standing. *Id.* Margitan has presented no evidence establishing an immediate, concrete and specific injury. Rather, Margitan argues that the drain field may be too close to his water line, and that his water may be at risk for contamination. Margitan also contends that he has been denied a certificate of occupancy. As explained below, neither of these arguments is sufficient to confer standing.

The minimal risk of contamination of the water line does not rise to the level of an “immediate, concrete and specific injury” so as to confer standing. Evidence was presented at the hearing with respect to the degree of risk presented if the horizontal separation was violated. The Board determined that any public health risk was minimal. CP 31, ¶ 2.7. In Finding of Fact 1.12, the Board found:

[A] breach to the water line would have to occur near the drain field, the water line would have to lose pressure, and then there would have to then be contamination of the water line which included pathogens. The evidence presented indicated that a loss of water pressure would be observable in the Margitan house, allowing for mitigation of any risk of harm.

This evidence does not establish an immediate, concrete and specific injury necessary to confer standing to seek judicial review.

Nor does Margitan's contention regarding the certificate of occupancy provide him with standing. Margitan's obligation under the building codes is to provide evidence of an adequate supply of potable water for the intended use of the building. RCW § 19.27.097(1). There is no evidence that either the supply or quality of the water is compromised. There is no immediate, concrete and specific injury, and consequently there is no standing. The Superior Court's decision should be affirmed.

D. SRHD IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES AND COSTS.

SRHD respectfully requests an award of reasonable attorney's fees and costs pursuant to RAP 14.2, RAP 18.1 and RCW § 4.84.370. RCW § 4.84.370 provides that if a party substantially prevailed in all prior judicial proceedings, the party is entitled to an award of reasonable attorney's fees and costs. RCW § 4.84.370; *Bellevue Farm Owners Ass'n. v. State of Washington Shorelines Hearings Bd.*, 100 Wn.App. 341, 997 P.2d 380, *review denied*, 142 Wn.2d 1014, 16 P.3d 1265 (2000). Should this Court determine that the Superior Court properly dismissed Margitan's appeal, SRHD will have prevailed in all prior judicial proceedings, thereby meeting the standard set forth in RCW § 4.84.370.

**V. CONCLUSION**

For the reasons set forth above, SRHD requests that the decision of the Superior Court be affirmed.

Dated this 17<sup>th</sup> day of March, 2015.

Respectfully Submitted,

*Michelle K. Fossum*

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Attorney for Respondent SRHD and  
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**CERTIFICATE OF SERVICE**

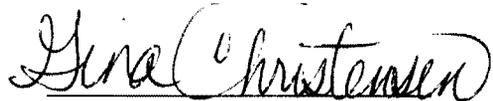
Gina Christensen hereby certifies under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, residing in Spokane County, Washington, over the age of 18 years, not a party to the above-captioned matter and qualified to give the following testimony:

That on March 27, 2015 pursuant to the agreement of the parties, I served a copy of Respondent's Brief via electronic mail and U.S. Mail, postage prepaid, to the following:

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DATED this 27 day of March, 2015, at Spokane, Washington.

  
Gina C. Christensen