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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 346064**

**COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON**

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ALLAN and GINA MARGITAN, husband and wife,

Appellants,

v.

SPOKANE REGIONAL HEALTH DISTRICT, a municipal  
corporation and SPOKANE REGIONAL HEALTH DISTRICT  
BOARD OF HEALTH, a municipal corporation, and MARK  
HANNA and JENIFER HANNA, husband and wife,

Respondents.

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**REPLY BRIEF OF APPELLANTS  
ALLAN AND GINA MARGITAN**

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## **I. INTRODUCTION**

In reply to the brief filed by the SRHD it must first be noted that the Respondent has referenced and placed many issue of material fact in dispute.

## **II. ISSUES AS TO SRHD'S PROCEDURAL HISTORY "Exhaustion of Administrative Remedies"**

The SRHD appears to be arguing that the administrative hearing somehow affects the Margitan's claims for damages. First, the administrative hearing was nothing more than an effort to exhaust administrative remedies. In State ex rel. Beam v. Fulwiler, 76 Wn.2d 313, 324, 456 P.2d 322 (1969) the Supreme Court held:

The doctrine of exhaustion of administrative remedies was formulated to absolve the courts of this difficult task. This court has consistently held that when an adequate administrative remedy is provided by statute, it must be exhausted Before the courts will intervene. State ex rel. Association of Washington Indus. v. Johnson, 56 Wash.2d 407, 353 P.2d 881 (1960); Sunny Brook Farms v. Omdahl, 42 Wash.2d 788, 259 P.2d 383 (1953).

In this case the Appellants attempted to force the SRHD to enforce Washington Administrative Codes to have the Hanna drain field removed from the Margitan easement. The issue of damages was not presented at the administrative hearing nor did it have jurisdiction to hear the issue of damages.

Spokane Regional Health District and Spokane Regional Health District Board of Health (SRHD) are requesting that this Court ignore or overlook the Washington Legislator's intentions. SRHD has not responded to the issue that SRHD has no legislative authority to act as they have with the issues before this Court. SRHD has not responded with any law or cited to any cases that support SRHD actions outside its legislative authority.

SRHD authority is under RCW 70.05 not RCW 43.20 as SRHD references in their brief. SRHD requests this Court to apply the laws that govern Washington State Department of Health, RCW 43.20 as their defense.

SRHD requests this Court rule that SRHD can step outside its legislative intent and duty and then not be held responsible for intentionally causing harm to a third party a property owner. SRHD cannot ignore its legislative duty. SRHD requests this Court to rule that while acting outside its legislative duty the Public Duty Doctrine protects SRHD, even though their actions impact a property owner's easement and property rights.

It is not proper for SRHD to claim they did not know the Short Plat easement was 40 feet wide as they required it in its creation (CP 13, 459, 1201, 1202) and SRHD also signed the plat March 11, 2002. RCW 58.17

would have required SRHD to grant its approval and signature again if the Short Plat easement was amended from 40 feet to 20 feet wide.

Since SRHD took no enforcement actions against Hannas, Margitans have been unable rent their high-end rental home on Long Lake since June 2013. Appellants, Margitans, thought they could handle this issue quickly through an administrative hearing with SRHD. Margitans pursued this effort all the way to this Court. This Court dismissed their administrative appeal due to a lack of standing. That decision forced Margitans to file an action against SRHD in Spokane Superior Court.

SRHD's response brief made many references to the administrative appeal, Margitan v. Spokane Regional Health District, 192 Wn. App. 1024 (2016) un-published. SRHD failed to admit to this Court that when it submitted its brief and oral arguments in the administrative appeal, SRHD claimed it had issued an order of enforcement. Dr. Joel McCullough testified that SRHD has never issued an order or required the intentional violator of Washington State law to do anything. (CP 136, 137, 139, RP151) SRHD fails to provide any legislative authority that grants SRHD to enter into the SRHD/Hanna agreement. Even worse, the agreement was written by Hannas' attorney and was not an order as SRHD argued previously to this Court and the trial Courts. (CP 260)

Counsel for SRHD argued to the trial Court in this case that SRHD had resolved the issue with its enforcement order. Yet when the Director for SRHD took the stand in the case against the Hannas, he testified that:

- 1) SRHD had not issued an order.
- 2) SRHD did not require Hannas to do anything.  
(RP 151)

The director even went further and stated that SRHD did nothing when Hannas never responded to its request to locate separation between the drain field and waterline. (RP 144)

Appellant, Margitans, are not the wrongdoers. They have complied with all laws. They did not place the illegal septic system in the easement. Hannas have restricted Margitans from performing any work within the easement with a series of protective orders.

Hannas requested from the Trial Court a protective order to keep Margitans from performing work within the easement. Margitans even had to go through the legal expense of obtaining a Court order to survey their 40 foot easement on Hanna's property. After the Court granted this approval and the survey was performed, Mr. Hanna removed the survey locators within hours of their placement. Mr. Hanna testified that he believed he had complied with the Court order allowing the survey to take place so nothing required him to keep the locaters in the ground.

SRHD's own response proves to this Court there are many issues in dispute which support that summary judgment was not appropriate.

Margitans reported the illegal septic system to SRHD in July of 2013. (CP 436-439) Mr. Holderby of SRHD made several commitments to Margitans that if the easement was actually 40 feet wide, SRHD would require the septic system be removed from the easement. (CP 436-439) SRHD does not dispute that these assurances were given to Margitans by Mr. Holderby.

SRHD should have performed its legislative duty and required the illegal septic system to be removed from within the easement. There would have been no need for Appellant Margitans to file a second complaint, and file their civil complaint in this case with the Superior Court.

At the time of writing this brief, the illegal septic system still has not been removed from Appellant Margitans easement. This is almost 4 years after their first complaint to SRHD. Margitans should be entitled to their day in court.

### **III. ISSUES AS TO SRHD'S STATEMENT OF FACTS**

SRHD states that the short plat requires public water to all lots as this was required by SRHD for plat approval. (CP13, RP 149) It is a misstatement that SRHD learned that the easement was 40 feet wide

through Margitan's complaint as this was another SRHD requirement for final plat approval. (CP 13, 459, 1201, 1202)

Then SRHD states that there was no imminent public health risk presented as a result of the illegal septic system within the easement. This is a "red Herring" argument as the issue is the SRHD failure to act which injured an innocent third party. SRHD was not forcing compliance upon the Margitans. SRHD has allowed the Hanna easement encroachment to continue in violation of Washington's Administrative Codes.

That being said the Spokane Regional Health District Board of Health found during the administrative hearing that there was a minimal risk. A minimal risk that **did not need** to exist. The Board found: (CP 67)

2.8 However, because there is some public health risk, additional information is necessary to fix the actual location of both the drain field and pressurized water line.

Margitans filed a complaint to Steve Holderby of SRHD requesting that the Hanna drain field encroachment be removed from their utility easement. (CP 436 -439)

On October 18, 2013, SRHD and Hannas entered into a written Agreement which allowed Hannas drain field encroachment to remain in the Margitans' easement for an undetermined time. (CP 89 – 91)

SRHD knew the Hannas' drain field was within the easement at the time of entering into the agreement as the document refers to the

encroachment. (CP 91) SRHD also referred to Mr. Utley's, Spokane Building and Planning, inspection report. (CP 749) The report clearly states what was/is needed for the Margitan's to obtain a certificate of occupancy. Specifically, the Comments section of the inspection Report prepared by Mr. Utley on September 3, 2014 states:

You have notified us of the encroachment of a septic drain field into the restricted zone of your water supply line which you claim endangers your potable water supply. You have also provided us corroboration of the issue through copies of SRHD documentation. A Certificate of Occupancy can be issued upon receipt of documentation (SRHD and/or water purveyor) accepting the water line and it's [sic] adequacy for residential use. (CP 737, 749)

This is a material fact which affects the outcome of the litigation. An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015) SRHD placed the above important material fact in dispute at the summary hearing by arguing that Mr. Utley, in his deposition, testified that he would have issued the Certificate of Occupancy for Margitans' property if the water to the home had been running and the Short Plat indicated it was potable. (CP 1516, 1521, p. 41) This is a material fact that should have precluded summary judgment.

The SRHD further argued disputed facts by Shawn Rushing who testified that he used a tracer wire to locate the water line and determined there was a fourteen-foot separation between the water line and the drain field at the closest point. (CP 1273, 1275, p. 43, lines 3-10). However, Mr. Rushing also testified:

11 Q But you have not found the actual water pipe? You can't  
12 verify if there's anything that you've done that can verify  
13 what the water line is that goes to parcel three?  
14 A No. You'd have to dig it up. That's it.  
15 Q Okay. No further questions.  
(CP 1273, 1275, p. 43, lines 3-14) (CP 1309)

This is simply more material facts in dispute.

SRHD argues that On January 27, 2014, Dr. Joel McCullough, Health Officer for Spokane Regional Health District, issued his determination. (CP 58, 61-62) Due to a lack of evidence as to the water line, Dr. McCullough was unable to conclude that Hannas' drain field failed to comply with the WAC regulations requiring a ten-foot horizontal separation between the drain field and the water line. (CP 58, 61-62) However, at this time all parties knew the Hanna drain field was within the Margitan's utility easement. The waterline separation is another "red herring" but it was a material fact the drain filed was encroaching in the easement in violation of Washington Administrative codes. However,

Hanna put this issue in dispute by placing before the trial court in a memorandum:

The Hannas agree that their drain field is within the Short Plat easement and within ten feet of a pressurized waterline, both of which are not in compliance with state regulation related to installation of drain fields. (CP 544)

#### **IV. ARGUMENT**

##### **a. UNCONSTITUTIONAL TAKING**

SRHD's brief regarding unconstitutional taking further places many issues in dispute. SRHD states that SRHD entered into the agreement with the Hannas prior to knowing that there was an alleged issue with the water line. This issue is in dispute because SRHD required the water line to be within the easement prior to it approving the Plat. (CP 459, 460, 1201, 1202) (RP 149)

SRHD argues Hannas constructed the drain field in the easement, not SRHD. The issue is not who constructed the drain field but rather the acts of the SRHD once they had received the complaint by the Margitans of the Hanna encroachment. The SRHD agreement with the Hannas negatively affected the innocent third parties, Margitans. The SRHD's agreement with the Hannas is a taking of the Margitan's property interest of the full use and enjoyment of their easement and as such constitutes an unconstitutional taking.

The SRHD cites to Woods View IL LLC v. Kitsap County, 188 Wn.App. 1, 41, 352 3d 807 (2015) for the argument, that governmental delay cannot support a claim of taking. However, it is distinguishable as the granting of a permit is not the same as an interference of a protected property interest.

SRHD in error argues that Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982) does not support the Margitans' taking argument. SRHD argues the current case is distinguishable because SRHD did not knowingly authorize placement of the drain field within the easement and the existence of the drain field in the easement is temporary.

The SRHD is attempting to deflect the real issue. The issue is the agreement entered into with the Hannas. The execution of the Hanna agreement is the act which constituted the taking as it allows the Hannas knowingly to interfere with the Margitan's easement.

Here, SRHD duty is required by the legislators to keep all septic systems at least 5 feet from an easement, WAC 246-272A-0210. SRHD exceeded its legislated authority by allowing the illegal septic system components to remain within Margitans' easement.

SRHD has **not** required the illegal septic system to be removed from within the easement, the taking is permanent. Washington State law

considers an easement a property right. This property right is negatively impacted by SRHD allowing the illegal septic system to remain within the easement. SRHD has pointed to no legislative authority to authorize a septic system to be within the Margitans recorded easement.

If the holder of the easement is unable to use it because it has been taken, a taking has occurred. This is supported with Arnold v. Melani 437 P.2d 908 75 Wn.2d 143 (1968). In Arnold the Court stated:

The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

SRHD's action of entering into the Hanna agreement took Margitan's use of their easement away.

**b. PUBLIC DUTY DOCTRINE**

The Margitans have argued that the Public Duty Exception does not apply as the actions of the SRHD (Hanna Agreement) was entered into solely to benefit the Hannas knowing it would adversely impact the Margitans. As SRHD points out, the public duty doctrine provides that a governmental entity is not liable for negligence unless the entity owes a duty to the plaintiff as an individual rather than to the public in general. West Coast, Inc. v. Snohomish County, 112 Wn.App. 200, 207, 48 P.3d 997 (2002). Here the SRHD admitted its actions were to

benefit the Hannas by not requiring them to move their system twice CP 248, 390 This was done knowing the Hannas' easement encroachment would remain contrary to the WAC.

Further, the exceptions to the Public Duty Doctrine apply.

**i. Legislative Intent**

SRHD's response brief continues to direct the Court to RCW 43.20. RCW 43.20 regulates the, "STATE BOARD OF HEALTH". This statute is only directed at the Washington State Board of Health not SRHD.

SRHD is governed by RCW 70.05 which is directed to "Local Health Departments, Boards and Officers.

RCW 70.05.010 Definitions states:

For the purposes of chapters 70.05 and 70.46 RCW and unless the context thereof clearly indicates to the contrary:

(1) "Local health departments" means the county or district which provides public health services to **persons** within the area. (3) "Local board of health" means the county or district board of health. (4) "Health district" means all the territory consisting of one or more counties organized pursuant to the provisions of chapters 70.05 and 70.46 RCW. (5) "Department" means the department of health. Emphasis added.

WAC 246-272A-0010 Definitions states:

"Person" **means any individual**, corporation, company, association, society, firm, partnership, joint stock company, or any governmental agency, or the authorized agents of these entities.

(Emphasis added)

Since Margitans are persons by definition, RCW 70.05.010 confirms that SRHD and the SRHD Board owe a duty to the Margitans.

RCW 70.05.070 also points to the legislator's intent when they require SRHD to comply with "rules of the state board of health and the secretary of health, and all local health rules, regulations and ordinances within his or her jurisdiction". This means that SRHD must comply with the WAC 246-272A-0210.

WAC 246-272A-0210 requires SRHD to prohibit any septic system from within 5 feet of an easement. SRHD's owed the duty to Margitans to require the septic system be removed and placed at least 5 feet from their easement.

SRHD exceeded its legislative authority when it allowed the Hanna septic system to remain within Margitans easement. The legislators did not grant SRHD authority to impact a recorded easement. SRHD and SRHD Board are required to assure that no septic systems be installed within 5 feet of an easement. When SRHD was notified of the illegal septic system, WAC 246-272A-0210 places a duty on SRHD and its Board to Margitans. The duty was to remove the illegal septic system from within Margitans easement.

WAC 246-272A-0210 identifies a class of persons that SRHD must protect. Margitans are within this protected class of persons that SRHD must protect. Margitans are easement holders, a class of persons that SRHD has a duty to protect. SRHD was required to immediately enforce the WAC and require Hannas to remove their illegal septic system from within Margitans' easement.

WAC 246-272A-0210 clearly identifies certain classes of protected persons. Not all of the general public are easement owners, well owners, or property owners. The legislators placed a duty on SRHD to protect those individual classes of persons when they required SRHD to comply with the WAC.

It would be illogical to think that the legislators would allow SRHD to grant authority to install a septic system that would impact an innocent third party. Setback requirements from boundaries and easements are designed to protect third parties. It is long standing law that intent can be determined by the RCW, WAC and municipal regulation. The court in Halvorson v. Dahl, 89 Wn.2d 673, 676, 5574 P.2d 1190 (1978) stated:

The traditional rule has an exception, however, which is applicable in this case. Liability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons. STRANGER v. NEW YORK STATE ELEC. & GAS CORP., 25 App. Div. 2d 169, 268 N.Y.S.2d 214 (1966); MOTYKA v. AMSTERDAM, 15 N.Y.2d 134,

256 N.Y.S.2d 595, 204 N.E.2d 635 (1965). The Seattle Housing Code is such a statute, and appellant states a claim under it.

While most codes are enacted merely for purposes of PUBLIC safety or for the GENERAL welfare, «2» this section identifies conditions and circumstances . . . dangerous and a menace to the health, safety, morals or welfare of THE OCCUPANTS OF SUCH BUILDINGS and of the public" and establishes it as the purpose of the code to provide "effective means for enforcement" of minimum standards. (Italics ours.) The Seattle Housing Code is an ordinance enacted for the benefit of a specifically identified group of persons as well as, and in addition to, the general public.

The SRHD cites Halvorson v. Dahl and misses the issue by only addressing RCW 43.20.050 and not RCW 70.05 and WAC 246-272A-0001. Halvorson supports the Margitan proposition of the legislative exception to the Public Duty Doctrine.

**ii. Failure To Enforce Exception**

The SRHD's duty arose when the Margitans contacted the agency requesting the enforcement of WAC to remove the Hanna drain field encroachment. The duty is established by the setback requirements of WAC 246-272A-0210.

The SRHD in error argues that where a public official has broad discretion, a duty does not arise under the failure to enforce exception. They further argue WAC 246-272A-0430 gives SRHD broad discretion with respect to the correction of non-conforming systems.

However, the SRHD has missed the point of the argument in that the Margitans, as a third party, insisted the Hanna drain field be removed from their easement. It was not and is not a compliance issue in regard to the Margitans as they are not the owners of the Septic system. As such, WAC 246-272A-0430 is not directed at them. WAC 246-272A-0430 (2) clearly states:

**(2) When a person violates the provisions under this chapter**, the department, local health officer, local prosecutor's office, or office of the attorney general 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:  
Emphasis added.

The Margitans are not the party to whom the WAC is directed. The WAC 246-272A-0430 (2) states: **“When a person violates the provisions under this chapter”** The Margitans have violated nothing.

The SRHD further argues that orders authorized under that section include orders requiring corrective measures necessary to effect compliance with WAC 246-272A which may include a compliance schedule. Once again arguing disputed facts the SRHD did not order the Hannas to do anything. Dr. Joel McCullough testified that there was no order directed to the Hannas. (AR 151) This issue was not addressed by the SRHD. Nor did the SRHD address the issue

that the Hanna agreement did not qualify as an order under the WAC246-272A-0430 (4) and (5) except for the argument that the Margitans have argued form over substance. WAC246-272A-0430 (4) and (5) states:

- (4) Enforcement orders issued under this section shall:
  - (a) Be in writing;
  - (b) Name the person or persons to whom the order is directed;
  - (c) Briefly describe each action or inaction constituting a violation of the rules of chapter 246-272A WAC, or applicable local code;
  - (d) Specify any required corrective action, if applicable;
  - (e) Specify the effective date of the order, with time or times of compliance;
  - (f) Provide notice of the consequences of failure to comply or repeated violation, as appropriate. Such notices may include a statement that continued or repeated violation may subject the violator to:
    - (i) Denial, suspension, or revocation of a permit approval, or certification;
    - (ii) Referral to the office of the county prosecutor or attorney general; and/or
    - (iii) Other appropriate remedies.
  - (g) Provide the name, business address, and phone number of an appropriate staff person who may be contacted regarding an order.
- (5) Enforcement orders shall be personally served in the manner of service of a summons in a civil action or in a manner showing proof of receipt.

The above requirements were not met nor can they just be disregarded. In Cockle v. Department of Labor and Industries, 142 Wn.2d 801, 820, 16 P.3d 583 (2001) the court stated:

...the Court of Appeals correctly noted that the Department is not entitled to disregard statutory provisions merely because it finds them administratively inconvenient.

Here, the SRHD is once more arguing disputed material facts and requesting the appellate court disregard statutory provisions simply as form over substance.

Unbelievably, that SRHD argues the disputed material fact that they had knowledge of only one statutory violation. The SRHD fails to cite to case law which requires more than one violation before the exception to the Public Duty Doctrine applies. This is also in light of the Hanna agreement which clearly identifies the Hanna drain-field as being in violation of WAC 246-272A-0210. Further, the SRHD appears to ignore the fact that the Spokane Regional Health District's Board of Health found in its Administrative hearing that the Hannas were in violation of WAC by holding:

2.3 Hanna's placement of their drain field within an easement violates the horizontal separation requirements of WAV 246-272A-0210 and consequently it is a nonconforming on-site system.  
(CP 67)

As such, the failure to enforce exception applies especially under the summary judgment standard.

**iii. Special Relationship Exception**

Mr. Holderby, the liquid waste manager of SRHD, had significant direct contact at which he expressed specific assurances to Mr. Margitan.

The SRHD argued that ordinarily a permit applicant is responsible for ensuring his or her own compliance with codes, regulations and ordinances. In so arguing the SRHD appears to have lost sight of the material fact that the Margitan's are not the permit applicant but rather the innocent third-party complainant. There is no doubt that the Margitans had significant contact with Mr. Holderby. SRHD once more argues material facts in dispute that there is no evidence of an unequivocal, specific assurance from SRHD that it would act in a certain way in response to a specific inquiry from Margitans. The evidence was/is the uncontroverted declaration of Allan Margitan. The Margitans have cited to numerous assurances which did, in fact, assure specific actions and times. (CP 437-439, 1178-1183)

Incredibly, SRHD argues that as of August 30, 2013, SRHD was still gathering information regarding the complaint and that Mr. Margitan had no further contact with SRHD after August 30, 2013. What the SRHD fails to disclose is the letter from the SRHD's counsel informing Mr. Margitan that he can no longer have contact with anyone at the SRHD, only through her. (CP 351, 390)

The SRHD once more argues material facts in dispute, as to the issue of justifiable reliance by simply making a conclusive statement:

“Margitans could not have justifiably relied on the alleged assurances by Holderby.”

As in Bratton v. Welp, 145 Wn.2d 572, 39 P.3d 959 (2002) the Court stated at 578:

In sum, there is a material question of fact concerning whether the County made an express assurance that Ms. Bratton and her family could justifiably rely upon. Accordingly, we reverse the Court of Appeals and remand to the trial court for further proceedings. (Emphases added)

Bratton clearly supports the proposition that summary judgment should not have been granted to SRHD. Margitans should be allowed their day in Court.

SRHD also raises the issue of privity or direct contact. SRHD misses the issue as to this element. There is no doubt that Steve Holderby with the SRHD had direct contact with the Margitans.

The SRHD does not challenge the multiple direct contacts between the Margitans and Steve Holderby of the SRHD. (CP 436-575, 1178-1183). At a minimum the SRHD’s argument raises further disputed material facts.

This issue was also addressed in 1515--1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp., 146 Wn.2d 194, 205, 43

P.3d 1233 (2002) the court held:

The Fukuis filed a claim with the city for flood damage, and were compensated. Aware of the drainage problems, the city installed catch basins in front of the Fukui residence. **Ms. Fukui submitted an affidavit saying she relied on assurances from the city that it would maintain the storm drains. She has demonstrated, sufficient to defeat a claim for summary judgment, direct contact, express assurances, and justifiable reliance. She falls within the special relationship exception with regards to damages occasioned by actual negligence in maintaining the storm drain system. Therefore, we affirm the Court of Appeals reversal of the trial court's dismissal of this claim and remand for further proceedings consistent with this opinion.** (Emphasis added)

The first element of direct contact or privity is assumed, as it is in keeping with a view of the facts in the light most favorable to the non-moving party and can be reasonably inferred from the exhibits.

**c. INTENTIONAL TORT**

SRHD misses the issues regarding their intentional failure to enforce WAC 246-272A-0210.

The SRHD intentionally entered into the agreement with the Hannas allowing the Hanna septic to encroach into the Margitan's utility element. SRHD knew by entering into the Hanna agreement they would be affecting the Margitans easement and property interest.

This was an intentional act which caused harm. In Miotke v. City of Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984) the court clearly held:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the [678 P.2d 819] same extent as if it were a private person or corporation. RCW 4.92.090. All political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or corporation ... RCW 4.96.010.

The simple question is – Is SRHD liable for its intention acts which cause harm to a party. Under RCW 4.96.010 and the court decision in Miotke, the answer is, YES.

SRHD has been instructed by the Washington State Department of Health that they have no legislative authority to impact a recorded easement under WAC 246-272A. (CP 1407, 1416)

SRHD had no authority either by statute or case law that allowed them to interfere with the Margitan's property interest, since they are the innocent third-party, not the landowner out of compliance. SRHD was not enforcing any regulation against the Margitans. And it's more egregious in light of its intentional nature.

SRHD intentionally failed to comply with WAC 246-272A-0210 and require the Hannas drain field to have the statutory required separation from the Margitan's utility easement.

**d. INTENTIONAL INTERFERENCE WITH BUSINESS EXPECTANCY**

The SRHD is apparently arguing they have no enforcement authority as the Hanna septic System is not in violation of WAC 246-272A-0210. This is contrary to the language in the Hanna agreement and the Spokane Regional Health District's Board of Health finding. Once more this is a material fact they wish to put in dispute. SRHD wishes to ignore the separation requirement of the Hanna drain field from the Margitan's utility easement pursuant to WAC 246-272A-0210.

The SRHD further is arguing that "Even if SRHD had authority to enforce, it did not have knowledge of Margitans' alleged business expectancy at any relevant time. SRHD did not have knowledge of Margitans' business expectancy at the time the drain field was installed in approximately 2003" The Margitan's claim arose after they purchased Parcel 3 of Short Plat 1227-00 and ripened when the SRHD entered into its agreement with the Hannas on October 18, 2013. The argument of what occurred in 2003 is not relevant.

As to the evidence of knowledge of the Margitans' business expectancy, the evidence before the court was the uncontroverted declaration of Allan Margitan specifically identifying the basis of SRHD's knowledge. The SRHD is now denying or ignoring the allegations and once more create issues of material fact being in dispute.

The SRHD further argues: "Nor is there any evidence to support Margitans' allegation that SRHD acted with an improper purpose of by improper means" The improper means was the execution of an agreement with the Hannas without authority to interfere with an innocent third-party's property interest. The agreement had the direct result of causing the Margitan's harm. The SRHD is arguing material disputed facts as a basis to support their position that the summary judgment dismissal was proper. This is contrary to CR 56(c) and long standing law that summary judgment is proper when there are no material facts in dispute and the trial court can resolve the issue presented as a matter of law. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

The trial court's granting of summary judgment for dismissal was improper due to the many issues of material facts in dispute.

**e. SRHD IS NOT ENTITLED TO ATTORNEY FEES AND COST**

SRHD request attorney fees and costs based on RAP 14.2, RAP 18.1, RCW 4.84.370, and RCW 4.84.030. SRHD is making a groundless argument for attorney fees as the Appellant has not brought any land use or zoning issues to this Court nor has the Appellant brought any action to this court under a LUPA.

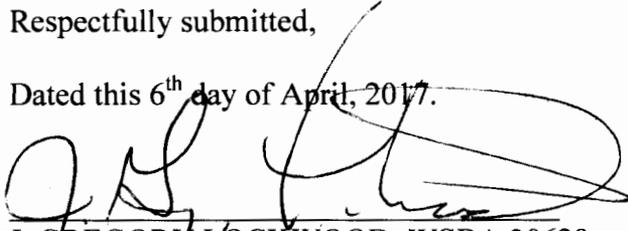
Attorney fees should be denied as requested by the SRHD.

**IV. CONCLUSION**

The SRHD has argued over and over disputed material facts as a basis to support the summary judgment dismissal of the Appellants' causes of actions. The appellants appeal should be granted and this matter remanded to the trial court for a jury trial.

Respectfully submitted,

Dated this 6<sup>th</sup> day of April, 2017.



J. GREGORY LOCKWOOD, WSBA 20629  
Attorney for Appellants

CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on April 6, 2017, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

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