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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

ALLAN and GINA MARGITAN, husband and wife,

Respondents/Cross-Appellants,

v.

MARK HANNA and JENIFER HANNA, husband and wife,

Appellants/Cross-Respondents.

**ALLAN AND GINA MARGITAN'S
AMENDED RESPONSE TO APPELLANT HANNA'S
BRIEF AND CROSS-APPELLANT'S BRIEF**

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TABLE OF CONTENTS

MARGITAN’S RESPONSE TO HANNA’S BRIEF

I.	INTRODUCTION	1
II.	ARGUMENT	3
A.	The Hannas, In Error, Argue The Trial Court Erred In Denying Defendants' CR 50 (a) And (b) Motions And Plaintiff Failed To Prove Any Interference, Intentional Or Otherwise, With The Margitan’s Road And Utility Easement Which Proximately Caused Damages.	3
	1. Standard Of Review	3
	2. CR 50(a) motion - Interference with Margitans; utility easement	4
	3. CR 50(b) motion.	12
	4. Causation	14
B.	The Hannas In Error Argue That The Margitans Failed To Prove An Intentional Tort And As Such Emotional Distress Damages Were Not Awardable And Finding Of Fact Nos. 8 And 15 Were In Error.	15
	1. Standard Of Review	15
	2. Argument	15
C.	Court Erred in Denying Hannas' CR 50(b) and/or Hannas' CR 59 Motions as There Was Not Substantial Evidence of Proximate Causation of Emotional Distress	19
	1. Standard Of Review	20
	2. Argument	20
	a. CR 50(b)	20
	b. Administrative Hearing - Res Judicata And Collateral Estoppels	22
	c. CR 59 Motion	24

D. The Hannas Argue An Abuse Of Discretion By The Trial Court By Entering An Injunction Where the Hannas Were In Compliance With SRHD's Compliance Schedule.	25
1. Standard Of Review	25
2. Argument	26
E. The Hannas In Error Argue That Margitans' Alleged Misconduct And The Trial Court's Failure To Impose An Appropriate Sanction Combined With Margitan's Counsels' Alleged Disregard Of The Court's Sanction In Closing Argument, Denied Hannas A Fair Trial	30
1. Standard Of Review	30
2. Argument	30
a. Sanctions Regarding Financial Discovery	31
b. Sanctions Regarding Water Testing	32
III. CONCLUSION	33
<u>MARGITANS' CROSS-APPEAL BRIEF</u>	
I. INTRODUCTION	34
II. TRIAL COURT ERRORS	34
III. STANDARD OF REVIEW	35
IV. ARGUMENT	35
V. PASSION AND PREJUDICE	42
VI. CONCLUSION	45

TABLE OF AUTHORITIES

Cases

<u>Adkisson v. Seattle</u> 42 Wash.2d 676, 687, 258 P.2d 461 (1953).....	19
<u>Arnold v. Melani</u> 75 Wn.2d 143, 449 P.2d 800 (1968).	26
<u>Arnold v. Sanstol</u> 43 Wash.2d 94, 260 P.2d 327 (1953)	11
<u>Attwood v. Albertson's Food Ctrs., Inc.</u> 92 Wash. App. 326, 331, 966 P.2d 351 (1998).....	15
<u>Bingaman v. Grays Harbor Cmty Hosp.</u> 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)	36, 38
<u>Birklid v. Boeing Co.</u> 127 Wn.2d 853, 864, 904 P.2d 278, (1995)	16
<u>Bradley v. Am. Smelting & Ref Co.</u> 104 Wn.2d 677,709 P.2d 782,.....	18
<u>Bunch v. King County Dept. of Youth Services</u> 155 Wn.2d165, 116	20, 43, 44
<u>Burnside v. Simpson Paper Co.</u> 123 Wn.2d 93, 108, 864 P.2d 937 (1994).....	29
<u>Cagle v. Burns and Roe</u> 106 Wn.2d 911, 726 P.2d 434(1986).....	44
<u>Demelash v. Ross Stores, Inc.</u> 105 Wn. App. 508, 20 P.3d 447 (2001).....	30
<u>Dexheimer v. CDS, Inc.</u> 104 Wn.App. 464, 17 P.3d 641 (2001) at 476 477	44

<u>Estate of Ryder v. Kelly-Springfield Tire Co.</u> 91 Wash.2d 111, 114, 587 P.2d 160 (1978).....	31
<u>G.W. Equip. Leasing, Inc. v. Mt. McKinley Fence Co.</u> 97 Wn.App. 191, 200, 982 P.2d 114 (1999).....	26
<u>Guijosa v. Wal-Mart Stores, Inc.</u> 144 Wash.2d 907, 917, 32 P.3d 250 (2001).....	12, 32
<u>Henderson v. Tyrrell</u> 80 Wash.App. 592, 630-632, 910 P.2d 522 (1996).	38, 39
<u>Hertog v. City of Seattle</u> 138 Wash.2d 265, 275, 979 P.2d 400 (1999).....	15
<u>Hill v. GTE Directories Sales</u> 71 Wn. App. 132 (1993) (CP 216).....	34, 41, 42
<u>Hizey v. Carpenter</u> 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).....	4, 20
<u>In re Miller</u> 86 Wash.2d 712, 719, 548 P.2d 542 (1976)	19
<u>In re Municipality of Metro. Seattle v. Kenmore Properties, Inc.</u> 67 Wn.2d 923, 930-31, 410 P.2d 790 (1966).....	38
<u>James v. Robeck</u> 79. Wn.2d 864, 869, 490 P.2d 878 (1971).....	43
<u>Karlbera v. Often, supra, decision</u>	14, 15, 20, 25, 30
<u>Littlefair v. Schulze</u> 169 Wn. App. 659, 278 P.3d 218 (2012).....	27
<u>Luisi Truck Lines, Inc. v. Washington Utilities and Transp. Commission</u> 72 Wn.2d 887, 894, 435 P.2d 654, (1967).....	22
<u>M.K.K.I., Inc. v. Krueger</u> 135 Wn.App. 647, 655, 145 P.3d 411 (2006), review denied, 161 Wn.2d 1012, 166 P.3d 1217 (2007).....	27

<u>MacMeekin v. Low Income Housing Institute, Inc.</u> 111 Wn.App. 188, 45 P.3d 570 (2002)	5
<u>Miller v. Yates</u> 67 Wash.App. 120, 124, 834 P.2d 36 (1992)	36
<u>Rabon v. City of Seattle</u> 135 Wn.2d 278, 284, 957 P.2d 621 (1998)	25
<u>Robinson v. Safeway Stores, Inc.</u> 113 Wn.2d 154, 161-62, 776 P.2d 676 (1989)	35
<u>RWR Management, Inc. v. Citizens Realty Co., supra.</u>	20
<u>Scanlan v. Smith</u> 66 Wn.2d 601,603,404 P.2d 776 (1965)	9
<u>Schmidt v. Coogan</u> 162 Wn.2d 488, 491, 173 P.3d 273 (2007)	3, 20
<u>Sing v. John L. Scott, Inc.</u> 134 Wn.2d 24, 29, 948 P.2d 816 (1997)	4, 5
<u>Sofie v. Fibreboard Corp.</u> 112 Wash.2d 636, 646, 771 P.2d 711, 780 P.2d 260 (1989)	35, 43
<u>State Farm Mut. Auto. Ins. Co. v. Avery</u> 114Wn. App. 299, 309, 57 P.3d 300 (2002)	23
<u>State v. Kirkman</u> 159 Wn.2d 918, 926, 155 P.3d 125 (2007)	29
<u>State v. Weber</u> 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006)	34
<u>Tincani v. Inland Empire Zoological Soc'y</u> 124 Wash.2d 121, 131, 875 P.2d 621 (1994)	40
<u>Washburn v. Beatt Equip. Co.</u> 120 Wn.2d 246 , 266-68, 840 P.2d 860 (1992)	39

<u>Wash State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</u> 122 Wn.2d 299,858 P.2d 1054 (1993).....	25, 30, 32
--	------------

Rules

CR 50	3, 14, 15, 16, 20, 25, 34
CR 50(a).....	3, 4, 5, 11
CR 50(b).....	3, 4, 12, 20, 34
CR 59	16, 20, 24, 25, 31, 34
CR 59(a)(2).....	30
CR 59(a)(5).....	24, 30
CR 59(a)(6).....	24, 30
CR 59(a)(7).....	24, 30

Statutes

RCW 4.76.030	34, 35, 36
RCW 58.17.165	27
RCW 64.04.175	27
RCW 70.05	23

Other

WPI 15.01.....	14
W. Prosser, Torts § 8, at 31-32 (4th ed.).....	18

MARGITAN'S RESPONSE TO HANNA'S BRIEF

I. INTRODUCTION

This case arose from a lawsuit filed by Mark and Jenifer Hanna (Hannas) in 2012 against Allan and Gina Margitan (Margitans) to reduce the width of a dedicated 40 foot easement for ingress, egress and utilities the Margitans have to their Parcel 3 of Short Plat 1227 in Spokane County Washington. (RP 412) During the course of that litigation discovery indicated the Hannas had intentionally placed their septic drain field in the 40 foot easement when they constructed their home. (RP 412) (RP 617) As confirmed by the Hannas' as built diagram of their septic system. (Appendix "A") The Margitans purchased parcel 3 in Short Plat 1227-00 in Spokane County in February of 2010. (RP 374) (Appendix "B") (Appendix "C") At the time of discovering the drain field encroachment the Margitans were finishing the building of their rental on Parcel 3. (RP 414) (Appendix "D") The Margitans asked the Hannas to move the drain field. (RP 416, 417) the Hannas refused. (RP 711-712) Being concerned about the Hannas encroachment the Margitans informed the Spokane County Building and Planning. (RP 463), (RP 885-886) As a result of the encroachment Spokane County denied an occupancy permit for the rental on Parcel 3. (RP 630) (Appendix "E") The denial of occupancy prevented

the Margitan's rental from being lawfully rented. (RP 629) This current litigation ensued.

On August 1, 2016 the morning of trial the Margitans moved for a continuance of the trial however the Hannas objected to the continuance.

(RP 53, 55) Hannas counsel clearly stated:

-- but at this point, we're -- as I said before, Judge, we're here, we're ready, and I think Mr. Lockwood and Mr. and Mrs. Margitan should put their case on. Thank you. (RP 55)

The morning of trial the court granted the Margitans summary motion for injunctive relief requiring the Hannas to remove their encroachment from the Margitans easement. (RP 327) The Margitans submitted testimony from Allan Margitan (RP 354- 483, 881-891), Gina Margitan (RP 840-845), Tim Utley (RP 627- 645, 868-881), Steven Holderby (RP 485-523, 646-687), Dr. Joel McCullough (RP 525-571), Charise Willis (RP 746-750), Mark Hanna (RP 604- 625, 695- 725) and expert witnesses Carla Durheim (RP 742-745) , Deweitt Sherwood (RP 787- 800, 804-814), Brian Gosline (RP 816-828).

Hannas' case consisted of testimony from Mark Hanna (RP 846-852) and Tim Utley (RP 868-881).

The Hannas made no objections to the order on motions in limine, no objections to opening statements, no objections to jury instructions, and no objections to closing statements.

At the end of trial the jury awarded \$210,125.00 as damages for lost rents and \$12,199.00 for increased finance charges. (CP 199-200) The jury verdict form asked the jury to make a finding if the Hannas acts were intentional and if so for emotional distress damages. The jury found the Hannas acted intentionally and awarded emotional distress damages of \$200,000.00. (CP 199-200) (Appendix “F”)

II. ARGUMENT

The Margitans address the alleged errors raised by the Hannas as follows:

A. The Hannas In Error Argue The Trial Court Erred In Denying Defendants’ CR 50 (a) And (b) Motions And Plaintiff Failed To Prove Any Interference, Intentional Or Otherwise, With The Margitan’s Road And Utility Easement Which Proximately Caused Damages.

The Hannas argued a lack of substantial evidence as grounds for their CR 50(a) motion filed at the conclusion of the evidence. (CP 744-749) The trial court denied the Hanna’s CR 50 motion, finding sufficient evidence existed to present the case to the jury. (RP 961)

1. Standard Of Review

When reviewing a trial court’s denial of a CR 50(a) motion for a directed verdict or judgment as a matter of law, the appellate court applies the same standard as the trial court. Schmidt v. Coogan, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). It is appropriate for a trial court to grant a CR

50(a) motion for judgment as a matter of law only after viewing the evidence most favorable to the nonmoving party and the court finds as a matter of law that there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). The inquiry on a denial of a CR50(b) motion is limited to whether the evidence presented was sufficient to sustain the jury's verdict. Hizey v. Carpenter, 119 Wn.2d 251, 272, 830 P.2d 646 (1992).

2. CR 50(a) Motion - Interference With Margitans; Utility Easement

Hannas moved the trial court on August 10, 2016 prior to the case going to the jury under CR 50(a), (CP 744-749) and renewed its motion on August 16, 2016 after a 12-0 jury verdict under CR 50(b). (CP 193-195)

The Hannas raised only one issue in their CR 50(a) motion:

- No substantial evidence of interference with the Margitan's utility easement to support a jury verdict.

The Hannas later reasserted their CR 50(a) issue and raised only one additional issue in their CR 50(b) motion:

- The Hannas claim res judicata prevents any award of damages to the Margitans.

The only allegation of the Hanna's CR 50(a) motion was no substantial evidence to support a submission to the jury. (CP 744)

It is important to note that the Hannas in their CR 50(a) motion conceded the Margitans have a right to “quiet enjoyment” of their easements citing to MacMeekin v. Low Income Housing Institute, Inc., 111 Wn.App. 188, 45 P.3d 570 (2002) Hannas counsel stated:

The Margitans only possess an easement that allows them to enter the easement on Parcel 2, traverse the easement and exit the easement. The Margitans also have an easement that allows for the installation and maintenance of the waterline, as well as a right to quite enjoyment of the waterline. (CP 747)

The trial court sat through the trial and after hearing all the evidence, denied the Hanna’s CR 50(a) motion based upon the evidence being considered in a light most favorable to the non-moving party, the standard enumerated in Sing v. John L. Scott. Inc., supra. (RP961) The court found the Margitans had presented substantial evidence to submit the case to the jury. (RP 963)

The Margitans presented substantial evidence during the course of the trial, sufficient to oppose the Hannas’ CR 50(a) motion regarding the single issue of interference with the Margitan’s utility easement. A brief synopsis of evidence presented to the jury includes the following:

- At the time of their purchase Mr. Hanna knew the easement was 40 feet but intentionally told his contractor the easement was 20 feet thus knowing his drain field would be encroaching. (RP 617)
- The Margitans purchased Parcel 3 of Short Plat 1227 in February 2010. (RP 374)

- The Margitans had a valid easement for ingress, egress and utilities to their Parcel 3 of Short Plat 1227, pursuant to the dedication on the face of the Short Plat. (RP 610) (Appendix “C”)
- In 2012, The Hannas filed suit against the Margitans to reduce the easement width to 20 feet; (RP 412), (RP 704)
- The Margitans learned of the Hanna drain field encroachment in their utility easement during the 2012 litigation filed by the Hannas. (RP 412)
- The discovery of the drain field encroachment came at a time when the Margitan’s were finishing the remodel project on their rental home on Parcel 3. (RP 414)
- The drain field encroachment was a health concern to the Margitans. (RP 417)
- Mr. Margitan experience as a member of the American Airline Safety committee and had testified on safety issues before congress. (RP 360)
- The Margitans while in the process of obtaining a certificate of occupancy for their rental disclosed the Hanna drain field encroachment to the Spokane County Building and Planning, and Spokane Regional Health District (SRHD). (RP 463), (RP 885-886)
- The Margitans requested the Hannas remove the drain field from the utility easement (RP 416) Mr. Hanna confirmed he was asked to move his drain field by the Margitans. (RP 712)
- Spokane Building and Planning informed the Margitans that the Hanna encroachment would interfere with a Certificate of Occupancy. (RP 834-836)
- The Hannas refused to remove their drain field from the utility easement. (RP 416-417)
- Washington Law requires the Hanna drain field to be a minimum of 5 feet from the easement. (RP 649)

- Mr. Hanna testified they were able to move the drain field any time they wanted. (RP 723)
- Washington Law requires a designated reserve area for all drain fields for a replacement area if needed. (RP 649-650)
- Washington Law requires the reserve area to be protected and preserved in the event needed. (RP 650)
- Mr. Hanna testified they had an unencumbered reserve area set aside to move their drain field if they had to move it. (RP 705-706)
- Margitan contacted SRHD regarding Hannas' drain field encroachment on numerous occasions. (RP 432 -433)
- SRHD confirmed that Mr. Margitan was frustrated that Hannas drain field was encroaching within the utility easement. (RP 488 -489)
- SRHD confirmed Mr. Margitan filed a complaint with them requesting to enforce Washington Administrative code set back requirements regarding drain fields and easements. (RP 505)
- In response to the Margitans complaint to SRHD the Hannas proposed and entered into an agreement to leave the drain field encroachment in the easement until the Hannas were through with their lawsuit against the Margitans (RP 698 -699) (Appendix "G")
- SRHD entered into the agreement with the Hannas based on Hanna claims that easements maybe over their reserve drain field area which had to be resolved. (RP 676)
- Contrary to the purpose of the SRHD agreement Hanna testified there were no easements over their drain field replacement area and no one was trying to establish one. (RP 712 -713)
- Hanna testified there were no structures over the drain field replacement area nor was the ground disturbed. (RP 713)

- At trial Mr. Hanna admitted he in effect signed off on false assertions in the SRHD agreement. (RP 714)
- The Spokane County Building and Planning issued a denial of a Certificate of Occupancy for the Margitans rental house on Parcel 3 due to the reason set forth in the inspection report's comment section, which identified the Hanna's drain field encroachment. (RP 630) (Appendix "E")
- SRHD was unable to provide documentation to Spokane Building and Planning or Margitans because Hannas failed to provide information requested by SRHD. (RP 685, 718)
- In reference to his inspection report, Mr. Utley confirmed that if the Hannas had not placed the septic system within the easement Margitans would probably have been granted a Certificate of Occupancy. (RP 879)
- Mr. Holderby confirmed that if Hannas had moved the drain field to the replacement area the parties would not be in court. (RP 687)
- Had it not been for the Hannas refusal to move their drain field from the easement the Margitans would not have suffered interference to the use of their easement. (RP 886, 888)
- Mr. Hanna confirmed he knew the Margitans intended to rent Parcel 3. (RP 622 - 623)
- Mr. Hanna stated he did not want any renters or anyone driving by his home especially renters on the Margitan easement. (RP 376 - 377)
- Mr. Hanna confirmed he made no efforts to move his drain field from within the easement prior to entering into the agreement with SRHD. (RP 711-712)
- Mr. Hanna confirmed, if ordered, he could have moved his drain field to the replacement area. (RP 713, 714)

- The Margitans' expert witness Skip Sherwood testified that the Margitan suffered lost rents due to the inability to obtain a Certificate of Occupancy, (RP 797 -798)
- Hanna's had no expert witness to rebut Skip Sherwood.
- The Margitans' expert Brian Goslin testified regarding the Margitans' increased finance costs due to the inability to obtain a Certificate of Occupancy and to refinance construction costs. (RP 819 - 820)
- The Hannas had no expert witness to rebut Brian Goslin.
- Mr. Margitan testified on numerous occasions regarding emotional distress and concerns caused by the drain field encroachment and the resulting inability to obtain a certificate of occupancy. (RP 408 - 409), (RP 433 - 434, 455, 463)
- Gina Margitan testified regarding emotional distress to her and family caused by Hannas refusing to remove their drain field. (RP 840 – 842)

The above uncontroverted evidence was presented to the jury. The jury as the fact finder has the right to believe or disbelieve evidence admitted into evidence. Scanlan v. Smith, 66 Wn.2d 601,603,404 P.2d 776 (1965).

The Margitans' theory of the case, presented to the jury was that the Margitans were denied a Certificate of Occupancy for their rental on parcel 3 due to the Hanna drain field encroachment into their utility easement. (RP 991) The Hannas clearly understood the Margitans theory

of the case that was being argued, was interference with an easement. (RP 207, 373, 380, 611, 668, 698) In fact at Hannas counsel stated:

MR. PERDUE: Okay. Two things, Judge. With the change of status yesterday, with the photographic evidence regarding construction on the inside of the residence, that would be particularly irrelevant to the interference of easement claim of ingress/egress and utilities. It's pretty straightforward, Judge. (RP 207)

The cause for the denial of the Certificate of Occupancy was due to the encroachment as clearly stated in the Spokane County Building and Planning's inspection report. (RP 644) (Appendix "E")

Further, testimony of Mr. Holderby and Dr. McCullough of the SRHD indicated that the Hannas had one option and that was to move their drain field from the easement. (RP 652) Mr. Holderby stated:

Q. Excuse me, yes, Dr. McCullough. There would've only been one option, and that would've been to move it.

A. That would be the option.

Q. That would be the option. That would be the only option left.

A. Yes.

(RP 652)

In reference to his inspection report Mr. Utley indicated that had the drain field not been in the easement probably would not have had the denial of Certificate of Occupancy. (RP 879)

Our courts have held that substantial evidence' is whether men of ordinary reason and fairness could find that the most favorable evidence

sustains the truth of the fact to which the proof is directed. Arnold v. Sanstol, 43 Wash.2d 94, 260 P.2d 327 (1953).

The trial court stated:

But one of the things I'm factoring in is the Court has to look at this evidence in the light most favorable to the Margitans. As Mr. Utley said, if this issue hadn't have been there, the drain field in the easement, I think probably this matter wouldn't be here. Hopefully, it wouldn't be here. The jury is going to have to make a call as to whether there is evidence that the drain field encroachment has affected the Margitans' enjoyment of their property. (RP 962)

The Hannas, in error, argue that there is no evidence of physical interference with the Margitan's utility easement. The evidence clearly showed the Hanna drain field physically encroached nine (9) feet into the Margitan's utility easement to parcel 3 and as a result interfered with the Margitan ability to obtain a Certificate of Occupancy for parcel 3. (RP 649) (RP 644) (Appendix "E")

The trial court, having heard all the evidence presented and after listening to the witnesses, evaluated the evidence in the light most favorable to the nonmoving party, found that substantial evidence existed to submit the case to the jury and properly denied the Hanna's CR 50(a) motion. (RP 963)

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3. CR 50(b) Motion.

The jury found substantial evidence of the encroachment into the utility easement to support a 12-0 verdict as to economic damages and the 10-2 decision of non-economic damages. (RP 1007-1011), (CP 199–200)

The Margitan's theory of the case was presented to the jury through documentary evidence and testimony. Both parties' theory of the case were properly submitted to the jury through agreed jury instructions. The Hannas agreed to all jury instructions, and made no objections or exceptions. Jury instructions to which no exceptions are taken become the law of the case. Guijosa v. Wal-Mart Stores, Inc., 144 Wash.2d 907, 917, 32 P.3d 250, 2001

Most pertinent are Jury Instruction No. 5 which addressed inability (CP 767), Jury Instruction No. 8 which addressed damages (CP 770) and Jury Instruction No. 10 which addressed proximate cause. (CP 772)

Agreed to Jury Instruction No. 5 required the Margitans to prove a valid easement and that the Hannas unreasonably interfered with their use and enjoyment of their utility easement. (CP 767) The Margitans had a valid easement pursuant to the dedication in the Short Plat 1227. (RP 416), (RP 610) (Appendix "C") It was for the jury to determine if the Hanna's drain field encroachment was a unreasonable interference as instructed in jury instruction No. 5. (CP 767)

However, Hannas counsel argues at closing:

First of all, let me be clear about one single thing, and that's in instruction No. 5; that is in order to find the Hannas liable, they must establish that – the Margitans must establish that they have an ingress going in, egress going out, and a utilities easement. (RP 984)

Hannas counsel further argues at closing:

Okay. So have the Hannas unreasonably interfered with that water line? There is no evidence that has been presented to you, not one single thing, no evidence that the Hannas interfered with the installation of that water line. There's no evidence that the Hannas interfered with the maintenance of that water line. There is no evidence that the water line in this particular case is contaminated at all. (RP 985)

... and:

There is nothing that the Hannas have actually done, and there's no evidence that they've done anything to the water line. (RP 986)

Jury Instruction No. 5 and Margitan's theory of the case address; an interference with their easement not a waterline. Hanna's counsel did not argue what the jury was instructed, but rather argued an interference with a waterline. (RP 986) Hannas' counsel's closing argument did not address the case tried to the jury or in accordance with the jury instructions.

No jury instruction addresses a waterline. No jury instruction regarding a waterline was given, nor did the Hannas make an exception for one not being given.

Jury Instruction No. 8 (CP 770) which addressed damages was addressed by Hanna's counsel who argued there were no damages that it was the Margitan's fault by arguing:

They should take on personal responsibility for what they did not do. My client didn't do anything to this water line, and they should not be responsible for paying any money to the Margitans. (RP 990)

The jury verdict indicates the jury believed the testimony of the Margitan's expert Mr. Skip Sherwood on lost rents. (RP 798) The Hannas had no expert to rebut Mr. Sherwood. The jury verdict indicates the jury believed the testimony of the Margitan's expert Mr. Brian Gosline as to increased finance charges. (RP 819) The Hannas had no expert to rebut Mr. Gosline's testimony.

4. Causation

The Hannas raise the issue of causation for the first time on appeal. This was not address in either the CR 50 (a) or (b) motions. As such the trial court did not have the opportunity to address this issue and the Margitans object as this claim of error has been waived for appeal pursuant to the holding in the Karlbera v. Often, supra, decision.

The Margitans, without waiving objection, point out Jury Instruction No. 10 on causation was agreed to by the parties, as it is the Hanna's proposed pattern instruction WPI 15.01. (CP 772)

Washington case law holds that proximate cause is generally a question of fact to be determined by the trier of fact. Hertog v. City of Seattle, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). Further, a plaintiff need not establish causation by direct and positive evidence. A plaintiff need only show by "a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable." Attwood v. Albertson's Food Ctrs., Inc., 92 Wash. App. 326, 331, 966 P.2d 351 (1998)

The evidence clearly shows that the evidence presented at trial was substantial and the courts decisions on the Hanna's CR 50 (a) and (b) motions should be upheld.

B. The Hannas In Error Argue That The Margitans Failed To Prove An Intentional Tort And As Such Emotional Distress Damages Were Not Awardable And Finding Of Fact Nos. 8 And 15 Were In Error.

1. Standard Of Review

The Hannas raise this issue for the first time on appeal. This issue was not addressed in either the CR 50 (a) or (b) motions. As such the Margitans object to this claim of error as having been waived by the Hannas under the reasoning in the Karlbera v. Often, supra, decision.

2. Argument

The Margitans without waiving their objection argue that, it is unclear what finding of Fact No's. 8 and 15 the Hannas are addressing as

the brief does not clearly identify from which order they are referencing. However it appears to be the Courts decision on the Hanna's CR 50 (a) and (b) motions.

The issue of intentional tort was a question for the jury. The jury was asked to make a finding on the agreed verdict if the acts of the Hannas were intentional. (CP 774) The Hannas are requesting this court now overrule a finding of the jury when the Hannas failed to raise this issue in any of their CR 50 or CR 59 motions which would have allowed the trial court to address the issue.

Further, the issue of intentional act was addressed in the agreed Jury Instruction No. 9 on damages in addition to the jury verdict form. (CP 771) (CP 774) The Hannas made no objection and made no exception to any jury instruction or the verdict form that went to the jury. The Hannas agreed to the emotional distress language in both the Jury Instruction No. 9 and Verdict Form. (RP 932-933)

In Birkliid v. Boeing Co., 127 Wn.2d 853, 864, 904 P.2d 278, (1995) the Supreme Court held:

An intentional tort "is not ... limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."

In this case the Hannas knew that they were interfering with the Margitan's easement and took efforts to keep the encroachment in the easement until the conclusion of their litigation against the Margitans. (RP 711, 714-716,) This was clearly demonstrated to the jury in the SRHD agreement in paragraph 1.6. (RP 547-549), (Appendix "G")

Evidence at trial indicated the Hannas intentionally placed their drain field in the 40 foot utility easement when it was constructed. (RP 617) It is undisputed that the Hannas knew the installation of their drain field was within the 40 foot easement and was condoned. (RP 617) Additional evidence at trial indicated the Hannas attempted to have the Margitan's predecessors reduce the width of the easement. (RP 466) This demonstrated to the jury the Hannas untruthfulness regarding the true easement width.

Evidence at trial indicated the Hannas knew the Margitans were remodeling their rental property on Parcel 3 when the encroachment issue arose. (RP 623) Evidence at trial indicated the Hannas intentionally filed suit against the Margitans to reduce the width of the Margitan's 40 foot easement. (RP 704) Evidence at trial indicated the Margitans discovered the purpose of the Hannas lawsuit to reduce the easement width to 20 feet was because the drain field is in the easement. (RP 412)

The Margitans requested the Hannas remove their drain field encroachment from the Margitan's easement and they refused. (RP 416, 417, 712) Evidence at trial indicated the Margitans filed a complaint with the SRHD to have the drain field removed from the easement. (RP 438)

Evidence at trial indicated the Hannas, in response to the Margitan's complaint with the SRHD and knowing the Margitans wanted the drain field out of their easement, proposed an agreement to the SRHD to allow the drain field to remain in the Margitan easement until the Hanna's lawsuit against the Margitans was concluded. (RP 658, 711, 715) (Appendix "G") The Hannas were using their interference with the Margitans as a litigation tool in their suit against the Margitans. (RP 715)

From the above evidence the jury could reasonably find the acts of the Hannas to be intentional.

The Hannas rely on Bradley v. Am. Smelting & Ref Co., 104 Wn.2d 677,709 P.2d 782, 786 (1985) as a basis for alleging the acts of the Hannas were not intentional. However, the Bradley court at page 683 did cite to W. Prosser, Torts § 8, at 31-32 (4th ed.) which held:

The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.

Washington courts have long held that intentional inaction may constitute affirmative conduct. In re Miller, 86 Wash.2d 712, 719, 548 P.2d 542 (1976) Further, our courts have held that the intentional failure to act in disregard of the consequences may constitute wanton misconduct Adkisson v. Seattle, 42 Wash.2d 676, 687, 258 P.2d 461 (1953).

The Hannas acted in intentional and reckless disregard of the consequences of placing the drain field in the easement and/or in failing to remove the drain field when the Hannas knew the encroachment was causing harm to the Margitans. (RP 720 -721)

The Hannas admitted that they knowingly allowed the drain field to be constructed within the 40 foot easement. (RP 617) The Hannas further had actual knowledge that the easement was used as a utility easement at time of their purchase. (RP 614)

The trial court had ordered the drain field encroachment out of the Margitan's utility easement. (RP 327)

Although raised for the first time on appeal in argument there is sufficient evidence for a court and jury to find intent. And as such the courts findings are proper.

C. Court Did Not Error in Denying Hannas' CR 50(b) and/or Hannas' CR 59 Motions as There Was Not Substantial Evidence of Proximate Causation of Emotional Distress.

1. Standard Of Review

When reviewing a trial court's denial of a CR 50 motion for a directed verdict or judgment as a matter of law, the appellate court applies the same standard as the trial court. Schmidt v. Coogan, supra, Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences from the evidence, there is substantial evidence to sustain a verdict for the nonmoving party. Hizey v. Carpenter, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992). A CR 59 motion is reviewed for abuse of discretion. RWR Management, Inc. v. Citizens Realty Co., supra. When reviewing a trial court's denial of a CR 59 motion for the denial of a new trial for abuse of discretion. Bunch v. King County Dep't of Youth Servs., 155 Wash.2d 165, 175-76, 116 P.3d 381 (2005)

2. Argument

a. CR 50(b)

The Hannas raise this issue for the first time on appeal. The Hannas CR 50(b) motion only addressed interference with an easement and res judicata. The issue of substantial evidence of proximate causation for emotional distress was not raised to the trial court. The Margitans object as this issue has been waived by the Hannas pursuant to Hannas under the reasoning in the Karlbera v. Often, supra, decision.

In argument and not waiving objection the Hannas assert that no evidence of intentional distress was presented. However, Gina Margitan testified regarding her emotional distress of: a fighting mode for about four years now; kids are fighting; I'm fighting; I'm fighting at work; I'm fighting at home; I'm fighting with my husband; affects every part of our lives; hard time sleeping; get up in the middle of the night and sit there and read for hours at a time, which then affects my work; physical issues, stomach issues, lots of Tums; I have no control over anything; husband doesn't sleep, he's up all night; very, very short with the kids. It's just -- it's a lot of stress. (RP 840–842) Her testimony went unchallenged.

The Hannas failed to ask one question of Gina Margitan on cross-examine on the issue of emotional distress.

Allan Margitan testified how the intentional actions of the Hannas had affected him; his frustration of dealing with the Hanna's drain field encroachment (RP 433), he felt like no light end of tunnel (RP 434), being upset (RP 436), feel like he can't do anything with his rental home. (RP 438) All this frustration due to the inability to obtain a Certificate of Occupancy for their rental property, as indicted in the testimony of Mr. Holderby. (RP 489) Additionally, the Hannas failed to ask Allan Margitan a single question regarding the frustrations and stress he had testified to

due to the Hannas drain field encroachment. Nor did the Hannas counsel address emotional distress at closing.

The uncontroverted evidence at trial demonstrated emotional distress caused by the Hannas' intentional acts.

b. Administrative Hearing - Res Judicata And Collateral Estoppels

The duty not to interfere with the Margitans full use and enjoyment of their utility easement is separate and distinct from the compliance issue with the SRHD.

Simply put the Hannas could have removed the drain field encroachment at any time, it was a litigation tactic. Per Mark Hanna when asked "why did you not just move the drain filed from the easement" he testified:

Q. At the time that the -- when the Margitans first asked you to move your drain field, did you look into the process of moving it?

A. All I did was consult with my attorney.
(RP 705)

The administrative hearing was with SRHD not the Hannas. The Hannas cannot rely on an administrative hearing with a third party governmental agency; with different parties and issues as res judicata or collateral estoppels. Luisi Truck Lines, Inc. v. Washington Utilities and Transp. Commission, 72 Wn.2d 887, 894, 435 P.2d 654, (1967)

An administrative hearing with a governmental agency to enforce Washington Administrative Codes is not res judicata when you have different parties and different issues.

The decision at the administrative hearing by SRHD Board upheld the letter decision of Dr. Joel McCullough. (RP 556) Dr. McCullough's decision held that SRHD had properly exercised compliance enforcement. (Appendix "H") The SRHD administrative hearing was simply the exhaustion of administrative remedies as to SRHD. Margitans had filed a complaint against SRHD which is on appeal with this court under Case No. 346064.

The SRHD administrative hearing could not give the Margitans the required ability to have a full and fair opportunity to litigate their claims. State Farm Mut. Auto. Ins. Co. v. Avery, 114Wn. App. 299, 309, 57 P.3d 300 (2002). The Margitans were not able to seek an injunction or damages against the Hannas for the interference with the easement at an administrative hearing before the SRHD Board, as it does not have subject matter or personal jurisdiction to resolve those claims. RCW 70.05

The Hannas in error argue the administrative decision was a final decision on the merits. The administrative hearing only addressed the issue of the agency compliance enforcement, not interference with the Margitans use and enjoyment of their easement, injunctive relief, or

damages, as indicated in the damages Jury Instruction No. 9. (CP 771) The administrative decision was not a decision on the merits.

c. CR 59 Motion

The Hannas CR 59 motion was made pursuant to CR 59 (a)(5), (a)(6) and (a)(7). (CP 781-791)

The Hannas identify no evidence which indicates the verdict was so excessive as unmistakably to indicate that the verdict must have been the result of passion or prejudice under CR 59(a)(5). Nor was any evidence of an error in the assessment of the amount of recovery under CR 59(a)(6). Further, there was evidence and more than a reasonable inference from the evidence to justify the verdict under CR 59(a)(7).

The economic damage award was consistent with the evidence presented by Mr. Margitan that his lost rents calculation should have begun in June 2013. (RP 805, 832) Based upon Mr. Margitan's testimony, Mr. Skip Sherwood a licensed appraiser testified to the amounts of rents lost by the Margitans. (RP 797-798) Ms. Carla Durham a mortgage broker testified regarding the inability to refinance based on the inability to obtain a certificate of occupancy for parcel 3. (RP 744) Mr. Brian Goslin a Certified Public Accountant and attorney testified as to the Margitans increased finance charges. (RP 820) The Hannas failed produce any

expert witness to controvert the evidence presented by the Margitans. The verdict was consistent with the evidence presented at trial. (CP 199-200)

The emotional distress component was supported by substantial evidence presented throughout trial by Allan Margitan, Gina Margitan, Steve Holderby and Tim Utley as discussed previously. Therefore the trial Courts' denied of Hannas CR 50 and CR 59 motions.

D. The Hannas Argue An Abuse Of Discretion By The Trial Court By Entering An Injunction Where Hanna Was In Compliance With SRHD's Compliance Schedule.

1. Standard Of Review

The standard of review of the trial court's issuance of the injunction for the removal of the Hanna's drain field encroachment is the abuse of discretion standard. The trial court's order will only be overturned if the decision is based on untenable grounds or reasons or where the decision is manifestly unreasonable or arbitrary. Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998).

A trial court has broad discretion in fashioning remedies and in controlling trials. Washington State Physicians Ins. Exch.& Ass'n v. Fisons Corp., 122 Wn.2d 299,858 P.2d 1054 (1993). However the Margitans object, as the Hannas raise this issue for the first time on appeal, as such the issue has been waived by the Hannas pursuant to the reasoning in the Karlbera v. Often, supra, decision.

2. Argument

The Margitans, without waiving their objection, point out the Hannas have made no prior objection or exception to the trial court's order granting the Margitans an injunction preventing the Hannas from further interference with the Margitan's ingress, egress and utility easement.

The Hannas in error argue that the court erred by granting an injunction for the Hannas to remove their drain field encroachment from the Margitans utility easement. Long standing Washington law holds that an injunction is a proper remedy for an adjoining landowner to seek for the purpose of compelling the removal of an encroachment. Arnold v. Melani, 75 Wn.2d 143, 449 P.2d 800 (1968).

The Hannas further argue the SRHD/Hanna agreement with the Hannas had the effect of barring the Margitans from obtaining an injunction. However, the Margitans were not a party to the Hannas agreement with the SRHD. As such there is no bar. An agreement between the Hannas and the SRHD cannot affect the property rights of the Margitans as a non-party. G.W. Equip. Leasing, Inc. v. Mt. McKinley Fence Co., 97 Wn.App. 191, 200, 982 P.2d 114 (1999). The Margitans did not waive or agree to restrict any property rights or the right to enforce those rights.

There is no dispute the Margitans' possessed a valid 40 foot easement for ingress, egress and utilities through the Hanna parcel. (CP 610, 614) The Short Plat 1227-00 created the 40 foot easement on the face of the Short Plat itself by dedication per RCW 58.17.165. (Appendix "C")

Further, it is undisputed the Margitan(s) have a protected property right in their 40 foot easement as stated in RCW 64.04.175 and case law.

Washington law recognizes the legal right of a dominant estate (Margitans) to seek the removal of interferences to the free and full use of its easement. The Hannas as the servient owner may not unreasonably interfere with the Margitan's use as the dominant owner of the easement. M.K.K.I., Inc. v. Krueger, 135 Wn.App. 647, 655, 145 P.3d 411 (2006), review denied, 161 Wn.2d 1012, 166 P.3d 1217 (2007).

The Margitans have a right to protect their property rights of full use and enjoyment of their easement, as the Hannas had refused to remove the drain field upon request. (RP 886) Further, the Margitans summary motion for injunctive relief for the removal of the Hanna drain field and other encroachments was also supported by Littlefair v. Schulze, 169 Wn. App. 659, 278 P.3d 218 (2012).

The Margitans exercised their right to preserve the integrity of their use and enjoyment of their easement. The Hannas assertion that they were in compliance with the SRHD agreement and therefore the Margitans

could not enforce and preserve their property rights is misplaced. The Hannas cite to law that would allow SRHD, a government agency a right to interfere with an easement or property right of an innocent property owner who is not a party to the compliance decision or agreement.

The Hannas also allege the Margitans failed to establish a well-rounded fear of immediate invasion of their legal easement rights, as they failed to prove interference or any damages associated with leaving the drain field encroachment in place. The Hannas ignore Jury Instruction No 8, that Washington law requires a five foot setback for drain fields from easements, and the testimony of the SRHD also confirming the setback requirement. (CP 770) (RP 649)

The Hannas ignore the fact that the evidence showed the Hanna's drain field in fact did encroach nine (9) feet into the Margitan easement (RP 649) The Hannas ignore the fact that their drain field encroachment prevented an occupancy permit for the Margitan rental property. (RP 888), (RP 629), (Appendix "E") The Hannas ignore the fact the Margitans were suffering lost rents as they had no occupancy permit for their rental property. (RP 629) Mr. Utley testified that the rental house could not be legally occupied without a certificate of occupancy. (RP 629)

The Hannas seem to argue weight and credibility of the evidence. However, the Washington courts have long held that they defer to the trier

of fact on issues of credibility and the weight of conflicting evidence.

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994)

The injunction was well within the discussion of the trial court. It is important to note that the Hannas had no objection to the injunction and did not argue the injunction, requiring the Hannas to move their drain field should not be entered. (RP 118-121)

Counsel for the Hannas stated they had no objection and agreed with the court to allow Margitans' counsel to inform the jury during opening statements that the drain field was ordered removed by the court. (RP 327)

The Hannas further argue that the trial court erred by allowing Margitan's counsel to inform the jury in opening arguments that they will not need to determine if the drain field must be removed, as the court had made that decision. Once more, the Hannas improperly raise this issue for the first time on appeal.

The Hannas must preserve evidentiary error for appeal, by objecting or making an exception at trial, to give the trial court the opportunity to prevent or cure error. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Here the Hannas not only failed to object, but in fact, agreed to the court's injunction and further allowed without objection the jury to be informed of the injunction in opening statements.

(RP 327) The evidence fails to support this claim of error in addition to the Hannas having waived this objection at trial.

E. The Hannas In Error Argued That Alleged Margitans' Misconduct And The Trial Court's Failure To Impose An Appropriate Sanction Combined With Margitans' Counsel's Alleged Disregard Of The Court's Sanction In Closing Argument, Denied Hannas A Fair Trial.

1. Standard Of Review

A trial court has wide discretion in ordering pretrial discovery; such orders are reviewed for manifest abuse of discretion. Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 20 P.3d 447 (2001). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. Wash. State Physicians Ins. Exch. Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). However, the Margitans object as the Hannas raise this issue for the first time on appeal, as such the issue has been waived by the Hannas pursuant to the reasoning in the Karlbera v. Often, supra, decision.

2. Argument

The Hannas have identified no misconduct by the Margitans during trial. The issue of misconduct is properly raised by CR 59(a)(2) motion, which was not brought before the trial Court. The Hannas CR 59 motion filed with the trial addressed a CR 59(a)(5),(6) and (7) only. (CP 781-791)

The Hannas are attempting to mislead this court with their argument as they are arguing the issues of discovery sanctions.

a. Sanctions Regarding Financial Discovery

First, the evidence admitted by the Margitans indicated damages based upon lost rents, due to the inability to obtain a certificate of occupancy for their rental property. (RP 798)

The Margitans were not seeking lost wages or income unrelated to lost rents from their rental property. (RP 454) The trial Court, in evaluating what sanctions would be appropriate, reviewed Washington case law to base its decision. (RP 330-331)

The trial Court based on the facts presented and the review of case law made its decision of what discovery sanctions should be imposed for the Margitans not turning over their personal financial records. (RP 337-338)

Hanna's counsel made no objection to the court's resolution of the Margitan financial sanction. (RP 332-338) The court addressed its remedy in Jury Instruction No 9. (CP 771) Hannas' counsel did not object or take exception to the Jury Instruction and in fact agreed to it. (RP 964) Washington law is very clear the failure to object to jury instructions waives the issue on appeal. Estate of Ryder v. Kelly-Springfield Tire Co., 91 Wash.2d 111, 114, 587 P.2d 160 (1978).

Likewise Hannas failed to preserve any object at trial. It is also long standing law that jury instructions to which no exceptions are taken become the law of the case." Guijosa v. Wal-Mart Stores, Inc., 144 Wash.2d 907, 917, 32 P.3d 250 (2001).

b. Sanctions Regarding Water Testing

It is important to note that the court granted Hannas requested remedy regarding the water testing sanction. (RP 780, 781) Now Hannas request review of their own requested remedy. (RP 780, 781) In addition this issue is raised for the first time on appeal. Further, Hannas' counsel in fact argued to jury at closing that Margitans never presented evidence of water contamination. (RP 985)

A trial court has broad discretion in fashioning remedies and in controlling trials. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299,858 P.2d 1054 (1993) and in this case the court adopted the remedy suggested by the Hannas as a remedy for the water testing sanction. (RP 779-781) In so doing the court also issued an Order withdrawing motion in limine No 1. (CP 803-804) This was a remedy suggested by the Hannas.

Hannas now for the first time claim they were unable to prepare for trial. This issue was not raised to the trial court by the Hannas. In fact on the morning of trial the Margitans requested a continuance. (RP 50)

Contrary to their current argument the Hannas objected to a trial continuance asserting they were ready for trial. (RP 53, 55) In arguing against a continuance Hannas' counsel stated the following at:

MR. PERDUE: Thank you very much, Judge. We're here, we're ready, and the -- Mr. Lockwood, as I did over the last week, tried to anticipate -- I went in maybe two or three different directions trying to prepare for this trial, not knowing exactly what was going to happen today, and I think that that was incumbent upon Mr. Lockwood; so therefore, a continuance of this trial should've anticipated that this was going to be exactly where we were going to end up as one of the options, Judge. Now, the only issue that -- now I'm talking about the continuance rather than certification. The only thing that is basically left is, as Mr. Lockwood indicates, the interference with the easement claim; that is, ingress -- some kind of interference with ingress/egress and utilities. Now, that's fairly straightforward. We can do that. Mr. Lockwood can put on his case, we can put on our case;... (RP 53)

The Hannas have raised a number of claimed errors for the first time on appeal. The courts have recognized that there is great potential for abuse when a party does not raise an issue before the trial court because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wn.2d 252, 271–72, 149 P.3d 646 (2006)

III. CONCLUSION

The Margitans have shown to this court substantial evidence to support the unanimous jury verdict. Additionally the Margitans have

identified claims of error for the first time on appeal. It is respectively requested that this Court of review deny the relief requested by the Hannas.

MARGITANS' CROSS-APPEAL BRIEF

I. INTRODUCTION

Following a jury trial a 12-0 verdict was reached awarding the Margitans \$210,125.00 for lost rents and \$12,119.00 for increased finance costs as economic damages. (CP 199-200) The jury also found that the acts of the Hannas were intentional and awarded emotional distress damages in the amount of \$200,000.00. (CP 199-200).

The Hannas filed motions for judgment pursuant to CR 50(b), CR 59 and for remittitur under RCW 4.76.030 (CP 193-195) for lost rents, emotional distress and for new trial.

The court denied the CR 50 and CR 59 motions. (CP 153- 161) The court in error granted the Remittitur motion in part reducing the emotional distress award to \$75,000.00. (CP 153- 161) The trial Court based its ruling on Hill v. GTE Directories Sales, 71 Wn. App. 132 (1993) (CP 216)

II. TRIAL COURT ERRORS

1. The trial court erred in granting the remittitur of emotional distress damages pursuant to RCW 4.76.030.

2. The trial court erred in its Conclusion of Law No. 4 by holding the only evidence the jury could have found emotional distress was from increased finance charges therefore, the jury award shocked the conscious of the trial court and the jury award was motivated by passion or prejudice.
3. The Trial court in error made no findings to support its Conclusion of Law No.4 that the jury award shocked the conscious of the trial court and the jury award was motivated by passion or prejudice.
4. The trial court erred by

III. STANDARD OF REVIEW

A decision to decrease a jury's award pursuant to RCW 4.76.030 is reviewed de novo. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 161-62, 776 P.2d 676 (1989). it has been held that the court must give great deference to the jury's determination of damages. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989).

IV. ARGUMENT

In this case the trial court in error granted the Hannas' motion for a remittitur and a reduction in the jury verdict pursuant to RCW 4.76.030 and in so doing the court erred in Conclusion of Law No 4 by finding that the only evidence the jury could have found emotional distress was for increased finance charges, that the jury award shocked the conscious of the trial court and motivated by passion or prejudice. (CP 216)

The court made no findings of jury misconduct or evidence of passion and prejudice. (CP 211-217)

Our courts have long held that a jury damage award should be overturned only in the most extraordinary circumstances. Miller v. Yates, 67 Wash.App. 120, 124, 834 P.2d 36 (1992). Those extraordinary circumstances have been found to be when the award is outside the range of the evidence, the jury was obviously motivated by passion or prejudice or the verdict amount is shocking to the court's conscience under RCW 4.76.030.

The trial court in error granted the remittitur and held that the award shocked the court's conscious and was outside the range of evidence. (CP 216)

The "shocks the conscience" test set out in Bingaman v. Grays Harbor Community Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) asks the trial court to determine if the award is "flagrantly outrageous and extravagant." In this case the trial court made no finding that the emotional distress award was flagrantly outrageous and extravagant. Here the court made no such finding. (CP 211-217) The court held in its Conclusions of Law No. 4:

Because the jury could not consider the lost rent or the failure to rent Parcel 3 as part of emotional distress damages, the only evidence by which the jury could have awarded emotional

distress damages was based on the Margitans' inability to refinance their credit card debt for their remodel. Awarding \$200,000 in emotional distress damages when the actual specific damages for failure to refinance were only \$12,119 is shocking to the Court's conscience, was obviously motivated by passion or prejudice, and was outside the range of evidence in this case. Wherefore, it is hereby ordered, adjudged and decreed. (CP 216)

In granting the remittitur, the trial court speculated that the jury may not have followed the court's Jury Instruction No. 9, to not consider lost rents or the failure to rent parcel 3 as a basis for emotional distress damages. (CP 771) However the trial court has no evidence the 12 member jury failed to follow the instructions as given and made no such findings. The jury was not polled or otherwise questioned as to the basis for its emotional distress award. The Hannas and the Court had the right and opportunity to poll the jury to determine what the non economic damages were based on. If the court, as it indicates found the verdict on non-economic damages "shocking to the court", it had a duty to poll the jury. The court's failure to poll the jury has prejudiced the Margitans who at the time had no reason to poll the jury.

The court's decision granting remittitur of emotional distress damages is based only on speculation to overcome the strong presumption the jury followed the court's instructions. Washington case law holds that a jury is presumed to follow jury instructions and that presumption will

prevail until it is overcome by a showing otherwise. In re Municipality of Metro. Seattle v. Kenmore Properties, Inc., 67 Wn.2d 923, 930-31, 410 P.2d 790 (1966).

There is no evidence the jury failed to follow the jury instructions as given and no court finding to overcome the presumption. The jury instruction the trial court speculated as being violated was Jury Instruction No. 9 regarding damages. (CP 771) However, confirming that the jury did in fact follow the jury instruction was the jury verdict itself. (CP 774) The verdict form specifically indicated the jury followed Jury Instruction No. 9 by including the following language:

If defendant Hannas' acts were intentional:

(4) For emotional distress, except this does not include any emotional distress for lost rents or the inability to rent the residence on Parcel 3:
(CP 774)

Further, the determination of the amount of damages is primarily and peculiarly within the province of the jury. Henderson v. Tyrrell, 80 Wash.App. 592, 630-632, 910 P.2d 522 (1996). The only issue the trial court had with the emotional distress award was to the size of the award. However the court in Bingaman, supra at 838 found:

"The verdict of a jury does not carry its own death warrant solely by reason of its size."

In reviewing the amount of a jury award, it is improper for a court to compare it with verdicts in other cases. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 266-68, 840 P.2d 860 (1992). It is unclear but it appears the trial court compared the jury award in the Hill v. GTE case to this one.

In this case, the trial court based its reduction on the jury not following instructions given and the apparent mathematical reductions analysis of Hill v. GTE Directories Sales Corp., 71 Wn.App. 132, 856 P.2d 746 (1993). (CP 216). The trial court stated: (CP 217)

The Court is reducing the emotional distress damages to \$75,000.00 withstanding the jury verdict for the reasons set forth herein and consistent with Hill v. GTE Directories Sales, 71 Wn. App. 132 (1993).

It appears the trial court engaged in a purely ratio-based analysis based only on damages related to refinance costs. (CP 216)

The trial court looked no further than numbers on a jury verdict form. (CP 774) The trial Court looked at one factor in determining emotional distress damages and that was the economic damages for increased finance charges. (CP 216) The court's analysis is inconstant with the court's instructions to the jury No. 9. (CP 771) The jury was instructed as follows:

...The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

(CP 771)

The court's ruling appears to state a standard it used for emotional distress. One based solely on economic factors, In this case, that of increased finance charges. The trial court Order assumed the jury disregarded all other testimony regarding emotional distress other than the increased financing costs. It is very clear law that a trial court may not substitute its judgment of the weight of the evidence for the jury's. Tincani v. Inland Empire Zoological Soc'y, 124 Wash.2d 121, 131, 875 P.2d 621 (1994).

The jury was instructed to disregard lost rents as a bases for emotional distress and there is no evidence they failed to follow Jury Instruction No. 9. The trial court failed to consider the substantial evidence provided throughout the trial by the testimony of the Margitans and their witnesses. (CP 408-409) (RP 433-434, 455, 463), (CP 840-842) The court did make findings in Findings of Fact No 8 that Allan Margitan and Gina Margitan gave general evidence as to emotional distress. (CP 214)

The trial court failed to consider that the award was for both plaintiffs Allan and Gina Margitan over the 3 years the Margitans were forced to deal with the consequences of the Hannas intentional acts. (CP 211-216)

The trial court in granting the remittitur in error engaged in a mathematical ratio-based analysis. The trial court took the jury's total economic damage award and subtracted the lost rents portion leaving the increased finance charges of \$12,119.00. (CP 215) This resulted in a reduction of the jury verdict for emotion distress from \$200,000.00 to \$75,000.00. (CP 216)

The court's remittitur analysis was done in the absence of any review of the Margitan's supporting testimony and evidence for non-economic damages. However, in granting the remittitur the court also held that substantial evidence did exist for an emotional distress award. (CP 211-216) Mr. Margitan testified on numerous occasions regarding emotional distress as well as concerns caused by the drain field encroachment and the resulting inability to obtain a certificate of occupancy. (RP 408-409), (RP 433-434, 455, 463) Gina Margitan testified about her emotional distress the effects on her and on the family, (CP 840-842) However, Hanna's counsel failed to ask one question in cross-examination regarding emotional distress.

The Hill decision relied on by the trial Court is can be distinguished from the present case. In Hill 71 Wn.App. at page 134-35, Ms. Hill's claim was for a period of time of 18 month, in this case the Margitans were impacted from a total 38 months. (RP 409) In Hill at page

140, there was misconduct of a juror as the jury foreman failed to disclose he had dealt directly with Mrs. Hills attorney, in this case there was no jury misconduct of any kind. In Hill at page 144 an error in instructing the jury was found harmless, in this case there was no error in instructing the jury. In Hill at page 144, there was insufficient evidence to support emotional distress, in this case the court itself found substantial evidence to support emotional distress. (CP 215) The court in Hill, at page 140, merely gave deference to the trial court's discretion to decrease a damage award when the award was unsupported by the evidence. This case is clearly distinguishable from Hill in that there was substantial evidence as to the emotional distress caused by the Hanna's intentional acts. Additionally, the jury's award for emotion distress was for both plaintiffs based upon the frustration, inconvenience and effects on the family caused by the intentional acts of the Hannas over a 3 year period as argued by the Margitans. (RP 409)

V. PASSION AND PREJUDICE

The trial court in error indicated that since the jury could not consider how lost rents effected emotion distress the only evidence the jury could have based emotion distress on was increased finance charges. (CP 216) Therefore, it must be passion and prejudice for the award. This finding completely disregards the Margitans' evidence of emotional

distress. The jury heard the evidence and granted non-economic damages based on the evidence without consideration to lost rents of Parcel 3 as stated on the jury verdict form. (CP 774)

The court in James v. Robeck, 79. Wn.2d 864, 869, 490 P.2d 878 (1971) held, a jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact. The James court stated at page 869:

"To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts — and the amount of damages in a particular case is an ultimate fact."

The jury's decision as to non-economic damages is given even greater deference. Sofie v. Fibreboard Corp., 112 Wash.2d 636, 646, 771 P.2d 711, 780 P.2d 260 (1989). The jury's constitutional role in determining damages, particularly noneconomic damages, is essential. Sofie at 645-46.

In Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 269, 116 P.3d 381 (2005) the Supreme Court specifically addressed the issue of passion and prejudice by holding:

¶ "Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable." Bingaman, 103 Wash.2d at 836, 699 P.2d 1230.

The record is void of any evidence of passion or prejudice. The trial court failed to identify any evidence of passion or prejudice or to make any findings addressing passion or prejudice.(CP 211-215)

This court held in Dexheimer v. CDS, Inc., 104 Wn.App. 464, 17 P.3d 641 (2001) at 476 477:

" 'Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable.' " Miller v. Yates, 67 Wash.App. 120, 124, 834 P.2d 36 (1992) (quoting Jacobs v. Calvary Cemetery & Mausoleum, 53 Wash.App. 45, 49, 765 P.2d 334 (1988)). The jury's judgment as to the amount of damages should be overturned in only the most extraordinary circumstances. Id.

The court's findings fail to meet the standard of "manifest clarity as to make it unmistakable" as required under Bunch v. King County Dept. of Youth Services, supra, or this court's decision in Dexheimer v. CDS, Inc., id.

It is further error to link the emotional distress damages to economic damages based upon the reasoning in Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986) Cagle confirms emotion distress damages can stand-alone by its self as the Cagle court stated at page 916:

This court has liberally construed damages for emotional distress as being available merely upon proof of "an intentional tort". Cherberg v. Peoples Nat'l Bank, 88 Wash.2d 595, 602, 564 P.2d 1137 (1977); see also Hunsley v. Giard, 87 Wash.2d 424, 431, 553 P.2d 1096 (1976); Browning v. Slenderella Sys.

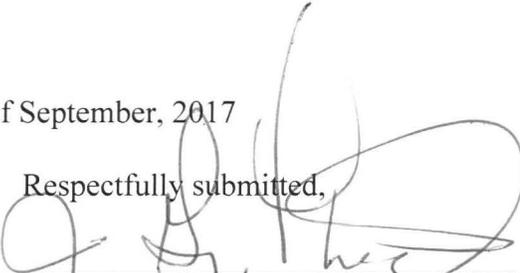
of Seattle, 54 Wash.2d 440, 341 P.2d 859 (1959). As the court in Hunsley stated: "From early in its history, this court has allowed recovery of damages for mental distress, even without physical impact or injury, when the defendant's act was willful or intentional." Hunsley, 87 Wash.2d at 431, 553 P.2d 1096. Moreover, contrary to the assertions made by the defendant, this court has not restricted the award of damages for emotional distress to only those intentional acts which protect dignity or personality interests. On the contrary, recovery of emotional distress damages has been allowed in conjunction with many intentional or willful acts which violate a clear mandate of public policy. See Miotke v. Spokane, 101 Wash.2d 307, 678 P.2d 803 (1984) (public nuisance); Cherberg v. Peoples Nat'l Bank, supra (intentional interference with business relationship)

VI. CONCLUSION

The trial Court erred in its Conclusion of Law No. 4 in its decision in granting a remittitur of the jury verdict. The court abused its discretion by making no findings related to passion or prejudice, or how the decision shocked the court's senses and by considering only one factor of economic damages as the bases for reduction of the jury verdict. It is respectfully requested this Court reverse the trial Courts' decision in granting the remittitur on non-economic damages and reinstate the jury verdict of \$200,000.00.

Dated this 27th day of September, 2017

Respectfully submitted,



J. Gregory Lockwood, WSBA # 20629
Attorney for Margitans

CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on September 28, 2017, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Stanley E. Perdue	_____	U.S. MAIL
Perdue Law Firm	_____	FACSIMILE
41 Camino Los Angelistos	_____	HAND DELIVERY
Galisteo, NM 87540	<u> X </u>	ELECTRONIC
perduelaw@me.com		DELIVERY

John C. Riseborough	_____	U.S. MAIL
Paine Hamblen, LLP	_____	FACSIMILE
717 West Sprague Ave	_____	HAND DELIVERY
Suite 1200	<u> X </u>	ELECTRONIC
Spokane, WA 99201		DELIVERY
Fax 509-838-0007		

DATED September 28, 2017.


LORRIE HODGSON

APPENDIX

ALLAN AND GINA MARGITAN

v.

MARK HANNA and JENIFER HANNA

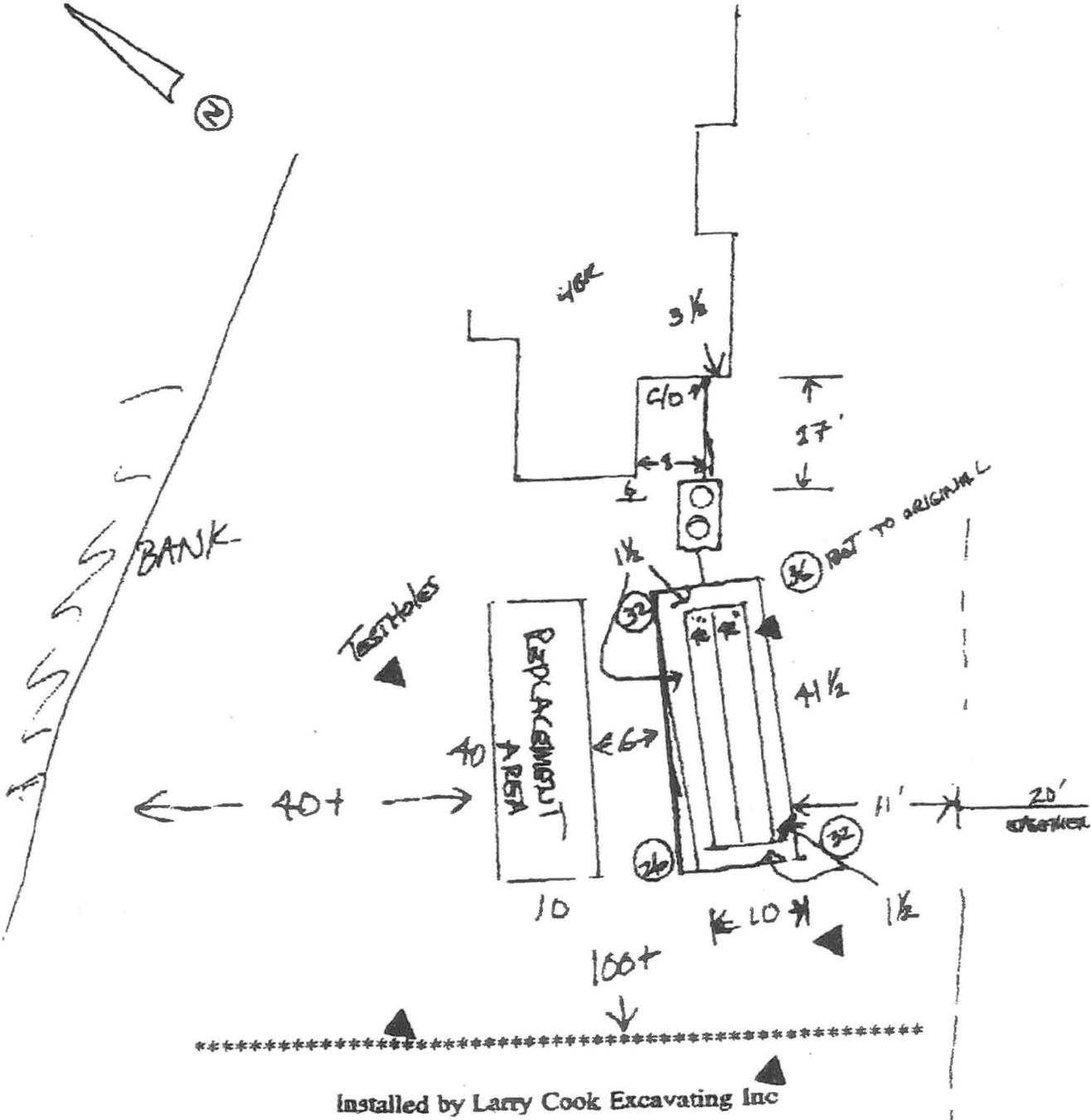
Court of Appeal, Division III

Case No. 347460

A.	1
B.	1
C.	1, 6, 12, 27
D.	1
E.	1, 8, 10, 11, 28
F.	3
G.	7, 17, 18
H.	23

APPENDIX A

AS BUILT



HANNA / 02-4270 / 14418 W CHARLES RD / 3-11-03

S 7/27/03

APPENDIX B



AFTER RECORDING MAIL TO:

Allan Margitan and Gina T. Margitan
14404 West Charles Road
Nine Mile Falls, WA 99026

Filed for Record at Request of:
First American Title Insurance Company

Space above this line for Recorder's use only

BARGAIN AND SALE DEED

File No: **4251-1528210 (ST)**

Date: **February 01, 2010**

Grantor(s): **Kondaur Capital Corporation**

Grantee(s): **Allan Margitan and Gina T. Margitan**

Abbreviated Legal: **PARCEL 3, SHORT PLAT 1227-00, VOL. 18, P. 3, SPOKANE COUNTY**

Additional Legal on page:

Assessor's Tax Parcel No(s): **17274.9110**

THE GRANTOR(S), Kondaur Capital Corporation, for and in consideration of Ten Dollars (\$10.00) and other valuable consideration, in hand paid, bargains, sells, conveys to **Allan Margitan and Gina T. Margitan, husband and wife**, the following described real estate, situated in the County of **Spokane**, State of **Washington**.

LEGAL DESCRIPTION: Real property in the County of Spokane, State of Washington, described as follows:

PARCEL 3, SHORT PLAT 1227-00, AS PER PLAT RECORDED IN VOLUME 13, OF SHORT PLATS, PAGE 3;

SITUATE IN THE COUNTY OF SPOKANE, STATE OF WASHINGTON.

Subject To: This conveyance is subject to covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey.

2/3/2010 11:40 AM \$4,455.00 201001071

APPENDIX C

APPENDIX D



Spokane County No. 15-2-00245-1
Margitan v. Spokane County/Hanna
Plaintiff's Exhibit No.: 77
Disposition:



Spokane County PWS 16-2-01678
Margitan v. Spokane County/Hanna
Plaintiff's Exhibit No.: 76
Disposition:

APPENDIX E



INSPECTION RESULTS

Spokane County Building and Planning
1026 W Broadway Avenue, Spokane WA 99260
(509) 477-3675
www.spokanecounty.org/bp

Report run on 09-03-2014 15:15:46

Application # RH-11004657 Parcel # 17274.9110 Application Type RESIDENTIAL ADDITION

Project Descr DEMOLISH A PORTION OF & REBUILD A PORT Site Address 14404 W CHARLES RD NINE MILE FALLS

Table with 5 columns: Inspector, Inspection Type, Date, Status, Comments. Row 1: Tim Utley, FINAL, 03-Sep-14, Requires Reinspect,

Action Description Status Status Date

Task Description Status Comments

Inspection Notes Violations found 1) You have notified us of 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 waterline and it's adequacy for residential use.

Required Correction:

APPENDIX F

FILED

AUG 10 2016

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE

ALLAN MARGITAN and GINA MARGITAN husband and wife, Plaintiffs,

NO. 15-200545-1

vs.

VERDICT FORM

MARK HANNA and JENNIFER HANNA, husband and wife, Defendants.

1. Have the Margitans proved that the Hannas unreasonably interfered with the Margitans' easement?

X yes _____ no

If no, do not answer any further questions. Sign the verdict form.

2. If yes, what damages were proximately caused by the Hannas' unreasonable interference?

(1) For lost rents of Parcel 3: \$ 210,125.⁰⁰

(2) For damages for increased construction costs of Parcel 3:
\$ 0

(3) For costs associated with the inability to refinance construction costs of Parcel 3: \$ 102,119.⁰⁰

If defendant Hannas' acts were intentional,

(4) For emotional distress, except this does not include any emotional distress for lost rents or the inability to rent the residence on Parcel 3:

\$ 200,000.⁰⁰

Dated: this 10 day of August, 2016

Richard Fair
PRESIDING JUROR

16905589-3 *cf*

APPENDIX G

When Recorded Return To:

Michelle K. Fossum, P.S.
528 E. Spokane Falls Blvd., Suite 502
Spokane, WA 99202

AGREEMENT

This Agreement is entered into between Mark and Jennifer Hanna [collectively referred to as "Hanna"] and Spokane Regional Health District ["SRHD"].

I. RECITALS

1.1 On June 6, 2002, Hanna submitted Application For On-Site Sewage System No. 02-4270 to SRHD. Hanna sought to install a septic tank and drain field on property located at 14418 W. Charles Road in Nine Mile Falls, Washington [the "Subject Property"].

1.2 The proposed septic tank and drain field drawing submitted to SRHD indicated there was a 20 foot easement running along the southern side of the Subject Property. Based on SRHD's review of the design plan submitted, SRHD issued Permit No. 02-4270 on January 10, 2003.

1.3 On or about March 11, 2003, Hanna submitted an As-Built drawing for the septic tank and drain field for Permit No. 02-4270. The As-Built drawing also reflects that there is a 20 foot easement running along the southern side of the Subject Property.

1.4 In July 2013, SRHD was made aware that instead of a 20 foot easement, the Subject Property was subject to a 40 foot easement along the southern side of the property. The existing drain field is partially within the 40 foot easement.

1.5 Spokane County Short Plat 1227-00 identifies the 40 foot easement as being for ingress, egress and utilities, and provides the corresponding legal description.

1.6 SRHD has also been made aware that there may be other easements located on the Subject Property. The existence and location of those other easements is currently being litigated in the matter of *Mark and Jennifer Hanna v. Allan and Gina Margitan, Spokane County Superior Court Cause No. 12-2-04045-6*.

1.7 WAC 242-272A-0210 mandates that a drain field be set back at least five feet from any easement line.

1.8 SRHD has notified Hanna that the location of the drain field on the Subject Property may constitute a nonconforming on-site sewage system.

0050

1.9 There is currently no imminent public health risk presented by existence of the drain field within an easement.

II. TERMS

Based on the above, the parties agree as follows:

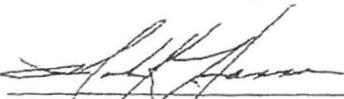
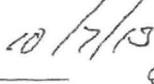
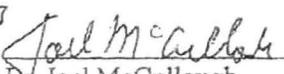
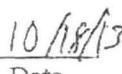
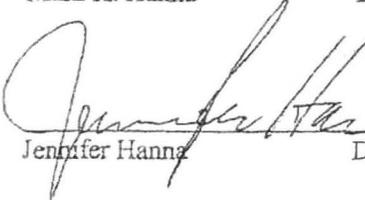
2.1 Within thirty (30) days of the conclusion of the litigation regarding the existence and location of the easements on the Subject Property, Hanna shall submit an Application to SRHD to relocate the septic system or otherwise bring the on-site sewage system into compliance with the rules and regulations existing at the time of application.

2.2 Within sixty (60) days of SRHD's approval of the Application for a Permit described in paragraph 2.1 above, Hanna will complete the installation of a conforming system.

2.3 It is further agreed that if at any time it appears to SRHD that there is a public health risk resulting from the nonconforming on-site sewage system, SRHD may require immediate corrective action from Hanna notwithstanding the terms of this Agreement.

2.4 It is acknowledged by the parties that the basis for this Agreement is the current uncertainty regarding the existence and location of all easements on the Subject Property making it impossible to determine whether relocation of the drain field will comply with setback and other legal requirements until the Court has made a determination on that existence and location of all Easements impacting the Subject Property.

2.5 This Agreement shall be recorded with and made of record in Spokane County.

 Mark K. Hanna	 Date	 Dr. Joel McCullough	 Date
		Health Officer, Spokane Regional Health District	
 Jennifer Hanna	 Date		

0051

APPENDIX

H

January 27, 2014

Allan Margitan
P.O. Box 328
Nine Mile Falls, WA 99026

Re: Request for an expedited administrative hearing regarding an alleged illegal onsite septic system at 14418 W. Charles Rd., Nine Mile Falls

Dear Mr. Margitan:

I'm writing to respond to your request for an expedited administrative hearing regarding the permitted onsite sewage system at the address of 14418 W. Charles Road, Nine Mile Falls, Washington. You allege that this onsite system is illegal. I have reviewed all of the information requested to be reviewed by both you and Mr. Hanna and my decision is noted below.

First, you requested that the Spokane Regional Health District (SRHD) provide you with the following documents:

1. The protocol and compliance with Washington State Legislature Title 246 WAC regarding requests for adjudicative proceedings, procedures and time limits.
2. Copies of the local health officer's 2013 quarterly reports submitted to the Department in compliance with WAC 246-272A-0420.
3. With this region's requirements, design and regulations for onsite septic systems.

Regarding your request for documents, all documents have been previously provided to you.

Regarding your allegation that the onsite sewage system at the address of 14418 W. Charles Road, Nine Mile Falls, Washington is illegal, you have not provided documentation to establish this claim. You provided a document entitled, "Declaration of Allan Margitan and Response to Mark Hanna's Declaration of January 7, 2014", in which you provided your input regarding the dispute between yourself and Mark Hanna in regards to the placement of pressured water line to your home and its proximity to the Mr. Hanna's onsite system's drain field.

In reviewing the associated documentation, including the "Declaration of Mark Hanna", there is insufficient documentation to definitely determine whether or not your water line is within 10 feet of the drain field (Chapter 246-272A WAC requires a minimum setback of a horizontal distance of 10 feet between a pressured water supply line and the edge of soil dispersal component and reserve area). Therefore, it is unknown if there is non-compliance of the onsite sewage system at the address of 14418 W. Charles Road, Nine Mile Falls, Washington as it relates to the location of your pressurized water line based on the currently available documentation.

To determine if there is a potential public health risk, I am requesting that Mr. Hanna provide documentation to establish the exact location of the water line and its relationship to the drain

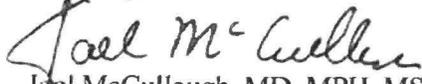
Allan Margitan
Re: Request for expedited administrative hearing

January 27, 2014
Page 2

field laterals to determine if there is non-conformity of the onsite sewage system and, if so, determine what mitigation measures would be necessary to bring the onsite sewage system into conformity.

If you disagree with my decision, you may appeal this ruling to the Spokane Regional Health District's Board of Health. The appeal to the Board of Health should be in writing and submitted within ten working days of your receipt of this letter. We have enclosed a copy of the appeal procedure for your reference. If you have any questions, please feel free to contact Michelle Fossum at (509) 324-9500 or my assistant, Ann Harwood, at (509) 324-1501.

Sincerely,



Joel McCullough, MD, MPH, MS
Public Health Director and Health Officer