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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 347460

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

ALLAN and GINA MARGITAN,

Respondents,

v.

MARK and JENNIFER HANNA,

Appellants.

**APPELLANT HANNAS' AMENDED REPLY BRIEF; CROSS-
RESPONDENT HANNAS' RESPONSE BRIEF**

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I. INTRODUCTION

Plaintiffs Margitan commenced a lawsuit against Defendants Hanna, seeking in relevant part damages for "... emotional distress, increased financing costs and rental income due to **interference with domestic water supply to Parcel 3 of Short Plat 1227-00**" (§4.4 of Margitans' Second Amended Complaint at CP 407) (emphasis supplied). The case was tried under that theory, with Margitans contending that a Certificate of Occupancy for their rental home was denied because of this interference. What they proved however was that the Certificate was denied because the home did not have running water (RP 638), a defect caused by Mr. Margitan's refusal to turn it on. Margitans failed to prove any interference with the waterline by the extension of a part of the drain field in the easement to justify this refusal. They did not prove the waterline's location in relation to the drain field, did not prove that the water was contaminated, or even that it was threatened. They put on no proof of any act by Hannas that impacted the waterline's ability to deliver potable water at all. Faced with that on appeal, they now claim that their theory has always been that the encroachment of the drain field alone was the interference.

With that admission, this Court should vacate the judgment and return the case to the Superior Court with directions that it be dismissed.

Washington law is clear that a landowner may make whatever use of his property he desires provided he does not unreasonably interfere with the use and purpose of the easement. Thus, an encroachment alone is not actionable – only where the encroachment causes an unreasonable interference with the dominant estate’s use of the easement, in accordance with its purpose, may the servient estate’s right to use of his property be limited. Thompson v. Smith, 59 Wn.2d 397, 407-08, 367 P.2d 798 (1962); Beebe v. Swerda, 58 Wn. App. 375, 384, 793 P.2d 442 (1990).

Margitans’ Response Brief underscores the propriety of remanding this case to the Trial Court for dismissal or for a new trial. Margitans make no effort to rebut the factual and evidentiary basis for the arguments Hannas present on appeal. In addition to the failure to demonstrate interference with their utility easement (waterline), they fail to prove any intent by Hannas to harm them when the drain field was installed, do not deny that the drain field was installed before the waterline, do not point to substantial evidence that the emotional distress they described was caused by Hannas as opposed to the stress of the litigation Margitans pursued, or their unhappiness with agency decisions and delays, and do not rebut the scope and results of the administrative hearings and appeals they pursued which collaterally estops them.

Finally, they do not deny that the agreement with the Spokane Regional Health District (SRHD) was a lawful and valid exercise of SRHD's authority in arriving at a compliance schedule (Memorandum Opinion, CP 1367 at 1374), and make no effort to excuse or explain their conduct in the month before trial which so prejudiced the Hannas' defense. Accordingly, this case should be remanded to the Trial Court for dismissal with prejudice, or, in the alternative, for a new trial.

II. ARGUMENT

A. Waiver.

As a preliminary matter, at numerous points in their Response Brief, Margitans assert that Hannas have waived issues for failing to object at the trial court level. Margitans continuously cite an unidentifiable case, "*Karlbera v. Often, supra*," which case first appears in their Brief at page 12. Although cited repeatedly, the case, if it exists, was never properly identified. In any event, the objections are not well founded. Each of the issues Hannas appealed were properly raised at the trial court level for appeal. These will be addressed in the order they appear in Margitans' Response Brief.

(1) CR 50(b) – Lack of Proof of Causation
(Respondents' Brief, p. 14). This issue was raised and addressed by both parties at the time of Defendants' CR 50(a) Motion

(CP 744-749; CP 750-759) as recognized by Judge Triplet in his Decision (RP 962; RP 948). It was again raised by Hannas' CR 50(b) motion at least by continuing to address the principle that with no interference there can be no causation of damages (CP 775-780).

(2) **Failure to Prove Intentional Tort (Respondents' Brief, p. 15)**. This is specifically raised and argued in Hannas' Amended Motion for Remittitur on Causation. *See also* Hannas' Response to Court's Proposed Findings and Conclusions and Order re CR 59 and RCW 4.76.030 (CP 898-901).

(3) **Proximate Causation of Emotional Distress (Respondents' Brief, p. 20)**. This issue is covered in the motions, argument and ruling of the Trial Court regarding Hannas' motions under CR 50(a) (CP 744-749), CR 50(b) (CP 775-780), CR 59 (CP 781-791; CP 805-815), Amended Motion for Remittitur (CP 196-198), Court's Findings of Fact and Conclusions of Law on these motions (CP 211-217).

(4) **Injunction vs. SRHD's Compliance Schedule (Respondents' Brief, pp. 25-26)**. Hannas strongly contested the granting of the summary judgment and timely appealed the decision to enter an injunction (CP 90-97; CP 98-142; CP 189-

192). Further, the Trial Court did not issue its Findings of Fact and Conclusions of Law until October 12, 2016 (CP 211), and did not enter its Order on Margitans' summary judgment until November 2, 2016 (CP 221).

(5) **Failure to Impose Appropriate Sanctions (Respondents' Brief, p. 30)**. This issue was raised and argued in Hannas' Motion for a New Trial (*See* CP 898-901).

In short, all the issues on appeal were properly preserved. The fact that Margitans failed to identify these issues when raised, or argue in response is not a basis for finding waiver against Hannas.

B. Margitans Have Failed to Produce Substantial Evidence to Establish Damages Caused by an Actual Interference with the Utility Use of the Easement.

1. Interference.

As set forth in Hannas' Opening Brief (BOA), the holder of an easement does not have a right to unfettered, indiscriminate use of the property burdened by the easement. Margitan v. Spokane Reg'l Health Dist., 192 Wn. App. 1024 (2016) (Unpublished) at CP 313. Rather, the easement holder is entitled to use of the easement consistent with its purpose. Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 243 P.3d 521 (2010). This includes the right to be free of unreasonable interference with that use by the servient estate holder. Both

the dominant and servient estate holders are entitled to a due and reasonable use of their respective interests. Richardson v. Cox, 108 Wn. App. 881, 884, 26 P.3d 970 (2001), opinion amended on denial of reh'g, 34 P.3d 828 (Wash.Ct.App. 2001).

Hannas entered into a lawful compliance schedule with the responsible agency (CP 135). Margitans contend that that agreement was not binding on them. That misses the point. Hannas' agreed compliance schedule is a lawful use of his property to which Margitans have no right to object until they prove that that encroachment, i.e., extension of a portion of the drain field into the easement, interferes with their use of the easement in accordance with its purpose.

The purpose of the utility easement was to allow the unfettered delivery of potable water. Interference with that use and purpose would include interfering with the water's delivery or contaminating the water. The pertinent regulation requires a waterline to be 10 feet or more from a drain field and Margitans produced no evidence demonstrating that their waterline was within 10 feet Hannas' drain field.¹ The parties agreed that Hannas' drain field encroached to some extent on the 40-foot easement. It was thus incumbent upon Margitans to prove that that encroachment

¹ Nor was there any evidence that the contractor who installed the waterline after the Hanna' drain field was in place violated that WAC regulation. WAC 246-272A-0420.

actually interfered with the delivery of water. They failed to do so. Accordingly, their cause of action failed, and none of the resulting damages claimed were recoverable against Hannas.

Margitans now contend that their cause of action all along was the mere encroachment and Mr. Margitan's reaction to that encroachment constitutes proof of an interference. Not only is that not the law, but it is a clear mischaracterization of Margitans' claims and presentation at the time of trial.

Margitans' Second Amended Complaint, in pertinent part, alleges not only the encroachment, but also interference with the waterline. Margitans' Second Amended Complaint (¶4.4; CP 407).

Further, the record is replete with Mr. Margitan's references to an impact on his waterline. One example is the hypothetical he proposed to the jury in attempting to explain why he had not turned the water on (RP 458, ln. 22 – RP 459, ln. 24; RP 492-493 – Judge Triplet's Comments). Margitans contended that they were unable to use their waterline because of the encroachment of the drain field, and offered their speculation that the encroachment may be affecting the potability of their water. They further claimed that the lack of potable water was the cause for the denial of the Certificate of Occupancy (Margitans' Exh. 101). Further, Mr. Margitan testified that he raised the issue with SRHD because

Hannas could not encroach on his waterline (RP 866, ln. 4). Finally, Mr. Margitan claimed that Margitans' Exhibit 101 established that the occupancy approval agency, Spokane County Building & Plans, would not give him a Certificate of Occupancy until he had SRHD and/or his water purveyor, demonstrate that he had potable water.

Contending that Mr. Margitan's theory was encroachment of the easement and not an impact on his waterline is sophistry (RP 886, ln. 4).

In any event, none of those assertions are correct. As recognized by this Court when Margitans first appealed this issue, Margitans' Exhibit 101 does not state that the Certificate of Occupancy is being denied because of the lack of potable water. It merely reflects Mr. Margitan's concerns in that regard. Margitan v. Spokane Regional Health Dist., 192 Wn. App. 1024 (2016) (Unpublished) (CP 334). Further, the plain wording of the recommendation says nothing about potable water. It says that the Certificate of Occupancy may be issued with establishment that "the waterline is adequate for residential use."

Finally, no government or agency representative testified that the Inspection Report required that Mr. Margitan demonstrate that his water was potable. Mr. Utley testified that the reason the Certificate of Occupancy was not issued was that Mr. Margitan did not have running water in the home (RP 638). Further, Mr. Utley testified that when he

returned to the Margitan residence with the Inspection Report (Margitans' Exh. 101), he still would have passed the Margitans' home if Mr. Margitan had turned the water on (RP 880).

In an effort to demonstrate that substantial evidence supported a finding of interference with the utility easement, Margitans' Response Brief lists 40 items they contend are evidence of interference. Those 40 items do not establish an interference with the waterline by the encroachment of the drain field whether individually or as a whole.² What Mr. Margitan needed to demonstrate was that the presence of a portion of the drain field in this easement interfered with his receipt of adequate, uninterrupted, potable water at the residence on Lot #3. At most, Mr. Margitan established his subjective concern that there was a potential that his waterline could be affected. That is insufficient, as a matter of law and Margitans' claim should have been dismissed at the conclusion of the evidence. Contrary to the assertions of Margitans' counsel, Margitans' Exhibit 101 does not state that the denial of the Certificate of Occupancy was due to the encroachment.

Counsel also makes the disingenuous argument that Instruction No. 5 (CP 767) alleviates the necessity of Margitans proving interference.

² Additionally, the items are largely inaccurate recitations of trial testimony, conclusory statements of counsel, or are irrelevant to the issue of interference.

Counsel argues that because the instruction talks in terms of an “easement” and doesn’t use the term “waterline,” it excuses Margitan from proving interference. As indicated above, Margitans’ damages case would make no sense without reference to the waterline, as Margitans’ alleged inability to utilize the waterline to access potable water was the sole basis for their economic damages. More importantly however, the term “easement” as used in that instruction is defined under Instruction No. 7 (CP 769), which provides: “An easement is a right to enter and use another’s property for some specified purpose, such as a waterline.” Given that Margitans’ primary focus throughout trial was on interference with their utility easement, Instruction No. 5 cannot be used by Margitans to escape their failure of proof.

2. Causation.

Margitans’ response to their lack of proof of causation is to contend that the issue was waived, citing a non-existent case without citation. They then argue that proximate cause is a jury question and that no objections to the instructions were made. The former is inaccurate (*see* discussion, *supra*, p. 4) and the latter misses the point. Regardless of the jury instruction, there still must be substantial evidence to support the jury’s finding of proximate cause, and there is no evidence to support that finding. Margitans do not address the absolute lack of proof that the

extension of a portion of the Defendants' drain field in 2002 prior to the installation of the waterline for their Lot #3 caused the damages of which they complain in 2013.

Preliminarily, there was no proof of interference with the easement's purpose, and thus any discussion of causation of damages by that interference is necessarily hypothetical. Accepting for the sake of argument only, however, that a minor underground encroachment, without more, constitutes an interference, it is clear that said encroachment was not the cause of the damages claimed by Margitans.

Substantially all of Margitans' damages were caused by, or are derivative of, their failure to obtain a Certificate of Occupancy for the rental they had constructed on Lot #3. The question thus becomes *what* was the proximate cause of that failure? More specifically, the question is whether the placement of approximately nine feet of the drain field in this 40-foot wide easement in 2002, prior to the installation of the waterline, can be considered a proximate cause of the failure to obtain a Certificate of Occupancy for a home serviced by that waterline over a decade later.

As this Court previously found,

Nevertheless the proximate location of the drain field does not by itself render a water supply unsafe. Therefore, the drain field's location within the easement does not equate to a denial of the Certificate of Occupancy. A drain field may not be

located within 10 feet of the waterline, but Margitan presents no evidence of violation of this rule.

CP 333.

Margitans rely on the case of Attwood v Albertson's Food Centers, Inc., 92 Wn. App. 326, 966 P.2d 3521 (1998) for the proposition that all that is needed is proof of a chain of circumstances. However, Attwood and the cases cited therein fully support Hannas' position that proximate cause was not proven. Attwood demonstrates that the "chain of circumstances" are events that are triggered by the initial conduct of the defendant and lead to the loss. That case concerned the negligent filling of a prescription – causing pulmonary edema – causing stress on the heart – causing a cardiac event which weakened the heart – causing plaintiff's subsequent heart failure and death. There is no similar causal link between the events subsequent to the placement of the drain field and Margitans' ultimate failure to obtain the Certificate of Occupancy.

Rather than a mere "chain of circumstances," causation requires a sufficiently close, actual, causal connection between the defendant's conduct and the damages sustained by the plaintiff. Rikstad v. Holmberg, 76 Wn.2d 265, 268, 456 P.2d 355 (1969); Hansen v. Washington Nat. Gas Co., 95 Wn.2d 773, 776, 632 P.2d. 504 (1981).

Further, the cases cited by Attwood also stand for the proposition that evidence establishing proximate cause must rise above speculation, conjecture, or possibility, Reese v Stroh, 128 Wn.2d 300, 309, 907 P.2d 282 (1995), and evidence that the defendant's conduct "might have," "could have," or "possibly did" is insufficient as a matter of law. Merriman v Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973).

Applying these principles to the evidence dictates a conclusion that there was an utter lack of evidence to support a finding of proximate cause. The initial placement of a portion of the drain field within the easement was not contested. The evidence established that it was placed before the waterline to Lot #3 was installed, and that it remained in place without objection or effect on the water supplied to Lot #3 up until Mr. Margitan began complaining in 2013 (RP 412; RP 457; RP 486). The evidence was that Mr. Margitan discovered that the drain field encroached and assumed that it was having an effect on his water. He thus turned the water off (CP 458) and requested a final inspection to obtain his Certificate of Occupancy. He was aware that he would not pass the inspection without running water, but asked for one anyway. When asked by the inspector Mr. Utley why the water was off, he advised that the drain field was encroaching (CP 636) and he was afraid that would affect his water (RP 871). He did not have evidence that the waterline was within 10

feet of the drain field (RP 464), nor did he have his water tested to determine if his suspicions were correct (RP 472). Mr. Margitan's request for a Certificate of Occupancy was denied because he did not have running water in the residence (RP 638, 879-880). Given that the short plat designated that the water was supplied by a public utility and prohibited private wells, if the water had been running, the inspection would have been passed (Margitans' Exhibit No. 2; CP 482; RP 879-880).

The evidence provided that Mr. Utley returned with an Inspection Report (Margitans' Exhibit #101), with language that a Certificate of Occupancy could be issued once it was provided with documentation by either SRHD or the water purveyor, "accepting the waterline and its adequacy for residential use." The evidence was that Mr. Margitan inquired of the two agencies listed, and after learning that neither certified the quality of water, did nothing (RP 449-450)

Mr. Utley also testified that irrespective of the language of the Inspection Report, if Mr. Margitan had turned the water on at the time of his return visit, he would have passed the inspection and obtained his Certificate of Occupancy (RP 879 at ln. 20 – 880, ln. 11).

Despite having been advised to the contrary by this Court (CP 334), Mr. Margitan claimed that the Inspection Report established that the encroachment of the drain field in the easement was the cause of his

failure to obtain a Certificate of Occupancy (RP 412). That was his sole evidence at trial of any relationship between the drain field and his ultimate damages.

Under this evidence there is no continuous, causally-linked chain of events leading from the placement of the drain field in the easement, and Mr. Margitan's failure to obtain his Certificate of Occupancy. Thus, any damages resulting from that failure are not recoverable and there is no basis for the damages award.

C. Margitans Fail to Demonstrate an Intentional Tort – Accordingly Emotional Distress Damages Were Not Awardable.

In their Opening Brief, Hannas established that an intentional tort requires a volitional act and cannot be based on an omission (Brief of Appellants (BOA), pp. 30-31 and cases cited therein). Hannas also demonstrated that the volitional act must be done with intent, i.e., the Margitans must prove that Defendants intended the consequences of their act or recognized that the consequences of which are substantially certain to follow. Hannas asserted the failure of proof on this element in their Motion for a New Trial citing White River Estates v. Hiltbruner, 134 Wn.2d 761, 768, 953 P.2d 796, 799 (1998) (CP 811). Recent case authority affirms that the focus in determining intent is on the results of the act, not on the act itself. State Farm Fire & Cas. Co. v. Justus, 199

Wn. App. 435, 398 P.3d 1258 (Div. II, 2017). The only affirmative act proven by Margitans was the original installation of the drain field. Accordingly, Margitans were required to prove that at the time the drain field was installed Hannas intended the denial of the Certificate of Occupancy and the resulting economic damages Margitans claimed.

Substantially all of Mr. Margitan's testimony of emotional distress was due to the mere presence of the drain field in the easement and his inability to get the responsive agencies to require it to be removed. Thus, his claim against Hannas was that Hannas would not remove the easement. In actuality, Margitans' claim was that Hannas were not acting to remove the drain field fast enough. Margitans' Exhibit 155 (SRHD Agreement) established that Hannas were acting lawfully pursuant to a compliance schedule established by Spokane Regional Health District (SRHD).³

In their response, Margitans cite Birkliid v. The Boeing Co., 127 Wn.2d 853, 864, 904 P.2d 278 (1995), as evidence that acting in disregard of the likely outcome can qualify as intent. Hannas do not quarrel with that principle, but it does not help advance Margitans' cause.

Margitans then attempt to demonstrate that they established volitional conduct at trial. Margitans assert that Hannas' agreement with

³ See Margitans' Exh. 155, SRHD. The Trial Court found that this was a compliance schedule falling within the authority of Spokane Regional Health District. That finding by the Court (CP 1374) has not been challenged by Margitans.

SRHD was an intentional act. The difficulty with that assertion is that there is no proof of intent to cause the harm Margitans complain of, i.e., denial of Certificate of Occupancy with resulting loss of rents, etc. Margitans argue that the suit by Hannas in 2012 was an intentional act, but that evidence was rejected by the Court as inadmissible (RP 412). The citation supporting Margitans' claim that the initial suit in 2012 by Hannas was brought to maintain the presence of the drain field (RP 412) was rejected by the Court as inadmissible. Even if Margitans' evidence might be stretched to qualify as volitional acts, it does nothing to establish the requisite intent to cause the injuries sustained.

Margitans claim that Hannas "knew" the encroachment was causing harm to the Margitans when Hannas knew nothing of the sort. The record citation to that effect, RP 720-721, does not establish that Hannas were aware that the encroachment alone was causing harm to the Margitans. It reflects a statement of counsel which was not responded to.

Finally, Margitans cite two cases for the proposition that intentional inaction may constitute affirmative conduct, In Re Custody of Miller, 86 Wn.2d 712, 719, 548 P.2d 542 (1976) and Adkisson v. City of Seattle, 42 Wn.2d 676, 687, 258 P.2d 461 (1953). Neither of those cases stand for that proposition. The In Re Custody of Miller case is a custody dispute which holds that a "tortious act" for purposes of Washington's

long arm statute includes the failure to pay child support. The Adkisson case concerns negligence, not an intentional tort, and stands for the proposition that negligence can be bottomed on the failure to do what a reasonable person would do under the circumstances. Adkisson is wholly inapplicable.

The actual facts are that the waterline in question was placed in the easement after Hannas had already installed their drain field. Hannas completed installing their drain field in March of 2003 (CP 424; CP 1266-67). The waterline Margitans contend as being interfered with was not placed until July 2003 (RP 362-365; RP 618, ln. 16-17; Margitans' Exh. P-140). This alone defeats an allegation of intent. Further, there was no evidence that Hannas were aware of the location of the waterline when it was placed or that they were aware a new waterline might be placed in unlawful proximity to their drain field. There is no evidence suggesting that Hannas should have recognized their drain field's presence in a 40-foot easement was substantially certain to interfere with a two-inch waterline. Finally, at the times the drain field was installed, and the waterline subsequently installed, Margitans didn't even own Parcel #3. There simply is no basis for a contention that Hannas' initial installation of the drain field was done with the intent to interfere with the waterline, a

denial of a Certificate of Occupancy, or that such interference was substantially certain to occur.

D. Margitans Have Failed to Establish Evidence that Any Intentional Act of Hannas Was the Proximate Cause of Emotional Distress to Margitans.

In Defendants' Opening Brief, Hannas demonstrate a lack of evidence by Margitans connecting the Hannas initial placement of the drain field with the emotional distress they testified to at the time of trial. Margitans' response is to contend that the jury was instructed on proximate cause, as if that supplies the evidence necessary to support the jury's decision. Margitans also contend that the issue was not raised, when it clearly was in connection with both the CR 59 Motion as well as the Motion for Remittitur on excessive damages (any damages are excessive when there is a lack of proof of causation).

Margitans then refer to the testimony of emotional distress. However, Margitans do not point to any testimony relating that emotional distress to Hannas' initial placement of the drain field.

Margitans cite Gina Margitan's testimony at RP 840-842 describing the emotional distress she experienced. However, there is no testimony relating that stress to the initial installation of the drain field, or to Hannas. Indeed, Ms. Margitan was asked to describe how the effects of the litigation had caused distress for her and her family. She further

testified that the request for damages for emotional distress was a tactic to motivate removal of the septic system (RP 842, ln. 20-24). Margitans cite no authority for the proposition they are entitled to recover emotional distress caused by litigation they have initiated and pursued.

Allan Margitan's testimony was no more helpful. Mr. Margitan testified that his frustration was due to his inability to obtain a Certificate of Occupancy for the rental property and his frustration and lack of control in dealing with the responsible agencies (RP 455; RP 449-450; RP 453; RP 885; RP 979). The Brief cites to no testimony in the record relating the Margitans' emotional distress to the Hannas' initial placement of the drain field.

Hannas agree that the test is substantial evidence. Reviewing the record reveals that there is insufficient evidence to support a finding that the emotional distress testified to by Margitans was proximally caused by an intentional act of Hannas.

E. Margitans' Response Fails to Address Collateral Estoppel, Which Bars Margitans from Relitigating Issues Dispositive of Their Suit.

In their Opening Brief, Hannas conclusively demonstrated that issues essential to Margitans' suit against them were barred by the principles of collateral estoppel (BOA, pgs. 35-44). Rather than addressing collateral estoppel in Respondents' Brief, however, Margitans devote their

argument to demonstrating why res judicata would not apply. Margitans argue that because the parties and the issues were different, res judicata cannot apply. However, Hannas are asserting collateral estoppel, not res judicata. Collateral estoppel does not require identity of parties. Further, the issues Hannas seek to bar are identical to those Margitans litigated and lost before the SRHD Board of Health (SRHD BOH).

Margitans assert the case of Luisi Truck Lines, Inc. v. Washington Util. & Transp. Comm'n, 72 Wn.2d 887, 894, 435 P.2d 654 (1967), for the proposition that an administrative hearing with a third party governmental agency between different parties and with different issues does not afford res judicata or collateral estoppel effect. The Luisi Truck Lines case is a res judicata case. It turns on the fact that the issue the defendant Commission was attempting to bar had not been previously litigated at all! This case provides no relief to Margitans here.

Margitans assert that the proceedings before the Health Officer, and the SRHD BOH, were “simply the exhaustion of administrative remedies as to SRHD” (Brief of Respondents, p.23). In doing so, Margitans recognize that they were a party to that prior administrative process. Although res judicata requires identical parties, collateral estoppel only requires that the party against whom collateral estoppel is asserted

(Margitans) was a party to the earlier proceedings. Margitans in effect confess this.

Margitans' next argument is that SRHD BOH was unable to award an injunction or damages for Hannas' alleged interference with the easement. This is an argument that the claims are not identical. Although res judicata (claims preclusion) requires an identity of claims, collateral estoppel does not. Collateral estoppel (issue preclusion) only requires that the issue sought to be barred in the subsequent proceeding be the same issue as that which had been determined in the earlier proceeding. Margitans do not deny that the issues essential to their claims against Hannas, i.e., that the drain field is interfering with their waterline, and that the drain field must be removed from the easement immediately, were litigated before the SRHD BOH. Given this, collateral estoppel acts to bar relitigation of those issues.

Next, Margitans contend that the proceedings before the SRHD BOH, pursuant to the Administrative Proceedings Act, did not result in a final order. It is clear on the face of the Order that it did (CP 9). Further, Margitans appealed that decision and Order to first the Superior Court, and then to this Court (CP 313-339). Both upheld the SRHD BOH Order. There was a final determination on the merits of these issues and collateral estoppel applies to bar them from being relitigated.

Finally, Margitans fail to address the additional factors which apply when the prior litigation was before an administrative agency. *See* BOA, pages 42-44. Margitans thus accept that those considerations support application of collateral estoppel in this instance.

F. The Trial Court's Error in Issuing an Injunction.

In their Opening Brief, Hannas demonstrated the error of the Trial Court's issuing an injunction which contravened SRHD's compliance schedule when Margitans had failed to establish any harm occasioned by the delay envisioned by that schedule.

Hannas demonstrated that the Trial Court's action should be vacated. A trial court's issuance of a mandatory injunction will be set aside where it is based on untenable grounds or untenable reasons, or where the decision is manifestly unreasonable or arbitrary (CP 1061-1066; RP 110-111; RP 330). A court's decision is manifestly unreasonable if it is "outside the range of acceptable choices, given the facts and the applicable legal standards. A decision is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an inaccurate standard or the facts do not meet the requirements of the correct standard." Lawrence v. Lawrence, 105 Wn. App. 683, 686, 20 P.3d 972 (2001).

Hannas demonstrated that the Trial Court's factual findings were unsupported by the record and that the Court's decision was based on untenable reasons as the Court applied an inaccurate standard (encroachment alone equals interference). Further, the Trial Court relied on an evidentiary record which did not prove actual interference with use and thus did not meet the appropriate standard. Lawrence v. Lawrence, 105 Wn. App. 683, 686, 20 P.3d 972 (2001). In the absence of proof of an actual interference, there is no basis for the Trial Court to alter the Agreement with SRHD, which established a compliance schedule, or the results of the BOH sustaining that decision. Margitans fail to address this recognized basis for setting a Trial Court's injunction aside.

Instead, Margitans claim that Hannas never objected to the injunction. This ignores Hannas' strong resistance to the Motion for Summary Judgment which led to that injunction (CP 1-10; CP 90-97; CP 98-142; CP 182-188; CP 189-192; CP 918-920).

Margitans then assert the unremarkable principle that a landowner may utilize an injunction to compel the removal of an encroachment, citing Arnold v. Melani, 75 Wn.2d 143, 449 P.2d 800 (1968). However that case involves a fee owner's right to a mandatory injunction to remove an encroachment on his property. It does not stand for the proposition that an injunction may issue to require removal of an easement encroachment

absent proof of interference with the use and purpose of that easement. This demonstrates Margitans' fundamental misunderstanding of their easement rights, i.e., their belief that they can require action by Hannas, the servient estate holder, without demonstrating an interference with their easement.

Margitans fail to address the Trial Court's authority to order equitable relief which usurps the authority of the agency empowered by the legislature with the administration of septic systems. Margitans fail to address whether a trial court, in equity, should substitute its judgment for that of the agency's expertise when there has been no showing of an interference by Hannas necessitating Court intervention.

The Margitans did not meet the requirement for equitable relief that they demonstrate actual damage or the threat of immediate actual and substantial damage. Their reference to Jury Instruction No. 8 and the five-foot setback rule is of no benefit to them. The drain field had been present in the easement since 2003. Margitans did not prove that the drain field encroachment alone prevented the occupancy permit. Margitans failed to meet that element required for equitable relief.

Conclusion of Law #4 of the November 2, 2016 Order was thus in error (CP 221, 224, ln. 3-6). The Court's injunction should be vacated.

G. Margitans' Response Does Not and Cannot Justify the Margitans' Misconduct Both Before and During Trial Which Unfairly Prejudiced Hannas' Defense.

In their Opening Brief, the Hannas detailed the egregious misconduct of the Margitans, including their contemptuous conduct in the presence of the Court on the first day of trial. Their conduct included resisting the Court's Order that they allow testing of their water, delaying the Court's ability to rule on that motion by filing a spurious motion to disqualify the judge (CP 939; RP 61, ln. 18 – RP 62, ln. 10), and refusing to produce their financial records. Margitans do not deny any of this in Respondents' Brief. Nor do they deny that their actions materially prejudiced Hannas' defense.

The Court ordered Margitans to provide their financial information in response to Hannas' second set of Interrogatories (CP 393-396; CP 413-414) and denied Margitans' Motion for Reconsideration of that Order (RP 332-334; RP 600-605). When the Court inquired of Margitans on the first day of trial regarding their intention to comply with the Court's Orders, they refused to comply (RP 330).

Margitans argue that the Hannas have not identified misconduct by the Margitans during the trial (Respondents' Brief, pp. 30-34). Margitans wish this Court to ignore their refusal on the first day of trial to comply with the Trial Court's lawful order. They also ignore the inappropriate

argument by counsel during closing argument which (a) exceeded what the Trial Court had allowed as comment on the Order to remove the drain field (RP 994), and (b) ignored the Court's sanction limiting and precluding an award of emotional distress damages for loss of rents or the inability to rent (RP 982).

Next, Margitans contend that Hannas did not object to the sanction that the Court imposed (Respondents' Brief, p. 32). However, when conduct is egregious, and the sanction imposed is ineffective, this Court has the inherent authority to act in the interests of justice and to preserve the integrity of the courts. This is correct even where an objection was not made. Gammon v. Clark Equip. Co., 38 Wn. App. 274, 686 P.2d 1102 (1984), aff'd, 104 Wn.2d 613, 707 P.2d 685 (1985); State v. S.H., 102 Wn. App. 468, 475, 8 P.3d 1058, 1060 (2000).

Further, that contention ignores that the Court did not impose the sanction it had ordered, as it did not preclude emotional distress damages for the inability to obtain refinancing (CP 737; CP 771). The Court's ruling on Motions in Limine #16 reads as follows:

Hannas' motion to exclude evidence of the lost profits and inability to refi as components of emotional distress for the residents on Parcel #3 is hereby granted.

(CP 737) However, the Court's instruction to the jury only precluded emotional distress for loss of rents or the inability to rent the residence on

Parcel #3 (CP 771). This is a clear irregularity in the proceedings, addressable under CR 59(a)(1). CR 59(a)(2), misconduct of the prevailing party, clearly applies to Margitans' behaviors and tactics as outlined in pages 17-20 of Hannas' Opening Brief. Hannas were thus precluded from demonstrating that the waterline was unaffected by the drain field or to rebut Margitans' assertion that the presence of the drain field caused an inability to refinance and resulting emotional distress. That substantial justice was not done is demonstrated by the exorbitant award for emotional distress.

III. CONCLUSION

The Trial Court's injunction should be vacated. This case should be remanded to the Superior Court with direction that the Judgment be vacated and Margitans' claims be dismissed with prejudice, or in the alternative for a new trial.

HANNAS' RESPONSE TO MARGITANS' CROSS-APPEAL

I. INTRODUCTION

Margitans have appealed the Trial Court's reduction of the award of emotional distress damages. That reduction was made in recognition that such award was likely the result of counsel's improper argument, which defeated the sanction the Court had imposed for Margitans' refusal to produce their financial information. As demonstrated in their appeal, Hannas do not believe any emotional distress damages were awardable, as there was no proof of an intentional tort and no testimony linking the presence of the drain field to the emotional distress testified to by the Margitans at the time of trial. Further, Margitans testified that their emotional distress was due to the frustration of dealing with the government agencies, as well as the stress and frustration of dealing with litigation. A proper ruling by this Court on Hannas' appeal renders Margitans' complaint that the award should not have been reduced moot.⁴

Further, the proper action of the Trial Court in light of the improper argument was to order a new trial. Hannas moved for remittitur under the provisions of RCW 4.76.030 (CP 196-198). Hannas tied that motion to their Motion for a New Trial under CR 59 (CP 193-195). The

⁴ Accordingly, Hannas' response to Margitans' cross-appeal should not be seen as a waiver or modification of their position on appeal. All the arguments hereafter are made upon the hypothetical that some award for emotional distress was appropriate.

statute requires that the court provide the aggrieved party (Margitans) the opportunity to accept the reduced amount in lieu of the court ordering a new trial. Margitans did not agree to a reduced amount but, rather than ordering a new trial as requested by Hannas, the Court reduced the award anyway. Thus, if there was sufficient basis for the Court's reduction, the appropriate remedy was a new trial.

II. ARGUMENT

A. Margitans' Argument That Remittitur was Improper Fails.

Margitans argue that the Court's reduction of the emotional distress damages was in error because there was no finding of jury misconduct or evidence of passion and prejudice. Margitans argue that the verdict of \$200,000 for emotional distress does not "shock the conscience" because the Court made no finding that the award was "flagrantly outrageous and extravagant." Margitans accuse the Trial Court of speculation regarding the jury's following of the instructions and, without citation to authority, asserts that the Trial Court was obligated to make some inquiry of the jurors individually. All of these arguments miss the point. The Trial Court's reduction was its effort to remedy the violation in closing argument by Margitans' counsel of the Order in Limine.

Margitans further charge the Trial Court with using a formula or fixed standard for the determination of emotional distress, that it failed to

view the testimony and evidence, that the Court engaged in a purely financially-based analysis, and that the Court should not devise a verdict by comparing it to other reported cases, in particular, Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 856 P.2d 746 (1993).

These arguments ignore the exchange between the Trial Court and counsel at the time the Motion for Remittitur was argued, as well as his oral findings of fact and the express rationale for his conclusions found in the Supplemental Verbatim Report of Proceedings (SRP), September 29, 2016 hearing, SRP 139-156. Further, as reflected in the Court's Findings of Fact Nos. 9, 10, 11, 12, 13, and 14, the Court was primarily concerned with the fact that Margitans' counsel violated the Order in Limine by arguing to the jury that it should make an award for emotional distress which equaled the award for other damages. Findings of Fact and Conclusions of Law, CP 211 et seq.; RP 982. September 29, 2016 hearing, SRP 153-155. The only other damages sought were the economic losses of lost rental income, inability to refinance, and increased construction costs. In effect, counsel had advised the jury to ignore the instruction which precluded emotional damages for lost rents. It was this that shocked the Court's conscience and suggested that the jury had been motivated to punish Hannas. The Court noted that the amount awarded for emotional distress (\$200,000) was almost exactly the amount awarded for economic

damages (\$226,000), which strongly suggested the jury had followed Margitans' counsel's advice. Under the circumstances, the case law cited by Margitans regarding deference to the jury's award of damage and presumption that the jury's award is correct, are inapplicable. Under these circumstances, it cannot be said that the Trial Court's damage reduction was error.

B. Any Error by the Trial Court in Arriving at the Reduction Was Error Invited by Margitans' Counsel.

Margitans argue that the Trial Court committed error by referencing the economic loss for the inability to refinance (\$12,119) in arriving at an appropriate emotional distress award of \$75,000. The Margitans claim the Trial Court utilized a fixed standard or formula and relied too heavily on the Hill, 71 Wn. App. 132, supra, in applying this analysis.

However, review of the Court's comments at the time of hearing reflect that he saw the Hill case as an example of a trial court referring to the other recoverable damages in assessing emotional distress. That approach by Judge Schroeder was upheld by this Court in the Hill case (September 29, 2016 hearing, SRP 132, ln. 6-18; RP 154, ln. 13-24). There is nothing untoward about that.

The irony here, however, is that the Trial Court was doing nothing more than what Margitans' counsel asked the jury to do in determining a fair amount for emotional distress damages! Mr. Lockwood's argument, found at RP 982 and recited by the Trial Court at the time of the hearing, advised the jury that equating the other damages awardable (which were the economic losses) was an appropriate approach to determining an emotional distress award. That's precisely what the Trial Court did. Using the logic of the Hill case, as well as Mr. Lockwood's assertion that such a connection is appropriate, the Trial Court actually awarded over six times the economic damages as opposed to the "same amount" suggested by Margitans' counsel!

Whatever the merits of relating emotional distress damages to the economic losses, that concept was introduced by Margitans' counsel in closing argument. In short, if there was error, it was error invited by Margitans' counsel. Invited error is a doctrine which prohibits a party from setting up an error at trial and then complaining of it on appeal. It precludes a party from seeking appellate review of an error it helped create. In Re Det. of Rushton, 190 Wn. App. 358, 372, 359 P.3d 935 (2015) (State precluded from asserting on appeal that it did not violate a statute when State's counsel, in oral argument at trial, had conceded the

violation). See also, Nania v. Pac. NW Bell Tel. Co., Inc., 60 Wn. App. 706, 806 P.2d 787 (1991).

This is precisely what has occurred here. Margitans' counsel requested that the jury assess emotional distress damages in the same amount as the other damages awarded. The only other damages sought were economic losses. The jury accepted that invitation making an award of emotional distress which was essentially the same as all economic damages. This defeated the sanctions the Trial Court had imposed for Margitans' refusal to produce their financial records as ordered. In determining the appropriate response, the Trial Court did nothing more than what counsel had asked of the jury, and Margitans cannot now complain of an error they invited.

III. CONCLUSION

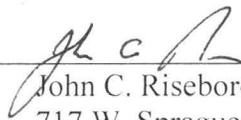
No emotional distress damages were recoverable by Margitans. Margitans failed to prove an intentional tort, i.e., a volitional act with the intent to cause the specific result or reckless disregard of that potential. Even assuming an intentional tort was proven, Margitans then failed to prove a causal connection between any volitional acts of Hannas and their emotional distress, testifying that their distress was caused by the frustration and impact of the litigation they had commenced and their inability to obtain relief from government agencies.

However, if emotional distress and damages were awardable, the proper response to counsel's argument and the resulting award was to order a new trial, not to impose remittitur. The Trial Court recognized that a new trial was a proper remedy, but determined to reduce the damage award instead (September 29, 2016 hearing, SRP 154, ln. 12; SRP 155, ln. 14-22). In any event, the Court's analysis at arriving at the reduction was invited by Margitans' counsel in closing argument and thus, under the doctrine of invited error, if this Court finds emotional distress damages were otherwise awardable, the Court's reduction should not be disturbed.

DATED this 26th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of September, 2017, I caused to be served a true and correct copy of the foregoing **APPELLANT HANNAS' AMENDED REPLY BRIEF; CROSS-RESPONDENT HANNAS' RESPONSE BRIEF**, by the method indicated below and addressed to the following:

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Gregory Lockwood Law Office of J. Gregory Lockwood, PLLC 421 W Riverside, Suite 960 Spokane WA 99201	<u> </u> <u> Y </u> <u> </u> <u> </u> <u> </u>	DELIVERED U.S. MAIL OVERNIGHT MAIL FACSIMILE E-MAIL
Stanley Edward Perdue 41 Camino De Los Angelitos Galisteo, NM 87540-9764	<u> </u> <u> X </u> <u> </u> <u> </u> <u> X </u>	DELIVERED U.S. MAIL OVERNIGHT MAIL FACSIMILE E-MAIL
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