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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.

**CROSS-APPELLANT MARGITAN'S
REPLY TO HANNA'S RESPONSE BRIEF**

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I. INTRODUCTION

The Hannas have failed to address the issue of passion or prejudice raised in the cross-appeal and discussed by this court in Dexheimer v. CDS, Inc., 104 Wn.App. 464, 17 P.3d 641 (2001) which held 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 trial court failed to identify any evidence of "manifest clarity" to base a claim of jury passion or prejudice. (CP211–CP217)

The trial court's decision is clear in only that it looked at one factor with no evidence of what the jury relied nor their discussion and deliberation. The trial court in error the trial court stated:

"...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" (CP 216)

Nor have the Hannas identified evidence of the basis for the jury's award for emotional distress.

The Hannas have also failed to address the "shocks the conscience" test raised in the cross-appeal as set out in Bingaman v. Grays Harbor Community Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985). The "shocks the conscience" test requires the 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. (CP 211-217)

The trial court failed to make a finding or identify evidence that the award was "flagrantly outrageous and extravagant." Nor have the Hannas.

II. NO OBJECTION TO MARGITANS' CLOSING ARGUMENT BY HANNAS OR THE COURT.

The Hannas only argues that the remitter was made in recognition of an improper comment was made at closing by the Margitans which was the "likely" cause of the award.

As stated in the prior briefing a reviewing court reviews de novo a trial court's order to remit damages due to the trial court having substituted its opinion for that of the jury on a question of

fact. Bunch v. King County Dep't of Youth Servs., 155 Wash.2d 165, 176, 116 P.3d 381 (2005); RCW 4.76.030. Again, it is important to note the Bunch court, 155 Wash.2d at 179, held that, the reviewing court; 1) must view the evidence in the light most favorable to the non-moving party, (2) strongly presume that the jury's verdict is correct; and (3) will only disturb the jury's verdict only if it is outside the range of substantial evidence, shocks the conscience, or appears to have resulted from the jury's passion or prejudice.

The Margitans disagree with the Hannas that any improper comment was made during closing argument. In fact no objection was made by the Hannas, nor did the Hanna request a corrective instruction. Likewise, the trial court did not feel a corrective instruction was necessary. In the trial court's Order granting the remitter, Finding of Fact No. 11 found:

11. During closing argument, Margitan's counsel urged the jury to use the same number for emotional distress damages as the other damages that the jury might find. Hanna's counsel failed to address the issue of emotional distress in their closing argument to the jury. (CP 215)

The trial court only found that the Margitan's counsel suggested a number for emotional distress not what to base it on.

The trial court then acknowledged Hanna's counsel failed to so much as address the issue of emotional distress. (CP 215)

At closing Margitans' counsel simply suggested that if the jury found the acts of Hannas to be intentional and made an award for emotion distress, a reasonable amount would be similar to the damage award. It is important to note the jury did not award the same amount as the non-economic award but a lesser amount of \$200,000.00.

The Margitans closing argument on the issue of emotional distress is as follows:

Then we have emotional distress. Emotional distress, if you find this was intentional, if you find that Mr. Hanna knowingly put this in the easement, which we know he did because he said he did, if you find that he intentionally failed to remove it, which we know he did because he said he did, then he's entitled to emotional distress. What number? That's going to be up to you. Through the years, I typically tell juries just go ahead and use the same number as -- as the damages that you find. That seems to be a reasonable compensation. So based on that, the facts sitting here in the jury room, you should be able to find for Mr. and Mrs. Margitan. So I'm going to stop right now, and then I may address you in a minute or two when Mr. Perdue is done.

THE COURT: Okay. You used 13 minutes, Counsel. You have 7 minutes left for rebuttal. And Mr. Perdue, you can use all 20 of your minutes, and it's 10:03. You're on the clock. (RP 982)

During closing the Hannas did not feel the Margitans' closing argument was objectionable as no objection to any of the Margitans' arguments was made. In fact, the Hannas response in closing began as follows:

MR. PERDUE: Thank you very much, Judge. First of all, I'd like to thank all of you for listening to me and taking time out of your busy schedules to serve on this jury. I know it's an imposition in your lives, and I and my client, for one, appreciate it. Mom goes -- mom cooks a chocolate cake. She goes into the backyard. She leaves her daughter, her 10-year-old daughter in the house. We'll call her Katie. (RP 983)

Further, Hanna's counsel responded to the issue of emotional distress by a completely avoiding it. The Hanna's counsel made no argument regarding emotional distress nor did he address the Margitan's closing argument. (RP 983-990)

It is also important to note that Hanna's counsel never addressed the issue of emotional distress at trial during cross examination or in their case-in-chief. The Hannas never addressed emotional distress during closing. The jury only heard the uncontroverted evidence and testimony the Margitans presented on the issue of emotional distress.

The Hannas' counsel did not address the issue of emotional distress but had the opportunity to respond to the Margitans initial

closing argument. If the Hannas' counsel felt the Margitan's closing argument regarding emotion distress was so prejudicial common sense would suggest some type of reply. Actions speak louder than words and the Hannas' counsel did not feel it was necessary to even comment.

The Hannas now allege the Margitans' comment at closing was so prejudicial the remitter was necessary or a new trial should have been ordered.

The trial court in its decision to grant the remitter made the following finding No. 11:

11. During closing argument, Margitan's counsel urged the jury to use the same number for emotional distress damages as the other damages that the jury might find. Hanna's counsel failed to address the issue of emotional distress in their closing argument to the jury. (CP215)

The court did not find that the comments of Margitans' counsel were improper or violated the Order in Limine, as it did not. The Order in Limine No. 16 only precluded the Margitans from arguing emotional distress resulting from lost rents or increased construction costs. (CP737)

Consistent with the Order in Limine, it was not argued to the jury in the Margitans' case-in-chief or at closing that the jury should

base emotional distress on lost rents or increased construction costs. The Hannas overlook that counsel clearly argued to the Jury that the amount of any award for emotional distress was up to them when he said, "What number? That's going to be up to you." (RP 982)

The jury weighed the evidence and did their job. There was no failure to comply with the Order on Limine during closing arguments only an award amount was suggested not what to base it on. In fact, the court did not find that it was argued to the jury to base emotional distress on lost rents and failure to refinance.

III. SPECULATION AND CONJECTURE.

However, the trial court did error in its Conclusions of law No. 4 by holding the jury should have only considered evidence of the Margitans' inability to refinance their credit card debt for their remodel in determining emotional distress damages. The trial court in error held:

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. (CP 216)

The trial court had no knowledge of what the jury based its award on as the jury was not polled nor were there requests that the jury be questioned. The trial court engaged in pure speculation and conjecture as to what the jury based its' award.

IV. TRIAL COURT DISREGARDED EVIDENCE IN ITS DECISION TO GRANT A REMITTER.

Further, the trial court did not take into consideration any other evidence of emotional distress presented to the jury. However, our Supreme Court held in Kloepfel v. Bokor, 149 Wn.2d 192, 203, 66 P.3d 630, (2003) that "Emotional Distress" includes "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. The trial court disregarded all other components of an emotional distress claim. The Margitans presented evidence of emotional distress as evidence by the following examples:

Anger:

A. There's beds sitting there, mattresses still wrapped up. They're just sitting there.

Q. 67?

A. There's a bed against the wall of the room just sitting

Q. Photograph 78, what does 78 depict?

A. In reality, driving by in my boat, thinking about my boat in anger.

Q. I'm sorry?

A. Sorry. The home has become a burden. It sits there.

MR. PERDUE: Objection. There was no -- there was no question.

THE COURT: Sustained to the nonresponsive.
(RP 408)

Disappointment:

Q. (BY MR. LOCKWOOD) Why did you want the jury to see all these photographs of your home being built?

A. It's a -- it's a beautiful structure. It sits there vacant more than three years. I have no control over it. I wait for the Health Department to get the information from Mr. Hanna so I can give the information to Spokane Building and Planning. It's out of my hands. It's -- in the airline industry, I'd say sitting in 37 after going along for the ride.

(RP 408 - 409),

Frustration:

Q. And at this point in time, or I should say at that point in time, what was your feelings about the process you were going through to get the drain field removed from your easement?

A. I shouldn't have to be going through it. I'm getting

Q. And why did you feel that this letter was needed to go To Mr. Holderby?

A. I needed the septic system out of the easement, and I needed -- I needed -- I'm getting frustrated. I'm getting upset. I'm trying every alternative I got. I wanted to, you know, put it -- bring it to his attention that I need help.

(RP 433)

Upset:

Q. And on that date that you sent that letter, how were

you feeling?

A. I was very upset
(RP 436)

Stress within the family:

As I listen to the testimony here, I feel like someone stabbed me in a knife -- with a knife in the back, and it continues. I hear that it is going to be removed from the easement. It's still there. We've tried everything we can to remove it. It's not happening. It's not happening. So my kids are fighting. I'm fighting. I'm fighting at work. I'm fighting at home. I'm fighting with my husband. It's been very, very difficult. And it seems like when more things come up, it's even more upsetting. I recalled about the sheetrock return after I heard that this morning. It's just a constant battle, constant battle; so it affects every part of our lives.
(RP 841),

Lack of sleep and worry physical issues such as stomach issues:

Q. Any specifics?

A. Well, I'm having a hard time sleeping. I get up in the middle of the night and sit there and read for hours at a time, which then affects my work, and keeping it all maintained and under control has been difficult for me; physical issues, stomach issues, lots of Tums, just the normal thing when you're going through stress. It's -- I have no control over anything, no control.
(RP841)

and Chagrin:

Q. At the point that this photograph was taken, what were you waiting for in order to be able to rent the lower unit?

A. I was waiting for the documentation from Mr. Hanna to provide it to Spokane Regional Health District to provide it to Spokane Building and Planning.

Q. And if that was provided to Building and Planning, what

would've happened?

A. I would have a certificate of occupancy.
(RP 409)

Additionally, the jury was present through the whole trial and was able to judge the reactions of the parties and make a judgment as to how the Margitans were impacted over a three year period. The emotional distress award by the jury was additionally for both plaintiffs. (CP 199 – 200)

The Hannas have argued the trial Court was just doing the job of the jury. Hannas overlook the purpose of the 12 member jury. The jury was provided Jury instruction No. 9, which is easy to understand and it advised the jury of the limitation of evidence on awarding noneconomic damages. (CP 771) There was no evidence the jury violated any instruction or considered improper evidence.

Jury instruction No. 9, reads:

“1. Emotional distress, except this does not include any emotional distress for lost rents or the inability to rent the residence on parcel 3.”

As noted in prior briefing 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)

The jury verdict form acted as an additional instruction on the evidence.

As such, other than emotional distress for lost rents or the inability to rent the residence on Parcel 3 the jury was free to consider other evidence as stated in RCW 4.56.250(b) which reads:

(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

The jury was not only allowed but required to base noneconomic damages on much more than the trial court's Finding No. 11, of only increased finance costs.

The jury was instructed on the evidence in Jury Instruction No. 1 which in pertinent part reads:

...The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict. ... (CP761) and (RP 967)

The jury was also provided with instructions specific to emotional distress in Jury Instruction No. 9 which reads in pertinent part:

...In addition, if you find that the actions of the Hannas were intentional, you should consider the following noneconomic damages elements:

1. Emotional distress, except this does not include any emotional distress for lost rents or the inability to rent the residence on Parcel 3.

The burden of proving damages rests upon the Margitans. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic 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 jury did as instructed – “you must be governed by your own judgment, by the evidence in the case, and by these instructions”.

V. AMOUNT OF AWARD IS WITHIN THE DISCRETION OF JURY.

The amount of damages was a matter within the discretion of the jury. Neither the trial court nor any appellate court should

substitute its judgment for that of the jury as to the amount of damages. In Rasor v. Retail Credit 87 Wn.2d 516, 531, 554 P.2d 1041 (1976). Further, the fact that the court would have assessed a smaller or larger amount than the jury is not grounds to interfere with the verdict. Workman v. Marshall, 68 Wn.2d 578, 582, 414 P.2d 625 (1966).

The jury heard the evidence and was able to hear the years of built up anger, stress, frustration and disappointment in the voices of the Margitans. All of which went unchallenged.

VI. INCONSISTENT ORDER GRANTING REMITTER.

It also appears the court itself was confused or unsure of its decision based upon its confusing Order, as the trial court Ordered:

Wherefore, it is hereby ordered, adjudged and decreed: "1. There is no basis to grant a new trial or to issue a remittitur." (CP 217)

And yet further Ordered: "2. The Court is reducing the emotional distress damages to \$75,000 notwithstanding the jury verdict for the reasons set forth herein and consistent with *Hill v. GTE Directories Sales*, 71 Wn. App. 132 (1993)." (CP217)

This shows confusion on the part of the trial court.

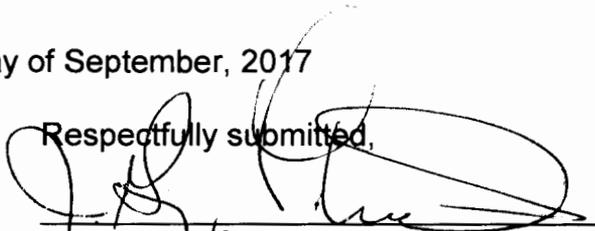
VII. CONCLUSION

The jury found the Hannas' intentional refusal to remove his drain field and other encroachments from within Margitans' easement caused emotional distress to the Margitans. The jury saw and heard from the parties and witnesses during the multi-day trial. The jury was able to evaluate the evidence and creditability of witnesses. The jury heard the testimony and their verdict reflected the evidence that was presented at trial.

The original jury verdict should be reinstated.

Respectfully submitted.

Dated this 21st 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 21, 2017, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

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DATED September 21, 2017.


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