No. 96422-0

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 34760

Spokane Superior Court No. 15-2-00545-1

In Re:

ALLAN and GINA MARGITAN,

Plaintiffs/Petitioners,

v.

MARK and JENNIFER HANNA,

Defendants/Respondents

ANSWER TO SECOND AMENDED PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENTS

The Respondents are Mark and Jennifer Hanna (the "Hannas").

II. INTRODUCTION

Petitioners Allan and Gina Margitan (the "Margitans") seek review of the Court of Appeals' decision reversing the trial court's decision denying the Hannas' CR 50(a) motion to dismiss all claims. In this regard, the Court of Appeals applied standard principles of review in holding that, at trial, the Margitans had failed to present sufficient evidence of interference with their waterline easement, or to establish proximate cause of the damages being claimed.

In seeking review, the Margitans mischaracterize the decision below, misstate the record, modify the sequence of events, forget the allegations of their Complaint and jury instructions on causation and assert a new theory of recovery. Despite that effort, the Margitans fail to establish their principal argument that the Court of Appeals "imported negligence principles" or that its decision conflicts with any decision of the Washington Supreme Court. Accordingly, the Margitans' Second Amended Petition for Discretionary Review should be denied.

III. COUNTERSTATEMENT OF THE ISSUES

Plaintiffs have cited four bases for the Petition, three of which are founded on an argument that the Court of Appeals "imported" negligence based "duty of care" principles. Plaintiffs also assert that the Court of Appeals "improperly

weighed the evidence." The Court of Appeals did neither. The dispositive issues are as follows:

A. Whether the Court of Appeals' finding that proof of encroachment alone did not constitute an interference conflicts with a decision of the Washington Supreme Court.

B. Whether the Court of Appeals' finding that the Hannas' "but for" causation evidence failed to establish "legal" causation of Margitans' alleged damages conflicts with a decision of the Washington Supreme Court.

C. Whether the Court of Appeals' Opinion fundamentally alters the rights of property owners with respect to easements in Washington so that public interest dictates that the Washington Supreme Court decide the issue.

D. Whether the Court of Appeals erred when it denied the Margitans' Motion to Publish the Court of Appeals' Opinion.[1]

IV. COUNTERSTATEMENT OF THE CASE

A reminder of the parties' respective interests, and their relationship to each other is important in appreciating the Court of Appeals' Opinion (hereinafter "Opinion"). Hannas own the property where their home and their septic system is located in fee. A portion of the drain field of their septic system extends into an area of Hannas' property which is encumbered by an egress and utility easement

[1] Margitans seek review only under RAP 13.4(b)(1) and (4). They have therefore waived any other basis for review. (*See* RAP 13.4(b)(2) and (3))

favoring Margitans. Spokane Regional Health District (hereinafter "SRHD") is the state agency with the authority and responsibility for the placement and operation of septic systems. Thus, when Margitans complained that the drain field extended into the easement, SRHD required Hannas, as the owner of the property and the system, to bring the system into compliance with the WACs 5-foot setback requirement. That demand led to an order and compliance schedule requiring Hannas to bring the system into compliance according to a schedule triggered by completion of the ongoing quit claim litigation. The trial court found that the compliance schedule was a lawful exercise of SRHD's authority. (CP 1374) Margitan objected to Hannas' compliance with that order, insisting that the drain field be removed immediately. However, Margitans have an easement. Margitans have no fee interest in the property in question. Margitans do not hold a restrictive covenant, nor any right to direct or control the use of Hannas' property. Margitans' rights are limited to use of the easement in accordance with its purposes, which use may not be unreasonably interfered with. Absent a showing of interference, Margitans thus had no legal right to require immediate removal.

The factual background of the parties' dispute is set out, in part, in the Petition. Critical facts are omitted however. First, Hannas' contractor installed the drain field for Hannas' home in March of 2003. (CP 424; CP 1266-67) The waterline in question, servicing Parcel 3, was not installed until July 2003 when the original waterlines were abandoned and replaced by the developer. (RP 362-

365; RP 618, *ll.* 16-17; Exh. P-140) Margitans never established at trial where that waterline had been placed in relationship to the portion of Hannas' drain field which extended into the 40-foot easement. (CP 1008; RP 464-465, *ll.* 12-15)[2]

Second, upon his discovery that a portion of the drain field encroached into the easement, Margitan complained to the Spokane Regional Health District requesting that it require removal. (RP 417, *ll.* 15-18) SRHD investigated and contacted the Hannas requesting that Hannas demonstrate compliance or remedy any non-compliance. (Exh. P-156, RP 489-490) Recognizing that the subject of the width of the easement was being litigated in the quiet title action, SRHD, acting within its authority under WAC 242-272A.0430(2), issued a valid compliance schedule. (CP 135-136) The schedule required that the Hannas submit a plan of remediation within 30 days after conclusion of the quiet title action, and bring the drain field into compliance within 60 days of approval of that plan. It also provided that SRHD could require immediate compliance if the existence of the drain field in the easement was shown to present a risk to health. (CP 135-136) SRHD advised Margitans of the compliance schedule and that it would not require the Hannas to move the drain field at that time. (CP 136; RP 521) Margitans then sought review by the Public Health Officer requesting that Hannas be required to remove their drain field immediately based on Margitans'

[2] There was evidence before the court in connection with motions for summary judgment regarding the claims of intentional interference by SRHD that it was located 14 feet from the drain field, well outside the required minimum of 10 feet. CP 1050-51.

speculation that the edge of the drain field may be within 10 feet of Parcel #3's waterline. (Exh. P-92) Margitans failed, however, to demonstrate the location of the waterline. Accordingly, their request was denied. They then sought review of Dr. McCullough's decision by SRHD-BOH. Margitan again contended that the existence of the drain field in the easement was of itself sufficient to establish interference with his waterline, a position that was rejected by the Board of Health. The Board of Health specifically found no evidence to support Margitans' contention that the drain field posed a threat to their waterline or that there was any threat to public health. It likewise found that SRHD's Compliance Schedule was appropriate. (CP 45-49) Margitan appealed the decision of the Board of Health to the Spokane County Superior Court, No. 14-2-01879-1. (CP 1074) He again contended that the presence of the drain field alone was sufficient to require immediate removal. He failed, however, to establish that the drain field was in unlawful or dangerous proximity to his waterline. Accordingly, the Superior Court dismissed his appeal. (CP 1115-1116) He then appealed that decision to Division III's Court of Appeals which upheld the trial court, again noting the lack of any evidence that the edge of the drain field was unlawfully close to the water line or that the drain field was having any effect on his water line. *Margitan v. Spokane Reg. Health Dist.*, 192 Wn. App. 1024 (2016) (Unpub.) (CP 313-339)

At no time did the Margitans attempt to locate their waterline or determine its proximity to the drain field. At no time did they test their water to determine if

there had been any contamination. (RP 472) At no time did the Margitans take advantage of the opportunity provided by the compliance schedule to demonstrate a health risk by testing their water or locating their waterline.[3] (RP 472)

In commencing the remodel, the Margitans had turned off the water to Parcel #3. (RP 458) Aware that they could not pass inspection without running water, Margitans nevertheless called for a final inspection of the portion of the structure they completed. (RP 888, *l.* 25 – 889, *l. 6*) This inspection was conducted by the Spokane County Building & Plans Department's inspector, Ken Utley. When Utley asked Mr. Margitan why the water wasn't running, Margitan responded that he had not turned on the water because of his concern that the drain field in question might be too close to Parcel #3's pressurized waterline. (CP 481; RP 462-463) At trial, in response to questioning by Margitans' counsel, Mr. Utley testified that he did not approve the home for a Certificate of Occupancy because there was no running water. (RP 638, *ll.* 3-5; RP 873, *ll.* 14-18)

On September 3, 2014, the Building and Planning Department issued a report, "Inspection Results." (Exh. P-101) The report observed that Mr. Margitan was claiming that his potable water supply was in danger. (Exh. P-101) Mr. Margitan then contacted both SRHD and his water purveyor and learned that

[3] Margitan's obstinance in this regard is remarkable. Despite the fact that establishing either of these was a sure way to require remediation under the compliance schedule, Margitan stubbornly clung to the position that he could force the SRHD and Hanna to do his will, without a showing of interference or public health risk.

neither of them certified the potability of water. (RP 449) Instead of determining who could certify the potability of water, he began claiming that the Inspection Results report established his inability to obtain a Certificate of Occupancy due to the mere encroachment in the easement of the drain field. (RP 412, *ll.* 3-17)

Thus on four occasions prior to commencement of this lawsuit, Margitans were advised that they needed to establish the proximity of the waterline to the edge of the drain field in order to establish facts sufficient to set aside the lawful compliance order.[4]

The Margitans commenced this action initially against Spokane Regional Health District and the Spokane Regional District Board of Health in February 2015. It subsequently added the Hannas by asserting counterclaims they had made in the quiet title action. (CP 261) Margitans sought damages for interference with their easement, specifically for loss of rental income due to interference with the domestic water supply to Parcel #3. (CP 406-407).

The case was given to the jury with instructions, which included instructions that the jury could award damages "proximately caused" by an interference. (CP 771, CP 772; RP 973)

On August 1, 2016, trial commenced. After several days of trial, the evidence was closed without any proof of the proximity of the waterline to the

[4] The Superior Court found the compliance schedule entered between SRHD and Hanna as the lawful exercise of that agency's authority. (RP 1374)

drain field, or any proof that any action by Hannas had interrupted the delivery of Margitans' water, affected the potability of their water, or posed any risk to the waterline. The Hannas moved for judgment under CR 50(a) on the basis of insufficiency of evidence. (CP 744) That motion was denied. (RP 961-963) The case was given to the jury resulting in a verdict for the Margitans.

On August 16, 2016, the Hannas moved for judgment under CR 50(b), again demonstrating that the Margitans had failed to prove any interference by the Hannas with their waterline. (CP 775) The Hannas also moved for a new trial under CR 59(a)(5), (7) and CR 59(b). (CP 193) again raising the issues of res judiciata, lack of proof of interference and lack of proof of causation, and lack of evidence to support emotional distress. (CP 193)[5] The Judge denied the motions and Judgment on the Verdict was entered on August 18, 2016. (CP 199) The Hannas timely appealed, asserting, *inter alia*, the trial court's error in failing to grant Hannas' CR 50(a) Motion at the conclusion of the evidence.

The Court of Appeals agreed with Hannas and reversed the trial court. (Appendix, p.1) The Court of Appeals noted that the Margitans failed to present evidence that the drain field interfered with their 40-foot easement, and that the Margitans had failed to present evidence that the drain field's encroachment into the easement had proximately caused the denial of their Certificate of Occupancy.

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[5] Hannas also sought and obtained remittitur, which reduced the award of emotional distress damages. Margitans have not sought review of that reduction in this Court.

Margitan v. Spokane Reg'l Health Dist., 34746-0-III; Appendix, p.1, p.10.

As to the first issue, the Court of Appeals noted that Margitans submitted no evidence that their water was contaminated. (*Id.* at p.5) The Court of Appeals further noted that the Margitans did not "present any evidence that the drain field was within 10 feet of the waterline, which would violate the 10-foot separation requirements under WAC 246-272A-0210." *Id.* at p.5. Rather, the Margitans' theory at trial was that "the 9-foot encroachment of the Hannas' drain field into their easement was an interference with their easement and caused the building inspector to not issue the certificate of occupancy." *Id.* In other words, the Hannas encroachment *alone* constituted an interference. The Court of Appeals disagreed, explaining that Margitan's central response that any structure in the easement establishes an actual interference was not supported by Washington juris prudence, citing, *Littlefair v. Schulze*, 169 Wn. App. 659, 665, 278 P.3d 218 (2012) (citing *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962)). *Id.* at 11. The Court of Appeals correctly noted that WAC 246-272A-0210's required a minimum 5-feet separation between an easement and a drain field, Margitans did not prove that the lack of physical separation interfered with Margitans' access or utilities. *Id.* at p.11. The Court of Appeals also correctly noted that the possibility of future harm as speculated by Margitans, was not actionable. *Margitan, id.* at 11-12, (citing *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219,

543 P.2d 338 (1975); *Brewer v. Lake Easton Homeowners Ass'n* 2 Wn. App. 2d 770, 780-81, 413 P.3d 16 (2018)).

With respect to the second issue, the Court of Appeals noted that the testimony of the inspector Utley was insufficient to establish legal causation as, although there was testimony by Utley that Margitans would have received a Certificate of Occupancy if the presence of the easement had not come up and there had been running water, that testimony was insufficient to charge Hannas with liability for an act which occurred 12 years before. *Id.* at p.6; pp. 12-14. The Court impliedly rejected Margitans' argument that the "but for" testimony elicited at trial was sufficient to establish causation, given the absence of legal causation. As pointed out by the Court:

> Legal causation is one of the elements of proximate causation and is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. A determination of legal liability will depend upon mixed considerations of logic, common sense, justice, policy, and precedent. Where the facts are not in dispute, legal causation is for the court to decide as a matter of law.

Appendix at p.13, citing *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998).

Based on the evidence at trial, the Opinion observes that, although there was encroachment into the easement, there was no evidence of any proximity to the waterline, nor any impact upon the water by that presence. Mr. Margitan's unsubstantiated concerns for his water which he expressed to the inspector as his

reason for not turning on his water was insufficient as a matter of law to establish legal causation, given considerations of logic, common sense, and justice. In short, "Mr. Hanna's mistake in April of 2002 should not result in legal liability for Mr. Margitan's August 2014 decision to express his unfounded concerns to the Building Inspector." (Appendix, p.14) Accordingly, the trial court should have granted Hannas' CR 50(a) Motion.

V. ARGUMENT

A. The Court of Appeals Did Not "Improperly Import" Negligent-Based "Duty of Care" Principles and Its Decision Does Not Conflict With Any Decision of the Washington Supreme Court.

Petitioners' primary contention is that Court of Appeals' Opinion "fundamentally alters" Washington law in property disputes by the "importation" of negligence-based "duty of care" principles. That contention is the basis for three of the four issues Petitioners want reviewed. However, there was no "importation" of negligence-based principles and the Court of Appeals applied existing Washington law to its determination. The fact is that Margitans alleged an intentional interference with their waterline and resulting damages. (*See* CP 406-408). They alleged that this intentional interference with their waterline caused them damages. Margitans submitted and the Court gave standard damages and proximate cause instructions. (CP 771 and 772) Margitans failed to prove, however, any interference with their waterline, intentional or otherwise. Contrary to Margitans' assertion, the Opinion answered the very question Margitans posed

to the jury, i.e., was there unreasonable interference with a utility easement. Attempting to recast the question as whether the Hannas' use of the utility's easement was "reasonable," ignores the legal requirement for interference. It also ignores the jury instruction which advised the jurors to determine if the Hannas had unreasonably interfered with the Margitans' easement as alleged, not whether any use by Hannas of the easement was "reasonable." The Court of Appeals addressed exactly the issue posed to the jury, the issue Margitans failed to prove.

Recognizing their failure of proof, Margitans now allege that the possibility of some future harm presents an actionable interference. The Court of Appeals properly noted that "the possibility of future harm unaccompanied by present damage is not actionable." App. at p.11. Margitans contend this was improper because the case cited, *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975) is a negligence action. Then, without citation to authority, Margitans argue that the principle is solely one of negligence without application to an easement dispute. Indeed, the general principle has been applied in other contexts. *Brewer v. Lake Easton Homeowners Ass'n*, 2 Wn. App.2d 770, 780-81, 413 P.3d 16 (2018), a nuisance action.

Fundamentally, however, Margitans' argument of prospective potential damages ignores the status of the case at the time it was presented to the jury. At that point, the trial court had already recognized that the compliance schedule had been triggered by the conclusion of the quiet title action and that Hannas were

intending to comply with that schedule. The trial court stated its intention to enforce that schedule. (CP 1112, *ll.* 10-14; RP 113, *ll.* 23-25) Indeed, the Court authorized Margitans' counsel to advise the jury that the drain field would be removed. (RP 951) Accordingly, Margitans did not present a claim of interference based on their fear of future contamination to the jury.

Further, the Margitans have failed to present any Washington Supreme Court case that the potential for future harm is actionable.[6] On the contrary, the Washington Supreme Court has addressed cases where only the *threat* of future interference, exists and held that only at that future time would it be appropriate to force the removal of the encroaching object. *Thompson*, 59 Wn.2d at 408. For an easement case holding that the threat of future harm is insufficient to constitute interference, one needs to look no further than *Thompson.* As the Washington Supreme Court explained in that case:

> There is no evidence that the south-ten feet of Smith's property has ever been used for a road, and no evidence that it will be used as such in the immediate future. It would not be proper at this time to prevent Smith's use of a concrete slab for parking an automobile or other appropriate use, until such

[6] The Margitans cite *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 458, 243 P.3d 521 (2010) for the proposition that "nonpossessory property interests are entitled to legal protection against actual or threatened harm. *Affiliated* is inapplicable to the instant case. First, *Affiliated* involved a fire that *actually* occurred on a monorail. The question presented to the Court was whether the monorail company, which did not own the monorail but had an exclusive right to operate the monorail, could bring a negligence action against the engineering firm that worked on the monorail's maintenance. The specific issue was therefore whether an engineer's duty of care extends to the persons who have a property interest to use and occupy the property. The quoted proposition was stated *in dicta* in response to the engineering firm's argument that only the owner of the property can sue in tort for damage to the property.

> time as the ten-foot strip may be required for road purposes.

Id. at 407 (emphasis added).

In other words, removal of an encroaching object is not appropriate just because an easement holder fears the object might one day interfere with their use of the easement. The instant case involves facts that weigh even more heavily against finding an interference. In this regard, the "threat" of future interference is nearly nonexistent.

Margitans misstate the jury's findings, claiming that the jury found that "using the easement for a septic drain field conflicted with the purpose of the utility's easement." (Petition at p.13) The jury made no such finding. Interestingly, however, Margitans' argument demonstrates their recognition of the proof required. Had Margitans proved that their water pipes were "running through a septic drain field," or that Mr. Margitan was "tasting sewage," they would have established an interference. They did not do so and accordingly the Court of Appeals' decision was correct.

The Margitans held an easement right, a right to use consistent with the purpose of the easement. There is no showing by Margitans that their utility use of the easement was in any way impeded. The Margitans' easement was a "right distinct from ownership to use in some way the land of another without compensation". It was not a restrictive covenant wherein they could "limit the

manner in which Hannas could use his or her own land." *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). To put it another way, the Margitans' easement right does not prevent the Hannas from making whatever use of their property they desire. The only limitation is that the rights of both the Margitans and the Hannas "must be construed to permit a due and reasonable enjoyment of both interests." *Thompson*, 59 Wn.2d at 408. In other words, the encroachment only becomes actionable when it interferes with the Margitans ability to use and enjoy the easement as intended. *Id.* at 408.

Finally, the Margitans present a new argument for interference based on adverse possession. (Petition, p.12, fn. 6) In doing so, Margitans contradict the theory they pursued at trial in favor of a theory they never presented in relation to the waterline. Initially this new argument fails for the same reason the "threat of future harm" fails as such issues were not submitted to the jury, having been resolved by the Court's enforcement of the compliance schedule. The jury was not asked to evaluate any evidence which might support such a theory.

Additionally, the Margitans did not raise this new issue in response to the Hannas' appeal. Indeed, the Margitans did not raise an adverse possession argument with respect to the drain field in their Complaint, nor anywhere else in the proceedings up to this point. (CP 1-232) Accordingly, were this Court to grant

the Second Amended Petition for Discretionary Review, the adverse possession argument would not be reviewable. *See* RAP 13.7.[7]

Second, the only case cited by the Margitans in support of their argument is *Littlefair.* Notably, *Littlefair* is a Washington Court of Appeals Opinion. The Margitans have not sought review under RAP 13.4(b)(2) and have therefore waived any argument that the decision is in conflict with a published decision of the Court of Appeals. *See generally Right-Price Recreation LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 821, 21 P.3d 1157 (2001). In this regard, no Washington State Supreme Court decision has been cited in support. Further, Margitans' argument re *Littlefair* is misleading. *Littlefair* turned on the fact that the fence in question was clearly interfering with the use of the easement and that the interfering use might lead to an adverse possession claim. Under *Littlefair*, a "clear interference is required" – an interference which Margitans failed to prove.

In summary, there has been no "import of negligence principles," nor any aspect of the Opinion that "fundamentally alters Washington law." Accordingly, this assertion, as well as the argument that review is appropriate because the Opinion involves an issue of substantial public interest, and the argument that the

[7] The issue of adverse possession was raised as part of Margitans' request for a mandatory injunction for removal of trees, shrubs and a concrete slab. The issue did not involve the drain field and was addressed and resolved as part of the Court's equitable determinations.

Opinion should have been published because it fundamentally alters Washington property law should be rejected.

B. The Court of Appeals Finding that the Hannas' Actions Were Not the "Legal Cause" of the Margitans' Purported Damages Does Not Conflict with a Decision of the Washington Supreme Court.

As part of their "imported negligence principles" argument, Margitans submit that the Opinion failed to apply well-settled Washington law regarding liability for interference with an easement. They pose an additional argument that the Opinion applied negligence "duty of care" principles. Neither argument has merit. As to the first, plaintiffs appear to recognize that proximate cause is an element of the proof required of Margitans in order to recover damages.[8] Simply put, in any action for damages, the damages claimed have to be tied to the complained of conduct. Most importantly, Margitans do not cite any Washington Supreme Court decision that holds that proximate cause is not an element of an action for unreasonable interference with an easement. The reason for this acknowledgement is unclear, however, as Margitans then proceed to recite Washington law regarding liability for interference with an easement, omitting the causation element. In doing so, Margitans again recognize they were required to prove that Hannas unreasonably interfered with their use of the easement. How

[8] Margitans have no choice but to recognize the application of proximate cause given the allegations of their Complaint and the Jury Instructions allowing damages that were proximately caused. (CP 771 and 772)

the Court of Appeals allegedly failed to apply appropriate Washington property law is unclear.

The second argument regarding "duty of care" principles is even less clear. First, the phrase "duty of care" appears nowhere in the Court of Appeals' Opinion. Second, there is no basis for Margitans' contention that the Court of Appeals was relying on *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.,* 170 Wn.2d 442, 458, 243 P.3d 521 (2010). Nowhere in the Opinion is that case cited for "duty of care." These arguments should be rejected out of hand as frivolous.

C. The Court of Appeals Finding that the Hannas' Actions Were Not the "Legal Cause" of the Margitans' Damages was not Improperly Based on Its Own Opinion of the Evidence in Conflict with a Decision of the Washington Supreme Court.

The Margitans argue that the Court of Appeals' Opinion conflicts with a decision of the Washington Supreme Court because it reverses the jury's verdict based on its own evaluation of the evidence. (Petition, at 18). In this regard, the Margitans argue that the Court of Appeals "explicitly acknowledges the existence of testimony from which the jury could find causation but based on its own weighing of the evidence, it concluded that the witness did not really intend to testify to causation." *id.* However, the Court of Appeals made no such acknowledgement, let alone conclude that a witness "did not really intend to testify to causation." Properly interpreted, the Opinion reflects the conclusion that the sum total of the testimony was insufficient to meet the legal cause prong of

proximate cause. Margitans' argument is particularly disingenuous in light of their recognition that proximate cause consists of legal causation, in addition to the "but for" causation proof presented at trial.

The Court of Appeals did not weigh evidence. The Court of Appeals reviewed the testimony as a whole and determined that it was insufficient as a matter of law to establish legal causation. Here, it is important to note that the only actionable conduct the Margitans presented to the jury was Hannas' mistake in not correcting the instructions to their contractor in 2002. Hannas' later conduct in not removing the drain field once brought to their attention was in compliance with a lawful compliance schedule negotiated with SRHD. The testimony of Mr. Utley, as well as the plain wording of the Inspection Report, Exhibit P-101, demonstrates that the reason the Certificate of Occupancy was not issued was due to Margitan not turning his water on, due to his unsubstantiated fear that the waterline was too close to the drain field.[9] There are any number of "but for" causes in the 12 years from the Hannas' mistake to Margitan's refusal to not turning his water on and his advice to the Building Department that he did not have it on because of an unsubstantiated fear that the waterline was too close to the edge of the drain field. Margitans' proof that "but for" the presence of the drain field in the easement he would have had his Certificate of Occupancy is insufficient to establish legal causation.

[9] The complete testimony of Mr. Utley is found at RP 627-638 and RP 868-880.

The Court of Appeals' determination was well within its purview, considering that legal causation is a question of law and that an Appellate Court's review of a trial court's CR 50(a) ruling is de novo. *See Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007).

VI. CONCLUSION

For all the reasons discussed herein, the Hannas respectfully request that the Margitans Second Amended Petition for Review be denied. Should the Hannas be the substantially prevailing party, the Hannas request costs incurred in responding to the Margitans' Second Amended Petition for Review pursuant to RAP 14.2.

DATED this 7th day of December, 2018.

PAINE HAMBLEN LLP

By: /s/ JOHN C. RISEBOROUGH
John C. Riseborough, WSBA #7740
Attorneys for Defendants/Respondents
Mark and Jennifer Hanna

CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of December, 2018, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

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Theresa J. Henry

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APPENDIX

FILED
JULY 24, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ALLAN MARGITAN and GINA MARGITAN, husband and wife, Respondents, v. SPOKANE REGIONAL HEALTH DISTRICT, a municipal corporation and SPOKANE REGIONAL HEALTH DISTRICT BOARD OF HEALTH, a municipal corporation, Defendants, MARK HANNA and JENNIFER HANNA, husband and wife, Appellants.	)	No. 34746-0-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Mark and Jennifer Hanna appeal after a jury determined that their drain field interfered with Allan and Gina Margitan's 40 foot access and utility easement. The Hannas make several arguments on appeal, including that the trial court erred by denying their CR 50(a) motion to dismiss the Margitans' claims. We agree and reverse the jury's verdict.

FACTS

Background facts

Spokane County Short Plat 1227-00 consists of "Parcels" 1, 2, and 3. Parcel 1 is to the east of Parcel 2, and Parcel 2 is to the east of Parcel 3. The short plat map shows a 40 foot wide access and utility easement across Parcels 1 and 2 in favor of Parcel 3. A note on the map requires the applicant to secure public water for each of the three parcels.

In April 2002, the Margitans purchased Parcel 1. In May 2002, the Hannas purchased Parcel 2. One month earlier, Mr. Hanna mistakenly informed the contractor hired to build his house that the easement was 20 feet wide. On May 1, 2002, Mr. Hanna learned that the easement through Parcel 2 was 40 feet wide, not 20 feet wide. Mr. Hanna neglected to inform his contractor of this.

In June 2002, Larry Cook Excavating Inc. applied to the Spokane Regional Health District (SRHD) for a permit to build an on-site sewage system on behalf of the Hannas. SRHD issued the permit in January 2003, and Cook Excavating built the septic system. In March 2003, Cook Excavating submitted an "as built" drawing of the septic system. Clerk's Papers (CP) at 51. The "as built" drawing erroneously depicts the easement as 20 feet and shows an 11 foot separation between the depicted easement and the closest

corner of the drain field. Had the actual 40 foot easement been depicted on the drawing, it would show that the closest corner of the drain field extends 9 feet into the easement.

Prior to 2002, water lines servicing the parcels had been installed and covered by a paved road. Around July 2003, these water lines were abandoned and new lines were installed providing water to each parcel.

In 2010, the Margitans purchased Parcel 3, including the existing home. In October 2011, the Margitans began to remodel the home so they could lease it out as a high-end rental property.

In July 2012, the Hannas filed a quiet title action in Spokane County Superior Court against the Margitans to reduce the 40 foot easement to 20 feet. About one year into that litigation, the Margitans learned that the Hannas' drain field was built 9 feet into their easement. The Margitans notified SRHD of this. The litigation was later amended to a quiet title action that sought to determine the rights of all Parcel 2 easement holders of record.

SRHD—Hannas' agreement

In October 2013, the Hannas and SRHD signed an agreement that contained a compliance schedule for relocating the drain field. The agreement provided that, within 30 days after their quiet title action was concluded, the Hannas would submit a plan for

relocating their drain field in compliance with the Washington Administrative Code. The Hannas also agreed that within 60 days of SRHD's approval of the plan, the relocated drain field would be built. The agreement also empowered SRHD to require the Hannas to immediately relocate their drain field if at any time it appeared to SRHD that the drain field posed a public health risk.

Building inspection and report

In the summer of 2014, the Margitans requested a final inspection of their remodeled house on Parcel 3 so they could obtain an occupancy permit. When the inspector arrived, the water was off. Mr. Margitan told the inspector that he was not comfortable with the potability of the water due to the water line's proximity to the Hannas' drain field. The building department declined to issue an occupancy permit. In the comments section of the inspection report, the inspector indicated that an occupancy would be issued once SRHD or the water purveyor accepted the water line as adequate for residential use.

Margitans' lawsuit

The Margitans brought the present lawsuit against SRHD and the Spokane Regional Health District Board of Health on February 13, 2015. The Hannas were not initially named in the lawsuit. The complaint sought money damages from SRHD for

refusing to have the Hannas promptly relocate the drain field. The Margitans alleged damages including, inter alia, loss of use of the property, loss of income, and emotional distress.

The Margitans, in agreement with SRHD and the Hannas, filed an agreed motion to consolidate certain counterclaims that the Margitans had asserted against the Hannas in the quiet title action that all related to the drain field's encroachment into the easement.

Prior to trial, SRHD successfully moved for summary judgment dismissal of the Margitans' claims. The propriety of that dismissal is the subject of a separate appeal.

Margitans' theory at trial

The Margitans did not present any evidence that their water on Parcel 3 was impaired by the drain field. The Margitans' water is public water and reaches Parcel 3 through a pressurized line. Any leaching of drain field contaminants could not impair the water within the pressurized line. Nor did the Margitans present any evidence that the drain field was within 10 feet of the water line, which would violate the 10 foot separation requirement under WAC 246-272A-0210.

Instead, the Margitans' theory at trial was that the 9 foot encroachment of the Hannas' drain field into their easement was an interference with their easement and

caused the building inspector to not issue the certificate of occupancy. In our view, the testimony of the building inspector is dispositive of this appeal.

Trial testimony of building inspector

The building inspector testified that he is concerned only with the building structure and that improvements more than two feet beyond the building structure are not inspected by him. But Mr. Margitan raised concerns about the proximity of the water line to the drain field. Mr. Margitan's concern caused the inspector to involve his boss in the decision, thus resulting in the language included in the comments section of the inspection report. The comments section indicated that an occupancy permit would be issued once Mr. Margitan furnished documentation from the water purveyor or SRHD accepting the water line as adequate for residential use.

Had Mr. Margitan not raised his concern to the building inspector, an occupancy permit would have been issued. This was confirmed by Mr. Margitan's own questioning of the building inspector:

> Q. [T]he issue dealing with the drain field encroachment, that was outside your normal experience?
> A. Yes, sir.
> Q. So had that issue not come up, would the Margitans have . . . received an occupancy permit?
> A. If the water was running inside the structure, yes.

Report of Proceedings (RP) at 634.

The Margitans raised the issue because the Hannas' drain field encroached 9 feet into the easement. The building inspector admitted that had the drain field not encroached into the easement, the Margitans probably would have received an occupancy permit.

CR 50(a) motion for judgment as a matter of law

After all of the evidence was presented, the Hannas moved to dismiss the Margitans' claims. One basis for their motion was that the Margitans failed to establish that the drain field's encroachment into the easement proximately caused the denial of their certificate of occupancy. The trial court denied the Hannas' motion.

Jury's verdict

The jury found for the Margitans and awarded $210,125 in lost rents and $12,119 for increased finance charges. Because the jury found that the Hannas' conduct of placing the drain field was intentional, the jury awarded the Margitans $200,000 in damages for emotional distress.

Remittitur

The Hannas moved for remittitur under RCW 4.76.030. The court made written findings and concluded that the only evidence the jury could have considered in awarding emotional distress damages was based on the Margitans' inability to refinance their credit

card debt to remodel. Accordingly, awarding $200,000 when the actual specific damage for failure to refinance was $12,119 shocked the court's conscience, was obviously motivated by passion and prejudice, and was outside the range of evidence. The court granted the remittitur and reduced the emotional distress damages to $75,000.

The Hannas appealed the jury verdict, and the Margitans cross-appealed the trial court's remittitur of damages.

MOTIONS FOR JUDICIAL NOTICE

The Hannas and the Margitans filed separate motions for judicial notice. We dispose of these issues first.

Hannas' motion

The Hannas ask this court to take judicial notice of a complaint filed in October 2017 by the Margitans against Spokane County, Spokane County Building and Planning and certain Spokane County employees. The Hannas argue that the Margitans' claims in the present case are inconsistent with claims made in the 2017 complaint. The 2017 complaint does not meet the requirements for this court to take judicial notice, and we therefore deny the Hannas' motion.

Under ER 201(b):

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Facts that a court may judicially notice are those "'facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty.'" *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) (quoting *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963)).

Here, the facts the Hannas seek to have judicially noticed do not fit this standard. Pleadings in a complaint are not indisputable facts. We therefore decline to judicially notice the complaint.

Margitans' motion

The Margitans request that this court take judicial notice of the Hannas' permit to relocate their drain field. We deny the Margitans' motion for judicial notice for the same reasons that we deny the Hannas' motion. The permit to relocate the drain field is not the subject of indisputable facts. *See CLEAN*, 130 Wn.2d at 809.

ANALYSIS

The Hannas contend that the trial court erred when it denied their CR 50(a) motion for judgment as a matter of law.

An appellate court reviews the trial court's CR 50(a) ruling on a motion for judgment as a matter of law de novo, engaging in the same inquiry as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). "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, substantial evidence exists to sustain a verdict for the nonmoving party." *Id.* "If any justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is for the jury." *Mega* v. *Whitworth College*, 138 Wn. App. 661, 668, 158 P.3d 1211 (2007).

The Hannas argue that the Margitans failed to present evidence that the drain field interfered with their 40 foot easement. They also argue that the Margitans failed to present evidence that the drain field's encroachment into their easement proximately caused the denial of their certificate of occupancy. We agree with both arguments.

Interference with easement

The Hannas assert that the Margitans presented insufficient evidence that the drain field interfered with their easement to support a jury verdict. The Margitans' central response is that the drain field's encroachment into their easement is sufficient to establish interference. We disagree.

"A servient estate owner may use his property in any reasonable manner that does not interfere with the original purpose of the easement. *Littlefair v. Schulze*, 169 Wn. App. 659, 665, 278 P.3d 218 (2012) (citing *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962)). For this reason, the Margitans' central response, that any structure in the easement establishes an actionable interference, is not supported by our jurisprudence.

Here, the Margitans had a 40 foot access and utility easement. The Margitans did not argue that the drain field interfered with their water line or any other utility. In fact, the Margitans presented no evidence that the water line was within 10 feet of the drain field, the minimum separation permitted by WAC 246-272A-0210. Nor did the Margitans argue or present evidence that the drain field interfered with their access.

Instead, the Margitans argue that the drain field was within the easement, which violates WAC 246-272A-0210's requirement of a minimum five feet of separation between an easement and a drain field. Although true, the lack of a physical separation did not interfere with the Margitans' access or utilities.

Lastly, the Margitans argue that the possibility that their water might become contaminated in the future established an actionable interference. But the possibility of future harm, unaccompanied by present damage, is not actionable. *Gazija v. Nicholas*

Jerns Co., 86 Wn.2d 215, 219, 543 P.2d 338 (1975); *Brewer v. Lake Easton Homeowners Ass'n*, 2 Wn. App. 2d 770, 780-81, 413 P.3d 16 (2018).

For these reasons, the trial court erred in not granting the Hannas' CR 50(a) motion to dismiss.

Proximate cause

The Hannas also assert that the Margitans presented insufficient evidence that the drain field proximately caused their damages. The Margitans respond that they presented a triable issue of fact and point to the testimony of the building inspector. The Margitans are partly correct; the building inspector did testify that had the drain field not encroached into the easement, the Margitans would have received a certificate of occupancy. But this snippet of testimony mischaracterizes his actual testimony.

The building inspector testified that he does not inspect anything more than two feet outside the building structure. But Mr. Margitan expressed his concern that his water might not be safe due to the proximity of the drain field to his water line. Mr. Margitan's concern caused the building inspector to consult his boss, who directed the inspector to require Mr. Margitan to provide documentation from his water purveyor or SRHD accepting the water line for residential use. So, in a manner of speaking, had the Hannas not built their drain field in the easement, Mr. Margitan would not have expressed his

concern to the building inspector, and a certificate of occupancy would have been issued. It was in this vein that the building inspector agreed that the drain field's location led to the certificate of occupancy not being issued.

We do not believe that this aspect of the building inspector's testimony warranted submission of the Margitans' claims to the jury.

> Legal causation is one of the elements of proximate causation and is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. A determination of legal liability will depend upon mixed considerations of logic, common sense, justice, policy, and precedent. Where the facts are not in dispute, legal causation is for the court to decide as a matter of law.

Crowe v. Gaston, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998) (internal quotation marks and citations omitted).

The following facts are undisputed: In April 2002, Mr. Hanna told his general contractor that the access and utility easement was 20 feet. It is undisputed that one month later, he learned that the easement was actually 40 feet wide. This was not communicated to the general contractor nor was it communicated to the subcontractor who built the on-site septic system. For this reason, a corner of the drain field encroaches 9 feet into the 40 foot easement. Provided that the water line does not crack near the drain field, drainage from the septic system cannot enter the pressurized water line. The facts are also undisputed that Parcel 3's water is public water and is thus drinkable.

Given these undisputed facts, considerations of logic, common sense, and justice lead us to conclude that Mr. Hanna's mistake in April 2002 should not result in legal liability for Mr. Margitan's August 2014 decision to express his unfounded concerns to the building inspector.

Because the Margitans presented insufficient evidence of interference and proximate cause at trial, the court erred in not granting the Hannas' CR 50(a) motion to dismiss all claims.

Reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.

PAINE HAMBLEN LLP

December 07, 2018 - 2:54 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96422-0
Appellate Court Case Title:	Allan Margitan, et ux. v. Spokane Regional Health District, et al.
Superior Court Case Number:	15-2-00545-1

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