No. 94282-0

SUPREME COURT
OF THE STATE OF WASHINGTON

HOLDEN-McDANIEL PARTNERS, LLC,

Petitioner,

v.

CITY OF ARLINGTON; WOODLAND RIDGE JOINT VENTURE; KAJIMA DEVELOPMENT CORP.; ARLINGTON COUNTRY CLUB, INC.; BNSF RAILWAY COMPANY,

Respondent.

ANSWER OF RESPONDENTS WOODLAND RIDGE JOINT VENTURE, KAJIMA DEVELOPMENT CORP., AND ARLINGTON COUNTRY CLUB, INC. TO PETITION FOR REVIEW

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I. INTRODUCTION

The meaning of "intent" is well-settled in Washington, and this case does not present an issue of substantial public interest. The Court of Appeals applied existing law to fact, and recognized Holden-McDaniel's "intentional" tort claims for what they are: straight-forward negligence claims dressed up in the garb of nuisance and trespass.

Woodland Ridge Joint Venture ("WRJV")[1] purchased the unconstructed portions of the partially-completed Gleneagle residential development project in 1989, and negotiated a "Rezone Contract" with the City of Arlington (the "City"), under which it paid the City to upgrade the City's downstream drainage facilities to accommodate stormwater from Gleneagle. WRJV commissioned an extensive master drainage report and downstream analysis in 1995 as part of its effort to exceed Arlington's then-existing "25-year storm" design standard by utilizing a "100-year storm" standard.

The downstream study determined an existing 36" drainage pipe under Holden-McDaniel's property was undersized and insufficient to handle even 25-year *pre-development* runoff from the Gleneagle site. When the City approached Holden-McDaniel about upgrading its drainage

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[1] WRJV is comprised defendants/respondents Kajima Development and Arlington Country Club. All three entities are referenced as "WRJV."

capacity, Holden-McDaniel sued the City and WRJV. The lawsuit was eventually settled and a *written* prescriptive drainage easement was recorded. WRJV then retained additional engineers to revise the stormwater system design. Holden-McDaniel claims the design was deficient, and that WRJV should have utilized certain design elements but failed to do so.

Holden-McDaniel's claims against WRJV are premised on a stormwater system that WRJV hired multiple engineers to investigate and purposefully design to *surpass* the City's standards, in an effort to *avoid* downstream flooding. The Court of Appeals correctly determined that Holden-McDaniel's complaints about that system sound in negligence. Its decision complies with established precedent and concerns the parties to this case alone. There is no justification for review.

II. COURT OF APPEALS' DECISION

WRJV does not assign error to the Court of Appeals' decision affirming dismissal of Holden McDaniel's intentional tort claim.

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals correctly apply existing precedent to determine that Holden-McDaniel's trespass and nuisance claims are duplicative of its negligence claim?

IV. STATEMENT OF THE CASE

A. WRJV PURCHASED THE GLENEAGLE DEVELOPMENT AFTER IT WAS PARTIALLY COMPLETE AND EXTENSIVELY INVESTIGATED THE DOWNSTREAM SYSTEM.

Water from the future Gleneagle development area flowed to and across Holden-McDaniel's property for decades before Holden-McDaniel purchased it, flooding the property every 20-30 years. CP 854-855, 1251-1254. By 1976, a 36" diameter underground pipe had been installed to handle the flows from Gleneagle and 67th, although even then the pipe was undersized and incorrectly sloped. CP 1606-1607.

WRJV purchased the Gleneagle Development in 1989 when the prior owner, Canus, went bankrupt after completing the first phase (Sector 1). CP 1264-1286, 1631. Sector 1 stormwater discharged to detention "pond W-1," located across the street from Holden-McDaniel's property.[2] Water from pond W-1 joined water from the remainder of pre-development Gleneagle to discharge through an existing culvert under 67th Avenue before flowing west across Holden-McDaniel's parcel through its underground 36" pipe, to a ditch running parallel and adjacent to the BNSF railroad tracks. CP 1590-1604; CP 1631. Water then flowed south

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[2] The storm water system for Sector 1, including W-1, was dedicated to the City before WRJV purchased the remainder of the development. CP 1256.

and west through a 24" pipe under the tracks to disperse and infiltrate south in a ditch on the west side of the tracks. *Id.*

In June, 1991, the City and WRJV entered into an amended Rezone Contract, which replaced the original contract between the City and Canus. CP 1310-1340. Under the new Rezone Contract, WRJV paid the City a substantial sum to upgrade the City's downstream storm water system to accommodate stormwater flows from the Gleneagle development. CP 1328-1329.

Holden-McDaniel's repeated assertion that WRJV (and the City) "never properly assessed" the downstream system or the capacity of the BNSF ditch is demonstrably untrue. WRJV engineer Triad prepared a master drainage plan in May, 1994, and determined that Holden-McDaniel's 36" pipe was insufficient to convey even *allowable* predevelopment flows from significant rainfall events. CP 1640-1709.[3] The City of Arlington required storm water conveyance systems at that time to be designed to handle at least a "25-year storm."[4] CP 1712. Triad

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[3] Triad also commissioned a **complete downstream geotechnical analysis and infiltration study of the BNSF ditch** from Terra Associates, Inc. CP 1739-1749, CP 1705-1708 (Triad's January 6, 1995, memo to WRJV reporting back on its downstream study, which confirmed the BNSF ditch was *infiltrating, detaining, and conveying,* not *capturing and retaining* water).

[4] In the mid-1990's, a "25-year storm event" or a "100-year storm event" was calculated using the Santa Barbara Urban Hydrograph ("SBUH") methodology, which incorporated the then-accepted 24-hour single event standard model. Engineers today use "continuous modeling methods," which generally produce lower

recommended that WRJV pay the additional cost to install an upgraded system across Holden-McDaniel's property capable of handling a "100-year storm" under the SBUH methodology.[5]

WRJV agreed to do this, but Holden-McDaniel refused and sued the City and WRJV. CP 1342-1357, 1719. Holden McDaniel ultimately relocated its too-small pipe[6] and provided a prescriptive drainage easement across its property:

> 4. To the extent there exists a prescriptive right to drain surface water which naturally flows to the HCI property through the existing culvert on the HCI property, said right shall be preserved through the relocated culvert to the same extent as if the culvert had not been relocated.

CP 1362. Holden-McDaniel also agreed to

> ...hold Arlington harmless from any damages occurring to HCI as result of Arlington authorizing HCI to ... reinstall a 24" x 36" drain pipe across HCI's property ... to the extent that a 24" x 36" drain pipe is inadequate to handle the flow of surface water legally conveyed to the HCI property in accordance with the common law of the state of

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allowable undeveloped outflow design rates and higher developed runoff rates than the SBUH single event method because the continuous models contemplate actual historical record rainfall events over multiple days as opposed to theoretical events lasting only 24 hours. At the time Triad conducted its work in the mid-1990's, however, continuous event modeling software was not available for Snohomish County or Washington State and the SBUH method was the accepted standard. CP 1582.

[5] Holden-McDaniel's expert Malcolm Leytham conceded that the generally accepted design standard in the 1980's through the mid-1990's required that stormwater systems be designed to handle 10-year to 25-year storms under the single-event model. CP 851-853. **At the time Gleneagle was designed, Arlington City Code required engineers to design for a 25-year event.** CP 1831.

[6] Holden-McDaniel actually installed a 24" x 36" "squash pipe," which is smaller than the previously-installed 36" diameter pipe. CP 1583.

> Washington and statutory provisions of the Arlington City Code.

CP 1364.[7]

B. WRJV RETAINED EXPERT ENGINEERS AND CONTRACTORS TO DESIGN AND INSTALL A STORMWATER SYSTEM THAT COMPLIED WITH CITY DIRECTIVES, REGULATIONS, AND INDUSTRY STANDARDS.

WRJV retained Higa Engineering to design an additional upstream detention facility when it became clear that Holden-McDaniel would not upgrade its system: pond W-2. CP 1378-1400. On September 6, 1995, Higa issued a Drainage Report for pond W-2, which stated that:

> Although the Master Plan agreement which Gleneagle has executed with the City of Arlington requires storm water runoff controls to be designed to accommodate a twenty-five year design event, this analysis provides for a far more conservative **one hundred year design event** as requested by the owners, Woodland Ridge JV.

CP 1380.

Higa met with City engineers and Public Works staff several times throughout the course of the project to discuss the design of pond W-2. CP 1402, 1719. The criteria for allowable outflow rates from Pond W-2 was provided by Barrett Consulting Group, retained by the City of

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[7] Holden-McDaniel concedes that the hold harmless agreement extended to WRJV via operation of its 1998 Release of All Claims. *See* App. Brf. at 28, n. 10 ("The release also extended the hold-harmless agreement to claims against the city's "agents, servants, heirs, executors or administrators, or **any other person, firm, corporation, association or partnership.**").

Arlington, in a letter dated December 4, 1995. CP 1576-1578. Barrett determined that the allowable **100-year** peak outflow rate from pond W-2 was 28 cfs. CP 1578. Higa's post construction calculations confirm W-2 restricted flows to the prescribed amount: 28 cfs. CP 1834.[8] Holden McDaniel now claims that pond W-2 and the upstream facilities are insufficient. However, its own expert, Dr. Malcolm Leytham, confirmed that the post-Sector 1 Gleneagle system does indeed "control the runoff from the post Sector 1 residential development for flood events up to about the 25-year event," in conformance with the then-existing Arlington City code. CP 856.

C. THE CITY SUBSTANTIALLY REVISED THE DOWNSTREAM SYSTEM BY CONSTRUCTING THE 67TH AVENUE IMPROVEMENT PROJECT.

After construction of pond W-2, the City upgraded the stormwater system between Gleneagle and Holden-McDaniel's property. In 1999, the City installed a second culvert under the railroad tracks, and in 2001 the City began the "67th Ave. Improvement Project," which included widening the roadway and significantly revising storm water outflows from pond W-1. CP 1378 CP 1751-1755. Designer Earth Tech incorporated a "v"-notch weir to limit flows to Holden-McDaniel's undersized pipe. CP

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[8] With the exception of one pond in the golf course's stormwater system, the "upstream ponds" in the Gleneagle development are not ornamental. Rather, they are functional detention systems. CP 231-276; CP 287-294.

1596-1597. Excess water was re-routed to a new regional infiltration/detention facility north of 188th street (the "triangle pond"). CP 1757-1811. WRJV had no involvement in the project.

Holden-McDaniel experienced no flooding *at all* between 2003 and 2009, though a handful of storm events after 2009 led to minor flooding on 67th, which reached Holden-McDaniel's property via its driveway. CP 1409-1413. This occurs when the triangle pond fills to above its 100-year level, at which point water pools on 67th at its low point near the Holden-McDaniel north driveway. CP 1597-1598. The City contends Holden-McDaniel insisted that the City lower the road at this location to accommodate its trucks. CP 1417-1418. Holden-McDaniel disputes this, but the condition has nothing to do with WRJV.

D. HOLDEN-MCDANIEL CAUSED ITS OWN FLOODING BY INCORRECTLY INSTALLING TWO INADEQUATELY DESIGNED ONSITE STORM WATER INFILTRATION SYSTEMS.

Holden-McDaniel retained Concept Engineers to design an onsite storm water infiltration system in 1995, however, Concept designed the system to handle only 50% of Triad's calculated allowable (i.e. pre-development) outflow for a 100 year event. CP 1594, CP 1737. Holden-McDaniel also failed to follow through with Concept's design for the infiltration system, which called for a 20 foot wide vegetative (grass) filter

strip and a safety/exclusion fence along the east edge of the filter strip. *Id.* These elements were intended to filter out silt and dust generated from trucks and vehicles driving through Holden-McDaniel's unpaved yard, but Holden-McDaniel didn't bother to incorporate these elements and the result was a slow decline of the system's ability to properly infiltrate storm water. CP 1376. Ultimately, "the system was insufficient to accommodate a rainfall event exceeding a 5- to 10-year event without surface ponding." CP 1377.

Holden-McDaniel replaced its clogged-up infiltration system in 2009 pursuant to a design by HN Lenhtinen. CP 1374-1375; CP 1813. Prior to this replacement, Holden-McDaniel sold its HCI metal building fabrication business to BlueScope, and it leased the HCI premises back to BlueScope in 2007. CP 1421-1441. The new infiltration system was designed assuming exactly the same soil, storage, operational and infiltration parameters employed by Concept in 1995, resulting in a similarly undersized system still unprotected from deterioration by sedimentation. CP 1600. As a result, Holden-McDaniel continues to experience standing, silty water which is unable to properly infiltrate even in minor rainfall events. CP 1815-1829.

This was the floodwater that actually "plagued" the property, not the clear water flowing from Gleneagle to the BNSF ditch. CP 1600-

1601; CP 1815-1829. Even so, flooding on the HCI premises had nothing to do with BlueScope's decision to shut down its operations at HCI in December, 2011, nearly three years *after* the January 2009 storm precipitating this lawsuit. *Ex. 32 to Reppart Decl.* BlueScope's representative testified that BlueScope decided to close the business and shutter the HCI brand as a result of the "GFC," or Global Financial Crisis, paying $2.6 million to Holden-McDaniel for the trouble of ending its lease. *Ex. 36 to Reppart Decl. at p. 36; Ex. 37 to Reppart Decl. Ex. 33 to Reppart Decl.*

V. PROCEDURAL HISTORY

Holden-McDaniel filed its initial Complaint on January 5, 2011. CP 2126-2132. After four years of extensive discovery, investigation, modeling and analysis, the parties filed various cross motions for summary judgment. *See, e.g.,* CP 2488-2531; 2559-2586; 2710-2720; 2536-2558, and 2648-2663. The trial court issued its Omnibus Order on April 24, 2015, dismissing Holden-McDaniel's claims. CP 41-62. Holden-McDaniel's Motion for Reconsideration was denied. CP 34-35.

The Court of Appeals restored many of Holden-McDaniel's claims in its unpublished decision, *Holden-McDaniel Partners, LLC v. City of Arlington,* 197 Wn. App. 1027 (2017), however, the Court upheld dismissal of Holden-McDaniel's intentional tort claims for nuisance and

trespass. The Court properly recognized that Holden-McDaniel's claim that WRJV and the City failed to properly design the stormwater system cannot be transfigured into knowledge that flooding was "substantially certain" to occur simply because the design (allegedly) failed. *Id.* Holden-McDaniel's claims sound in negligence.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

Holden-McDaniel submits its petition under RAP 13.4(b)(1), (b)(2) and (b)(4), which support review only if a decision of the Court of Appeals "is in conflict with a decision of the Supreme Court," "is in conflict with a published decision of the Court of Appeals," or if the "petition involves an issue of substantial public interest that should be determined by the Supreme Court." In this case, the Court of Appeals correctly applied established precedent to circumstances that are commonplace, and there is no basis for review.

A. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH A DECISION OF THE WASHINGTON SUPREME COURT

Holden-McDaniel contends the Court of Appeals' decision conflicts with *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 692–93, 709 P.2d 782 (1985), a case the Court of Appeals explicitly relied on, because WRJV supposedly knew it's conduct was "substantially certain" to result in flooding, or that there was a high probability of

increased flooding. *Holden-McDaniel Partners, LLC v. City of Arlington,* 197 Wn. App. 1027 (2017). According to Holden-McDaniel, "substantial certainty" and "high probability" can be established because WRJV's downstream studies revealed Holden-McDaniel's conveyance pipe was too small to convey pre-development flows of stormwater from significant rainfall events. *Petition at 16.*

This case is nothing like *Bradley,* where the defendant copper smelter had "known for decades" that "sulfur dioxide and particulates of arsenic, cadmium and other metals were being emitted from the tall smokestack," and the parties even stipulated that the particulates were being deposited on the plaintiffs' land. *Bradley,* 104 Wn.2d at 680-682. In this case, WRJV's awareness of deficiencies in the downstream stormwater system is what led it to retain not one but two stormwater engineers to design solutions for the partially completed development, and it is Holden-McDaniel's contention that the engineers *failed to do so properly* which forms the basis of its nuisance and trespass claims. Holden-McDaniel's First Amended Complaint asserts that:

> The Gleneagle Developers were **negligent** in their design of the Gleneagle development and the storm water system serving the development. Their activities constitute an ongoing **nuisance**; have resulted in the **trespass** of surface waters onto the Holden-McDaniel Property; and create an immediate and concrete threat of future trespass.

Ex. 40 to Reppart Decl. at ¶ 21. Notably, Holden-McDaniel did not plead intentional conduct.[9] "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847, 850 (1999), quoting *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986).

To establish intentional **trespass**, a plaintiff must show (1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages. *Bradley*, 104 Wn.2d at 692–93. The Court of Appeals properly applied *Bradley* when it recognized that "[i]ntent requires proof that the actor "desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Holden-McDaniel Partners, LLC*, 197 Wn. App. at *8, citing *Bradley*, 104 Wn.2d at 682. "At a minimum," the Court of Appeals stated, "this consists of proof that the actor has knowledge that the consequences are certain, or substantially certain, to result from his conduct and proceeds in spite of the knowledge." *Id.*

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[9] Holden-McDaniel's failure to plead intentional conduct was raised by WRJV in its initial motion for summary judgment. CP 2513.

Applying *Bradley*'s definition of "intent" to the facts of this case, the Court stated:

> HM is essentially arguing that the City and WRJV knew that the culvert was insufficient and failed to take that into account when it designed and implemented the various elements of a stormwater management system. A claim for failure to act sounds in negligence and does not support the intentional act needed for trespass. *Estate of Price v. City of Seattle*, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001).

Holden-McDaniel Partners, LLC, 197 Wn. App. at *8.

The Court of Appeals is correct. Holden-McDaniel's claim is that WRJV should have designed the system differently, not that it subjectively set out to flood Holden-McDaniel's property. This is the precise sort of "failure to act" envisioned in *Estate of Price v. City of Seattle*, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001). In that case, the owners of homes damaged by land sliding from the upper slope of a bluff sued the city, as the upland owner, for trespass, among other claims. Like Holden-McDaniel, the homeowners relied on *Bradley* for the proposition that the intent element of trespass can be shown where the actor "knows that the consequences are certain, or substantially certain, to result from his act." *Bradley*, 104 Wn.2d at 682. The homeowners argued that the City knew that a landslide was a substantially certain consequence of its failure to take preventive measures. But, the *Price* Court stated:

> ...they have provided no authority for the proposition that an "act", as used in defining the elements of trespass, means a failure to act. Stated in terms of a failure to act, their trespass claim is no different from their negligence claim. Cf. *Lewis v. Krussel*, 101 Wash.App. at 183, 2 P.3d 486 (nuisance claim in case involving fallen trees, grounded in inaction, need not be considered separately from the negligence claim). As there is no evidence that the City acted to cause the landslide, the trespass claim also fails.

Price, 106 Wn. App. at 660.

The same scenario is presented by Holden-McDaniel in this case. There is no dispute that Holden-McDaniel's pipes (both of them) were too small to convey allowable *pre-development* flows—facts conceded by Holden-McDaniel's expert. CP 1590-1604; CP 1294-1295. WRJV did not create the water naturally flowing toward Holden-McDaniel's property. Rather, it tried to design around Holden-McDaniel's self-imposed pinch point. Holden-McDaniel's contention that WRJV failed to employ the *right* design is simply a failure to act, which cannot, as the *Price* Court stated, support a cause of action for intentional trespass.

B. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANOTHER PUBLISHED COURT OF APPEALS DECISION

Holden-McDaniel cites several Court of Appeals decisions which, it contends, support *Bradley's* "unambiguous statement" that "intent" encompasses consequences "which the actor believes are substantially certain to follow from what he does..." *Bradley*, 104 Wn.2d at 682,

including *Hurley v. Port Blakely Tree Farms LP,* 182 Wn. App. 753, 332 P.3d 469 (2014), *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 213 P.3d 619 (2009), and *Seal v. Naches-Selah Irr. Dist.*, 51 Wn. App. 1, 751 P.2d 873, 875 (1988). While these cases recite this definition of "intent," they do not support Holden-McDaniel's position and do not conflict with the Court of Appeals' decision in this matter.

In fact, not one of these cases resulted in a finding of intentional conduct, and the Courts' opinions disclose why:

- *Hurley v. Port Blakely Tree Farms LP,* 182 Wn. App. at 72:

> "...appellants argue that they satisfied the requirements for intentional trespass based on Respondents' intentional act of cutting down trees. We disagree. The "intent element of trespass can be shown where the actor 'knows that the consequences are certain, or substantially certain, to result from his act.' " *Price ex rel. Estate of Price v. City of Seattle*, 106 Wash.App. 647, 660, 24 P.3d 1098 (2001) (citing *Bradley*, 104 Wash.2d at 691, 709 P.2d 782). Even viewed in the light most favorable to Appellants, the nonmoving party, there is no evidence in the record that Respondents knew or were substantially certain that their logging activities would result in a landslide. The trial court did not err in dismissing the trespass claim as duplicative of the negligence claim."

The same is true in this case. There is no evidence that WRJV knew or was "substantially certain" that its extensive efforts to design a

stormwater system that exceeded City standards would result in downstream flooding – a consequence it made every effort to avoid.

- *Grundy v. Brack Family Trust*, 151 Wn. App. at 569:

> "The Bracks intentionally raised their bulkhead. But the issue for intentional trespass is whether they had "'knowledge that [raising their bulkhead would] to a substantial certainty result in the entry of the [sea water and debris]' " onto Grundy's property. *Bradley*, 104 Wash.2d at 682, 709 P.2d 782 (quoting 1 Restatement (Second) of Torts § 158 cmt. i at 279 (1965)). Grundy's evidence on the elements of intentional acts and foreseeability also fails."

Holden-McDaniel's intentional trespass claim against WRJV fails for similar reasons. There is no evidence that WRJV knew its design efforts were substantially certain to result in flooding. The evidence shows WRJV chose to design to a 100-year flood standard, well above the 25-year standard in place at the time, for the purpose of *avoiding* flooding.

- *Seal v. Naches-Selah Irr. Dist.*, 51 Wn. App. at 6:

> "We disagree with the Seals' assertion under *Zimmer* and *Bradley* that the District was culpable of intentional trespass because it knew the canal was flooding their property and failure to repair such damage would cause extensive harm to their orchard. As discussed, the record discloses affirmative measures taken by the District to both prevent and alleviate seepage problems on the Seals' property. There has been no showing by the Seals to equate the District's conduct with a desire to allow water to seep into the orchard. The evidence indicates only negligence on the part of

> the District. Therefore, the Seals' claim of intentional trespass must fail."

Holden-McDaniel's intentional trespass claim also fails. Like the District in *Seals,* the record is replete with WRJV's "affirmative measures" to avoid flooding – ineffective conduct may equate with negligence (which is denied), but not with a desire to allow flooding or even a "substantial certainty" that flooding would occur.

More importantly, not one of the three cases cited by Holden-McDaniel articulated a legal premise that conflicts with the Court of Appeals' decision in this case. The Court of Appeals relied on the very same precedent cited in *Hurley, Grundy* and *Seal.* The cases are consistent, and the Court of Appeals' application of the law to the facts is correct. Holden-McDaniel just doesn't like the result.[10]

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[10] The trial court also dismissed Holden-McDaniel's "intentional nuisance" claim. Washington courts treat nuisance just like any other negligence claim when it is premised on an unlawful act or omission of a duty. *Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002) (landowners brought action against city for inverse condemnation, trespass, nuisance, negligence, and waste after their property flooded; the court recognized that the nuisance claim "is simply a negligence claim presented in the garb of nuisance."). *See also Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 546, 871 P.2d 601 (1994), overruled on other grounds by *Phillips v. King County*, 87 Wn. App. 468, 943 P.2d 306 (1997) (a "party's characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls.").

C. HOLDEN-MCDANIEL'S PETITION DOES NOT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

The Court of Appeals' decision presents no "conflict" about the meaning of "intent," and the issues in this case do not invoke anything of "substantial public interest." Stormwater systems concerning just two neighboring properties in Arlington are hardly "a matter of continuing and substantial interest," nor do they "present[] a question of a public nature which is likely to recur" for which "it is desirable to provide an authoritative determination for the future guidance." *See, e.g., State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005). If anything, the facts of this case merit *support* of the Court of Appeals' decision without comment, if only because nearly *every* stormwater design requires consideration of downstream complications that must be addressed. WRJV maximized its efforts to design and install a stormwater system that complied with all applicable codes and requirements. There is NO support for the argument that WRJV's *intentional plan* was to flood or allow flooding on Holden-McDaniel's property, or that it's alleged failure to employ a "better plan" equates to an intentional tort. The only *intentional* misconduct was Holden-McDaniel's *intentional* installation of a pipe that was too small to accept historical pre-development flows—a decision entirely out of WRJV's control.

The issues in this case concern the parties in this case alone. There is nothing of "substantial public interest" in the Court of Appeals' decision, which is why it declined the invitation to publish. *Mot. To Publish, App. A, Order to Petition for Review.* There is no separate basis for review under RAP 13.4(b)(4).

VII. CONCLUSION

The Court should decline Holden-McDaniel's invitation to establish an automatic presumption that mere knowledge of a downstream impediment equates to an intentional tort should a stormwater system fail. Holden-McDaniel's petition lacks merit, and it should be denied.

VIII. REQUEST FOR FEES AND REASONABLE EXPENSES

WRJV respectfully requests the Petition for Review be denied and that the Court issue an order awarding its costs under RAP 14.3.

RESPECTFULLY SUBMITTED this 28th day of April, 2017.

FORSBERG & UMLAUF, P.S.

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing **ANSWER OF RESPONDENTS WOODLAND RIDGE JOINT VENTURE, KAJIMA DEVELOPMENT CORP., AND ARLINGTON COUNTRY CLUB, INC. TO PETITION FOR REVIEW** on the following individuals in the manner indicated:

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SIGNED this 28th day of April, 2017, at Seattle, Washington.

Lynda T. Ha