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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CHARLES WOLFE, a single person, JANICE WOLFE, a single person,  
and JOHN and DEE ANTTONEN, and the marital community comprised  
thereof,

Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## **I. INTRODUCTION**

Petitioners were unable to meet the burden of proof at trial. They contend they presented more than sufficient evidence at trial to demonstrate that the Naselle River Bridge is a public nuisance. But their argument cherry-picks the trial court's findings that are favorable to Petitioners and overlooks the findings and conclusions that they failed to establish causation as to floodplain expansion, absence of lawful authority, impact to the entire community, and pollution as matters of fact. Because Petitioners' trial case was so deficient, and because the Court of Appeals' affirmance does not conflict with any binding precedent, this Court should deny review.

## **II. STATEMENT OF THE CASE**

In 1926, the Washington State Department of Transportation (WSDOT) (then the Department of Highways) commissioned the construction of a bridge to accommodate a highway now known as SR 4. CP at 1466. The bridge was designed to span the Naselle River, approximately 200 feet. CP at 1466. In order to elevate the roadway to accommodate this span, an approximate 600 foot earth-fill embankment (approach embankment) was built on the northwesterly bank of the Naselle River. CP at 1466-67.

In 1985, WSDOT determined the bridge needed replacement. CP at 1467. The 1985 bridge was widened to thirty-six feet, and raised six

feet to obtain flood clearance. CP at 1467. The approach embankment was also raised six feet. CP at 1467. Like the 1926 bridge, the 1985 bridge cleared a span of approximately 200 feet, which cleared the channel of the Naselle River flowing underneath. CP at 1467. Aside from a repair project to one of the bridge piers in 1998, WSDOT has not made any significant changes to the bridge since it was replaced in 1985. CP at 1467.

Petitioners Charles and Janice Wolfe first purchased a parcel of real property (Wolfe property) in 2004. CP at 1467. They then purchased a neighboring parcel that abuts the Wolfe property to the east in 2004, eventually selling it to John and Dee Anttonen (Anttonen property) in 2007. CP at 1467. Both the Wolfe property and the Anttonen property experienced recurring flooding and bank erosion that Petitioners maintain was caused by the bridge's piers redirecting water toward their property. CP at 1468. In 2010, Wolfe filed a lawsuit against WSDOT in Pacific County Superior Court (*Wolfe I*<sup>1</sup>), alleging inverse condemnation, negligence, and nuisance. *Wolfe I* was dismissed at summary judgment. CP at 111-12. The Court of Appeals affirmed that dismissal on appeal. *Wolfe v. Dep't of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 (2013).

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<sup>1</sup> *Wolfe & Antonnen v. Dep't of Transp.*, Pacific County Superior Court No. 10-2-00180-0.

Petitioners then filed this separate lawsuit (*Wolfe II*) in Thurston County Superior Court in 2014, alleging that the bridge constituted a public nuisance. CP at 10-34. The trial court denied WSDOT's summary judgment motion, and held two claims could move forward: (1) the "obstruction claim"—that the bridge was obstructing the Naselle River floodplain in violation of RCW 7.48.140(3); and (2) the "pollution claim"—that the obstruction caused erosion, which in turn caused excessive amounts of sediment to deposit into the Naselle River, arguably polluting the Naselle River in violation of RCW 7.48.140(2). CP at 1417-18.

*Wolfe II* proceeded with a bench trial on October 10, 2016. RP 1, Oct. 10, 2016. Over the course of three days, Petitioners called four witnesses: Col. John Anttonen (Col. Anttonen) (RP 44-87, Oct. 10, 2016), Russ Lawrence (Lawrence) (RP 88-250, Oct. 10-11, 2016), Charles Wolfe (Wolfe) (RP 301-399, 406-586, Oct. 11-12, 2016), and Kimberly Schaumburg (Schaumburg) (RP 587-606, 612-668, Oct. 12, 2016).

Col. Anttonen testified as to the flooding events his property experienced since he acquired his portion of the property, as well as the amount of erosion to his riverbank. RP 63:11-66:15, Oct. 10, 2016. He also testified as to his research into what might be causing the flooding and erosion and how those impacts might be remediated. RP 59:1-9, 61:4-7, 69:23-73:10, Oct. 10, 2016.

Lawrence is an engineer hired by the Petitioners to review reports conducted into potential causes of and remedies for the flooding and erosion on the Wolfe property. RP 105:15-106:6, Oct. 10, 2016. He offered opinion testimony that the bridge and its approach embankment are obstructing the Naselle River floodplain, which is affecting how the Naselle River naturally migrates over time. RP 166:3-7, Oct. 10, 2016. He testified that this obstruction causes water to flow through the bridge during periods of high flow (flood events) at a faster rate and at a greater volume since the water cannot access the whole floodplain to flow downstream. RP 200:12-23, Oct. 10, 2016.

Steven Zaske (Zaske) (one of WSDOT's witnesses, called out of order<sup>2</sup>) testified as to his experience working for WSDOT and his knowledge of the bridge's reconstruction project in 1985, including what environmental compliance measures WSDOT performed as part of the project. RP 263:22-24, 264:17-265:13, 268:15-21, Oct. 11, 2016.

Wolfe testified as to his personal observations as an owner of the Wolfe property; specifically, how often the property floods (RP 369:17-370:7, Oct. 11, 2016) and how much erosion has occurred since he purchased the property. RP 323:2-11, Oct. 11, 2016. He testified about his

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<sup>2</sup> Petitioners appealed the trial court's ruling permitting Zaske to be called out of order; the Court of Appeals affirmed the trial court's decision. Unpub. Op. at 17-18. Petitioners do not assign error to that ruling in its Pet. for Rev.

investigation into what was causing the flooding and erosion, and his plans to protect the riverbank from additional erosion. RP 324-330, Oct. 11, 2016. Through his communications with Pacific County personnel in 2007, Wolfe learned he would need several permits to perform bank stabilization work within a fish-bearing stream. RP 338-39, Oct. 11, 2016. He also testified about his communications with WSDOT about these issues, including his public records requests. *See generally* RP 340-354:21, Oct. 11, 2016.

Wolfe explained his motivation for seeking WSDOT's permit applications and approvals for the bridge; to his understanding, WSDOT would need the same permits Wolfe was required to obtain before the bridge was rebuilt. RP 345-46, Oct. 11, 2016. However, no foundation was laid for Wolfe to opine that WSDOT was in fact, required to obtain the same permits in 1985 that he was required to obtain in 2007. *Id.* Additionally, no foundation was laid for him to opine on whether the bridge caused the increased flooding and erosion. RP 316-17, Oct. 11, 2016.

Schaumburg, a fish biologist consultant, testified about her personal observations of the Naselle River and Salmon Creek near the Petitioners' property, as well as her review of Lawrence's report. RP 588:21-22, 591:14-595:1, 617:17-22, 621:18-623:10, Oct. 11-12, 2016. She testified that "scour" of a riverbank by the river's flow increases the amount of sediment in the river, which can negatively affect fish habitat. RP 623:1-624:18,



Oct. 11, 2016. However, Schaumburg admitted that her site visit of the Petitioners' property and the bridge was limited to ninety minutes, she offered no opinion as to the Naselle River's water quality, and she took no water samples. RP 658:22-659:3, Oct. 12, 2016. Ultimately, she described some indications of poor water quality and excess sediment in the Naselle River, but did not offer opinion testimony as to whether the bridge was causing these conditions. RP 661:13-15, Oct. 12, 2016.

After Petitioners rested, WSDOT moved for involuntary dismissal. RP 688:1-9, Oct. 12, 2016. WSDOT argued that Petitioners failed to establish that the bridge's obstruction of the floodplain, even if taken as true, was not causing any actionable damage as a matter of fact. RP 690:20-22, Oct. 12, 2016. WSDOT also argued that Petitioners failed to establish the "special injury" element since they did not present evidence that the bridge caused the Federal Emergency Management Agency (FEMA) floodplain maps to expand the floodplain area to include the Wolfe property. RP 696:8-16, Oct. 12, 2016. Finally, WSDOT argued that Petitioners did not present any evidence that: (a) the bridge was the cause of increased flooding of the Wolfe property; and (b) the change in the floodplain maps that FEMA maintains for flood insurance purposes were amended as a result of the bridge's construction in 1926 or its reconstruction in 1985. RP 696:10-16, Oct. 12, 2016.

The trial court ruled on WSDOT's motion to dismiss on October 17, 2016. RP 709:6-748:12, Oct. 17, 2016. It found that Petitioners had put forth sufficient evidence (through the Lawrence testimony and exhibits) that the bridge and its embankment were, in effect, obstructing the Naselle River's floodplain. RP 725:25-726:16, Oct. 17, 2016. The trial court also found that this obstruction was affecting the Naselle River's migration and constricting its passageway, which was having an impact downstream on Wolfe's property through increased erosion. RP 726:17-727:2, Oct. 17, 2016.

However, the trial court found that Petitioners did not establish a "causal link" between the bridge and the expansion of the Naselle River's floodplain. RP 728:5-12, Oct. 17, 2016. The trial court stated:

It is important for the Court to note that I didn't hear expert testimony on floodplains and causation. I didn't hear Mr. Lawrence offer such opinion. He documented the changes, but I didn't hear that, within his expertise or within his opinion that he offered, that he was able to say that the flooding events that have been described and that the change in the floodplain designation is caused or has been caused by the bridge mechanisms.

RP 728:13-21, Oct. 17, 2016.

Next, the trial court turned to whether the bridge (as a floodplain obstruction) was built or maintained without legal authority. The trial court found that Petitioners did not offer facts to support the claims that: (1) the Code of Federal Regulations (C.F.R.) provision dealing with a no-rise

certification for structures that increase the Base Flood Elevation (BFE) is applicable to this type of infrastructure; and (2) even if the C.F.R. applied, Wolfe did not present competent evidence that the bridge, in fact, increased the BFE. RP 731:15-733:13, Oct. 17, 2016.

While the trial court acknowledged it could “stop” its analysis since Petitioners did not establish lack of legal authority, it continued its analysis regarding the erosion of the Wolfe property to determine whether the erosion was impacting the entire community or neighborhood, which is an essential element to public nuisance. RP 733:19-736:13, Oct. 17, 2016.

Ultimately, the trial court concluded:

[My] conclusion, based upon the evidence, is that it does not support a finding that the nuisance, the obstruction, and the injury that have been documented impact the entire community or the neighborhood. And so, therefore, based upon the first prong, I am finding that there is no evidence to support the claim of a public nuisance.

RP 737:1-7, Oct. 17, 2016.

The trial court then took up Petitioner’s “pollution” claim under RCW 7.48.140(2). The trial court considered Schaumburg’s testimony, finding that while Schaumburg described her observations and experience as to how “disconnected migration zones” can impact water quality, she did not opine that the bridge caused the impacts she described, and therefore

causation was not established. RP 740:18-741:5, Oct. 17, 2016. More specifically:

[T]he Court ultimately concludes that it is not reasonable to infer that there are specific water quality concerns or fish life or aquatic life impacts in the area from the bridge based upon all of her testimony taken as a whole. Again, she did not offer any evidence of testing or measuring, either measuring a specific elevated increase in the specific area or measuring a change since the bridge was located there and since the 1985 work was done.

RP 740:22-741:5, Oct. 17, 2016.

Based on this ruling, the trial court entered Findings of Fact and Conclusions of Law, dismissing all of Petitioner's public nuisance claims. CP at 1503-12. Petitioners appealed the dismissal to Division I of the Court of Appeals. CP at 1833-1845. The Court of Appeals unanimously affirmed the trial court's dismissal, holding that substantial evidence supported the trial court's findings of fact, and those findings in turn supported the trial court's conclusions of law. Unpub. Op. at 1. This timely Petition for Review (Pet. for Rev.) followed that decision.

### **III. RESTATEMENT OF THE ISSUES**

This case does not warrant review, but if review is granted, four issues are presented:

A. Does a public nuisance claimant alleging pollution of a body of water under RCW 7.48.140(2) meet the burden of proof when no

evidence is presented to show that the alleged “source” of pollution is, in fact, causing the pollution alleged?

B. Does a public nuisance claimant alleging floodplain obstruction in violation of RCW 7.48.140(3) meet the burden of proof when no evidence is presented to show, as a matter of fact, that the obstruction exists without “lawful authority?”

C. Do a trial court’s findings that a permanent structure (like a bridge) is altering the flow of a river, obstructing a floodplain, and contributing to erosion of a downstream owners’ riverbank relieve the downstream owners’ from their burden of proving the structure was constructed without lawful authority, is the cause of the floodplain’s expansion, or is the cause of alleged pollution (in this case, sediment from the eroded riverbank)?

D. In order to establish a public nuisance claim for pollution under RCW 7.48.140(2), may a plaintiff prevail even though the plaintiff presented no evidence at trial that: a) the body of water is, in fact, polluted; or b) that the alleged nuisance is, in fact, the cause of the pollution?

#### **IV. ARGUMENT**

The Court of Appeals correctly upheld the trial court’s dismissal of Petitioners’ claims because Petitioners failed to present sufficient evidence at trial. This Court should not entertain Petitioners’ request to change the

law to make it easier to prove public nuisance absent causation evidence or proof of lack of unlawful authority. Petitioners do not point to any credible conflict between this case and established legal precedent, nor does this case raise issues of substantial public interest. Thus, review ought to be denied.

**A. Standard of Review**

This Court allows discretionary review of a decision terminating review in limited circumstances. RAP 13.4. Petitioners allege that the unpublished opinion in this case is in conflict with decisions of this Court “and the Supreme Court of the United States.” Pet. for Rev. at 12. RAP 13.4 allows for review where of a Court of Appeals decision that may be in conflict with a prior Washington appellate decision, but RAP 13.4 does not treat alleged conflict with a United States Supreme Court decision as a basis for discretionary review. Regardless, as explained below, this case is not in conflict with any prior decision of any court.

**B. This Case Does Not Conflict with Any Binding Precedent**

Petitioners indirectly contend that the unpublished opinion conflicts with *Dep’t of Ecology v. Jefferson Cty. PUD No. 1*, 121 Wn.2d 179, 187, 849 P.2d 646 (1991), and its holding that altered stream flows may constitute “pollution” under the Clean Water Act (CWA). Even if that case was on point, neither the trial court nor the Court of Appeals made a finding or conclusion adverse to the *Dep’t of Ecology* case.

In *Dep't of Ecology*, the City of Tacoma and the local public utility district (City) applied for a "Section 401" permit from the Department of Ecology (Ecology) in order to divert water from the Dosewallips River to operate a hydroelectric power plant, then return the water to the river downstream. *Id.* at 184. Ecology granted the Section 401 permit on the condition that the City maintain minimum stream flows for the length of the river between the point of diversion for the plant and where the water is returned downstream. *Id.* The City appealed, arguing that Ecology's authority under Section 401 to regulate water quality standards was limited to pollution and discharges. *Id.* at 188. This Court disagreed, holding that the CWA's definition of pollution is "extremely broad" and includes "man-induced alteration of streamflow levels." *Id.*

In this case, neither the Court of Appeals nor the trial court made any findings or conclusions to the contrary. Petitioners did not contend that alteration to stream flows (man-made or otherwise) is "pollution" for purposes of the CWA or Washington's nuisance statute; rather, they argued that sedimentation from bank erosion is "pollution." The Court of Appeals recognized that excess sedimentation may constitute "pollution" under RCW 7.48.140(2) if water quality and habitability is negatively affected. Unpub. Op. at 15. However, the Court of Appeals affirmed the trial court's conclusion that RCW 7.48.140(2) requires "evidence of pollution being

introduced into a river that renders the river impure and that causes injury to people,” and its finding that no such evidence was produced. *Id.* (internal quotations omitted). As the Court of Appeals explained, Petitioner’s expert, Schaumburg, “only testified to the possible effects of increased sedimentation in the water, without offering any evidence of an increase in sedimentation below the bridge.” Unpub. Op. at 16.

Petitioners offered no evidence that the bridge is causing excessive amounts of sediment to enter the Naselle River through erosion of their property.<sup>3</sup> They rely entirely on the trial court’s findings that: a) their property is eroding; and b) the erosion is caused by the obstructed floodplain, which is attributable to the bridge and its approach embankment. *See* CP at 1507 (Findings of Fact 1.26-1.30). They contend this is all that is needed to prove a RCW 7.48.140(2) pollution claim. As discussed above, the *Dep’t of Ecology* case does not support that contention, nor does any other decision of this Court. The trial court properly concluded that Petitioners had not proved all elements of their RCW 7.48.140(2) claim and the Court of Appeals was correct in affirming the trial court. The Court of

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<sup>3</sup>Petitioners allege that the trial court found WSDOT was responsible for “32,000 cubic yards of dirt” avulsing into the Naselle River since the bridge was initially built, and that “[t]he numbers are not in dispute.” Pet. for Rev. at 12-14. Those numbers are not in dispute because Petitioners never offered them at trial; at no point did any witness testify as to the specific amount of sediment that had been deposited into the Naselle River, and the trial court did not make any finding on that issue. *See* CP at 1504-1509.



Appeals decision is consistent with legal precedent and need not be reviewed here.

Neither is the unpublished opinion in conflict with *Moore v. Steve's Outboard Servs.*, 182 Wn.2d 152, 339 P.3d 169 (2014). In *Moore*, neighboring property owners sued the operator of an outboard motor repair service for nuisance *per se*, alleging the operator was conducting the business without proper permits. *Id.* at 153-4. The trial court found for the operator because it found that the neighbors did not prove they had suffered damages; it made no finding as to whether the operator violated any laws or failed to obtain any required permits. *Id.* at 154. The Court of Appeals reversed as to the nuisance *per se* claim, holding that if the operator did fail to obtain permits that would constitute nuisance *per se*.

This Court disagreed. Distinguishing the *Moore* case from *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 922 P.2d 115 (1996), the Court explained that the nuisance condition in *Tiegs*—pollution of groundwater—was the same condition that was prohibited by the controlling statute that required a permit. *Tiegs*, 182 Wn.2d at 155-56. On the other hand, the conditions identified in *Moore* (noise, fumes, and traffic) were incidental to the alleged failure to obtain a permit (there, a Shoreline Management Act permit). *Id.* This Court also explained that although operating a business like the one in *Moore* may become a nuisance in fact if noise, fumes, and

traffic become unreasonably burdensome to the community, it is not a nuisance “at all times under all conditions” simply because a permit was not obtained. *Id.* at 156-57.

In this case, Petitioners’ take as a given that WSDOT was required to obtain a permit to obstruct the Naselle River floodplain. Pet. for Rev. at 16. However, the trial court correctly found that Petitioners put forth no evidence to substantiate their claims that WSDOT was required to obtain a permit to obstruct the floodplain in 1985 and failed to do so. CP at 1508 (Findings 1.35-1.37); Unpub. Op. at 14.

Petitioners argue that because the courts in *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984), and *Tiegs* did not require “any expert explanation of legal requirements/prohibitions applicable to defendants,” they should be excused from doing so in this case. There are two problems with this argument. First, it is unclear from the factual recitations in those decisions how the facts surrounding permit requirements were entered into the trial court record. *Miotke*, 101 Wn.2d at 307-321; *Tiegs*, 83 Wn. App. at 411-415. Second, and more importantly, even if expert testimony is not required, as Petitioners argue, *Miotke* and *Tiegs* both required their respective plaintiffs to present some evidence of actionable nuisance. The Court of Appeals in this case explicitly held that “[Petitioners] failed to offer any credible evidence as to which permits were

required at the time the bridge was built, or that WSDOT violated any permit procedures.” Unpub. Op. at 14. Wolfe’s testimony as to what he believed were the required permits was not sufficient; “[c]iting to statutes alone does not specify what permits were required administratively at the time.” *Id.* And, as the trial court found, Petitioners’ reliance on 40 C.F.R. § 60.3(d) for the claim that WSDOT was required to obtain an “engineered no-rise certification” was “not clearly established as a matter of fact.” CP at 1508. This distinguishes *Wolfe II* from *Miotke* and *Tiegs* and does not warrant further review by this Court.

**C. No Issue of Substantial Public Interest Is Raised by This Case**

Any case, when viewed in its broadest terms, may be construed to present issues of public interest. But RAP 13.4(b)(4) requires the Court to narrow its focus on whether review of the legal issues presented would have far-reaching impacts on our jurisprudence that merits the Court’s attention. That is not the case here.

This case was decided by the trial court acting as the trier of fact. The trial court found that Petitioners failed to present sufficient evidence that the bridge was a public nuisance, and the Court of Appeals held that substantial evidence supported those findings, which is the appropriate standard of review. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561,

573, 980 P.2d 1234 (1999). This confines the analysis to the specifics of the case and does not raise broader public policy issues.

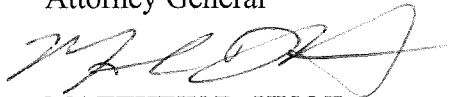
Petitioners contend, without citation to the record, that the bridge's obstruction of the floodplain impacts all property owners within the floodplain. Pet. for Rev. at 18. This ignores the trial court's finding that Petitioners failed to present sufficient evidence that the erosion caused by the bridge "extended to the entire community or broader neighborhood than the [Petitioners]." CP at 1508. Consequently, this case is limited to Petitioners, WSDOT, and the specific facts presented to the trial court.

#### V. CONCLUSION

Petitioners have offered no compelling reason to resurrect their dismissed trial case on appeal. The Court of Appeals decision is not in conflict with any decision of this Court, and no issues of substantial public interest are implicated by the trial court's dismissal or the Court of Appeals' unpublished opinion. This Court should deny the petition.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of October, 2018.

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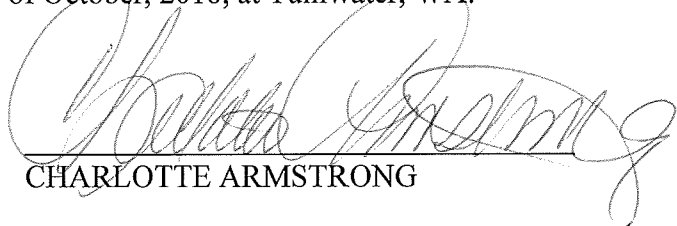
**CERTIFICATE OF SERVICE**

I certify that I served a copy of this document by Electronic Mail  
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 4th day of October, 2018, at Tumwater, WA.



CHARLOTTE ARMSTRONG

**ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION**

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