

NO. 49729-8-II

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

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

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Respondent.

RESPONDENT'S OPENING BRIEF

ROBERT W. FERGUSON
Attorney General

Matthew D. Huot
Assistant Attorney General
WSBA No. 40606
PO Box 40113
7141 Cleanwater Drive SW
Olympia, WA 98504-0113
(360) 586-0641
OID No. 91028

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....1

III. ISSUES PRESENTED.....11

IV. STANDARD OF REVIEW.....12

V. ARGUMENT.....13

 A. Public Nuisance Law.....14

 1. At common law, floodplain obstruction is not a valid nuisance.....15

 2. Water pollution as a public nuisance.....17

 B. Wolfe Did Not Prove Public Nuisance.....18

 1. Wolfe did not prove “lack of legal authority”.....19

 2. Wolfe did not prove injury to the “entire community”.....20

 3. Wolfe had the burden to prove causation.....21

 C. No Procedural Errors at Trial.....23

VI. CONCLUSION.....27

TABLE OF AUTHORITIES

Cases

<i>City of Walla Walla v. Conkey</i> , 6 Wn. App. 6, 492 P.2d 589 (1971).....	18
<i>Commonwealth Real Estate Services v. Padilla</i> , 149 Wn. App. 757, 205 P.3d 937 (2009).....	13
<i>Grundy v. Thurston Cty.</i> , 155 Wn.2d 1, 117 P.3d 1089 (2005).....	19
<i>Hector v. Martin</i> , 51 Wn.2d 707, 321 P.2d 555 (1958).....	24
<i>King v. Snohomish Cty.</i> , 146 Wn.2d 420, 47 P.3d 563 (2002).....	22
<i>Mitoke v. City of Spokane</i> , 101 Wn.2d 307, 678 P.2d 803 (1984).....	17
<i>N. Fiorito Co. v. State</i> , 69 Wn.2d 616, 419 P.2d 586 (1966).....	12
<i>NW Wholesale, Inc. v. PAC Organic Fruit, LLC</i> , 184 Wn.2d 176, 357 P.3d 650 (2015).....	24
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 954 P.2d 877 (1998).....	22
<i>Wash. Fed. Savings & Loan Assoc. v. McNaughton</i> , 181 Wn. App. 281, 325 P.3d 383 (2014).....	21
<i>Wilson v. Overlake Hosp. Med. Ctr., Inc.</i> , 77 Wn. App. 909, 895 P.2d 16 (1995).....	23
<i>Wolfe v. Dep't of Transp.</i> , 173 Wn. App. 302, 293 P.3d 1244 (2013).....	3

Statutes

RCW 7.48.010 14

RCW 7.48.120 15

RCW 7.48.130 12, 15, 20

RCW 7.48.140(2)..... 11, 16

RCW 7.48.140(3)..... 15, 19

RCW 7.48.150 15, 20

Rules

CR 41(b)(3)..... 12

Federal Regulations

44 C.F.R. § 60(3)(d)(4)..... 19

Other Authorities

I Henry Philip Farnham, *The Law of Waters and Water Rights: International, National, State, Municipal, and Individual Including Irrigation, Drainage, and Municipal Water Supply* § 14a, at 66 (1904) 16

Washington Pattern Jury Instruction 380.05 (6th ed.) 22

I. INTRODUCTION

On appeal, the Wolfe II appellants (Wolfe) ask this Court to substitute its judgment for the superior court acting as the trier of fact. This Court should decline to do so. Wolfe's Opening Brief provides an inaccurate and misleading summary of the superior court's ruling. While the court did find that the State Route (SR) 4 bridge over the Naselle River was "obstructing" the river's floodplain, the court also held that Wolfe failed to present any evidence that the obstruction caused any actionable damage under a public nuisance theory. Additionally, Wolfe's assigned errors to the superior court's management of witnesses and evidence are baseless and disregard the deference owed to the court's inherent authority to manage the trial process.

As WSDOT's response brief will show, the *Wolfe* II plaintiffs had the opportunity to present their case before the court at trial and failed to meet their burden. The superior court entered detailed findings of fact and conclusions of law in granting Washington State Department of Transportation's (WSDOT) CR 41 motion to dismiss. The findings and conclusions are supported by the record below and ought to be affirmed.

II. STATEMENT OF THE CASE

In 1926, WSDOT (then the Department of Highways) commissioned the construction of a bridge to accommodate a highway now

known as SR 4. CP at 1466. That highway serves as a critical link between southwest Washington's coastal areas (particularly Willapa Bay) and the State's primary transportation corridor on Interstate 5. CP at 1466. The bridge was designed to span the Naselle River, just east of the town of Naselle and just upstream from the river's confluence with Salmon Creek. That span was approximately 200 feet. CP at 1466. In order to elevate the roadway to accommodate this span, an approximately 600 foot earth-fill embankment (approach embankment) was built on the northwesterly bank of the river. CP at 1466-67.

In 1985, WSDOT determined the bridge needed to be replaced. 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.

Appellants 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 (Anttonen property). CP at 1467. They conveyed the Anttonen property to

a third party in 2005, but re-acquired it in 2007. CP at 1467. After adjusting the boundary lines between the Wolfe and Anttonen properties in 2005, the Wolfes conveyed the Anttonen property to John and Dee Anttonen (Dee Anttonen is the daughter of Janice Wolfe) that same year. CP at 1467.

Confronted with recurring flooding and bank erosion on the Wolfe and Anttonen properties, appellants explored options for protecting their properties from future flooding and erosion. In the process, they formed the opinion that the bridge is diverting the river's flow toward their properties because the piers supporting the bridge were re-aligned in 1985 toward the direction of their banks, compared to the 1926 bridge piers. CP at 1468. In 2010, Wolfe filed a lawsuit against WSDOT in Pacific County Superior Court (*Wolfe I*¹), alleging inverse condemnation, negligence, and nuisance. *Wolfe I* was dismissed at summary judgment. CP at 111-12.

This Court affirmed that dismissal on appeal. *Wolfe v. Dep't of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 (2013). At that time, Wolfe conceded that the nuisance claims brought at the trial court were “essentially an unconstitutional taking claim, such that these two claims conflate into a single claim.” *Id.* at 307. Since the Wolfes purchased their property after the bridge was built, this Court agreed with the trial court that the subsequent

¹ *Wolfe & Anttonen v. Dep't of Transp.*, Pacific County Superior Court Cause No. 10-2-00180-0.

purchaser rule prevents Wolfe's recovery for inverse condemnation. *Id.* at 308-09.

The Wolfes then filed a separate lawsuit in Thurston County Superior Court in 2014, alleging that the bridge constituted a public nuisance. CP at 10-34. After extensive motion practice, the superior court determined (by denying WSDOT's motion for summary judgment) that a floodplain obstruction claim was actionable under Washington's public nuisance laws and not barred by res judicata. CP at 1275-77. In light of the court's rulings, the *Wolfe II* claims were limited to two enumerated causes of action: (1) the "obstruction claim"—the claim that the bridge was obstructing the Naselle River floodplain, which caused increased flooding to the Wolfe property and the surrounding area and negatively impacted the river's natural migration process; and (2) the "pollution claim"—the claim that obstruction caused erosion, which in turn caused excessive amounts of sediment to deposit into the river, negatively affecting the river's water quality and habitability for aquatic life. 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, Wolfe called four witnesses: plaintiff Col. John Anttonen (RP 44-87, Oct. 10, 2016), Russ Lawrence (RP 88-250, Oct. 10-11, 2016), plaintiff Charles Wolfe (RP 301-399, 406-586,

Oct. 11-12, 2016) and Kimberly 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.

Mr. Lawrence is an engineer hired by Wolfe 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 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.

After Mr. Lawrence was excused, WSDOT asked to call Steven Zaske out of order to accommodate the witness's schedule. RP 256:5-8, Oct. 11, 2016. While Wolfe initially stipulated to this request (RP 255:11-14, Oct. 11, 2016), he later objected when WSDOT qualified calling

Mr. Zaske out of order by stating WSDOT did not waive any defense or assume any burden of proof in doing so. RP 257:11-12, Oct. 11, 2016. The superior court noted Wolfe's objections but permitted WSDOT's witness to be called out of order. RP 257:20-258:13, Oct. 11, 2016. Mr. Zaske 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 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, Mr. 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.

Mr. Wolfe explained his motivation for seeking WSDOT's permit applications and approvals for the bridge; to his understanding, WSDOT would need the same permits Mr. Wolfe was required to obtain before the bridge was rebuilt. RP 345-46, Oct. 11, 2016. However, no foundation was laid for Mr. 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.

Ms. Schaumburg offered testimony regarding her experience as a fish biologist consultant and her personal observations of the Naselle River and Salmon Creek near the Wolfe property. RP 588:21-22, 591:14-595:1, 617:17-22, 621:18-623:10, Oct. 11-12, 2016. She described some indications of poor water quality and excess sediment in the river, but did not offer opinion testimony as to the cause of these conditions. RP 661:13-15, Oct. 12, 2016.

After Wolfe rested, WSDOT moved for involuntary dismissal. RP 688:1-9, Oct. 12, 2016. WSDOT argued that, as a matter of law, WSDOT does not stand in the same position as a private landowner, and if it obstructs a floodplain for a public use that interferes with a citizen's property right, that is a taking, not a nuisance. RP 695:12-20, Oct. 12, 2016.

WSDOT also argued that, based on the facts, Wolfe failed to establish that the bridge's obstruction of the floodplain, even if taken as true, was not causing any actionable damage. RP 690:20-22, Oct. 12, 2016. Since the bridge was not obstructing the river when it was flowing at normal levels, the bridge was not obstructing the river's passage. RP 691:25-692:3, Oct. 12, 2016. WSDOT also argued that Wolfe failed to establish the "special injury" element since Wolfe 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 Wolfe 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 superior court ruled on WSDOT's motion to dismiss on October 17, 2016. RP 709:6-748-12, Oct. 17, 2016. Consistent with its ruling on summary judgment in August 2016, it considered floodplain obstruction a viable cause of action as a public nuisance, regardless of whether the main channel of the watercourse was obstructed. RP 714:4-14,

Oct. 17, 2016. In light of this, the superior court considered WSDOT's legal arguments and found that none of them were appropriate grounds for dismissal of Wolfe's case. RP 714:15-22, Oct. 17, 2016.

Turning to the facts, the superior court held that Wolfe had put forth sufficient evidence (through the Lawrence testimony and exhibits) that the bridge and its embankment were, in effect, obstructing the river's floodplain. RP 725:25-726:16, Oct. 17, 2016. The court also found that this obstruction was affecting the 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 superior court found that Wolfe did not establish a "causal link" between the bridge and the expansion of the river's floodplain. RP 728:5-12, Oct. 17, 2016. Commenting on the evidence, the superior 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 superior court turned to whether the bridge (as a floodplain obstruction) was built or maintained without legal authority. The court found that Wolfe 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 court acknowledged it could “stop” its analysis since Wolfe 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. The court noted Mr. Lawrence’s testimony that downstream property owners may be impacted by the changing riverbank as well as photos of the riverbank on the Wolfe property as well as upstream. RP 735:9-20, Oct. 17, 2016. The court also noted Col. Anttonen’s observations, but held his testimony did not establish causation between the bridge and the community impact of erosion. RP 735:23-736:8, Oct. 17, 2016. Ultimately, the superior court held:

So ultimately 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 superior court then took up Wolfe's "pollution" claim under RCW 7.48.140(2). The superior court considered Ms. Schaumburg's testimony, finding that while Ms. 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.

Based on this ruling, the superior court entered Findings of Fact and Conclusions of Law, dismissing all of Wolfe's public nuisance claims. CP at 1503-12. This timely appeal followed. CP at 1833-45.

III. ISSUES PRESENTED

1. Did the superior court properly dismiss Wolfe's public nuisance claim as to flooding damage after Wolfe presented insufficient evidence that the SR 4 bridge was causing increased flooding on the Wolfe property?

2. Did the superior court properly dismiss Wolfe's public nuisance claim as to erosion of his riverbank after Wolfe presented insufficient evidence that (a) the SR 4 bridge was built without "legal authority," and (b) the erosion was negatively affecting the entire community as required by RCW 7.48.130?

3. Did the superior court properly dismiss Wolfe's public nuisance claim as to pollution of the Naselle River after Wolfe presented no evidence that the SR 4 bridge was negatively impacting the water quality or aquatic habitat of the Naselle River?

4. Did the superior court appropriately exercise its inherent authority as trial manager when it permitted (after stipulation from Wolfe) a WSDOT witness to be called out of order?

IV. STANDARD OF REVIEW

Motions for involuntary dismissal after a plaintiff rests are governed by CR 41(b)(3). A defendant may move for involuntary dismissal based on the facts of the case and the applicable law if the plaintiff has shown no right to relief. CR 41(b)(3). As the fact-finder, the trial court is not required to accept plaintiff's evidence as true; rather, the court is entitled to weigh the evidence based on the credibility of testimony, exhibits, circumstantial evidence, and draw reasonable inferences therefrom. *N. Fiorito Co. v. State*, 69 Wn.2d 616, 619, 419 P.2d 586 (1966).

If the trial court enters findings of fact as a basis for involuntary dismissal, these findings are accepted as “verities” on appeal unless those findings are without substantial evidentiary support. *Id.* at 619. However, if “the relevant and sustainable findings support the judgment of dismissal, [the appellate court] will not disturb the judgment, for we cannot substitute our findings for those of the trial court.” *Id.* Thus, appellate review is limited to whether substantial evidence supports the trial court’s findings of fact. *Commonwealth Real Estate Services v. Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937 (2009).

In this case, the record below is clear that the superior court granted involuntary dismissal as a matter of fact. *Compare* RP 716:18-23, Oct. 17, 2016 (denying State’s motion as to matter of law) with RP 720:3-12, 737:5-7, Oct. 17, 2016 (issuing findings of fact). Consequently, this Court must not disturb the superior court’s ruling if substantial evidence supports the findings of fact entered in granting WSDOT’s motion.

V. ARGUMENT

The superior court correctly determined that Wolfe did not present sufficient facts on key elements of his public nuisance claims. While Wolfe presented evidence that the bridge and its approach embankment was obstructing the Naselle River floodplain, Wolfe did not present any

evidence that the bridge was causing increased flooding on his property or anywhere else in the floodplain. And, while the court found that the bridge was impacting how the river erodes the surrounding landscape (including Wolfe's property), Wolfe did not demonstrate that WSDOT lacked lawful authority in building the bridge or that the erosion was affecting an entire community or neighborhood as required by law. Finally, the superior court properly concluded that Wolfe did not present sufficient evidence that the bridge was causing any pollution of the Naselle River.

A. Public Nuisance Law

Nuisance law in Washington is governed by statute. The Legislature has defined an actionable nuisance as:

[t]he obstruction of any highway or the closing of any channel of any stream used for boating or rafting logs, lumber, or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

RCW 7.48.010 (emphasis added).

Nuisance is further defined in the same chapter as:

unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public

park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.120 (emphasis added).

A nuisance is either public or private; a public nuisance “is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.” RCW 7.48.130. “[Every nuisance [that is] not included in the definition of RCW 7.48.130 is [a] private [nuisance].” RCW 7.48.150.

1. At common law, floodplain obstruction is not a valid nuisance

The Legislature has determined that “[t]o obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water” is a public nuisance. RCW 7.48.140(3).

Case law that might inform this Court’s analysis of the scope of an “obstruction” claim is sparse. At trial, WSDOT argued that Wolfe’s “obstruction” cause of action was limited to obstructions to the “passage” of a watercourse as used as a navigable waterway within the river at normal levels, not the river’s floodplain. CP at 1470-71. Historically, common law provides the following guidance:

[T]he general principle that **water ways are highways which should be preserved as such** is so firmly imbedded in the fundamental principles of the law that, even when dealing with the right of the state, under the Federal Constitution, to obstruct, or authorize the obstruction of, a

navigable water way, the courts have interpreted such right in the light of the more general one holding that the obstruction, as authorized by the state, must not be a material one; and that a state statute authorizing a bridge which is a material obstruction to a stream is a nullity.

I Henry Philip Farnham, *The Law of Waters and Water Rights: International, National, State, Municipal, and Individual Including Irrigation, Drainage, and Municipal Water Supply* § 14a, at 66 (1904) (emphasis added).

Additionally, Farnham clarifies that this “principle” of preserving waterways as highways “apply only to obstructions which may interfere with commerce and the power of Congress over it, and **they do not apply to interference with the flow of the stream**, or to the passage of fish, or to other purposes for which one state may have a right to have the stream kept open as against the action of another[.]” *Id.* § 14a, at 67 (emphasis added). The common law is also instructive as to what rights the public holds as a community over the government or private riparian owners; the public has an equal right to the unobstructed use of a river or stream “**at the ordinary stage of the water**” for travel and transportation purposes. *Id.* § 27, at 131 (emphasis added). Additionally, it is a public nuisance to “in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury or prejudice of others.” RCW 7.48.140(2).

The superior court adopted a broader interpretation of RCW 7.48; it held that an obstruction case can go beyond a river's main channel. RP 722:9-17, Oct. 17, 2016. It further held that floodplain obstruction can present a viable public nuisance claim, so long as the remaining elements are met. RP 722:23-723:21, Oct. 17, 2016. Under this rationale, the superior court also entertained Wolfe's "erosion" public nuisance claim on that theory, since (in the superior court's opinion), if a floodplain obstruction causes erosion that interferes with a neighboring landowner's property right, that might give rise to a public nuisance action under RCW 7.48.120. RP 723:25-724:7, Oct. 17, 2016.

2. Water pollution as a public nuisance

Washington courts have generally been confronted with "water pollution" claims in the context of contaminated discharge into a body of water. For example, in *Mitoke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984), private property owners brought action against the City of Spokane when the City authorized a discharge of raw sewage into the Spokane River during the construction of a new sewage treatment plant. The court found that, even though the City sought approval from the Department of Ecology to conduct the discharge, that discharge nevertheless violated an existing waste disposal permit. The court upheld the trial court's finding that the discharge was a public nuisance;

specifically, that the discharge was in unlawful violation of a permit, which violated the appellants' comfortable enjoyment of their property, and that it affected all members of a community with frontage along an impacted waterway. *Id.* at 331-32.

However, the court also acknowledged the principle that a permanent nuisance maintained by a governmental agency is a constitutional taking requiring just compensation to be paid to the affected landowner. *Id.* at 334 (quoting *N. Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist.*, 85 Wn.2d 920, 924, 540 P.2d 1387 (1975)); *see also City of Walla Walla v. Conkey*, 6 Wn. App. 6, 11, 492 P.2d 589 (1971) (“[t]here is no question that pollution of a stream by a municipality in carrying out its sewage disposal functions constitutes a constitutional taking, where the disposal results in pollution of the stream on such a scale as to create a public nuisance.”)

B. Wolfe Did Not Prove Public Nuisance

Wolfe's argument on appeal boils down to this: since the superior court found that the bridge was obstructing the floodplain and causing erosion, that alone is sufficient to find WSDOT liable for public nuisance. This argument must fail as it ignores several critical elements a plaintiff must satisfy in order to prove public nuisance.

1. Wolfe did not prove “lack of legal authority”

As the superior court recognized, a critical element to Wolfe’s obstruction claim was that WSDOT was obstructing the river’s floodplain “without lawful authority.” RP 731:15-732:12, Oct. 17, 2016. This is an accurate statement of the law; for Wolfe’s obstruction claim to stand, Wolfe needs to show the obstruction exists without legal authority. RCW 7.48.140(3); *Grundy v. Thurston Cty.*, 155 Wn.2d 1, 6-7, 117 P.3d 1089 (2005). Here, Wolfe did not meet his burden of proof.

Wolfe has continually alleged that WSDOT failed to obtain several permits to re-build the bridge in 1985. *See, e.g.*, Wolfe’s Opening Br. at 19-22; 35-41. While the superior court gave Mr. Wolfe some latitude in describing why he thought WSDOT would need the same permits in 1985 that he needed in 2007, Wolfe never connected the dots by competent testimony as to the relevant regulatory scheme in place in 1985. *See* RP 360:18-361:10, Oct. 10, 2016; RP 733:2-13, Oct. 17, 2016; CP at 1508 (Finding of Fact 1.36). However, the superior court did permit Wolfe to argue that, as a floodplain obstruction, the bridge’s embankment may have required WSDOT to obtain a “no-rise certification” pursuant to 44 C.F.R. § 60(3)(d)(4). RP 731:22-25, Oct. 17, 2016. While the superior court did not agree with Wolfe’s interpretation of the C.F.R. or its applicability to the present case, it assumed for the sake of argument that a

no-rise certification would have been required for the bridge and considered whether Wolfe proved the bridge would raise the floodplain's base flood elevation. RP 732:2-12, Oct. 17, 2016. The court correctly concluded that Wolfe presented no expert testimony that the bridge has caused an increase in the BFE, only exhibits that "generally touched on" the issue. *Id.* Substantial evidence supports the superior court's conclusion on lawful authority and Wolfe has demonstrated no basis for disturbing that conclusion.

2. Wolfe did not prove injury to the "entire community"

Wolfe was also required to prove that the bridge was a nuisance to the "entire community or neighborhood." RCW 7.48.130. If a nuisance does not meet the definition of public nuisance, then it is a private nuisance. *See* RCW 7.48.150; *see Grundy*, 155 Wn.2d 1, 6-7, 117 P.3d 1089 (2005).

The superior court considered Wolfe's evidence on community impact, even though it had already held Wolfe had not established lack of legal authority. *See* RP 733:19-736:13, Oct. 17, 2016. The court noted that Mr. Lawrence testified that downstream property owners *may* be impacted by the erosion conditions on the Wolfe property. RP 735, Oct. 17, 2016. The only other witness to discuss neighborhood impacts was Col. Anttonen, but as he was not qualified to offer opinion as to causation; he could only describe what he observed. RP 735:20-736:8, Oct. 17, 2016. Even then, he

did not specifically identify where he observed erosion other than the Wolfe property. *Id.* And, while Wolfe presented some evidence that the flooding aspect of his obstruction claim affected the neighboring community, the court already ruled this portion of the obstruction claim must be dismissed for lack of causation. *Id.* at 736:19-737:7, Oct. 17, 2016. Thus, Wolfe failed to present sufficient evidence to demonstrate the existence of a necessary element of his claim.

3. Wolfe had the burden to prove causation

Wolfe's causation argument on appeal is a prime example of the logical fallacy *post hoc, ergo propter hoc* (because one event follows another, the first event must have caused the second event). He assumes that since his property has experienced more flooding and continued erosion over time after the bridge was re-built in 1985, those impacts must be because of the bridge. However, the superior court was clear that Wolfe did not meet his burden as to causation. *See* RP 728:5-731:14, Oct. 17, 2016.

Wolfe further argues that WSDOT's assertion of an affirmative defense absolves Wolfe from having to put on causation evidence. Wolfe's Opening Br. at 45-48. This misstates the law. Generally, a defendant bears the burden of proof only where it asserts an affirmative defense. *See Wash. Fed. Savings & Loan Assoc. v. McNaughton*, 181 Wn. App. 281, 297, 325 P.3d 383 (2014). Certain defenses are required to be pled

“affirmatively” to avoid unfair surprise or “ambush” through the civil litigation process. *King v. Snohomish Cty.*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). However, the superior court correctly understood proximate cause to be an essential element of Wolfe’s nuisance claim and did not err in holding Wolfe to his burden. *See Tiegs v. Watts*, 135 Wn.2d 1, 15, 954 P.2d 877 (1998); *Washington Pattern Jury Instruction* 380.05 (6th ed.).

Wolfe argues that no causation of evidence is required because the bridge is the only man-made structure that could be causing either the erosion or the increased flooding. Wolfe’s Opening Br. at 42. This confuses the issue; finding that the bridge was the cause of erosion does not relieve Wolfe of his burden as to causation as to increased flooding or pollution.

The superior court properly considered all evidence Wolfe submitted regarding the bridge and his property; as described above, it heard evidence that the bridge exists within the floodplain and how the river’s migration has been impacted by the bridge’s embankment filling in a portion of the floodplain. While Mr. Lawrence opined the bridge is impeding the river from migrating away from the Wolfe property (thus causing more erosion than would exist if the bridge was not there), he (nor any other plaintiff witness) was qualified to opine that the bridge has caused additional flooding in the area or that the FEMA floodplain maps were

revised because of the bridge. RP 727-31, Oct. 17, 2016. Moreover, Ms. Schaumburg testified as to what she saw during her site visit to the Wolfe property, and while she observed conditions (such as siltation) that are concerning for a river's water quality, "she didn't take any measurements, and she didn't offer any opinion regarding causation, and I don't think she established the foundation for that." RP 740:4-11, Oct. 17, 2016. This is an accurate summation of the evidence submitted, and thus the superior court correctly held that Wolfe did not meet his burden as to causation.

C. No Procedural Errors at Trial

Wolfe assigns error to the superior court having allowed WSDOT to call Mr. Zaske out of order and then denying Wolfe's request to recall Mr. Lawrence in rebuttal. Both actions are within the superior court's discretion and should not be second-guessed on appeal.

While it is generally accepted that the party with the burden of proof may open its case first at trial, the order of presentation of evidence is within the sound discretion of the trial court. *See Wilson v. Overlake Hosp. Med. Ctr., Inc.*, 77 Wn. App. 909, 912, 895 P.2d 16 (1995). In that case, plaintiffs objected to defendants calling one of its expert witnesses out of order. *Id.* at 910. The Court of Appeals held that parties "do not have an absolute right to present their case without interruption" and that a court

may permit the calling of witnesses out of order, even over objection. *Id.* at 912.

In this case, Wolfe initially stipulated to the calling of Mr. Zaske out of order, but then retracted the stipulation when WSDOT attempted to qualify the witness so as to not waive its defenses or relieve Wolfe from the burden of proof. RP 257:11-12, Oct. 11, 2016. As outlined above, the superior court noted the objections and reservations from both sides and properly exercised its discretion in permitting a witness to be called out of order.

Next, Wolfe contends WSDOT “waived” its ability to move for involuntary dismissal by calling Mr. Zaske out of order to testify. This argument has absolutely no basis in law or fact. A defendant calling a witness out of order is not the same thing as failing to make a motion to dismiss on the sufficiency of plaintiff’s evidence, or failing to stand on a motion to dismiss after the court denies the motion, which is what *Hector v. Martin* actually holds. *Hector v. Martin*, 51 Wn.2d 707, 709-10, 321 P.2d 555 (1958), (“a challenge to the sufficiency of the evidence at the close of plaintiff’s case is waived by a defendant who does not stand on his motion and proceeds to present evidence on his own behalf, after his motion to dismiss has been *denied*.”). See *NW Wholesale, Inc. v. PAC Organic Fruit, LLC*, 184 Wn.2d 176, 182-83, 357 P.3d 650 (2015).

Wolfe also asserted the superior court erred in denying him the opportunity to recall Mr. Lawrence to offer rebuttal testimony to Mr. Zaske. WSDOT objected at the time, because (1) Wolfe already had called and excused Mr. Lawrence without reserving the right of recall; (2) Wolfe already had ample opportunity to elicit the testimony sought on direct examination; and (3) it was established at that point that no foundation existed for Mr. Lawrence to offer expert opinion as to WSDOT's legal authority (or alleged lack thereof) to obstruct a floodplain without an engineered no-rise certification.

Finally, Wolfe claims prejudice from having Mr. Zaske called out of order since the superior court considered his testimony when ruling on WSDOT's CR 41(b)(3) motion. Wolfe's Opening Br. at 49. Wolfe relies on the court's prefatory statement that it reviewed all the evidence it received during trial, including Mr. Zaske's testimony which was provided out of order. RP 710:9-10, Oct. 17, 2016. But Wolfe can point to no finding of the superior court explicitly relying upon Mr. Zaske's testimony.

Even if the superior court had relied upon Mr. Zaske's testimony and invited error by hearing it out of order without rebuttal, it would be unavailing because Wolfe still did not show all the elements necessary for a public nuisance.

On the issue of WSDOT's "lawful authority" to obtain permits for the 1985 reconstruction project, Mr. Zaske did discuss what permits WSDOT sought during the 1985 project; but this did not alleviate or shift the burden on legal authority away from Wolfe. Quite the contrary; as discussed above, the superior court specifically and correctly found that Wolfe did not meet his burden to show WSDOT lacked legal authority. *See* Findings of Fact and Conclusions of Law 1.35-1.37 (CP at 1508). Had the superior court denied WSDOT's motion, Mr. Zaske's testimony would have been offered to refute the claim WSDOT lacked legal authority to show what permits were obtained.

Additionally, Mr. Zaske's testimony did not concern any element of causation or "community impact"; he was not offered as an expert to counter Mr. Lawrence's testimony as to erosion causation, nor did he discuss flooding or pollution causation. Finally, while Mr. Zaske testified as to his personal knowledge of the area since he traveled over the bridge on many occasions, he offered no testimony as to whether the bridge's impact to the floodplain was affecting the entire community. *See* RP 286:6-12, Oct. 11, 2016. Consequently, the superior court did not err in calling Mr. Zaske out of order.

VI. CONCLUSION

The superior court afforded Wolfe a full and fair opportunity to present evidence at trial. After Wolfe rested, the court weighed all the evidence presented and issued detailed findings of fact to support its conclusion that Wolfe had failed to make a prima facie case for his public nuisance claims. This Court should defer to the superior court's findings of fact and conclusions of law because they correctly characterize what evidence was submitted into the record, and what evidence is lacking that was required for Wolfe to meet his burden of proof. Since there are no procedural or legal errors that warrant remand, this Court should affirm the CR 41 dismissal of Wolfe's lawsuit with prejudice.

RESPECTFULLY SUBMITTED this 17th day of July, 2017.

ROBERT W. FERGUSON
Attorney General



MATTHEW D. HUOT
Assistant Attorney General
WSBA No. 40606
7141 Cleanwater Drive SW
P.O. Box 40113
Olympia, WA 98504-0113
(360) 586-0641
Attorneys for Respondent
OID No. 91028

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

July 11, 2017 - 4:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49729-8
Appellate Court Case Title: Charles & Janice Wolfe, Appellants v State Dept of Transportation, Respondent
Superior Court Case Number: 14-2-01481-1

The following documents have been uploaded:

- 5-497298_Briefs_20170711161310D2132524_4447.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Respondent_OpeningBrief.pdf

A copy of the uploaded files will be sent to:

- alanscottmiddleton@comcast.net
- dennis@ddrlaw.com

Comments:

Sender Name: Angela Boggs - Email: AngelaB@atg.wa.gov

Filing on Behalf of: Matthew D. Huot - Email: MattH4@atg.wa.gov (Alternate Email:)

Address:
PO Box 40113
Olympia, WA, 98504-0113
Phone: (360) 586-7777

Note: The Filing Id is 20170711161310D2132524