

NO. 49729-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

REPLY BRIEF
OF APPELLANTS CHARLES WOLFE, JANICE WOLFE
AND JOHN AND DEE ANTTONEN

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I. INTRODUCTION

Throughout the instant litigation (Wolfe II) and a prior lawsuit dismissed on summary judgment (Wolfe I),¹ the State Department of Transportation (“WSDOT”) has done one thing consistently: hold itself above the law. Just last month, another chapter closed in the story of the WSDOT river obstruction when the Honorable Judge John Skinder of the Thurston County Superior Court entered Findings of Fact, Conclusions of Law, a final Order, and a Judgment in Mr. Wolfe’s Public Records Act action, awarding Mr. Wolfe \$181,192.08 for the wrongful withholding of public records relating to the State Route 4 (“SR 4”) Bridge work at issue in this case.²

WSDOT’s illegal attempt to prevent Mr. Wolfe from obtaining design, permitting and other related State/National Environmental Policy Act (SEPA/NEPA) documents from WSDOT concerning the SR4 Bridge has implications in this appeal. WSDOT took the position in the PRA case

¹ *Wolfe v. Department of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 (2013) (“Wolfe I”). Wolfe I concerned claims of inverse condemnation, negligence and private nuisance. In Wolfe II, appellants sought relief for and abatement of a public nuisance resulting from WSDOT’s obstruction of a waterway and pollution of the Naselle River by the resulting scouring of river banks into the river.

² *Charles Wolfe et al v State of Washington Department of Transportation*, Thurston Cause No. 12-2-01059-2, (August 25, 2017).

that the records and permits Mr. Wolfe sought do not exist,³ yet argues to this Court that Appellants Wolfe cannot prove such. WSDOT's inconsistent positions strongly suggest that justice has not been done in this case. This Court should reverse and allow Appellants to try their claims under a correct application of the law particularly since Wolfe/Anttonen met their evidentiary burdens

On the last point, the superior court made the following rulings, none of which have been challenged by WSDOT and thus are verities on appeal:

- The SR4 bridge, including its approach, is only 200 feet long, which obstructs the 800-foot floodplain of the Naselle River that is a waterway under state law, RCW 7.48.130(3). Findings of Fact 1.3 through 1.9, CP 1504:19-25, 1505:1-9.⁴
- As a result of the SR4 bridge's obstruction, the bridge and its approach disconnected the floodplain from the river and altered the direction of the river's flow. Vol. 1, p:156:25, p.157, p.158, p.159, p.160:1-23.
- The SR4 bridge, its approach, and rip rap installed by WSDOT, have caused erosion of plaintiffs' properties. Finding of Fact 1.29, CP 1507:7-9.

³ Id.

⁴ While obstruction of the floodplain is not disputed by either party, it is worth noting that the original bridge design obstructed the floodplain 37.5% according to WSDOT design documents. The reconstructed bridge in 1985 moved the approach twenty feet south of the original bridge and raised the approach fill by six feet, extending the floodplain obstruction out to the full width of the floodplain (600) feet, which increased the resultant floodplain obstruction to 75% (600 feet approach fill length divided by 800-foot wide floodplain). VRP Vol. 1, p152:8-19. There was no evidence presented at trial that the Wolfes' property flooded before 1985.

- “The erosion of the Anttonen and Wolfe properties, *as well as the interference with the natural migration of the meandering stream*, indicate an interference with plaintiffs’ use and enjoyment of their property. Findings of Fact No. 1.30 (CP 1840: 10-12) (emphasis added).
- The common enemy doctrine is not applicable and WSDOT stands in the same place as a private riparian landowner with respect to Wolfe’s claims. *Oral Opinion of the Court* (Verbatim Report of Proceedings (“VRP”)) Vol. 4, p.715:14-25, p.716:17.⁵

This Court must reverse the trial court’s dismissal ruling, which is inconsistent with the law, the evidence and the unchallenged findings.

II. REPLY ARGUMENT

The fundamental questions in this appeal are (1) whether Appellants established a legal causal link between the SR4 Bridge and increased flooding and erosion, and (2) whether WSDOT had legal authority to block the Naselle River floodplain and change the direction of flow of the river. A correct interpretation of the law supports the conclusions that Wolfe presented sufficient evidence of both (1) a causal link and (2) lack of legal authority for WSDOT’s actions. Reversal is justified.

In its Response Brief, WSDOT reiterates its view that the agency is above the law by arguing that it does not stand in the same position as a private landowner and it can obstruct a floodplain without legal authority and still avoid liability for nuisance. Respondent’s Br. 8. The trial court

⁵ See Findings of Fact 1.26 through 1.30 (CP 1840: 1-12) and Conclusions of Law 2.3 through 2.8 (CP 1843: 9-22).

flatly—and correctly—rejected this argument in its verbatim oral ruling. RP 714:4-14. WSDOT did not appeal. WSDOT mischaracterizes the trial court’s ruling, alleging that its obstruction of the floodplain was somehow “excusable” if it was not causing any “actionable damage.” Resp. Br. 8. But the trial court correctly concluded that lawful authority was necessary for WSDOT to obstruct the passage of the river and avoid liability for a public nuisance:

It is a public nuisance to “obstruct or impede, without lawful authority, the passage” of any river. RCW 7.48.140(3). This can include obstruction of a river’s floodway that supports the functioning of the overall river system, beyond the river’s main channel. Conclusion of Law 2.6 CP 1843:15-17.

Conclusion of Law 2.6 (emphasis added).

WSDOT also resurrects flawed arguments urging an unsupportable reading of common law concerning floodplain obstruction. Resp. Br. 15-16; *but see* CP 713:16-25, CP 714:1-22. WSDOT actions negatively affect public resources: the waters and aquatic environment of the Naselle River that are protected by law. *See infra*, III.E. Appellants Established a Prima Facie Claim for Violation of RCW 7.48.140(2), Water Pollution. *infra*. WSDOT maintains that its violation of these laws does not constitute a public nuisance when its very purpose is to protect the public. This Court must correct WSDOT.

The State attempts to obfuscate the claims in Wolfe I and Wolfe II. This Court should reject its argument that Wolfe I precludes Wolfe II, just as the trial court did when it ruled several times on pre-trial summary judgment motions that Wolfe II presents distinct causes of action. CP 480-481 . 1275-1277. 1000-1002 Wolfe II does not include claims for inverse condemnation or other private damages, the claims that were raised in Wolfe I. It is a public nuisance case, based on the existence of conditions that are defined as public nuisances in RCW 7.48.140: (1) obstruction of a waterway, and (2) water pollution.

A. The Court Should Review the Involuntary Dismissal De Novo

The State is incorrect that the trial court granted the motion for involuntary dismissal as a matter of fact. The trial court's ruling indicated mistakes of law, including its incorrect view regarding the necessary showing to establish that WSDOT's activities caused flooding and were without legal authority. Because the involuntary dismissal turned on these incorrect legal views, this Court should review the ruling *de novo*, viewing the evidence in the light most favorable to Wolfe. *Commonwealth Real Estate Services v. Padilla*, 149 Wn.App. 757, 762, 205 P.3d 937 (Div. 3 2009). In the alternative, substantial evidence supports an outcome in favor

of Wolfe, and does not support the CR 41 dismissal.⁶

B. The Undisputed Evidence That WSDOT Obtained No Permits or Approvals to Obstruct the Floodplain or Alter the Direction of Flow of the River Shows that Wolfe Met His Burden to Show “Lack of Legal Authority.”

Wolfe met his burden to present evidence that WSDOT obtained no legal authority to obstruct the floodplain. The trial court correctly ruled that the SR4 Bridge and its approach obstructs the floodplain, which (a) changes water flow, increases backwater elevation, and increases river velocities in the vicinity of the bridge; (b) constrains and interferes with the natural meandering characteristics of the river; (c) causes the erosion of the Antonnen and Wolfe properties; (d) and interferes with the natural migration of the meandering stream and with plaintiffs’ use and enjoyment of property. Findings of Fact 1.26 through 1.30, CP 1840:1-12. The Court also properly recognized that an obstruction is a public nuisance where “legal authority” is lacking, stating,

2.6 It is a public nuisance to “obstruct or impede, without lawful authority, the passage” of any river. RCW 7.48.140(3). This can include the obstruction of a river’s floodway that supports the functioning of the overall river

⁶ While it is true that the superior court made findings of fact, its ruling was that Wolfe failed to establish a prima facie case of public nuisance as a matter of law. Where the trial court dismisses the case as a matter of law after the plaintiff rests, “review is de novo and the question on appeal is whether the plaintiff presented a *prima facie* case, viewing the evidence in the light most favorable to the plaintiff.” *In re Dependency of Schermer*, 161 Wn.2d 927, 939, 169 P.3d 452 (2007).

system, beyond the river's main channel.⁷

Conclusion of Law 2.6 (emphasis added). Where the evidence showed that WSDOT's activities obstructed and impeded the Naselle, Wolfe only had to show that WSDOT lacked lawful authority in order to prove a public nuisance. Wolfe showed this. The trial court erred when it dismissed their claims.

The law required a total of eight approvals to allow WSDOT to complete both the 1985 bridge construction work and the 1998 bridge repair work, four for each project (Hydraulics, Shorelines, Floodplains, and Wetlands.) WAC Ch. 220-660, Hydraulic Code Rules; RCW Ch. 90.58 Shorelines Management Act of 1971; RCW Ch. 86.16, Floodplain Management.

Wolfe sufficiently supported an inference that WSDOT failed to obtain at least five of the necessary eight approvals. Wolfe demonstrated that no evidence existed in the public records of Pacific County, WSDOT, Washington Department of Fish and Wildlife, ("WDFW"), FEMA, or Army Corps of Engineers ("ACOE") that WSDOT obtained five of the required eight approvals (two Floodplain approvals, two Wetlands approvals, or the 1998 project Shorelines approval). VRP Vol. 2, p.347-p.361.

⁷ CP 1510:15-17.

WSDOT introduced only two of the four required permits: the 1985 Shoreline Substantial Development Permit (“SSDP”) (Exhibit 20) and the 1985 Hydraulic Project Approval (“HPA”) (Exhibit 24). At no time, through discovery or at trial, did WSDOT refute Wolfe’s evidence that WSDOT never secured full legal permission for its actions.

This Court should reject the State’s argument that no “competent testimony” exists to prove lack of the required permits, and that Plaintiffs failed to lay a “foundation” concerning the required permits. Resp. Br. 7, 19. Mr. Wolfe’s testimony regarding his effort to obtain evidence or records of permits and approvals is competent and supports an inference that, where he could find none, none existed. That WSDOT itself could not and did not offer the permits or approvals further supports the inference that WSDOT never obtained them.

Mr. Wolfe *could, and did*, testify to his personal knowledge that he sought and did not find required applications, permits or approvals.

The evidence was sufficient to prove the negative. *State v. N.M.K.*, 129 Wn. App. 155, 162, 118 P.3d 368 (2005) (Evidence Rule (“ER”) 803(a)(10) allows admission of evidence that an event or matter was *not* recorded in public records to show that it did not occur or did not exist); KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, 409-10 (2005); *United States v. Keplinger*, 776

F.2d 678, 689-90 (7th Cir. 1985) (proof of absence of records that would ordinarily exist if a particular event had occurred is properly admitted to show that the event did not occur).

Mr. Zaske, WSDOT's own witnesses, conceded more permits were required.⁸ Permits were required as a matter of law to do work in a floodplain, and the record more than supports the conclusion that none were sought or obtained. In addition, the permit applications submitted for the permits obtained did not disclose any intent on WSDOT's part to alter the floodplain. *See* p. 11, *infra*.

Mr. Zaske, who worked on the permitting for the 1985 and 1998 projects, admitted there was no floodplain permit issued, which would have required an Engineered, No-Rise Certificate under 44 C.F.R §60(3).⁹ He further admitted that WSDOT did not obtain a flood control approval from Ecology, nor did the agency ask for or obtain a flood control approval from any federal agency.¹⁰ This is a gross oversight. ***The law specifically makes it a criminal offense to do the work without first obtaining legal authority.*** RCW 90.58.210; RCW 90.58.220; RCW 90.58.230; RCW 77.15.300. Mr. Zaske's testimony alone carries Wolfe's burden.

⁸ CP 1510:15-17.

⁹ VRP Vol. 2, p.292:16-20

¹⁰ VRP Vol. 2, p.291:22-25, p.292:1-25, p.293:1-17.

The trial court further erred when it analyzed 44 CFR 60.3(d)(4), an error that WSDOT failed to address in its brief. First, the plaintiffs were not required to show that the bridge or its approach caused a change in the base flood elevation in order to establish the state failed to comply with the law, contrary to Finding of Fact 1.36, CP 1841:6-9. The federal regulation is a before-the-fact exercise; application must be undertaken *before* an encroachment within the regulatory floodway can be permitted. It is not the other way around. WSDOT points to no authority that excuses compliance with 44 CFR 60.3(d)(4) *after* a floodway obstruction is constructed. The lower court's error is underscored by its finding that the Bridge and approach do obstruct the floodway. Finding of Fact 1.26 through 1.30, CP 1840:1-12. There simply is no minimal BFE increase allowed or required to show a lack of "lawful authority."¹¹

Second, the trial court erred as a matter of law (despite including it in a finding of fact) that all "prerequisites" of 44 CFR 60.3(d)¹² were not

¹¹ The state criterion allows only a 0.2 foot (2.4 inches) increase in BFE, not one foot (12 inches), per WAC 220-110-070. This is a "relaxed" requirement because federal law (44 CFR 60.3(d)(3)) allows no net rise in backwater elevation. The one-foot standard referred to by the trial court is applied at the County level whenever someone wants to build a structure within the floodplain. It allows for future permitted construction that would partially obstruct the floodplain (only 0.8 feet, or 9.5 inches of "slop") without affecting NFIP regulations regarding existing structures.

¹² Washington's floodplain management laws including RCW Ch. 86.16 and WAC Ch. 173-158 incorporate the standards and definitions contained in 44 C.F.R., Parts 59 and 60 for the National Flood Insurance Program as the minimum state

met. Finding of Fact 1.37, CP 1841:10-14. Tellingly, neither the trial court nor WSDOT specify what “prerequisites” were required to trigger application of the regulations. Uncontroverted testimony established that there was no legal notice to affected property owners explaining the potential rise in base flood elevation (BFE) that would result from the floodplain-obstructing bridge and approach. Mr. Zaske confirmed that floodplain impacts were not even disclosed to permitting agencies and were not considered by WSDOT because it did not believe the Bridge would impact the floodplain.¹³

44 C.F.R. §60.3(d)(3) prohibits *any* work within a floodplain, once the floodplain has been established, *unless* it can be demonstrated that the work does not lead to any increase in the base flood level. Per WAC 220-110-070(1)(h), “[a]butments, piers, piling, sills, approach fills, etc., shall not constrict the flow so as to cause any appreciable increase (not to exceed 0.2 feet, or 2.4 inches) in backwater elevation (calculated at the 100-year flood) or channel wide scour and shall be aligned to cause the least effect on the hydraulics of the watercourse.” Wolfe introduced sufficient evidence to establish the floodplain and the fact that WSDOT’s work was contemplated within such floodplain. These are the only “prerequisites”

standards.

¹³ VRP Vol. 2, p.291:22-25, p.292:1-25, p.293:1-17.

necessary to trigger 44 C.F.R. §60.3(d)(3). WSDOT did not satisfy the federal regulations and its actions, therefore, were without legal authority.

The trial court's error of law must be reversed by this Court.

C. RCW 7.48.140(3) Requires Proof of an Obstruction, Which Wolfe Showed, and Does Not Require Proof of the "Degree" to Which a Waterway is Obstructed).

The trial court erred in adding a legal requirement that is not found in the public nuisance statute or case law interpreting and applying RCW 7.48.140(3). Specifically, there is no "degree" or "percentage" determination to be made if a floodplain obstruction has been determined, as here. The only question is whether the person, *or government agency*, obstructing the floodplain has legal authority to do so, that is, whether WSDOT's actions are inconsistent with the law. As set forth above, this is a simple yes or no question that must be answered in the negative. No showing of "damage" or "degree" is required because a nuisance *per se* results in strict liability. *Tiegs v. Boise Cascade Corp.*, 83 Wn.App. 411, 418, 420, 922 P.2d 115 (1996), *affirmed in Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1988). RCW 7.48.140(3) is clearly a nuisance *per se* claim, as shown in the Washington Practice:

Several statutes creating nuisances per se can be found in RCW Chapters 7.48 and 7.48A. Many others are located elsewhere in the revised code...Other statutes that may support a nuisance per se claim include...; RCW 77.57.030 (property owner with a dam or obstruction, after having been

served with notice to construct a fishway); RCW 90.48.142 (water pollution); RCW 90.64.030 (water pollution caused by dairy cattle).

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 380.04 (6th ed.)

To the extent this Court also analyzes the violation of RCW 7.48.140(3) as a public nuisance *in fact*, the testimony shows substantial impacts as a result of WSDOT's actions. Mr. Lawrence testified that during his site visit, he measured and observed results of the floodplain obstruction, both upstream and downstream of the Bridge. He explained that the obstruction causes water to flow through underneath the bridge during periods of high flow at a faster rate and at a greater volume, since the water cannot access the whole floodplain to flow downstream. RP 200:12-23. As a result, the water level in the floodplain during an "obstructed" flood is higher than if the floodplain is not obstructed (the Bernoulli effect). Thus, the obstruction leads to higher flooding levels (a higher "backwater elevation") for any given flood flow.

Mr. Wolfe also testified as to the extent the obstruction has affected the official FEMA/FIRM data. Exhibit 66. There was no testimony or evidence presented showing any other potential causes of these effects in the vicinity.¹⁴ The law demands that verdicts rest upon testimony, and not

¹⁴ Aerial photographs of the floodplain do not show any other manmade obstructions in the area other than the SR4 Bridge and its approach. See WSDOT Exhibits 152-163, 176-178, 180-182, 189-192; Plaintiffs' Exhibits 47-55; see also

conjecture and speculation. See *Anton v. Chicago, M. & St. P.R. Co.*, 92 Wash. 305, 159 P. 115 (1916). Moreover, the assertion that other causes are to blame for the flooding is an affirmative defense of the State, on which it alone has the burden of proof. *Locke v. City of Seattle*, 133 Wn.App. 696, 713, 137 P.3d 52 (2006). Speculation cannot sustain a finding. See *Johnson v. Aluminum Precision Prods., Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006).

Mr. Wolfe and Colonel Anttonen also presented substantial evidence concerning the impacts of the floodplain obstruction on their property¹⁵. Their testimony was unrefuted that the properties experience 500-year flood events when the same properties were not mapped in the original FEMA FIRM maps since the 1985 and 1998 projects.¹⁶ The properties are inundated by water two to three times a year when they are not even supposed to flood. Specifically, the Anttonen portion of the property floods whenever the river flow is 4,460 cfs, although the FEMA published 100-year flood flow is 11,800 cfs, showing the effect of the floodplain obstruction on the flooding characteristics of their property.¹⁷

Exhibit 60.

¹⁵ VRP Vol. 2, p.369;17 through p.372:15.

¹⁶ VRP Vol. 1, p.61:2-25, p.62:1-2; Ex. 69.

¹⁷ See CP 538:20 through 539:3. See also Exhibits 66, 67.

It is irrefutable that the base flood elevation in the area has increased. It is further a reasonable inference from evidence in the record that the cause of the increase in base flood elevation is the SR4 Bridge. *Parmelee v. Chicago, M. & St. P.R. Co.*, 92 Wash. 185, 194, 158 P. 977, 981 (1916) (“We will infer a consequence from an established circumstance.”)¹⁸

Perhaps the most compelling exhibit is the video of floodwaters. In order to comply with local building codes (septic systems cannot be located within a floodplain), a Washington State Professional Surveyor marked the Base Flood Elevation (“BFE”) of the Appellants’ property by noting the land elevation that is 12 inches (one foot) above the BFE, doing so by use of a nail placed at the base of a fence post.¹⁹ Exhibit 67-a shows that fence post during a January 2006 FEMA 2-year, not 100-year, flooding event while Exhibit 67b shows the fence post during a November 2008 two-year flood. Exhibit 67c, and the video, exhibit 69, show that fence post under three feet of water during the January 2009 500-year flood.

Aerial photographs, maps and other illustrative evidence confirm a measurable increase in flooding levels which Mr. Lawrence’s expert testimony as a fluvial geomorphologist connected to the SR4 Bridge

¹⁸ Causation may be proved by circumstantial evidence. *Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power*, 37 Wash..App. 241, 243, 679 P.2d 943, 944 (1984).

¹⁹ VRP Vol. 3, p.429:24 through p.435:9.

obstruction in Exhibit 74. Exhibit 66 summarizes the bottom line.

Each time that a flooding event occurred on the property, Mr. Wolfe, a retired engineer, took pictures of the flooding and obtained the “official” river flow rate, as published by the USGS, at a river gauge station just upstream of the Bridge (VRP Vol. 3, p.426:23 through p.427:9.). He then annotated, for trial, the USGS generated figure depicting the maximum river flow noted for each year, starting in 1929. (VRP Vol. 3, p.427:9 through p.429:23.) Shown on Exhibit 66 are the official FEMA 500-year, 100-year, 10-year, and 2-year flooding flows. He also noted the river flow rate at which point the river just starts to overflow the bank (4,460 cfs) (VRP Vol. 3, p.536:20 through p.539.5).

Each time the measured river flow was greater than 4,460, the property flooded, even though, according to the FEMA data, the property was not in either the 100-year or 500-year floodplain. Exhibit 60. Any increase in BFE is not permissible without legal authority.

D. The Court Applied an Incorrect Definition of “Affected Community” When it Evaluated WSDOT’s Violations of the Water Pollution Control Act and the Shoreline Management Act

This case involves alleged violations of the Water Pollution Control

Act²⁰ and the SMA²¹ which support nuisance *per se* claims. Violation of those laws are presumed to affect the entire public because of the public interest in protecting the shoreline environment. The people of the state have a vested interest in clean water, unobstructed floodplains, robust aquatic habitat, and robust floodplain functions and values, consistent with RCW 90.58.020. Wolfe contends a violation of these laws which threaten(or damage) public waters and public resources affect the entire community without regard to the location of the environmental perturbation. It was legal error for the trial court to rule that Wolfe did not prove an impact on the “entire community.”

Substantial evidence in the record established impacts both upstream and downstream of the SR4 Bridge; the trial court’s own findings

²⁰ RCW 90.48.080 states, “It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.” “Pollution” is defined in RCW 90.48.020 to mean “such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, **turbidity**...” Water quality standards for surface water in the state of Washington are set forth in WAC Chapter 173-201A.

²¹ RCW 90.58.020 sets forth goals and policies of the SMA and states, in relevant part, “This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life,” and “To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state’s shoreline.”

established this. Since water seeks its own level, if the BFE at the Wolfe/Anttonen property increased three feet, as established at trial, it also increased going down floodplain past the Appellants' properties until equilibrium was established. In turn, that affects all private and public property located within and adjacent to the floodplain. The nuisance established by the Wolfes is indeed 'Public', not 'Private'.

The trial court cannot have it both ways. It first found that the earth fill approach within the floodplain has caused erosion downstream and interfered with the river's natural condition.²² The trial court also specifically found that Mr. Lawrence testified regarding impact *downstream* to another property owner, and Col. Antonnen offered photographs and testimony "indicating impacts to the river bank in the vicinity of plaintiffs' property *upstream*" from the Bridge. Finding of Fact 1.39 CP 1841:17-23 (emphasis added). The trial court's finding that the evidence is insufficient to show that erosion or bank loss extended to a "broader neighborhood than the Plaintiffs" is unsupported and contrary to substantial evidence. Finding of Fact 1.40, CP 1841:23-25.

E. Wolfe Established a Prima Facie Claim for Violation of RCW 7.48.140(2) Concerning Water Pollution.

This Court should hold that Wolfe presented a prima facie claim for

²² Findings Nos. 1.26-1.31 (CP 1507:1-16).

violation of RCW 7.48.140(2) based on WSDOT's corruption of the water quality. With respect to this water pollution claim, WSDOT failed to address the evidence in the record. WSDOT cited a single case that addresses violation of a water discharge permit, *Miotke v. City of Spokane*, 101 Wn2.d 307, 678 P.2d 803 (1984), then reiterated its argument already rejected by the trial court that a permanent nuisance is a "constitutional taking." Resp. Br. 17-18. WSDOT failed to distinguish *Miotke*, which authority supports a conclusion that Wolfe met his burden. WSDOT failed to defend the trial court's erroneous conclusions on water pollution by pointing to substantial evidence in the record or citing supportive law. WSDOT has waived its right to respond to this Assignment of Error.

RCW 7.48.140(2) provides that it is unlawful to corrupt or render unwholesome or impure the water of a river to the injury or prejudice of others (Conclusions 2.19 and 2.20.)²³ The trial court correctly found that the effects of WSDOT's Bridge system have resulted in substantial erosion of property in the vicinity of the SR4 Bridge (Findings of Fact 1.26 through 1.30, CP 1840:1-12), and acknowledged expert testimony establishing that "when a river's bank erodes and introduces sediment into a river system, including increases in water temperature and river velocity that in turn

²³ Findings CP 1507:10-12, Conclusions CP 1511:17-20.

negatively impacts fish and aquatic life, as well as their habitat.” Finding of Fact, 1.43, CP 1842:6-10). These findings supported a conclusion that the Bridge or earth fill approach caused negative impact to the river’s water quality or impacts to fish or other aquatic life, yet the trial court reached an opposite conclusion. See Finding of Fact 1.45, CP 1842:18-20. This inconsistency demands reversal.

Wolfe met his burden described in WPI 380.04 and RCW 7.48.140(2). The record shows that the amount of dirt eroded from the property over time was over 32,000 cubic yards and that dirt went into the river.¹⁴ This loss of dirt is a significant interference with Wolfe’s use and enjoyment of the property.²⁴ The trial court’s conclusion that this same dirt did not render the river water unwholesome or that its loss did not interfere with the use and enjoyment of any other property owner in the neighborhood or in the entire community is unsupported and inconsistent with the evidence.²⁵

Ms. Schaumburg testified applicable regulations require that any development of the floodplain must prevent loss of other channel functions. VRP Vol. 3, p.602:14-22 She concluded that the ***Bridge approach isolates the floodplain from the river***, “[s]o there’s a disconnectivity between the

²⁴ Findings 1.30 (CP 1507:10-12).

²⁵ Conclusions 2.17/2.18 (identical) CP 1511:13-16.

floodplain and river.” *Id.* p.604:19-25, p.605:1, causing scour. (*Id.* p.605:12-23). Ms. Schaumburg stated that scour is erosion from the water to the stream *bank or bed* and has numerous negative impacts to aquatic life.²⁶ The witness testified that these are not “minimal” impacts, *and that it would affect properties other than Plaintiffs’ properties in terms of the loss of functions and values.*²⁷ She testified that DOE’s information indicated that the *water quality levels were below WDFW’s standards for fish survival*, even if it was “close” to state water quality standards.²⁸

Erosion also is increasing as a result of increased water intensity. Findings of Fact 1.42, 1.43 and the first part of Finding 1.44²⁹ capture the essence of erosion, water pollution law and biologist Ms. Schaumburg’s testimony as to the impacts on the general public. The last part of Findings 1.44, along with 1.45 and 1.46³⁰ contradict Schaumburg’s testimony. If erosion causes pollution and WSDOT caused the erosion, it logically follows that WSDOT caused the pollution which affected, and continues to affect, functions and values of the floodplain and the river downstream.

²⁶ VRP Vol. 4, p.617:12-13

²⁷ VRP Vol. 4, p.643:14-25, p.644:1-10.

²⁸ *Id.* p.659:8-19.

²⁹ CR 1509:3-15.

³⁰ CR 1509:15-24.

This is the only reasonable inference that can be drawn from the substantial evidence in the record.

All Wolfe had to present was evidence that WSDOT's actions "corrupt[ed] or render[ed] unwholesome or impure the water of river to the injury or prejudice of others." *See* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 380.04 (6th ed.). The law does not require an analysis of the "degree" of impurity, and it is irrelevant that witnesses testified they observed fish in the area. The trial court apparently believed otherwise, which was a clear error of law.

III. CONCLUSION

Wolfe submitted sufficient evidence to support his claims under a correct view of applicable law. This Court should reverse the Superior Court's order of dismissal.

Dated: September 8th, 2017

DENNIS D. REYNOLDS LAW OFFICE

By: 

Dennis D. Reynolds, WSBA #04762
Counsel for Appellants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that the original of the foregoing brief was timely filed on September 8th, 2017 pursuant to RAP 18.6(c), as follows:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300, MS TB-06
Tacoma, WA 98402-4454

Via Court's JIS-Link Electronic Filing System

I further certify that I caused a true and correct copy of the foregoing brief to be served this date, in the manner indicated, to the parties listed below:

<p>Matthew D. Huot, AAG, WSBA #40606 Attorney General of Washington Transportation & Public Construction Div. P.O. Box 40113 Olympia, WA 98504-0113 <u>Deliveries/FedEx Only:</u> Transportation & Public Construction Div. 7141 Cleanwater Drive SW Tumwater, WA 98501-6503 (360) 753-6126, tel / (360) 586-6847, fax MattH4@atg.wa.gov; tpcef@atg.wa.gov; JennahW@atg.wa.gov; MelissaE1@atg.wa.gov <i>Attorneys for Respondent</i></p>	<p><input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email</p>
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DATED at Bainbridge Island, Washington, this 8th day of September, 2017,



Jon Brenner, Paralegal

Wolfe – Reply Brief

Appendix A-1

SUPERIOR COURT
THURSTON COUNTY, WA
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Findings of Fact and Conclusions of Law
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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

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

Plaintiffs,

v.

STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION,

Defendant.

NO. 14-2-01481-1
(Consolidated with 14-2-01941-3)

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER & JUDGMENT

This matter was tried to the Court, without a jury, on October 10-12 and October 17, 2016. The Honorable Mary Sue Wilson presided at the trial. This matter came before the Court pursuant to a complaint for public nuisance pursuant to RCW 7.48.120-.140.

Plaintiffs Charles Wolfe, a single person, and Janice Wolfe, a single person; and John Anttonen, appeared personally at trial and through their attorneys of record, Dennis D. Reynolds, Alan S. Middleton, and Stephanie Marshall Hicks. Defendant State of Washington Department of Transportation appeared personally at trial and through its attorneys of record, Attorney General Robert W. Ferguson and Assistant Attorney General Matthew D. Huot.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER & JUDGMENT - 1
[90263-2]

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1 The following witnesses were called and testified at trial:

- 2 1. Plaintiffs' witnesses:
- 3 a. John Anttonen
 - 4 b. Russ Lawrence
 - 5 c. Charles Wolfe
 - 6 d. Kim Schaumburg
- 7 2. Defendant's witnesses (called out of order):
- 8 a. Steven Zaske

9 The following exhibits were admitted into evidence and considered by the Court:

- 10 1. Plaintiffs Exhibit Numbers: 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 19, 20, 22, 25, 30,
- 11 31, 45, 46, 47, 49, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, and 78.
- 12 2. Defendant's Exhibit Numbers: 164, 165, 167, 168, 169, 170, 172, and 197.

13 **I. FINDINGS OF FACT**

14 1.1 Any finding of fact stated herein, that is properly characterized as a conclusion of law,

15 shall be incorporated under the conclusions of law as if set forth therein.

16 1.2 The Washington State Department of Transportation (WSDOT) is a public agency for

17 the State of Washington with delegated authority to construct highways and bridges subject to various

18 statutory restrictions.

19 1.3 In 1926, WSDOT (then known as the Department of Highways) constructed a bridge

20 across the Naselle River at approximately milepost 6 of State Route (SR) 4 in Pacific County (the

21 "Naselle River Bridge").

22 1.4 The Naselle River Bridge (as built in 1926) was designed to span the Naselle River

23 just upstream from the river's confluence with Salmon Creek. The bridge is approximately 200-foot

24 long.

1 1.5 In 1926, a 600-foot earth-fill embankment (the "approach") was constructed on the
2 northwesterly bank of the Naselle River to accommodate the bridge's span of the river.

3 1.6 WSDOT replaced the Naselle River Bridge beginning in 1985.

4 1.7 The 1985 bridge utilizes the same 600-foot approach embankment to span the river.

5 1.8 The 1985 bridge was widened to thirty-six feet, and raised six feet to obtain flood
6 clearance. The approach embankment was also raised six feet.

7 1.9 Like the 1926 bridge, the 1985 bridge cleared a span of approximately 200-feet, which
8 cleared the channel of the Naselle River flowing underneath.

9 1.10 WSDOT performed a repair project on the bridge in 1998, which ~~consisted~~
10 ~~among other things of~~ installing rip rap alongside one of the bridge piers to protect it from
11 river scour.

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atm
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12 1.11 Charles Wolfe is a resident of Pennsylvania. Jan Wolfe is a resident of
13 Washington. John Anttonen and Dee Anttonen, husband and wife, are residents of New
14 Mexico.

15 1.12 On December 2, 2003, Charles F. Wolfe and Janice E. Wolfe purchased a
16 parcel of real property in Pacific County (Wolfe property).

17 1.13 On December 9, 2004, Charles F. Wolfe and Janice E. Wolfe purchased a second
18 parcel of real property in Pacific County (Anttonen property).

19 1.14 The Wolfe property and Anttonen property are abutting parcels that have frontage
20 along the Naselle River.

21 1.15 On July 18, 2005, Charles F. Wolfe and Janice Wolfe recorded a boundary line
22 adjustment resulting in a change to the boundaries and acreage of the Wolfe and Anttonen parcels.

23 1.16 On July 28, 2005, the Wolfes sold the Anttonen property to Frank T. McLucas and
24 Shannon K. McLucas, subject to a deed of trust.

1 1.17 On November 22, 2005, the Wolfes (as a marital community), conveyed the Wolfe
2 property to Janice Wolfe as her separate property.

3 1.18 On January 22, 2007, Charles Wolfe and Janice Wolfe conveyed, by way of Quit
4 Claim Deed, Tax Parcel No. 10091050006 (the Anttonen property), to Dee Christine Anttonen and
5 John Stuart Russel Anttonen.

6 1.19 On January 23, 2007, Frank R. McLucas and Shannon K. McLucas, husband and
7 wife, conveyed the Anttonen property back to Charles F. Wolfe and Janice E. Wolfe in satisfaction of
8 the deed of trust.

9 1.20 Plaintiffs do not engage in commercial activity on the Wolfe or Anttonen property that
10 utilizes the river (e.g., floating of logs or timber).

11 1.21 Plaintiffs do not pilot any vessels on the Naselle River.

12 1.22 Plaintiffs do not rely on the Naselle River for access to the Wolfe property or
13 Anttonen property.

14 1.23 1.23 Mr. Lawrence was designated an expert in the area of river systems.
15 He testified that the Naselle River is a meandering stream; it flows in alternate directions like
16 a "sine wave," and the bends of the river change position over time. In his opinion, the
17 placement of the fill in the 600-foot area within the floodway constricted the natural course of
18 the river and interfered with the natural meandering of the river. He also testified that the
19 placement of the piers in such a way as to change the water flow and increased velocity also is
20 an obstruction.

21 1.24 Mr. Lawrence further testified that the Naselle River is not impacted by the tides in
22 the vicinity of the bridge. He also stated that the earth fill approach does not obstruct the flow of the
23 river below the ordinary high water mark.

24 1.25 The Court finds that there is no evidence that the main channel of the river has been
25 obstructed below the ordinary high water mark.

1 1.26 The 600-foot earth fill approach supporting the bridge is an obstruction of the
2 floodplain in that area.

3 1.27 The obstruction of the floodplain resulted in a change of water flow, as well as
4 increased river velocities in the vicinity of the bridge.

5 1.28 The 600-foot long earth fill approach across the floodplain has constrained and
6 interfered with the natural meandering characteristics of the river.

7 1.29 The erosion of the Anttonen and Wolfe properties has been caused by the mechanisms
8 described by Mr. Lawrence are attributable to the earth fill approach. This is supported by Exhibits 46,
9 51, 54, and 55.

10 1.30 The court finds that the erosion of the Anttonen and Wolfe properties, as well as the
11 interference with the natural migration of the meandering stream, indicate an interference with
12 plaintiffs' use and enjoyment of the property.

13 1.31 The Wolfe and Anttonen properties have experienced ~~increased~~ inundation by
14 floodwater during flooding events. However, the court does not find sufficient evidence to
15 establish that the bridge or the earth fill approach was the cause of the increased flooding
16 events.

ADM
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17 1.32 The court does not find sufficient evidence to establish that the bridge or the earth fill
18 approach was the cause of any change in the floodplain designation on FEMA Flood Insurance Rate
19 Manual (FIRM) maps of the area, including the Anttonen and Wolfe properties.

20 1.33 The court finds that the flooding and the flood plain changes are not evidence of
21 impacts or injuries or interference with use and enjoyment due to the lack of evidence on the causal
22 link. [DELETED?]

23 1.34 The plaintiffs failed to present evidence that the bridge or earth fill approach
24 are not interfering with plaintiffs' use and enjoyment of their property as to (a) the flooding of
25 their property, or (b) the changes in the floodplain designation on FEMA FIRM maps.
26

1 1.35 In order to maintain a public nuisance action for obstruction of a river or its
2 floodplain, the conduct giving rise to the nuisance must be taken without lawful authority. RCW
3 7.48.120, .140(3). Plaintiffs have alleged the bridge and the earth fill approach, as a matter of fact,
4 have impacted the base flow elevation by more than one foot, which has impacted the surrounding
5 area.

6 1.36 While some of plaintiffs' evidence generally touched on this argument, sufficient
7 evidence was not provided to establish that as a matter of fact WSDOT violated a permitting
8 requirement at the time the bridge was replaced in 1985, or that the bridge or its approach caused a
9 change in the base flood elevation.

10 1.37 Plaintiffs did not present sufficient facts to establish WSDOT's lack of
11 lawful authority. Moreover, the legal requirement asserted by Plaintiffs (40 C.F.R. § 60.3(d))
12 is not clearly established as a matter of fact, as plaintiffs have not offered sufficient evidence
13 to support a finding that all the prerequisites set forth in that regulation have been met in this
14 case.

15 1.38 In order to maintain a public nuisance, the nuisance must affect an entire community
16 or neighborhood. RCW 7.48.130.

17 1.39 Mr. Lawrence testified that there may be an impact downstream to another property
18 owner when asked about the extent of the change in the riverbank and the erosion he noted on
19 plaintiffs' property. He testified that the river's migration will slow down at some point, but he could
20 not say when that would occur. Photographs and testimony from plaintiff John Anttonen were also
21 offered indicating impacts to the river bank in the vicinity of plaintiffs' property upstream from the
22 bridge.

23 1.40 However, in light of this testimony and the reasonable inferences drawn therefrom,
24 the court does not find this evidence is sufficient to show that erosion or bank loss extended to the
25 entire community or a broader neighborhood than the Plaintiffs.
26

1
2 1.41 Therefore, the court finds that sufficient evidence has not been offered to support a
claim for public nuisance for the bridge and earth fill approach's obstruction of the river's floodplain.

3
4 1.42 In order sustain a claim for public nuisance for "water pollution," there needs to be
5 evidence of pollution being introduced into a river that renders the river impure and that causes injury
to people.

6
7 1.43 In addition to photographs and testimony from lay witnesses, plaintiffs offered expert
8 testimony from fisheries biology consultant Kim Schaumburg. Ms. Schaumburg testified generally as
9 to concerns caused when a river's bank erodes and introduces sediment into a river system, including
10 increases in water temperature and river velocity that in turn negatively impacts fish and aquatic life,
as well as their habitat.

11
12 1.44 Ms. Schaumburg also testified that interruptions with stream and floodplain
13 connectivity can negatively impact river systems and habitats for the type of aquatic life found in the
14 Naselle River near plaintiffs' property. She further testified as to what she personally observed during
15 her site visit of the area, as well as the opinions she drew from that visit. However, she did not take
16 specific measurements of the water quality in the area. And, while she described potential impacts to
17 water quality in general terms, she did not offer an opinion that the bridge or the earth fill approach
caused the water quality issues she noted.

18
19 1.45 Sufficient evidence has not been offered to support a finding that the bridge or the
20 earth fill approach caused any negative impact to the river's water quality or impacts to fish or other
aquatic life.

21
22 1.46 The court also finds sufficient evidence has not been offered to establish that the
23 entire community has been injured by any water quality change attributable to the bridge. The area
24 near the bridge supports fishing by members of the general public, and plaintiff John Anttonen
25 admitted he has fished the river near his property in the past.
26

1 **II. CONCLUSIONS OF LAW**

2 2.1 The Court has jurisdiction of the parties and subject matter of this action.

3 2.2 Civil Rule 41(b)(3) provides that after the plaintiff in a nonjury trial has rested,
4 the defendant may move for dismissal on the ground that, upon the facts and the law, the
5 plaintiff has shown no right to relief. CR 41(b)(3). When considering a defendant's
6 CR 41(b)(3) motion to dismiss at the close of the plaintiff's case, the court may grant the
7 motion either as a matter of law or as a matter of fact. *Commonwealth Real Estate Servs. v.*
8 *Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937, 940 (2009).

9 2.3 "Nuisance" is a substantial and unreasonable interference with the use and enjoyment
10 of land.

11 2.4 When considering unreasonable interference, the court considers the reasonableness
12 of the harm and balances that against the social utility of the activity.

13 2.5 Public nuisance is defined in RCW 7.48.130 as "one which affects equally the rights
14 of an entire community or neighborhood, although the extent of the damage may be unequal".

15 2.6 It is a public nuisance to "obstruct or impede, without lawful authority, the passage"
16 of any river. RCW 7.48.140(3). This can include obstruction of a river's floodway that supports the
17 functioning of the overall river system, beyond the river's main channel.

18 2.7 It is a public nuisance to corrupt or render unwholesome or impure the waters of any
19 river to the injury of others. RCW 7.48.140(2). *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d
20 803 (1984); *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998).

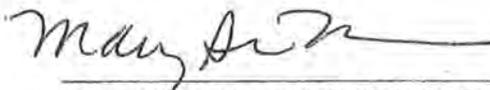
21 2.8 The bridge and the earth fill approach are obstructing the Naselle River's floodplain,
22 causing erosion of plaintiffs' property and interfering with their quiet enjoyment of their land.

23 2.9 The evidence is insufficient to prove that the bridge and the earth fill approach
24 are the cause of flooding on plaintiffs' land or of any change in the area's FEMA FIRM maps.

25 2.10 The evidence is insufficient to prove that WSDOT did not have lawful
26 authority to build the Naselle River Bridge and the approach embankment in 1926.

1 a public nuisance on either of the theories that the plaintiffs have offered. It is therefore
2 ORDERED that plaintiffs' claims are dismissed with prejudice and without costs.

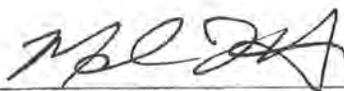
3 DATED this 18th day of November, 2016.

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7 HONORABLE MARY SUE WILSON

8 Presented by:

9 ROBERT W. FERGUSON
10 Attorney General

11 

12 MATTHEW D. HUOT
13 Assistant Attorney General
14 Attorneys for Defendant
15 State of Washington Department of Transportation

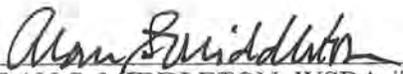
16 Approved as to Form:

17 DENNIS D. REYNOLDS LAW OFFICE

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20 DENNIS D. REYNOLDS, WSBA #04762
21 Attorneys for Plaintiffs

22 LAW OFFICES OF ALAN S. MIDDLETON PLLC

23
24 

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FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER &
JUDGMENT - 10
[90263-2]

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September 08, 2017 - 12:51 PM

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

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