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No. 81257-8

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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DON L. FITZPATRICK and PAM FITZPATRICK, husband and wife;  
BRAD STURGILL and HEATHER FITZPATRICK STURGILL, husband  
and wife,

Respondents,

OKANOGAN COUNTY,

Petitioner,

THE STATE OF WASHINGTON; JOHN L. HAYES and JANE DOE  
HAYES, husband and wife; and METHOW INSTITUTE FOUNDATION,

Defendants.

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**ANSWER TO PETITION FOR REVIEW**

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## INTRODUCTION

On June 16, 2002, the Methow River swept away a residence and accompanying real property owned by siblings Don L. Fitzpatrick and Heather Fitzpatrick Sturgill. The uncontroverted evidence on summary judgment below demonstrated that this tragedy was caused by a public works project for the construction of a nearby upstream dike.

The County moved for summary judgment arguing that, even though the dike caused the damage, the common enemy doctrine precluded liability because the dike merely repelled surface waters. The County presented no evidence that the dike repelled surface waters. In contrast, the Fitzpatricks presented uncontroverted expert testimony that the dike actually blocked several of the Rivers' natural side channels.

The Court of Appeals summarized this case as follows:

The common enemy rule, which allows landowners to repel surface waters to the detriment of their neighbors, does not apply when the landowner obstructs a watercourse or natural drainway or when the landowner obstructs riparian water from entering a flood channel. *Currens v. Sleek*, 138 Wash.2d 858, 862-63, 983 P.2d 626, 993 P.2d 900 (1999); *Sund v. Keating*, 43 Wash.2d 36, 42-43, 259 P.2d 1113 (1953)... The landowners presented evidence that the dike caused high waters flowing down the river to change the course of the channel and swept their land and home down the river. We conclude that they have presented material issues of fact that preclude summary judgment.

*Fitzpatrick v. Okanogan County*, \_\_ Wn. App. \_\_, 177 P.3d 716, 717-18, ¶ 1, (2008).

The Court of Appeals correctly followed this Court's precedent. Accordingly, the matter should now be remanded for trial.

### **REBUTTAL STATEMENT OF THE CASE**

#### **A. Factual background**

In the early 1980's, siblings Don L. Fitzpatrick and Heather Fitzpatrick Sturgill acquired real property adjacent to the Methow River in Mazama, Washington. Clerk's Papers (CP) 2, 163-64. They subsequently constructed a log house and garage, which were situated approximately 80 to 100 feet from the River and outside the 100 year floodplain. CP 3, 165-67. At that time, the channel alignment of the River was generally southwest and away from their property. CP 3.

On or around June 16, 2002, the River avulsed, abruptly changing course and forming a new channel alignment, altogether distinct from the previous one. CP 3. During this channel alignment, a substantial force of water was redirected straight at the Fitzpatricks' property—the residence and its contents collapsed into the River and were swept away along with substantial underlying real property. CP 3, 46-48.

The County's Petition labels this event as a "flood" event. *See, e.g.*, Pet. at 2-3. However, this event is more accurately described as a two year

storm event, which was precipitated by the rapid melting of snowpack in the North Cascades. CP 145. Although this was a high water event, there is no evidence that supports the County's "flood" characterization. CP 76.

The uncontested evidence below was that the direct cause of this abrupt avulsive event was the construction of a nearby upstream dike, the Sloan-Witchert Slough Dike. CP 133. The dike blocked several well-defined natural watercourses that were side channels to the main stem of the River. Indeed, the blocking of these channels also wiped out the potential fish rearing habitat that these side channels provided. CP 266. Jeffrey B. Bradley, Ph.D. in Civil Engineering - Hydraulics explained:

[T]here are several **naturally defined side channels, or watercourses**, in the right floodplain of the Methow River in the vicinity of the dike. These side channels relieve flow from the main channel as the water level rises during a high flow event.

CP 132-133.

Dr. Bradley also explained that it was the blockage of these side channels that caused the avulsion.

By allowing the river to access these natural side channels, it would have been able to meander more naturally and the **avulsion** that occurred in 2002 **would not have occurred**.

CP 133. This uncontroverted evidence was also corroborated by the hydrogeologist for the Washington State Department of Ecology. CP 254-55.

Interestingly, the State of Washington has not joined the County's Petition.

The dike was constructed as a public project.<sup>1</sup> The Fitzpatricks were not aware of the existence of the dike until after the June 16, 2002 event. CP 168.

**B. Procedural background**

The Fitzpatricks brought an inverse condemnation claim against the State of Washington and Okanogan County. CP 2, 4.<sup>2</sup> The State and County separately moved for summary judgment to dismiss the Fitzpatricks' claims. CP 18-27, 75-87. The Fitzpatricks responded that summary judgment was inappropriate because there were genuine issues of material fact, as established by the evidence presented and the Declaration submitted by their expert, Dr. Jeffrey B. Bradley. CP 110-130. Nonetheless, the trial court granted summary judgment to each of these defendants. CP 232-234.

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<sup>1</sup> The County's Petition alleges that the dike was originally installed by private landowners prior to 1970. Pet. at 2. To the best of the Fitzpatricks' knowledge, this alleged "fact" has never been raised previously by the County. Tellingly, it is made without citation to the record. Moreover, the record shows that the dike was constructed by the Washington Department of Highways and Okanogan County. CP 174 (agreement between State and County for construction of dike). *See also* CP 93-94, 174-99.

<sup>2</sup> The Fitzpatricks alternatively pled claims for trespass, negligence, and waste (RCW 4.24.630) against the State and County. CP 4-5.

As previously indicated, the Court of Appeals reversed. *Fitzpatrick v. Okanogan County*, \_\_ Wn. App. \_\_, 177 P.3d 716 (2008). In reversing, the Court of Appeals concluded that material issues of fact precluded summary judgment. *Id.* at 718, ¶ 1. The County has now filed a Petition for Review.

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT SUMMARY JUDGMENT WAS IMPROPER

The considerations governing acceptance of review are set forth in RAP 13.4(b). The sole criterion relied upon by the County in its Petition is that the Court of Appeals opinion is allegedly “in conflict with longstanding caselaw established by the Supreme Court and the Court of Appeals.” Pet. at 4. In this regard, the County’s Petition is replete with dire predictions of the calamitous consequences that will follow if this decision is upheld. Pet. at 5 (stating that the Court of Appeals decision “nullifies over a century of Washington case law” and “eviscerates the Common Enemy Rule.”).

The County’s conclusions can only be reached by deliberately misinterpreting relevant jurisprudence. The Court of Appeals readily understood this Court’s precedent and applied the law in a straight forward and clear manner. Further appellate review is not warranted.

**A. Well-Established Law Holds that the Common Enemy Doctrine Does Not Extend to the Obstruction of Watercourses or Natural Drainways**

The County correctly observes that Washington's common enemy doctrine finds its roots in the seminal case of *Cass v. Dicks*, 14 Wash. 75, 44 P. 113 (1896): "**surface water**" is regarded "as an outlaw and a common enemy, against which anyone may defend himself, even though by so doing injury may result to others." *Id.* at 78 (emphasis added). However, this defense only applies when blocking **surface waters**, as distinguished from **riparian waters** flowing within a natural stream. *Id.* at 77-78. In other words, it is the classification of the water itself that determines the applicability of the common enemy defense.

Tellingly, rather than addressing the classification of the water affected by the dike, the County focuses almost exclusively on the nature of the obstructing structure, arguing that the common enemy defense is typically applied to "the construction and maintenance of dikes and levees to prevent floodwaters from escaping the banks of the river." Pet. at 6. Yet, any structure, whether it be a berm, dike, etc. could block either surface waters or riparian waters. Thus, it is not the nature of the obstruction that determines the applicability of the common enemy doctrine, it is the classification of the water itself.

In *Sund v. Keating*, 43 Wn.2d 36, 259 P.2d 1113 (1953), for example, this Court acknowledged the general proposition that waters overflowing from a river in flood time **may** often be surface waters. *Id.* at 41. However, the Court clarified that this is not always the case. Indeed, with respect to *Cass v. Dicks*, the Court explained:

Because the flood waters involved in the *Cass* case were not confined within the channel of a natural watercourse, we assumed, without discussion, that the case was governed by the law of surface waters.

*Id.* Significantly, the Court clarified that its prior cases did **not** hold that flood waters *remaining in a flood channel* of a stream were surface waters.

In none of these cases have we decided whether flood waters, still remaining within the confines of the flood channel of a stream, are an integral part of the watercourse and governed by the laws relating to riparian rights, or whether they are surface waters.

*Id.* at 42. The Court then followed the “weight of the authority” recognizing that

[T]he law of surface waters is applicable, **once the facts show** that the waters have become ‘diffused surface waters’ as opposed to surface waters flowing within a watercourse. The logical underpinning for the majority view is that a stream must be viewed as consisting of its normal banks and what is termed its ‘flood channel.’ *So long as the waters remain within this flood channel*, the waters are properly classifiable as **riparian waters**.

*Id.* at 42-43 (bold and italics added). The Court of Appeals relied upon *Sund*

below, describing it as “persuasive authority.” *Fitzpatrick v. Okanogan County*, \_\_ Wn. App. \_\_, 177 P.3d 716, 719, ¶ 15 (2008).

In subsequent cases, the Court has referred to blockage of water within a natural watercourse as being an “exception” to the common enemy defense.

The first exception [to the common enemy defense] provides that, although landowners may block the flow of diffuse surface water onto their land, they may **not** inhibit the flow of a **watercourse** or **natural drainway**. Under this exception, a landowner who dams up a stream, gully, or drainway will not be shielded from liability under the common enemy doctrine.

*Currens v. Sleek*, 138 Wn.2d 858, 862, 983 P.2d 626 (1999). “A natural drain is that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands.” *King County v. Boeing Co.*, 62 Wn.2d 545, 550, 384 P.2d 122 (1963).

The County’s Petition relies heavily upon *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999) to argue that the common enemy doctrine precludes liability for dikes. Pet. at 6-9. The same argument was made to the Court of Appeals. *Fitzpatrick v. Okanogan County*, \_\_ Wn. App. \_\_, 177 P.3d 716, 719, ¶ 12 (2008). However, the Court of Appeals correctly recognized that *Halverson* is not applicable because *Halverson* did not involve blocking a natural watercourse. *Id.* at 719, ¶ 14.

Instead, *Halverson* involved blocking diffused surface waters.

Indeed, this distinction was specifically noted by this Court in footnote 14; “waters escaping the banks of a river and flowing *into a defined flood channel* are not surface waters.” *Halverson*, 139 Wn.2d at 14 n.14 (citing *Sund v. Keating*, 43 Wn.2d 36, 42-46, 259 P.2d 1113 (1953) (italics by the Court; bold added). This Court then distinguished the facts in *Halverson* because

there is **no evidence in the record** that the overbank floodwaters flowed within a defined flood channel. To the contrary, even Plaintiffs’ expert testified that, absent these levees, the floodwaters would have diffused over the entire floodplain, escaping into an entirely separate river drainage basin.

*Id.* (emphasis added).

In short, and as expressly recognized in the Court of Appeals decision, the defendants in *Halverson* had not inhibited the flow of a natural watercourse or drainway. *Fitzpatrick v. Okanogan County*, \_\_\_ Wn. App. \_\_\_, 177 P.3d 716, 719, ¶ 14 (2008). Accordingly, the common enemy defense was available to the *Halverson* defendants. In contrast, the uncontested fact here is that the dike blocked flow into the natural side watercourses and thereby caused the avulsion event. Under these facts, *Halverson*, *Sund*, and *Currens* all hold that the common enemy defense is not applicable. Here, the same cannot be said of the County.

The *Halverson* opinion goes on to state:

The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course ...*Sund* held that floodwaters still flowing within a defined “flood channel” cannot be diverted out of the channel without incurring liability for resulting damages, thus, partially limiting those earlier cases which classified any floodwaters as surface waters. See *Sund*, 43 Wash.2d at 44-45, 259 P.2d 1113.

*Halverson*, 139 Wn.2d at 15 (italics by the Court).

Accordingly, *Halverson* embraces and follows the law set forth in *Sund*, and also recited in *Currens*. The Court of Appeals correctly understood and applied this jurisprudence to this case and reversed summary judgment.

**B. The Undisputed Evidence Shows the County Blocked a Natural Watercourse**

Based on the foregoing common enemy jurisprudence, summary judgment would have been proper only if the trial court was presented undisputed factual evidence that the waters blocked by the dike would have been **surface waters**. But there was **no such evidence**. The County cannot point to a shred of evidence that the dike blocked waters on June 16, 2002 that would have become diffused surface waters. To the contrary, the only evidence before the trial court was that the waters held back by the dike were riparian waters that would have otherwise flowed through natural side

channels. CP 133. Granting summary judgment was clearly contrary to the law because facts and inferences must be read in light most favorable to the Plaintiffs as the nonmoving party. *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 625, 911 P.2d 1319 (1996).

The Fitzpatrick's expert, Dr. Jeff Bradley, had exceedingly high qualifications. CP 136-42. Notably, the County did not question his credentials in any respect.

The County offered nothing to rebut Dr. Bradley's conclusion that the blockage of the side channels caused this event. Indeed, his conclusion is corroborated by other evidence. A memorandum dated November 30, 1999, prepared by Al Wald, identified on the document as a hydrogeologist for the Washington State Department of Ecology states:

This road and dike work has impacted the Methow River by **cutting off** at least three **natural overflow channels** in the floodplain, thereby compressing more flood flow into the main channel and reducing the natural flood conveyance capacity of the river. Overall this work has cut off about a mile of overflow channels. Additional velocity and quantities of high flows compressed into the main channel during floods are disrupting the natural bed form of the river and causing additional erosion and scour of the main channel downstream.

CP 254-255 (emphasis added).

Although Dr. Bradley's testimony was more than sufficient, this memorandum is consistent with Dr. Bradley's analysis. The Fitzpatrick's

provided factual evidence that the dike blocked natural watercourses and therefore caused the destruction of their property. The Court of Appeals correctly concluded that the granting of summary judgment was in error.

**C. There is No Intent Element to Inverse Condemnation**

The County's Petition perpetuates the absurd argument that the County cannot be liable for inverse condemnation because the damage to the Fitzpatricks' property was not contemplated by the construction of the dike. Pet. at 14. Not only is the "I didn't mean to" defense legally deficient in most areas of law, but relevant case law expressly rejects the notion within the context of inverse condemnation.

As noted by the Court of Appeals, the elements of inverse condemnation are: "(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings." *Fitzpatrick v. Okanogan County*, \_\_ Wn. App. \_\_, 177 P.3d 716, 777, ¶ 36 (2008)(citing *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1988)). Even a cursory review of the elements of this cause of action demonstrate that proving intent is unnecessary.

As observed by the Court of Appeals, all that is required is that the "landowners must show proximate cause between the governmental activity and the landowners' loss." *Id.* at 723, ¶37 (citing *Halverson*, 139 Wn.2d at

12-13)(quoting *Phillips*, 136 Wn.2d at 966)(quoting *Lambier v. City of Kennewick*, 56 Wn. App. 275, 283 n.4, 783 P.2d 596 (1989)). Nonetheless, the County persists.

The authority cited by the County for this argument finds its genesis in the discredited case of *Jorguson v. City of Seattle*, 80 Wash. 126, 141 P.334 (1914). The holding of *Jorguson* was overruled by *Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 P. 645 (1927). See also *Lambier*, 56 Wn. App. 275 (1989), *rev. denied*, 114 Wn.2d 1016 (1990) (recognizing overruling of *Jorguson*).

Perhaps recognizing that the discredited *Jorguson* decision is not the best standard bearer for its argument, the County relies directly upon *Jorguson's* equally defunct progeny. Petitioners wholly entrust this Court to see through the County's transparent citation gamesmanship.

*Jorguson* simply noted that a particular cause of action for landslide damage sounded in tort, not inverse condemnation. *Jorguson*, 80 Wash. at 130-131. In *Wong Kee Jun*, this Court overruled *Jorguson's* tort-inverse condemnation distinction:

[T]he only inharmony arises from the *Casassa* and *Jorguson* cases and those which attempt to follow them. In the beginning they were a not unjustified attempt to draw a distinction which does exist, but the line drawn was too fine, and the results show that it leads to confusion. So far as out of harmony with what is here said, those cases are **overruled**.

*Wong Kee Jun*, 143 Wash. at 505 (emphasis added). The County's Petition tellingly omits this language from *Wong Kee Jun*.

Indeed, a recent case recognizes that the *Jorguson* tort-inverse condemnation distinction was overruled by *Wong Kee Jun*. In *Lambier*, the court specifically held, the "unintended results of a governmental act may constitute a taking." 56 Wn. App. at 281. See also Barer, Stanley H., Distinguishing Eminent Domain From Police Power and Tort, 38 Wash. L. Rev. 607, 622 (1963) ("[B]oth the 'negligent plan' rationale and the 'not necessarily anticipated by the plan' approach were put to rest with the decision in *Wong Kee Jun v. City of Seattle*."). Here, the Court of Appeals was understandably persuaded by *Lambier's* cogent analysis. *Fitzpatrick v. Okanogan County*, \_\_ Wn. App. \_\_, 177 P.3d 716, 723, ¶37 (2008).

The County predictably attempts to dismiss *Lambier* as factually distinguishable because it did not arise within the context of flooding.<sup>3</sup> Pet.

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<sup>3</sup> Notably, *Lambier* also held that *Seal v. Naches-Selah Irrigation District*, 51 Wn. App. 1, 751 P.2d 873 (1988) and *Songstad v. Municipality of Metropolitan Seattle*, 2 Wn. App. 680, 472 P.2d 574 (1970), two cases cited by the County, were factually distinguishable from *Jorguson*. *Id.* at 280. First, it noted that in *Seal*, there was not an affirmative act of construction which directly resulted in damage to property, so the claim was more appropriate as a tort. *Id.* The *Lambier* Court also factually distinguished *Songstad* on the fact that the damages were not permanent, but were merely a temporary interference with their property interests. *Id.* Neither of those distinguishing facts are present in this case. *Lambier* went on to recognize that both *Seal* and *Songstad* mistakenly rely on *Jorguson*. *Id.* at 281.

at 15-16. The different factual scenario of *Lambier* does not diminish its holding—for it would be absurd to argue that damages must be contemplated in inverse condemnation claims with the context of flooding, but not in other contexts.<sup>4</sup>

The County's citation to *Olson v. King County*, 71 Wn.2d 279, 482 P.2d 562 (1967) is equally misguided. Pet. at 14, 17-18. Contrary to any implied suggestion by the County, *Olson* affirmed the principles of *Wong Kee Jun*.

Concededly this distinction between a constitutional taking and damaging and tortuous conduct by the state or one of its subdivisions is not always clear. But subsequent to our comprehensive analysis of our cases ...in *Wong Kee Jun v. City of Seattle*...we have adhered fairly closely to the principles enunciated in those cases.

71 Wn.2d at 284.

In short, *Olson* does not resurrect the negligence distinction or inadequate plan rule of *Jorguson*. It simply recognizes that in some situations, a government may act negligently and cause temporary interference and damage without resulting in a taking of the land. However, the *Olson* case provides no legitimate basis for the County to contend that its

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<sup>4</sup> It is ironic that the County would argue that *Lambier* has no applicability to this case because it was not a flooding case, but argue that *Olson*, also not a flooding case, is analogous to this case.

**permanent** destruction of the Fitzpatricks' residence and real property, as a direct result of its construction of the dike, is not a compensable taking.

Finally, the County argues that a taking requires that it not only be contemplated but "necessarily incident to" the government project. Pet. at 16 (citing *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005)). The County boldly claims that *Dickgieser* lays to rest any uncertainty whether an inverse condemnation claim requires a showing that damage be necessarily incident to, or contemplated by the government project. Pet. at 16. Contrary to the County's assertions, *Dickgieser* does not support its case, but actually supports the Fitzpatricks' inverse condemnation action.

*Dickgieser* involved logging of state owned property by the Washington Department of Natural Resources (DNR). By removing large quantities of mature timber, the natural drainage of surface water from the area was significantly altered and a stream subsequently overflowed its banks and destroyed three homes on Dickgieser's land. Dickgieser subsequently brought an inverse condemnation claim. In response, the State argued that DNR's logging operation was negligently implemented (*i.e.* tortious conduct), but the resulting damage was not a taking.<sup>5</sup>

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<sup>5</sup> Because the statute of limitation had passed on the tort claims, the State's motive in *Dickgieser* for attempting to characterize DNR's logging project as tortious, rather than a taking, was to avoid liability. *Id.* at 533-34.

The County's reliance on *Dickgieser* ignores the holding in the case. The Supreme Court rightfully rejected the State's argument that the action sounded in tort and held that the permanent destruction of the plaintiff's home was NOT a negligence claim. Importantly, the case says nothing about a requirement that a taking be contemplated. The County's select quotes from *Dickgieser* are taken out of context.

### CONCLUSION

The undisputed evidence in this case is that the dike completed by the County and State as a public project caused the destruction of the Fitzpatrick's house and property. The Court of Appeals correctly determined that summary judgment was improper. The Fitzpatrick family should now have the opportunity to prove up the elements of their inverse condemnation claim at trial. Accordingly, it is respectfully requested that the Petition for Review be denied.

RESPECTFULLY submitted this 2<sup>nd</sup> day of April, 2008.

GROEN STEPHENS & KLINGE LLP

By:           /s/ Samuel A. Rodabough            
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To the Clerk of the Court:

In the matter of Fitzpatrick v. Okanogan County, Supreme Court Case No. 81257-8, attached for filing with the court is Answer to Petition for Review. This document is being filed by John M. Groen, WSBA #20864, and Samuel A. Rodabough, WSBA #35347, attorneys for Respondents.

Thank you for your attention to this matter. Please call us with any questions.

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