NO. 94282-0

SUPREME COURT OF THE STATE OF WASHINGTON

HOLDEN-McDANIEL PARTNERS, LLC

Petitioner,

v.

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

Respondent.

ANSWER TO PETITION REVIEW

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I. IDENTITY OF RESPONDENT

The City of Arlington ("the City") was the defendant at the trial court level, and having prevailed on summary judgment, the Respondent in Division I of the Court of Appeals. It now respectfully responds to Plaintiff Holden-McDaniel Partners'[1] Petition for Review.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The first problem with the Partnership's legal position is that it invites an advisory opinion. The notion that the City or Joint Venture had "knowledge to a substantial certainty" that flooding would occur exists only in the naked assertions of the Partnership. The record—including and especially the excerpts cited by the Partnership—establishes otherwise. Thus, expansion or contraction of *Bradley* will, at best, be a dicta exercise—and review is unwarranted for that reason alone.

But more fundamentally, the Partnership's is deeply problematic—both from the perspective of the case law and practical impact—because it blurs the line between negligence and intentional conduct. It is one thing to find an intentional act when a party deliberately fires a gun into a crowd, or, as was the case in *Bradley*, knowingly (and admittedly) showers neighbors with arsenic. However, it is quite another to find "intent" merely because a defendant acknowledges the *risk* of a certain

[1] Referred to herein as "the Partnership."

outcome. A jury will decide whether the Joint Venture[2]—which designed the Gleneagle development to a 100-year flooding standard—failed to address this risk consistent with ordinary care. But its mere awareness that flooding *could* occur does not mean it *intended* flooding to occur.

Appellate holdings have carefully developed around this distinction, unbroken, for good reasons. The way people liquidate and manage risk—in the context of insurance, indemnity, releases, contracts, and even Worker's Compensation—will be upended. Every negligence lawsuit where there is a creditable "notice" argument will be transmogrified into an intentional tort lawsuit. And, as a practical matter, a premium will be put on ignorance, while parties like the Joint Venture, who carefully identify risk early on, will actually have *greater* exposure.

Because the Partnership has not demonstrated grounds under RAP 13.4; and more, because acceptance of its position would leave the law affirmatively worse off, review should be denied.

III. RESTATEMENT OF THE CASE

A. The Property's Long History Of Flooding

In the mid-1990's, two development projects were underway in Arlington. The first was being undertaken on the Partnership's property; it was adding a 65,000 engineered metal building. CP V: 2008-2009. The

[2] As discussed below, the City did not design or build the Gleneagle development—apart from enforcing certain stormwater standards and, decades later, developing additional facilities to offset some of the stormwater impacts.

second was the Gleneagle development, on the hill adjacent to the Partnership's property. CP V: 2032; CP IV: 1875.

Topographically, the Partnership's property lies within a "gutter" of sorts. It is sandwiched between a hill and a raised railroad track (CP IV:1875), which, as historical reports confirm (and the Partnership's own experts admit) led to a history of flooding that predates any development whatsoever. CP IV:1904 (Tr. 129:9-14) (admitting property "flooded on a regular basis... long before there was any development on the hill...").[3] When it originally purchased this property, the Partnership's due diligence in this regard was virtually nonexistent. CP IV:1953; CP IV:1953.

This would become significant later, because it was anything but clear what flooding would or would not have occurred, but for the Gleneagle development. The Partnership's hydraulic engineer, Malcolm Leytham, cited a higher "frequency," but could not say that this played a role in any particular exceedance event; nor could he quantify any increase in severity. CP II: 516 (Tr. 109:1-23). The Partnership's damages expert, for his part, acknowledged that "water is water"; a property that floods every 25 years (the Partnership's property, pre-development) and a property that floods every 15 years (the present) are both simply "properties with a flooding problem." The *de minimus* increase has no impact on valuation or marketability. CP I: 380-382.

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[3] *See also* CP IV: 1616 (Historical drainage report stating: "Several characteristics of the Woodlands site and surrounding area contribute to the drainage situation and indicate that remedies to the existing problems will not be easily found.").

B. The City's Role In The Gleneagle Development

The Gleneagle development was designed and constructed over a course of decades, by dozens of engineers, and ultimately tripled the population of Arlington. CP II:511 (Tr. 8:23-9:22).

The City, appropriately, took the project seriously and ensured that it met applicable standards. But that is not to say it was *the City's* project. It was not. The City's role was regulatory in nature. It processed permits and engaged in reasonable back-and-forth with the developer. CP I:214-15; CP V:2023-24. The City did not pay for or fund the development, nor bill itself as a partner. *Id.* This was always a private project—something the Joint Venture itself confirmed in no uncertain terms:

> Q. Was it a typical sort of developer local government relationship that you had with the City?
>
> A. It wasn't as bad as some. It was bad, but it's not as bad as it could have been.
>
> Q. The typical back and forth?
>
> A. Yes.
>
> Q. You filed applications, they granted permits, that kind of thing?
>
> A. Yes.
>
> Q. The City wasn't your partner, or a member of the Joint Venture, or anything like that?
>
> A. No.

CP IV:1938 (Tr. 33:8-19).

As for "knowledge to a substantial certainty" that flooding would occur, the Partnership's claims are wrong. Indeed, they demonstrate a disregard for the record verging on reckless:

PARTNERSHIP'S ASSERTION	THE RECORD
"The first flooding of the Holden-McDaniel property occurred in 1990 soon after the first phase of the project was complete." Pet. at 5.	Q. So their property in all likelihood flooded on a regular basis, didn't it? A. That seems likely. Q. And that's long before there was any development on the hill, the Gleneagle development on the hill, correct? A. Correct. CP IV:1904 (Tr. 129:9-14).[4]
"... the floodwaters caused Holden-McDaniel to lose its lease with BlueScope, costing it millions in damages." Pet. at 5.	*See, e.g.*, CP IV: 1993-96 (BlueScope *bought out* its lease for $2.6 million); CP II: 703 (Tr. 59:10-20) (BlueScope representative refusing to testify that they left because of flooding); CP VI: 2137-40 (internal BlueScope documents indicating that operations in Arlington were no longer feasible after 2009 financial collapse); CP VI: 2167-68 (press release indicating closure for reasons unrelated to water); CP VI: 2151-52 (BlueScope employee unable to say that flooding *ever* impacted operations).[5]

[4] This testimony comes from the Partnership's expert, Tom Holz.

[5] The Partnership consistently cited to an excerpt from the BlueScope deposition in which the witness was unaware of all of his *legal grounds* to break the lease. Not only does this fail to prove BlueScope left because of water, but, in any event, the witness later clarified that BlueScope *could* have broken the lease and negotiated based upon the Partnership's duty to mitigate its losses. CP I: 194-95.

"The City of Arlington attempted to compel Holden-McDaniel into increasing the size of its culvert to accommodate [the] increased stormwater runoff." Pet. at 7.	As its own declaration confirms, this step was taken "to deal with the *resulting flooding*" of the uphill development. CP V:2038. The flooding was already occurring, so the City attempted to persuade the Partnership to take steps to protect itself (the Partnership declined, and sued the City instead).
"... the defendants signed a rezone contract concerning the Gleneagle project..." Pet. at 8.	The Partnership misrepresents Section 19 of the rezone agreement, which contemplates only "impacts of the Gleneagle development ***on the storm drainage system of the City***..." CP I:495-96 (emphasis added). There is nothing contemplating impacts on the Partnership or other third party.
Gleneagle was authorized "to discharge more stormwater to Holden-McDaniel's culvert than the culvert could bear." Pet. at 9.	The documents cited are actually a confirmation that water emanating from Gleneagle did *not* exceed "predevelopment" flows. *See* CP IV:1576-78; CP III:1382 ("Calculations for the proposed pond sizing and confirming that post-development flow rates will not exceed the pre-development flows downstream of the Gleneagle site are located in the appendix.").
"The defendants also designed alternatives to prevent Gleneagle from flooding..." Pet. at 9.	Again, the documents cited by the Partnership only confirm that the Joint Venture understood that it was "responsible for matching pre-development release rates..." CP II:779.[6]

[6] It is true enough that the Joint Venture "considered options" (Pet. at 9), within the bounds of matching pre-development flows, *e.g.*, modifying certain ponds while eliminating others. *See* CP II:779-80. But that only serves to illustrate reasonable engineering judgment.

"... the Joint Venture was warned early on that if it wanted to prevent downstream flooding, it would need to greatly expand on-site stormwater ponds." Pet. at 10.	Three observations are in order. **One**, the document cited was a letter from an engineering firm to the Joint Venture. CP IV:1705-08. The City did not receive it. **Two**, the letter did not state that there *would* be flooding; only that there was a "risk." *Id.* at 1706. **Three**, the engineer proposed as an option facilities capable of conveying a 100-year storm, "which would constitute the least risk, but also the highest capital cost." *Id.* at 1707. This is the option the Joint Venture chose, and conveyed to the City: Q. The general directive was aim for a hundred year? A. Aim for a hundred year. Q. And would that have been something that would have been communicated to the City's engineers...? A. Yes. CP IV:1938

C. Flooding Events

There were sporadic flooding events over the years, however, they markedly decreased in 2002. This was attributable to the City's improvements in the area; namely, the 67th Avenue Project—after which, flooding ceased for *years*. Between 2002 and 2009, there was not a single flooding event. The Partnership was forced to concede the obvious:

> Q. Can you and I agree that the 2002 improvements made flooding better, that it improved or reduced flooding as a general matter?

A. It appears to have.

* * *

Q. And it had the effect of reducing flooding on your property?

A. It appears to.

CP IV: 1872 (Tr. 248:24-249:19). Internal correspondence also confirmed that the Partnership viewed the water, over these years, as a non-event:

> Continued flooding; Yes, after the 2009 flood that triggered the reconstruction of the current proper functioning stormwater retention system... ***there has been two more events including the only time water entered a building, and then only for a short time and then in a truck driveway causing no interruption to business or damage***... The facts speak for themselves, there was no flooding between 2002 and 2009 or the city engineer and the city street department would have records of those events which they do not as there was no flood event during those time periods.

CP IV: 1894 (Email from Joe Holden) (emphasis added).

As for the 2009 event, it was a flood of statewide significance, which led to a national disaster declaration. It involved substantial snowfall throughout the preceding months and freezing temperatures, combined with immediate warming and significant rain. The result, as Jeff Renner explained, was a disaster:

> As documented in the Storm Events Database compiled by the National Weather Service, this sequence of heavy snow, heavy rain, extreme cold and rapid warming led to widespread damage of property, road closures, flooding and landslides. In the opinion of this analyst, this represents neither a modest, nor a common event. Additional verification of the severity of this sequence of storms is

> available in local governmental and media reports, key examples of which are appended to this report. These include discussions of the severity and extent of the snowstorms, the cold, the thaw, resultant flooding and the impact on the region, including then-Governor Gregoire's request for declaration of much of Puget Sound, including Arlington, as a Federal Disaster Area.

CP I:471.

D. Proceedings Below

After considering 83 declarations and filings, the trial court granted summary judgment in favor of the City and Joint Venture, reasoning that the Partnership's settlement and release of claims in 1998 barred the present lawsuit. CP I:20-25. It also excluded the Partnership's expert for discovery abuse (CP I:17-18) and dismissed the intentional tort claims because "[t]he evidence in this case, construed in favor of [the Partnership], does not establish intentional conduct as defined by applicable Washington law" (CP I:18-19).

The Court of Appeals agreed with the dismissal of the intentional tort claims, confirming that the conduct, at best, "sounds in negligence and does not support the intentional act needed for trespass." Op. at 19. Reconsideration was denied.

The Partnership now seeks review.

IV. ARGUMENT

A. The Analysis Invited By The Partnership Would Amount To An Advisory Opinion

Even if the legal issue identified in the Petition warranted review under RAP 13.4(b)—which it does not (*infra* Section B)—this case would

be a poor vehicle for it. The lower courts' application of *Bradley* is only relevant to the extent the Joint Venture and City actually "knew to a substantial certainty" that the Gleneagle development would cause flooding. Conversely, to the extent such knowledge is *not* established, the Court would be doing little more than issuing a speculative, advisory opinion. *See Clallam Cty. v. Dry Creek Coal.*, 161 Wn. App. 366, 393, 255 P.3d 709 (2011); *see also To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 417, 27 P.3d 1149 (2001) ("dispute must be one that the court's decision will conclusively resolve").

Here, as every prior court pointed out, the *evidence* does not support the Partnership's claims. There may be room to dispute "ordinary care," but there is no reason to believe any party desired to cause flooding or knew to a "substantial certainty" that it would occur. The documents cited by the Partnership prove as much. Accordingly, neither affirmation nor rejection of the *Bradley* standard will be of any help to the Partnership—even with a liberally construed record.

Expressed differently, even if the legal issue were worthy of review, the Court would be better served to await a better case, where its ruling would be outcome-determinative. Revisiting or clarifying a rule, divorced from tangible application, will not serve the parties, and is likely to confuse future practitioners.[7]

[7] "A statement is dicta when it is not necessary to the court's decision in a case. Dicta is not binding authority." *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013) (internal citations omitted).

B. Review Is Not Warranted Under RAP 13.4

Even assuming for the sake of argument that the legal issue presented were outcome-determinative, the result would be no different. RAP 13.4(b) is not implicated. On the contrary, not only has the appellate—including Division I, in this case—applied *Bradley* with remarkable consistently and in principled fashion, but revisiting it as proposed by the Partnership would be subversive to sound public policy.

1. Development and State of the Law

The City agrees that *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985), is the leading case and sets forth the intentional trespass standard. The problem is that the Partnership selectively block-quotes from it, with no acknowledgment of its fact-driven nature. Some context is in order.

Critically, *Bradley* was decided on stipulated facts, where "knowledge" of the ongoing trespass was undisputed. The case involved a smelting factory which *admitted* to emitting various particulates—including arsenic—onto the plaintiff's property. *Id.* at 680. The issue was not *risk* of trespass; everyone agreed that it was happening on an ongoing basis. *Id.* at 683 ("known for decades"). The smelting factory's defense was that it should prevail on the intentional tort claims, because it did not subjectively "desire" to cause a trespass. This Court disagreed, confirming that "[i]ntent... is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired,

but also to those which the actor believes are substantially certain to follow from what he does." *Id.* at 683.

This standard has been in place, and appropriately applied, for decades. However, the courts have been careful not to wrench *Bradley* out of its logical bounds; and in that regard, distinguish between knowledge of a *fact* and knowledge of a *risk.*

Three years after *Bradley* was decided, in *Seal v. Naches-Selah Irr. Dist.*, 51 Wn. App. 1, 4, 751 P.2d 873 (1988), the plaintiff-cherry farmers purchased property subject to "seepage" caused by the water district. It was an ongoing problem, and one the district made repeated attempts to resolve. They failed, and trial ensued. On appeal, the plaintiffs claimed the trial court erred in failing to give them an "intentional trespass" instruction. Division III disagreed, emphasizing the distinction between negligence and "desire to flood":

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

Id. at 6. In other words, simple awareness of flooding is not compatible with "intentional flooding" – especially when the defendant, like the City, is actively attempting to remediate the problem.

Next, in *Price ex rel. Estate of Price v. City of Seattle*, 106 Wn. App. 647, 650, 24 P.3d 1098 (2001), the Court of Appeals held—wholly consistent with authority—that trespass required an "act"—which was, in turn, consistent with its dictionary definition.[8]

Following several minor landslides, Seattle retained an environmental consulting firm to examine the cause. It found "an imminent hazard" that a "catastrophic landslide" would occur. *Id.* Seattle took steps, but not enough, and six homes were destroyed. *Id.* at 651. The property owners brought the same claim as the Partnership. Citing *Bradley*, they pointed to the consultant's "imminent" language. *Id.* at 660. Division I dismissed the argument, explaining that "a failure to act" sounds in negligence, *id.*, and hence, merged into the existing negligence claims. *See also Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 546, 871 P.2d 601 (1994); *Pruitt v. Douglas Cty.*, 116 Wn. App. 547, 553–54, 66 P.3d 1111 (2003) ("We treat claims for trespass and negligence arising from a single set of facts as a single negligence claim.").

In *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 569, 213 P.3d 619 (2009), Division II carefully framed the issue, again, in terms of

[8] "An unlawful ***act*** committed against the person or property of another; esp., wrongful entry on another's real property." TRESPASS, Black's Law Dictionary (10th ed. 2014) (emphasis added).

the *Bradley* standard. *See id.* at 569 (whether the defendant "had knowledge that raising their bulkhead would to a substantial certainty result in [flooding]"). And though the defendants did in fact raise their bulkhead "without considering the consequences"—and presumably "knew to a substantial certainty" that water rolls downhill—it was not enough to sustain the claim. Division II, like the other courts to consider the issue, refused to blur the line between what was *known* and what *should have been known. Id.*

The same was true in *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 402, 305 P.3d 1108 (2013), where Division III acknowledged the difference between knowledge of a *risk* of landslides and knowledge that there *would* be landslides. *Id.* ("we conclude that no question of material fact exists as to whether SCBID intended to trespass on JMR's property.").

And most recently, in *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 770, 332 P.3d 469 (2014), the court got to the same result in a closer case than ours'. There, the plaintiffs cited evidence that clearcutting increased the risk of landslides by upwards of 3000% which, the they reasoned, furnished the defendants with knowledge of a slide "to a substantial certainty."[9] There was, moreover, no dispute that the defendants "intended to cut down the trees." *Id.* at 7. The court nonetheless rejected the argument, citing both *Price* and *Bradley*:

[9] Counsel for the Partnership represented the Hurley plaintiffs below and on appeal.

> The intent element of trespass can be shown where the actor knows that the consequences are certain, or substantially certain, to result from his act. Even viewed in the light most favorable to Appellants, the nonmoving party, there is no evidence in the record that Respondents knew or were substantially certain that their logging activities would result in a landslide.

Id. at 8. This Court denied review the following year. *See* 182 Wn.2d 1008 (2015).

In short, the case law developed with remarkable consistency. There is little debate about the *Bradley* standard, which permits intentional tort claims in some contexts, but not all contexts.[10]

2. The Unpublished Court of Appeals Decision Is Entirely Consistent With *Bradley* and Subsequent Case Law

Given the above-framework, Division I's decision was hardly remarkable. It neither "struck at the heart of *Bradley*," nor "gut[ted] it." Br. at 19; 20. The Court of Appeals merely applied a settled legal standard—which it, itself, acknowledged (Op. at 18)—to established facts.

The problem with the Partnership's theory is that our case is very much like *Price*, a holding the Court of Appeals rightly pointed to. Like the property-owners in *Price*, the Partnership cannot meaningfully prove that the City directly harmed or flooded it. Instead, according to its own

[10] The same is true in other contexts. *See, e.g., Walston v. Boeing Co.*, 181 Wn.2d 391, 397, 334 P.3d 519 (2014) (deliberate act under Workman's Compensation law: "Disregard of a *risk* of injury is not sufficient... *certainty* of actual harm must be known and ignored.") (emphasis in original); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.05 (4th Ed 2016) (defining "willfully" to require knowledge "as to a particular fact"); *cf. Sorensen v. Estate of McDonald*, 78 Wn.2d 103, 109, 470 P.2d 206 (1970) (wanton misconduct contemplates intentional conduct on part of host driver that is more reckless and dangerous than gross negligence, yet short of premeditated and deliberate harm).

testimony, the City has only helped the Partnership by developing nearby facilities. *See* CP IV: 1872 (Tr. 248:24-249:19); CP IV: 1894; CP I:471.

So, like *Price*, the Partnership developed a "rescue theory" of its own (*compare* Pet. at 18), in which the City should have done more to stop the private developer from causing harm. As the Partnership's CR 30(b)(6) representative put it:

> Q. In your own words, what did Arlington do wrong to cause you to bring this lawsuit?"
>
> A. They failed to control the stormwater from the -- from other entities, in the development across the street, and caused me years of flooding and grief.

CP IV:1872 (247:1-16); *see also id* (clarifying "City should have controlled the Gleneagle developer's discharge of water better.").

Accepting this theory as true and legally relevant—though, it is neither[11]—this was, at best, a "failure to act" which "sounds in negligence and does not support the intentional act needed for trespass." Op. at 19 (citing *Price v. City of Seattle*, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001)). Moreover, the City's repeated efforts to address the problem over the years, like *Seal*, are incompatible with "a desire to allow water to seep into the [Partnership's property]." *Seal*, 51 Wn. App. at 6. And, as even

[11] Factually, the record replete with careful analysis and proactive efforts by the City; and legally, the Partnership's attempt to shift blame onto local government is foreclosed by the public duty doctrine. *See, e.g., Patterson v. City of Bellevue*, 37 Wn. App. 535, 537-38, 681 P.2d 266, *rev. denied,* 102 Wn.2d 1005 (1984) (local government not liable for increased stormwater associated with growth and private development); *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 168, 171, 759 P.2d 447 (1988) (permit applicant, not government, is responsible for consequences of development); *Mull v. City of Bellevue*, 64 Wn. App. 245, 251-52, 823 P.2d 1152 (1992) (similar).

the documents cited by the Partnership confirm, the defendants were considering the *risk* of flooding (CP IV:1576-78; CP III:1382; CP II:779; CP IV:1705-08), not the *fact* that it would happen—which courts have never treated as "substantial certainty." *See, e.g., Jackass Mt. Ranch, Inc.* 175 Wn. App. at 402; *Hurley*, 182 Wn. App. at 770.

In the end, the only party claiming that the possibility of flooding was obvious is the one who did not participate in the development. The City looks forward to trial, where a jury can decide if it managed risk consistent with ordinary care. But the four judges who, to date, have rejected the Partnership's "intentional trespass" theory did not err.

Their decisions should stand.

3. Blurring The Line Between Negligence and Intent Is Bad Public Policy

There is perhaps a more fundamental reason review is not warranted: it would create more problems than it would solve. Courts have jealously guarded the line between "should have known" and "actually knew."[12] And for good reason.

The line between negligence and intent is heavily relied upon by those who would seek to apportion risk and liability. Insurance policies commonly exclude "intentional acts," as does Washington's Industrial Insurance Act. *See* RCW 51.24.020 (excluding injuries that are the

[12] Notably, the only case cited by the Partnership (or found by the City) where an "intentional trespass" was endorsed was *Bradley*—which involved stipulated knowledge of an ongoing trespass. All of the other cases, which involved more compelling and culpable facts than ours, rejected the intentional act allegation as a matter of law. *See* Supra, Section B-1.

product of a "deliberate intention... to produce such injury"). Liability releases, by law, exclude intentional injuries; as do most statutory immunities. *See, e.g.,* RCW 4.24.210 (recreational immunity); *Coldeen v. Reid,* 107 Wash. 508, 515, 182 P. 599 (1919) (qualified immunity for police officers).

Allowing parties like the Partnership to proceed on intentional theories—when it is anything less than clear that the conduct was *intentional*—does little but dislodge apportioned risk, with very little benefit for the impacted party (who will, almost by definition, have a right to recover in negligence).

The problem—illustrated in this case—is that it is actually quite easy to argue the knowledge of the defendant. Especially, as here, when the defendant is sophisticated and went through a fastidious process, performed analyses, and considered various outcomes. Undoubtedly, the Joint Venture knew that downstream flooding was a possibility. But permitting parties like the Partnership to conflate that into an intentional act—when the Joint Venture plainly did not intend to harm anyone—is intellectually disingenuous.

If anything, it puts a premium on ignorance. The documents cited by the Partnership are mainly engineering studies commissioned by the Joint Venture. From the perspective of intentional trespass, it would have been better off not to do them—and proceed without knowledge of risk. And the City is one step removed from that; it had no obligation at all to

involve itself in private development. It very well could have let one private property owner flood another, which does not implicate government. *See, e.g., Patterson v. City of Bellevue*, 37 Wn. App. 535, 537-38, 681 P.2d 266 (1984). But the City did its job instead. It identified risk and enforced standards—things now cited by the Partnership as "knowledge" of future flooding. False as that may be, the subverted incentives cannot be overstated.

For decades, appellate courts have struck an appropriate balance. Smelting factories that knowingly shower their neighbors in arsenic commit an intentional tort; as does a man who fires a gun into a crowd of people. *Bradley*, 104 Wn.2d at 683. But defendants who evaluate risk—even substantial risk—before acting, are not acting "intentionally." They may have to answer for their decisions in negligence, should they strike a balance inconsistent with ordinary care; but there is no legal, factual, or public policy-based reason to extend the *Bradley* beyond its settled bounds.

Review should be denied.

V. CONCLUSION

For the foregoing reasons, review is not warranted. The unpublished Court of Appeals decision should stand.

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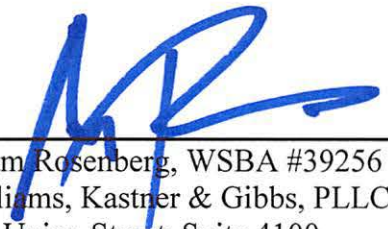
RESPECTFULLY SUBMITTED this 28th day of April, 2017.



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CERTIFICATE OF SERVICE

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

On the date given below I caused to be served the foregoing ANSWER TO PETITION REVIEW on the following individuals in the manner indicated:

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Janis Hager