No. 97031-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF BELLEVUE,

Petitioner,

v.

GREENSUN GROUP LLC,

Respondent.

BRIEF OF AMICUS SUBMITTED ON BEHALF OF THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF CITY OF BELLEVUE'S PETITION FOR REVIEW

Charlotte A. Archer, WSBA No. 43062
Inslee, Best, Doezie & Ryder PS
10900 NE 4th Street, Suite 1500
Bellevue, Washington 98004
Tel: 425-455-1234
Fax: 425-635-7720
carcher@insleebest.com

Attorney for Washington State Association of Municipal Attorneys

TABLE OF CONTENTS

I. INTRODUCTION AND IDENTITY AND INTEREST OF AMICUS CURIAE 1

II. SPECIFIC ISSUE ADDRESSED 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 2

A. *Greensun II* saddles Washington's municipalities with greater tort liability than a private actor, compromising limited resources and the necessary conduct of the people's business. 2

B. *Greensun II* is an unwarranted departure from this Court's directive that an agency must have wrongful intent to commit an intentional tort. 5

1. The Court of Appeals stripped the "intent" requirement out of this intentional tort. 6

2. The Court of Appeals relegated Bellevue's good faith to a postscript. 8

3. Allegations of arbitrary and capricious conduct do not create an intentional tort. 10

V. CONCLUSION 10

APPENDIX 12

WASHINGTON CASES

Bailey v. Town of Forks,
108 Wn.2d 262, 737 P.2d 1257 (1987),
amended, 753 P.2d 523 (1988) 3

Dunstan v. City of Seattle,
24 Wn. App. 265, 600 P.2d 674 (1979) 9, 11

Elcon Const., Inc. v. E. Washington Univ.,
174 Wn.2d 157, 273 P.3d 965 (2012) 7, 9

Greensun Group, LLC v. City of Bellevue,
-- Wn.2d --, 436 P.3d 397 (March 4, 2019) 1

King v. City of Seattle,
84 Wn.2d 239, 525 P.2d 228 (1974) 7

Leingang v. Pierce Cty. Med. Bureau, Inc.,
131 Wn.2d 133, 930 P.2d 288 (1997) 1, 6, 9

Libera v. City of Port Angeles,
178 Wn. App. 669, 316 P.3d 1064 (2013) 8

Mancini v. City of Tacoma,
188 Wn. App. 1006 (2015) (unpublished) 3

Maytown Sand & Gravel LLC v. Thurston Cty.,
198 Wn. App. 560, 395 P.3d 149 (2019) 7

Moore v. Commercial Aircraft Interiors, LLC,
168 Wn. App. 502, 278 P.3d 197 (2012) 10

Munich v. Skagit Emergency Comm. Ctr.,
175 Wn.2d 871, 288 P.3d 328 (2012) 3

Osborn v. Mason Cty.,
157 Wn.2d 18, 134 P.3d 197 (2006) 4

Pleas v. City of Seattle,
112 Wn.2d 794, 774 P.2d 1158 (1989) 5, 7, 10

Rodriguez v. City of Moses Lake,
158 Wn. App. 724, 243 P.3d 552 (2010) 4

Schmerer v. Darcy,
80 Wn. App. 499, 910 P.2d 498 (1996) 1, 6

Stiefel v. City of Kent,
132 Wn. App. 523, 132 P.3d 1111 (2006) 5

Taylor v. Stevens County,
111 Wn.2d 159, 759 P.2d 447 (1988) 5

Vergeson v. Kitsap Cty.,
145 Wn. App. 526, 186 P.3d 1140 (2008) 4

Westmark Dev. Corp. v. City of Burien,
140 Wn. App. 540, 166 P.3d 813 (2007) 8

WASHINGTON STATUTES

RCW 4.96.010 3

RULES

RAP 13.4(b)(1) 2

RAP 13.4(b)(2) 2

RAP 13.4(b)(4) 2

OTHER AUTHORITIES

Jenifer Kay Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401, at 403 (1989) 3

Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Governmental Liability,* 29 Seattle U.L. Rev. 1, 46 (2005) 4

I. INTRODUCTION AND IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA) urges this Court to accept review of the Court of Appeals' decision in *Greensun Group, LLC v. City of Bellevue* ("*Greensun* II").[1] WSAMA is a non-profit corporation comprised of counsel to Washington's cities and towns; in that capacity, its members uniquely appreciate that litigation is an occupational hazard for local officials. However, *Greensun* II upsets the careful balance of values central to agency tort liability: fairness to the citizens, preservation of essential functions of government, and conservation of scarce public resources. *Greensun* II deviates from this Court's directive that intentional interference with a business expectancy requires "purposefully improper interference."[2] Countless decisions are made by public agencies in Washington, and many have unintended consequences for applicants.[3] Often the agency knows or can predict those impacts—an agency denying a business license does so with the knowledge

---

[1] Appendix A to Petitioner's Petition for Review, No. 77635-5-I, -- Wn.2d --, 436 P.3d 397 (March 4, 2019).

[2] *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997) (citing *Schmerer v. Darcy*, 80 Wn. App. 499, 505, 910 P.2d 498 (1996)).

[3] City of Seattle, for example, processed more than 7,000 building permit applications in 2017. *See* Beekman, Daniel, "Rocky launch of Seattle's new construction-permit system causes delays, anger." The Seattle Times (Aug. 12, 2018) (available at: https://www.seattletimes.com/seattle-news/politics/rocky-launch-of-seattles-new-construction-permit-system-causes-delays-anger/)

that the applicant will not be able to operate the business. Before *Greensun* II, this conduct alone did not create an intentional tort. By allowing Greensun to ignore wrongful intent this decision contradicts binding authority, grossly expands tort liability, and requires this Court's intervention.

II. SPECIFIC ISSUE ADDRESSED

WSAMA's amicus brief focuses on the need for review under RAP 13.4(b)(4) due to the significant public policy implications of *Greensun* II, as well as the need for review under RAP 13.4(b)(1) and (2) because the decision contradicts Washington's appellate courts on material issues.

III. STATEMENT OF THE CASE

WSAMA adopts Bellevue's facts in its Petition for Review.

IV. ARGUMENT

A. *Greensun II* saddles Washington's municipalities with greater tort liability than a private actor, compromising limited resources and the necessary conduct of the people's business.

Review is warranted under RAP 13.4(b)(4) because the Court of Appeals' decision upsets the current careful balance of public values inherent to municipal tort liability: protecting limited public resources from tort damage awards and allowing government officials to perform essential

functions without fear of liability, while protecting against wrongdoing directed at a particular member of the public.

As Bellevue aptly points out, intentional interference minus intent is simply negligence, a claim likely barred by the public duty doctrine. Removing the intent required to commit the intentional tort asserted (discussed at Section B.1) grossly expanded municipal liability and deprived Bellevue of the benefit of the public duty doctrine, which "was created to ensure that governments are not, as a consequence of immunity being withdrawn, saddled with greater liability than private actors as they conduct the people's business."[4]

The doctrine reflects a belief that the legislature never intended to make government agencies insurers for all losses linked to their decisions.[5] The doctrine recognizes that unless an exception applies, governments should not be liable to every member of the public when exercising police powers and serving the public at large.[6] Courts treat intentionally caused

---

[4] *Mancini v. City of Tacoma*, 188 Wn. App. 1006 (2015) (unpublished) (citing *Munich v. Skagit Emergency Comm. Ctr.*, 175 Wn.2d 871, 886, 288 P.3d 328 (2012) (Chambers, J., concurring)) (internal quotations omitted). See also *Osborn v. Mason Cty.*, 157 Wn.2d 18, 26, 134 P.3d 197 (2006).

[5] *See* RCW 4.96.010 (1961); Jenifer Kay Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401, 403 (1989); see also *Bailey v. Town of Forks*, 108 Wn.2d 262, 267, 737 P.2d 1257 (1987), *amended*, 753 P.2d 523 (1988).

[6] *Bailey*, 108 Wn.2d 267; see also Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Governmental Liability*, 29 Seattle U.L. Rev. 1, 41-42, and46 (2005) (discussing public duty doctrine, and tort claim and legal defense costs).

harm differently than negligence because "[n]egligence conveys the idea of neglect or inadvertence, as distinguished from premeditation or formed intention."[7] Intentional torts are not subject to the public duty doctrine, because the analysis does not turn on duty owed a particular plaintiff, but "more egregious, willful action or inaction, such as a County employee having intentionally failed to remove a quashed warrant or having intentionally entered false information into a database."[8]

Greensun's displeasure with the *first in time* rule could not form a compensable negligence claim due to the public duty doctrine; Greensun notably did not assert negligence. If this Court does not revisit *Greensun* II, the decision sets a dangerous precedent for the non-tortious performance of necessary government functions by public agencies. No longer is this intentional tort a means to penalize "public officials exercising their official powers in a blatantly biased manner to gain favor with a certain community group," [9] but instead a weapon to circumvent the public duty doctrine and persecute agencies acting in good faith.

---

[7] *Rodriguez v. City of Moses Lake*, 158 Wn. App. 724, 731, 243 P.3d 552 (2010).
[8] *Vergeson v. Kitsap Cty.*, 145 Wn. App. 526, 544, 186 P.3d 1140 (2008).
[9] *Pleas v. City of Seattle*, 112 Wn.2d 794, 806, 774 P.2d 1158 (1989) (dismissing concerns of the "chilling effect" the Court's approach to intentional torts would have on public agencies because the claim would still require evidence of a wrongful intent to interfere).

Washington's local governments review (and often deny) dozens of permit and license applications each day. Post-*Greensun* II, applicants denied a permit or license by a municipality applying in good faith regulations suddenly have the new-found potential for an intentional tort without any demonstration of intent, defying the adage "that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability."[10]

B. *Greensun* II is an unwarranted departure from this Court's directive that an agency must have wrongful intent to commit an intentional tort.

Greensun II signifies a substantial departure from this Court's guidance on intentional interference. The Court of Appeals focused myopically on conduct it concluded created an issue of fact as to whether Bellevue acted in an arbitrary and capricious manner. This Court has consistently required much more for this intentional tort claim to proceed, balanced good faith against allegations of arbitrary and capricious conduct, and placed the burden on the plaintiff to establish wrongful intent. Additionally, this Court has never allowed allegations of arbitrary and capricious conduct to subsume the necessary showing of wrongful intent, and to do so now would have dire consequences for municipalities. The

[10] *Stiefel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988).

Court of Appeal's decision deviates from binding authority on these important issues, and WSAMA urges this Court to accept review under RAP 13.4(b)(1) and (2) and ultimately reverse.

1. The Court of Appeals stripped the "intent" requirement out of this intentional tort.

After *Greensun* II, municipal agencies are liable to an extent far greater than a private actor. By conflating intent to interfere with the (unintended) consequences of good faith conduct, *Greensun* II does not reflect an imperative directive of this Court: "purposeful interference denotes purposefully improper interference."[11]

In *Pleas v. City of Seattle*, the Court focused on Seattle's motive to show wrongful intent.[12] "City officials acted for the primary purpose of political gain" which informed an intent to deny the permit to "curry favor with the voters who lived on Capitol Hill."[13] In *King v. City of Seattle*, the Court noted it was bound by the lower court's finding that the City "intended to harass and discriminate against Plaintiffs and to prevent Plaintiffs from constructing a commercial building on their property."[14] In *Elcon Const., Inc. v. E. Washington Univ.*, this Court affirmed dismissal of

[11] *Leingang*, 131 Wn.2d at 157 (citing *Schmerer*, 80 Wn. App. at 499).
[12] 112 Wn.2d at 804-5.
[13] *Id.*
[14] 84 Wn.2d 239, 247, 525 P.2d 228 (1974).

plaintiff's claims, holding that while the action taken was not in dispute, plaintiff's assertions that the conduct was "intentional and vindictive" were insufficient because "[c]onclusory statements and speculation will not preclude a grant of summary judgment."[15]

Greensun II also marks a departure from *Westmark Dev. Corp. v. City of Burien*, where the Court of Appeals "stressed the importance of evidence that the defendant singled out the plaintiff" to avoid displeasing a state representative opposed to the project, holding that Burien intentionally prevented, blocked and delayed *the plaintiff's* plans.[16] Bellevue's treatment of Greensun is more akin to *Libera v. City of Port Angeles*, where the court dismissed plaintiff's intentional tort claim because plaintiff failed to "allege that the City arbitrarily singled out him or his type of business for an especially long or egregious delay."[17] Bellevue did not target Greensun and adopted the *first in time* rule before it knew which business would be first.[18]

---

[15] 174 Wn.2d 157, 169, 273 P.3d 965 (2012).
[16] 140 Wn. App. 540, 564, 166 P.3d 813 (2007). See also *Maytown Sand & Gravel LLC v. Thurston Cty.*, 198 Wn. App. 560, 574, 395 P.3d 149 (2017), *review granted*, 404 P.3d 480 (2017), *and aff'd in part, rev'd in part on other grounds*, 191 Wn.2d 392, 423 P.3d 223 (2018), *as amended* (Oct. 1, 2018) (intentional interference established by commissioners' e-mails with opponents of the plaintiff's project offering guidance on methods (later employed) to subject application to onerous and delaying environmental analysis).
[17] 178 Wn. App. 669, 679, 316 P.3d 1064 (2013).
[18] CP 89-90, 133, 139-40, and 489-92.

2. The Court of Appeals relegated Bellevue's good faith to a postscript.

The decision below misapplies the value of evidence of good faith on summary judgment, removing it entirely from the equation when evaluating intent.[19] This approach deviates from directive from this Court and lower appellate court holdings. In *Elcon*, this Court recites the factors comprising the defendant's good faith in affirming dismissal of plaintiff's claims, ultimately concluding "[i]f [defendant] was motivated by greed, retaliation, or hostility in sending a copy of the termination letter to [plaintiff's] surety, [plaintiff] has failed to show such a motive."[20]

In *Dunstan v. City of Seattle,* the appellate court noted its "skepticism at the proposition that the instant public officials' good faith decision to grant a building permit different from that requested, ... although later held to be arbitrary and capricious could be grounds for suit for damages in tort."[21] Dismissing plaintiff's claims on summary judgment, the court in *Dunstan* found "no evidence that the defendant ... did not act in good faith..." even though the final decision was "arbitrary and capricious."[22] Similarly, in *Leingang v. Pierce Cty. Med. Bureau, Inc*, no

[19] Appendix A to Petition for Review, at 13 ("Whether the City acted in good faith, however, does not matter under this element.").
[20] 174 Wn.2d at 169-70.
[21] 24 Wn. App. 265, 268, 600 P.2d 674 (1979).
[22] *Id.* at 267.

intentional interference claim arose where the plaintiff's damage was justified by the defendant's "arguable interpretation of existing law."[23]

Moore v. Commercial Aircraft Interiors, LLC,[24] does not support the Court of Appeals' conclusion that "the analysis of intentional interference does not consider good faith."[25] In *Moore*, the court dismissed the intentional tort claim on summary judgment, finding the *plaintiff* had not proffered evidence to establish that the defendant "threatened litigation without believing in the merits of its claim or on based on a desire to harass or cause harm to [plaintiffs]."[26] Rather than rejecting good faith on the basis that it is irrelevant, the *Moore* approach burdens the plaintiff on summary judgment of both establishing intent and addressing good faith, head-on. Here, the Court of Appeals excused Greensun from proffering evidence to establish intent. Greensun was not required to address that Bellevue's *first in time* rule was adopted before it had any idea who was first, and Greensun would not have been entitled to a license if Bellevue used the building permit application date approach.[27] *Greensun* II turns Bellevue's honest attempts at implementing legislation into an intentional tort.

---

[23] 131 Wn.2d 133 at 157.
[24] 168 Wn. App. 502, 514–15, 278 P.3d 197 (2012)
[25] *See* Appendix A to Petition for Review, at 12.
[26] 168 Wn. App. at 514–15.
[27] CP 89-90, 133, 139-40, and 489-92.

3. Allegations of arbitrary and capricious conduct do not create an intentional tort.

The lower court's decision is a departure from another directive: alleged arbitrary and capricious actions may be evidence of improper means, but the tort does not exist absent evidence of intent.[28] Identical to the situation rejected in *Dunstan*, Greensun relies exclusively on evidence of "arbitrary and capricious" conduct to support its claim.[29] When read in harmony, *Pleas* and *Dunstan* establish that evidence of arbitrary and capricious action does not allow the plaintiff to avoid the key element of the intentional tort: wrongful intention to interfere.[30] This decision contradicts precedent, with the calamitous result that unintended consequences of good faith conduct can form the basis for an intentional tort.

V. CONCLUSION

For all the reasons set forth above, and those provided by Petitioner City of Bellevue, WSAMA respectfully requests that this Court grant the Petition for Discretionary Review and ultimately reverse the Court of Appeals' decision.

---

[28] *Pleas*, 112 Wn.2d at 805 ("*Dunstan* does not appear wholly applicable since the plaintiff in that case failed because he, unlike Parkridge in the present case, could show no duty and no intentional interference.").
[29] *Dunstan*, 24 Wn. App. at 268.
[30] *Id.*; *Pleas*, 112 Wn.2d at 805.

Respectfully submitted this 3rd day of June 2019.

Counsel for Amicus Curiae Washington State Association of Municipal Attorneys

Charlotte A. Archer, WSBA No. 43062
Inslee, Best, Doezie & Ryder PS
10900 NE Fourth Street, Suite 1500
Bellevue, WA 98004
(425) 450.4209
carcher@insleebest.com

CERTIFICATE OF SERVICE

I, Leslie M. Addis, hereby declare and state:

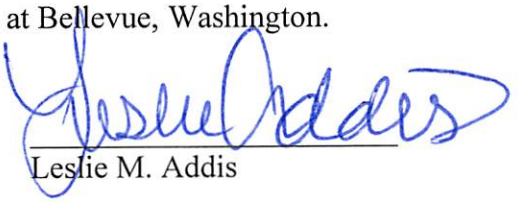
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 3rd day of June, 2019, I set for service a true copy of the foregoing *Amicus Brief in Support of City of Bellevue's Petition for Direct Review* on the following using the method of service indicated below:

Washington State Supreme Court 415 12th Avenue SW Olympia, WA 98501-2314	☒ E-Filing via Court Portal
Attorneys for Respondent Kenneth H. Davidson Bryan W. Krislock Davidson, Kilpatric & Krislock, PLLC P.O. Box 817 Kirkland, WA 98083-0817	☒ E-Filing via Court Portal kdavidson@kirklandlaw.com bryan@kirklandlaw.com ken@kirklandlaw.com
Attorneys for Petitioner City of Bellevue Matthew J. Segal Jessica A. Skelton Jamie L. Lisagor Athanasios P. Papailiou Pacifica Law Group, LLP 1191 Second Avenue, Suite 2000 Seattle, WA 98101-3404	☒ E-Filing via Court Portal: matthew.segal@pacificalawgroup.com Jessica.skelton@pacificalawgroup.com Jamie.lisagor@pacificalawgroup.com Athan.papailiou@pacificalawgroup.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of June, 2019, at Bellevue, Washington.



Leslie M. Addis

INSLEE, BEST, DOEZIE & RYDER, P.S.

June 03, 2019 - 3:41 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97031-9
Appellate Court Case Title:	Greensun Group LLC v. City of Bellevue
Superior Court Case Number:	14-2-29863-3

The following documents have been uploaded:

- 970319_Briefs_20190603153520SC924954_5478.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Amicus Brief on Behalf WSAMA.pdf
- 970319_Motion_20190603153520SC924954_3758.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Mtn for Leave to File Amicus re WSAMA.pdf

A copy of the uploaded files will be sent to:

- Jessica.skelton@pacificalawgroup.com
- athan.papailiou@pacificalawgroup.com
- bryan@kirklandlaw.com
- cindy.bourne@pacificalawgroup.com
- dawn.taylor@pacificalawgroup.com
- jamie.lisagor@pacificalawgroup.com
- kdavidson@kirklandlaw.com
- ken@kirklandlaw.com
- matthew.segal@pacificalawgroup.com
- sydney.henderson@pacificalawgroup.com

Comments:

Sender Name: Leslie Addis - Email: laddis@insleebest.com
Filing on Behalf of: Charlotte A Archer - Email: carcher@insleebest.com (Alternate Email: laddis@insleebest.com)

Address:
10900 NE 4th Street, Suite 1500
Bellevue, WA, 98004
Phone: (425) 450-4201

Note: The Filing Id is 20190603153520SC924954