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Division II
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

SAVE THE DAVIS MEEKER GARRY OAK, Appellant, v. DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater Respondent.	**NO. 58881-1-II** **RESPONSE TO MOTION FOR INJUNCTIVE RELIEF PURSUANT TO RAP 8.3**

I. INTRODUCTION

Respondent Debbie Sullivan, Mayor of the City of Tumwater hereby opposes the Appellant's Motion for Injunctive Relief, filed on July 2, 2024.

II. FACTS RELEVANT TO MOTION

A. THE CITY IDENTIFIES A HAZARDOUS TREE OVER A MAJOR HIGHWAY.

This case arises because an old oak tree is coming to the end of its life. That tree, known as the Davis Meeker Garry Oak ("DMGO"), is located along Old Highway 99 in Tumwater, and its canopy hangs over the highway.

In May 2023, a large limb fell from the tree, suggesting that it might present a hazard to the traveling public. The City commissioned a study led by the City's contracted tree professional, Kevin McFarland of Sound Urban Forestry. A team of professional arborists investigated and concluded that there was substantial rot and decay in the main stems of the tree and recommended its removal. They found the tree was in poor condition and posed a high risk to the public. Myers Decl., Exhibits 4, 5 (Report of Sound Urban Forestry, Exhibit 1 to Declaration of Sullivan and Declaration of McFarland).

The removal of this tree is important to safeguard the public using the adjacent street, Old Highway 99, and other members of the public at the airport. The City's decision was made to protect the public from harm and the City from potential liability. Myers Decl. Ex. 4 (Sullivan Declaration at 2). The City's insurance carrier, WCIA, estimates that the amount of liability could easily exceed $10 million if people are injured or killed by falling limbs or collapse of the tree itself. *Id.*

B. PROCEDURAL HISTORY

The City proceeded to contract with a tree professional to remove the hazardous tree, which was scheduled for Tuesday May 28, 2024. Myers Decl., Exhibit 4 (Sullivan Decl.) On Friday, May 24, 2024, at 8:01 a.m., counsel for Appellant left a cryptic voicemail with the city attorney's legal assistant. Myers Decl. Exhibit 7 (Johansen Declaration). She stated that she "was hoping to speak to the city attorney to inform her that she was filing a motion for a temporary restraining order against the City today for the Meeker Oak." *Id*.

Her message did not leave specifics, and just said she was filing a motion for temporary restraining order "today". *Id.* No time was given and certainly no indication that she was headed to the courthouse at that moment. Counsel did not state that she was going to "ex parte" to obtain the TRO or give any indication when such a motion would be served or brought before the court. *Id.* Appellant did not send any emails or provide the papers

seeking a TRO to the City before going to court. Counsel did not even identify which court she would be seeking the TRO from.

Despite the City's immediate efforts to contact Appellant's counsel, she proceeded to present a TRO to the trial court which entered it *ex parte*. *Id.* At approximately 10:30 a.m., counsel delivered a complaint and a signed TRO to the City. *Id.*

The TRO was facially deficient in three regards: (1) no notice was given; (2) no bond was required; and (3) it provided no end date. Myers Decl., Ex. 2. The TRO did not contain any factual findings whatsoever and failed to show what irreparable harm would result or make findings why it was permissible to dispense with notice as required by CR 65 and RCW 7.40.050. Additionally, the TRO did not provide for any further hearings to allow the City to be heard or consider a motion for a preliminary injunction. The City immediately moved to shorten time and to dissolve the improperly issued TRO. Myers Decl., Ex. 3.

The Court set a hearing for May 31, 2024, and both parties filed briefs. On May 31, 2024, the Court heard argument and then dissolved the TRO, but provided that its ruling would not become effective for 5 days to allow Appellant an opportunity to immediately go to the court of appeals. Myers Decl., Ex. 8.

On May 31, 2024, the Appellant filed an "emergency" notice of appeal of the order dissolving the TRO. However, the Appellant did not file an immediate motion to stay the dissolution order. This allowed the TRO to be dissolved effective on June 5, 2024. Instead, Appellant delayed for another month, waiting until July 2, 2024 to file the instant motion.

C. THE CITY AGREES TO SEEK ADDITIONAL INFORMATION PRIOR TO REMOVAL OF THE TREE.

Following the Court's order dissolving the TRO, multiple members of the public addressed the City Council urging reconsideration of the decision to remove the DMGO. Sullivan Declaration at 1-2. The public asked for consideration of alternatives to removal, including mitigation measures, and to

get additional information about the condition of the tree. The Mayor listened and considered their comments. At the June 4, 2024 City Council meeting, Mayor Sullivan agreed to obtain a second opinion from an independent arborist to evaluate the condition of the tree. Sullivan Declaration at 2. The City issued a Request for Qualifications and is obtaining responses through July 18, 2024. *Id.* The process of selecting an independent arborist and completing a third party review is expected to continue through August 2024. *Id.*

Despite the City's commitment to obtain a third party review, Appellant filed the instant motion to enjoin the City pending appeal. In their motion, they falsely alleged that the Mayor told the Olympian that the tree would ultimately not be there. Motion at 26. This quote was flagged by the Court in setting the motion for consideration. The mayor was responding to a question about what would happen to the site if the tree were removed. She responded that the road would not be widened and the site would remain a historic place, even without the tree.

Appellant's statement that she has predetermined that outcome is categorically false.

III. STANDARD OF REVIEW

Plaintiff seeks an injunction under RAP 8.3. The rule provides the court with authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security.

In considering such motions, the Court should follow traditional principles governing appellate review of trial court rulings. The Court of Appeals reviews a trial court order granting or denying a preliminary injunction for an abuse of discretion. *Speelman v. Bellingham/Whatcom Cnty. Hous. Authorities*, 167 Wn. App. 624, 273 P.3d 1035 (2012).

The Task Force Comment on RAP 8.3 notes the rule gives the appellate court broad discretionary authority to issue orders before or after acceptance of review to ensure effective and equitable review. 3 Lewis H. Orland & Karl B. Tegland, Wash.

Prac., *Rules Practice* RAP 8.3 cmt. (4th ed.1991). *State v. Wilks*, 85 Wn. App. 303, 308, 932 P.2d 687, 690 (1997).

RAP 8.1(b)(3) and RAP 8.3 give appellate courts discretion to stay the enforcement of trial court decisions. RAP 8.1(b)(3) requires the court to consider (1) whether the moving party can demonstrate debatable issues, and (2) a comparison of the injury that would be suffered by the moving party in the absence of a stay with the injury to the non-moving party if a stay is issued. In deciding whether to grant a stay, the appellate court should weigh the factors set forth with care and may condition the granting of the stay on the posting of a supersedeas bond or other security as noted in that rule.

As with any equitable ruling, the court should balance the equities and consider the possible harm to the movant if the stay is denied but should also consider the harm to the non-moving party if it is granted. See RAP 8.1(b)(3).

The standard for determining whether a stay of an equitable decision should be granted is a modification of the

holding in *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986). In that case, the court held that a "sliding scale" should be used to evaluate the merits of an appeal against the need for a stay when deciding whether to suspend enforcement of an equitable judgment under RAP 8.3. Under the Committee's 1990 revision, in section (b)(3), the standard has been rewritten to require that the appeal present "debatable" issues (without regard to the strength of the issues), and that the relative harm to the parties then be balanced. RAP 8.1. Supersedeas Procedure, 2A Wash. Prac., Rules Practice RAP 8.1 (9th ed.).

Additionally, the rules recognize that the standard practice in granting a stay or injunction is to require financial security or a bond to address possible damages

IV. ARGUMENT

A. THE ORDER DISSOLVING THE TRO IS NOT PROPERLY BEFORE THE COURT AS IT IS NOT A FINAL APPEALABLE ORDER UNDER RAP 2.2.

Appellant here filed a notice of appeal challenging the Superior Court's order granting Defendant's motion to dissolve a TRO. Such an order is interlocutory and is not a final order appealable under RAP 2.2. As such, this appeal is not properly before the appellate court.

RAP 2.2 identifies what orders are appealable as a matter of right to this court. Typically appeals are taken from final orders of the superior court or final judgments. RAP 2.2(a)(1). RAP 2.2(a)(3) also allows an appeal of any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action. The dissolution of a TRO does not determine the outcome of the action, nor does it discontinue the proceedings in the trial court, which remain pending.

B. THERE ARE NO FRUITS OF THE APPEAL BECAUSE THE TRO EXPIRES AFTER 14 DAYS BY OPERATION OF LAW UNDER CR 65.

The only order being appealed is the order dissolving a TRO, a TRO which would have only been valid for 14 days

under CR 65. If denied, the TRO would have continued in force until June 7, 2024, just two days after it was dissolved.

CR 65(b) provides that a TRO:

> shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

Thus, the underlying TRO would be in force only for 14 days. No provision for an extension of the TRO or a hearing to convert it into a preliminary injunction was made under the order, which would be required because the City did not consent for it to be extended for a longer period of time.

C. ISSUANCE OF A STAY AFTER APPELLANT ALLOWED THE TRO TO EXPIRE WOULD BE INEQUITABLE.

It is a time honored maxim that equity aids the vigilant, not those who slumber on their rights. *Arnold v. Melani,* 75 Wn.2d 143, 147–48, 449 P.2d 800, 450 P.2d 815 (1968). It is related to the doctrine of laches which precludes equitable relief

based on the undue delay in asserting and thereafter maintaining a right. Indeed, equity requires the utmost diligence on the part of the party who invokes its preventive aid, and a slight degree of acquiescence is sufficient to defeat the application. *Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 611, 289 P. 530, 532 (1930).

Here, Appellant delayed bringing any injunctive action until the last possible time, despite months of discussion before city panels. They acted inequitably in failing to provide notice of the TRO. They then failed to bring a motion to stop dissolution of the TRO despite being provided an opportunity to do so by the trial court. Appellant further delayed for another month in bringing the instant motion, allowing the order dissolving the TRO to take effect, dissolving the TRO.

Now that the City has agreed to seek an independent third party review, they seek to inflict further cost upon the City by seeking an untimely stay under RAP 8.3. It is apparent that Appellant chose to bring their motion in the appeals court so as to avoid proving entitlement to injunctive relief in the trial court.

Such forum shopping and delay is inequitable and the Court should not provide the requested relief due to Appellant's lack of diligence and undue delay.

D. THE TRIAL COURT PROPERLY DISSOLVED THE TRO BECAUSE IT WAS VOID FOR FAILING TO COMPLY WITH RCW 7.40.130 AND CR 65.

The TRO issued on May 24, 2024 failed to include required elements under CR 65 and was therefore void. *In re Estates of Smaldino*, 151 Wn. App. 356, 367–68, 212 P.3d 579, 584–85 (2009); *Dep't of Labor & Indus. v. Fowler*, 23 Wn. App. 2d 509, 532, 516 P.3d 831, 844 (2022), *review denied,* 200 Wn.2d 1027, 523 P.3d 1184 (2023). The deficiencies of the May 24, 2024 TRO are myriad and apparent on the face of the order. See Myers Declaration, Exhibit 2.

When a party obtains a temporary restraining order, the moving party must provide notice or, if it is sought *ex parte*, must certify to the court the efforts made to notify the adverse party and certify the reasons why such notice should not be required. CR 65(b). As early as 1900, the Washington Supreme Court

held, in *In re Groen*, 22 Wash. 53, 56, 60 P. 123 (1900), these prerequisites exist to ensure that parties are afforded minimum due process protections.

CR 65(b) sets forth specific requirements for every TRO, stating:

> Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

None of these required elements is presented in the Court's order. It lacks any findings defining the injury, why it was irreparable and why the order was granted without notice. It fails to specify an expiration date or basis for extension thereof. It fails to set a hearing to consider extension of the TRO as a preliminary injunction.

The application for the TRO was required to describe efforts to notify the opposing party and demonstrate why immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition. CR 65(b). Similarly, RCW 7.40.050 requires notice, stating:

> No injunction shall be granted until it shall appear to the court or judge granting it, that some one or more of the opposite party concerned, has had reasonable notice of the time and place of making application, except that in cases of emergency to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing had thereon.

The TRO here was granted without any meaningful notice. Counsel for plaintiff left a voicemail with a paralegal for the City stating a TRO was being sought, but which failed to identify what court and at what time the application would be made. Myers Decl., Ex. 7 (Johansen Decl.). The voicemail was left at 8:01 a.m., approximately 29 minutes before the TRO was requested. No written pleadings were provided until after the TRO was obtained. *Id.*

The plaintiff's paltry efforts to provide notice were barely described in counsel's declaration. That declaration misleadingly states that counsel contacted the City Attorney, when, in fact, all that happened was a 20 second voicemail. Counsel's declaration contained a single conclusory paragraph stating that she left a voicemail that she was filing a lawsuit and motion for TRO. Counsel failed to provide "reasonable notice of the time and place of making application", as required by RCW 7.40.050. Her declaration did not certify "the reasons supporting the applicant's claim that notice should not be required" nor did it identify a reason why there would be irreparable harm if the City were allowed to be heard, as required under CR 65(b).

Plaintiff relied exclusively on hearsay and inadmissible declarations. The Declaration of Tanya Nozawa presented hearsay from anonymous sources and internet postings. She is not an expert and fails to provide any competent testimony to support the conclusion that the tree is "structurally sound".

Ms. Nozawa's conclusion was contradicted by two professional arborists whose opinions were available to plaintiff but were not provided to the Court. Dec. of Sullivan Exhibits 1, 2. The city's tree professional opined that:

> there are structural concerns associated with the significant decay found in the stem base, lower main stem, east facing co-dominant stem and large scaffold branches. Probable future failures include large diameter scaffold branches from the east facing co-dominant stem and the entire west facing co-dominant stem at the union. The associated inclusions and stress loads will contribute to future failures. Structural support systems in conjunction with pruning were considered but the extent of decay in the main stem and upper east side of the canopy removes that as a mitigation option in my opinion.

E. THE COURT OF APPEALS SHOULD NOT INTERVENE IN THE CITY'S CONSIDERATION OF WHETHER THE TREE SHOULD BE REMOVED TO SAFEGUARD THE PUBLIC USING THE ADJACENT HIGHWAY.

1. Appellant Relies On New Claims Outside the Complaint Filed in the Trial Court.

Generally, an appellate court will not consider issues or arguments that were not presented at the trial court level. RAP

2.5; *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn.App. 297 (2011); *Dalton M, LLC v. North Cascade Trustee Services, Inc*., 2 Wn.3d 36 (2023); *Edmonds v. Ashe*, 13 Wn.App. 690 (1975).

Here, the Complaint filed in the trial court presented two claims seeking injunctive relief. Those claims were under the Migratory Bird Treaty Act, 16 U.S.C. §703(a) and the City of Tumwater Historic Preservation Code, Ch. 2.62 TMC.

On appeal, Appellant now seeks a stay based on other claims not included in the complaint. Appellant raises issues under RCW 27.53.060, the Archeological statute, as well as under the Centennial Accords, pertaining to Tribal consultation. These are not the claims brought by their own complaint, nor were they a basis for issuance of the TRO (since the Appellant did not file any motion seeking a TRO, apparently relying on their Complaint).

Because these were not grounds stated in the Complaint, the Court should decline to consider them as new claims not properly argued in the trial court. At oral argument of the Motion

to Dissolve the TRO, counsel for the Defendant objected to the interjection of RCW 27.53.060 on precisely this ground. Kramer Decl, Ex. K (Transcript of Oral argument at 13).

2. Appellant Fails To Show Any Legally Protected Right Under The Migratory Bird Treaty Act.

Appellant conceded in the Complaint that there is no private right to enforce alleged violations of the MBTA. Myers Decl., Ex. 1 (Complaint at 5, ¶14). It is therefore not debatable that Appellant lacks any clear legal or equitable right to invoke the MBTA to support a TRO or injunctive relief.

Appellant alleges that a migratory bird is nesting in the tree and contends that any action to remove the tree would violate the MBTA as a "taking" of these birds. This interpretation of the statute has been squarely rejected by the Ninth Circuit for decades, including cases cited in the complaint. See Complaint at 5, n.8.

One of these cases, *City of Sausalito v. O'Neill,* 386 F.3d 1186 (9th Cir. 2004) undercuts their position because it held that

cutting down a tree was not prohibited by the MBTA, even if there is a migratory bird nesting there. The Court held:

> The Migratory Bird Treaty Act ("MBTA") provides that without authorization from the Secretary of the Interior it is unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any migratory bird or "any part, nest, or egg of any such bird...." 16 U.S.C. § 703. Sausalito asserts that implementation of the Fort Baker Plan will violate the MBTA because migratory birds' nesting trees will be cut down, thereby disturbing both birds and their nests. The FEIS makes clear that the Park Service has not sought, and does not intend to seek, authorization from the Secretary.
>
> In *Seattle Audubon Society v. Evans,* we explained that the definition of an unlawful "taking" under the MBTA "describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918." 952 F.2d at 302. There we held that unlike under the ESA, an unlawful "taking" under the MBTA did not occur through "habitat destruction," even that which "le[d] indirectly to bird deaths." *Id.* at 303. Because Sausalito alleges only that migratory birds and their nests will be disturbed through habitat modification, we hold that the Park Service does not need to seek authorization from the Secretary.

City of Sausalito v. O'Neill, 386 F.3d 1186, 1225 (9th Cir. 2004)

There is no violation of the MBTA from cutting down a tree, even if there is a nest. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991); *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997). Since this case seeks to apply the MBTA to the same facts as in *O'Neill, Evans,* and *Newton Cnty. Wildlife Ass'n*, the court should follow these precedents in rejecting the same claim advanced here.

Appellant contends that the defendants are relying on a "Trump era rule" that was repealed by the Biden administration. Motion at 20. Appellant misses the point. The statute's interpretation in the Ninth Circuit was decided 33 years ago in 1991 by *Seattle Audubon Soc'y v. Evans*. The Ninth Circuit did not rely on an administrative rule, but construed Congress' intent in using the term "take". This is not a matter of administrative deference, because it is the court's province to "interpret the act of Congress, in order to ascertain the rights of the parties." *Loper Bright Enterprises v. Raimondo*, __ U.S. __, 144 S. Ct. 2244, 2257 (2024).

3. Appellant Fails To Show That The City's Historic Preservation Codes Require Injunctive Relief.

Appellant argued in their Complaint that the City's codes required a permit before removal of a structure. Myers Decl. Ex. 1 (Complaint at 6, ¶32). The trial court rejected this argument because a tree is not a structure. Under the City's codes, historic structures require a permit to demolish, but trees are protected by the heritage tree ordinance. Myers Decl. Ex. 8 (Order at 3). The City's heritage tree ordinance allows removal of hazard trees, such as the oak in question here, without a permit when the City tree professional verifies that it is a hazard. TMC 16.08.080(E).

Appellant disregards the City's clear public interest in fulfilling its duty to provide safe streets. The tree is located in the city's right of way and has already experienced a large limb falling into the street. Fortunately, it did not hit anyone. The next time everyone may not be so lucky. This tree has been identified as a "high" hazard by the City's arborist. The arborists' forecast that it will have future failures including "large diameter"

branches and "co-dominant" stems may fail which could severely injure or kill members of the public who pass by.

This is a known hazard in the right of way that the City has a clear duty to remedy. *Albin v. National Bank of Commerce of Seattle*, 60 Wash.2d 745, 748, 375 P.2d 487, 489 (1962). If the city fails to remove the tree, the City could be liable for any injuries or deaths that result. Such liability is conservatively estimated by the city's insurer to easily exceed $10 million dollars. Myers Decl. Ex. 4 (Sullivan Decl. at 2).

4. Appellant does not have standing to assert communal rights of Tribes.

Appellant seeks to assert a right of Tribes to be consulted about city decisions. This novel theory is not to be found in the Complaint, so it was not considered in issuance of the TRO. Now, the Appellant raises the "Centennial Accords" which is claimed to require consultation with Tribes. If the court considers this new claim on appeal, it provides no basis for

injunctive relief. The trial court properly noted that the plaintiff lacks standing to assert the rights of tribes.

Appellant argues that it has standing because individual tribal members have standing, sufficient for associational standing. Motion at 23-24. Appellant contends, without citation to legal authority, that individual members of tribes may assert the communal rights of the tribe. This assertion is incorrect and has been rejected by the Ninth Circuit. *Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076 (9th Cir. 2019) (members may not sue to vindicate the tribe's communal rights).

Rights, enumerated under treaties, are reserved to communities or "tribes" rather than to individuals. Because individuals have no enforceable treaty rights, when and how an individual may use such treaty rights is considered an "internal affair" of the tribe. *United States v. Oregon,* 787 F.Supp. 1557, 1566 (D.Or.1992), *aff'd,* 29 F.3d 481, 484 (9th Cir.1994) ("As we explained in *Washington I,* '[e]ach tribe bargained as an entity for rights which were to be enjoyed communally' ").

Moreover, these Tribal rights cannot be assigned or delegated to others. *See United States v. Washington,* 476 F.Supp. 1101, 1110 (W.D.Wash.1979), *aff'd,* 641 F.2d 1368 (9th Cir.1981), *cert. denied,* 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982).As such, individual tribal members lack standing to assert the communal rights of the Tribe itself.

In making the argument that members of SDMGO have standing, Appellant points to the declaration of Diane Riley. Appellant fails to disclose that Ms. Riley expressly stated she had no basis to speak for the tribe and made her declaration, not as a representative of the tribe, but as an individual. Kramer Decl., Exhibit A at 1.

Appellant does not cite any particular provision of the Centennial Accords is violated here or describe in what circumstances "consultation" is required or identify who the accords apply to. Its terms apply to "state agencies", not local governments such as the City of Tumwater. Kramer Decl., Exhibit E. As such, it is inapplicable to the current situation.

The Mayor has conferred with tribes and respected their communal rights. Myers Decl., Ex. 4 (Sullivan Declaration at 2) No tribe has sought to intervene or alleged any violation of tribal rights. This claim is nothing but a frivolous diversion.

F. THE COURT SHOULD REQUIRE A BOND FROM APPELLANT IF THE CITY IS PREVENTED FROM FULFILLING ITS DUTY TO PROVIDE SAFE STREETS.

Appellant cavalierly dismisses the requirement for a bond, pointing to an irrelevant letter from the state claiming that a permit is necessary. That permit issue is not before the court and does not affect the need for a bond, which even the appellant concedes is normally required.

The bond is the City's protection and only recourse against the plaintiff in the event that the City's arborist is correct in his observations and tests showing the tree to be hazardous and Appellant is wrong. *Fisher v. Parkview Properties, Inc.*, 71 Wn. App. 468, 478, 859 P.2d 77, 83 (1993). Such a bond protects the interests of the City, which are substantial, if the injunction is

ultimately vacated as wrongful. This is exactly what occurred in the trial court when it was able to consider both sides' arguments, rather than in an *ex parte* forum where the City was deprived of any opportunity to be heard.

The City's financial risks are substantial because there is a known hazard present in the City roadway. The estimated liability could "easily exceed $10 million" if there is an injury to a traveler along one of the busiest highways in Tumwater. (Decl. of Sullivan at 2, (Myers Decl., Exhibit 4). It is clear from numerous cases that the city has a duty. A municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel, *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). Maintaining the roads in a safe condition would seem to encompass keeping them free from the risk of motorists driving into fallen trees and free from the risk of trees falling on motorists using the roads. The city should not be precluded from providing a safe roadway unless the Appellant provides

substantial financial security to protect against the massive liability that could result from the requested injunctive relief.

V. CONCLUSION

The Court should deny the motion for emergency relief and allow the City to complete its evaluation of the condition of the tree and make decisions consistent with its duties to protect the public. The Court should remand the matter to the trial court, as no final appealable order has yet been issued.

DATED this 15th day of July, 2024.

I certify that this brief contains 4,873 words as determined by computer word count in conformity with RAP 18.17.

LAW, LYMAN, DANIEL,
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CERTIFICATE OF SERVICE

I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of the foregoing document along with the Declaration of Debbie Sullivan, Declaration of Kevin McFarland, and Declaration of Jeffrey S. Myers, all to be served to the below listed party by the Washington State Court of Appeals e-filing system as well as by electronic mail per service agreement upon the following person(s)::

Appellant's Attorney:

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DATED this 15th day of July 2024 , at Olympia, WA.

/s/ Tam Truong
Tam Truong, Legal Assistant

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

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