No. 58881-1-II

IN THE 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.

REPLY TO APPELLANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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I. INTRODUCTION

This appeal concerns dissolution of a TRO. SDMGO conceded that they have no imminent threat that their asserted rights will be violated in briefing filed with this court. They cannot meet the elements required to obtain injunctive relief, so this appeal is moot. It is moot because of the Appellant's unprompted concession that there is no well-grounded fear of an immediate invasion of their purported rights. Such a well-grounded fear is the second element necessary to gain a preliminary injunction under the *Tyler Pipe* standard. As this appeal is from an order dissolving a TRO, failure to meet the *Tyler Pipe* standard requires dismissal.

SMDGO argues in opposition to the motion to dismiss that: (1) Respondent has stated that the tree is not hazardous; (2) that voluntary cessation does not moot an appeal; and (3) that SDMGO is entitled to declaratory relief even if the remainder of the case is moot. However, point (1) is incorrect and irrelevant. Point (2) is also irrelevant. Point (3) is incorrect as to the law.

II. REPLY ARGUMENT

A. THE CONCEDED LACK OF AN IMMINENT INVASION OF ASSERTED RIGHTS PREVENTS APPELLANT FROM MEETING TYLER PIPE TEST FOR INJUNCTIVE RELIEF.

This appeal is not from a dispositive motion or final judgment. Rather, this appeal is taken from an order dissolving a TRO. The granting or dissolution of a TRO is determined based on the *Tyler Pipe* elements which are: "(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue,* 96 Wn. 2d 785, 792, 638 P.2d 1213, 1217 (1982). It is the party moving for injunction's burden to establish these elements and failure to establish even one requires the injunction be denied. *Kucera v. State, Dep't of Transp.*, 140 Wn. 2d 200, 210, 995 P.2d 63, 69 (2000). As this appeal is from an order dissolving a TRO, failure to establish the *Tyler Pipe* elements requires dismissal of

the appeal. SDMGO has in three statements effectively denied the existence of the second element, Those statements are:

1. Since [expedited review was sought], circumstances have changed. The mayor no longer is threatening to immediately cut down the historic tree. (Reply in Support of Motion for Extension at 2).

2. In short, the circumstances that led SDMGO to request expedited review no longer exist. The mayor no longer has imminent plans to remove the tree. She does not even possess the very study she now says she needs to evaluate the tree's condition and to determine how the tree should be managed in the future. (Reply in Support of Motion for Extension at 2-3).

3. As a result, not only does the mayor not have plans to immediately cut the tree down, and not only does she not possess the very study she now needs to evaluate the tree's condition and to make a decision, but she also is protected by a $10,000.00 bond. (Reply in Support of Motion for Extension at 3).

Because SDMGO admits that an essential element for the granting of injunctive relief is not present, SDMGO admits they cannot prevail, and this appeal should be dismissed.

B. THE INITIAL ARBORISTS REPORT IDENTIFIES THE DMGO AS A HAZARDOUS TREE.

SDMGO has argued that the Mayor's decision to pursue a second opinion is tantamount to an admission that the tree is not

a known hazardous tree. First, this statement is a recurring misrepresentation of what the Mayor has argued. She has never said that she "needs" a second opinion. This is misstated by Appellants at least 9 times in their response. They further misrepresent that the Mayor doesn't know if the tree is a hazard tree in at least four other statements.

Although the Mayor agreed to obtain a second opinion with regards to the DMGO, she has never said that she "needs" one and is not bound by its results. SDMGO's notion that the Mayor "needs" a second opinion to determine if the tree is hazardous is either their assumption or wishful thinking. However, it misrepresents what the City has actually said. See Response at 14-16, 18, 20-22, 24. The Mayor has been consistent in stating that she will obtain a second opinion and consider it in future decisions.

SDMGO further assumes, without support, that by seeking additional information, the Mayor has abandoned or rejected the initial diagnosis rendered by the city arborist who

has cared for the tree for over 23 years. CP 41, CP 112. Her agreement to seek a second opinion does not render a hazardous tree non-hazardous, nor does it invalidate the initial opinion of Mr. McFarland 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.

CP 41.

Further, whether the Mayor "needs" a second opinion is irrelevant as to the central question of this motion, which is whether the appeal should be dismissed after SDMGO's concession that there is no immediate threat to their purported rights, an essential element of their case for an injunction.

A known hazardous tree is a tree that is known to pose a hazard. The property owner must know that the tree poses a

hazard in order for liability to attach in the event of injury or death caused by said tree. *Lewis v. Krussel*, 101 Wn. App. 178, 179, 2 P.3d 486, 487 (2000). The moment that the City of Tumwater's contract arborist, who has cared for this tree for two decades, authored a report that the tree posed a hazard the city was on notice of a hazard. Tree fall cases typically revolve around the issue of constructive notice, actual notice is so obvious that it is not usually discussed in much detail. See *Albin v. Nat'l Bank of Com. of Seattle*, 60 Wn. 2d 745, 748, 375 P.2d 487, 489 (1962); *Lewis v. Krussel*, 101 Wn. App. 178 (2000). Therefore, for the purposes of Washington tree fall law the DMGO is a known hazardous tree because the property owner, City of Tumwater, is on notice that the tree poses a "high" hazard. Pursuit of a second opinion does not take the City of Tumwater off notice of the hazard posed.

SDMGO's characterization of the Mayor's agreement to have an additional study done misrepresents the facts. First, they contend that circumstances changed "since" they sought

expedited review. Response at 18. This is false because the Mayor had already agreed to seek a second opinion, at SDMGO's urging, on June 4, 2024, a month before SDMGO moved for a stay of the court's order and before this court issued an administrative stay. If the Mayor is so eager to cut the tree, as SDMGO alleges (Response at 19), then she had a month in which no court order existed to prevent her from doing so. She did not. SDMGO's allegations are simply wrong.

The Mayor has agreed to consider the findings of the second arborist's report, but the pursuit of a second opinion does not signify a lack of confidence in the original arborist's report.[1] Rather, additional information and a multiplicity of perspectives may aid City decisionmakers in how to best approach dealing with the known hazardous tree. None of this suggests the contradiction that SDMGO argues exists. The City can pursue a

[1] The second arborist's investigation is underway, with non-invasive work having begun on October 11, 2024. More invasive testing awaits permitting from DAHP, which is being requested on an emergency basis.

second opinion while the tree remains a known hazardous tree posing a risk to human life. It is nonsensical for SDMGO to contend that merely seeking a second opinion revokes the original opinion. When a cancer patient is diagnosed with a tumor, it does not magically vanish when the patient seeks another doctor's opinion to confirm the diagnosis and evaluate alternative treatment options. That Mayor Sullivan has sought a second opinion is wholly commendable.

C. CASES ON VOLUNTARY CESSATION ARE DISTINGUISHABLE BECAUSE OF APPELLANT'S ASSERTION THAT ITS RIGHTS WILL NOT BE IMMINENTLY INVADED.

SDMGO argues that the case is not rendered moot by a voluntary cessation of the activity which gave rise to it. It is true that "[v]oluntary cessation of allegedly illegal conduct does not moot a case because there is still a likelihood of the illegal conduct recurring." *State v. City of Sunnyside*, 3 Wn.3d 279, 313, 550 P.3d 31, 49 (2024).

However, none of the cases cited by SDMGO involve an admission by a party with the burden of proof that it cannot meet an essential element of the claim for injunctive relief, as is the case here. *Sunnyside* involved a suspension, but not a repeal, of a crime-free rental housing program that allegedly violated civil rights during litigation only. The City could not rely on that suspension to have the Attorney General's complaint dismissed when its ordinance remained on the books.

Likewise, *Braam v. State* addressed whether evidence of past conduct was admissible to prove prior condition needed to support injunctive relief. *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 708, 81 P.3d 851, 861 (2003). It did not involve a plaintiff's concession that its rights were not being imminently invaded.

In *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 271, 510 P.2d 233, 238 (1973), the State showed that the defendants did not cease the complained of practices, but continued their illegal practices. Thus the case was not moot.

The State never conceded that there was no imminent invasion of the public's rights, as SDMGO has acknowledged.

Here, SDMGO has affirmatively stated, in multiple places that no threat of imminent invasion of the rights exists. Thus, it is Appellant who alleges they cannot demonstrate an essential *Tyler Pipe* element, not Respondent that seeks to dismiss this case by way of a voluntary cessation. SDMGO has affirmatively alleged they cannot meet the second *Tyler Pipe* element requiring a well-grounded fear of the imminent invasion of a right. *Tyler Pipe Indus., Inc.*, 96 Wn. 2d at 792 (1982). Therefore, this appeal should be dismissed on that basis alone without implicating the issue of voluntary cessation.

D. THIS APPEAL DOES NOT INVOLVE A DECLARATORY JUDGMENT.

Finally, SMDGO is not entitled to declaratory relief because this appeal is from the dissolution of a TRO. This notice of appeal is from the Superior Court's ruling granting a motion to dissolve a TRO. There was no final judgment rendered or any

ruling regarding declaratory relief. The issue on DAHP's authority was not included in pleadings, was not briefed and, as amicus points out, is made without standing to enforce the state statute. The Superior Court did consider the likely outcome on the merits with regards to the dissolution of a TRO. The issue before this Court is narrowly whether the TRO was properly dissolved. The other issues are peripheral to deciding this central question. SDMGO cannot, by alleging that they cannot meet the *Tyler Pipe* elements, now convert this action into one seeking declaratory relief that was never considered before the trial court.

To gain a Declaratory Judgment under the Declaratory Judgment Act a party must meet certain standing requirements: "(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which

will be final and conclusive." *Grandmaster Sheng-Yen Lu v. King Cnty.*, 110 Wn. App. 92, 98, 38 P.3d 1040, 1042 (2002). Further, a party "is not entitled to relief by way of a declaratory judgment if there is available a completely adequate alternative remedy." *Id* at 98–99.

If the Court dismisses this appeal because SDMGO cannot meet the *Tyler Pipe* elements, the dispute on appeal is resolved. SDMGO is not entitled to declaratory relief on peripheral issues if the core of their appeal fails. This court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions. *Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994). Therefore, the appeal should be dismissed.

III. CONCLUSION

SDMGO has stated that there is no imminent plan to remove the tree. They posited this allegation in hopes of gaining more time but have instead admitted that they cannot meet the second *Tyler Pipe* element, i.e., existence of a well-grounded fear

of an immediate invasion of a right. This is sufficient grounds to dismiss this appeal.

SDMGO argues in opposition to the motion to dismiss that: (1) respondent has admitted the tree is not hazardous; (2) that voluntary cessation does not moot an appeal; and (3) that SDMGO is entitled to declaratory judgment even if the remainder of the case is moot. SDMGO has argued incorrectly that the Mayor's decision to pursue a second opinion is tantamount to an admission that the tree is not a known hazardous tree. The conclusion does not logically follow the premise, and it is irrelevant as to SDMGO's own allegation.

In the same vein, SDMGO has acknowledged that they cannot meet *Tyler Pipe* elements and their central claim therefore fails. Finally, the Appellant is not entitled to declaratory relief as that was not part of the order that was appealed. For the foregoing reasons, SDMGO's appeal should be dismissed.

I certify that this brief contains 2,343 words as determined by computer word count in conformity with RAP 18.17.

DATED this 24th day of October, 2024.

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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 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):

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DATED this 24th day of October, 2024.

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