No. 58028-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SILENT MAJORITY FOUNDATION, a Washington non-profit corporation,

Plaintiff-Appellant,

v.

JAY INSLEE, in his official and individual capacity as Governor of the State of Washington,

Defendant-Appellee,

On Appeal from the Superior Court
of the County of Thurston
No. 22-2-01146-34

Reply Brief of Appellant

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Contents

Cases

Statutes

Other Authorities

I. INTRODUCTION

Appellee erred in the characterization of the lower pleadings and the subsequent intervening facts. SMF does not "seek an injunction;" rather, SMF *sought* an injunction and a declaration that the challenged Proclamations were "null and void." Response Br., at 14. Because this is a matter of significant public concern, which is capable of repetition, the mootness exemption applies. Thus, the remaining question for this Court is whether the trial court erred in the challenged findings and its review of Plaintiff-Appellant's facts. Because those answers are "no," this Court should overturn the lower court's decision that Governor Inslee met his threshold requirements for adopting, implementing, and prolonging the challenged Proclamations.

II. REPLY ARGUMENT

A. The Instant Case Presents the Quintessential Public Policy Exception to Mootness.

SMF sought an injunction and declaratory relief as briefed by Defendant-Appellee. Response Br., at 14. The declaratory

relief Appellant sought was to have the Court declare the Proclamations invalid for the governor's failure to provide the grounds which serve as a basis to a declaration of an emergency proclamation, as follows: (1) the governor failed to find that a public disorder or disaster exists; and (2) the governor failed to identify the area affected by such disaster/disorder. Importantly, a state of emergency is only effective in the area described in such an emergency proclamation, and the challenged proclamations identified "all counties" of the State of Washington, notwithstanding certain counties that, intermittently, lacked such a disorder/disaster (i.e., several counties with no COVID-19 cases at the time the initial complaint was filed. CP 2.

This accords with the statutory language which grants the governor the authority to declare an emergency, as the invocation of emergency powers by the governor is triggered "after finding that a public disorder [or] disaster … exists[.]" RCW 43.06.010(12). The locus of the proclamation is not

hypothetical, as the emergency is confined to "the area affected[,]" and the governor's emergency powers "shall be effective only within the area described in the proclamation." *Id*.

While the two challenged emergency orders have been terminated, several questions remain: (1) what are the limitations on the governor's powers to declare an emergency; (2) what are the required factual findings that serve as a predicate to declare an emergency; and (3) what exactly does the mandatory language requiring that "the governor must terminate said state of emergency proclamation when order has been restored in the area affected" actually mean? RCW 43.06.210. These issues were raised in the briefing before the lower courts and in Appellant's opening brief. CP 155-57, Opening Br., p. 21-22.

To conserve judicial resources in response to a future state of emergency declared by a governor of this state, and to provide guidance to the future governors of this state who may have the misfortune of governing during a time fraught with emergencies, a judicial determination of these questions is warranted—hence,

the continuing public interest in judicial clarification of the same. The three factors necessary to invoke the public policy exception to mootness are present in the instant case, namely, (1) the issue is patently of a public nature; (2) an authoritative determination is desirable to provide future guidance to public officers; and (3) the issue is likely to recur. *See, e.g.*, *In re Detention of Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983); *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.3d 445, 448, 759 P.2d 1206 (1988). Each factor will be addressed in turn.

1. The Issue Challenged is of a Public Nature

The Defendant does not dispute that the issue is of a public nature. As the Covid pandemic impacted day-to-day life in myriad ways, and the simple fact that gubernatorial action is the subject of this challenge, it is a verity that the issue is of a public nature; the first nine pages of Appellee's response demonstrates the public nature of the COVID-19 pandemic and its related Proclamations challenged herein. Response Br., p. 1-10.

Moreover, clarification from this Court on the statutory construction of gubernatorial authority in times of emergency is a matter of public policy and interest. *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 472, 647 P.2d 481, 484 (1982).

2. Authoritative Determination is Desirable to Provide Future Guidance.

Contrary to Defendant's brief, the statute providing that the governor may declare an emergency is a disjunctive statement, using the word 'or' to show that there is an election or determination to be made by the governor; when the governor determines there is a predicate to declare a state of emergency exists, the governor must declare that it exists "within this state *or* any part thereof[.]" RCW 43.06.010(12) (emphasis added). The state of emergency is either in the state at large, or a subordinate part thereof. Governor Inslee chose the latter by declaring that "a State of Emergency exists in all counties in the state of Washington[.]" CP 204. Throughout the next 975 days,

Governor Inslee approached the pandemic on a county-by-county basis as discussed *infra*, at I.B.2. The Governor also intermittently utilized a phased, regional approach to management of the COVID-19 pandemic wherein certain counties or regions would qualify to move from phase to phase, which would allow certain business and social activities. *See, Miller v. Inslee,* Order Dismissing Original Action Against State Officer, 2-5; CP, 353-356, discussing Proclamations 20-25.3 and 20-25.4. Appellant noted this phased reopening, and Appellee responded, stating that such an "approach would not have been possible had the emergency not been maintained statewide." Appellee's Br., at 24, n.14. This admission concedes the point of contention: the Governor *managed* the pandemic on a regional, county-by-county basis when convenient and on a statewide basis when convenient, without changing the enabling language of finding an emergency in "all counties" of the State of Washington. Thus, Appellant's challenge was appropriate—the Governor's declaration was tailored in a fashion that should have

allowed counties with low, or no, COVID-19 infections to escape from the Proclamations' teeth. Yet, that was not the case, and the central premise of Appellant's position remains viable: when the governor declares an emergency in "all counties" of the State of Washington, which is tied to a particular illness (here, COVID-19), and there are no cases of that illness, or very low cases of the same in several counties, does the emergency persist in those counties?

As briefed by the Appellant in its opening brief, a judicial determination of gubernatorial emergency powers is desirable to determine the appropriate use of those powers and to limit those powers, where unfettered gubernatorial edicts are not supported by evidence or underlying facts or where those edicts are improperly placed.

The Washington Supreme Court has not in fact, answered the question what the proviso of RCW 43.06.210 actually means; in *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982), the Court simply held that under RCW 4.92.090, the

state is not liable for torts or other wrongs for discretionary decisions and such actions are not amenable to review in a civil action for damages. 97 Wn.2d at 476. The Court even went so far as to caution that its "holding does not leave the residents of this state without redress in similar situations. Appellant may have challenged the actions by using an extraordinary writ at an earlier stage." *Id*. at 471. While perhaps this action could have been brought in a different procedural posture, namely a writ for certiorari, mandamus, or prohibition, that is beside the point; *Cougar* and its progeny do not stand for the proposition that judicial review of gubernatorial discretion is not allowed. *Cougar* was limited to review in a civil action for damages, and any citation to *Cougar* for authority to the contrary is *obiter dicta*, at most.

3. The Issue is Likely to Recur

While the recent COVID-19 emergency was in response to a "novel" coronavirus, emergencies are not new. Additionally, the governor has noted that while the emergency was terminated,

COVID-19 has not been eradicated, and that it's here to stay; the governor has simply found ways to "adapt" to life with COVID-19.[1]

The governor has unilateral and unchecked discretion on declaring a state of emergency, with few limitations on terminating such an emergency, despite a provision that a state of emergency must end when order is restored in the area affected. The arbitrariness that ensues with these gubernatorial proclamations is illustrated by a proclamation issued a decade ago by Governor Inslee. Wash. Off. Of the Gov., *Proclamation 13-07* (Aug. 19, 2013). In that proclamation, Governor Inslee

[1] "We've come a long way the past two years in developing the tools that allow us to adapt and live with COVID-19," Inslee said. "Ending this order does not mean we take it less seriously or will lose focus on how this virus has changed the way we live. We will continue our commitments to the public's well-being…" Governor Jay Inslee home page, News & Media: *Inslee announces end to remaining COVID-19 emergency orders and state of emergency by October 31*. Available at: https://governor.wa.gov/news/2022/inslee-announces-end-remaining-covid-19-emergency-orders-and-state-emergency-october-31. Last accessed: May 24, 2023.

terminated three separate proclamations which the governor had previously issued to declare emergencies due to severe storms. These prior proclamations were as follows: (1) Proclamation 12-07, July 23, 2012, effective in 16 counties, effective more than one year; (2) Proclamation 13-01, Jan. 16, 2013, effective in six counties and one county due to multiple ongoing fires; and (3) Proclamation 12-12, Sep. 12, 2012, effective in nine counties. Proclamation 13-07 sunset each of these Proclamations on the same day. It is unclear what was special about August 19, 2013 that allowed termination of emergency proclamations issued either within, or more than, the past year; yet the governor terminated those emergency proclamations on August 19, 2013. It is doubtful that the storms were of such severity that a state of emergency existed in 21 counties (Kitsap had two simultaneous states of emergency due to storms as it was included in both Proclamation 12-07 and Proclamation 13-01) ranging in duration from half a year to more than one year.

While those states of emergency did not result in a fundamental loss, or at the very least transformation, of civil liberties, as did the Proclamations challenged herein, the arbitrary nature of concluding these year-long emergency proclamations (issued separately and individually) with a single proclamation demonstrates the need for judicial review to determine the appropriate limits of the governor's discretion in light of the proviso of RCW 43.06.210, and these facts demonstrate that gubernatorial emergency proclamations declaring a state of emergency happens with regularity.

Because COVID-19 has not been eradicated, and public health officials continuously warn that it could recur or that another global pandemic could erupt, the Governor's authority to operate within a state of emergency must be reviewed by this court as such declarations are likely to recur. Moreover, as this challenge seeks judicial review of *how* the Governor declared the state of emergency (i.e., that he declared a statewide emergency that existed in *all counties* of the State), which was not always

supported by evidence, the matter needs adjudication to provide defined limits of such proclamations, where appropriate.

B. Defendant's Defenses are Meritless

1. Appellant Seeks this Court to Require the Governor to Declare an Emergency in a Specific Area, and Declare the Governor's Emergency Powers Effective Only Within those Areas.

The statute conferring upon the governor the discretion to proclaim an emergency, only does so "after finding" that such a state of emergency exists. Further, the proclamation is limited to "the area affected," and the "powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation." RCW 43.06.010(12). The statute therefore has a triggering mechanism, as well as temporal and geographic limitations. Somehow, Appellee posits that the statute is a grant of unfettered discretion, not subject to any review whatsoever.

Effectively, Appellee urges nullification of the proviso of RCW 43.06.210; a governor could declare a state of emergency

in perpetuity, as there is no mechanism for reviewing "when order has been restored in the area affected." This violates basic rules of statutory construction and interpretation as well as logic; if the termination of a state of emergency was strictly discretionary, there would be no provision that mandates the termination of such when order is restored. *See, e.g., Cougar,* 97 Wn.2d at 471; CP 156-57 (discussion of Senate Floor debate Apr. 3, 1969, regarding powers of citizens to challenge continuing gubernatorial emergency powers once order has been restored).

2. The Governor Treated Counties as Discrete Areas in Accordance with Extant Statutory Schema and the Nature of the Virus.

The governor elected to declare a state of emergency in "all counties in the state of Washington." Therefore, the area described in the state of emergency is each and every county, not the state as a unit. The governor could have just as easily declared a state of emergency in the entire state; indeed such a proclamation had been done before, notably in response to the

eruption of Mt. St. Helens, which eventually spurred the challenge in *Cougar*.

However, Governor Inslee, with the challenged Proclamations did not declare a statewide emergency, or in the entirety of the state of Washington, but elected to declare a state of emergency in "all counties in the state of Washington." Accordingly, each county is treated as a discrete area, which is exactly how the response to Covid was handled, as demonstrated by the ensuing synopsis/recitation of the COVID-19 emergency proclamations.

The initial restrictions imposed by Governor Inslee were prohibitions of gatherings of 250 or more people, but only in the counties of King, Pierce, and Snohomish. Wash. Off. of the Gov., *Proclamation 20-07* (Mar. 11, 2020).

In planning a return to normalcy, the governor promulgated a "Safe Start Washington" re-opening plan. Wash. Off. of the Gov., *Proclamation 20-25.3* (May 4, 2020). Initially, every county started in Phase 1, but counties with a population

less than 75,000 and which had not identified a resident with Covid for three consecutive weeks could request a variance from the Secretary of the Washington State Department of Health to be exempted from specific aspects of the prohibitions. *Id*.

The governor then transitioned from "Stay Home – Stay Healthy" to "Safe Start – Stay Healthy" which was a "county-by-county phased reopening." Wash. Off. of the Gov., *Proclamation 20-25.4* (May 31, 2020). This plan was "applied on a county-by-county basis, and will allow any county that has been in Phase 1 or 2 for three weeks to apply to the Secretary of Health to move in whole or in part to the next phase;" such application was to be submitted by the County Executive, or in the absence of the County Executive, with the approval of the County Council or Commission. *Id*.

Yakima County received special attention and had additional restrictions imposed during the phased re-opening, with masks mandated in all public places. Wash. Off. of the Gov., *Proclamation 20-60* (Jun. 24, 2020). Yakima County was not

simply returned to Phase 1, but had masks mandated in all public places, even outdoor settings.

With the onset of the new year, the governor amended the name of the county-by-county phased reopening once again, this time to "Healthy Washington – Roadmap to Recovery." Wash. Off. of the Gov., *Proclamation 20-25.12* (Jan. 11, 2021). This roadmap to recovery shifted from a county-by-county approach to a "regional approach that is substantially similar to existing emergency medical services regions[.]" *Id*. The governor reiterated that a state of emergency existed in all counties of Washington State, but simply shifted the "area affected" to regions, as "every county is part of a region, and all regions begin in Phase 1[.]" *Id*.

Regardless of the geographic area described, the areas were discrete constituent elements of the state as a whole; ostensibly, if a county or region had progressed through all four phases of the plan, the governor would have terminated the state of emergency in that area. Yet, as the COVID-19 pandemic

persisted, the Governor continued with the declaration that an emergency existed in all counties notwithstanding the fact that, at times, some counties experienced no or low COVID-19 cases. Under the prior phased approach, counties with no COVID-19 cases could have sought termination of the proclamation as applied to that county. Yet, as the pandemic progressed the practice was not allowed, and the lone persisting application of the proclamation was statewide while the declaration remained a county-based approach.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court remand the action for further discovery and a declaration issued by the superior court that the challenged emergency proclamations must be supported by necessary findings, including a proper declaration/designation of the "affected area," for the governor to wield emergency powers to

waive, suspend, or circumscribe civil liberties and statutory protections.

This document contains 2,715 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of May, 2023.

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