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.

RESPONDENT MAYOR DEBBIE SULLIVAN'S MOTION TO DISMISS APPEAL

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I. INTRODUCTION

Respondent Debbie Sullivan, Mayor of the City of Tumwater hereby moves to dismiss this appeal based upon Appellant's concession that there is no longer an immediate threat of invasion of their rights which is necessary to support the injunctive relief sought.

II. FACTS RELEVANT TO MOTION

Appellants sought an extension of time to revise their Reply Brief on the merits that was filed in this matter. Respondent objected and Appellants replied on October 10, 2024. In the reply filed to support their request to delay compliance with this court's order to refile their reply brief, Appellants claimed that circumstances have materially changed. SDMGO now asserts:

> 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.

As such, Appellants concede in three separate places that there is no immediate plan to cut down the tree, which is the basis of their allegation that they will suffer an immediate and irreparable harm. This significant concession renders their attempt to secure injunctive relief moot and prevents them from being able to establish a necessary element of their claims.

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III. ARGUMENT

A. APPELLANTS' CONCESSION THAT THERE IS NO IMMEDIATE PLAN TO CUT DOWN THE TREE PRECLUDES ESTABLISHING AN ESSENTIAL ELEMENT OF THEIR REQUEST FOR INJUCTIVE RELIEF.

In this case, Appellants sought a TRO or injunction to prevent the mayor from cutting down a tree. A preliminary injunction or TRO generally requires the party seeking it to demonstrate three elements: (1) a clear legal or equitable right, (2) 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. *Tyler Pipe Indus., Inc. v Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quoting *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn. 2d 317, 319, 324 P.2d 1099 (1958); *Bellevue Square, LLC v. Whole Foods Mkt. Pac. Nw., Inc.*, 6 Wn. App. 2d 709, 715, 432 P.3d 426 (2018) (emphasis added). This standard is consistent across multiple cases and statutes in Washington.

The requirement of a well-grounded threat of an "immediate invasion" of the asserted right indicates that there must be an imminent threat of harm. For instance, in *Kucera v. Dep't of Transp.,* 140 Wn.2d 200, 209, 995 P.2d 63 (2000)., the court emphasized that a preliminary injunction requires a well-grounded fear of immediate invasion of the right. Similarly, in *Bellevue Square, LLC v. Whole Foods Market Pacific Northwest, Inc*., Division One of this court reiterated that the party must show a well-grounded fear of "immediate invasion" of their right and failure to show any of the *Tyler Pipe* elements required denial of injunctive relief. *Bellevue Square, LLC v. Whole Foods Mkt. Pac. Nw., Inc.*, 6 Wn. App. 2d 709, 715, 432 P.3d 426 (2018), citing *Kucera*, 140 Wn.2d at 209-10, 995 P.2d 63.

The necessity of showing "actual and substantial injury" underscores the need for there to be an imminent threat, which SDMGO now says does not exist. Our Supreme Court has held that failure to establish any of the *Tyler Pipe* criteria, including a well-grounded fear of immediate invasion, dictates that

preliminary injunctive relief be denied. *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State,* 99 Wn.2d 878, 888, 665 P.2d 1337 (1983).

SDMGO has now conceded, in three separate statements, that there is no imminent threat or well-grounded fear of an immediate invasion of their claimed right. As such, they cannot make a case for an injunction under *Tyler Pipe,* whether it is termed a TRO or a preliminary injunction. Given their concession, and consequent lack of an imminent threat of irreparable harm, SDMGO cannot prove an essential element of the *Tyler Pipe* elements necessary to show entitlement to injunctive relief. *Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn.App. 98, 115, 168 P.3d 443 (2007). Therefore, this case is now moot.

An appeal is moot if the matter becomes purely academic and the court cannot provide effective relief. *Department of Labor and Industries v. Fowler*, 23 Wash.App.2d 509 (2022). In *Fowler,* a restaurant owner's challenge to a TRO enforcing

Covid-19 restrictions from the Governor's emergency proclamation. Because the TRO against indoor seating at the restaurant expired, there was no longer an imminent threat of invasion of the owner's rights and the appeal became moot.

Here, SDMGO now asserts that the circumstances since the trial court ruled have materially changed such that there is no longer any immediate threat or plan to cut down the tree. Absent such an imminent threat to do so, there is no basis to continue to seek injunctive relief. Such a threat is an essential element of their claim that SDMGO is entitled to injunctive relief. In its absence the case is now moot and should be dismissed.

IV. CONCLUSION

The Court should therefore dismiss the appeal and remand the matter back to the trial court. Whether the trial court erred in its dissolution of the TRO is now a purely academic issue, as SDMGO concedes there is no imminent plan to remove the tree. Absent an immediate threat of an invasion of their rights, there is no basis for injunctive relief.

I certify that this brief contains 999 words as determined by computer word count in conformity with RAP 18.17.

DATED this 14th 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 14th day of October, 2024.

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