

EXPEDITE  
 Hearing is set:  
Date: September 6, 2024  
Time: 9:00 a.m.  
Judge/Calendar: Hon Anne Egeler

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON**

SAVE THE DAVIS-MEEKER GARRY OAK,  
  
Plaintiff,  
  
vs.  
  
DEBBIE SULLIVAN, in her capacity of Mayor  
of Tumwater,  
  
Defendant.

**NO. 24-2-01895-34**

**DEFENDANT’S MOTION FOR  
ATTORNEY’S FEES**

Pursuant to this Court’s equitable powers, Defendant Mayor Debbie Sullivan of Tumwater moves, by and through her undersigned attorney, for attorney’s fees.

**I. FACTS**

This case arises from attempts by a group of activists to enjoin the removal of the Davis Meeker Garry Oak which was determined to be hazardous by the City of Tumwater’s contracted arborist. *Plaintiff’s Complaint* at 1-2. A temporary restraining order (“TRO”) was issued *ex parte* and provided to the City of Tumwater on May 24, 2024. Declaration of Jeffrey S. Myers (hereinafter “Myers Decl.”) at ¶ 2.

The City immediately filed an emergency motion to dissolve the TRO which failed to comply with notice requirements. Myers Decl. ¶ 2. The TRO failed to contain any factual findings whatsoever or describe the basis for imposition of the TRO. Myers Decl. ¶ 2. It failed to contain any requirements for a

1 hearing to allow the city of Tumwater to oppose the injunction or to convert the TRO into a preliminary  
2 injunction as set forth in CR 65. Myers Decl. ¶ 2. The TRO further failed to include any financial security  
3 or bond to protect the City of Tumwater against the consequences if the TRO was determined to be  
4 wrongfully issued. Myers Decl. ¶ 2.

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6 The court shortened time and set the motion to dissolve the TRO for May 31, 2024. Myers Decl.  
7 ¶ 3. The Court granted the motion to dissolve the TRO but stayed the effective date of its order until June  
8 5, 2024 to allow the plaintiff an opportunity to seek emergency relief in the court of appeals. Myers Decl.  
9 ¶ 3. On May 31, 2024, the plaintiff filed an “emergency notice of appeal” to the court of appeals. Myers  
10 Decl. ¶ 4. However, the plaintiff did not file an emergency motion to stay the dissolution order or  
11 otherwise seek emergency relief under RAP 17.4(b). Myers Decl. ¶ 4. In response, on June 3, 2024, the  
12 Court of Appeals issued a ruling informing the plaintiff that it could not grant any such relief unless such  
13 an emergency motion for a stay was filed. Myers Decl. ¶ 4. As a result of their failure to file such a motion,  
14 the TRO was dissolved and this Court’s May 31 order became effective on June 5, 2024. Myers Decl. ¶  
15 4. Plaintiff delayed for another month, waiting until July 2, 2024, to file a motion with the appellate court  
16 seeking a stay of this court’s May 31, 2024, ruling. Myers Decl. ¶ 4. In that motion, the plaintiff contended  
17 that the order dissolving the TRO was an appealable final order. Myers Decl. ¶ 4. The Court of Appeals  
18 agreed in its July 23, 2024, ruling that the superior court effectively determined the City’s right to remove  
19 the tree, and because it appears no other issues remain pending in the superior court, allowed the appeal  
20 to proceed under RAP 2.2(a)(3). Myers Decl. ¶ 4.

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23 Instead of filing an emergency motion with the court of appeals, as noted by the July 3 ruling and  
24 allowed by this Court’s May 31 order, the plaintiff instead sought to remove this matter to federal court.  
25 Myers Decl. ¶ 5. A notice of removal was filed by the plaintiff on June 4, 2024, even though the plaintiff  
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1 had originally chosen this court as a proper venue in which to bring its action. Myers Decl. ¶ 5. In response,  
2 the defendant filed an objection pointing out that under federal law, only a defendant may remove a case  
3 to federal court. Myers Decl. ¶ 5. Consequently, the federal court immediately remanded this case back to  
4 Thurston County Superior Court. Myers Decl. ¶ 5.

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6 In the meantime, at the June 4, 2024, City Council meeting, the City of Tumwater and Mayor  
7 Sullivan agreed to obtain a second opinion concerning the condition of the tree. Myers Decl. ¶ 6. The City  
8 issued a Request for Qualifications and obtained responses through July 18, 2024. Myers Decl. ¶ 6. The  
9 City has contracted with an independent arborist, Todd Prager & Associates, to make the assessment,  
10 which will be used to evaluate next steps concerning the Davis Meeker Garry Oak. Myers Decl. ¶ 6.

11 The City of Tumwater reasonably incurred attorney's fees to oppose the wrongfully obtained TRO  
12 as well as the aborted attempt to relitigate this issue through removal to federal court. Myers Decl. ¶ 7.  
13 Defendant was forced to move quickly to hire outside counsel to immediately bring the multiple flaws in  
14 the TRO to the court's attention. Myers Decl. ¶ 7.

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16 The City's legal counsel reasonably incurred 51.1 hours and \$13,003.00 in attorney's fees in this  
17 matter. Myers Decl. ¶ 9. The time set forth is reasonable and undersigned counsel has excluded time  
18 which in the exercise of billing judgment would have been excessive and included only the time  
19 reasonably necessary to defend this matter. Myers Decl. ¶ 9. This time includes only the time incurred  
20 while the matter was pending in Superior Court and does not include time responding to the plaintiff's  
21 filings on appeal. Myers Decl. ¶ 9.

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23 In addition to the reasonable attorney's fees incurred in dissolving the wrongfully issued TRO, the  
24 City is continuing to incur attorney's fees to respond to issues raised by the plaintiff on appeal. Myers  
25 Decl. ¶ 10. The amount of reasonable attorney's fees incurred in July and August 2024 are an additional  
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1 \$18,353.88 to respond to the motions in the court of appeals and defend the right of the city to prevent  
2 hazards in its right of way. Myers Decl. ¶ 10. These amounts would reasonably be awarded to the City if  
3 it prevails on appeal. Myers Decl. ¶ 10. The total amount of reasonable attorney’s fees spent by the City  
4 of Tumwater in responding to plaintiff’s litigation is currently in excess of \$31,356.88. Myers Decl. ¶ 10.  
5 This amount does not include time spent responding to the motion to determine the amounts of a  
6 supersedeas bond or to bring Defendant’s motion for attorney’s fees. Myers Decl. ¶ 10.

## 8 II. ARGUMENT

### 9 A. PLAINTIFF IS LIABLE TO THE DEFENDANT FOR REASONABLE ATTORNEY’S 10 FEES INCURRED TO DISSOLVE THE WRONGFULLY OBTAINED TRO.

11 Courts have the discretion to award attorney’s fees on the dissolution of a wrongfully granted  
12 temporary restraining order. “On equitable grounds, a party may recover attorneys’ fees reasonably  
13 incurred in dissolving a wrongfully issued injunction or restraining order. *Alderwood Assocs. v.*  
14 *Washington Env’tl. Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981); *Cecil v. Dominy*, 69 Wn.2d 289,  
15 291–92, 418 P.2d 233 (1966). A temporary restraining order is “wrongful” if it is dissolved at the  
16 conclusion of a full hearing. *Id.* at 293–94, 418 P.2d 233.” *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d  
17 103, 143, 937 P.2d 154, 176 (1997), *amended*, 943 P.2d 1358 (Wash. 1997).

18 The amount of the award is within the trial court’s discretion. *Id.* The award of attorney’s fees may  
19 exceed the bond required by CR 65(c) because the award is based on equity not the bond statute. *Id.* The  
20 recovery of attorney’s fees is for the costs directly associated with dissolving the wrongfully issued TRO.  
21 *Cornell Pump Co. v. City of Bellingham*, 123 Wn.App. 226 (2004). Such liability will include liability  
22 for fees incurred defending the dissolution of a wrongfully issued TRO. *Doyle v. Lee*, 166 Wn. App. 397,  
23 407–08, 272 P.3d 256, 261–62 (2012)

1 Attorney's fees are appropriate when a TRO is dissolved at the conclusion of a full hearing. *Burt*  
2 *v. Washington State Dep't of Corr.*, 191 Wn. App. 194, 207, 361 P.3d 283, 289 (2015). "Courts have  
3 generally held that, where the person against whom the injunction has been issued has employed attorneys  
4 to seek its dissolution, and they have succeeded in doing so without a trial of the case upon its merits, in  
5 a suit upon the injunction bond, such person is entitled to recover such sum as he may have paid, or  
6 obligated himself to pay, his attorneys for their services in that connection, not exceeding, of course, a  
7 reasonable amount." *Cecil v. Dominy*, 69 Wn. 2d 289, 292, 418 P.2d 233, 234–35 (1966).  
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9 The Court has discretion over the award of reasonable attorney's fees and the amount where a  
10 TRO is dissolved. There is no brightline rule or clear formula. However, "[t]he purpose of the equitable  
11 rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs  
12 from seeking relief prior to a trial on the merits." *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 143  
13 (Wash. 1997). Here, the Plaintiff's highly irregularly TRO lacked proper notice, factual findings, failed to  
14 state the basis for its issuance, failed to include a hearing date to consider a preliminary injunction, and  
15 failed to include any financial security or bond to protect the interests of the Defendant, who was absent  
16 when the TRO was obtained. In granting the Defendant's motion to dissolve the TRO, this court has  
17 already concluded that issuance of the TRO was wrongful, given so many of the procedural requirements  
18 were not met, as well as on the merits of the contentions raised by the plaintiff's complaint. The Defendant  
19 incurred significant attorney's fees dissolving this highly irregular TRO and should be fully awarded such  
20 fees.  
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23 Rather than pursuing a resolution on the merits in state court, the Plaintiff then engaged in a  
24 frivolous attempt to remand their own case to federal court. Only after this did the Plaintiff begin to  
25 seriously pursue resolution of this matter in the Court of Appeals. Plaintiff's actions have not been aimed  
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1 at a swift resolution of this matter, but rather at delay and obfuscation. Each of these actions requires a  
2 response by Defendant's attorneys which increases the costs to city taxpayers.

3 The purpose of the equitable rule concerning TROs is to deter seeking relief prior to a trial on the  
4 merits. Here, the Plaintiff has taken multiple steps to delay that resolution on the merits. The Plaintiff  
5 pursued a highly procedural irregular TRO, which failed on the merits, in order delay the tree's removal.  
6 The Plaintiff pursued removal of their own case to federal court a facially frivolous action rather than  
7 pursue resolution in the Court of Appeals, the appropriate channel. Only after these attempts at delay had  
8 been scuttled was the Plaintiff compelled to seriously pursue the case in the Court of Appeals. It is unclear  
9 what further dilatory tactics the Plaintiff will utilize, however their goal of delay is nakedly apparent. The  
10 rule is meant to deter plaintiff's seeking relief prior to a resolution on the merits. Therefore, the rule is  
11 particularly against actions which seek to delay that resolution so that the affected party remains in  
12 prolonged legal limbo.  
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15 **B. THE AMOUNT OF ATTORNEY'S FEES SOUGHT BY THE CITY TO VACATE THE**  
16 **WRONGFULLY ISSUED TRO IS REASONABLE.**

17 The attorney's fees incurred by the Defendant in seeking to dissolve the wrongfully issued TRRO  
18 in this matter are reasonable under the lodestar methodology used by Washington courts to determine the  
19 amount of reasonable attorney's fees. The lodestar fee is calculated by multiplying a reasonable hourly  
20 rate by the number of hours reasonably expended and excluding wasteful or duplicative hours and time  
21 spent on unsuccessful claims or theories, then adjusting up or not based on the contingent nature of the  
22 case. *Mahler v. Szucs*, 135 Wn. 2d 398, 434, 957 P.2d 632 (1998). The fees sought must be based on  
23 contemporaneous time records. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d  
24 193 (1983). Such documentation need not be exhaustive or in minute detail, but must inform the court, in  
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1 addition to the number of hours worked, of the type of work performed, and the category of attorney who  
2 performed the work (*i.e.*, senior partner, associate, etc.).

3 Here, the Defendant responded by immediately moving to dissolve an order that prevented it from  
4 taking measures necessary to protect public safety in its right-of-way and prevent huge potential liability.  
5 The Mayor and the City were represented by Jeffrey Myers and Jakub Kocztorz. Myers Decl. ¶ 7. As the  
6 principal attorney on this matter, Jeffrey Myers directed the preparation of pleadings to obtain the  
7 dissolution of the TRO. *Id.* Mr. Myers is an experienced attorney with over 38 years of practice in  
8 environmental, land use and municipal law. He billed at a discounted hourly rate to the city of Tumwater  
9 and does not seek to shift any additional costs beyond the actual fees incurred by the Defendant. He was  
10 assisted by an associate who conducted research and assisted in drafting pleadings in order to respond on  
11 an emergency basis, given the immediate imposition of the TRO without notice. Mr. Kocztorz billed his  
12 time in this matter at his regular hourly rate of \$190 per hour, which is reasonable for an associate attorney  
13 with his skills and academic background. Myers Decl. ¶ 8. In sum, the Defendants reasonably incurred  
14 51.1 hours responding to the TRO, securing its dissolution and responding to plaintiff's attempts to evade  
15 this court's rulings by removing the matter to federal court.

16 Therefore, the Court should award attorney's fees in the amount of \$13,003.00 representing 51.1  
17 hours of the Defendant's attorneys' efforts in dissolving the TRO. This is a reasonable amount of hours  
18 to pursue the dissolution of a TRO. Further, this time included only the time reasonably necessary to  
19 defend this matter. This time includes only the time incurred while the matter was pending in Superior  
20 Court and does not include time responding to the plaintiff's filings on appeal. The hourly rates charged  
21 are reasonable. The court should follow the Lodestar methodology and award \$13,003.00 as reasonable  
22 attorney's fees incurred to dissolve the TRO.  
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1 **III. CONCLUSION**

2 The Court has the discretion to award, and determine the amount of, attorney's fees to the party  
3 that successfully dissolves a TRO after a full hearing. The spirit of this rule is to deter parties from seeking  
4 relief prior to resolution of the matter on the merits. The equitable rule in Washington supports a grant of  
5 attorney's fees incurred to dissolve a wrongful injunction. The \$13,003.00 in attorney's fees incurred is  
6 reasonable and should be awarded. Therefore, the Defendant respectfully requests the Court grant  
7 attorney's fees in the amount of \$13,003.00.  
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9 Dated this 28<sup>th</sup> day of August 2024.

10 LAW, LYMAN, DANIEL, KAMERRER  
11 & BOGDANOVICH, P.S.

12 

13 Jeffrey S. Myers, WSBA No. 16390  
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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I caused to be electronically filed the foregoing document, and this Certificate of Filing & Service, and have mailed a copy of this filing to the following parties via email per service agreement:

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DATED this 28<sup>th</sup> day of August 2024, at Tumwater, WA.

/s/ Tam Truong  
Tam Truong, Legal Assistant