IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 43076-2-II

KITSAP COUNTY, a political subdivision of the State of Washington,

Respondent/Cross-Appellant,

vs.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE ROES I-XX, inclusive

Appellants/Cross Respondents,

and

IN THE MATTER OF NUISANCE AND UNPERMITTED CONDITIONS LOCATED AT One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton, Washington

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BRIEF OF *AMICUS CURIAE* CK SAFE & QUIET, LLC

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I. INTRODUCTION

This case concerns Kitsap County's effort to enjoin the public nuisance actions of the Kitsap Rifle and Revolver Club ("KRRC") at its 72-acre property in central Kitsap County. After a 14-day bench trial, Pierce County Superior Court Judge Susan K. Serko issued extensive and well supported findings, conclusions, and an order enjoining KRRC from operating its facility until it, (1) applied for and obtained a conditional use permit ("CUP") from Kitsap County; and (2) permanently enjoining the use of automatic weapons, rifles greater than nominal .30 caliber, exploding targets and cannons, and from operations outside the hours of 9 a.m. to 7 p.m.

After years of enduring ever increasing noise impacts and worse, an increasing and ever-present risk of a stray bullet hitting their property, Judge Serko's order *finally* brought a modicum of relief to the adjacent homeowners and residents. Finally, the neighbors believed they would be able to fully enjoy their properties free from the oppressive noise of incessant gunfire and free from the risk of having their home or themselves struck by an errant bullet. Upholding the trial court's decision will bring this long needed relief.

While the parties have provided this Court with extensive briefing, CK Safe and Quiet writes separately to clarify three key issues: (1) the trial court's credibility determinations should not be subject to this Court's review; (2) the trial court found credible the testimony of neighbors and determined that a public nuisance existed; and (3) the trial court's discretionary grant of injunctive relief was well grounded in law and fact and should not be disturbed on review.

II. INTEREST AND IDENTITY OF AMICUS CURIAE

The movement that would eventually become CK Safe & Quiet began in 2009 as neighbors came together to discuss the constant and increasing intrusion of the sound of gunfire from Kitsap Rifle and Revolver Club into their neighborhoods and homes. As these neighbors shared their stories about KRRC's adverse impact on their lives, they learned that a number of homes downrange from KRRC had been struck by errant bullets, widening the scope of their concerns to include safety as well as noise. As they began to look more closely at KRRC's operation it became clear that there were other issues, including contamination of wetlands with toxic chemicals, unlawful and flagrant filling of wetlands, and extensive land clearing, earth moving and construction of new

shooting areas without benefit of professional design or engineering input or evaluation and without obtaining necessary local, state, or federal permits. Types and intensity of shooting activities had also been expanded in violation of land use regulations.

As the acoustical assault continued and the fear of injury and property damage from errant bullets grew, increasing numbers of neighbors spoke out. Approximately 200 individuals representing over 100 households signed petitions objecting to the excessive noise produced by KRRC. Most of these people live in neighborhoods within a radius of about 2 miles from KRRC with many directly downrange from KRRC's rifle line; some live as far as four miles from KRRC but still find the noise intrusive and objectionable.

CK Safe & Quiet, LLC was formally incorporated in 2011. Since its inception CK Safe & Quiet has encouraged Kitsap County to protect the comfort, repose, health and safety of the public by enforcing existing ordinances, rules and regulations as they apply to KRRC. Many of CK Safe & Quiet's members and supporters live in neighborhoods directly downrange from KRRC's rifle line where they continue to live in fear of

being struck by errant bullets and most endure the domination of their daily lives by the sounds of the discharge of high energy firearms.

Members of CK Safe & Quiet, including Molly Evans, Terry Allison, Kevin Gross, testified during the bench trial on this matter providing detail about noise impacts as well as stray bullets on their properties.

III. STATEMENT OF THE CASE

CK Safe & Quiet adopts the statement of the case as set forth by Kitsap County.

IV. ARGUMENT

A. The Trial Court was not Required to Make Express "Credibility Determinations"

KRRC urges this court not defer, or at least give "reduced" deference to the trial court's factual determinations because "credibility ... was not a factor in the trial court's decision." KRRC Reply at 9-10. KRRC supports this theory by claiming the trial court was required to make express written "credibility determination" within the decision. KRRC theorizes that without such express determinations, it necessarily means that the trial court "concluded that credibility is not important." *Id.*

KRRC's argument is pure legal fiction. Trial courts are not required to make express "credibility determinations." Any time a trial court weighs conflicting testimony and makes a decision it is making a credibility determination. And while trial court's sometimes do make express written credibility determinations, they are not required.

For example, in *In re Estate of Bussler*, 160 Wn. App. 449, 465-66, 47 P.3d 821 (2011), the appellant challenged a trial court's decision that she had failed to prove by clear and convincing evidence that a challenged will was the product of undue influence. This court explained the clear cogent and convincing burden of proof has two components – the burden of production and the burden of persuasion and that determining whether the evidence meets the clear, cogent, and convincing standard of persuasion, the trial court must make credibility determinations and weigh and evaluate the evidence. *Id.* After explaining that the trial court had the benefit of numerous witnesses and medical records in determining the testator's intent, this Court upheld the trial court's decision confirming that "[i]t is the trial court's job to weigh all the evidence and to determine credibility of the witnesses when there is disputed evidence. ... Because credibility determinations are for the trier of fact, they are not subject to

our review." *Id.* at 469-70. Importantly, while deferring to the trial court's credibility determination, there were no specific findings of credibility made. Instead this Court correctly presumed that in weighing testimony and evidence, the trial court had decided whom to believe in making its decision.

Similarly, in *Trotzer v. Vig,* 149 Wn. App. 594, 609-611, 203 P.3d 1056 (2009), this Court reviewed a trial court's decision in a trespass case between neighboring property owners. After hearing contradictory testimony from the two parties, the trial court concluded that the trespass was not willful and therefore subject to treble damages. Despite there being no express written credibility determinations, this Court once again deferred to the trial court explaining:

> [b]ut the trial court *implicitly* found Vig credible in his testimony that he believed the fence was the property line and that he tried to stay on his side of this line when he extended the trail. We will not disturb the trial court's factual and credibility determinations on appeal.

Id. (emphasis added); *See also State v. Bartolome*, 139 Wn. App. 518, 522, 161 P.3d 471 (2007).[1]

[1] As this Court explained in the criminal context:

In this case, the trial court heard testimony over 14-days – testimony that was often in sharp dispute. While the trial court may not have made express credibility determinations, it did so, at least implicitly. This Court should not disturb those credibility determinations on review. *Trotzer,* 149 Wn. App. at 611; *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

B. The Trial Court's Findings that KRRC is a Public Nuisance are Entitled to Deference

Citing apparently conflicting testimony from neighbors residing with a two mile radius of the Club, KRRC argues that it cannot be a public nuisance because the sound does not "equally affect the rights of the entire community ... ." KRRC Brief at 20-22; KRRC Reply at 16-17. This argument fails for at least two reasons.

First and foremost, even if there were conflicting testimony concerning the extent of the noise impact on the surrounding neighborhood, the trial court heard the testimony and, at least implicitly,

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> Bartolome argues that the trial court's failure to make explicit credibility determinations means that it lacked sufficient evidence. We disagree. By adopting AMH's version of the events, the trial court implicitly found her statements, in conjunction with Kayla's and Zanaeia's statements, more credible than Bartolome's.

139 Wn. App. at 522.

found that testimony not credible. Indeed, the trial court expressly found to the contrary – that the noise indeed *did* rise to the level of a public nuisance. As the trial court explained:

> The testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of homeowners within two miles of the Property. The noise conditions described by those witnesses interfere with the comfort and repose of residents and their use and enjoyment of their real properties. The interference is common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the "sounds of war" *and the Court accepts this description as persuasive.*

AR 4073 (Finding 84) (emphasis added). This finding represents both an implicit and express determination of credibility and cannot be disturbed on appeal.[2]

Second, even if the trial court believed that some residents were not bothered by what the court accepted was the "sounds of war," this does not mean that KRRC's operations are not a public nuisance.

[2] *See also*, AR 4074 (Finding 86): "The Club allows use of exploding targets, including Tannerite targets, as well as cannons, which cause loud "booming" sounds in residential neighborhood within two miles of the Property, and cause houses to shake."

Requiring each individual within a two mile radius to feel the same impact would turn the law of public nuisance on its head and allow a handful of KRRC proponents, or those with hearing difficulties, or "thick skinned," to defeat a legitimate claim of public nuisance.

To the contrary, RCW 7.48.130 expressly recognizes that a public nuisance may exist even if individuals may be affected differently:

> A public nuisance is one which affects equally the rights of an entire community or neighborhood, *although the extent of the damage may be unequal.*

(emphasis added). Here, as the trial court determined, the sounds of the Club, including the automatic and semi-automatic weapons fire, exploding targets, and cannons did affect the entire community. AR 4073-74 (Findings 81, 84-86). If some individuals' are not particularly harmed from the impact, it goes solely to their level of damages – not to the question of whether a public nuisance exists.

The two cases cited by KRRC are readily distinguishable. In sharp contrast to the present situation, in *State v. Hayes Investment Corp.,* 13 Wn.2d 306, 125 P.2d 262 (1942), the supreme court was being asked to overturn a trial court's determination that a public nuisance did *not* exist. *Id.* at 310. The trial court's decision was based in large part on finding

that the witnesses were complaining about a whole host of different types of impacts from a public bathing beach and trailer camp. For example, some witnesses were concerned with the "ordinary noise resulting from attendance of people at a picnic or recreational ground, conducting themselves in an orderly manner..." *Id.* at 311. Others complained of hearing profane language while visiting the beach, but the trial court found it minimal and limited. Still others complained about seeing people in a boat drinking from a whiskey bottle. But here, in stark contrast, while some neighbors might have testified they weren't bothered by KRRC's noise, the public nuisance was well defined – noise from gunfire and explosives reaching the level of "sounds of war."

Crawford v. Central Steam Laundry, 78 Wash 355, 139 P. 56 (1914) is even less applicable. *Crawford*, as KRRC admits in a footnote, was *not* a public nuisance case. KRRC Brief at 22, fn.11. Because it was not a public nuisance case, the Court did not even discuss 7.48.130 or its applicability. *Crawford* provides no assistance in interpreting RCW 7.48.130. Instead, the Court's focus was on "[t]he precise degree of discomfort that must be produced to constitute a lawful business a nuisance because of the things complained of by respondents cannot be

definitively stated. 78 Wash at 357. To the extent *Crawford* is relevant, the present case is readily distinguishable. Here, unlike *Crawford*, the trial court clearly understood the nature of the neighbor's complaints and the source of those complaints.

The trial court's numerous findings support its legal conclusion that the KRRC facility constituted a public nuisance. Even if some members of the community suffer less damage, it does not diminish the trial court's factual determination that a public nuisance exists.

C. The Trial Court's Injunctive Relief was Not an Abuse of Discretion

The "granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of each case." *Washington Fed'n of State Employees, Council 28 v. State,* 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). Moreover, the "trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary." *King v. Riveland,* 125 Wn.2d 500, 515, 886 P.2d 160 (1994). As a result, this Court "must accord the trial court great deference and review its decision only for an abuse of discretion." *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn. 2d 623, 628, 989 P.2d 524 (1999).

KRRC challenges the trial court's two injunctions as based on "untenable grounds, manifestly unreasonable or arbitrary." But to the contrary, the trial court's first injunction -- abating of all activity at the Club until KRRC obtains a CUP -- is an appropriate remedy for a zoning code violation. The trial court's second injunction -- permanently banning automatic weapons, larger caliber weapons, exploding targets and cannons, and slightly limiting the hours of operation – is narrowly tailored and grounded in the trial court's findings and conclusions.

1. An injunction is the appropriate remedy for a zoning code violation

The trial court's first injunction abating of all activity at the Club until the club obtains a CUP is based on sound principles of law. In general, and as explained by Division 1:

> Injunctive relief is available against zoning violations which are declared by ordinance to be nuisances. ... The Mercer Island code states that any use of property contrary to the ordinance is a public nuisance which the city may abate by an action in the superior court. The relief may be sought by the municipality itself to restrain the violation taking place. ... The enforcement of a zoning ordinance by injunction is essential if the amenities of the area sought to be protected are to be preserved.

City of Mercer Island v. Steinmann, 9 Wn. App. 479, 485-86, 513 P.2d 80 (1973)(citations omitted).

Based on the trial court's extensive findings and conclusions that KRRC's non-conforming use had terminated, continued operation of the facility without a CUP would put it in violation of the County's zoning code and a nuisance per se. "Engaging in any business or profession in defiance of a law regulating or prohibiting the same, however, is a nuisance per se." *Kitsap County v. Kev*, 106 Wn.2d 135, 138-139, 720 P.2d 818 (1986) (upholding trial court's determination that a violation of Kitsap County's place and manner restrictions on topless dancing was a public nuisance and subject to permanent injunction).

Kitsap County has determined that a violation of its zoning code is a public nuisance subject to mandatory abatement. Pursuant to Kitsap County's zoning code:

> Any use, building or structure in violation of this title is unlawful, and a public nuisance. Notwithstanding any other remedy or means of enforcement of the provisions of this title, including but not limited to Kitsap County Code Chapter 9.56 pertaining to the abatement of public nuisances, the prosecuting attorney, any person residing on property abutting the property with the proscribed condition, and the owner or

> owners of land abutting the land with the proscribed condition may each bring an action for a mandatory injunction to abate the nuisance in accordance with the law. The costs of such a suit shall be taxed against the person found to have violated this title.

KCC 17.530.030. Because Kitsap County has legislatively declared that a violation of its zoning code is a public nuisance, the trial court's injunction prohibiting KRRC from operating until it obtains a CUP is well grounded in law and is neither arbitrary nor unreasonable. This Court should defer to the trial court's discretion.

2. The trial court's second permanent injunction was narrowly tailored

KRRC takes issue with the trial court's second injunction permanently banning automatic weapons, larger caliber weapons, exploding targets and cannons, and slightly limiting the hours of operation claiming it is not "appropriately tailored" to the harm. KRRC Brief at 74-78. But the trial court's second injunction *is* narrowly tailored. Assuming KRRC obtains its required CUP, the trial court's permanent injunction does not prohibit all shooting at the facility. Instead it is narrowly grounded in the trial court's findings and conclusions.

For example, the trial court's ban on the 'use of fully automatic firearms, including machine guns" is tailored at remedying the court's finding that "use of fully automated weapons, and constant firing of semi-automatic weapons" led to the surrounding community being subjected to the "sounds of war." AR 4073 (Finding 84). Similarly, the trial court's ban on the use of rifles greater than nominal .30 caliber and explosive devices along with the slight reduction in hours of operation are all tailored at remedying the public nuisance conditions the court identified as affecting the neighborhood and surrounding environment. AR 4074 (Finding 85). Finally the ban on use of exploding targets and cannons is narrowly tailored at remedying the trial court's finding that these devises cause "loud 'booming' sounds in residential neighborhood within two miles of the Property, and cause houses to shake." AR 4074 (Finding 86).

Because the trial court's injunction permanently banning the specific weapons the court determined were creating the public nuisance, the injunction was based on tenable grounds, was reasonable and was not arbitrary. This Court should defer to the trial court's discretion. *King,* 125 Wn.2d at 515.

V. CONCLUSION

For the foregoing reasons, this Court should deny the appeal and affirm the decision and injunctive relief issued by the trial court.

DATED this 10th day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on the date and in the manner indicated below, I caused the AMICUS BRIEF OF *AMICUS CURIAE* CK SAFE & QUIET to be served on:

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DATED this 10 day of February, 2014, in Seattle, Washington

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