IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 94437-7

Court of Appeals No. 48423-4-II

(Thurston County Superior Court Cause No. 15-2-00527-5)

JOHN ROSKELLEY, FAYETTE KRAUSE, SPOKANE AUDUBON SOCIETY, SPOKANE MOUNTAINEERS, AND THE LANDS COUNCIL,

Appellants,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION, AND MT. SPOKANE 2000,

Respondents.

APPELLANTS' REPLY IN SUPPORT OF INJUNCTION

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I. MS 2000 IS APPLYING THE INCORRECT LEGAL STANDARD TO THE COURT'S CONSIDERATION OF THIS MOTION

MS 2000's response attempts to turn the standard for this Court to grant injunctive relief into a "high hurdle," but the heavy burden that MS 2000 has invented has no basis in Washington caselaw. MS 2000 Resp. at 3. MS 2000 argues that the Appellants "must establish that the Court will accept review of the unpublished opinion of Division II under the standards set forth under RAP 13.4(b)." *Id.* MS 2000 mischaracterizes the standard as whether the Appellants "will likely prevail on the merits." MS 2000 Resp. at 12. Tellingly, MS 2000 cites no Washington cases for this unreasonable burden.

The Appellants are required to raise issues that are "debatable" to obtain an injunction pending resolution by this Court. Appellants' Motion at 4; *Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956). As demonstrated in our motion for injunctive relief and petition for review, the issues presented in this case go well beyond being merely debatable.

In its response, MS 2000 glosses over the Commission's lack of consideration of its own policy to make the Commission's decision appear more reasoned than it was by misrepresenting the Commission's actions. MS 2000 Resp. at 15. First, the EIS does not cite the relevant policy sections (Subsections E.2 and D.2). Instead, the EIS cites subsection A.1

of the Commission's natural resource policy and quotes language from that subsection. *See*, AR 00020; AR00079; AR000532. To suggest that the EIS considered the relevant policy sections is entirely misleading.

Second, as we discussed at length in the petition for review, the Commissioners did not "address" the policy — the Commission staff merely acknowledged that it existed and represented it as the "typical procedure with areas of significant natural resources," but did not discuss why the substance of the policy or its application to this matter was not applicable here. *See* Pet. for Rev. at 9; AR 00754-755.

This case presents issues that are more than debatable, and MS 2000's attempt to turn the legal standard into a "heavy burden" should be rejected.

II. THE EQUITIES FAVOR AN INJUNCTION

A. The Harm the Appellants Could Suffer Far Outweighs the Harm that MS 2000 and the Commission Could Suffer

The potential harm suffered by each party is not equal. If MS 2000 proceeds with its plan to clear-cut the old-growth forests of Mt. Spokane State Park, the harm to the Appellants, its members, and the public would be permanent and irrevocable. The fruits of this appeal are the intact old-growth forests of Mt. Spokane. Once the old-growth trees are cut down, they cannot be replaced.

On the other hand, neither MS 2000 nor the Commission has even suggested that they would be forever precluded from constructing the ski area expansion if they were enjoined from logging in the short-term, pending resolution of this appeal. If they ultimately prevail, they will be able to pursue their plan and log the old-growth forest.

Here, the equities favor an injunction due to the far greater harm that the Appellants will suffer if MS 2000 can log while this appeal is pending.

B. The Danger Posed to the Public and the Mount Spokane Ski Patrol is Overstated

MS 2000's claims that the ski area expansion is necessary for the safety of the public and the Mount Spokane Ski Patrol are dubious at best. First, MS 2000 does not document any injuries or fatalities that have occurred on the west side of the mountain outside of the current ski area. See Dec. of Nathan Smith (July 19, 2017), Ex. A. Second, the west side of Mt. Spokane is out of bounds of the existing ski area and MS 2000's out of bounds policy is clear: the Mt. Spokane Ski Patrol is not obligated to engage in rescue outside of the ski area and the area is not patrolled by Ski Patrol. Decl. of Jacob Brooks (July 21, 2017), Ex. A.

III. THIS COURT SHOULD NOT REQUIRE A BOND

It would be inequitable and unjust to require the Appellants to post a bond in this case. The decision to require a bond or security to support an injunction is entirely within the discretion of the Court. *See Fisher v. Parkview Properties, Inc.*, 71 Wn. App. 468, 479, 859 P.2d 77 (1993).

If a bond is required, then in setting the amount, this Court should follow the same rule that trial courts must follow, which is that "courts shall exercise care to require adequate though not excessive security in every instance." RCW 4.44.470. It is appropriate under this rule to deny an excessive request for a bond when the request lacks factual support. *See Hockley v. Hargitt*, 82 Wn.2d 337, 510 P.2d 1123 (1973).

First, the Court should not require a bond. As discussed above, the harm that the Appellants will suffer if MS 2000 begins logging will be permanent and irrevocable, whereas the worst harm that MS 2000 and the Commission will suffer is income that will be deferred while the Court considers this case. Thus, the equities favor no bond.

Second, MS 2000 has assumed the risk of proceeding with its logging plans in the face of this litigation, and it is inequitable to require a bond from the Appellants that covers these risks. Courts have recognized that parties that knowingly continue an action while litigation is pending proceed at their own risk and should not receive special treatment. For

instance, parties that construct a home in the face of outstanding litigation to enforce an ambiguous covenant assume the risk that the other party will prevail and be granted injunctive relief. *See e.g.*, *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (2007). Here, the costs incurred by MS 2000 were taken at their own risk and the Appellants should not have to post a bond to cover these costs.

Third, MS 2000's bond request is excessive and unreasonable. MS 2000 requests a bond of $854,000. MS 2000 Resp. at 19. The Appellants, as retired individuals living on fixed incomes and conservation organizations that rely upon donations and grants, cannot raise such a huge amount of money. *See* Decl. of Michael Petersen (July 22, 2017). For example, the bond amount requested by MS 2000 is larger than the annual operating budget of one of the Appellants, the Lands Council. Petersen Decl., ¶ 6. The other Appellants have even less of an ability to post a bond. Petersen Decl., ¶ 9. MS 2000's exorbitant bond request is simply an attempt to block injunctive relief. The public policy behind bond requirements "is to encourage ready access to courts for good faith claims." *Jensen v. Torr*, 44 Wn. App. 207, 211, 721 P.2d 992 (1986). Requiring a bond in the amount requested by MS 2000 would effectively block access to the courts.

Fourth, MS 2000 has not shown that it will suffer damages at this time. For instance, if this Court were to deny the Appellants' petition for review in August, 2017, MS 2000 has not shown that it would be unable to complete logging to open new ski runs for the 2017-2018 ski season. It is inequitable to require a bond for damages that may be entirely theoretical. If and when the petition is still pending and MS 2000 is approaching the "no go" point for logging this year, it could re-apply for a bond at that time. Given the information in MS 2000's response, it cannot be determined that MS 2000 is anywhere close to that point now or will reach that point before this Court acts on the petition.

IV. IF THIS COURT DOES REQUIRE A BOND, IT SHOULD BE LIMITED TO $5,000

If this Court were to require a bond, it should be limited to $5,000. Lost revenue is not the appropriate measure of damages because MS 2000's revenue would not be lost if it were to prevail in front of this Court — it would merely be deferred. The Court should also consider the Appellants' ability to pay.

MS 2000 has requested a bond amount that does not accurately reflect the actual damages it will suffer. MS 2000's damage claim is based entirely on its consultant's forecast of additional skier visits that will occur if the ski runs are open and the new lift installed. *See* Decl. of

Beeler, ¶ 13. From this projection of increased ski visits, Mr, Beeler then projects lost net income. *Id.* Thus, if the additional skier visits forecast lacks foundation, then there is no foundation for the lost income claim.

Mr. Beeler has provided no credible foundation for his forecast that visits to Mt. Spokane Ski and Snowboard Park will increase by approximately 20 percent. "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded." *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha,* 126 Wn. 2d 50, 103, 882 P.2d 703 (1994). Mr. Beeler provided two rationales to support his 20 percent claim, but neither survives the slightest scrutiny.

First, Mr. Beeler calculated a utilization rate as a function of "comfortable carrying capacity" for the existing facilities and then assumed the new ski runs and lift would add to that capacity and be used at the same rate, bringing new skiers to the mountain. Beeler Decl., Ex. B at 7. The second assumption — that the new capacity would be used at the same rate as the existing facilities — is a classic example of "build it and they will come" thinking. Any economist, business planner or accountant would know that such projections are baseless absent a study of demand. Unless there is evidence of unmet demand, building new facilities will not generate additional skier days. It will just spread out the

existing skiers on additional terrain. (Terrain that used to be old growth forest.) Because neither Mr. Beeler nor MS 2000 have presented a demand study, there is no foundation for Mr. Beeler's naked claim that increasing facilities will increase skier use days. *See* Decl. of Amy Nabors-Biviano (July 21, 2017).

Second, Mr. Beeler identified increases at two other ski areas when they increased their facilities. Beeler Decl., Ex. B at 3. Here, Mr. Beeler incorrectly assumed a cause and effect relationship which lacks foundation and is belied by his own data. Mr. Beeler's data demonstrates that even without changes in facilities ("comfortable carrying capacity"), there can be a large change in skier use days, year to year. For instance, without any change in the number of lifts or terrain at Mt. Spokane, over the course of five years, skier use changed, year to year, anywhere from 10% to 200%. *Id.*, Ex. B at 7. Mr. Beeler assumes that the increased skier days at the two resorts he examined (*id.* at 3) was due to the new facilities and was not attributable to any other factor that causes skier use to fluctuate widely (most notably weather, but also other factors unrelated to new capacity, such as the economy, pricing and road access). Mr. Beeler did not examine whether and to what extent any other factor may have contributed to the change in use in these two other examples. Having omitted such a basic step, his reliance on the data from these other ski areas lacks

adequate foundation. *See* Decl. of Amy Nabors-Biviano (July 21, 2017), ¶¶ 3-5; "The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert's conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact." *Griswold v. Kilpatrick,* 107 Wash. App. 757, 761 - 762, 27 P.3d 246 (2001). Mr. Beeler's reliance on data from these other ski areas flunks this test and should be excluded.

Moreover, Mr. Beeler's reliance on data from other ski areas is improper because he does not testify that he has personal knowledge of that data (or the circumstances that led to the changes in ski use rates at those areas) nor does he testify that other experts in his field reasonably rely on such data (especially without investigating the basis for the changes is use rates). As such, his testimony relying on the data from other ski areas is admissible under ER 602, too.

Because MS 2000 has not provided competent, admissible evidence of *any* damages it will suffer now, no bond should be required.

Additionally, when considering whether to require a bond, this Court should consider the ability of the Appellants to post a bond. Posting a bond in excess of $5,000 would put significant strain on the Lands

Council. Petersen Decl., ¶ 8. It would also be very difficult for the other Appellants to produce $5,000. *Id.* at ¶ 9. Requiring a bond in any amount greater than this would frustrate the Appellants ready access to the courts.

Finally, we note that the Court of Appeals has previously rejected MS 2000's outlandish bond requests. In a prior related appeal, the Lands Council moved the Court of Appeals for injunctive relief and MS 2000 requested a bond in the amount of $2,500,000. Brooks Decl., Ex. B. The Court of Appeals rejected this exorbitant request and granted injunctive relief, requiring $10,000 in security. Brooks Decl., Ex. C. The Appellants' requested bond amount of $5,000 is commensurate with what the Court of Appeals has previously required.

Dated this 21 day of July, 2017.

Respectfully submitted,

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