WILLIAM R. HEWLETT et al., Plaintiffs and Appellants, v. SQUAW VALLEY SKI CORPORATION, Defendant and Appellant.

No. C020539.

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

54 Cal. App. 4th 499; 63 Cal. Rptr. 2d 118; 1997 Cal. App. LEXIS 310; 97 Cal. Daily Op. Service 2939; 97 Daily Journal DAR 5145

April 22, 1997, Decided

[**123] **SPARKS, Acting P. J.**

In this appeal we are presented with the latest installment in the continuing dispute between defendant Squaw Valley Ski Corporation (Squaw Valley) and objecting parties over the development of ski runs [***2] in an area of Squaw Valley's ski resort known as the "Tram Basin Bowl." When litigation threatened [**124] the planned project, Squaw Valley in essence resorted to self-help and cut more than 1,800 trees.

The Placer County District Attorney brought a lawsuit for unfair competition asserting Squaw Valley had engaged in unlawful business practices in cutting down these trees. (Bus. & Prof. Code, § 17200.) A second suit, brought by a private individual, William R. Hewlett, and the Sierra Club, made similar allegations. The district attorney dismissed his suit and joined Hewlett and the Sierra Club as a plaintiff in their lawsuit.

The trial court found defendant Squaw Valley had engaged in unfair competition by committing unlawful business practices by violating provisions of the Z'berg-Nejedly Forest Practice Act (Forest Practice Act or FPA) [*510] (Pub. Resources Code, § 4511 et seq.), violating provisions of a conditional use permit and violating terms of a temporary restraining order. The court imposed fines totaling $ 223,000, ordered mandatory and prohibitory injunctive relief, and awarded attorney fees to plaintiffs Hewlett and Sierra Club.

On appeal, Squaw Valley contends [***3] it did not engage in ongoing unlawful business practices, and did not violate the Forest Practice Act or the temporary restraining order. It further asserts that violations of a use permit or a temporary restraining order cannot form the basis for a claim of unlawful business practices under the unfair competition statute. Squaw Valley also challenges the remedies imposed and the award of attorney fees.

DISCUSSION

I. *Squaw Valley's Acts Constitute Ongoing Business* [***23] *Practices*

(1a) Squaw Valley contends the court erroneously equated a business practice with multiple violations of law predicated on a single project, the development of one ski run. This characterization is misconceived.

At the time relevant to this case, the unfair competition statute provided: "[U]nfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 [relating to advertising] (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Bus. & Prof. Code, § 17200; Stats. 1977, ch. 299, § 1, p. 1202 [all [*519] subsequent statutory references in this part are to the Business and Professions Code unless otherwise indicated].) n7 The remedies and penalties authorized for violation of this statute are cumulative to each other and to any other penalties or remedies available elsewhere in the law. (§ 17205.)

n7 In 1992, the Legislature amended this section to provide that "unfair competition shall mean and include any unlawful, unfair or fraudulent business *act or* practice . . . ." (Stats. 1992, ch. 430, § 2, italics added.)

[***24]

[**130] **(2)** The unfair competition statute is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 209-210 [197 Cal. Rptr. 783, 673 P.2d 660].) Thus, California courts have consistently interpreted the language of section 17200 broadly. (*People v. McKale* (1979) 25 Cal. 3d 626, 631-632 [159 Cal. Rptr. 811, 602 P.2d 731].) "An 'unlawful business activity' includes ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " (*Id.* at p. 632, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d. 94, 113 [101 Cal. Rptr. 745, 496 P.2d 817]; accord, *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal. App. 4th 1284, 1291-1292 [22 Cal. Rptr. 2d 20].) "The Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." (*Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal. 3d at p. 210; accord, *Farmers Ins. Exchange* [***25] *v. Superior Court* (1992) 2 Cal. 4th 377, 383 [6 Cal. Rptr. 2d 487, 826 P.2d 730]; *Consumers Union of United States, Inc. v. Fisher Development, Inc.* (1989) 208 Cal. App. 3d 1433, 1438-1439 [257 Cal. Rptr. 151].)

The use of the phrase "business practice" in section 17200 indicates that the statute is directed at ongoing wrongful conduct. (*State of California* ex rel. *Van de Kamp v. Texaco, Inc.* (1988) 46 Cal. 3d 1147, 1169 [252 Cal. Rptr. 221, 762 P.2d 385].) As the California Supreme Court explained: "[T]he 'practice' requirement envisions something more than a single transaction . . .; it contemplates a 'pattern of conduct' [citation], 'on-going . . . conduct' [citation], 'a pattern of behavior' [citation], or 'a course of conduct.' . . ." (*Id.* at pp. 1169-1170.)

Squaw Valley's primary business activity was the operation of a ski resort. The creation and development of ski runs and ski trails were clearly part of that activity or practice. On January 28-30, 1989, Squaw Valley cut down more than 1,800 trees to create a ski run for the Silverado lift. In March 1989, an additional 18 trees were felled. In 1992, more trees were cut in this area. [*520] [***26]

(1b) Contrary to its characterization, Squaw Valley's actions did not involve one event or a single episode. A large number of trees were cut over three different time periods. The fact that these acts were charged as violations of the Forest Practice Act, CUP-974, and the TRO is immaterial. These multiple violations related to a course of conduct, not one isolated incident. These actions can properly be termed business practices for purposes of section 17200. (See *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal. App. 3d 432, 452-453 [249 Cal. Rptr. 872]; *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal. App. 3d 509, 515, 526-527 [206 Cal. Rptr. 164].)

In a related argument, Squaw Valley asserts it cannot be guilty of violating section 17200 because it lacked the intent to engage in an unlawful business practice. However, such an intent is not an element of such a violation. (*People* ex rel. *Van de Kamp v. Cappuccio, Inc.* (1988) 204 Cal. App. 3d 750, 760-761 [251 Cal. Rptr. 657].) "The statute imposes strict liability. It is not necessary to show that the defendant intended to injure anyone." (*State Farm Fire & Casualty Co. v. Superior Court* [***27] (1996) 45 Cal. App. 4th 1093, 1102 [53 Cal. Rptr. 2d 229].) Here, Squaw Valley intended to cut down the trees and did so. The fact that it may have believed its conduct was lawful under the Forest Practice Act, CUP-974 and/or the TRO is not a defense.

Before turning to the question of whether Squaw Valley's actions were unlawful, we pause to comment on one recurring theme. Squaw Valley repeatedly urges that any violation of the FPA, CUP-974 or TRO should be addressed in a different forum, and not be prosecuted as an unlawful business practice. Consequently, so the argument goes, violations of the FPA should be handled by CDF, violations of CUP-974 should [**131] be dealt with by Placer County, and violations of the TRO should be left to the issuing court to punish through contempt proceedings.

This argument runs afoul of section 17205, which specifically provides that ". . . the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state." Thus, the fact that other entities might have addressed these violations has no bearing on whether Squaw Valley's conduct also constitutes an unlawful business [***28] practice under section 17200.

Squaw Valley also asserts that TRO violations should be handled in contempt proceedings, and not used as a basis for an action for unlawful business practices. We disagree. We reiterate that proceedings under the unfair competition statutes are cumulative to other possible remedies or penalties (Bus. & Prof. Code, § 17205), and violations of a TRO may therefore be prosecuted as an unlawful business practice. (*Saunders v. Superior Court*, *supra*, 27 Cal. App. 4th at pp. 838-839; see *People v. Toomey* (1985) 157 Cal. App. 3d 1, 17-18 [203 Cal. Rptr. 642].)

Equally unavailing is Squaw Valley's claim that procedural safeguards associated with contempt [***63] proceedings will be ignored in a prosecution for unlawful business practices. Stale claims cannot

form the basis for a unlawful business practice, as an action under the unfair competition statute must be brought within four years of the wrongful conduct (Bus. & Prof. Code, § 17208). If a violation of a TRO is alleged as an unlawful business practice, the full procedural protections of a trial will come into play. Cases Squaw Valley cites describing other problems presented in contempt proceedings, such as *In re Blaze* (1969) 271 Cal. App. 2d 210 [76 Cal. Rptr. 551], are simply inapposite. Squaw Valley was not found to be in contempt; it was found to have engaged in unfair competition by committing unlawful business practices.

Although Squaw Valley does not contend otherwise, we note that the evidence amply supports the trial court's determination that Squaw Valley violated the TRO. Mott, the president and general manager of Squaw Valley, [*536] ordered the cutting of trees on March 17, 1989, while the TRO prohibiting such activity was in effect. Squaw Valley's characterization of this action as "regrettable" [**141] is a gross understatement. It was also an unlawful business [***64] practice.

V. *Remedies Imposed*

Upon finding Squaw Valley had committed a variety of unlawful business practices, the trial court ordered a variety of remedies. The court imposed monetary penalties totaling $ 223,000, and ordered mandatory and prohibitory injunction relief. On appeal, Squaw Valley raises several challenges to this order. We discuss each in turn. n23

n23 We reiterate that in its statement of decision, the trial court expressly stated that if these remedies were determined to be improper, different remedies would have been imposed "to conform to that which may subsequently be deemed permissible. In particular, [if it] is subsequently determined on appeal that the injunctive relief granted herein is unwarranted or unavailable, this court would have imposed substantially higher monetary sanctions. Conversely, should the monetary sanctions prove to be impermissible in the amounts imposed, then a greater scope of injunctive relief would have been considered."

A. *Monetary Penalties* [***65]

Business and Professions Code section 17206, subdivision (a), provides every person who has engaged in unfair competition "shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($ 2,500) for each violation[.]" (All subsequent statutory references in part V of this opinion are to the Business and Professions Code unless otherwise indicated.)

(14) Plaintiffs sought monetary penalties in excess of $ 4.5 million, calculated at $ 2,500 per tree removed. The trial court concluded ". . . such a penalty would be excessive in light of the conduct which is apparent before this court along with the other remedies imposed herein." Instead, the court ordered penalties of $ 223,000 as follows:

"1. Use of unapproved landing areas: Two violations, $ 2,500 each, for a total of $ 5,000.

"2. Failure to have [a registered professional forester] at initial harvesting: One violation $ 2,5000, for a total of $ 2,500.

"3. Failure to provide approval of CDF prior to cutting: One violation, $ 2,500 for a total of $ 2,500.

"4. Failure to provide letter of credit for reforestation: One violation, $ 500, for a total of $ 500. [*537]

"5. March [1989] cut: Eighteen [***66] violations, $ 2,500 each, for total of $ 45,000.

"6. 1992 cuts: One violation comprising all acts in cutting trees, $ 2,500 for a total of $ 2,500.

"7. The January [1989] Cut: . . . The court assesses $ 125 per violation for 1320 violations, for a total of $ 165,000."

Presenting a skewed view of the evidence to minimize its wrongdoing, Squaw Valley contends these penalties are excessive. We are unpersuaded.

Section 17206, subdivision (a), requires a court to impose a penalty for each unlawful business practice committed. However, the amount of the penalty lies within the court's discretion. (*People v. Custom Craft Carpets, Inc.* (1984) 159 Cal. App. 3d 676, 686 [206 Cal. Rptr. 12].)

Here, the penalties imposed were modest in light of Squaw Valley's egregious behavior. The trial court imposed less than the maximum $ 2,500 per violation in several cases, did not impose a separate fine for Squaw Valley's failure to have a registered forester on the scene in March 1989, and counted the 1992 cut as only one violation. There was no abuse of discretion in ordering $ 223,000 in monetary penalties. n24

n24 Squaw Valley also asserts the trial court could not both impose monetary penalties and award attorney fees. We defer our discussion of this claim to our analysis of the attorney fees issue.

[***67]

B. *Mandatory Injunctive Relief*

In its judgment, the trial court ordered Squaw Valley to take several actions. In part, the court ordered: "In the event that Placer County refuses to grant a Use Permit and zoning change to allow the Tram Basin Bowl to be used to its fullest extent for downhill skiing, [Squaw Valley] is ordered to restock, revegetate and reforest the unlawfully cut area in conformity with the Forest Practices Act. The court

specifically retains [**142] jurisdiction of this portion of its judgment in order to effect this provision." n25

n25 The court also ordered Squaw Valley to (1) remove all sawed logs from a watercourse, (2) remove all logs and slash located in specified log deposit areas, (3) develop and implement an appropriate reforestation and revegetation plan to meet the requirements of CUP-974, (4) restore the scenic beauty of the area by removing logs and slash, repairing and restoring log deposit areas, and flush cutting any stumps, and (5) deposit an appropriate letter of credit to guarantee reforestation efforts.

As we have noted several times earlier in this opinion, remedies under the unfair competition statute are cumulative. (§ 17205.) Squaw Valley repeatedly insists that the trial court should defer to other agencies--CDF, the planning commission, and/or the county--to address the alleged violations. Statutes and case law compel a different conclusion, as we have already explained. The trial court properly exercised its discretion in fashioning injunctive relief to meet the needs of this particular case.

(18) Squaw Valley next contends the injunctive relief is unrelated to the proven violations. Nothing could be further from the truth. The record is replete with evidence of Squaw Valley's complete disregard for procedures designed to protect the environment and forest resources. Its focus was on developing a ski run for the Silverado lift as quickly as possible, without [*542] regard to permit requirements or court orders. The fact that a hearing was pending on an injunction to preclude further cutting spurred Squaw Valley to advance its plans and fall a large number trees. One employee overheard Alexander Cushing, Squaw Valley's owner, approve the January 1989 tree cutting by saying, "What are they going to do, make us replant them?"

Squaw Valley's cavalier attitude led to the cutting of more than 1,800 trees, many of [***78] them hundreds of years old, without the proper FPA permits, without a valid EIR, and without an approved use permit. Any subsequent action by the county to rezone a portion of this land and issue a use permit [**145] cannot justify Squaw Valley's initial and continuing disregard for the proper legal process. n28

n28 As one court pointed out: "[I]t is all too likely that if [preliminary activities] proceed pending preparation of an adequate EIR, momentum will build and the project will be approved, no matter how severe the environmental consequences identified in the new EIR. . . . [Once activity proceeds beyond the planning stages], change will be both more difficult to effect and less likely to occur." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 742 [32 Cal. Rptr. 2d 704].) Similarly, once trees are cut down, the damage is done and it is too late to address most of the environmental concerns.

VI. *Award of Attorney Fees*

(19a) Squaw Valley asserts the [***82] trial court erred in awarding attorney fees to plaintiffs William Hewlett and the Sierra Club under [**146] the Private Attorney General Doctrine of Code of Civil Procedure section 1021.5. (All subsequent statutory references in this part are to the Code of Civil Procedure unless otherwise indicated.) n30 This claim is unpersuasive.

n30 Section 1021.5 provides in relevant part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

(20) "To obtain an award of fees under section 1021.5, one must be a successful party in an action [***83] resulting in the enforcement of an important [*544] right affecting the public interest. A significant benefit, whether pecuniary or nonpecuniary, must have been conferred on the general public or a broad class of persons, and the necessity and financial burden of private enforcement must transcend the litigant's personal interest in the controversy. [Citations.]

" 'Whether a party has met the requirements for an award of fees and the reasonable amount of such an award are questions best decided by the trial court in the first instance. [Citations.] That court, utilizing its traditional equitable discretion, must realistically assess the litigation and determine from a practical perspective whether the statutory criteria have been met. [Citation.] Its decision will be reversed only if there has been a prejudicial abuse of discretion. [Citation.] To make such a determination we must

review the entire record, paying particular attention to the trial court's stated reasons in denying or awarding fees and whether it applied the proper standards of law in reaching its decision.' [Citation.]" (*Crawford v. Board of Education* (1988) 200 Cal. App. 3d 1397, 1405-1406 [246 [***84] Cal. Rptr. 806].)

(19b) Squaw Valley contends the trial court cannot award attorney fees under section 1021.5 if it has also awarded penalties for violations of the unfair competition statute. Squaw Valley posits that it was the Placer County District Attorney who initially brought the action, thereby making monetary penalties a possible remedy. (See Bus. & Prof. Code, § 17206.) Asserting that outside counsel in this case was merely doing work on behalf of the district attorney, Squaw Valley claims attorney fees are inappropriate because "the public benefit fee doctrine has never been applied as a subterfuge by which public bodies make private defendants pay for legal work done on behalf of the public body." Alternatively, Squaw Valley asserts that if the case was truly brought by the private parties and not the district attorney, the penalties imposed were inappropriate. This analysis is faulty.

Numerous cases have awarded both penalties and attorney fees. (See, e.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy, supra*, 4 Cal. App. 4th at p. 971; *Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal. App. 3d 633, 636 [280 Cal. [***85] Rptr. 329].) The question is not whether both fees and penalties can, as a matter of law, be awarded in the same action. Instead, it is whether penalties and fees are appropriate in a particular instance. We have already addressed the question of penalties. We turn to the issue of attorney fees.

The dispute here centers on the question of whether private enforcement was necessary. This factor " ' "looks to the adequacy of *public* enforcement and seeks economic equalization of representation in cases where private [*545] enforcement is necessary." ' " (*City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1299 [255 Cal. Rptr. 704], italics in original.)

(21) A privately enforced action against individual defendants may be deemed "necessary" for purposes of section 1021.5. Due to the burdens imposed on public agencies, adequate government enforcement of the laws is not always possible, making private action imperative. (*Committee to Defend Reproductive Rights v. A Free Pregnancy Center, supra*, 229 Cal. App. 3d at pp. 639-640.) [**147] As one court noted: "[S]ection 1021.5 does not proscribe payment of attorney fees to private plaintiffs who successfully initiate and [***86] try a private lawsuit for the public benefit *solely* because the People have initiated a similar action which is consolidated for trial with that brought by such plaintiff[s]." (*Id.* at p. 643, italics in original.)

"The trial court, in considering fee awards to private litigants on the facts and record applicable to each particular case, must carefully walk the line between unreasonably transmuting section 1021.5 into an unwarranted cornucopia of attorney fees for those who intervene in, or initiate litigation against, private parties under the guise of benefiting the public interest while actually performing duplicative, unnecessary, and valueless services, and providing appropriate compensation under that statute in cases where the colitigating private party does render necessary, significant services of value and benefit to the public." (*Committee to Defend Reproductive Rights v. A Free Pregnancy Center, supra*, 229 Cal. App. 3d at pp. 643-644.) The instant case is an example of the latter situation.

(19c) The trial court concluded that although the case was "overtried" and the fees sought by Hewlett and Sierra Club were excessive, the case "was beyond the capabilities [***87] of the Placer County District Attorney to prosecute, and . . . outside counsel was necessary." The court therefore awarded $ 480,000 in attorney fees to Hewlett and $ 192,000 to Sierra Club.

There was no abuse of discretion in making such an award. In their motions for attorney fees, counsel for Hewlett and the Sierra Club outlined their involvement in the case. The Placer County Deputy District Attorney submitted declarations stating that the scope of this litigation was simply too much for his office to handle, and that full-time prosecution of this case would have made prosecution of other offenses impossible. Primary responsibility for litigation was therefore given to Hewlett's attorney. n31 Attorneys for the Sierra Club, who had been involved in the earlier litigation against [*546] Squaw Valley, provided expertise in land use and forestry law, as well as the historical and factual background knowledge necessary to prosecute the case efficiently. Attorneys for all three parties attended trial and conferred on trial strategies.

n31 The characterization of necessity offered by a colitigating party is not binding on the court. (*Committee to Defend Reproductive Rights v. A Free Pregnancy Center, supra*, 229 Cal. App. 3d at p. 644.) However, the instant case does not involve private parties who brought an action that was "opportunistic or collusive and undertaken simply to generate such attorney fees." (*Ibid.*) The trial court properly concluded the involvement of plaintiffs Hewlett and Sierra Club was in fact necessary to the successful prosecution of this case.

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Under these circumstances, the trial court did not

abuse its discretion in awarding attorney fees under section 1021.5.

Sims, J., and Davis, J., concurred.