IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 20-0065

ANIMALS OF MONTANA, INC., TROY HYDE, PERMIT HOLDER
Petitioner and Appellant,
v.
STATE OF MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,
Respondent and Appellee

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK
CAUSE NO. BDV-2015-999
HONORABLE MICHAEL MCMAHON, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE

1. Whether the District Court properly upheld the final agency order of the Department of Fish, Wildlife and Parks (FWP) in revoking Animals of Montana Inc.'s roadside menagerie permit.

STATEMENT OF CASE

This case concerns an appellant who, by his own on the record admission at hearing, violated laws and rules pertaining to his business, and now seeks to justify his transgressions through an argument that the enforcement of state regulations pertinent to his business was unconstitutional. Troy Hyde, and Animals of Montana, Inc., (collectively referred to as AMI) currently appeal the District Court's Order on Petition for Judicial Review, which affirmed FWP's Final Order in this matter.

Animals of Montana is a roadside menagerie located in Gallatin County, Montana and owned by Troy Hyde. To legally operate, a roadside menagerie requires a permit, which is subject to regulations which FWP is required to adopt, and has adopted, in Administrative Rules of Montana. The legislature mandated that violation of even a single rule or law by a roadside menagerie requires revocation of the relevant permit without right of renewal. In 2015, FWP documented over two dozen violations of law or rule by Animals of Montana. Subsequently, in December of 2015, FWP issued a notice of revocation, imposition of penalties and opportunity for hearing (notice of revocation) to AMI.

In response to the notice of revocation, AMI elected to request an administrative hearing in this matter, which is the process set forth for review of an agency action under the Montana Administrative Procedure Act, (MAPA). *See* Mont. Code Ann. Title 2, chapter 4, part 6. Simultaneously, on December 13, 2015, AMI filed a suit in the First Judicial District, Lewis and Clark County, seeking injunctive relief while the case was pending, cause number BDV-2015-999. This request was granted by the First Judicial District.

A contested case hearing was held on June 12, 2017, and on August 31, 2017, the Hearing Officer issued Findings of Fact, Conclusions of Law, and Proposed Order, which found that FWP had factually proven twenty-two of the alleged violations. AMI next appealed the Hearing Officer's decision to the FWP director, who affirmed the findings of fact and conclusions of law of the Hearing Officer. This resulted in FWP's Final Order revoking AMI's permit.

On August 30, 2018, AMI filed its Petition for Judicial Review in the Eighteenth Judicial District, in Gallatin County, cause number DV-18-941B. In its Petition, AMI presented arguments regarding overbreadth and vagueness as well as the issue of entrapment by estoppel and equitable estoppel. Ultimately, the venue was changed and the case was transferred to the First Judicial District, in Lewis and Clark County, and consolidated with the case in which the stay was issued, cause number BDV-2015-999. No party requested oral argument. On January 17,

2020, the District Court issued its Order on Petition for Judicial Review, affirming FWP's Final Order revoking AMI's permit. AMI subsequently filed its Notice of Appeal with this Court.

STATEMENT OF FACTS

Animals of Montana is a roadside menagerie which owns a large number and variety of animals, including (at the time of revocation) a tiger, African lion, brown bear, black bear, coyote, grey wolf, arctic wolf, bobcat, three lynxes, Siberian lynx, badger, raccoon, red fox, pine marten, porcupine, fisher, cross fox, and black leopard. FWP understands that AMI does its business primarily as a wildlife casting agency, business which has continued during this appeal by virtue of a court stay. While AMI contends that FWP has tried to fit it into a regulatory scheme that doesn't accommodate AMI's "mission or purpose," it is AMI which has sought to be regulated as a roadside menagerie and for years applied annually to be permitted as such. Without finding some legislative framework within which to fit its operations, none of the "mission or purpose" of AMI could be lawfully carried out, at all.

FWP is responsible for permitting, regulation, and oversight of roadside menageries such as AMI within the bounds set by the legislature for regulation of such facilities. FWP is tasked by law with satisfactorily verifying that "provisions for housing and caring for the animals and for protecting the public are proper and

adequate." § 87-4-803(4), MCA. More specifically, FWP must "adopt and enforce reasonable regulations for the housing, care, treatment, feeding, and sanitation of animals kept in roadside menageries. § 87-4-802, MCA. Those regulations were adopted through the MAPA rulemaking process and exist as Administrative Rules of Montana 12.6.1301 through 12.6.1309. In addition, AMI, pursuant to the permit issued by FWP, is required to follow conditions listed on its permit. Specifically, AMI was required to only take animals off site after receiving authorization and an indemnity agreement from FWP, and required to have a firearm or tranquilizer gun ready and available any time animals are taken off premises and worked outside a cage. AMI was also responsible for maintaining appropriate types and suitable quantities of tranquilizing drugs, and for keeping animals under direct control of qualified handlers, and was not permitted to allow their animals to come into direct contact with clients or the public at any time. Animals taken off site and worked outside their enclosures were additionally required to remain within suitable fencing approved by FWP, or within an approved electrified barrier. The permit reminded AMI that "[f]ailure to comply with the terms of these conditions or other state laws or regulations regarding roadside menageries shall, in addition to any criminal penalties, be grounds for revocation of the permit."

In February of 2015, FWP received a complaint that AMI had conducted an

unlawful photo shoot at the Pioneer Bar in Virginia City. FWP had issued AMI an indemnity agreement and permission to conduct an exhibition off site for the dates in question, however, that permission was specific to the Old West Town in Nevada City, miles away from Virginia City, where AMI had not requested or received permission.

FWP investigated this complaint, and in so doing, interviewed Mr. Hyde, who admitted to conducting the photo shoot, admitted that he did not have a tranquilizer gun as required by his permit, and admitted that AMI had not set up an electrical barrier as required by his permit. Hyde even went so far as to say that he did not "know exactly where we were going to be or what we were going to be doing." Order on Petition for Judicial Review, p. 4. This information, and the "exact location" of the exhibition, are are required to be provided and approved by FWP before an indemnity agreement is issued to allow for a roadside menagerie's exhibition. Accordingly, Hyde was cited and later found guilty by a jury.

In November of 2015, FWP conducted an inspection of AMI's premises, finding numerous violations at the facility, including multiple insufficiently secured cages, unroofed cages, failure to padlock cages, insufficient availability of fresh water, and multiple cases of unsanitary and/or cramped cages.

FWP subsequently issued its notice of revocation to AMI. At hearing, FWP established 22 violations, several of which were established by Mr. Hyde's direct

admission. AMI appealed to the District Court and now submits its appeal to this Court on constitutional grounds as a last-ditch effort to excuse its flagrant violation of legitimate and reasonable state laws and regulations which govern its operations.

STANDARD OF REVIEW

Judicial review of a final agency decision must be conducted by the court without a jury and must be confined to the record. § 2-4-704(1), MCA. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced either because findings of fact upon issues essential to the decision were not made although requested, or because the administrative findings, inferences, conclusions, or decisions are (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. § 2-4-704(2), MCA.

In reviewing conclusions of law, the court must determine whether the agency's interpretation and application of law are correct. *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595. These standards apply to both the District Court and this Court. *Knowles*, ¶ 23. This Court "will not defer

to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 16, 388 Mont. 453, 401 P.3d 712.

SUMMARY OF THE ARGUMENT

FWP conclusively established 22 separate violations of law and rule by AMI, any one of which would require revocation of the permit under §87-4-806, MCA. While AMI's Petition for Judicial Review raised multiple constitutional arguments, the appeal before this Court raises only the argument of entrapment by estoppel. *See generally* Appellant's Opening Brief. The District Court properly decided this issue by finding that "the court cannot overturn findings or conclusions on estoppel because Petitioner has failed to present specific evidence or law that those findings were 'in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; of arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Order on Petition for Judicial Review, p.19.

AMI argues that the District Court did not fully consider the estoppel issue and also incorrectly argues that the District Court committed reversible error by relying upon "erroneous conclusions" which were never appealed from the

Hearing Officer's decision and never raised at the District Court level. To the extent that AMI tries to bolster its deficient District Court brief with new arguments at this stage, these arguments were not preserved properly for appeal to this Court because they were never heard for consideration by the District Court. These deficiencies are AMI's alone and do not constitute reversible error on the part of the District Court. To the contrary, the District Court's Order was thorough, well-supported by the record, and correct on the law, and it should be upheld.

ARGUMENT

I. The District Court considered and correctly addressed AMI's arguments regarding estoppel.

The District Court considered the arguments AMI raised regarding both equitable estoppel and estoppel by entrapment, and correctly found that AMI's petition failed to present specific evidence or law that the findings and conclusions regarding estoppel were unlawful or erroneous. This is a clear departure from AMI's characterization of the District Court decision as failing to consider this argument.

AMI's Petition for Judicial Review raised its arguments regarding estoppel by entrapment and equitable estoppel jointly in the same section of its brief, and the District Court responded to AMI's arguments and contentions jointly. AMI addressed estoppel by entrapment in an extremely cursory manner, noting that

"there is an estoppel by entrapment defense, *not yet explicitly recognized in Montana*." Petition for Judicial Review, p. 13 (emphasis added). AMI went on to add that this unrecognized doctrine "must establish reasonable reliance on a government agent's affirmative misrepresentation that the proscribed conduct is in fact permissible." *Id.* AMI went on to argue that FWP's conduct in the case satisfied both estoppel doctrines, but presented very little legal precedent supporting the doctrine of estoppel by entrapment, and presented no credible evidence that FWP's conduct resulted in any sort of estoppel doctrine being met.

The District Court analyzed the information and argument AMI presented and found that AMI failed to present evidence to justify overturning findings or conclusions on either estoppel doctrine. As the District Court noted, "[w]hether such evidence exists, none has been brought to this Court's attention by counsel. It is the lawyers and not the Court's role to scour the record in search of specific citations to evidence in the record that support counsel's argument. A lawyer's role is not to merely claim, for example, 'There is evidence somewhere in the record to support out (sic) position,' but rather to specifically show that 'Finding of fact #4 is contradicted by the undisputed testimony of witness X, who said…'" Order on Petition for Judicial Review, p. 17. As this Court has noted previously, "[t]he general rule is that issues not raised before the trial court and new legal theories are not considered by this Court on appeal because it is unfair to fault the trial court on

an issue it was never given an opportunity to consider." *Renner v. Nemitz,* 2001 MT 202, ¶15, 306 Mont. 292, 297, 33 P.3d 255, 259, 2001 Mont. LEXIS 362, *9; *see also Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶15, 289 Mont. 255, ¶15, 961 P.2d 100, ¶15 (citing *Day v. Payne* (1996), 280 Mont. 273, 276, 929 P.2d 864, 866). AMI's attempt to supplement its deficient District Court brief with bolstered argument and additional citations should not be given credence at this late stage when it was not presented in the Petition for Judicial Review. The District Court properly considered the arguments presented to it and did not err in the scope of its consideration. Remand is not necessary and the District Court's decision should be affirmed.

II. AMI's arguments regarding estoppel by entrapment fail.

In any case, AMI's arguments regarding estoppel by entrapment fail. AMI argued in its Petition that, to meet the standards of estoppel by entrapment, they "must establish reasonable reliance on a government agent's affirmative misrepresentation that the proscribed conduct is in fact permissible." Petition for Judicial Review, quoting 9th Circuit case.

Even if we are to apply this doctrine as if it were recognized in Montana, there is no evidence supporting AMI's assertion that estoppel by entrapment occurred. Put simply, there was no affirmative representation by FWP personnel that the conduct in each of the 22 violations was permissible – to the contrary,

AMI was repeatedly reminded of the standards they must meet - and there was no reasonable reliance on any FWP official's statement that would excuse such conduct.

The record shows no instance where FWP made any false representation or concealed any material facts from the AMI. To the contrary, FWP provided the AMI repeated notice of the requirements it must meet, both on its facility and when operating off of its facility. Conditions AMI had to meet were set in administrative rule, on its permit, which went through a public environmental assessment process before issuance, and on every single indemnity agreement it was issued in order to operate off site.

Regarding the unlawful exhibition at the Pioneer Bar, FWP specifically provided AMI with indemnity forms which specifically identifies the permitted location by physical address. It is difficult to conceive of language which could more clearly have identified the permitted location in Nevada City. It is also difficult to conceive of language which could more clearly have provided that the Indemnity was limited to the location specifically listed. The other stipulations which were violated are written in plain English, and there has been no allegation and nothing in the record supporting that any FWP agent told AMI that they could be ignored. FWP did not expect that AMI would violate terms expressly listed in statute, Administrative Rules of Montana, and conditions of AMI's 2015 roadside

menagerie permit. FWP also did not expect or intend that AMI would perform a photo shoot of a wolf, in the Pioneer Bar, with members of the public present, without electric fencing, and without readily available firearms or tranquilizer guns. To the contrary, FWP's expectation was that AMI would *not* perform photo shoots outside of Nevada City, and AMI did not perform such shoots based on any representation by FWP.

Similarly, when FWP placed conditions upon Animals of Montana's licensure, it expected that those conditions be followed. The record shows that AMI did not factually establish the existence of an "opportunity to correct" policy, and §87-4-806, MCA, states clearly that FWP "shall revoke" a roadside menagerie permit if violations are found. AMI has not established an estoppel defense and the District Court correctly denied the Petition.

III. The District Court correctly found that AMI did not challenge seventeen of the twenty-two violations found by the Hearing Officer, and failed to preserve those counts for appeal.

The District Court correctly noted that AMI failed to preserve its rights on appeal when it only partially contested the violations against it at hearing. The evidentiary stage of this matter was the hearing before the Hearing Officer, who issued his Findings of Fact, Conclusions of Law, and Proposed Order (Proposed Order). That Proposed Order found that FWP factually established 22 individual violations. AMI left undisputed 17 of the 22 factually established violations, and

the Proposed Order ruled based on the lack of dispute by AMI. *See*, *e.g.*, Proposed Order, Violations 1, 3, 6-20 pp. 13-23. The remaining 6 factually established violations were proven through photographic and verbal testimony. *See*, Proposed Order, p. 13, 15, and 16-23. Any single violation requires that "the director shall revoke the permit without right of renewal." § 87-4-806, MCA. The record establishes that AMI's undisputed violations justified revocation of their permit.

AMI was given the ability under Admin. R. M. 2-4-621(1) to appeal the Hearing Officer's proposed order to the FWP director through an opportunity to file exceptions to the proposed order and request oral argument. AMI did not file exceptions, but did request oral argument. The only basis the FWP Director had to review AMI's claims on appeal was what was presented in oral argument. The FWP Director noted that "[t]here were no exceptions presented and no alternative arguments offered at the hearing that could have substantiated a deviation from the Hearing Officer's findings on these points." Final Order, p. 5. Animals of Montana has, at each stage from the hearing until this appeal, failed to contest the factual basis for several of the violations admitted to at hearing and revocation is statutorily demanded.

CONCLUSION

The District Court correctly found that each of the AMI's constitutional challenges to the Hearing Officer's decision fail. AMI failed to address, and left

factually undisputed - even in the Petition for Judicial Review - 17 of the 22 violations that are established in the record. Any single violation would *require* revocation of AMI's roadside menagerie permit under §87-4-806, MCA. AMI cannot show that overturning the findings and conclusions for every single one of these already-established violations is merited. This Court should therefore affirm the District Court's Order denying AMI's Petition for Judicial Review and affirming FWP's Final Order revoking AMI's permit.

RESPECTFULLY SUBMITTED this 8th day of February, 2020.

By: /s/ Aimee Hawkaluk
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3141, excluding caption, certificate of compliance, and certificate of service.

DATED this 8th day of February, 2020.

By: /s/ Aimee Hawkaluk
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CERTIFICATE OF SERVICE

I, Aimee Hawkaluk, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-08-2020:

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