IN THE SUPREME COURT OF THE STATE OF NEVADA

SYBIL ABBOTT,

Appellant,

vs.

EARL E. GAMES, INC., A NEVADA CORPORATION; EARL E. GAMES, JR., AND EILEEN C. GAMES, AS TRUSTEES OF THE GAMES FAMILY TRUST,

Respondents.

No. 36273

FILED

SEP 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a bench trial in which the district court rendered judgment in favor of the respondents (collectively "Games"), concluding that Games's use of their property did not constitute a nuisance. For various reasons, appellant Sybil Abbott contends that the district court erred in rejecting her claims.

This court has defined a nuisance as:

> such unreasonable, unwarrantable or unlawful use by a person of his own property, or his improper, indecent or unlawful conduct which operates as an obstruction or injury to the right of another or to the public and produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.[1]

Or, more simply stated, "[a]n actionable nuisance is an intentional interference with the use and enjoyment of land that is both substantial and unreasonable."[2]

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[1]See Jezowski v. City of Reno, 71 Nev. 233, 241, 286 P.2d 257, 260-61 (1955) (citing Bliss v. Grayson, 24 Nev. 422, 454, 56 P. 231, 240 (1899)). Nevada has adopted the common law nuisance rule by statute in NRS 40.140. See Bliss, 24 Nev. at 454, 56 P. at 240 (citing Gen. St. § 3273, the ancestor of NRS 40.140).

[2]Culley v. County of Elko, 101 Nev. 838, 841, 711 P.2d 864, 866 (1985).

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Determining what is substantial and unreasonable requires the court to weigh a number of factors, including:

- the character of the neighborhood;
- compliance with the law;
- the magnitude, frequency, and duration of the interference based on neighborhood norms;
- priority in time; and
- social utility of the defendant's use.[3]

After reviewing the record, we conclude that substantial evidence supports the district court's determination that, based on a balancing of the above factors, Games's use did not constitute such an unreasonable and substantial interference that the law will presume consequent damages.[4]

Citing extra-jurisdictional authority in support of her argument,[5] Abbott contends that Games's use of their property was an unlawful expansion of its prior, nonconforming use according to the Reno Municipal Code. Thus, she argues that the use was a nuisance per se - a nuisance "under all circumstances"[6] - obviating the need to analyze the reasonableness of the interference. We first note that the district court concluded that Games's use of their property "did not constitute a significant change or expansion of the legal non-conforming use," and substantial evidence supports this conclusion. In any event, we decline to adopt the nuisance per se rule for expansions of prior, non-conforming uses. The better approach is to consider any expansion of the

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[3]2 Dan B. Dobbs, The Law of Torts § 465 (2001).

[4]See Jezowski, 71 Nev. at 242, 286 P.2d at 261 (upholding the jury's nuisance determination because it was supported by substantial evidence).

[5]See, e.g., Jerome Tp. v. Melchi, 457 N.W.2d 52, 54 (Mich. Ct. App. 1990).

[6]Black's Law Dictionary 737 (6th ed. abridged 1991).

nonconforming use as one factor in the balancing equation, examining the nature and magnitude of the violation.[7]

Although Abbott's arguments are tenable, and although her complaints call for empathy - the noise, dust, and smoke undoubtedly caused great annoyance - we conclude that substantial evidence supports the district court's judgment in all respects. In a fact-intensive balancing analysis such as this, we will not reweigh the factors considered, absent a clear abuse of discretion or some error in applying or interpreting the relevant legal principles. Here, the district court correctly employed long-recognized factors in its nuisance analysis. We cannot say that the various factors it considered or the weight it gave them was erroneous.[8] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Maupin, C.J.

Agosti, J.

Rose, J.

cc: Hon. Peter I. Breen, District Judge
Law Office of James Shields Beasley
Prezant & Mollath
Washoe County Clerk

[7]Similarly, we do not agree with Abbott that the fact that Games allowed others to use its property as a staging area automatically constitutes an expansion of its prior nonconforming use.

[8]Because we uphold the district court's conclusion that Games's use did not constitute a substantial and unreasonable interference, we need not address Abbott's contentions regarding public nuisance or nominal damages.