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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1352-MR

PATRICIA L. CHICK, CO-TRUSTEE
OF THE PATRICIA L. CHICK LIVING
TRUST DATED JULY 18, 2001; AND
DAVID B. CHICK, CO-TRUSTEE OF THE
PATRICIA L. CHICK LIVING TRUST
DATED JULY 18, 2001 APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 20-CI-006431

JON C. BOHNERT; AND
KELLY M. BOHNERT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; CETRULO AND L. JONES, JUDGES.

JONES, L., JUDGE: Appellants Patricia L. Chick and David B. Chick, co-trustees of the Patricia L. Chick Living Trust dated July 18, 2001 ("Chicks") appeal from

the Jefferson Circuit Court dismissing their claims for injunctive relief and damages based on nuisance and violation of a restrictive covenant against Appellees Jon C. Bohnert and Kelly M. Bohnert ("Bohnerts") related to the Bohnerts' use of their own tennis court to play pickleball. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Chicks and the Bohnerts are neighbors whose properties are located in the Glenview Manor subdivision in Jefferson County. The neighborhood is exclusively a residential neighborhood. While the Chicks have lived in their Glenview Manor property since 1979, they spend part of the year in Florida. The Bohnerts have lived at their Glenview Manor property for several years and two separate times; from 2002 to 2015 and again from 2019 to present.

The Bohnerts are former tennis players and have a backyard tennis court on their property. In 2019, the Bohnerts converted their property to play pickleball. Pickleball is defined as "a paddle sport using a special perforated ball on a 20-foot-by-44-foot court with a tennis type net." 2024 Official Rulebook, p. 1 (USA Pickleball, 2024). The parties agree that pickleball is a fast-growing sport. The Bohnerts began playing pickleball in fall 2019 and increased their play during the COVID-19 pandemic. The tennis court is now primarily used for pickleball, though there have been brief occasions where the court was used again for tennis.

While the parties disagree about the overall volume and frequency of noise from pickleball play, they agree that pickleball does generate more noise than tennis. The Chicks objected to the noise from pickleball and made complaints to Joe Martin, the mayor of Glenview. Two other neighbors, Michael and Gretchen Mueller, ("Muellers") also made complaints to Mr. Martin, and Mrs. Mueller made at least twenty police complaints regarding pickleball noise. Mr. Martin investigated the issue, but the city of Glenview took no action, believing that noise complaints should go to the Louisville Metro Police and that any alleged deed restrictions from pickleball noise should be enforced by property owners. No action was ever taken by Louisville Metro Police regarding pickleball noise complaints.

Dissatisfied, the Chicks filed suit in Jefferson Circuit Court on November 6, 2020, alleging that the noise from the Bohnerts' pickleball court violated the Amended Declaration of Restrictions for Glenview Manor and that the noise from the pickleball court constituted "a nuisance per KRS[1] 411.530 and/or (sic) KRS 411.540." In their Complaint, the Chicks requested injunctive relief to prohibit the Bohnerts from using their property for pickleball play and for damages. On February 18, 2022, by agreement with the Bohnerts, the Chicks

[1] Kentucky Revised Statutes.

amended their complaint to add the Muellers as parties plaintiff. No substantive amendments were made to the Complaint.

On July 24, 2022, the trial court entered an agreed order setting the matter for a bench trial and bifurcating the proceedings into two stages. In the first stage of the trial, the trial court would decide whether a permanent injunction to prohibit pickleball play should be issued. The second stage of the trial would be reserved for damages, if necessary. The parties undertook extensive discovery prior to trial.

The bench trial on the first stage spanned three days with the testimony of eighteen witnesses concerning whether the pickleball play constituted a private nuisance, whether the pickleball play violated the Louisville-Jefferson County Metro Government noise ordinance, and whether the pickleball play violated the Glenview Manor Amended Declaration of Restrictions. The trial court described the proof at trial as follows:

> The witnesses can be broken down into four groups: the four Plaintiffs; the two Defendants; nine individuals living in or near Glenview Manor; Plaintiffs' expert witness, William Thornton, and Defendants' expert witness, Robert Unetich; and local pickleball coach and tennis instructor, Chuck Rueff. Testimony of course differed; some individuals described pickleball noise as extremely loud and disturbing while they were in their homes, while others said the noise does not bother them. Plaintiffs' expert witness and Defendants' expert witness used two different scientific methods to ascertain the noise levels: Thornton used a metric known as the "peak

> sound pressure level" while Unetich employed the "fast mode" metric. Thus, the expert opinions differed on exactly how loud the pickleball noise registers.

Following the close of proof, the trial court asked the parties to submit proposed Findings of Fact and Conclusions of Law. On June 22, 2023, the trial court entered an order denying the Chicks' request for a permanent injunction, finding that the pickleball play did not violate the Louisville Metro Government Noise Ordinance, nor the Glenview Manor Amended Declaration of Restrictions. The trial court also found that the Chicks' requested remedy was a reach too far. While the trial court suggested "that a better remedy may be one where the Bohnerts play for shorter durations only during reasonable daylight hours to mitigate the noise coming from their backyard," the trial court concluded that the Chicks' request of "a permanent injunction as to the playing of pickleball in the Bohnerts' backyard is not appropriate under the circumstance." On October 3, 2023, the trial court entered an order amending its judgment to make clear that the trial court also found that the pickleball play was not a nuisance under the Kentucky nuisance statute. On October 18, 2023, the trial court entered an order ultimately dismissing the Plaintiffs' claims. From those orders, the Chicks made a timely appeal.[2]

[2] The Muellers chose not to join the Chicks on appeal.

On appeal, the Chicks argue that the trial court erred because (1) they have "unequivocally demonstrated that the Bohnerts have violated the Kentucky's Nuisance Statute," (2) they have "unequivocally demonstrated that the Bohnerts violated the [Louisville-Jefferson County Metro Government] noise ordinance, and (3) "there was also a plain violation of the relevant residential covenants, i.e., Glenview Manor's Amended Declaration of Restrictions." Furthermore, the Chicks argue that the trial court erred in not issuing an injunction preventing any pickleball play as the "equities weigh in favor of a permanent injunction" and that "a total prohibition against pickleball play is the appropriate injunctive remedy."

STANDARD OF REVIEW

Because this action was tried without a jury, we review the trial court's factual findings for clear error and legal determinations *de novo.* CR[3] 52.01; *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016). In reviewing whether or not the trial court's factual findings are clearly erroneous, this Court looks at "whether or not those findings are supported by substantial evidence." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "Substantial evidence" means "evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that when taken alone or in the light of all evidence, has sufficient probative value to induce conviction in the minds of reasonable men." *Id.*

[3] Kentucky Rules of Civil Procedure.

(citations omitted). Because it is for the trial court to weigh the credibility of witnesses and weight of the evidence, "mere doubt as to the correctness of a finding will not justify its reversal." *Id.* (citations omitted).

Furthermore, injunctive relief "is an extraordinary remedy," and whether an injunction should be granted is reviewed for an abuse of discretion. *Maupin v. Stansbury*, 575 S.W.2d 695, 697-98 (Ky. App. 1978). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With those standards in mind, we turn to the Chicks' arguments.

ANALYSIS

Nuisance Under KRS 411.500 et. seq

The Chicks first assert that the trial court erred in finding the Bohnerts' pickleball play did not constitute a nuisance under Kentucky law. A cause of action for private nuisance exists because "[o]rdinarily one has the right to use his property as he sees fit, but a man's dominion over his own premises is qualified to the extent that his use of them must be reasonable and not create a nuisance and deprive neighbors of the enjoyment of their homes." *Warren & Son Stone Co. v. Gruesser*, 209 S.W.2d 817, 819 (Ky. 1948). In 1991, the General

Assembly "restate[d] and codif[ied] in KRS 411.500 to 411.570 the law of nuisance existing in the Commonwealth on May 24, 1991." KRS 411.500.

Whether or not an activity constitutes a nuisance turns wholly upon the facts and circumstances of a particular case. As observed in *Louisville Refining Company v. Mudd*, 339 S.W.2d 181, 184 (Ky. 1960), "In the whole field of law there is nothing more difficult to capture within the confines of a workable definition than the concept of nuisance, nothing more dependent on the peculiar facts of the given case." Furthermore, in reviewing a trial court's determination of whether a nuisance exists, Kentucky law recognizes that "each nuisance case is unique, from which it follows that the question of whether a given fact situation results in nuisance cannot be determined wholly by any particular precedent." *Curry v. Farmers Livestock Market*, 343 S.W.2d 134, 138 (Ky. 1961).

Determining whether a particular case establishes a nuisance is decided not by satisfaction of elements, but by consideration of non-exclusive factors. KRS 411.550 provides that:

> (1) In determining whether a defendant's use of property constitutes a private nuisance, the judge or jury, whichever is the trier of fact, shall consider all relevant facts and circumstances including the following:
>
> (a) The lawful nature of the defendant's use of the property;

(b) The manner in which the defendant has used the property;

(c) The importance of the defendant's use of the property to the community;

(d) The influence of the defendant's use of property to the growth and prosperity of the community;

(e) The kind, volume, and duration of the annoyance or interference with the use and enjoyment of claimant's property caused by the defendant's use of property;

(f) The respective situations of the defendant and claimant; and

(g) The character of the area in which the defendant's property is located, including, but not limited to, all applicable statutes, laws, or regulations.

(2) A defendant's use of property shall be considered as a substantial annoyance or interference with the use and enjoyment of a claimant's property if it would substantially annoy or interfere with the use and enjoyment of property by a person of ordinary health and normal sensitivities.

Additionally, there is nothing in our jurisprudence indicating that any one factor has more weight than the other. With an alleged nuisance based on noise, it has been recognized in *Kentucky & West Virginia Power Company v. Anderson*, 156 S.W.2d 857, 859 (Ky. 1941), "[t]here can be no fixed standard as to what kind of noise constitutes a nuisance." Some persons may be annoyed by certain noise and others unaffected; neither situation is dispositive as to whether a

certain noise constitutes a nuisance. *Id.* Indeed, in *Anderson*, the Court stated, "[t]he determining factor when noise alone is the cause of complaint is not its intensity or volume. It is that the noise is of such character as to produce actual discomfort and annoyance to a person of ordinary sensibilities, rendering adjacent property less comfortable and valuable." *Id.*

Recognizing this, the trial court analyzed the evidence adduced at trial in light of the factors in KRS 411.550:

> To begin, the Bohnerts' use of their property is lawful; they are playing an outdoor sport in their backyard and even with complaints to the Louisville Metro Police, there has been no enforcement or citations issues as to the pickleball noise.[4] Additionally, in looking at the kind, volume, and duration of the annoyance or interference with the use and enjoyment of the [Chicks'] property, this is minimal noise. Per the pleadings, the Bohnerts played pickleball approximately half the days in the month, for approximately one hour per day. Comparing this to [other cases examined by the trial court], the pickleball play is not of such duration to be considered "around the clock" and is not disturbing the plaintiffs' sleep as it is during normal waking hours. Further, in looking at the character of the area, it is a residential neighborhood. Families live in neighborhoods and use their property for entertainment; including outdoor sports. Overall, in considering all of the facts and circumstances of the case, including the limited

[4] This is in reference to the Louisville Metro Noise Ordinance. That issue will be discussed more in detail below.

duration of pickleball play, a permanent injunction is not appropriate here.[5]

Further, the trial court did not find[6] "that the noise from pickleball play constitutes an annoyance or nuisance to the neighborhood, anymore than other noise such as lawnmowers, leaf blowers, etc."

As the finder of fact, it was the trial court's sole prerogative to hear and weigh the evidence,[7] and apply the evidence to KRS 411.550. The trial court's findings are supported by substantial evidence. This Court cannot substitute its own judgment for that of the trial court, and this court certainly does not find that the Chicks "unequivocally" established a nuisance.

Louisville Metro Government Noise Ordinance

The Chicks next claim that the trial court erred in not finding that the Bohnerts' pickleball play violated the Louisville Metro Government Noise Ordinance, LMCO[8] § 99.01 *et seq.* The Chicks did not specifically plead a violation of the noise ordinance as an independent ground for an injunction. Instead, the Chicks claim that violation of the ordinance should be considered

[5] The trial court made clear in its October 3, 2023, Order that it found that the Chicks had failed to establish a nuisance claim.

[6] Though referencing the alleged violation of the Amended Declaration of Restriction.

[7] Furthermore, the trial court did hear recordings of the noise from pickleball play itself, under the conditions and with audio equipment requested by the Chicks' expert.

[8] "Louisville/Jefferson County Metro Government Code of Ordinances."

when evaluating whether an activity is a nuisance under KRS 411.500(1)(a) and KRS 411.500(1)(g). While the trial court apparently interpreted the Chicks' claim that the noise ordinance was violated as a separate ground for injunctive relief rather than a factor to consider under KRS 411.500, we agree that the trial court did not err in finding the noise ordinance was not violated.

LMCO § 99.02(A) provides:

> It shall be unlawful for any person within Louisville Metro to make, continue, or cause to be made or continued, any unreasonably loud, harsh or excessive noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of others, unless the making and continuing of the noise is necessary for the protection or preservation of property or the life, health, or safety of a person or persons.

LMCO § 99.01 provides in relevant part:

> For the purposes of this ordinance, the following definitions shall apply unless the context clearly indicates or requires a different meaning.
>
> . . .
>
> ***UNREASONABLY LOUD, HARSH, or EXCESSIVE NOISE.*** Any manufactured noise plainly audible at a distance of 50 feet from its point of origin or emanation.

Ordinances are interpreted according to the rules of statutory construction. *See Lafayette Football Boosters, Inc. v. Commonwealth*, 232 S.W.3d 550, 556 (Ky. App. 2007) (applying the rules of statutory construction to a smoking ban ordinance).

As explained in *Lafayette Football Boosters*:

> If the language enacted is plain and unambiguous, we need not resort to principles of statutory construction and further interpretation is unnecessary. *Mohammad v. Commonwealth*, 202 S.W.3d 589, 590 (Ky. 2006); *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002); *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 131 (Ky. App. 1990). In giving the words of the [ordinance] their plain, ordinary meaning, "[w]e are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). If, however, the language of the ordinance is ambiguous and its meaning unclear, we will determine the [municipality's] intent by considering the whole statute and the purpose to be accomplished. *Dep't of Motor Transp. v. City Bus Co*., 252 S.W.2d 46, 47 (Ky. 1952). In the end, we are bound by the words actually enacted by the [municipality] and we must test the ordinance based upon what they said, not what they might have said. *Commonwealth, Transp. Cabinet, Bureau of Highways v. Roof*, 913 S.W.2d 322, 326 (Ky. 1996); *Musselman v. Commonwealth*, 705 S.W.2d 476, 478 (Ky. 1986); *Estes v. Commonwealth*, 952 S.W.2d 701, 703 (Ky. 1997).

We first note that the ordinance does not define "unreasonably loud, harsh or excessive noise" as *any* noise, but only as *manufactured* noise audible at fifty feet from its point of origin or emanation. The ordinance does not define "manufactured noise," nor does any case law give guidance as to how to interpret the adjective "manufactured." Thus, we must look at the ordinance as a whole and the purpose to be accomplished.

In interpreting the ordinance as a whole, we are guided by our Supreme Court in *Hendricks v. Commonwealth*, 865 S.W.2d 332, 337 (Ky. 1993):

> The interpretation of statutes can be applied to this city ordinance. We find instructive the language of 73 Am. Jur. 2d *Statutes* § 265:
>
> A statute subject to interpretation is presumed not to have been intended to produce absurd consequences, but to have the most reasonable operation that its language permits. If possible, doubtful provisions should be given a reasonable, rational, sensible and intelligent construction. These rules prevail where they are not restrained by the clear language of the statute. Under this rule, general terms in a statute should be so limited in their application as not to lead to absurd consequences.

We are also guided by the Rule of Lenity, which "broadly provides that doubts in statutory construction are to be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruent results." *Kentucky Exec. Branch Comm'n v. Wooton*, 465 S.W. 3d 453, 457 (Ky. App. 2014). Finally, statutes (or in this case ordinances) "in pari materia or those which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose, must be construed together and [with] the legislative intention apparent from the whole enactment [to] be carried into effect." *Milner v. Gibson*, 61 S.W.2d 273, 277 (Ky. 1933).

LMCO § 99.02(B) provides a list of acts that are "declared to be unreasonably loud, harsh or excessive noise." While LMCO § 99.02(B) makes

clear that list is non-exclusive, that list is instructive in interpreting what constitutes such "manufactured noise." Those acts are:

> (1) The sounding of any horn or other such audible signaling device on any automobile, motorcycle or other vehicle on any right-of-way, parking lot or other public place, except as a danger warning, for an unreasonable period of time;
>
> (2) The use or operation of any radio, stereo, or other machine or device for the producing, reproducing or amplification of sound in any vehicle in such a manner as to create an unreasonably loud, harsh, or excessive noise, that disturbs the peace, quiet or comfort of others;
>
> (3) The use or operation of, or allowing the use or operation of, any radio receiving set, musical instrument, phonograph, or other machine or device for the producing or reproducing of sound in such a manner as to create an unreasonably loud, harsh or excessive noise which disturbs the peace, quiet, and comfort of others by creating or allowing a louder volume than is necessary for the convenient hearing of the person or persons who are voluntarily in the room, chamber, or vehicle in which any above described machine, device, or musical instrument is located;
>
> (4) The use or operation of any vehicle in such manner as to produce any unreasonably loud, harsh or excessive noise, or to discharge into the open air the exhaust of any vehicle except through a muffler or other device which will effectively prevent any unreasonably loud, harsh or excessive noises therefrom;
>
> (5) Creation of any unreasonably loud, harsh, or excessive noise in connection with the loading or

> unloading of any vehicle, except as provided for in § 99.03(B)(14), or by the operation of any such vehicle;
>
> (6) The use of any mechanical loud speaker, amplifier, sound system, stereo or radio on any moving or standing vehicle for advertising, entertainment or any other purpose, in such a manner as to create an unreasonably loud, harsh or excessive noise;
>
> (7) The use or operation of any portable generator which exceeds decibel levels of 70 dBA by any vehicle.

These seven examples, while non-exclusive, suggest that the ordinance is intended to apply to sound generated *(e.g.* sounding of horns or generators) or amplified (*e.g.* by radio or loud-speaker) by some mechanical device rather than noise from ordinary recreational sporting activity in and of itself. This makes sense, because otherwise, the ordinance could be used to penalize ordinary, everyday activities such as children playing basketball in a driveway, a birthday party, or even a parent taking a crying baby outside in a stroller if such sound was "plainly audible at a distance of 50 feet from its point of origin." Such activities are the reality of living in a community with others.

Furthermore, similar to KRS 411.500, LMCO § 99.03(A) provides a list of non-exclusive factors to be considered when determining if the noise ordinance has been violated. The enumerated factors are:

> (1) The volume of the noise;

(2) The intensity of the noise;

(3) The volume and intensity of back-ground noise, if any;

(4) The proximity of the noise to a residential area, place of public accommodation such as a hotel, motel, inn, campground and the like, health care facilities, churches or schools;

(5) The nature and zoning of the area within which the noise emanates;

(6) The density of inhabitation of the area within which the noise emanates;

(7) The time of day or night the noise occurs;

(8) The duration of the noise; [and]

(9) Whether the noise is recurrent, intermittent or constant[.]

Many of these factors mirror the factors enumerated in KRS 411.500. While not making findings regarding these specific factors, the trial court's findings with regards to nuisance apply to these factors as well. As with the nuisance statute, we find that the trial court's factual findings are not clearly erroneous, and the trial court did not err in finding that pickleball play does not violate the noise ordinance.[9]

[9] The Bohnerts also challenge the constitutionality of the noise ordinance, claiming it is unconstitutionally vague. This argument was raised before the trial court, but not addressed by the trial court in its judgment. The Bohnerts reraise that issue here on appeal. However, the Bohnerts failed to provide the Attorney General with proper notice that they were challenging

Glenview Manor Amended Declaration of Restrictions

The Bohnerts' property is subject to an Amended Declaration of Restrictions. The operative paragraph provides:

> 4. No noxious or offensive trade shall be carried on upon any lot, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood. Livestock and poultry shall not be permitted.

The Chicks claim that the Bohnerts' pickleball play constitutes an "annoyance or nuisance to the neighborhood," violating the Amended Declaration of Restrictions and the trial court erred in finding otherwise. Furthermore, the Chicks claim that if the pickleball play violates the Amended Declaration of Restrictions, then the trial court was *mandated* to enjoin pickleball play.

The Amended Declaration of Restrictions is a restrictive covenant. "[E]ach case involving restrictions on the use of property, whether it be by reciprocal negative easements contained in conveyances or by a zoning ordinance, must be decided on its merits – on the particular terms of the instrument and the facts of the case." *Robertson v. W. Baptist Hosp.*, 267 S.W.2d 395, 397 (Ky. 1954). "One primary rule of construction relating to all instruments is that every part of the instrument will be given meaning and effect when possible."

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the ordinance, and thus failed to preserve the issue for review. *See Johnson v. Commonwealth*, 449 S.W.3d 350, 351 (Ky. 2014) (finding that an appellant failed to preserve a constitutional challenge to an ordinance when she failed to provide requisite notice to the Attorney General).

McFarland v. Hanley, 258 S.W.2d 3, 5 (Ky. 1953). "[A]s a fundamental and supreme rule of construction of contracts, the intention of the parties governs. That intention in respect to a restrictive covenant is to be gathered from the entire context of the instruments." *Parrish v. Newbury*, 279 S.W.2d 229, 233 (Ky. 1955) (citing *McFarland v. Hanley*, 258 S.W. 2d 3 (Ky. 1953)).

The Chicks cite *Home Depot USA v. Saul Subsidiary I, Limited Partnership*, 159 S.W. 3d 339 (Ky. App. 2004), for their argument that the pickleball play violated the restrictive covenant in the neighborhood and that the trial court was required to issue an injunction against further pickleball play. In that case, Home Depot purchased a tract of land to construct a freestanding store. *Id.* at 340. The tract of land Home Depot purchased was subject to a 1969 property agreement and restrictive covenant which required Home Depot's tract, along with a contiguous track, to be developed as a single mall. *Id.* The adjoining landowner filed suit, seeking, *inter alia*, a permanent injunction against Home Depot's freestanding store. *Id.* Ultimately (following a visit to this Court and remand), the trial court found that "Kentucky appellate decisions compelled enforcement of the covenants" and "issued a mandatory injunction for removal of the offending structure and replacement of the original structure[.]" *Id.*

On appeal, a separate panel of this Court affirmed, echoing the trial court's citation of *Marshall v. Adams*, 447 S.W.2d 57, 59-60 (Ky. 1969):

> If there is a negative covenant, . . . the court has no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that the thing shall not be done. In such a case the injunction does nothing more than give a sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of the balance of convenience or inconvenience or of the amount of damage or injury: it is the specific performance by the court of that negative bargain which the parties have made, with their eyes open, between themselves.

Home Depot, 159 S.W.3d at 341-42.

The Bohnerts claim *Home Depot* is inapposite because while the covenants in *Home Depot* expressly prohibited a freestanding store, the Amended Declaration of Restrictions "do not say that residents cannot play pickleball." However, deed restrictions do not need to be that explicit. Thus, we examine whether the Bohnerts' pickleball play qualifies as something "which may be or become an annoyance to the neighborhood."

The trial court examined the Amended Declaration of Restrictions and found as follows:

> In the current case, the restrictive covenant states that no activity should be done in the neighborhood which may be or become an annoyance or nuisance. In looking at the plain language, the Court does not find that the noise from pickleball play constitutes an annoyance or nuisance to the neighborhood, anymore than other noise such as lawnmowers, leaf blowers, etc. The intention of the grantor and the general scheme of the subdivision

> was likely one of family neighborhood and community, wherein families could take part in activities around their homes. . . . Here, the covenants do not state that homeowners are not allowed to play pickleball or other outdoor sports on their property. Thus, the Court finds that the Bohnerts have not violated the Amended Declaration of Restrictions.

The Amended Declaration of Restrictions does not define what constitutes an "annoyance or nuisance to the neighborhood." Nor does this Court's research find any cases that define that phrase. Looking at the Amended Declaration of Restrictions, it is clear that the intent of the restrictive covenant is to maintain a residential family neighborhood, albeit one where residents may have to endure noise from activities such as sports, family celebrations, or children playing outside.

Furthermore, as stated, *supra*, this Court agrees that pickleball play does not constitute a nuisance. We next look as to whether pickleball play constitutes an "annoyance." In *City of Louisville v. Munro*, 475 S.W.2d 479, 482 (Ky. 1971), an "annoyance" (at least for legal purposes) means one "such as to interfere materially with ordinary physical comfort or the reasonable use of property." (citing *Louisville Refining Co.*, *supra*). The Chicks argue that the Bohnerts' pickleball play may have materially interfered with their physical comfort or use of their property in line with *Munro*.

However, the Amended Declaration of Restrictions makes clear that the annoyance must be to the *neighborhood*, not to only a few residents. Thus, in construing "annoyance" under the Amended Declaration of Restrictions, that "annoyance" must be measured in light of all of the other noises and inconveniences with community life. The risk of noise from an occasional recreational sport played in a back yard is something one must suffer living in a community with others just as lawn mowers or birthday parties. What is subjectively "annoying" to one cannot be the basis of what is "annoying" to a neighborhood. Thus, the trial court correctly found that the Bohnerts' pickleball play did not violate the Glenview Manor Amended Declaration of Restrictions.

Weight of Equities

Because we agree with the trial court that the Bohnerts' pickleball play was not a nuisance, did not violate the noise ordinance, nor violate the Glenview Manor Amended Declaration of Restrictions, we need not discuss whether an injunction is an appropriate remedy. However, even if the Chicks had succeeded on one of their claims, we agree the trial court did not abuse its discretion denying the Chicks' requested relief of "total prohibition against pickleball play[.]"

The trial court found that a total prohibition of pickleball play would be inequitable. The trial court reasoned:

> The Court here would suggest that a better remedy may be one where the Bohnerts play for shorter durations and only during reasonable daylight hours to mitigate the noise coming from their backyard. As stated in an older case, "One living in a city . . . must necessarily submit to annoyances which are incidental to city life." *Pfingst v. Senn*, 23 S.W. 358, 360 (Ky. 1983). This is a neighborhood containing numerous families, and some amount of noise is incidental to living near other people. In sum, the Court must deny the request for an issuance of a permanent injunction against the playing of pickleball on the Bohnerts' property.

The Chicks claim that in balancing the equities, there is no alternative to a total ban on pickleball play because "there is no reasonable method by which they can abate the pickleball noise" and their only solution is "to leave their homes, be it retreating to the basement, leaving the home temporarily during the course of a pickleball game, or moving away from Glenview Manor altogether."

This Court agrees that the equities weigh in favor of the Bohnerts, particularly in light of the far-reaching and drastic remedy sought by the Chicks. This is not a situation where a suite of full-time pickleball courts have opened with continuous play every hour of the day. Instead, this is a situation where a family is using their property for an occasional recreational activity; as the trial court found, the Bohnerts "played pickleball approximately half the days in the month, for a total of approximately one hour of the day" and "during normal waking hours." As the trial court noted, community living requires suffering occasional annoyances incidental to city life. A family enjoying their property by playing a sport on

occasion is one of those "annoyances." Thus, even assuming the Chicks had proven one of their underlying claims, we find the trial court did not abuse its discretion in denying a complete injunction against all pickleball play.

CONCLUSION

This is a case concerning pickleball, but it is not a referendum on pickleball. This Court has no opinion on the propriety of pickleball as a sport, nor whether there are times or circumstances where pickleball play can or should be curtailed. This case is merely one where a party claimed injunctive relief for an alleged violation of Kentucky nuisance law, an alleged violation of a noise ordinance, and an alleged violation of a restrictive covenant. Our role is merely to review the findings and judgment of the trial court. Having done so, and for the foregoing reasons we find the trial court did not err, and the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
Donald L. Cox Louisville, Kentucky	Kenneth A. Bohnert Louisville, Kentucky