Supreme Court of Nevada.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, a/k/a PETA, a Delaware Non-Profit Corporation; Performing Animal Welfare Society, a/k/a PAWS, a California Non-Profit Corporation; Jeanne Roush, Ottavio Gesmundo, and Pat Derby, Appellants,
v.
BOBBY BEROSINI, LTD., a Nevada Corporation, and Bohumil Berousek, a/k/a Bobby Berosini, Individually, Respondents.

No. 21580.

May 22, 1995.

In this litigation respondent Berosini claims that two animal rights organizations, ****1271** People for the Ethical Treatment of Animals (PETA) and Performing Animal Welfare Society (PAWS), and three individuals defamed him and invaded his privacy. Judgment was entered by the trial court on jury verdicts on the libel and invasion of privacy claims in the aggregate amount of $4.2 million. This appeal followed. We conclude that the evidence was insufficient to support the jury's verdict and, accordingly, reverse the judgment.
***

***620** Appellant Ottavio Gesmundo did the actual taping of Berosini. Gesmundo was a dancer in the Stardust Hotel's "Lido" floor show, at which Berosini's animal act was the principal attraction. Gesmundo claims that he was prompted to videotape Berosini's treatment of the animals because he had become aware of Berosini's conduct with the animals and thought that he would be in a better position to put an end to it if Berosini's actions were permanently recorded on tape. Gesmundo says that he had, on a number of occasions, heard the animals crying out in distress and that he had overheard "thumping noises" coming from the area backstage where the videotaping was eventually done. The area in question was demarked by curtains which kept backstage personnel from entering the staging area where Berosini made last- minute preparations before going on stage. By looking through the worn portions of the curtains, Gesmundo testified that backstage personnel were able to observe the manner in which Berosini disciplined his animals in the mentioned staging area. Berosini's position is that his actions depicted on the tape were a "proper" and "necessary" manner of treating these animals.

However motivated, Gesmundo did decide to record Berosini's treatment of the animals on his eight-millimeter home video recorder. From July 9 through July 16, 1989, Gesmundo placed his video camera in a place that would permit Berosini's actions to be recorded without Berosini's being aware of it. Gesmundo would go home each night and transfer that day's video recording onto a VHS tape. In doing this he would edit out the "dead-time," the time during which Berosini was not within the curtained area preparing to go on stage. The final tape which Gesmundo put together showed nine separate incidents, with the date superimposed on the daily taped images.

All of the members of this court have viewed the tape; and what is shown on the tape is clear and unequivocal: Berosini is shown, immediately before going on stage, grabbing, slapping, punching and shaking the animals while several handlers hold the animals in position. The tape also shows Berosini striking the animals with a black rod ****1273** approximately ten to twelve inches long. ***

****1279 *630** Berosini claims that one of the Stardust dancers, Ottavio Gesmundo, has intruded upon his "seclusion" backstage, before his act commenced. We support the need for vigilance in preventing unwanted intrusions upon our privacy and the need to protect ourselves against the Orwellian nightmare that our "every movement [be] scrutinized." The question now to be examined is whether Gesmundo's inquiring video camera gives cause for concern over privacy and gives rise to a tort action against Gesmundo for invasion of Berosini's privacy.

Although the problems which the tort of intrusion seeks to remedy are well- recognized, the tort of intrusion has only recently gained the attention of this court. In *M & R Investment Co. v. Mandarino,* 103 Nev. 711, 748 P.2d 488 (1987), we faced the question of whether appellant, "a twenty-two year old man, disguised in dark glasses, a false mustache and slicked down hair, who by virtue of his skill at counting cards, [won] a great deal of money in a short period of time" had stated a cognizable claim for intrusion against the casino personnel who confiscated his winnings, had him arrested, photographed him, and distributed his photograph to other casinos. *Id.* at 719, 748 P.2d at 493. We answered this question with an emphatic "No," noting that the appellant, so conspicuously attired, could have had no subjective expectation that "casino

personnel [would] turn a blind eye to his presence." This court held that even viewing the facts in the light most favorable to the appellant, such an expectation was patently unreasonable and would thus not give rise to a tort action. *Id.* at 719, 748 P.2d at 493.

The *Restatement,* upon which this court has previously relied for guidance in this area, [FN15] formulates the tort of intrusion in terms of a physical invasion upon the "solitude or seclusion" of another, [FN16] the rationale being that one should be protected against intrusion by others into one's private "space" or private affairs. To Prosser, these torts were personal injury actions, and he saw as examples of tortious activity the meddling conduct of eavesdroppers, the unpermitted opening of others' mail, and the making of illegal searches and seizures. [FN17] Simply put, the intrusion tort gives redress for interference with one's "right to be left alone."

FN15. *See Montesano,* 99 Nev. at 649, 668 P.2d at 1084.

FN16. *Restatement,* § 652B at 378, *supra* note 11.

FN17. Prosser at 392, *supra* note 9.

[6] To recover for the tort of intrusion, a plaintiff must prove the following elements: 1) an intentional intrusion (physical or otherwise); 2) on the solitude or seclusion of another; 3) that would be highly offensive to a reasonable person.

[7] ***631** In order to have an interest in seclusion or solitude which the law will protect, a plaintiff must show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable. *M & R Investment Co.,* 103 Nev. at 719, 748 P.2d at 493. Thus, not every expectation of privacy and seclusion is protected by the law. "The extent to which seclusion can be protected is severely limited by the protection that must often be accorded to the freedom of action and expression of those who threaten that seclusion of others." 2 Fowler V. Harper, et al., *The Law of Torts,* § 9.6, at 636 (2d ed. 1986). For example, it is no invasion of privacy to photograph a person in a public place; *see, e.g., Gill v. Hearst Publishing Co.,* 40 Cal.2d 224, 253 P.2d 441 (1953); or for the police, acting within their powers, to photograph and fingerprint a suspect. *See, e.g., Norman v. City of Las Vegas,* 64 Nev. 38, 177 P.2d 442 (1947). Bearing this in mind, let us examine Berosini's claimed "right to be left alone" in this case and, particularly, the nature of Berosini's claim to seclusion backstage at the Stardust Hotel.

[8] Berosini's "Invasion of Privacy" claim in his Second Claim for Relief contains no ****1280** factual averments and refers the reader back to paragraphs 1 through 18 of the First Claim for Relief, where one is required to search for some factual basis for Berosini's charging of the intrusion tort. The only factual allegations that appear to have any relation to the intrusion tort are found in paragraph 12 of the first claim, a paragraph that relates only to defendant Gesmundo. (Gesmundo is the only defendant against whom a judgment was entered on the intrusion tort.) Paragraph 12 reads as follows:

> 12. Defendant GESMUNDO unlawfully trespassed onto the Stardust Hotel with a video camera in July, 1989. Video cameras and other recording equipment are strictly prohibited at the Stardust Hotel. Defendant GESMUNDO unlawfully filmed Plaintiff BEROSINI disciplining the orangutans without the Plaintiff's knowledge or consent and just after Defendant GESMUNDO and others agitated the orangutans.

The focus, then, of Berosini's intrusion upon seclusion claim is Gesmundo's having "trespassed onto the Stardust Hotel with a video camera" and having "unlawfully filmed Plaintiff Berosini disciplining the orangutans without the Plaintiff's knowledge or consent." It is of no relevance to the intrusion tort that Gesmundo trespassed onto the Stardust Hotel, and it is of no moment that Gesmundo might have "unlawfully" filmed Berosini, unless at the same time he was violating a justifiable expectation of privacy ***632** on Berosini's part. The issue, then, is whether, when Gesmundo filmed Berosini "disciplining the orangutans without the Plaintiff's knowledge or consent," Gesmundo was intruding on "the solitude or seclusion" of Berosini.

The primary thrust of Berosini's expectation of privacy backstage at the Stardust was that he be left alone with his animals and trainers for a period of time immediately before going on stage. Berosini testified that "as part of his engagement with the Stardust," he demanded that "the animals be left alone prior to going on stage." Throughout his testimony, over and over again, he stresses his need to be alone with his animals before going on stage.

Berosini's counsel asked him what his "purpose" was in requiring that he be "secured from the other cast members and people before [he] went on stage." Berosini's answer to this question was: "I have to have the attention ... I have to know how they think. I cannot have them drift away with their mind...."; and, further, "it is very important that before the show I have the orangutans' attention and I can see what they think before I take him on stage...." Significantly, Berosini testified that his "concern for *privacy* was *based upon the animals* " and that his "main concern is that [he] have no problems going on stage and off stage," that is to say that no one interfere with his animals in any way immediately before going on stage. (Emphasis added.)

Berosini was concerned that backstage personnel not "stare at the orangutans in their faces. The orangutans will interpret [this] as a challenge." It is clear that Berosini's "main concern" was that he be provided with an area backstage in which he could get the animals' undistracted attention before going on stage. He never expressed any concern about backstage personnel merely seeing him or hearing him during these necessary final preparations before going on stage; his only expressed concern was about possible *interference* with his pre-act training procedures and the danger that such interference might create with respect to his control over the animals. Persons who were backstage at the Stardust could hear what was going on when "Berosini [was] disciplining his animals," and, without interfering with Berosini's activities, could, if they wanted to, get a glimpse of what Berosini was doing with his animals as he was going on stage. [FN18]

FN18. The record reveals that a number of people were readily able to see or hear what was going on in Berosini's "private" area.

What is perhaps most important in defining the breadth of Berosini's expectation of ****1281** privacy is that in his own mind there was nothing wrong or untoward in the manner in which he disciplined the animals, as portrayed on the videotape, and he ***633** expressed no concern about merely being seen or heard carrying out these disciplinary practices. To Berosini all of his disciplinary activities were completely "justified." He had nothing to hide--nothing to be private about. Except to avoid possible distraction of the animals, he had no reason to exclude others from observing or listening to his activities with the animals. Berosini testified that he was not "ashamed of the way that [he] control[led] [his] animals"; and he testified that he "would have done the same thing if people were standing there because if anybody would have been standing there, it was visibl[e]. It was correct. It was proper. It was necessary."

As his testimony indicates, Berosini's "concern for privacy was based upon the animals," and not upon any desire for sight/sound secrecy or privacy or seclusion as such; and he "would have done the same thing if people were standing there." The supposed intruder, Gesmundo, was in a real sense just "standing there." By observing Berosini through the eye of his video camera, he was merely doing what other backstage personnel were also permissibly doing. The camera did not interfere in any way with Berosini's pre-act animal discipline or his claimed interest in being "secured from the other cast members and people before [he] went on stage." [FN19] Having testified that he would have done the same thing if people were standing there, he can hardly complain about a camera "standing there."

FN19. *See* discussion, *supra,* at 1280.

If Berosini's expectation was, as he says it is, freedom from distracting intrusion and interference with his animals and his pre-act disciplinary procedures, then Gesmundo's video "filming" did not invade the scope of this expectation. Gesmundo did not intrude upon Berosini's *expected* seclusion. *See, e.g., Kemp v. Block,* 607 F.Supp. 1262, 1264 (D.Nev.1985) ("[t]his Court finds that the plaintiff knew that other persons could overhear. He, therefore, had no reasonable expectation of privacy"); *Mclain v. Boise Cascade Corp.,* 271 Or. 549, 533 P.2d 343, 346 (1975) ("plaintiff conceded that his activities which were filmed could have been observed by his neighbors or passersby"). For this reason the tort of intrusion cannot be maintained in this case. [FN20]

FN20. We do not find it necessary to discuss the question of reasonability (objective expectation of privacy) of Berosini's privacy interests because, as said, his concern was not with being seen. Nevertheless, we note that Berosini's being a public figure militates against his privacy claim. It is probably not reasonable for a well known, headliner entertainer to expect that his picture will not

be taken backstage at his place of performance, even when it is a violation of company rules. Furthermore, we note that there is, generally speaking, a reduced objective expectation of privacy in the workplace. *See, e.g., Baggs v. Eagle-Picher Industries,* 957 F.2d 268 (6th Cir.1992), *cert. denied,* 506 U.S. 975, 113 S.Ct. 466, 121 L.Ed.2d 374 (1992); *Yarbray v. Southern Bell Tel. & Tel. Co.,* 261 Ga. 703, 409 S.E.2d 835 (1991).

[9] ***634** On the question of whether Gesmundo's camera was *highly* offensive to a reasonable person, we first note that this is a question of first impression in this state. As might be expected, "[t]he question of what kinds of conduct will be regarded as a 'highly offensive' intrusion is largely a matter of social conventions and expectations." J. Thomas McCarthy, *The Rights of Publicity and Privacy,* § 5.10(A)(2) (1993). For example, while questions about one's sexual activities would be highly offensive when asked by an employer, they might not be offensive when asked by one's closest friend. *See Phillips v. Smalley Maint. Services,* 435 So.2d 705 (Ala.1983). "While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion." *Miller v. National Broadcasting Co.,* 187 Cal.App.3d 1463, 232 Cal.Rptr. 668, 678 (1986); *see, e.g.,* ****1282***Lovgren v. Citizens First Nat. Bank,* 126 Ill.2d 411, 128 Ill.Dec. 542, 534 N.E.2d 987 (1989); *Kaiser v. Western R/C Flyers Inc.,* 239 Neb. 624, 477 N.W.2d 557, 562 (1991); *Smith v. Jack Eckerd Corp.,* 101 N.C.App. 566, 400 S.E.2d 99 (1991). A court considering whether a particular action is "highly offensive" should consider the following factors: "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Miller,* 232 Cal.Rptr. at 679; 5 B.E. Witkin, *Summary of California Law, Torts* § 579 at 674 (9th ed. 1988).

Three of these factors are of particular significance here and, we conclude, militate strongly against Berosini's claim that Gesmundo's conduct was highly offensive to a reasonable person. These factors are: the degree of the alleged intrusion, the context in which the actions occurred, and the motive of the supposed intruder. First, we note the nonintrusive nature of the taping process in the instant case. Berosini was concerned with anyone or anything interfering with his animals prior to performance. The camera caused no such interference. Neither Berosini nor his animals were aware of the camera's presence. If Gesmundo had surprised Berosini and his animals with a film crew and had caused a great commotion, we might view this factor differently. *See generally Miller,* 232 Cal.Rptr. 668. On the contrary, it appears from these facts that any colorable privacy claims arose not from the actual presence of the video camera but from the subsequent use to which the video tape was put.

Secondly, as has been discussed fully above, the context in which this allegedly tortious conduct occurred was hardly a ***635** model of what we think of as "privacy." We must remember that the videotaping did not take place in a private bedroom (*see Miller,* 232 Cal.Rptr. at 668), or in a hospital room (*see Estate of Berthiaume v. Pratt,* 365 A.2d 792, 796 (Me.1976)), or in a restroom (*see Harkey v. Abate,* 131 Mich.App. 177, 346 N.W.2d 74 (1983)), or in a young ladies' dressing room (*see Doe by Doe v. B.P.S. Guard Services Inc.,* 945 F.2d 1422 (8th Cir.1991)), or in any other place traditionally associated with a legitimate expectation of privacy. Rather, Gesmundo filmed activities taking place backstage at the Stardust Hotel, an area where Gesmundo had every right to be, and the filming was of a subject that could be seen and heard by any number of persons. This was not, after all, Berosini's dressing room; it was a holding area for his orangutans.

Finally, with regard to Gesmundo's motives, we note that Gesmundo's purpose was not to eavesdrop or to invade into a realm that Berosini claimed for personal seclusion. Gesmundo was merely memorializing on tape what he and others could readily perceive. Unlike the typical *intrusion* claim, Gesmundo was not trying to pry, he was not trying to uncover the covered-up. Although Berosini envisioned Gesmundo to be engaged in a conspiracy with others (as put in the Answering Brief) "to put an end to the use of animals in entertainment," as noted in note 3, *supra,* the conspiracy charges in Berosini's complaint were dismissed. Furthermore, even if Gesmundo was conspiring to put an end to the use of animals in entertainment, this is not the kind of motive that would be considered highly offensive to a reasonable person. Many courts, and Professor Prosser, have found the inquiry into motive or purpose to be dispositive of this particular element of the tort. *See*

Prosser and Keeton on Torts § 117 at 856 (W. Page Keeton, ed.; 5th ed. 1984). For example, in *Estate of Berthiaume,* 365 A.2d at 796, the court held that a doctor who photographed a dying patient against his will could be held liable for intrusion, in part because the doctor was not seeking to further the patient's treatment when he photographed him. Similarly, in *Yarbray v. Southern Bell Tel. & Tel. Co.,* 261 Ga. 703, 409 S.E.2d 835 (1991), the court held that an employee who claimed that her employer pressured her regarding her testimony in an employment discrimination suit brought against the company, could not state a claim for intrusion because the employer ****1283** was motivated by his desire to protect the company's interests. *Id.* 409 S.E.2d at 837; *see also Baggs v. Eagle-Picher Industries,* 957 F.2d 268 (6th Cir.1992), *cert. denied,* 506 U.S. 975, 113 S.Ct. 466, 121 L.Ed.2d 374 (1992); *Saldana v. Kelsey-Hayes Co.,* 178 Mich.App. 230, 443 N.W.2d 382 (1989).

While we could reverse Berosini's intrusion upon seclusion judgment solely on the absence of any intrusion upon his actual ***636** privacy expectation, we go on to conclude that even if Berosini had expected complete seclusion from prying eyes and ears, Gesmundo's camera was not "highly offensive to a reasonable person" because of the nonintrusive nature of the taping process, the context in which the taping took place, and Gesmundo's well-intentioned (and in the eyes of some, at least, *laudable*) motive. If Berosini suffered as a result of the videotaping, it was not because of any tortious intrusion, it was because of subsequent events that, if remediable, relate to other kinds of tort actions than the *intrusion* upon seclusion tort.***