IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James and Paula Boswell, h/w, Petitioners	:	
v.	:	No. 389 M.D. 2006 Argued: May 15, 2012
Skippack Township and Skippack Township Board of Supervisors, Respondents	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON FILED: June 27, 2012

James and Paula Boswell (Landowners) filed an action against Skippack Township and the Skippack Township Board of Supervisors (collectively, Township) in our original jurisdiction seeking declaratory and injunctive relief from the Township's Peace and Good Order Ordinance (Ordinance). Landowners claim the Ordinance violates the Agricultural Communities and Rural Environment Act, 3 Pa. C.S. §§311-318, (ACRE) and the Right to Farm Law (RFL)[1] because it precludes their use of the Critter Blaster Pro (Device) in order to deter deer from their tree farm. In its opinion issued December 21, 2011, this Court entered a non-jury Decision in favor of the Township on all claims, subject to post-trial practice. We held Landowners did not prove the Device constituted a "normal agricultural operation" entitled to protection from enforcement of the Ordinance.

---

[1] Act of June 10, 1982, P.L. 454, as amended, 3 P.S. §§951-957.

Before the Court are Landowners' post-trial motions for: (1) judgment notwithstanding the verdict (JNOV); (2) new trial as to use/modification of the Device; (3) reconsideration of finding as to use and (4) of finding as to public health; (5) reversal of an evidentiary ruling; and, (6) attorney fees under Section 317 of ACRE, 3 Pa. C.S. §317. After argument, we grant in part and deny in part.

I. Background

Landowners use the sound-emitting Device to repel deer from their tree farm. They operated the Device between the hours of dusk and dawn from October 2005 through March 2006. The Township issued three citations to Landowners for violating the Ordinance, alleging that use of the Device disturbed the peace of the neighborhood unnecessarily.

Landowners allege their tree farm is an agricultural operation and that the Device qualifies as a "normal agricultural operation" protected by ACRE and the RFL. As "normal agricultural operations" cannot be restricted, Landowners argue the Ordinance is invalid to the extent it precludes their use of the Device.

In a four-count complaint filed in July 2006, Landowners sought: (1) a declaration that the Ordinance is invalid because ACRE prohibits municipalities from passing an ordinance unless it excludes from the definition of nuisance an activity protected by the RFL (Count I); (2) an order enjoining enforcement of the Ordinance (Count II); and, (3) an order for attorney fees and litigation costs for negligent enforcement of the Ordinance (Counts III and IV).

After a prolonged period of inactivity, the case proceeded to a bench trial on August 1, 2011. Landowners presented the testimony of Richard Palmer to establish that the Device is a normal farming practice. Palmer has served as a wildlife conservation officer with the Pennsylvania Game Commission for over 20 years. Landowners conducted *voir dire*, reviewing Palmer's professional qualifications regarding wildlife control, including deer, and submitted his curriculum vitae.

Palmer testified the Device is one of the "harassment or disturbance techniques" aimed at scaring deer from affected property. Notes of Testimony (N.T.) at 19. Palmer advised the Game Commission is "the agency that is very often asked to make these interpretations of the legality as well as potential recommendations to mitigate this damage." N.T. at 20. Palmer opined that noise control devices are widely-used in Pennsylvania. N.T. at 21. On cross-examination, Palmer stated the Device is authorized as a deer deterrent. N.T. at 26.

Palmer also authored a February 27, 2009 letter to Landowners opining on behalf of the Game Commission "that devices such as, but not limited to Critter Blaster Pro and others are normal farming practices that are safe and effective in controlling damage to agricultural crops by certain types of wildlife, such as deer and blackbirds." (Letter) N.T. at 19. Palmer signed an affidavit adopting the Letter, and the trial judge admitted it.

Significantly, Palmer did not offer an opinion on Landowners' use of the Device. There is no evidence that Palmer went to the site and heard the Device

as used by Landowners, and he did not testify regarding how the Device was used in this case. See N.T. at 23 (qualifying the legality of noise devices to "within the certain parameters"). Palmer did not testify about the specific parameters of the Device, the volume at which it should be set or whether the addition of speakers to the Device is a normal agricultural operation. Palmer's testimony focused on noise harassment techniques generally, not Landowners' use of the Device.

Landowner James Boswell testified about the deer damage to his tree farm and his other unavailing attempts at controlling deer. He tried to reduce damage to his crop by permitting hunting on his land, using dried blood, spraying the trees with deer repellant or deterrents such as "Liquid Fence" or "Deer Away," coyote urine, egg whites, dog hair and human hair. N.T. at 34-37. Based on his family's operation of tree farms, he testified fences do not work and are costly.

Pertinent to later discussion, Landowner James Boswell testified the Device came with four speakers, and he added more and directed them toward the corners of his property. N.T. at 57, 71. He measured the decibel level and testified that as he used it, the Device emitted a noise of less than 55 decibels. He set the Device's volume at 70 percent and placed it approximately 150 feet from his property line. N.T. at 44. The Device is a "high-pitched sound in the three and a half to 27,000 hertz range. It uses a pie-wedge tweeter …. All sound pressure levels are not the same. High frequency dissipates at a much shorter distance than low frequencies." N.T. at 55. There are eight different sounds. Id.

Landowner James Boswell stated that he resides on the property, and

he could not hear the Device inside his home. He testified that his family and dog have not suffered any adverse effects from use of the Device. N.T. at 46, 49, 56. Also, he measured the Device's decibel reading from areas around the neighborhood and found it barely audible. N.T. at 58-59. Boswell also operated the Device in open court. N.T. at 179.

The Township submitted the testimony of Ted Locker, the Township manager and code enforcement officer (Enforcement Officer). Enforcement Officer visited Landowners' property after receiving several complaints regarding the Device. He testified the property is zoned R-1 residential.[2] Enforcement Officer described the Device's noise as a "series of screeches, squeals. It sounds like fingernails on a blackboard, sounds like animals fighting …." N.T. at 85. He could not determine whether using the Device violated the noise ordinance because he did not have proper equipment to measure "weighting scales." N.T. at 85, 93-94, 98. Instead, he issued three citations for violating the Ordinance based on complaints that the Device adversely affected the neighbors' health and safety. Enforcement Officer did not testify regarding the specific decibel-level of the Device. While he testified he took a noise meter reading, he did not have any notes to confirm the reading. He also testified he could not recall whether he could hear the Device in his vehicle or only when outside.

The Township presented the testimony of several neighbors who hear

[2] We take judicial notice of the Township's zoning ordinance which provides that the primary purpose of the R-1 residential district is "to preserve open land, sensitive natural areas and rural community character." Agriculture qualifies as a "right use" of the property so zoned. Section 200-13(C) of the Skippack Township Zoning Ordinance, Zoning Ordinance §200-13(C).

the Device. The neighbors signed a letter, authored by Phillip Burke in February 2006, about the adverse effects the Device caused the neighborhood (Neighborhood Letter). Burke testified Landowners increased the volume of the Device after receiving the Neighborhood Letter. N.T. at 109.

Many of the neighbors testified that the Device disturbed their sleep, which affected work productivity. N.T. at 104, 105, 132, 134, 136. Burke testified he could hear the Device in his home anywhere between 5:00 p.m. and 7:00 a.m. Id. Susan Koch, Burke's wife, also testified. Generally, she confirmed Burke's testimony and added that the noise from the Device caused her to lose sleep, caused stress and strain, resulting in headaches, and caused strife in their marriage. N.T. at 132, 134, 136. She also signed the Neighborhood Letter. Bruno Lovrino, who lives across the street from Landowners, testified the Device's noises are unbearable and a person cannot go outside when it is operating. N.T. at 159.

Christopher Drummond, who lives behind the Burkes, also testified about the noise level and its impact upon his household. His property is "about a football field" from Landowners' property. N.T. at 146. Drummond testified that normal household noise generally blocked the noise from the Device; however, once all household devices were turned off, all that could be heard was the "annoying, incessant beeping and screeching." Id. Drummond testified that "with the windows closed, the volume [from the Device] was not high" and the reason it disturbs sleep is that the "pitch is really high and the noise is not consistent." Id.

The Township also called David Eubank, who lived in the

neighborhood during the relevant period. He described the Device as emitting a "loud, screeching, beeping sound." N.T. at 164. Use of the Device changed the way his family normally lived. N.T. at 165. He believed the noise echoed on his property due to its configuration, and he could not escape the noise, even inside. Id. His young daughters were afraid of the noise and began having sleep issues. He was also affected with sleep loss, irritability, and lack of concentration.

The Township's last witness was Carol Arena. An easement to her property runs along Landowners' property. N.T. at 172. The Device's speakers were pointed directly at her property. Id. She verified the Device emitted the noises in Burke's audio recording played for the Court and admitted as evidence. N.T. at 173. The noises were the same regardless of whether she was inside or outside her home. Id. Her family no longer wanted to go outside given the noise. N.T. at 173-174. She also signed the Neighborhood Letter.

After reassignment of the case,[3] and based on the evidence, this Court made the following findings: Landowners' property consists of approximately 11.3 acres, located in a primarily residential area; since 1995, Landowners operated a tree farm on their property; Landowners used the Device during the hours of 5:00 p.m. and 7:00 a.m. to repel deer from the tree farm to reduce crop damage; Landowners added speakers to the Device, situated pointing out toward the property lines; and, James Boswell did not use the Device at full volume, which volume is adjustable.

---

[3] Because the trial judge became unavailable, this case was reassigned to the undersigned authoring judge on October 24, 2011.

The Court found Landowner James Boswell credible regarding his reasons for employing the Device (to repel deer), the hours and manner he used it, the position of the Device, and the other methods he attempted, unsuccessfully, to repel deer. Landowners were cited for violations of the Ordinance based on the noise from the Device. Enforcement Officer did not measure the noise from the Device using the equipment necessary to show a violation of the noise ordinance.

Palmer testified that noise harassment techniques like the Device are a normal farming practice employed across the country to deter deer from crops. Palmer did not testify regarding Landowners' use of the Device. There is no evidence that Palmer visited the property or heard or observed the Device as used by Landowners. Palmer testified regarding the use of similar devices to deter deer in the abstract, without regard to the use or effectiveness of the Device with added speakers, and without addressing the volume at which this Device was used, or should be used consistent with the manufacturer's instructions.

The sound of the Device as played in open court was not recorded; however, by various accounts it did not sound the same as when used by Landowners at their farm. Landowners did not describe the Device on the record, submit photographs of the Device, or submit the Device itself as demonstrative evidence.

The Court found the neighbors credible to the extent they described the Device's noises and its impact upon their sleep, productivity and enjoyment. The Court found Landowners' use of the Device adversely affected public health.

The Court concluded that Landowners' tree farm constitutes an agricultural operation. Further, the Court determined that Landowners submitted competent evidence regarding the general use of noise devices like the Device to repel deer. However, the Court held that Landowners did not meet their burden of proving that their use of the Device constitutes a "normal agricultural operation." The Court concluded that there was no evidence regarding the specific use of the Device by Landowners, addressing volume or impact by the addition of speakers. Accordingly, the Court concluded Landowners did not establish the Ordinance violates ACRE or the RFL. The Court did not award attorney fees.

On January 5, 2012, Landowners filed post-trial motions asking this Court to vacate the judgment and reconsider its opinion issued December 21, 2011.[4] Essentially, Landowners argue this Court found the use of the Device is a normal farming practice and part of their normal agricultural operation; therefore, they are entitled to judgment in their favor.

Discerning no prejudice from the late filing, the Court accepted the post-trial motions and issued an order striking the judgment in the Township's favor. The Court also directed that the matter be decided "en banc,"[5] by a panel of three judges of which the reassignment judge is a member.

---

[4] The Court received Landowners' post-trial motion on January 5, 2012. The non-jury Decision was filed on December 21, 2011, and it ordered that judgment was to be entered within 10 days in the event no post-trial motions were filed. The Court Clerk, however, did not enter judgment once the 10 days elapsed, that is on January 3, 2012.

[5] "Post-trial motions … shall be heard and decided by the trial judge unless the trial judge orders that the matter be heard by a court en banc of which the trial judge shall be a member. … No more than three judges shall constitute the court en banc." Pa. R.C.P. No. 227.2.

II. Discussion

A. Legal Standard for Post-trial Motions

Pursuant to Pa. R.C.P. No. 227.1(a), this Court may: (1) order a new trial as to all or any of the issues; or (2) direct the entry of judgment in favor of any party; or (3) remove a nonsuit; or (4) affirm, modify or change the decision; or (5) enter any other appropriate order. Id. Rule 227.1(b) provides:

> (b) Except as otherwise provided by Pa. R.E. 103(a), post-trial relief may not be granted unless the grounds therefor,
>
> (1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and
>
> (2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Pa. R.C.P. No. 227.1(b). Thus, motions for post-trial relief must specify the relief requested. See Pa. R.C.P. No. 227.1(d). Post-trial relief may not be granted unless the grounds for such relief are specified in the post-trial motion. Hall v. Owens Corning Fiberglass Corp., 779 A.2d 1167 (Pa. Super. 2001). In addition, the grounds for relief sought and the manner in which those grounds were previously asserted must be stated in the motion. Grounds not specified are deemed waived. Hinkson v. Dep't of Transp., 871 A.2d 301 (Pa. Cmwlth. 2005) (a trial court is not required to review the transcript and pre-trial material to find the basis of the post-trial motions).

The purpose of post-trial motions is to give the trial court an opportunity to review and reconsider its earlier rulings and correct its own errors

before an appeal is taken. Lahr v. City of York, 972 A.2d 41 (Pa. Cmwlth. 2009). Post-trial motions should be granted only when the moving party suffered prejudice as a result of the trial court's clear error. Id.

B. Post-trial Motions

Landowners seek JNOV, and, in the alternative, a new trial limited as to their use and/or alleged modification of the Device. Landowners also ask us to reconsider certain findings, and they challenge an evidentiary ruling excluding a pamphlet on noise deterrents. In addition, Landowners seek statutory attorney fees. We address each post-trial motion in turn.

1. Judgment Notwithstanding the Verdict

JNOV may be entered on two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) where the evidence is such that no two reasonable minds could disagree the verdict should have been rendered for the movant. See Commonwealth v. TAP Pharm. Prods., 36 A.3d 1112, 1182-1183 (Pa. Cmwlth. 2011) (Johnson & Johnson Trial).

On the first basis, a court reviews the record and concludes that even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in movant's favor. Id. On the second basis, the court reviews the evidentiary record and concludes the evidence is such that a verdict for the movant is beyond peradventure. Commonwealth v. U.S. Mineral Prods., 927 A.2d 717 (Pa. Cmwlth. 2007), aff'd, 598 Pa. 331, 956 A.2d 967 (2008). Landowners claim both grounds support directed judgment here.

a. Judgment as a matter of law

Landowners fail to establish that they are entitled to judgment as a matter of law. As petitioners bringing an action for declaratory and injunctive relief, Landowners bore a heavy burden at trial. Further, as ordinances are presumed valid, "a heavy burden is placed on the one seeking to challenge the […] ordinance." Commonwealth v. Ebaugh, 783 A.2d 846, 849 (Pa. Cmwlth 2001) (denying constitutional challenge to nuisance ordinance).

To be entitled to judgment in their favor, Landowners had to prove that their use of the Device was "conducted in accordance with normal agricultural operations." The Court held that Landowners failed to meet this burden, and Landowners point to nothing in the record to show the error in that decision.

ACRE addresses local regulation of "normal agricultural operations." Section 313, entitled "Certain local government unit actions prohibited," precludes a local government from adopting or enforcing an "unauthorized local ordinance." 3 Pa. C.S. §313. An "unauthorized ordinance" is one that prohibits or limits "normal agricultural operations" unless the municipality has express or implied authority to adopt the ordinance and is not prohibited or preempted by State law from doing so. 3 Pa. C.S. §312. The RFL limits local ordinances as follows:

> Every municipality that defines or prohibits a public nuisance shall exclude from the definition of such ordinance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.

Section 3(a) of the RFL, 3 P.S. §953(a)(emphasis added). An agricultural operation that is conducted "in accordance with normal agricultural operations" must be exempt from any nuisance ordinance.

The Court did not conclude that the Device constitutes a normal agricultural operation; rather, the Court concluded "Landowners did not meet their burden of proving that the use of the Device here constitutes a normal agricultural operation." Concl. of Law No. 6. Landowners do not cite anything in the non-jury Decision to support their claim to the contrary. As this Court explained in Office of Attorney General v. East Brunswick Township., 956 A.2d 1100 (Pa. Cmwlth. 2008), whether a device qualifies as a "normal agricultural operation" cannot be determined as a matter of law; rather, it is assessed based upon the evidence.

b. Judgment as required by the evidence

On a motion for JNOV, we are required to consider the evidence in a light most favorable to the verdict winner. U.S. Mineral Prods. JNOV should only be entered where directed verdict would have been proper at trial. Id.

The evidence does not dictate directed judgment for Landowners. Landowners did not submit sufficient evidence to show that they used the Device in accordance with normal agricultural operations. Landowners do not cite to any evidence the Court overlooked to establish that fact.

That reasonable minds may differ in interpreting the evidence in this case is evident from the vastly different interpretations offered by the parties. As

judgment may only be entered in the clearest of cases, JNOV is not appropriate here.

2. Request for New Trial Limited to Use of the Device

Landowners argue they are entitled to a new trial regarding the use of the Device because the Court found the use of the Device is a "normal agricultural operation," yet did not find in their favor because of their actual specific use of the Device. Landowners claim the issue of how the Device was used was not raised at trial, and they had no notice of it until receiving the opinion.

Landowners contend the use of extra speakers does not render their use of the Device unusual or not "normal," asserting they used the Device in comportment with operational instructions. However, they do not cite any evidence to support that allegation.

In order to obtain a new trial, Landowners must demonstrate how a trial error caused an incorrect result. In assessing a motion for new trial, we follow a two-step analysis:

> First, we must decide whether one or more mistakes occurred at trial. Second, if we conclude a mistake occurred, we must determine whether the mistake is a sufficient basis for granting a new trial. The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate prejudice resulting from the mistake. In addition, a new trial based on weight of the evidence issues will not be granted unless the verdict is so

> contrary to the evidence as to shock one's sense of justice. A mere conflict in testimony will not suffice [] for a new trial.

Johnson & Johnson Trial, 36 A.3d at 1182.

Landowners fail at the first step as they do not identify an error that occurred at trial. Notably, Landowners do not argue that the trial judge precluded them from submitting evidence regarding their use or modification of the Device. As to use of the Device, Landowner James Boswell testified as to his use, particularly the hours of operation and the volume, and he demonstrated the sound in court. Landowners did not request a view, and they did not seek an opportunity to offer more evidence of use, such as testimony regarding the manufacturer's instructions for use or operating parameters. Because Landowners offered evidence of their use of the Device, and all their offered evidence was received, neither surprise nor reversible error is apparent.

Moreover, Landowners introduced the issue of Device modification. Landowner James Boswell testified regarding his addition of four speakers and his locating them toward his property lines. Landowners cannot now be heard to claim surprise from an issue they introduced. Also, Landowners do not identify evidence regarding the configuration of their equipment which was offered but not received.

Nevertheless, given reassignment after trial, the Court considered the utility of further inquiry into whether the Device here was used "in accordance with normal agricultural operations." We conclude that Landowners already had a trial, and with the exception of an evidentiary ruling discussed below, they put on

their case unrestricted by the trial judge. Witnesses testified that the playing of the Device in open court was not the same as the sounds heard on their properties, and there is no reason to believe a second trial would cure that discrepancy. In short, given the failure of proof by the party with the burden, there is no compelling reason to put the neighbors and the Township through the time and expense of a second trial. As we discern no errors during trial, we deny the motion for a new trial.

3. Reconsideration of "Modification" Finding

Landowners ask this Court to reconsider its finding that the Device was "modified," contending there is no evidence of modification. Landowners allege there is no evidence that the Device was not used within the operational parameters found in the on-line description of the Device, made part of the record at Exhibit R-9. Provided the use is within the operational parameters, it does not qualify as "modified." In the alternative, Landowners argue the Court should find the Device was not modified in any way inconsistent with its purpose.

The plain meaning of the term "modify" is to alter, or change in some manner. It cannot be denied that the Device was "modified," because James Boswell admitted that he added four speakers to the Device. N.T. at 58, 71. Such an addition alters the Device, and is thus a modification based upon the common meaning of the term. Further, Landowners do not cite any record evidence to show that they used the Device in accordance with manufacturer's instructions, or that they used only the parts included with any Critter Blaster Pro.

Landowners contend that since there is no testimony that the Device was used outside the manufacturer's operational parameters, finding "modification" is improper. However, the burden was on Landowners to prove that their use was "in accordance with normal agricultural operations," not with the manufacturer's manual. Moreover, the manufacturer's manual is not in the record. Under these circumstances, we deny Landowners' motion for post-trial relief as to "modification."

4. Reconsideration of Finding of Effect on Public Health

Landowners ask this Court to reconsider its finding that Landowners' use of the Device adversely affected the public health. Landowners contend there was no testimony that the Device adversely affected the public health, and no harm linked to use of the Device. In addition, Landowners assert that the use of the Device is less dangerous to the public health than alternative deterrence methods, such as "use of projectiles to kill the deer." Landowners' Post-trial Br. at 9.

The Township argues the finding is well-supported by the testimony of the neighbors and of those who investigated use of the Device. The Township reminds us that the burden of proof lay with the party challenging the ordinance, not with the Township.

This case is not a nuisance suit or an enforcement action in which the effect upon the public is material. Rather, the focus in this declaratory judgment action is whether the use of the Device is "in accordance with normal agricultural operations." As we declared in Commonwealth v. Richmond Township, 2 A.3d 678, 687 (Pa. Cmwlth. 2010): "an agricultural operation complying with the […]

RTF does not constitute an operation that has a direct adverse effect on the public health and safety." See id., 2 A.3d at 687 (citing Commonwealth v. Richmond Twp., 975 A.2d 607 (Pa. Cmwlth. 2009)) (emphasis added).

As a matter of law, a compliant agricultural operation is not a threat to public health and safety. Hence, Landowners' use of the property as a tree farm is protected regardless of its adverse effect upon his neighbors provided the use of the Device is "in accordance with normal agricultural operations" or a "normal farming practice."[6]

As the finding of fact as to adverse impact upon public health is not pertinent to the issues in an ACRE case, we grant this post-trial motion and vacate the Finding of Fact No. 14 as to public health as unnecessary.

5. Evidentiary Ruling Excluding Wildlife Control Pamphlet

Landowners ask the Court to reconsider the evidentiary ruling as to a pamphlet entitled "Landowners' Guide to Wildlife Control and Prevention Laws in Pennsylvania," published by extension professors Gary San Julian and Cristin Conrad of Pennsylvania State University College of Agricultural Sciences in cooperation with the Game Commission (Pamphlet). The trial judge sustained the Township's hearsay objection to admission of the Pamphlet. N.T. at 22.

[6] This Court holds that the terms "agricultural" and "farming" are interchangeable. Office of Att'y Gen. v. East Brunswick Twp., 956 A.2d 1100 (Pa. Cmwlth. 2008) (regarding application of sewer sludge as a fertilizer to a tree farm); Hempfield Twp. v. Hapchuk, 620 A.2d 668 (Pa. Cmwlth. 1993).

During trial, Landowners' counsel argued that the Pamphlet shows the Game Commission approves of noise-emitting devices as a means of deterring deer. Counsel for the Township made a hearsay objection to its admission. N.T. at 22. Landowners argued before the trial judge that the Pamphlet is an "official publication" and thus qualifies for an exception under Rules of Evidence 901(a) and 902(b)(5). N.T. at 21-22.

Landowners contend that since the Pamphlet was published by a public authority, it is not necessary for it to be certified or authenticated. Specifically, Landowners argue the exclusion of the Pamphlet is reversible error given its materiality, because it states the use of frightening devices is effective and legal. Landowners do not address the hearsay objection.

Decisions as to the admissibility of evidence are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion or misapplication of law. Gaudio v. Ford Motor Co., 976 A.2d 524, 535 (Pa. Super. 2009). An abuse of discretion exists where the trial court reached a conclusion which overrides or misapplies the law, or when the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will. Middletown Twp. v. Lands of Stone, 595 Pa. 607, 939 A.2d 331 (2007).

Moreover, to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. A party suffers prejudice when the trial court's error could have affected the judgment. Schuenemann v. Dreemz, LLC, 34 A.3d 94, 101 (Pa. Super.

2011); Gaudio. Evidentiary rulings that did not affect the judgment do not provide a basis for relief.

The trial judge's exclusion of the Pamphlet had no effect on the Decision. This is because the Pamphlet did not address the way this farmer used this Device. The Pamphlet addresses only the use of noise devices generally as deer deterrents. The Pamphlet does not discuss "normal farming practices," "normal agricultural operations," or list the Device among such practices. Admitting the Pamphlet into the record would not bridge this evidentiary gap. As the trial judge's decision to exclude the Pamphlet can constitute no more than harmless error, we deny Landowners' post-trial motion to reconsider the evidentiary ruling.

6. Attorney Fees under ACRE

Despite losing on the merits, Landowners assert the Court erred in not awarding attorney fees under Section 317 of ACRE. That section provides:

> (1) If the court determines that the local government unit enacted or enforced an unauthorized local ordinance with negligent disregard of the limitation of authority established under State law, it may order the local government unit to pay the plaintiff reasonable attorney fees and other litigation costs incurred by the plaintiff in connection with the action.

3 Pa. C.S. §317 (emphasis added).

As an initial matter, we note Landowners did not seek attorney fees in their post-trial motion or specify how they preserved the issue in their motion or brief in support. Accordingly, this issue is waived. See Pa. R.C.P. No. 227.1.

Regardless of waiver, Landowners are not entitled to attorney fees. To trigger Section 317, this Court must find the Township enacted or enforced an "unauthorized local ordinance" and did so with "negligent disregard" of the authority established under State law. 3 Pa. C.S. §317. This Court ruled in the Township's favor, holding the Ordinance is not unauthorized under ACRE or RFL and did not find the Township disregarded its authority to enforce its Ordinance.

In any event, the statute does not mandate fees even when a violation of the RTF Law is found; rather, an award is discretionary. As the Court did not abuse its discretion in denying attorney fees to the non-prevailing party, we deny the post-trial motion as to fees.

C. Conclusion

Based on the foregoing, we deny Landowners' post-trial motions as to directed judgment, new trial, reconsideration of the finding on modification, an evidentiary ruling and attorney fees. However, deeming the finding unnecessary and irrelevant to our holding in the ACRE/RFL action, we grant the post-trial motion seeking reconsideration of our finding regarding the effect of the Device on public health, and we vacate that finding.

Having disposed of post-trial motions, we authorize entry of judgment in the Township's favor on all claims.

____

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James and Paula Boswell, h/w,	:	
Petitioners	:	
	:	
v.	:	No. 389 M.D. 2006
	:	
Skippack Township and Skippack	:	
Township Board of Supervisors,	:	
Respondents	:	

O R D E R

AND NOW, this 27th day of June, 2012, after argument on Petitioners' post-trial motions, it is **ORDERED** and **DECREED** as follows:

1. Petitioners' post-trial motions are **DENIED**, except as set forth in Paragraph 2 of this Order; and,

2. The motion for reconsideration as to Finding of Fact No. 14 is **GRANTED,** and the finding is **VACATED** as unnecessary; and

3. The Court directs the Chief Clerk to enter **JUDGMENT** in favor of Respondents Skippack Township and the Skippack Township Board of Supervisors on all claims.

____

ROBERT SIMPSON, Judge