

AUG 19 2009

William Remaley and Barbara Remaley,  
husband and wife

vs.

David Zook and Thelma Zook, husband and  
wife; and Leander Zook and Neila Zook,  
husband and wife

) IN THE COURT OF COMMON PLEAS  
) OF THE 17TH JUDICIAL DISTRICT  
) OF PENNSYLVANIA  
) SNYDER COUNTY BRANCH

) No. CV-0580-2007

) CIVIL DIVISION  
)  
)  
)

**NOTICE OF ENTRY OF ORDER**

TO THE WITHIN NAMED PARTIES and COUNSEL OF RECORD:

Notice is hereby given that on Aug 14, 2009, an order/decrece was filed in the above matter, by the Honorable, Louise O. Knight, P. Judge, ordering and or decreeing that:

Plaintiff's Motion for Post-Trial Relief is denied.

(A copy of the order/decrece is attached for your review.)

Entered and Filed: Aug 14, 2009 @ 8:41 a.m.

TERESA J. BERGER  
Prothonotary of Snyder County

By: Jean M. Faurie  
Deputy / Administrative Assistant

Tuesday, August 18, 2009  
Date of Mailing Notice

COPY

FILED

2009 AUG 14 AM 8:41

PROTHONOTARY  
SNYDER CO., PA

WILLIAM REMALEY and BARBARA	:	IN THE COURT OF COMMON
REMALEY, husband and wife,	:	PLEAS OF THE 17 <sup>TH</sup> JUDICIAL
	:	DISTRICT OF PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	SNYDER COUNTY BRANCH
	:	
DAVID ZOOK and THELMA ZOOK,	:	CIVIL ACTION - LAW AND EQUITY
husband and wife; and LEANDER	:	
ZOOK and NEILA ZOOK, husband and	:	NO. CV 580-2007
wife,	:	
	:	
Defendants	:	

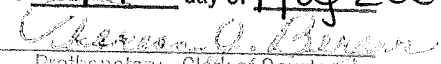
**ORDER**

AND NOW August 14, 2009 for the reasons set forth in the Opinion of the Court filed this same date, it is hereby ORDERED that Plaintiffs' Motion for Post-Trial Relief is denied.

BY THE COURT:

  
\_\_\_\_\_  
Knight, J.

Copies to: Hon. Harold F. Woelfel, Jr., P.J.  
J. Michael Wiley, J.D.  
Ronald L. Finck, J.D.  
Mary F. Leshinskie, J.D., Law Clerk  
Judge's File  
*Plaintiff*  
*Defendants*

Certified and Extracted from the Record  
this 17<sup>th</sup> day of Aug 2009  
  
Prothonotary - Clerk of Courts  
of Snyder County, Pennsylvania

  
Jan M. Fauer, Deputy

WILLIAM REMALEY and BARBARA : IN THE COURT OF COMMON  
REMALEY, husband and wife, : PLEAS OF THE 17<sup>TH</sup> JUDICIAL  
Plaintiffs : DISTRICT OF PENNSYLVANIA  
: :  
vs. : SNYDER COUNTY BRANCH  
: :  
DAVID ZOOK and THELMA ZOOK, : CIVIL ACTION – LAW AND EQUITY  
husband and wife; and LEANDER : :  
ZOOK and NEILA ZOOK, husband and : NO. CV 580-2007  
wife, : :  
Defendants :

**OPINION**

**Knight, J. – August 14, 2009**

2009 AUG 14 AM 8:41  
PROTHONOTARY  
SNYDER CO., PA

FILED

Before the Court is the Plaintiffs’ Motion for Post-Trial Relief. The Defendants have filed a Response to the Motion, and both sets of parties have filed supporting briefs. The Plaintiffs have additionally filed a Reply Brief. We have reviewed all of the parties’ submissions and respond to Plaintiffs’ Motion as follows:

**1. Introduction.**

The purpose of a post-trial motion is to give the trial court an opportunity to review and reconsider its earlier rulings and correct errors it may have made. *Soderberg v. Weisel*, 687 A.2d 839, 845 (Pa. Super. 1997). On appeal an appellate court’s review of the decision in a non-jury trial is limited

to determining “whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in the application of the law.” *Kornfeld v. Atlantic Financial Federal*, 856 A.2d 170, 173 (Pa. Super. 2004).

## **2. Weight and Sufficiency of the Evidence.**

Plaintiffs contend that our conclusion that the conduct of the Defendants did not constitute a nuisance is not supported by “substantive evidence.” Motion, at ¶ 5. Plaintiffs focus is upon our conclusion that the element of “nuisance” missing is the “unreasonableness” of the Defendants’ conduct. Motion, ¶ 13. Plaintiffs then proceed to point to the evidence in the case which they say supports their conclusion that the Defendants’ conduct was “unreasonable.” We agree with Defendants that the essence of Plaintiffs’ argument is essentially a disagreement with our interpretation of the evidence. The evidence in support of the “reasonableness” of the Defendants’ conduct was fully assessed in our findings of fact and in our Conclusions of Law No.’s 25-40.

Beginning at ¶ 23 of their Motion the Plaintiffs make reference to evidence that they say supports the unreasonableness of the Defendants’ conduct. We will address Plaintiffs’ references in order.

- A. Defendants’ failure to notify Plaintiffs of the plans to build the poultry barn to permit earlier discussions of a way to avoid impact of the farm operation.

There is no such requirement in the law. Moreover, we agree with

Defendants that the evidence showed that the Plaintiffs knew about the poultry barn before its construction began. Findings of Fact 52-56. (Hereinafter referred to as "FF"). Further Plaintiffs fail to explain how earlier discussions would have changed anything as far as the effect of the operation on the Plaintiffs. What Plaintiffs wanted was for Defendants to move the location of the fans. There was no way in which this could be done as a practical matter. FF 56. Moreover, expert testimony showed that the placement of the fans had nothing to do with the odors experienced by the Plaintiffs. FF 162 and 165.

- B. Defendants had other sites available.
- C. Defendants did not seek assistance from available resources in siting the barn.
- D. Defendants did not consider the impact on Plaintiffs of the site selected.

There was no evidence offered by Plaintiffs that there were other available sites. The ownership of 125 acres of land does not equate with the ability to place the poultry operation in another location. Defendant Leander Zook explained why his family selected the particular site. FF 56. Curtis Dietz from Ag Depot which constructed the poultry bar explained why the site was chosen. FF 40-43. Defendant Zook was aware of the Plaintiffs' concerns. FF 56. The poultry operation complied with existing law in all respects. The evidence showed that the Defendant were operating their business by the highest applicable agricultural standards. FF 58, 59.

- E. Defendants did not accept offers of financial assistance from Plaintiffs to locate the poultry barn further from Plaintiffs' residence.

The trial testimony was that Plaintiff William Remaley had initially offered to pay one half of the "additional costs" to locate the poultry barn in a different location. When that offer was refused the Plaintiffs offered \$80,000 to buy the field where the proposed poultry barn was to be located. We considered the testimony irrelevant to the issues of the case because the Plaintiffs had no legal obligation to the Plaintiffs to change their plans for the barn location, and had good reasons to site the barn where they did.

- F. Defendants could have placed fans on the north side of the poultry barn at the time of construction without incurring any additional costs and Defendants' explanation on this issue was not credible.

It may be true that the cost to the Defendants would have been no different at the time of construction if the fans had placed on the north side of the barn. Such evidence was not offered by either side. Nonetheless, the Defendants had sound reasons for placing the fans on the north side of the barn. FF 56. As for moving the fans, there was never any competent evidence presented by Plaintiffs to substantiate that the fan location was the cause of the odors they experienced. There only evidence was their own opinion. In fact, the Defendants' expert, Dr. Robert Mikesell, testified to the contrary. FF 161, 162.

We agree with Defendants that Plaintiffs seem to ignore the fact that they have the burden of proving that the Defendants' invasion of their interest in the

private use and enjoyment of their land was “unreasonable.” Conclusion of Law 7 (hereinafter referred to as “CL”). Once a nuisance is proven, then it is the Defendants who must show that the use of the property “is unavoidable or cannot be prevented except by an expenditure which would substantially deprive him of the use of his own property.” *Chase v. Eldred Borough*, 902 A.2d 992, 999 (Pa. Cmwlth. 2006). In this case no evidence was offered by the Plaintiffs to show that the Defendant’s “invasion” was unreasonable. Instead, it was the Defendants who came forward with all of the evidence to support the reasonableness of their endeavor. Stated simply, the Plaintiffs did not meet their burden of proof.<sup>1</sup>

Viewed in its totality, the Plaintiffs’ case was limited to their own factual narrative of the odors they experienced from the time the poultry barn was erected and their personal opinion that the fans caused the odors.<sup>2</sup> In contrast the Defendants presented extensive testimony from credible witnesses as follows:

1. Defendant Leander Zook who explained how the decision was made to locate the barn.

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<sup>1</sup> At the close of the Plaintiffs’ case the Defendants made a motion for compulsory nonsuit pursuant to Pa.R.C.P. 230.1. With hindsight we could have granted the motion. But since this was a nonjury trial, we elected instead to hear the entire case.

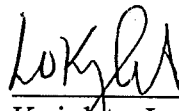
<sup>2</sup> They also presented the testimony of Arthur F. Bowen, a licensed real estate broker to give an opinion on the diminished market value of the Plaintiffs property by reason of the location of the poultry barn. His testimony had no bearing on the Plaintiffs’ burden to prove the elements of a private nuisance.

2. Curtis Diëtz: an expert in the construction of poultry barns throughout Central Pennsylvania who built the Defendants' barn and explained why the barn location was the best location possible.
3. Dr. Robert Mikesell: an expert in livestock odor management who testified that the Defendants were following best management practices for a poultry operation despite their having no legal obligation to do so; that the location of the exhaust fans was not the cause of the odors; and that complete elimination of all poultry barn odors is prohibitively expensive;
4. Keith Fleetwood: the Live Operations Director of the Defendants' poultry supplier Kreamer Feeds, who oversees poultry operations for Kreamer and was involved in the planning for the Defendants' operation. He testified that his employer is interested in insuring that its poultry operations are hygienic. He labeled the Defendants a "model grower and who meet all hygienic standards.
5. Mike Watkins: a poultry operation supervisor from Kreamer Feeds who until recently had responsibility to inspect the Defendants' poultry operation on a weekly basis. He has seen hundreds of poultry operations and rated the Defendants' operation in the top 95% for cleanliness of operation. He has never detected any significant amount of odor from the Defendants' operation.
6. Ten of the Plaintiffs' neighbors who noticed no odors from the poultry operation.



**3. Conclusion.** For the reasons stated we must conclude that our decision in this case was fully supported by competent evidence, that our decision was neither against the weight of the evidence nor unsupported by substantial evidence, and that we made no error of law.

BY THE COURT:

  
\_\_\_\_\_  
Knight, J.

Copies to: Hon. Harold F. Woelfel, Jr., P.J.  
J. Michael Wiley, J.D.  
Ronald L. Finck, J.D.  
Mary F. Leshinskie, J.D., Law Clerk  
Judge's File

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