2011 IL App (5th) 090308-U

NO. 5-09-0308

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RUTH E. PIERSON, DELLA K. JONES, DALE E. JONES, JEAN BAILEY, ROBERT D. BAILEY, JERRY McKNELLY, PAIGE KINCAID, ROSE ANN QUANDT, THEODORE QUANDT, EMMA JEAN SACHAU, LISA SACHAU, GARY SACHAU, DOROTHY SCHOONOVER, TERRI WOLFE, and EDGAR WOLFE, Plaintiffs-Appellants, v. BIBLE PORK, INC., an Illinois Corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Clay County. No. 05-MR-19 Honorable Michael D. McHaney, Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court properly granted summary judgment in favor of defendant on issue of public nuisance and properly denied motion for new trial after jury verdict in favor of defendant on issue of private nuisance.

¶ 2 Plaintiffs, Ruth E. Pierson, Della K. Jones, Dale E. Jones, Jean Bailey, Robert D. Bailey, Jerry McKnelly, Paige Kincaid, Rose Ann Quandt, Theodore Quandt, Emma Jean Sachau, Lisa Sachau, Gary Sachau, Dorothy Schoonover, Terri Wolfe, and Edgar Wolfe, sought a declaratory judgment that odors emanating from a swine facility run by defendant, Bible Pork, Inc. (hereinafter Bible Pork), created a public and private nuisance for the neighboring properties owned by plaintiffs. Prior to trial,

the circuit court of Clay County granted summary judgment in favor of Bible Pork on the issue of public nuisance. Following trial, the jury reached a verdict in favor of Bible Pork on the issue of private nuisance. Plaintiffs appeal the court's granting of summary judgment as well as the jury verdict in favor of Bible Pork. Plaintiffs also appeal the admission and exclusion of certain evidence during the jury trial, the denial of their motion for mistrial, and the denial of their posttrial motion requesting a new trial. We affirm.

¶ 3 Plaintiffs own land and reside within one-half and one and a half miles of a Bible Pork facility. Most of the plaintiffs have owned and lived on their land for decades, and some have had the property in their family for generations. Bible Pork is a livestock company that owns and operates several swine facilities in the area. In May 2005, Bible Pork applied to the Illinois Department of Agriculture for permission to construct and operate a new livestock facility, to be known as Bible Pork 4, near plaintiffs' properties. Bible Pork 4 is a swine "breed to wean" facility, and according to the Bible family who runs the facility, Bible Pork 4, on average, contains approximately 5350 breeding sows, 8000 piglets and 1200 gilts. Manure generated by the facility is stored in deep pits beneath the buildings. In the spring and fall, the manure is pumped from the facility and distributed to surrounding farms to be used as fertilizer. Once the manure reaches these farms, the manure is injected into the soil. Bible Pork 4 began operations in the winter of 2005.

¶ 4 Plaintiffs believe that the odors emanating from Bible Pork 4 interfere with their lives. Plaintiffs stated they were not seeking to shut down Bible Pork 4's operations nor were they asking for an award of money, but rather they wanted the odors to be reduced. The parties engaged in extensive pretrial discovery over a two-year period, and at trial, each plaintiff testified at length about the effects of Bible

Pork's operations on his or her life. Three of the plaintiffs testified that they had kept odor logs noting times when the odors were particularly bad. According to these logs, during the year 2008, plaintiffs noted 125 times in 365 days when there was an odor event significant enough to warrant recording. Plaintiffs also presented testimony of several expert witnesses, one of whom had conducted air monitoring activities at locations near plaintiffs' homes. This expert testified that his monitoring equipment only detected ammonia and hydrogen sulfide between 1% and 2% of the monitoring period. The majority of the readings were also below levels that would be detectable by the human nose. It was further noted, however, that during the monitoring period, consistent with the testing results, plaintiffs also noted very few, if any, odor events in their logs. Bible Pork presented its own expert testimony which confirmed that ammonia and hydrogen sulfide rarely reached plaintiffs' residences and never at levels that were detectable by the human nose. Additionally, four nearby residents who were not parties to the lawsuit testified that Bible Pork 4's operations had no impact on their daily lives and that there was no interference with the use and enjoyment of their respective properties. The jury found in favor of Bible Pork.

¶ 5 Plaintiffs first argue on appeal that the court erred in granting summary judgment on plaintiffs' public nuisance claim after finding that Bible Pork is a highly regulated industry. Relying on the reasoning in *Gilmore v. Stanmar, Inc.*, 261 Ill. App. 3d 651, 633 N.E.2d 985 (1994), the court determined that plaintiffs needed to establish that Bible Pork 4 was in violation of the Livestock Management Facilities Act (Act) (510 ILCS 77/1 *et seq.* (West 2004)) or related statutes and regulations; that Bible Pork 4 was negligent in carrying out its activities; or that the Act or the Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.* (West 2004)) was invalid for allowing such a nuisance. See *Gilmore*, 261 Ill. App. 3d at 661, 633 N.E.2d at 993.

Plaintiffs argue that a comprehensive regulatory scheme does not equate to "highly regulated" for public nuisance purposes. We agree that the Act does not prohibit an individual from using statutory or common-law causes of action to challenge the construction or operation of a livestock facility. See *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 687, 941 N.E.2d 347, 364-65 (2010). A lawful enterprise can be conducted in such an unreasonable manner as to create a public nuisance. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 389, 821 N.E.2d 1099, 1124 (2004). But, we also agree with Bible Pork that plaintiffs ultimately would have failed to establish any claim for a public nuisance in this instance, and therefore the judge did not err in granting summary judgment in favor of Bible Pork.

¶ 6 A public nuisance is an unreasonable interference with a right common to the general public. More specifically, it is doing or failing to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public. *City of Chicago*, 213 Ill. 2d at 370, 821 N.E.2d at 1114; *Helping Others Maintain Environmental Standards*, 406 Ill. App. 3d at 689, 941 N.E.2d at 366. Accordingly, plaintiffs would have had to establish that by operating Bible Pork 4, Bible Pork violated some right common to the general public. Plaintiffs, however, could not have proved the violation of any public right that they contended was being violated by the operation of Bible Pork 4. While plaintiffs each testified without contradiction as to their experiences with the unreasonableness of the odors, the air emissions monitoring conducted by plaintiffs' own expert recorded almost no emissions leaving the grounds of Bible Pork 4. While we agree that agricultural smells can reach a point where they overwhelmingly interfere with a homeowner's right to enjoy his or her property (see *Woods v. Khan*,

95 Ill. App. 3d 1087, 1090, 420 N.E.2d 1028, 1031 (1981)), plaintiffs here could not and did not produce sufficient evidence that Bible Pork 4 had interfered with any public right in a substantial manner. We therefore find no error in the court's granting of summary judgment in favor of Bible Pork with respect to the issue of public nuisance.

¶ 7 Plaintiffs also appeal the denial of their motion for new trial. We initially note that a motion for a new trial should only be granted when a verdict is contrary to the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454, 603 N.E.2d 508, 512 (1992). When there is sufficient evidence to support the verdict, it is, in fact, an abuse of the court's discretion to grant a motion for new trial. *Maple*, 151 Ill. 2d at 455, 603 N.E.2d at 513. Here, there clearly was sufficient evidence to support the verdict reached by the jury. Given that it is the province of the jury to resolve conflicts in the evidence and to judge the credibility of witnesses (see *Maple*, 151 Ill. 2d at 452, 603 N.E.2d at 511-12), we find no error in the court's denial of plaintiffs' motion for new trial. As the trial court stated, the jury verdict in favor of Bible Pork was the "exact right verdict" based upon the evidence the jury heard. The court specifically commented on the diligence and attentiveness of the jurors during the course of the trial to the extent that the court noted in particular an outward manifestation of a difference in the jury's reception of evidence from one side to the other. Unfortunately for plaintiffs, we agree that the jury's finding of no substantial invasion of plaintiffs' properties and/or interests in the use and enjoyment of their lands was supported by the record.

¶ 8 In order for plaintiffs to have been successful, they needed to establish that the operation of Bible Pork 4 constituted a private nuisance. A private nuisance is a substantial invasion of another's interests in the use and enjoyment of his or her land.

Dobbs v. Wiggins, 401 Ill. App. 3d 367, 375, 929 N.E.2d 30, 38 (2010). In order to be substantial, an invasion must be severe enough to constitute a material annoyance to an adjoining landowner as experienced by a reasonable person of ordinary sensibilities. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 204-05, 680 N.E.2d 265, 277-78 (1997). Based on the monitoring and modeling data from both sides, the evidence revealed that the odors emanating from the facility are not getting to plaintiffs' properties in the type of concentrations and/or the duration that plaintiffs' testimonies seem to indicate. Plaintiffs' experts chose to monitor hydrogen sulfide and ammonia because they are good "indicator gases" of odors which can be detected by the human nose. One of plaintiffs' experts, using several pieces of sophisticated equipment, conducted testing for approximately a one-month period in the fall of 2007. He admitted that his instruments which were placed at plaintiffs' residences only detected ammonia during 7½ hours over 26 days of testing and that the concentration of ammonia was not even great enough for a human nose to detect. He further testified that his equipment only detected hydrogen sulfide for 1 hour and 10 minutes during the same time period, and again the levels were below the detection level of a human nose. Plaintiffs' own expert witnesses testified that the gas molecules which carry the odor simply were not present at plaintiffs' residences during the monitoring period, thereby providing significant support for the jury's conclusion that Bible Pork 4 did not and does not interfere with the use and enjoyment of plaintiffs' properties. The testimony of four nonparty neighbors of plaintiffs who resided near the facility also corroborated the lack of odors emanating from Bible Pork 4. Taking everything into account, the evidence supports the jury's conclusion that the operation of Bible Pork 4 did not constitute a private nuisance.

¶ 9 Plaintiffs argue, however, that numerous errors prevented them from receiving

a fair trial. We have reviewed each and every one of them and found them all to be without merit. Turning to the first allegation of error, plaintiffs presented a motion *in limine* during the trial to preclude certain allegedly prejudicial material from reaching the jury. The first item to be excluded concerned a certain statement made by plaintiff Ruth Pierson to certain members of the Bible family. Allegedly Ms. Pierson, in anger over the Bible family's refusal to listen to her, stated she was going to kill and destroy them financially. One of the family members while testifying made reference to the statement pertaining to killing them, allegedly in violation of the motion *in limine*. Plaintiffs demanded a mistrial and filed a petition for adjudication of direct criminal contempt against the witness and the Bible Pork attorneys. The Bible family member who testified, however, also put the statement in context by further testifying how Ms. Pierson allegedly made numerous statements about destroying their reputation in the community and the Bible family financially, as was permitted under the motion *in limine*. The motion only prohibited the use of the phrase implying a homicidal intent. Moreover, Ms. Pierson admitted to making the same statement during her own testimony. Plaintiffs were neither surprised nor prejudiced by the testimony, and we find no reversible error.

¶ 10 Plaintiffs also argue they should have a new trial because jurors may have viewed a proposed exhibit that was left on an easel during the cross-examination of Ms. Pierson. The exhibit, which contained a transcript of a voice mail message purportedly made by Ms. Pierson to the Bible family, was left on an easel facing the jury but away from the view of the judge or plaintiffs' counsel. Defendant counters that the exhibit was pointed toward the bench and the witness chair, and not to the jury as claimed. We initially note that a party requesting a new trial must demonstrate that any alleged error or misconduct was so prejudicial as to deny them a fair trial.

Not every instance in which extraneous or unauthorized information reaches the jury results in error so prejudicial as to require reversal. *Danhof v. Richland Township,* 202 Ill. App. 3d 27, 31, 559 N.E.2d 1155, 1157 (1990). The alleged improper evidence will not constitute prejudicial error if the evidence or document only had some slight relevance to an issue in the case. *Craigmiles v. Egan,* 248 Ill. App. 3d 911, 929, 618 N.E.2d 1242, 1254 (1993). Here, Ms. Pierson's feelings about the proposed opening of Bible Pork had already been interjected into the case during direct examination and were only remotely relevant to the issue of whether the operation of the facility constituted a private nuisance. Plaintiffs' claim of error therefore does not rise to the level justifying reversal in this instance.

¶ 11 We likewise find no reversible error with respect to the court's ruling preventing any evidence concerning the location where one of the Bible family members built their new home. Plaintiffs claim that the family member had represented that he lived by one of Bible Pork's other hog facilities and had no problems with odors, yet when he built his new house, he placed it some three miles across town from Bible Pork 4. Ms. Pierson was not prevented from testifying about this Bible family member's alleged misrepresentation concerning the size and impact of Bible Pork 4 on the surrounding community; she was only prevented from testifying about the location of his new home. Generally speaking, evidence is deemed relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Fronabarger v. Burns,* 385 Ill. App. 3d 560, 564, 895 N.E.2d 1125, 1129 (2008). Where this family member built his home was irrelevant to whether Bible Pork 4 interfered with the use and enjoyment of plaintiffs' properties.

¶ 12 Plaintiffs next contend that the court erred in barring one of plaintiffs' experts

from giving his opinions on the use of air scrubbers at Bible Pork 4 which plaintiffs believe could significantly reduce odors emanating from the facility. Plaintiffs argue that Supreme Court Rule 213(g) (eff. Jan. 1, 2007) specifically provides that information disclosed in a discovery deposition can be used at trial and is deemed a part of the disclosure under Rule 213(f)(3) (eff. Jan. 1, 2007). No opinions regarding or related to air scrubbers were included or referenced in any expert report produced by plaintiffs. The expert mentioned scrubbers on two occasions during his discovery deposition but neither of the references related to the Bible Pork 4 facility or to the ventilation equipment used at Bible Pork 4. More importantly, plaintiffs made no proffer of the purported opinion that they sought to introduce. The trial court therefore did not err in barring the expert testimony. We further note that the decision whether to admit expert testimony rests within the sound discretion of the trial court. *Fronabarger*, 385 Ill. App. 3d at 565-66, 895 N.E.2d at 1130. Absent an abuse of the court's discretion, the court's determination will not be disturbed on review. *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1070, 866 N.E.2d 663, 673 (2007). We see no reason under the circumstances presented to overturn the court's decision in this instance.

¶ 13 Plaintiffs next find fault with the court's refusal to let the jury see photos portraying the inside of the Bible Pork 4 facility and how the pigs were treated in order to give an accurate depiction of the Bible Pork operation. Plaintiffs claim that the Bible family members opened the door themselves as to the care of the animals and that plaintiffs should have been allowed to show a true picture of how the pigs were treated. Plaintiffs have failed, however, to make any credible argument as to why such exhibits were relevant and material to their nuisance issue, *i.e.*, whether Bible Pork 4 substantially and unreasonably interfered with the use and enjoyment of plaintiffs' properties. Trial courts are granted substantial discretion in the admission

or exclusion of evidence. *Bosco v. Janowtiz*, 388 Ill. App. 3d 450, 463, 903 N.E.2d 756, 767 (2009). The omission of the exhibits caused no prejudice to plaintiffs' ability to prove their case pertaining to nuisance.

¶ 14 For plaintiffs' final argument on appeal, plaintiffs assert that the court erred in refusing to grant their request for the jury to visit the Bible Pork 4 facility. Plaintiffs argue the central component of their case was the facility's size coupled with the concentration of animals and resulting millions of gallons of manure generated as the source of the nuisance, and the only way the jury could truly understand their claims was by a site visit to the facility. It is within the court's discretion to permit a jury to view premises that are part of the subject matter of the litigation. *Boner v. Peabody Coal Co.*, 142 Ill. 2d 523, 535, 568 N.E.2d 883, 889, (1991). A jury's viewing of the scene is merely a device to facilitate the jurors' understanding to help them apply the evidence. *Boner*, 142 Ill. 2d at 535, 568 N.E.2d at 889. A party does not have an absolute right to have the jury view a scene, however. A court may refuse to allow the jury to view the premises where the scene is adequately portrayed by photographs or diagrams, the jurors are familiar with the site, no useful purpose would be served by the viewing, or the viewing would be expensive or cause delay. *Boner*, 142 Ill. 2d at 535, 568 N.E.2d at 889. The court here noted that numerous 3' x 5' photographs, including ariel photos and maps, had already been presented to the jury, thereby obviating the need for a site inspection. The court also identified numerous concerns about transporting jurors via bus to the site. We conclude the court properly exercised its discretion in denying plaintiffs' request for a site visit.

¶ 15 We note, in conclusion, that when conflicting inferences may be reasonably drawn from the evidence, the resolution of such conflicts is peculiarly within the province of the jury. See *Reed v. Williams*, 9 Ill. App. 3d 742, 743, 292 N.E.2d 426,

427 (1973). Here the jury chose to resolve any conflicting evidence pertaining to odors emanating from Bible Pork 4 and the level of interference to plaintiffs' use and enjoyment of their respective properties in favor of Bible Pork 4. Unfortunately for plaintiffs, we cannot say such a conclusion is against the manifest weight of the evidence. We therefore must affirm the judgment entered on the jury verdict in favor of Bible Pork and affirm the trial court's denial of plaintiffs' motion for a new trial as well as the court's entry of summary judgment in favor of Bible Pork on the issue of public nuisance. Given the outcome, we further deny the motion taken with the case to strike a portion of plaintiffs' reply brief.

¶ 16 For the aforementioned reasons, we affirm the judgment of the circuit court of Clay County.

¶ 17 Affirmed.