[Cite as *Adkins v. Boetcher*, 2010-Ohio-554.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

Patsy S. Adkins, et al.,	:	
	:	
Plaintiffs-Appellants,	:	
	:	Case No. 08CA3060
v.	:	
	:	DECISION AND JUDGMENT ENTRY
Tony Boetcher, et al.,	:	
	:	
Defendants-Appellees.	:	**Released 2/12/10**

APPEARANCES:

John H. Schaeffer and J. Douglas Drushal, CRITCHFIELD, CRITCHFIELD & JOHNSTON, LTD., Wooster, Ohio, for appellants.

Donald L. Anspaugh, ISAAC, BRANT, LEDMAN & TEETOR, LLP, Columbus, Ohio, for appellees Tony Boetcher, Melissa Boetcher, and BLB Enterprises, LLC.

Thomas M. Spetnagel, Sr. and Paige J. McMahon, SPETNAGEL & McMAHON, Chillicothe, Ohio, for appellee R.A.P.'N 35.

Harsha, J.

{¶1} After several area residents filed a declaratory judgment action against the owners of a nearby automobile racetrack, the trial court found it constituted a nuisance and issued an injunction to limit the noise and light the track emitted. The residents contend the trial court erred in classifying the racetrack as a qualified private nuisance rather than an absolute private nuisance. And that because of this error, the court crafted an injunction that "does virtually nothing" instead of permanently enjoining the commercial operation of the racetrack. However, even if we were to assume that the trial court mislabeled the nuisance, that error was harmless. Regardless of the label placed on the nuisance, the trial court retained broad discretion in fashioning an

injunctive remedy and found that the terms of its injunction afforded the only appropriate relief based on the evidence. Moreover, as we discuss below, the trial court did not abuse its discretion when it determined the scope of the injunction.

{¶2} Next, the residents argue that the trial court erred in conducting independent factual research on the internet after the trial testimony concluded. However, the residents (1) failed to object to the court's conduct; (2) consented to the court's consideration of the research; (3) agreed to participate in additional scientific testing in light of the court's research findings; and (4) stipulated to the results of that testing. Therefore, the residents waived the right to raise this issue on appeal and failed to show that any error by the trial court so affected the basic fairness, integrity, or public reputation of the judicial process as to implicate the plain error doctrine.

{¶3} The residents also contend that the trial court abused its discretion by permitting R.A.P.'N 35, an unincorporated association of racecar owners, drivers, and crew who utilized the racetrack, to intervene in the action. The residents complain that because of this error, the court improperly considered the association's interest in the continued commercial operation of the racetrack when the court determined the scope of the injunctive remedy. Even if we were to assume that the trial court abused its discretion in granting R.A.P.'N 35's motion for permissive intervention, that error was harmless. Regardless of whether the association intervened, the trial court could properly consider evidence the owners introduced regarding the benefits the racetrack offers drivers, i.e. prize money and a convenient racing location, in determining the injunction's scope.

{¶4} Next, the residents argue the trial court's finding that the methodology

employed by the owners' experts was more reliable than that employed by their expert was against the manifest weight of the evidence. However, the owners presented evidence that the sound measurements of the residents' expert may not accurately reflect the impact the racetrack's activities had on noise levels in the area in light of the dates the measurements were taken and the expert's decision to exclude noise emitted by certain sources from testing. Because some competent, credible evidence supports the court's finding, its decision was not against the manifest weight of the evidence.

{¶5} The residents also contend that the trial court abused its discretion in fashioning the scope of its injunctive remedy. Specifically, the residents argue that instead of issuing an injunction to decrease the noise and light from racetrack activities, the court should have barred the racetrack's commercial operation. However, given (1) evidence supporting the trial court's conclusion that the residents exaggerated the degree of harm the racetrack caused them; (2) the investment in the racetrack facilities; (3) the benefits the racetrack provided members of the community, i.e. part-time jobs and the opportunity to race at a convenient location for prize money; and (4) the fact that total racing time on a given day lasts 45-90 minutes and races only occur on approximately 20 Saturdays a year, the trial court's decision to allow the track to continue to operate within certain limits was not unreasonable, arbitrary, or unconscionable.

{¶6} Finally, the residents contend that the trial court's injunction lacks the specificity required by Civil Rule 65(D). We agree. An ordinary person reading the court's order could not ascertain exactly what obligation the owners have in regards to minimizing noise created by the racetrack. Accordingly, we reverse the trial court's

judgment in part and affirm it in part, and we remand this matter for further proceedings consistent with this opinion.

I. Facts

{¶7} After the lease expired for the property that Tony and Melissa Boetcher (the owners) used to operate their racetrack, 35 Raceway Park, the couple spent $80,000 to $100,000 to construct a new racetrack with the same name on a parcel of property in the vicinity of Roxabel, Ohio. Boetcher Motor Sports, Inc. ("BMS") operates this 1/5 mile oval dirt racetrack on unzoned land owned by BLB Enterprises, LLC ("BLB"). Melissa Boetcher owns BMS, and Tony Boetcher is president of the company. Mr. and Mrs. Boetcher own BLB.

{¶8} Eighteen residents living in the area near the new racetrack filed a declaratory judgment action against the Boetchers seeking a declaration that the racetrack constituted a nuisance and an injunction prohibiting its operation. The residents later amended their complaint to add BLB as a defendant, but they never made BMS a party to this suit.[1] Less than one month after the residents filed suit, R.A.P.'N 35 (an unincorporated association of racecar owners, drivers, and crew who utilized the racetrack) filed a motion seeking permission to intervene in the action. Over the residents' opposition, the trial court granted the motion. The matter proceeded to a bench trial where the residents contended that the noise, light, dust, and traffic generated by the racetrack constituted an absolute private nuisance. Although several witnesses testified at length during the trial, only an abbreviated summary of the evidence is necessary at this point.

[1] The trial court notes in its judgment entry that counsel did not question the fact that BMS had not been made a party to the suit, so the court did "not [consider] this to be a relevant fact."

{¶9} At trial, all of the testifying residents indicated that they moved to the area before the Boetchers built the racetrack. Many of the residents testified that on a scale of one to ten, with one being "trifling" and ten being "unbearable," the noise from the racetrack ranked as a nine or ten. A number of the residents also testified that they could not converse outside during the races without yelling and that they could not enjoy outdoor activities during races. Many of the residents testified that the racetrack noise interfered with their ability to watch television or sleep inside their homes. Several of the residents also complained about the lights from the racetrack. Although the lights were normally shut off by midnight on race days, the residents presented evidence that the lights had been on as late as 1:00 a.m. or 1:30 a.m.

{¶10} Mr. Boetcher admitted that he knew the residents opposed the racetrack before he began its construction. However, he feared that a delay in racing would cause him to lose the sponsors he secured when the racetrack was at its previous location. The Boetchers presented evidence that races occur on approximately 20 Saturdays a year and that total racing time for a night averages between 45 and 90 minutes. In 2006, races generally concluded at 10:19 p.m, with 11:51 p.m. being the latest time racing ended. Five classes of vehicles race at 35 Raceway Park, and Mr. Boetcher testified that to compete, a vehicle had to be equipped with a muffler that would limit sound from the vehicle to no more than 95 decibels at 100 feet. He also testified that employees at the track checked decibel levels during "hot laps," i.e. practice laps. He testified that if a vehicle loses its muffler after racing begins, the employees stop the race and eject the offending vehicle. In addition, Mr. Boetcher testified that he planted numerous trees around the track in an effort to cut down on

sound, to obscure the view of the track, and to minimize dust.

{¶11} At trial, the residents offered the expert testimony of Eric Zwerling, director of the Noise Technical Assistance Center at Rutgers University and president of Noise Consultancy, L.L.C. The owners presented the testimony of Angelo J. Campanella, Ph.D., P.E., an acoustical engineer and consultant, and Patrick McGrath, a public health sanitarian with the Columbus Health Department. All three experts conducted sound measurement tests in the vicinity of the racetrack to compare ambient sound levels, i.e. sound levels when racing was not occurring, to sound levels during racing.

{¶12} The experts related that normal conversations are usually conducted at 60 decibels and that decibel levels decrease over distance. During racing, the measurements taken from various locations near the track showed sound levels at times of 80 decibels. The parties stipulated that for three classes of vehicles at the racetrack, mufflers ranging from $21.00 to $35.00 kept noise levels below 75 decibels as measured from the property line of Ralph and Trudy Wollett. The Wolletts are the residents living closest to the racetrack at a distance of 187 yards from the racetrack fence. The parties agreed that no muffler currently available could reduce sound levels below 85 decibels at 100 feet.

{¶13} The court found that the noise and light from the racetrack constituted a qualified private nuisance but that the dust and traffic did not.[2] The court determined that the "only injunctive relief appropriate" concerning the sound was a requirement that all cars competing at the racetrack "utilize mufflers whose [sic] rating is the lowest decibel rating at 100 feet and are economically feasible." Given the amount of money racers invested in their vehicles, the court defined an "economically feasible" muffler as

[2] The residents do not challenge the trial court's findings on the dust and traffic.

one "costing $250 or less." The court also ordered that all lights at the racetrack be turned off by 11:45 p.m. After the court issued its judgment, the residents filed this appeal.

II. Assignments of Error

{¶14} The residents assign the following errors for our review:

> 1. The trial court erred in finding that the activity at the [r]acetrack was a "qualified private nuisance" instead of an "absolute nuisance."
>
> 2. The trial court erred in not finding that a permanent injunction was the appropriate remedy for the absolute liability of the appellees.
>
> 3. The trial court erred by permitting R.A.P. 'N 35 [sic] to intervene in the matter.
>
> 4. The trial court erred in considering evidence outside of the record after the trial testimony was concluded.
>
> 5. The injunction crafted by the trial court fails to comply with Civil Rule 65(D) in that it lacks specificity and is unenforceable.
>
> 6. The trial court erred in finding that Defendants' experts were more credible that [sic] Plaintiffs' expert.

For ease of analysis, we will address the residents' assignments of error out of order.

III. Type of Nuisance

{¶15} We recently set forth the law governing a private nuisance claim in *Ogle v. Ohio Power Co*., 180 Ohio App.3d 44, 2008-Ohio-7042, 903 N.E.2d 1284, at ¶7:

> As we and many other courts have previously noted, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 712, 622 N.E.2d 1153, quoting Prosser & Keeton, Law of Torts (5th Ed.1984) 616, Section 86. "Nuisance" is defined as "the wrongful invasion of a legal right or interest." *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 432, 28 O.O. 369, 55 N.E.2d 724. "Wrongful invasion" encompasses the use and enjoyment of property or of personal rights and privileges. Id. A "private nuisance" is "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Brown* at

> 712, 622 N.E.2d 1153, citing Restatement of the Law 2d, Torts (1979), 100, Section 821D. Unlike a public nuisance, a private nuisance threatens only one or few persons. *Taylor* at 442, 28 O.O. 369, 55 N.E.2d 724, citing *McFarlane v. Niagara Falls* (1928), 247 N.Y. 340, 160 N.E. 391. In order for a private nuisance to be actionable, the invasion must be either (1) intentional and unreasonable or (2) unintentional but caused by negligent, reckless, or abnormally dangerous conduct. *Brown* at 712-713, 622 N.E.2d 1153, citing Section 822 of Restatement of the Law 2d, Torts at 113-115.

{¶16} A private nuisance may be categorized as either an absolute or a qualified nuisance. *Brown* at 713. "An absolute nuisance, or nuisance per se, consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault." *Metzger v. Pennsylvania*, *Ohio & Detroit RR. Co.* (1946), 146 Ohio St. 406, 66 N.E.2d 203, at paragraph one of the syllabus. "A qualified nuisance, or nuisance dependent on negligence, consists of an act lawfully but so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another." Id. at paragraph two of the syllabus, following *Taylor*, supra.

{¶17} In their first assignment of error, the residents contend that the trial court erred when it found that the noise and light at the racetrack constituted a qualified private nuisance rather than an absolute private nuisance. The residents claim that the trial court erroneously perceived the difference between the types of nuisances to be based on the kind of interference, e.g. "pure noise" versus "relative noise." They argue that the nature of the defendant's conduct determines the type of nuisance, i.e. an absolute nuisance results from intentional conduct while a qualified nuisance results

from negligent conduct. The residents claim that because the Boetchers intentionally built and operated the racetrack, the noise and light generated by the track constitute an absolute nuisance. The residents argue that because the trial court incorrectly labeled the nuisance, it granted an injunction that "does virtually nothing" instead of permanently enjoining the commercial operation of the racetrack.

{¶18} Even if we were to assume, without deciding, that the trial court erroneously found that the racetrack constituted a qualified nuisance, any error was harmless. Ultimately, the trial court found that the noise and light from the racetrack constituted a nuisance. Regardless of the label placed on that nuisance, the trial court retained broad discretion in fashioning the terms of the injunction.[3] *Myers v. Wild Wilderness Raceway, L.L.C.*, 181 Ohio App.3d 221, 2009-Ohio-874, 908 N.E.2d 950, at ¶25, citing *D & J Co. v. Stuart* (2001), 146 Ohio App.3d 67, 80, 765 N.E.2d 368; *Restivo v. Fifth Third Bank of Northwestern Ohio, N.A.* (1996), 113 Ohio App.3d 516, 520, 681 N.E.2d 484; and *Cullen v. Milligan* (1992), 79 Ohio App.3d 138, 141, 606 N.E.2d 1061. In other words, even if the noise and light at the racetrack constituted an absolute nuisance, the court was not required to prohibit commercial operation of the track as the residents contend.

{¶19} "[E]quity requires that any injunction be narrowly tailored to prohibit only complained-of activities." *Myers* at ¶28, citing *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 224, 1994-Ohio-433, 626 N.E.2d 59; *Sharon Twp. Bd. of Trustees v. Crutchfield*, Medina App. No. 3286-M, 2002-Ohio-4747, at ¶23. After considering the

[3] Professor Dobbs suggests it is time to abandon the almost meaningless definitions and bewildering terminology "of the older decisions based upon contemporary rules that recognize negligent, intentional and strict liability nuisances." Dobbs, Law of Torts (2001), Nuisance, Section 462. He also suggests the term "absolute nuisance" is particularly deserving of extinction. We agree.

racetrack's social utility and effect on the surrounding neighborhood, the trial court specifically found that closing the racetrack would not be "appropriate or equitable" and that the terms of its injunction afforded the only "appropriate" relief. Simply calling the nuisance an "absolute nuisance" instead of a "qualified nuisance" does not alter these findings. And as we discuss in Section VII, the trial court did not abuse its discretion in determining the scope of the injunctive remedy. Accordingly, we overrule the residents' first assignment of error.

IV. Independent Judicial Fact-Finding

{¶20} In their fourth assignment of error, the residents contend that the trial court erred in conducting independent factual research on the internet after the trial testimony concluded. The Supreme Court of Ohio recently adopted a new Ohio Code of Judicial Conduct ("OCJC"), effective March 1, 2009. Rule 2.9(C) provides that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." The commentary in Comment 6 to the rule states that "[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." Thus, the current OCJC clearly prohibits a judge from using the internet to conduct an independent investigation of the facts in a matter before the court. However, this version of the OCJC was not in effect at the time the trial court issued its decision in this case, and the former OCJC had no provision comparable to Rule 2.9(C).

{¶21} Nonetheless, even if we were to assume that the trial court erred in conducting independent research of the facts of this case, a party waives any error that arises during the trial court proceedings if that party fails to bring the error to the court's

attention at a time when the trial court could avoid or correct the error. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, 679 N.E.2d 1099. Furthermore, "[i]n appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." Id. at syllabus.

{¶22} Here, the residents never objected to the trial court's independent research. In fact, the record shows that the residents actually consented to the court's consideration of its research. The court's decision states that it "considered, *with the consent of counsel*, information the court obtained from the internet * * *." (Emphasis added.) Moreover, while the residents attempt to argue that the substance of the court's research results remains secret, the court's decision states that it "utilized the internet and learned that in fact there were mufflers rated at 88 decibels per 100 feet available in the $100 price range for some additional classes that raced at the 35 Raceway Park." The court then "notified counsel of this fact and counsel agreed to inquire into this matter and agreed to conduct additional sound testing utilizing lower decibel mufflers * * *."

{¶23} The court's decision demonstrates that (1) the residents knew the substance of the court's research results; (2) the court did not simply rely on this information but rather relied on the parties to orchestrate additional scientific testing in light of the court's findings; and (3) the residents stipulated to the results of that testing. Thus, the residents fail to show how the trial court's conduct implicates the fairness,

integrity, or public reputation of the judicial process. Accordingly, we overrule their fourth assignment of error.

V. Permissive Intervention

{¶24} In their third assignment of error, the residents argue that the trial court abused its discretion by permitting R.A.P.'N 35 to intervene in this action. They contend that because of this error, the trial court improperly considered the association's interest in the continued commercial operation of the racetrack when the court determined the scope of the injunctive remedy. Although the residents correctly note that the trial court granted R.A.P.'N 35's motion based on Civ.R. 24(B)(2), they erroneously recite and apply the standard for intervention of right under Civ.R. 24(A) in their appellate brief. Civ.R. 24(B) governs permissive intervention and states:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

{¶25} This rule is "generally liberally construed in favor of intervention." *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 1995-Ohio-269, 656 N.E.2d 1277 (per curiam). Moreover, we review a trial court's decision to grant or deny a Civ.R. 24(B) motion for an abuse of discretion. *In re Adoption of T.B.S.*, Scioto App. No. 07CA3139, 2007-Ohio-3559, at ¶10. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶26} Even if we were to assume, without deciding, that the trial court erred in

permitting R.A.P.'N 35 to intervene in the action under Civ.R. 24(B)(2), that error was harmless. The residents acknowledge the fact that R.A.P.'N 35 did not actively participate at trial. The findings of the trial court that the residents argue constitute an improper basis for limiting the injunction's scope, i.e. that "at least for some types of racing conducted at the track, only one other track in Ohio, several hours away, is available for drivers" and that the drivers raced for "not insignificant purses" at the racetrack, are based on evidence the Boetchers themselves introduced.

{¶27} Moreover, the residents base their argument on the flawed premise that unless R.A.P.'N 35 properly intervened in the case, the trial court had no discretion to consider the association's interests in fashioning an equitable remedy. The residents argue that in *Myers*, supra, which involved a permanent injunction barring the commercial operation of a motocross raceway, this court did not "waste time" considering the interests of racers when it upheld the injunction. However, the raceway owners in *Myers* did not argue that any benefits it provided racers weighed in favor of a less restrictive injunction.

{¶28} Furthermore, benefits the racetrack provides its drivers, such as the opportunity to race in a convenient location for prize money, are unquestionably relevant to an inquiry on the usefulness of the racetrack's commercial operation. And given the trial court's broad discretion in fashioning the terms of an injunction, see *Myers* at ¶25, we cannot say that the court erred in considering the racetrack's social utility in determining the injunction's scope. Moreover, as we discuss in Section VII, the trial court did not abuse its discretion when it determined the scope of the injunctive remedy in this case. We overrule the residents' third assignment of error.

VI. Reliability of Expert Methodology

{¶29} In their sixth assignment of error, the residents contend that the trial court's finding that the methodology employed by their noise expert was less reliable than the methodology employed by the owners' experts was against the manifest weight of the evidence. Thus, they argue that the court improperly credited the testimony of the Boetchers' experts when it crafted its injunctive remedy. "We will not reverse a trial court's judgment as being against the manifest weight of the evidence as long as some competent, credible evidence supports it." *Amsbary v. Brumfield*, 177 Ohio App.3d 121, 2008-Ohio-3183, 894 N.E.2d 71, at ¶11, citing *Sec. Pacific Natl. Bank v. Roulette* (1986), 24 Ohio St.3d 17, 20, 492 N.E.2d 438; and *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578. Under this highly deferential standard of review, we do not decide whether we would have come to the same conclusion as the trial court. Id. Instead, we must uphold the judgment so long as the record contains "some evidence from which the trier of fact could have reached its ultimate factual conclusions." Id., citing *Bugg v. Fancher*, Highland App. No. 06CA12, 2007-Ohio-2019, at ¶9.

{¶30} The residents argue that in computing LEQ, i.e. average decibel levels during an interval of time, Zwerling used a shorter interval, which presents a more accurate picture of the sound's effect on the listener, than that used by the owners' experts. In addition, the residents argue that the Boetchers had the opportunity to manipulate their experts' measurements because they knew when McGrath would be testing and because Dr. Campanella did not staff his sound meters the entire time they were in place. The residents conclude that "it is inconceivable that the trial court found

[the Boetchers'] expert[s] more credible than Mr. Zwerling, considering [his] background, training and experience in community noise, as well as the methodology used to measure the sound."[4]

{¶31} However, as we explained in *State v. Murphy*, Ross App. No. 07CA2953, 2008-Ohio-1744, at ¶31:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. * * * Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

{¶32} The trial court found the methodology employed by the Boetchers' experts to be more reliable than that employed by Zwerling, and we will not substitute our judgment for that of the trial court under these circumstances. The evidence reasonably supports the trial court's conclusion that the Boetchers' experts utilized more reliable methods to measure the impact the racetrack had on sound levels in the community. For example, Zwerling testified that when he computed the LEQ for ambient sound levels in the area, he did not include the increased sound levels caused by the siren of an emergency vehicle. However, Dr. Campanella testified that noise from sirens should be measured when the noise is part of the ambient environment. Also, unlike Zwerling, Dr. Campanella placed one of his meters near a local road when measuring the ambient sound since the noise from vehicles on the road is normally present in the area.

{¶33} In addition, McGrath took ambient sound measurements on the same day he measured sound levels with racetrack activities, and his report indicates that "the

[4] The residents also state that "expert testimony is not necessary to establish that the volume of the noise rose to the level of a nuisance." They emphasize their own testimony regarding the impact the racetrack had on their lives and conclude that "[t]his is the kind of evidence that no expert witness can convey and is, in fact, sufficient to prove to the trier-of-fact that the raceway is a nuisance." We fail to see the relevance of this argument to the residents' complaint that the trial court erred in comparing the reliability of the methodology employed by the experts in this case.

weather throughout the day was sunny." Dr. Campanella began taking his ambient sound measurements the day after he measured sound levels with racetrack activities. In contrast, Zwerling measured ambient sound levels more than six months before he measured sound levels with racetrack activities and acknowledged that he measured ambient levels on a day when racing had been cancelled due to poor weather. Given Mr. Boetcher's testimony that he observed little outdoor activity on that day, which was cool and damp, the trial court could reasonably conclude that Zwerling's data did not give an accurate picture of the ambient sound levels in the area at a time when weather was conducive to racing.

{¶34} Thus, after reviewing the entire record, we conclude it contains some credible evidence to support the trial court's finding that the methodology of the owners' experts was more reliable than that of the residents' expert. Moreover, the trial court's reliability finding has questionable relevance to its determination of the scope of the injunction as the court recognized that all of the experts "appeared to place sound meters in locations that would render readings more favorable to their respective clients" and that "the methodology used by the experts for each side appear[ed] designed to favor the party utilizing that expert." We overrule the residents' sixth assignment of error.

VII. Scope of the Injunction

{¶35} Trial courts retain broad discretion to fashion the terms of an injunction. *Myers*, supra, at ¶25, citing *D & J Co.*, supra, at 80; *Restivo*, supra, at 520; and *Cullen*, supra, at 141. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or

arbitrary. *Adams*, supra, at 157. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181.

{¶36} "[E]quity requires that any injunction be narrowly tailored to prohibit only complained-of activities. *Myers* at ¶28, citing *Eastwood Mall*, supra, at 224; and *Sharon Twp. Bd. of Trustees*, supra, at ¶23. Here, the trial court considered both the (1) social utility of the racetrack and (2) the effect of the racetrack on the surrounding neighborhood. And after considering these issues, the court narrowly tailored an injunctive remedy that addresses the competing interests.

{¶37} However, in their second assignment of error, the residents complain that the trial court's injunction failed to adequately address the harm the racetrack caused. They argue that the trial court failed to give proper consideration to: (1) their "[a]bundant testimony" that the racetrack "destroyed the peace and tranquility of the area"; (2) the fact that they lived in the area before the Boetchers built the racetrack and that the Boetchers knew of opposition to the racetrack before its construction; and (3) evidence they presented of financial losses the Boetchers sustained in operating the racetrack and the fact that the Boetchers had a source of income outside the operation of the racetrack. The residents contend that if the trial court had give proper consideration to this evidence, it would have banned commercial operational of the racetrack instead of crafting an injunction that merely reduced noise and light from the racetrack.

{¶38} Although the fact that the residents did not "come to the nuisance" and that the Boetchers knew of opposition to the racetrack before they began construction are certainly relevant considerations in fashioning an equitable remedy, those facts do

not mandate an injunction banning the commercial operation of the racetrack. The trial court felt that the residents "exaggerated" the gravity of the harm the racetrack caused them and that "much of the [residents'] subjective testimony concerning noise [was] governed by their dislike of the race track [sic]." Most of the residents testified that on a scale of one to ten, with one being "trifling" and ten being "unbearable," the noise from the racetrack ranked as a nine or ten. A number of the residents testified that they could not converse outside during the races without yelling.

{¶39} However, in its judgment entry, the trial court considered the following evidence: (1) the Boetchers presented testimony of witnesses who lived near the racetrack, though not as close as the residents did, who were not bothered by the sound it created; (2) one witness testified that she sat on the porch at the Boetchers' home, which is the home closest to the racetrack, during racing and conducted a normal conversation without raising her voice; (3) a lieutenant and a deputy from the Ross County Sheriff's Office testified that they could converse in a normal tone when they provided services at the track; (4) resident Ralph Wollett interfered with Dr. Campanella's sound testing by placing a running riding lawnmower near a sound meter[5]; and (5) on viewing a tape in which resident David Walker is engaged in a conversation with resident David Sowers during racing, the court observed that neither party raised their voice during the conversation and that a four-wheeler one of the residents started was the loudest sound on the tape. In addition, the trial court noted that the total racing time for a night averaged between 45 and 90 minutes and occurred

[5] In their reply brief, the residents contend that this behavior lends credibility to the residents' claims as it shows Mr. Wollett was "so bothered by the noise from the track that he would turn to extreme measures and/or act somewhat irrationally." However, this behavior also supports the conclusion that Mr. Wollett sought to manipulate the sound testing results in an effort to exaggerate the residents' discomfort.

only on Saturday afternoons and evenings approximately 20 times per year.

{¶40} As to the utility of the racetrack, the residents presented evidence that the Boetchers had a source of income outside the racetrack and that BMS operated at a loss in several tax years, including 2005 – the last year represented in the income tax returns offered into evidence. However, Mr. Boetcher testified that he viewed the racetrack as an investment, not merely a recreational endeavor. The Boetchers invested $80,0000-$100,000 in constructing the track. Furthermore, BMS's tax returns indicate that the company made a profit of $6,212.33 in 2004, and Mr. Boetcher testified that he attributed the 2005 loss of $18,304.10 to the fact that he was not able to have a full racing season that year. In addition, the trial court's entry cites the following evidence demonstrating the utility of the racetrack's commercial operation: (1) the track employed 25-30 part-time employees; (2) for some types of racing at the track, only one other track in Ohio, several hours away, is available for drivers[6]; and (3) the prize money offered in races was "not insignificant," i.e. Mr. Boetcher testified that generally purses totaled $825-950 a night and that special races are sometimes conducted with larger purses.

{¶41} In determining that the noise and light from the racetrack constituted a nuisance, the trial court clearly recognized that the residents suffered some harm from the racetrack's activities. However, given the evidence that the residents exaggerated the degree of that harm and the evidence of the racetrack's utility, coupled with the fact that the racetrack only operates approximately 20 days of the year, we cannot say that the trial court's decision to not prohibit commercial operation of the racetrack was

[6] The residents attached maps to their appellate brief as exhibits in an attempt to discredit testimony of racecar drivers as to the location of this racetrack. However, these documents are not part of the record, so we may not consider them. See App.R. 9.

unreasonable, unconscionable, or arbitrary. Moreover, the terms of the trial court's injunction represent a reasonable attempt to balance the parties' competing interests and are narrowly tailored to restrict racetrack activities no more than necessary to prevent the harm the court felt the residents realistically suffered due to the lights and noise the racetrack generates.

{¶42} Before the trial court issued the injunction, the Boetchers permitted drivers at their track to race cars with mufflers that allowed the vehicles to emit as many as 95 decibels at 100 feet. The parties stipulated that for three classes of vehicles that race at the track, mufflers ranging from $21.00 to $35.00 kept noise levels below 75 decibels as measured from the property line of the Wolletts, who live 187 yards from the racetrack fence. The injunction allows racing to continue but imposes a stricter muffler requirement than the Boetchers imposed – racers must use a muffler with the lowest decibel rating at 100 feet, which may be less than the rating the Boetchers' require, if it is $250 or less – in an effort to reduce the noise intruding on the residents' solitude. Moreover, the injunction permits the Boetchers to have lighting to continue operating the racetrack in the evening but prevents the lights from invading the residents' homes into the early morning hours. Thus, we find that the trial court did not abuse its discretion in fashioning the terms of the injunction. Accordingly, we overrule the residents' second assignment of error.

VIII. Specificity of the Injunction

{¶43} Civ.R. 65(D) provides that "[e]very order granting an injunction * * * shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or

acts sought to be restrained * * *[.]" The Supreme Court of Ohio has held that to satisfy the rule's "form and scope" requirements, an injunction must be sufficiently specific that "an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 60, 556 N.E.2d 157, quoting 11 Wright & Miller, Federal Practice and Procedure (1973) 536-537, Section 2955. The key concept is that the order should provide the parties with adequate notice of what is expected. However, this Court had held that "specificity, not perfection, is required by Civ.R. 65(D). Only sufficient detail as to advise the defendants of the conduct which they are prohibited from engaging in is required. It is not necessary that every conceivable situation be covered in minute detail." *Mead Corp. v. Lane* (1988), 54 Ohio App.3d 59, 67, 560 N.E.2d 1319. But the injunction must be specific enough to permit the defendant to comply without fear of committing an unwilling violation and it must allow the plaintiff to monitor compliance and seek enforcement for violations.

{¶44} In their fifth assignment of error, the residents contend that the terms of the trial court's injunction related to the noise at the racetrack lack the specificity Civ.R. 65(D) requires. The residents argue that the injunction fails to limit track activity to its "traditional day" of Saturday, thereby permitting the Boetchers to operate the racetrack everyday of the week. We agree that the language of the injunction leaves the parties to guess about what restrictions, if any, the court has placed upon the frequency and total number of events that the Boetchers can conduct. The court should clarify its order.

{¶45} The residents also complain that the injunction provides them with no

mechanism to ensure the Boetchers are complying with the injunction's terms. However, nothing in the court's order prevents the residents from continuing to monitor noise from the racetrack on their own property. Moreover, the injunction's failure to provide for noise monitoring does not prevent the Boetchers from understanding "the conduct which they are prohibited from engaging in[.]"

{¶46} The residents also argue that the injunction fails to explain (1) whether the $250 muffler price point includes taxes or shipping and handling charges; (2) how changes in the cost of living or inflation impact this price point; (3) what happens if the Boetchers lack knowledge that an "economically feasible" muffler with a lower decibel rating than the muffler on a particular vehicle is available; (4) whether the Boetchers have a continuing obligation to ensure vehicle mufflers are updated in light of technological improvements; and (5) whether mufflers intended for one type of vehicle must be modified to fit a different type of vehicle if the modification would meet the terms of the injunction.

{¶47} We agree that the trial court's instruction that vehicles competing at the racetrack "utilize mufflers whose [sic] rating is the lowest decibel rating at 100 feet and are economically feasible[,]" i.e. $250 or less, lacks the specificity Civ.R. 65(D) requires. We acknowledge that the injunction need not cover every conceivable situation in "minute detail," e.g. whether mufflers must be modified or how inflation impacts the price point.

{¶48} However, the injunction does not instruct the Boetchers about whether the $250 price point represents the retail cost of a muffler, exclusive of taxes and other costs, which could make a significant difference in the decibel rating of mufflers used at

the track. In addition, it is foreseeable that technological advances may cause the muffler with the "lowest decibel rating at 100 feet" that is $250 or less to change over time, and the injunction provides the Boetchers with no instructions as to how their duties change in light of such advances. Perhaps the Boetchers should be required to prepare a list, prior to the first race of each calendar year, of mufflers that satisfy the court's noise limits for each class of vehicle and then conduct an inspection prior to each race to insure compliance by the drivers. In any event, we leave the details to the trial court. See, generally, Jost, From *Swift* to *Stotts* and Beyond: Modification of Injunctions in the Federal Courts (1985-1986), 64 Tex. L. Rev. 1101, 1161-1162, fn. 361 ("Many of the perplexities faced by courts contemplating modification [of an injunction] could be alleviated by careful drafting at the time of the entry of the initial court order or consent decree. * * * To the extent future contingencies can be foreseen, decrees should address the question of whether and in what respect the eventuation of such contingencies would support modification."). Because the injunction lacks the specificity Civ.R. 65(D) requires in these regards, we sustain the residents' fifth assignment of error.

IX. Conclusion

{¶49} We overrule the residents' first, second, third, fourth, and sixth assignments of error. We sustain the residents' fifth assignment of error and remand this cause to the trial court for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellants and Appellees shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.