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CASE NUMBER: 2008-SU-3249-01

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IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
FAMILY DIVISION

RALPH GILBERT, ET AL., Plaintiffs	:	No. 2008-SU-3249-01
v.	:	
SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS, and STEVE TROYER, Defendants	:	Motion for Summary Judgment

APPEARANCES:

For the Plaintiffs:	George A. Weber, III, Esquire John E. Kotsatos, Esquire
For Defendants Synagro:	Neil A. Slenker, Esquire
For Defendants Hilltop Farms and Phillips:	Curtis N. Stambaugh, Esquire
For Defendant Troyer:	David R. Breschi, Esquire

OPINION

This matter is before the Court on the Joint Motion for Summary Judgment of Defendants Synagro Central, LLC, Synagro Mid-Atlantic, George Phillips, Hilltop Farms, and Steve Troyer. For the reasons set forth herein, Defendants' Motion is **GRANTED**.

FACTUAL and PROCEDURAL HISTORY

The thirty-seven (37)[1] named Plaintiffs own or have resided at properties located in New Freedom, York County, Pennsylvania. The Plaintiffs' various properties are

[1] Thirty-five Plaintiffs are named in the Gilbert complaint, filed at 2008-SU-3249-01. Two additional plaintiffs are named in the Jasinski complaint, at 2008-SU-3327-01.

located adjacent to or near Defendant Hilltop Farms (herein "Farm"), a 220-acre farm business owned and operated by Defendant George Phillips (herein "Phillips"). Defendants Synagro Central, LLC and Synagro Mid-Atlantic (herein collectively "Synagro") are Delaware corporations, with their principal places of business in Maryland. Synagro recycles biosolids for public agencies for land application and has engaged in this business within the Commonwealth of Pennsylvania. Defendant Steve Troyer (herein "Troyer") leased and worked the Farm during 2007. Plaintiffs allege that the Defendants engaged in a combination of activities at or near the Farm during 2007, including farm operations, and hauling, spreading and applying "sewer sludge."[2]

Plaintiffs allege that sludge is "the solid by-product of sewage treatment," received from "homes, . . . street runoff, industry and other sources including hospitals and medical facilities." Complaint ¶¶43, 52. It contains various bacteria, viruses, pathogens, prescription drug products and pharmaceutical compounds, pesticides, thousands of synthetic and industrial chemicals, waste, heavy metals, and toxic runoff, and the sludge treatment process often raises the pH to a level where it is irritating to skin, nose, throat and lungs. *Id.* ¶¶ 53-57. Plaintiffs also allege that the sludge has an extremely offensive odor that "can burn and irritate the lungs, eyes throat, nose and skin," which "gives offense to the senses, endangers life and health, violates the laws of decency and obstructs the reasonable and comfortable use of property." *Id.* ¶¶ 63; 66. Plaintiffs claim that Defendants' sludge

[2] The parties dispute the substance applied to the land. Plaintiffs allege "sewer sludge" as described in the next paragraph. Defendants contend Plaintiff's definition is incomplete and inaccurate, and therefore Plaintiff's

activities have interfered with their right to the use and enjoyment of their properties and homes and that they have suffered various medical problems as a result of exposure from the Defendants' conduct of the sludge activities at the Farm site beginning in mid July 2007. *Id.* ¶¶ 88-378.

On July 3, 2008, and July 10, 2008,[3] the Plaintiffs filed similar three-count complaints in the respective actions. On November 25, 2008, Synagro filed Motion for Consolidation of Actions, which this Court granted on December 1, 2008. On July 12, 2010, Plaintiffs filed a third Motion for Leave to File Amended Complaint, which this Court granted on July 20, 2012. On July 23, 2010, Plaintiffs filed a joint Amended Complaint, which alleged three counts. In Count I, Plaintiffs allege that Defendants' activities and omissions have resulted in offensive conditions and created a health hazard for those living on the adjoining properties, in the nature of a private nuisance. In Count II, Plaintiffs allege that Defendants have acted negligently in that Plaintiffs have been harmed by Defendants' biosolids activities, when Defendants failed in their duty to properly handle and dispose of the biosolids, despite that they knew of and could have avoided the potential harm. In Count III, Plaintiffs allege that Defendants' activities constitute a trespass onto their land. Plaintiffs seek an injunction that modifies Defendants' conduct so that the injurious conditions do not continue, compensatory and punitive damages as to each count, and counsel fees and other costs.

Complaint mischaracterizes what Defendants call "biosolids."

[3] The Gilbert plaintiffs filed their Complaint on July 3, 2008. The Jasinski plaintiffs filed on July 10, 2008. All

On July 25, 2011, Defendants filed a Joint Motion for Summary Judgment and a brief in support thereof. Plaintiffs filed a Response in Opposition to Defendants' Motion for Summary Judgment on August 15, 2011. On August 22, 2011, Defendants filed a Reply Brief in Support of the Motion for Summary Judgment, and on October 14, 2011, this court denied Defendants' Joint Motion for Summary Judgment.

On July 2, 2012, Defendants filed a second Joint Motion for Summary Judgment and a brief in support thereof. On July 19, 2012, Plaintiffs filed Response in Opposition to Defendant's Joint Motion for Summary Judgment and Brief in Support of Plaintiffs' Response in Opposition. On July 24, 2012, Defendants filed Reply Brief in Support of Defendants' Joint Motion for Summary Judgment. On July 24, 2012, Defendants praeciped to list the Joint Motion for Summary Judgment and requested oral argument. On August 1, 2012, the matter was assigned to this court.[4]

On October 19, 2012, the Pennsylvania Department of Environmental Protection (herein "DEP") filed a Motion to File Brief of Amicus Curiae In Support of Defendants' Motion for Summary Judgment. On October 22, 2012, the Pennsylvania Attorney General's Office (herein "Attorney General") and the Pennsylvania Department of Agriculture (herein "Department") filed Joint Motion for Leave to File a Joint Statement of Joinder in the Amicus Curiae Brief of DEP. On October 31, 2012, Plaintiffs filed Response

other dates are the same for both sets of plaintiffs.

[4] After the matter was assigned to this court, Defendants praeciped to Designate Withdrawal Paragraphs 19 and 28 from the Joint Motion for Summary Judgment, Sections V(C)(4) and V(F)(3) from the Brief in Support of the Motion, and Section II(H) of Reply Brief in Support of the Motion.

in Opposition to Joint Motion of the Attorney General and Department for Leave to File Joint Statement of Joinder in the Amicus Curiae Brief of DEP, and on November 1, 2012, filed Response in Opposition to DEP's Motion to File Brief of Amicus Curiae. On November 5, 2012, Defendants filed Joint Reply in Support of the Commonwealth Agencies Participation as Amici Curiae. On November 8, 2012, the Attorney General and Department filed Joint Reply Brief In Opposition to Plaintiffs' Response.

On November 13, 2012, this Court granted both DEP's Motion for Leave to File Amicus Curiae Brief and the Attorney General and Department's Joint Motion for Leave to File Joint Statement of Joinder. On November 19, 2012, the Attorney General and Department filed Joint Statement of Joinder In the Brief of Amicus Curiae of DEP in Support of Defendants' Motion for Summary Judgment, and on November 20, 2012, DEP filed its Brief of Amicus Curiae In Support of Defendants' Motion for Summary Judgment. On November 28, 2012, Plaintiffs filed Brief In Opposition to DEP's Brief of Amicus Curiae. On December 5, 2012, this Court heard oral argument on the Defendants' Joint Motion for Summary Judgment.

DISCUSSION

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Gutteridge v. A. P. Green Services, Inc.*, 804 A.2d 643, 651 (Pa.Super. 2002);

see also Pa.R.C.P. No. 1035.2. In reviewing a case for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Staiano v. Johns Manville Corp.*, 304 Pa. Super. 280, 288, 450 A.2d 681, 685 (1982) (quoting Pa. R.C.P. 1035). "'A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense.'" *Basile v. H & R Block, Inc.*, 777 A.2d 95, 99 (Pa.Super. 2001) (quoting *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 940 (Pa.Super. 1998)).

An adverse party need not file a formal response to a motion for summary judgment, and Pennsylvania Rule of Civil Procedure 1035 contains no provisions for any action by the adverse party except the filing of affidavits in opposition, if he wishes. In *Knecht v. Citizens and Northern Bank*, the Superior Court affirmed that the "mere failure to file counter-affidavits does not assure that summary judgment will be granted to the moving party. The moving party's evidence must clearly exclude any genuine issue of material fact." 364 Pa.Super. 370, 376, 528 A.2d 203, 206 (1987) (quoting *Aimco Imports v. Industrial Valley Bank, etc.*, 291 Pa.Super. 233, 237, 435 A.2d 884, 886 (1981)). However, where the moving party has presented supporting evidence, "the non-moving party must 'go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"

U.S. v. Hemmons, 774 F.Supp. 346, 349 (E.D.Pa. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986)).

Therefore, the failure to file countervailing affidavits may constitute an admission of facts, even though the failure to file an answer to a motion for summary judgment or an affidavit in response thereto does not constitute a waiver of the issues necessary to decide the motion for summary judgment. *See Moore v. Gates*, 398 Pa.Super. 211, 214, 580 A.2d 1138 (1990). In addition, the failure to file a counter-affidavit requires the court to ignore controverted facts appearing only in the pleadings, and to restrict its review to material filed in support of and in opposition to a motion for summary judgment, and to all uncontroverted facts contained in the pleadings and affidavits. *See Atkinson v. Haug*, 424 Pa.Super. 406, 411, 622 A.2d 983 (1993). *See also Hibbs v. Chester-Upland School District, et al.*, 146 Pa.Cmwlth. 556, 606 A.2d 629 (1992). However, before this Court can enter a judgment in favor of the Defendants, the evidentiary record must establish that the Defendants are entitled to judgment as a matter of law and that there is no genuine issue of any material fact.

A. Private Nuisance and the Right to Farm Act

Defendants posit three arguments against Plaintiff's first cause of action, private nuisance. First, Defendants argue that Plaintiffs' case is barred by the Right to Farm Act's (herein "RTFA") statute of repose, 3 P.S. § 954. Second, Defendants contend that if not time barred, the nuisance claim still fails because application of biosolids was approved

and closely regulated. Third, Defendants maintain that Plaintiffs cannot satisfy the elements of nuisance.

Defendants argue Plaintiff's claims are barred under the Right to Farm Act's statute of repose, 3 P.S. § 954(a). Defendants aver that the Farm began using biosolids as fertilizer in March 2006, but Plaintiffs did not file suit until July 2008, which was beyond the one year statute of repose. Quoting the language from the RTFA, Defendants contend that the application of biosolids as fertilizer is an agricultural practice that has been well-established as "normal agricultural operation" in Pennsylvania, and this application has existed "without substantial change" at the Farm since March 2006. Therefore, Defendants contend that this Court lacks jurisdiction over the claim because the Complaint was filed nearly two years after the activity began. In support their argument, Defendants cite *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. 1999).

Plaintiffs contend the RTFA does not apply because: (1) the practice of using sewer sludge did not exist at the time the Farm began operations in 1986; (2) the use of sewer sludge constitutes a substantial change to the fertilization practices at the Farm; (3) it is disputed whether the application of biosolids is a normal agricultural operation, and so Defendants cannot invoke the RTFA based solely on their assertion that it is; and (4) Defendants have violated state law. Plaintiffs principally argue that the RTFA's statute of repose means that the one year limitation runs from the establishment of the agricultural

operation, or in other words, from the establishment of the farm itself, and not from the commencement of the various activities on the farm.

The RTFA was enacted to protect agricultural land and operations from the encroachment of nonagricultural uses and nuisance suits. *See* 3 P.S. § 951; *accord Horne*, *supra*, 728 A.2d at 956 (holding that the RTFA does not prohibit nuisance actions, but that the nuisance action must either be filed within one year or be based upon a violation of law). Specifically, the RTFA provides:

> (a) No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations are substantially expanded or substantially altered and the expanded or substantially altered facility has either: (1) been in operation for one year or more prior to the date of bringing such action, or (2) been addressed in a nutrient management plan … and is otherwise in compliance therewith: …
>
> (b) The provisions of this section shall not affect or defeat the right of any person, firm or corporation to recover damages for any injuries or damages sustained by them on account of any agricultural operation or any portion of an agricultural operation which is conducted in violation of any Federal, State or local statute or governmental regulation which applies to that agricultural operation or portion thereof.

3 P.S. § 954.

In the case at bar, there are three main issues around the RTFA's statute of repose: (1) whether the land application of biosolids is a "normal agricultural operation" pursuant to Section 954(a); (2) whether Plaintiffs are time barred to bring a nuisance claim

under Section 954(a); and (3) whether Defendants' conduct was unlawful as such to allow Plaintiffs to recover under Section 954(b). We will address each of these issues separately.

1. Normal Agricultural Operations

As discussed in our prior Opinion and Order, dated October 14, 2011, at issue is whether the application of biosolids as fertilizer constitutes a normal agricultural operation. Defined by the RTFA, "normal agricultural operations" includes:

> The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities. . . . The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry.

3 P.S. § 952. Yet, the Right to Farm Act does not elucidate what may comprise "activities, practices, equipment and procedures." *See Com., Office of Atty. Gen. ex rel. Corbett v. East Brunswick Twp.*, 956 A.2d 1100, 1114 (Pa.Cmwlth. 2008) (finding that the RTFA does not elaborate on this definition and noting that the case lacked an evidentiary record, and therefore, the court could not determine if sewer sludge application met the definition).

In response to our prior Opinion, which found that the record lacked evidence to show that the land application of biosolids was a normal agricultural operation pursuant to the RTFA, Defendants provided additional information and multiple exhibits. Citing DEP statistics, Defendants aver that in the past 20 years, DEP has permitted approximately 1,500

sites, including farms, for the application of biosolids, and more than 700 of those sites had active permits as of 2010. Defendants further aver that DEP's statistics show that more than 70 sites in York County have been approved in the past 15 years. In support, Defendants cite to state laws and regulations that govern this practice. Furthermore, DEP, who regulates biosolids pursuant to the Pennsylvania Solid Waste Management Act, 35 P.S. §§ 6108.101 – 6108.1003 (herein "SWMA"), provided additional information on the land application biosolids program in its Amicus Brief, including facts, statistics, and the permit process.

Plaintiffs contend that material issues of dispute fact remain on this issue, and therefore, summary judgment cannot be granted. Plaintiffs maintain that significant evidence exists, including affidavits, that disposal of sewage sludge is not a normal agricultural operation. Plaintiffs posit this is demonstrated also by Defendants' failure to limit or control the amount of odors and flies that the method of applying sewer sludge generated. Furthermore, Plaintiffs argue that the statistics cited by Defendants fail to support the argument because 700 farms only amount to about 1% of the farms in Pennsylvania, which Plaintiffs state totaled over 50,000 in 2002.

When reviewing the plain language of the definition, we first note the definition is silent as to numbers. The definition makes no indication that a certain percentage of farms or acres must be used in order to constitute "normal." While the United States Department of Agriculture ("USDA") found that as of 2007 Pennsylvania had 63,163 farms constituting 7,809,244 acres, these statistics included cropland, woodland, and land

with livestock and poultry. *See* USDA, 2007 Census of Agriculture: Pennsylvania State and County Data Vol. 1 Part 38, 314 (2009).[5] Furthermore, the definition of farm as used by the USDA is "any place from which $1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year." *Id.* at VII, Introduction. Thus, the fact that the Commonwealth has over 60,000 farms can be misleading when we consider the variety of products produced which may constitute a "farm." Therefore, to find that biosolids are not a normal agricultural operation simply based on the fact that the 700 sites only constituted 1% of total farms goes beyond the plain language of the definition, as well as the intent of the RTFA.

In addition to its silence on numbers, the definition also states that "the term includes *new* activities, practices, equipment and procedures *consistent with technological development* within the agricultural industry." *See* 3 P.S. § 952. Defendants have provided data that show biosolids have been in use in Pennsylvania for over 20 years. Information provided by DEP states that the United States Environmental Protection Agency developed regulations on biosolids in 1993. Brief of Amicus Curiae, Ex. B at 5; *accord*, 40 C.F.R. §§ 503.1-503.18 (Part 503 Standards for the Use or Disposal of Sewer Sludge, Subchapter O Sewer Sludge, established in 1993). *See also* 25 Pa.Code §§ 271.901-271.933 (Subchapter J Beneficial Use of Sewer Sludge by Land Application, established in 1997). Furthermore, DEP's regulation defines "normal farming operations" to include using waste to improve

[5] *Available at* http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_State_Level/Pennsylvania

soil. 25 Pa.Code § 271.1. *See also Hempfield Twp. v. Hapchuk*, 153 Pa.Cmwlth. 173, 180, 620 A.2d 668, 672 (1993) (finding that the application of sewer sludge is a farming and agricultural use).

Based on the evidence that has been provided by Defendants and the Amici, we find that Defendant has established an evidentiary record to show the land application of biosolids is a program that has been acknowledged and addressed by both the United States government and the government of the Commonwealth. Therefore, we find that the land application of biosolids does constitute an activity or practice that has been adopted or used by farmers, and is consistent with technological development, and accordingly, meets the RTFA's definition of a "normal agricultural operation."

2. One-Year Time Limit

Having established that the land application of biosolids is a normal agricultural operation, we next consider whether Plaintiffs are time barred, pursuant Section 954(a), to bring a nuisance action against Defendants.[6]

Defendants argue that Plaintiffs are time barred under Section 954(a). Defendant state that they began the land application of biosolids at the Farm in March 2006, but Plaintiffs did not file their action until 2008. Defendants aver that when the Complaint was filed, forty-three land applications of biosolids had been applied to the Farm, and more than twenty had been applied prior to the July 2007 date upon which Plaintiffs focus their

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[6] The Oral Arguments, heard by this Court on December 5, 2012, predominantly focused on this issue.

allegations. Defendants interpret the statute to mean that because Plaintiffs brought the action more than one year after the conditions complained of have existed substantially unchanged since the established date of operation, then Plaintiffs are barred. Defendants also contend that the land application of biosolids did not change in any manner after it started in March 2006.

In the alternative, Defendants posit that the introduction of land application of biosolids does not even constitute a "substantial change" because the Farm had used various other organic fertilizers. Because no other Pennsylvania case had constituted a change from one organic manure fertilizer type to another, Defendants argue that using biosolids does not constitute a substantial change. Consequently, Defendants reason that Plaintiffs are time barred pursuant to the RTFA's statute of repose either way, because the Farm has been in operation under Defendant Phillips since 1986, the land application of biosolids began in March 2006, and the Plaintiffs did not file until 2008.

Plaintiffs contend that Defendants have mis-interpreted the RTFA's statute of repose. First, Plaintiffs argue that the first clause, "which has lawfully been in operation for one year or more prior to the date of bringing such action," only bars nuisance claims that are brought more than one year after "an agricultural operation" has been in operation. Plaintiffs state that "agricultural operation" is distinct and different from "normal agricultural operations." Whereas "normal agricultural operations" is defined by the RTFA, Plaintiffs argue that "agricultural operation," which is not specifically defined, refers to a farm as a

whole, "the (singular) plot of land on which the farm is situated and which is fixed and immovable." *See* Plaintiff's Brief at 25-26.

Second, Plaintiffs suggest that the clause "established date of operation" refers back to its antecedent "agricultural operation," instead of applying to "normal agricultural operations," which follows the clause. Plaintiffs contend their interpretation is the most natural and logical and follows proper statutory construction rules, because it means that the "established date of operation" refers to when the farm began operating. As a result, Plaintiffs argue the clause "where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation" means the conditions complained of, the application of sewer sludge, has not existed unchanged since 1986, but began in 2006, twenty years after the Farm's "established date of operation."

Additionally, Plaintiffs claim that their interpretation is supported by the clause that begins "if the physical facilities of such agricultural operations." Plaintiffs argue this clause provides that the bar applies if the expanded or altered facilities have "been in operation for one year or more prior to the date of bringing such action." Plaintiffs contend that this phrase is identical to the phrase modifying "an agricultural operation," and therefore, confirms the legislative intent to make an "established date of operation" applicable only to immovable land or structures, and not to movable farm equipment or operational practices.

Thus, Plaintiffs argue that this statute does not provide immunity to "normal agricultural operations" that did not exist or have otherwise substantially changed since the farm began operation, even if that "normal agricultural operation" has been occurring for more than one year. Consequently, Plaintiffs reason that the RTFA does not apply here because the land disposal of sewer sludge in 2006 did not exist when the farm began in 1986. To interpret otherwise, Plaintiffs argue would make the "substantially unchanged" clause superfluous.

When determining the meaning of a statute, the Pennsylvania Supreme Court has long instructed that "the intention and meaning of the legislature must primarily be determined from the language of the statute itself, and not from conjectures aliunde." *Farmers-Kissinger Market House Co. v. City of Reading*, 310 Pa. 493, 498, 165 A. 398, 400 (1933) (internal citations omitted); *accord Appeal of Biddle*, 390 Pa. 460, 135 A.2d 915 (1957); *Commw. ex rel. Cartwright v. Cartwright*, 350 Pa. 638, 40 A.2d 30 (1944); *Reitz v. Sinking Fund Comm'n of Jefferson Cnty.*, 315 Pa. 87, 172 A. 292 (1934). Therefore, if the language is plain and unambiguous and conveys a clear and definite meaning, then "the statute must be given its plain and obvious meaning." *Id.* Accordingly, words that are plainly not in the statute should not be inserted, language should not be ignored to render any portion unnecessary, and the statute must be construed to give effect to all of the provisions. *Frazier v. W.C.A.B. (Bayada Nurses, Inc.)*, 52 A.3d 241, 245 (Pa. 2012) (internal citations

omitted). Furthermore, the presumption is "that the General Assembly did not intend an absurd or unreasonable result." *Id.*

In reading Section 954, we first review General Assembly's explicit intent in enacting the RFTA, which states "[i]t is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources *by limiting the circumstances* under which agricultural operations may be the subject matter of nuisance suits and ordinances." 3 P.S. § 951 (emphasis added). Correspondingly, Section 954(a) provides a defense to agricultural operations, or "farms," against nuisance actions. However, in order for the farm to use this defense, the farm must meet certain conditions. The farm must have been lawfully working, for a year or more prior to the date of the action either in a substantially unchanged manner, or if it had expanded or substantially altered, the farm must have an approved nutrient management plan for that expansion. *See* 3 P.S. § 954(a).

In *Horne v. Haladay*, 728 A.2d 954 (Pa.Super. 1999), plaintiff set forth a private nuisance claim and negligence claim against defendants and their poultry business in November 1995. *Id.* at 955. Plaintiff alleged that the poultry business interfered with his use and enjoyment of his property because it created an excessive number of flies and noise, emanated a strong odor, and spread eggshells, feather and dead chickens which plaintiff would find on his property, and defendants failed to take reasonable steps to control these issues. *Id.* On a motion for summary judgment, the trial court found that the private nuisance claim was barred by Section 954(a). *Id.* at 956. On appeal, the Superior Court

reviewed Section 954(a) against the facts that defendants had begun their poultry operation in November 1993, when the poultry house was stocked with 122,000 hens, and then built a decomposition building for waste in August 1994. *Id.* at 955.

The Court found the action was time barred because "[defendant]s' poultry house was lawfully in operation in a *substantially unchanged* manner for more than one year prior to the date on which [plaintiff] filed his nuisance suit." *Id.* The Court noted that they ruled "the construction ... of the decomposition house was a substantial change in the[] poultry operation *sufficient to start the one-year limitations period anew*." *Id.* at 957, n.1 (emphasis added). However, the Court emphasized that the later date was chosen only to benefit plaintiff because the end result was the same *Id.* However, the Court did not specifically find that the construction of the decomposition house was a substantial change, only that it might be considered as such. *Id.* at 956.

In the case at bar, we agree with Plaintiffs that "agricultural operation" refers to the entire farm and is distinct from "normal agricultural operations." Furthermore, we agree with Plaintiffs that the clause "established date of operation" means when the agricultural operation, or farm, began, which is supported by *Horne*. However, Plaintiffs would have us interpret the rest of the statute to mean that the date that the farm began establishes what "activities, practices, equipment and procedures" the farm could use throughout the rest of the farm's tenure. This interpretation is clearly erroneous and would result in absurd or unreasonable standards. Under Plaintiffs' interpretation, for example, a

farm established in the 1950s would be restricted to the "activities, practices, equipment and procedures," or normal agricultural operations, that it used in the 1950s, and any change that farm made today would constitute a "substantial change." Thus, if the farm used an oxen team and plow in 1950 and sought to buy a 2012 model tractor, then the farm would be open to nuisance suits from neighbors who might complain about the noise difference and that farm could not use Section 954(a) as a defense. Based on the purpose of the RTFA and the plain language of Section 954(a), we cannot find that this is a reasonable interpretation.

Using the plain language as analyzed above in conjunction with the reasoning in *Horne*, we first review the significant dates: (1) 1986, when the Farm began under Defendant Phillips; (2) March 2006, when the land application of biosolids began; and (3) July 2008, when Plaintiffs filed their Complaint.[7] First, there is no dispute that the Farm has been lawfully working for a year or more prior to the date of the action because the Farm began more than twenty years prior to this suit. Then, as analyzed above, the land application of biosolids is a "normal agricultural operation." Thus, the issue hinges whether the Farm operated in a substantially unchanged manner since its inception in 1986, or in other words, whether biosolids, or "sewer sludge," which agricultural operations use as fertilizer, constitutes a "substantial change."

Substantial is defined as "large in size, value, or importance." *Substantial Definition*, Cambridge Dictionaries Online,

[7] Plaintiffs may argue that July of 2007 is significant because that is the date when Plaintiffs allege their problems began. However, neither the plain language of the statute, nor the Superior Court's decision in *Horne*

http://dictionary.cambridge.org/dictionary/american-english/substantial?q=substantial (last visited Dec. 18, 2012). During oral argument, neither party disputed that for centuries farms have used various types of fertilizers, both organic and chemical. Biosolids are defined as "those wastewater solids that have been treated to produce fertilizers or soil amendments." *See* DEP, Understanding Biosolids Land Application In the Community Fact Sheet, 3800-FS-DEP2649 (2012), *available at* http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-89306/3800-FS-DEP2649.pdf. Thus, biosolids are a type of organic fertilizer, and Defendants averred to using biosolids as fertilizer for corn, wheat and soybeans. For that reason, like the *Horne* Court could not find that the decomposition house was a substantial change to a poultry operation, we cannot find that the use of biosolids as a fertilizer is a substantial change to an agricultural operation.[8] Therefore, we find that Plaintiffs are barred under 3 P.S. § 954(a) from bringing this nuisance action against Defendants.

3. Legal or Regulatory Violations

In the alternative, Plaintiffs argue in their opposition to the motion that Defendants' conduct was unlawful. Therefore, Plaintiffs contend that pursuant to Section 954(b), the RTFA exception in Section 954(a), discussed above, does not apply when the conduct was unlawful. The violations mentioned by Plaintiffs include three Notices of Violations issued by DEP, and a violation of SWMA. Plaintiffs further argue that "[t]here is

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v. Haladay, 728 A.2d 954 (Pa.Super. 1999), support this argument.

[8] Even if we had found that the land application of biosolids was a substantial change, Plaintiffs would be time barred under Section 954(a) because Defendants began using biosolids in March of 2006, which pursuant to *Horne* would start the one-year limitations period anew, *see* 728 A.2d at 957, n.1, but Plaintiffs did not file their

no requirement that the violations be directly related to the nuisance complained of." *See* Brief in Opposition, at 39.

Defendants admitted to receiving three Notices of Violations. Defendants averred in their brief in support that on two occasions, March 2006 and April 2009,[9] the biosolids were spread beyond the target areas; however, Defendants contend that they took immediate and appropriate responsive actions to correct the violation. The third notice was issued in June 2007 for tilling a field too soon after the application of the biosolids.

We first note that Plaintiffs' Complaint does not contain any averments that the injuries alleged were a result of Defendants' conduct violating any Federal, State or local statute or governmental regulation pursuant to Section 954(b). Plaintiffs' three causes of action – nuisance, negligence, and trespass – all sound solely in common law tort. Plaintiffs only discussed a potential violation in their Response in Opposition to Defendants' [First] Motion for Summary Judgment, filed on August 15, 2011, and their Response In Opposition to Defendants' [Second] Joint Motion for Summary Judgment and Brief In Support of Plaintiffs' Opposition. *See* [First] Response at 27, § 3(6); Response at 11-12, ¶ 14; and Brief at 39, § 2(E).

In reviewing Plaintiffs' argument, we disagree that Section 954(b) lacks a requirement that the violations be directly related to the nuisance. The plain language of Section 954(b) states that "to recover damages for any injuries or damages sustained by [any

Complaint until July of 2008, more than two years after the "substantial change" would have begun.
[9] Defendants noted that the April 2009 violation occurred after Plaintiffs filed this case.

person] *on account of* any agricultural operation … which is *conducted in violation* of any Federal, State or local statute or governmental regulation." 3 P.S. § 954(b) (emphasis added). The Pennsylvania Supreme Court has long held that "[t]he object of statutory construction is to ascertain and effectuate the General Assembly's intent. The plain language of a statute is, as a general rule, the best indicator of such legislative intent." *Mercury Trucking, Inc. v. Pa. Public Utility Com'n*, --- A.3d ----, 2012 WL 5871299, at *9 (Pa. 2012) (referring to *Bd. of Revision of Taxes v. City of Philly*, 607 Pa. 104, 4 A.3d 610, 622 and 1 Pa.C.S. § 1921(a)).

The Court continued by stating that the plain language rule must be balanced against the presumption "that the General Assembly 'does not intend a result that is absurd, impossible of execution, or unreasonable.'" *Id.* (citing *Com. v. Shiffler*, 583 Pa. 478, 879 A.2d 185, 189–90 (2005) and referring to 1 Pa.C.S. § 1922(1), (2)). To discern legislative intent if the words are unclear or ambiguous, then other considerations include:

> [T]he occasion and necessity for the statute; the circumstances under which the statute was enacted; the mischief to be remedied; the object to be attained; the consequences of a particular interpretation; the contemporaneous legislative history; and the legislative and administrative interpretations of such statute.

Id. at *10 (citing 1 Pa.C.S. § 1921(c)).

The Superior Court in *Horne* held that subsection (b) provides that "[plaintiffs] must *base their suit* upon a violation of any Federal, State or local statute or regulation, as provided by § 954(b) of the Act." 728 A.2d at 956. The Superior Court's interpretation of subsection (b) indicates that a plaintiff must demonstrate a causal

relationship between the injuries alleged and the violation of law or regulation. This is supported by the plain language of subsection (b) which includes the phrase "on account of" as a connector between the alleged injuries and the violations.

To accept Plaintiffs' contention that the nuisance does not have to be related to a violation would negate subsection (a)'s exception and expose farmers to a potential deluge of litigation, which would render the purpose and protections of the RTFA useless. Therefore, this Court finds that Plaintiffs must allege a causation between the violations and alleged injuries. In reviewing the Complaint and subsequent pleadings, we find that Plaintiffs have failed to aver that the spreading of biosolids beyond a target area and the tilling of a field too early resulted in any injury. Therefore, we do not find the three Notice of Violations or the alleged SWMA violation meet the standard required in Section 954(b).

Moreover, we find that Plaintiffs' argument of alleged SWMA violations is inapplicable here. The purpose of SWMA was to create a program to correct "*improper and inadequate* solid waste practices [that] create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare." 35 P.S. § 6018.102 (emphasis added). SWMA further authorizes DEP to issue general permits to "encourage the beneficial use or processing of municipal waste or residual waste." 35 P.S. § 6018.104(18). And as mentioned above, the regulations governing the program have been in effect since 1997. *See* Subchapter J Beneficial Use of Sewage Sludge by Land Application, 25 Pa.Code §§ 271.901-271.933.

In the case at bar, the record clearly indicates that Defendants had a permit from DEP for the land application of biosolids. In addition to the extensive permitting processes, this program also required Defendants to meet and maintain quality standards for the biosolids, land application standards, application management practices, and continuing compliance, sampling and analysis, monitoring, recordkeeping, reporting and inspection. Plaintiffs only argue that Defendants violated the SWMA because they had to meet these requirements, but Plaintiff failed to allege how Defendants violated SWMA. Because Defendants had a permit for the land application of biosolids issued and regulated by DEP under their authority pursuant to SWMA and Plaintiffs failed to allege how Defendants violated SWMA, we find that SWMA is inapplicable in the case at bar.

In summary, we find that Plaintiffs are barred to bring a nuisance claim under Section 954(a), and have failed to allege any legal violations under Section 954(b). Because we have found that Plaintiffs' nuisance cause of action is barred pursuant to 3 P.S. 954, the issue of whether or not Plaintiffs satisfied the elements of nuisance has been rendered moot and will not be discussed.

B. Negligence

Next, Defendants advance two arguments against Plaintiff's negligence cause of action. Defendants argue that the negligence claim mirrors the nuisance claim, and therefore, Plaintiff's claim was properly a nuisance claim, which is time barred. In support of this argument, Defendants cite *Horne*, *supra*. Second, Defendants maintain that even if the

negligence claim is found to be separate from the nuisance claim, Plaintiffs cannot establish the necessary elements of negligence. Specifically, Defendants argue that there was no legal duty requiring Defendants to prevent off-site odors from the activities that occurred on the Farm because the only duty a landowner has to prevent off-site harms are limited to physical harms. Furthermore, Defendants contend that Plaintiffs cannot show causation or lack of reasonable care. Therefore, Defendants maintain that Plaintiffs' negligence cause of action fails as a matter of law.

Plaintiffs contend that neither the RTFA or *Horne* support Defendants' arguments. Plaintiffs reason that the *Horne* Court found that both causes of action were based on the same operative facts, whereas Plaintiffs' claims are not based on the same facts, but are distinguishable. Regarding negligence, Plaintiffs maintain that the claim is based on traditional negligence principles and allegations that Defendants breached their duty of reasonable care instead of the theory of strict liability or allegations of interference with use and enjoyment of property. Plaintiffs argue that the allegations of breach of duty are supported by the establishment that Defendants failed to follow best management practices, did not take appropriate steps to limit odor impacts, and failed to follow their own guidelines to reduce the impact of odors caused by them, and therefore, Plaintiffs maintain they have established the necessary elements of negligence.

It is well established that in order to prove negligence, a plaintiff must show:

> (1) a duty or obligation recognized by the law requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks;
> (2) defendant's failure to conform to the standard required;
> (3) a causal connection between the conduct and the resulting injury;
> (4) actual loss or damage resulting to the plaintiff.

R.W. v. Manzek, 585 Pa. 335, 346, 888 A.2d 740, 746 (2005) (citing *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 812 A.2d 1218 (2002); *Morena v. S. Hills Health System*, 501 Pa. 634, 462 A.2d 680, 684 n. 5 (1983)). The primary element in any negligence cause of action is "that the defendant owes a duty of care to the plaintiff ... [which] consists of one party's obligation to confirm to a particular standard of care for the protection of another." *Id.* (internal citations omitted). "The existence of a duty is *a question of law* for the courts to decide." *Id.* (emphasis added).

Here, we find that although Plaintiffs alleged that Defendants owed a duty, Plaintiffs failed to allege specifically what the legally recognized duty was. Plaintiffs aver that Defendants were "transporters, haulers, spreaders, marketers, users, or those otherwise providing assistance, access, permission, or land for the transportation, hauling spraying, spreading, or other uses or disposal methods of sludge." Compl. ¶ 395. However, at no point in the Complaint, Plaintiffs' Response In Opposition, or the support brief do Plaintiffs clarify what legal duty Defendants, as transporters, haulers, spreaders, marketers or users, owed to Plaintiffs to protect Plaintiffs against the alleged unreasonable risks and injuries.

In negligence, many various duties can exist. Landowners owe a duty to those who enter upon the land; however, Plaintiffs did not allege that they stepped foot on the Farm. In fact, all of Plaintiffs' allegations involve odors, particulates, and flies entering Plaintiffs' property. Manufacturers, suppliers, and sellers of chattels owe a duty to those using the chattels. Yet, Defendants did not manufacture, supply, or sell biosolids for the use of Plaintiffs, but the biosolids were used for Defendants' purposes. Employers owe a duty to protect employees and contractors from harm, but none of the Plaintiffs worked for Defendants. Thus, although there may be foreseeable risks to transporting, hauling, spreading, marketing, or using biosolids, we can find neither that Defendants owed a duty to Plaintiffs, nor that Defendants failed to conform to the standard of conduct required for that duty. Even if Plaintiffs could allege a legally recognized duty, Plaintiffs would still have to demonstrate the causal connection between Defendants' conduct and Plaintiffs' resulting injuries.

Furthermore, while the law provides that a nuisance action may be founded on negligent conduct, a negligence claim cannot solely be based on facts which support the nuisance claim. *See Horne*, 728 A.2d at 959-60. Although Plaintiffs attempt to argue Defendants owed Plaintiffs a duty, Plaintiffs aver that odors, particulates, and flies caused the alleged harm, which are the same facts Plaintiffs rely upon for their nuisance claim. Like in *Horne*, Plaintiffs' ignore that Defendants' operation of the Farm and the use of biosolids may have infringed upon the use of Plaintiffs' properties, which "'is not wrongful in itself,

but only in the consequences which may flow from it[,]' and, thus, is properly a nuisance claim." 728 A.2d at 960 (quoting *Kramer v. Pittsburgh Coal Co.*, 341 Pa. 379, 380, 19 A.2d 362, 363 (1941)).

In short, Plaintiffs failed to allege a legally recognized duty and this Court cannot determine any duty or obligation recognized by the law requiring Defendants to conform to a certain standard of conduct for the protection of Plaintiffs against unreasonable risks. Because we can find no duty, Plaintiffs' negligence claim fails without need to discuss the remaining four elements of negligence. Furthermore, the facts to support Plaintiffs' negligence claim mirror their nuisance claim, which we found is barred by operation of 3 P.S. § 954(a).

C. Trespass

Defendants advance three arguments against Plaintiff's trespass cause of action. First, Defendants maintain that the RTFA extinguishes the trespass claim because the facts are identical to the nuisance claim. Second, Defendants contend that the trespass claim fails because odor is not a "solid particle," and therefore, cannot constitute a trespass which requires a physical invasion. In support of this argument, Defendants cite *Karpiak v. Russo*, 676 A.2d 270, 275 (Pa.Super. 1996). Third, Defendants maintain that Plaintiffs cannot prove intent. Defendants contend that even if Plaintiffs could show that physical particles entered Plaintiffs' land, that Plaintiffs could not prove that Defendants knew with substantial certainty that any particles would enter Plaintiffs' properties.

Plaintiffs argue that the trespass claim is supported by evidence of solid particles and runoff from the Farm entering their properties. Plaintiffs also contend that there is ample evidence to show that Defendants were made aware of the continuing trespass; therefore, Plaintiffs maintain that Defendants did know with substantial certainty that the trespass was occurring. In support of their argument, Plaintiffs cite *Marlowe v. Lehigh Twp.*, 441 A.2 497, 500-01 (Pa.Cmwlth. 1982).

In regard to Defendants' first argument, Defendants have essentially asked this Court to extend the RTFA to bar all torts. While the RTFA does bar nuisance suits in certain situations, as analyzed above, this Court does not believe that the General Assembly intended the RTFA to preclude *all* tort actions. Specifically, we refer to the language used in the RTFA which states the purpose of the act is to limit the circumstances for *nuisance* suits. *See* 3 P.S. § 951, 954. As such, we find that Defendants' first argument that the RTFA extinguishes the trespass because the facts are identical to be unconvincing. Thus, we will review whether Plaintiffs have pled a *prima facie* case for trespass.

A defendant is liable for trespass for intentional intrusions on land "if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove. Restatement (Second) of Torts § 158 (1965). In effect, trespass involves "the interest of the possessor in holding his land free from *physical intrusions* by others. [Trespass] do[es] not deal with the invasion of other interests of the possessor of land,

such as his interest in its enjoyment free from annoyances other than physical intrusions, or his interest in its vendibility." Restatement (Second) of Torts, Ch. 7, Topic 1, Scope Note. In comparison, "nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts § 821D, comment d. Furthermore, trespass does not require a harm, whereas nuisance requires a significant harm. *Id.*

In the third cause of action section of the Complaint, Plaintiffs aver that Defendants:

> ... knew or in the exercise of reasonable care should have know, that sludge and other industrial or animal wastes ... whether in solid, liquid, or gaseous phase, are hazardous to human health, offensive to the senses, diminish the comfort, use and enjoyment of one's property, diminish the value of nearby property, and diminish other property rights. ... Defendants intentionally stored, spread, and sprayed sewage sludge and other industrial and animal wastes, releasing it into the environment and directly and proximately caused and continue to cause sewage sludge or the pollutants that comprise sludge, whether in solid, particulate, or gaseous state, to enter into and contaminate Plaintiffs' property.

Compl. ¶¶ 404- 405. Plaintiffs also incorporate into the third cause of action prior additional allegations, which are primarily listed per Plaintiff, *see* Compl. ¶¶ 90-377; however, the majority of those paragraphs focus on odors invading the respective Plaintiffs' properties with a few alleging an increase in flies. Of the 288 paragraphs describing each Plaintiff's individual allegations, only two discuss run off, *see* Compl. ¶¶ 83 and 333, with another four allege that well water was impacted. *See* Compl. ¶¶ 101, 188, 262, 328.

The case law on intrusions and effects which come through the air, such as noise, odors, smoke, interference with light and air, and the like, has predominately qualified these intrusions as nuisance, not trespass. *See Guarina v. Bogart*, 407 Pa. 307 (1962) (holding that noise from a drive-in theatre constitutes a nuisance); *Kramer v. Pitts. Coal Co.*, 341 Pa. 379, 19 A.2d 362 (1941) (determining that plaintiff's cause of action for dust blown from a coal mine was nuisance based in negligence); *Hughes v. Emerald Mines Corp.*, 303 Pa.Super. 426, 450 A.2d 1 (1982) (finding that the failure and pollution of a well was a non-trespassory nuisance); *Alexander v. Stewart Bread Co.*, 21 Pa.Super 526, (1902) (finding that plaintiffs allegations on the diminished value of their home because of odors and noise was a trespass in nuisance which requires a substantial injury). Accordingly, the Restatement (Second) of Torts treats these types of invasions as more non-trespassory.

Besides finding that Plaintiffs' allegations sound more appropriately in nuisance, we further find that Plaintiffs have failed to plead a *prima facie* case for trespass. Relevant to these facts, trespass requires that a defendant *intentionally* causes a thing to enter another's land, or *intentionally* allows the thing to remain on the land, or *intentionally* fails to remove the thing from the land that he has a duty to remove. Plaintiffs only alleged that Defendants "intentionally stored, spread, and sprayed sewage sludge and other industrial and animal wastes." But intentionally doing an activity does not directly mean that Defendants intended to cause the sludge, i.e., "the thing," to enter Plaintiffs' properties.

Furthermore, we believe that finding a trespass for odors from a farm would undoubtedly expose any agricultural operation, especially those located near more suburban areas, to much vexation. The Court in *Guarina*, *supra*, stated "[t]he person who lives in the middle of a city cannot, of course, ask to be immunized from the effects of the turbulence, traffic and noises which are inevitably part of urban life." 407 Pa. at 313, 180 A.2d at 561. Correspondingly, a person who lives in an area that is more rural or zoned agricultural cannot ask to be immunized from the effects of odors and insects which are inevitably part of agricultural life.

We also note that Plaintiffs, with properties adjacent to the Farm, received actual notice from Defendants, pursuant to DEP regulations, in August of 2005, that Defendants would be land applying and storing biosolids on the Farm, and this notice was sent over six months *prior* to the first land application of biosolids.

In sum, we find that Plaintiffs have failed to plead a *prima facie* case for trespass.

D. Statute of Limitations

Defendants claimed a final argument in support of their motion. Defendants argue that the Complaint was filed after the two-year statute of limitations had run. However, as we have granted Defendants' Motion for Summary Judgment on each of the three counts in Plaintiffs' Complaint, this argument is moot.

CONCLUSION

This Court finds that Plaintiffs are barred to bring a nuisance claim under the RTFA, 3 P.S. § 954(a), and failed to allege any legal violations under RTFA, 3 P.S. § 954(b). As to Counts II and III, Plaintiffs failed to plead a *prima facie* case for both negligence and trespass. Furthermore, we found that the facts to support Plaintiffs' negligence claim mirror their nuisance claim, which is barred by operation of 3 P.S. § 954(a). Therefore, Defendants' Motion for Summary Judgment is granted, and the case is dismissed as to all Defendants.

BY THE COURT,

MARIA MUSTI COOK, JUDGE

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
FAMILY DIVISION

RALPH GILBERT, ET AL., Plaintiffs	:	No. 2008-SU-3249-01
v.	:	
	:	Motion for Summary Judgment
SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS, and STEVE TROYER, Defendants	:	

APPEARANCES:

For the Plaintiffs:	George A. Weber, III, Esquire John E. Kotsatos, Esquire
For Defendants Synagro:	Neil A. Slenker, Esquire
For Defendants Hilltop Farms and Phillips:	Curtis N. Stambaugh, Esquire
For Defendant Troyer:	David R. Breschi, Esquire

ORDER GRANTING DEFENDANTS JOINT MOTION FOR SUMMARY JUDGMENT

AND NOW, this 28th day of December 2012, in accordance with the foregoing Opinion, the Joint Motion for Summary Judgment of the Defendants is **GRANTED**.

Copies of this Order and Opinion shall be provided by the Prothonotary to counsel of record.

BY THE COURT,

Maria Musti Cook

MARIA MUSTI COOK, JUDGE