IN THE SUPREME COURT OF PENNSYLVANIA

No. 121 MAP 2014

RALPH GILBERT, GLORIA GILBERT, MICHELLE TORGERSON, EDWIN TORGERSON, MELDA BITTORF, BEVERLY COX, WILLIAM COX, KIMBERLY MILES, CLEO FOCKLER, JOHN FOCKLER, LINDA ECKERT, SCOTT ECKERT, WILLIAM STRINE, KENNY JASINSKI, DENNIS JASINSKI, KATHRYN JASINSKI, JOSEPH JASINSKI, PATRICIA UNVERZAGT, MEGAN JACOBS, BARBARA UNVERZAGT, DONNA PARR, JEFF FODEL, WENDY FODEL, JENNIFER JASINKSI, JOHN JASINSKI, JUDY QUEITZSCH, JEAN FRY MCSHERRY, RICK MCSHERRY, JOHN FREESE, DONNA LYNN FREESE, JEFF VAN VOORHIS, SUSAN LEE FOX, TERRENCE FANCHER, AND DONNA FANCHER,
Appellees

v.

SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS, AND STEVE TROYER,
Appellants

BRIEF FOR APPELLANTS

Appeal from the Order of the Superior Court of Pennsylvania dated April 15, 2014, at No. 119 MDA 2013; reversing the Order of the Common Pleas of York County, Civil Division dated December 28, 2012, at No. 2008-SU-003249-01

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Section 724(a) of the Judicial Code, 42 Pa. C.S. § 724(a), governing allowance of appeals from Superior and Commonwealth Courts, and pursuant to Rule 1112(a) of the Pennsylvania Rules of Appellate Procedure.

ORDER IN QUESTION

Appellants Synagro Central, LLC, Synagro Mid-Atlantic, George Phillips, Hilltop Farms, and Steve Troyer appeal the Opinion and Order of the Superior Court dated April 15, 2014, which states: "Order reversed. Case remanded to the trial court for further proceedings consistent with the decision. Jurisdiction relinquished." The Superior Court Opinion and Order are attached as Appendix A ("App. A").

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This appeal concerns whether the Superior Court erroneously determined that the statute of repose in the Pennsylvania Right to Farm Act ("RTFA"), 3 P.S. §§ 951-957, must be interpreted and applied by a jury rather than a judge. This issue presents legal questions involving statutory interpretation and jurisdiction, and therefore the scope of review is plenary and the standard of review is *de novo*. *Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013) ("Because these issues are purely legal ones involving statutory interpretation, we exercise a *de novo* standard of review and a plenary scope of review....").

STATEMENT OF THE QUESTION INVOLVED

Whether the Right to Farm Act may be interpreted to require a jury trial to determine that the land application of biosolids falls within the Act's definition of "normal agricultural operations," notwithstanding the text of the Act itself and this Court's precedent that statutes of repose and statutory interpretation present questions of law for resolution by courts, not juries?

The Superior Court answered this question in the affirmative.

STATEMENT OF THE CASE

A. Form of the Action and Procedural History

The thirty-four Plaintiffs/Appellees filed complaints in the Court of Common Pleas of York County alleging nuisance, negligence and trespass claims against the Defendants/Appellants on July 3 and July 10, 2008. The complaints were consolidated on December 1, 2008, and Plaintiffs amended their complaint on July 23, 2010. The Defendants filed a motion for summary judgment on July 2, 2012. The trial court granted the motion on December 31, 2012, and dismissed Plaintiffs' claims.

Plaintiffs appealed, and on April 15, 2014, the Superior Court reversed the trial court in a split decision. This Court granted the Defendants' petition for allowance of appeal on October 9, 2014.

B. Prior Determinations

The trial court granted the Defendants' motion for summary judgment in a December 2012 opinion and order. *Gilbert v. Synagro Cent., LLC*, 2012 Pa. D. & C. LEXIS 323 (Pa. Comm. Pl. York Cnty. Dec. 28, 2012) (Appended as App. B).

The Superior Court reversed the decision of the trial court in an opinion dated April 15, 2014. *Gilbert v. Synagro Cent., LLC*, 90 A.3d 37 (Pa. Super. Ct. 2014) (Appended as App. A), *appeal granted*, 101 A.3d 1149 (Pa. 2014).

C. Judges in the Proceedings Below

The Honorable Maria Musti Cook granted the Defendants' motion for summary judgment in the trial court. The Honorable Christine L. Donohue, joined by the Honorable Paula Francisco Ott, wrote the opinion of the Superior Court. The Honorable William H. Platt dissented.

D. Factual Background

1. Appellant Farm Parties

Since 1986, Appellant/Defendant George Phillips (collectively with the other Appellants, "the Farm Parties") has owned and operated a 600-acre farm ("Phillips Farm") located near New Freedom Borough in Shrewsbury Township, York County. Defs.' 2012 S.J. Ex. A (R. 557a). Mr. Phillips primarily grows three cash crops: corn, soybeans, and wheat. *Id.* Phillips Farm is protected by conservation easement from non-farm development, having been placed in agricultural land preservation in 1993. *Id.*; 3 P.S. §§ 901-915. Mr. Phillips

primarily used untreated animal manures as organic fertilizer on his crops for several years. Defs.' 2012 S.J. Ex. A (R.558a). Since 2003, Mr. Phillips has leased portions of Phillips Farm to Appellant/Defendant Steve Troyer, who plants, tends and harvests crops on his leased portion of the Farm. Mr. Phillips continues to farm those parts of the Farm not leased to Mr. Troyer, and he assisted Mr. Troyer with spreading biosolids—nutrient-rich organic matter derived from sewage generated at wastewater treatment plants—on Mr. Troyer's leased acreage. *Id.*; Defs.' 2012 S.J. Ex. B (unreproduced record).

Appellant/Defendant Synagro Central, LLC ("Synagro") contracts with cities and towns in Pennsylvania to recycle biosolids to the Commonwealth's farms for use as fertilizer. Farmers commonly use biosolids as a fertilizer and soil amendment, practices that are encouraged and regulated by both the U.S. Environmental Protection Agency ("EPA") under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Pennsylvania Department of Environmental Protection ("PaDEP"), whose own program supplements and builds upon the federal program. *See* 33 U.S.C. § 1345; 40 C.F.R. pt. 503; 25 Pa. Code §§ 271.1, 271.901-271.933, 275.201-275.418; Defs.' 2012 S.J. Ex. E (R. 11a-15a). Farmers have been applying recycled biosolids to their fields to fertilize their crops on a widespread basis since the 1970s, and many of America's largest municipalities, including Philadelphia and Allegheny County, use land application of biosolids as part of their wastewater

infrastructure. *See* 33 U.S.C. §§ 1281(d), 1345 (1972); EPA, *Standards for the Use or Disposal of Sewage Sludge*, 58 Fed. Reg. 9,248 (Feb. 19, 1993)

PaDEP has permitted approximately 1,500 land application sites across the Commonwealth, mainly farms, for biosolids in the past 20 years (including 70 sites in York County alone), and over 700 sites in Pennsylvania have active permits. Defs.' 2012 S.J. Exs. E (R. 11a-15a), L (R. 142a-147a), X (unreproduced record). The Commonwealth's farmers use more than one-third of the biosolids produced annually by the Commonwealth's wastewater treatment plants, thereby preventing these biosolids from being sent to landfills or incinerated. Defs.' 2012 S.J. Exs. Y (R. 207a-214a), Z (R. 215a-236a). Nationally, EPA estimates that approximately fifty percent of all biosolids are recycled to land by farmers. *See* EPA, *Water: Sewage Sludge – Frequently Asked Questions*, http://water.epa.gov/polwaste/wastewater/treatment/biosolids/genqa.cfm (last visited Dec. 22, 2014).

2. PaDEP Approved Use of Biosolids by the Farm Parties at Phillips Farm

In August 2005, Synagro provided written notice of intent to PaDEP, local officials, and landowners adjacent to Phillips Farm (including many of the Plaintiffs) that Synagro sought to apply and store biosolids at the Farm pursuant to PaDEP Biosolids General Permit PAG-08. Defs.' 2012 S.J. Exs. F (R. 16a-97a), G (R. 98a-111a). PaDEP inspected Phillips Farm on November 7, 2005, and provided

its approval for biosolids use there on November 23, 2005. Defs.' 2012 S.J. Ex. H (R.112a-113a). PaDEP published notice of this determination to register Phillips Farm under the General Permit in the *Pennsylvania Bulletin*. 35 Pa. Bull. 6663, 6695 (Dec. 10, 2005). Likewise, the generators of the biosolids applied at Phillips Farm—the local wastewater treatment plants for York City, Derry Township, Penn Township, Hanover Borough, and seven Lancaster-area municipalities (Lancaster Area Sewer Authority, or "LASA") in Pennsylvania, and Frederick County (Ballenger Creek) and Howard County (Little Patuxent) in Maryland—all secured permits from PaDEP that authorized them to recycle their biosolids to farmland. Defs.' 2012 S.J. Ex. F (R. 16a-97a).

With authorization from PaDEP secured, Mr. Phillips began applying biosolids to his farm using a standard manure spreader starting in March 2006, more than two years before Plaintiffs filed suit. Defs.' 2012 S.J. Exs. A (R. 558a), J (R. 114a-141a), K (unreproduced record). Over the course of 54 days between March 2006 and April 2009, Mr. Phillips applied approximately 11,635 wet tons of biosolids on 14 different fields spanning more than two hundred seventy acres, as dictated by crop fertilization needs and within appropriate agronomic rates (*i.e.*, the volume of biosolids was limited by the particular crop's need for the nitrogen in the biosolids). Defs.' 2012 S.J. Exs. F (R. 16a-97a), J(R. 114a-141a), K (unreproduced record).

Both PaDEP and the York County Solid Waste Authority ("YCSWA") monitored and regulated biosolids application at Phillips Farm from 2006 to 2009. Starting shortly after Mr. Phillips began applying biosolids at the Farm, these agencies responded to odor complaints from the Plaintiffs, among others. PaDEP, YCSWA, and the municipalities that generated the biosolids visited the site more than thirty times to supervise and evaluate the land application operations, including monitoring for odors. Defs.' 2012 S.J. Exs. M (R.148a-201a), N (R.202a-203a). The significant oversight provided by PaDEP and YCSWA resulted in three notices of violation over a four-year period. None of these notices involved odors or otherwise related to the Plaintiffs' nuisance allegations. Defs.' 2012 S.J. Exs. O, P, Q (unreproduced record). Application of biosolids has not occurred at Phillips Farm since April 2009, and in October 2009, Synagro notified PaDEP that it was suspending land application at Phillips Farm. Defs.' 2012 S.J. Ex. S (unreproduced record).

3. The Lawsuit Against the Farm Parties and the Rulings Below

Plaintiffs filed their complaints in July 2008, which was (as acknowledged by all of the parties and the courts below) more than two years after biosolids application began at Phillips Farm. The Plaintiffs allege that biosolids applied at Phillips Farm as fertilizer generated odors and attracted flies, amounting to a legal nuisance; that the production of odors was negligent; that the odors constituted a

trespass; and in some instances that biosolids in some form entered onto their properties during some rain events, causing a trespass. Their complaint seeks millions of dollars in compensatory and punitive damages. Pls.' Am. Compl (R. 437a-543a).

The Farm Parties moved for summary judgment at the close of discovery, arguing primarily that the Right to Farm Act's one-year statute of repose barred the suit because Plaintiffs waited until July 2008, well after the running of the one-year statute of repose under the RTFA, to file their lawsuit.[1] In a 33-page opinion issued in December 2012, Judge Cook of the Court of Common Pleas of York County granted the Farm Parties' motion and dismissed Plaintiffs' action on all counts. Trial Ct. Op. (App. B). The trial court first explained that "[t]he RTFA was enacted to protect agricultural land and operations from the encroachment of nonagricultural uses and nuisance suits." *Id.* at 9 (App. B at 9). The court then analyzed Section 954 of the Act, which immunizes from nuisance actions "normal agricultural operations" that have lawfully been in existence for at least one year and have not been substantially altered or expanded. *Id.* (quoting 3 P.S.§ 954).

Judge Cook held that the application of biosolids to farmland is among the "normal agricultural operations" shielded by the RTFA. Looking to the definition in the Act of normal agricultural operations, which extends to "'activities,

[1] The text of the RTFA is reproduced in Appendix C to this Brief.

practices, equipment and procedures that farmers adopt, use or engage in the production ... harvesting and preparation for market or use of agricultural ... crops and commodities,'" including new activities and practices "consistent with technological development within the agricultural industry,'" the court determined that "land application of biosolids does constitute an activity or practice that has been adopted or used by farmers, and is consistent with technological development...." *Id.* at 10, 13 (App. B at 10, 13). Accordingly, the court concluded that the Act barred Plaintiffs' nuisance claims because they were filed well over a year after use of biosolids and attendant odors began at Phillips Farm. *See id.* at 10-24 (App. B at 10-24).

The trial court also ruled that Plaintiffs' negligence claim failed because (i) there was no duty of care to prevent odors from crossing farm property lines onto Plaintiffs' properties; and (ii) the negligence allegations paralleled the nuisance allegations and were also barred by the RTFA. *See id.* at 24-28 (App. B at 24-28). On this second point, the trial court relied on *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999), a prior case in which the Superior Court applied the RTFA and dismissed both nuisance and trespass claims. Trial Ct. Op. 27 (citing 728 A.2d at 959-60) (App. B at 27). The trial court then dismissed all of the Plaintiffs' trespass claims because odors could not constitute a trespass based on Pennsylvania case law. *Id.* at 31 (App. B at 31). For the four plaintiffs alleging that biosolids ran off

of the farm and onto their properties during a few rainfall events, the court ruled that there was no showing of an intentional trespass necessary to sustain those claims, and dismissed those four trespass causes of action. *Id.*

All Plaintiffs appealed, and the Superior Court reversed the summary judgment in a split decision. 90 A.3d 37 (App. A). The Superior Court majority ruled that (i) issues of material fact remained as to whether farming with biosolids falls within the definition of "normal agricultural operations" under the Right to Farm Act, and (ii) with respect to Plaintiffs' trespass claims, four Plaintiffs—Mr. and Mrs. Fodel and Mr. and Mrs. Freese—offered sufficient evidence to create issues of material fact precluding dismissal of their trespass claims. Judge Platt dissented on the ground that applying biosolids to farmland falls within the ambit of "normal agricultural operations" protected by the Right to Farm Act. *Id.* at 51-52 (Platt, J., dissenting) (App. A, Dissenting Op., at 2-3).

The Superior Court majority rejected several interpretations offered by the Plaintiffs that would have weakened and limited the Right to Farm Act. The majority correctly ruled that the RTFA defines its time limit for bringing suit by reference to the farm activity itself and whether it is covered by the Act, not when neighbors begin to perceive a nuisance. *Id.* at 44 (App. A at 14). Reaffirming its prior ruling in *Horne*, the court then rejected Plaintiffs' contention that, once a farmer engages in conduct that constitutes a "substantial change" to operations,

"the RTFA no longer bars nuisance actions." 90 A.3d at 46 (App. A at 17). Such a reading, the court found, "fails to accomplish th[e] fundamental legislative goal" of the RTFA: limiting the circumstances under which farming operations can be the subject of nuisance suits. *Id.* Instead, a new farm activity or a substantial change restarts the one year window for tort claims. The Superior Court also rejected Plaintiffs' position that an increase in the nuisance, such as an increase in odors on a particular occasion, grants a new one-year period for bringing suit under the RTFA's statute of repose. *Id.* (App A. at 18) ("The RTFA's statute of repose would be rendered entirely ineffectual if plaintiffs could continue to restart the one-year time period by pointing to increases over time in their perception of the degree of the offensive conditions.").

The Superior Court further determined that the trial court correctly dismissed Plaintiffs' negligence claims. The court ruled that farmers and property owners do not owe a duty of care to use their property in a manner that prevents odors and other nuisance conditions from crossing onto neighbors' properties. *Id.* at 51 (App. A at 28-29). The Superior Court opinion also affirmed that the Right to Farm Act's Protections extend to negligence claims that track nuisance claims. Relying again on its prior decision in *Horne*, the majority wrote that "the operative facts here establish that the Residents have asserted nuisance claims, not negligence claims – namely claims based upon a use of property that 'is not

wrongful in itself, but only in the consequences which may flow from it.'" *Id.* (App. A at 29). Plaintiffs challenge none of these rulings.

At the outset of its analysis of whether the RTFA protects biosolids, the Superior Court majority recognized correctly "that statutes of repose are jurisdictional in nature, and that as a result their *scope*, as determined by statutory interpretation, presents a question of law for courts to decide." 90 A.3d at 49 (App. A at 23-24) (emphasis in original). With respect to interpreting the Act's term "normal agricultural operations" and whether it includes the use of biosolids on a farm, however, the majority incorrectly decided that this dispositive jurisdictional issue was a factual dispute for resolution by a jury. *Id.* at 51 (App. A at 27-28).

The majority nonetheless proceeded to weigh the evidence on this issue, questioning whether the 700 farms using biosolids in Pennsylvania was a number sufficient to qualify as a normal agricultural operation, whether something could be a normal agricultural operation if it created nuisance conditions, and whether it could qualify for protection under the Act if a plaintiffs' expert was critical of how the agricultural operation was conducted. *See id.* at 49-50 (App. A at 25-27). The Superior Court indicated that these factors compelled sending the question to a jury for trial, despite the fact that other criteria under the Right to Farm Act were satisfied. *See id.* at 50-51 (App. A at 27-28). While acknowledging the purpose of the RTFA to protect farming, the majority nonetheless reasoned that if a plaintiff

alleges that a farm is a nuisance, then the farm does not qualify for the Act's protection against nuisance suits. *Id.* In contrast, the dissent argued that the Plaintiffs' case plainly was barred under the RTFA because they sued well over a year after the alleged nuisance conditions began. *Id.* at 52-53 (App. A, Dissenting Op. at 2-3).

E. Statement of the Order Under Review

The order of the Superior Court under review is set out verbatim in the section above titled "Order in Question."

SUMMARY OF THE FARM PARTIES' ARGUMENT

The Superior Court erred by not ruling that farming with biosolids fertilizer is a "normal agricultural operation" under the Right to Farm Act. The Act shields farms from litigation initiated more than a year after the start of the farm operation that is targeted in the lawsuit. The RTFA is a jurisdictional statute of repose for farm work, not a defense that a defendant must prove to a jury. Whether the RTFA protects a category of farming practices presents a straightforward legal question of jurisdiction and statutory interpretation. The common law has long recognized that courts exclusively resolve questions of law, particularly those involving statutes of repose. The Right to Farm Act supports this conclusion; it unambiguously protects farmers from suits brought after a generous one-year window closes.

The plain meaning of the Act warrants reversal of the Superior Court. The RTFA protects "normal agricultural operations," defined without limit as all "activities, practices and procedures" used by farmers. The trial court concluded that farming with biosolids—a long-standing practice approved and regulated by the EPA and Commonwealth agencies—is protected by the Act as a matter of law. In contrast, the Superior Court delegated this jurisdictional and interpretive question to a jury. That decision eviscerates the Act's statute of repose by forcing farmers to defend untimely claims through a jury verdict.

The application of the RTFA's statute of repose raises a question of law that only a court may decide. Moreover, statutory interpretation—in this case, whether "normal agricultural operations" encompass application of biosolids to fertilize farmland—is the exclusive role of judges. Permitting a jury to resolve this legal question weakens the RTFA and other statutes of repose by requiring litigation in the precise circumstances where the legislature determined none should occur.

This Court should clarify that statutes of repose raise jurisdictional questions for judges and that the Right to Farm Act on its face covers a wide swath of farm work, including fertilizing crops with biosolids. Because of the importance of the Right to Farm Act, eleven diverse amici—including two Commonwealth agencies charged with regulating agriculture; Philadelphia and the Allegheny County Sanitary Authority; the Pennsylvania Farm Bureau; and six Pennsylvania and

national professional and trade organizations—ask that the Court restore the Act's plain meaning and preserve its protections for farmers. Farmers and their community partners need this Court to sustain the protections of the Right to Farm Act by holding that the Act protects biosolids use, which is an essential component of Pennsylvania's wastewater infrastructure. Affirming the Superior Court would encourage tort claims against farms, particularly those using biosolids, and force farm defendants to defend untimely claims through a jury decision on an issue that should be resolved by a judge before trial.

THE FARM PARTIES' ARGUMENT

I. Statutes of Repose and Statutory Interpretation Present Jurisdictional and Legal Questions that Courts Decide

The Superior Court decision rests on three distinct errors of law, each of which provides independent grounds for reversal by this Court. The majority opinion below: (1) failed to treat the RTFA's statute of repose as a jurisdictional requirement that a court must apply; (2) wrongly delegated the interpretation of the RTFA to a jury; and (3) incorrectly interpreted the RTFA's definition of "normal agricultural operations," which plainly encompasses land application of biosolids. Further, even if the Superior Court's decision did not depend on these legal errors, its rejection of the trial court's conclusion that biosolids application is a normal agricultural operation is contrary to the record.

The first two dispositive questions before the Court turn on the same principle: courts, not juries, resolve questions of law. The Court should first determine that the RTFA's statute of repose is a jurisdictional requirement that only a judge can decide as a matter of law. Second, the Court should reaffirm that courts interpret statutes and particularly definitional issues like whether certain farming practices are "normal agricultural operations." Resolution of either issue in the Farm Parties' favor mandates reversal of the Superior Court and will ensure that future trial courts properly apply the RTFA.

A. Statutes of Repose Are Jurisdictional

A statute of repose precludes further litigation by depriving a trial court of jurisdiction. Leaving its application to a jury prevents a court from evaluating for itself whether it can hear a case and undermines the statute's purpose. Whether a statute of repose's time-bar categorically applies to a class of activities like farming with biosolids (the question presented to both courts below) is a legal question for court resolution. This Court, courts across the country, and legal scholarship have long recognized that judges must decide categorical jurisdictional issues and statute of repose questions, leaving for juries discrete factual disputes that involve the merits of the case. Threshold legal decisions on jurisdiction are not the proper arena for juries, which by law and practice resolve factual disputes relating to an underlying claim.

A statute of repose establishes a clear deadline after which a court no longer has jurisdiction and litigation is barred. These statutes create "an outer limit on the right to bring a civil action." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014). This "outer limit" is determined based on an objective standard of when the defendant engaged in a relevant act. *See Black's Law Dictionary* 1637 (10th ed. 2014) (defining a statute of repose as "[a] statute barring any suit that is brought after a specified time *since the defendant acted* . . . even if this period ends before the plaintiff has suffered a resulting injury." (emphasis added)); William H. Danne, Jr. *et al.*, 54 C.J.S. *Limitations of Actions* § 28 (2014) ("A statute of repose bars a cause of action a certain time *after the defendant's act*, regardless of whether it accrued and conditions the right of action on filing suit within the statutory period." (emphasis added)). The policy underlying statutes of repose is simple: they "effect a legislative judgment that a defendant should be 'free from liability after the legislatively determined period of time.'" *CTS Corp.*, 134 S. Ct. at 2179 (citation omitted). These statutes promote certainty and predictability by conferring immunity from suit on a defendant after a period of time to bring suit has passed, giving parties covered by these statutes "a fresh start." *Id.* at 2183.

Statutes of repose impose basic and objective limits on lawsuits that distinguish them from statutes of limitations. Unlike the latter, statutes of repose do not create a procedural requirement that measures when a party must file after

accrual of a cause of action. Instead, statutes of repose "completely abolish[] and eliminate[] a party's cause of action." *Abrams v. Pneumo Abex Corp.*, 981 A.2d 198, 211 (Pa. 2009); *see also Schreffler v. Worker's Comp. Appeal Bd.*, 788 A.2d 963, 969 (Pa. 2002) ("The three-year limitations period [in a Pennsylvania statute] is a statute of repose which completely extinguishes the right as well as the remedy"). Statutes of repose are powerful tools that permit legislatures to declare prospective defendants free from liability when a certain time period passes after a designated action.

In Pennsylvania, statutes of repose, such as that in the RTFA, provide protected parties a safeguard beyond merely extinguishing potential liability. The Commonwealth's courts repeatedly acknowledge that "[s]tatutes of repose are jurisdictional," meaning that they are a non-waivable prerequisite for a claim. *See, e.g.*, *Beisswanger v. Workmen's Comp. Appeal Bd.*, 808 A.2d 984, 986 (Pa. Commw. Ct. 2002), *app. denied*, 818 A.2d 505 (Pa. 2003) ("Statutes of repose are jurisdictional ...."); *Sharon Steel Corp. v. Workmen's Comp. Appeal Bd.*, 670 A.2d 1194, 1198 (Pa. Commw. Ct. 1996); *Smith v. Workmen's Comp. Appeal Bd.*, 670 A.2d 1146, 1148-1149 (Pa. 1996) (affirming that statutes of repose, unlike statutes of limitations, are jurisdictional). Plaintiffs bear the burden of demonstrating that a court has jurisdiction. A failure to meet this burden requires that a court dismiss the

claim. *See Beisswanger*, 808 A.2d at 986 (dismissing worker's compensation claim because a claimant failed to show that he timely filed his claim).[2]

This Court recognizes that "[t]he question of jurisdiction is a pure question of law." *MCI Worldcom, Inc. v. Pa. Pub. Util. Comm'n*, 844 A.2d 1239, 1246 n.3 (Pa. 2004). These legal determinations regarding a court's power are reserved exclusively for a judge. *See Harris-Walsh, Inc. v. Borough of Dickinson City*, 216 A.2d 329, 331 (Pa. 1966) ("[I]t is our duty to inquire into the existence of jurisdiction."); *Alter v. Pa. Gas & Water Co.*, 532 A.2d 913, 915 (Pa. Commw. Ct. 1987) ("It is a fundamental and basic concept that any court has jurisdiction to decide if it has jurisdiction...."). Indeed, the Superior Court decision below recognized that a jurisdictional question "presents a question of law for courts" to decide, but then did not follow through on this requirement to evaluate the scope of its jurisdiction. 90 A.3d at 49 (App. A at 23-24).

This Court has applied this rule and categorically determined whether jurisdiction existed as a matter of law. In *Commonwealth v. Cruz*, 852 A.2d 287 (Pa. 2004), for example, this Court addressed the question of jurisdiction in the context of a time-bar statute and stated that "time limits are jurisdictional in nature,

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[2] Delaware similarly holds that statutes of repose are jurisdictional. *See Cheswold Volunteer Fire Dep't v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985) (holding that a statute of repose may not be waived because "it relates to the jurisdiction of the court...."). Some states, by contrast, classify statutes of repose as an affirmative defense that can be waived. *See, e.g., Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 739 (Tenn. 2013) ("We hold that the statute of repose is an affirmative defense that is generally waived if not timely raised.").

implicating a court's very power to adjudicate a controversy." *Id.* at 292. *Cruz* stands for the principle that the "question of the proper interpretation and scope of the exceptions" to a Pennsylvania statute's time-bar "are *questions of law*...." *Id.* (emphasis added). In that case, the Court addressed whether the defendant's claim of mental incapacity fell within an exception to the Post Conviction Relief Act's one-year time-bar for introducing after-discovered evidence. That issue did not require resolution by an evidentiary hearing but was rather one of law for the court because the question required the judge to interpret and apply a jurisdictional statute to a class of cases. *Id; see also Commonwealth v. Fahy*, 959 A.2d 312, 316 (Pa. 2008) ("'[q]uestions regarding the scope of the statutory exceptions to the PCRA's jurisdictional time-bar raise *questions of law*.'" (emphasis added) (citation omitted)). The Court should reaffirm here that defining a court's jurisdiction under a statute of repose is a question of law that should be resolved by courts.

B. Disputes on Jurisdiction and Other Legal Issues Do Not Create Jury Questions

1. Courts Routinely Resolve Disputes Relating to Questions of Law

When Courts confront questions of law like jurisdiction, they are often required to determine some facts that bear on dispositive legal issues. A dispute as to how the court should resolve these legal questions does not necessarily take the questions of law out of the court's hands. In many tort contexts, courts—not

juries—determine disputed threshold issues that control the outcome of a case and lead to summary judgment. Deciding that farm use of biosolids comes under the broad definition of a normal agricultural operation to qualify for the RTFA's statute of repose is just such a threshold decision reserved to a court.

Libel suits are illustrative: courts must determine whether a publication is capable of defamatory meaning; if it is not, the suit must be dismissed as a matter of law. In *Thomas Merton Center v. Rockwell International Corp.*, 442 A.2d 213 (Pa. 1981), for example, the Court dismissed a defamation claim based on its own determination that the relevant publication was incapable of defamatory meaning as a matter of law. In agreeing with the trial court's dismissal of the case on summary judgment, the Court explained that "[i]f the court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial." *Id.* at 215-16; *see also Tucker v. Phila. Daily News*, 848 A.2d 113, 123-24 (Pa. 2004). As discussed above, Pennsylvania courts evaluating the scope of their jurisdiction under Pennsylvania's time-bar statutes have often decided all issues as questions of law. *See Fahy*, 959 A.2d at 315; *Cruz*, 852 A.2d at 292.

Courts outside of Pennsylvania likewise recognize that judges must resolve any threshold matters upon which a court's jurisdiction turns, even when the parties do not agree. In *Scarfo v. Ginsburg*, 175 F.3d 957 (11th Cir. 1999), for

example, a federal court of appeals rejected a defendant's argument that a dispute relating to whether multiple business entities constituted a single "employer" under a jurisdictional statute should have been resolved by a jury rather than the trial court. The court stressed that juries cannot make preliminary findings on which the court's subject matter jurisdiction rests. Rather than these questions being for a jury, the court emphatically stated that "[i]nstead, that duty is for the court." 175 F.3d at 961; *see also Pavey v. Conley*, 544 F.3d 739, 741 (7th Cir. 2008) (Posner, J.) (explaining that subject matter jurisdiction may hinge on "issues that may be genuinely debatable, but even if so the issues are resolved by the judge."); *Gen. Elec. Co. v. Cain*, 236 S.W.3d 579, 589 (Ky. 2007) (rejecting the argument that a dispute over findings necessary to establish jurisdiction must be tried to a jury). These cases exemplify the traditional duty of courts to decide as a matter of law jurisdictional questions, even where, at first glance, a dispute appears to be "factual." *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 990 (2006) ("Jurisdictional facts are traditionally classified as questions of law for jury-trial purposes.").

2. The Jurisdictional Issue Under the RTFA Does Not Present a Circumstance Where a Jury Must Find Facts

Judges may only cede their obligation to resolve their jurisdiction in limited situations. Although judges are required to determine their jurisdiction as a matter of law without any assistance from a jury, "the authorities equivocate when

jurisdictional facts overlap the merits, saying that maybe a jury has to pass on jurisdiction because a jury right exists on the same facts involved in the merits." *Id.*; *Cameron v. Children's Hosp. Med. Ctr.*, 131 F.3d 1167, 1170 (6th Cir. 1997). This exception to the rule permits courts to send purely factual disputes relevant to jurisdiction in that small subset of cases where it is impossible to untangle those facts relevant to determining whether the court has jurisdiction from those facts that must be proven to prevail on the claim.

Application of this principle hinges on maintaining a distinction between facts relating to jurisdiction and facts relating to the merits. *See Scarfo*, 175 F.3d at 961 (describing how jurisdictional facts presented no jury question because they were not "intertwined" with plaintiff's discrimination claim). Overlap between jurisdictional and merits issues usually occurs when a plaintiff must prove one or more of the same elements both to establish jurisdiction and to prevail on a substantive claim. *See id.* (discussing how one class of discrimination claim can potentially present an issue relevant to jurisdiction that a jury must resolve).

The majority below, without explanation, erased this distinction by turning an element of jurisdiction into part of Plaintiffs' claims. To the extent there are some readily apparent facts for judicial notice regarding the long-standing regulatory approval of farm use of biosolids and their importance in Pennsylvania, they drive the legal decision of whether the land application of biosolids is among

the RTFA's "normal agricultural operations," an element of the jurisdictional question under this statute of repose. The Superior Court majority, however, erroneously conflated this jurisdictional issue with the merits of Plaintiffs' tort claims by suggesting, for example, that jurisdiction hinges on whether the Farm Parties took proper "steps to mitigate odors and other nuisance conditions resulting from their use of biosolids." 90 A.3d at 50 (App. A at 26-27). As discussed below, the majority opinion's focus on the merits rather than jurisdiction defeats the RTFA – the Act precludes litigating the merits of the nuisance claim if the lawsuit is filed beyond the statute of repose, which is a threshold, objective legal decision to be made by the court.

3. The Cases Relied on by the Superior Court Do Not Support Delegating the Legal Question Here to a Jury

The majority rested its decision to reverse the trial court on a few cases involving statutes of repose where the fact-intensive questions regarding the defendant's conduct—not the category of activity engaged in by the defendant—led the courts to deny summary judgment and let the issue go to trial. The issues presented therein were highly fact-bound and related to the merits of the underlying claims. They are distinguishable on that basis and also are inconsistent with the broader Pennsylvania rule that jurisdictional issues should be decided by the Court.

The Superior Court relied chiefly on *McConnaughey v. Building Components, Inc.*, 637 A.2d 1331 (Pa. 1994), in which this Court reversed a lower court's grant of summary judgment in favor of a product manufacturer pursuant to a statute of repose for construction projects. The statute protected persons who performed or supervised construction activities giving rise to a tort claim. In *McConnaughey*, this Court found that there was a factual dispute regarding whether the defendant had *actually performed* any of the relevant construction because "the parties do not agree as to what involvement, if any," the defendant had in building a particular barn. 637 A.2d at 1334. *McConnaughey* is distinguishable from this case because the issue there did not involve a purely legal question of whether a certain category of activity falls within a statutory definition that qualifies for protection under a statute of repose. Instead, the statute of repose in *McConnaughey* required scrutiny of the defendant's conduct, *i.e.*, whether the defendant was involved in the planning, design or construction of the barn at issue. The issue, then, was whether the defendant engaged in conduct *on a particular occasion* that fell within a category of activities already established as a matter of law to be protected by the statute of repose. Whether a person took an action on a particular occasion, when that fact is disputed, is the kind of fact-intensive question that calls for jury resolution.

In contrast, there is no dispute here that the Farm Parties worked for years with biosolids beginning in 2006 and the question simply is whether application of biosolids as a class of farm activity qualifies for protection under the RTFA's statute of repose and its definition of protected agricultural operations. This inquiry calls for the court to interpret the definition and make a categorical decision on the statute of repose that is separate from Plaintiffs' tort claims regarding the impacts on the neighbors of farming with biosolids. Unlike in *McConnaughey*, there is no need to scrutinize the Farm Parties' conduct or involvement in the protected activity because there is no dispute that they applied biosolids to fertilize farmland, and, two years later, the Plaintiffs alleged it was a nuisance.

The other two Superior Court cases that the majority discussed likewise rely on questions of a defendant's specific behavior and state of mind, issues wholly different from whether a type of activity falls within a statutory definition. In *Pridgen v. Parker Hannifin Corp.*, 974 A.2d 1166 (Pa. Super. Ct. 2009), and *Stewart v. Precision Airmotive, LLC*, 7 A.3d 266 (Pa. Super. Ct. 2010), *app. denied*, 42 A.3d 294 (2012), the Superior Court quashed as interlocutory an appeal from a trial court's order denying summary judgment under the 18-year statute of repose included in the General Aviation Revitalization Act of 1994 on the grounds that the trial court properly determined that issues of fact remained regarding whether defendants knowingly misrepresented or fraudulently withheld

information. In both cases, the Superior Court determined that a genuine issue of material fact existed because, like in *McConnaughey*, the defendant's conduct and intent on a particular occasion was at issue, *i.e.*, whether the defendants knowingly misrepresented or fraudulently withheld information. Again, this type of question falls within the normal capacity and role for juries. Here, however, no such inquiry into the Farm Parties' conduct is necessary, as it is undisputed that they engaged in a farm practice—applying biosolids to fertilize farmland—and the only issue is the legal question whether this activity is categorically a normal agricultural operation under the definition in the RTFA.

II. The RTFA Must Be Interpreted by a Court, Not a Jury

In addition to its error on the jurisdictional issue, the Superior Court majority overlooked that the interpretation of the RTFA's definition of a normal agricultural operation is simply a question of statutory interpretation that is the court's responsibility. Whether a class of activities falls within a definition in a statute of repose presents a hornbook case of a statutory interpretation question for a court to decide.

A. Statutory Interpretation Is a Judicial Function

The application of the Right to Farm Act to this case is an exercise in statutory interpretation. Pennsylvania law unambiguously places on judges the duty of interpreting statutes. In particular, courts are charged with making

categorical determinations as to what statutory definitions do and do not cover. For example, two years ago, in *Giant Eagle, Inc. v. Workers' Compensation Appeal Board*, 39 A.3d 287 (Pa. 2012), this Court faced the question of whether the term "compensation" in Pennsylvania's workers' compensation statute encompasses medical benefits. In reaching its decision that an employee could not have the value of her medical benefits deducted from a worker's compensation benefit award, the Court stressed that when "the issue is the proper interpretation of a statute, it poses a question of law...." 39 A.3d at 290.[3]

Faced directly with the argument that a jury should determine whether an item falls under a statutory definition, this Court unequivocally reserved statutory interpretation to itself. In *Commonwealth v. McKetta*, 364 A.2d 1350 (Pa. 1976), the Court held, as a matter of law, that Ritalin constitutes a "dangerous drug" for the purposes of a criminal statute and rejected an argument that this was a jury issue. The Court wrote that "[s]tatutory interpretation has been traditionally a function of the court and not the jury." 364 A.2d at 1352. Although the Court acknowledged that a factual dispute as to the identity of the substance on the defendant (*i.e.*, whether the substance he possessed was indeed Ritalin) would be an issue for the jury, the Court held that the issue of statutory classification—

[3] The Court has repeatedly underscored this black letter law. *See, e.g.*, *Brown v. Levy*, 73 A.3d 514 (Pa. 2013) ("statutory interpretation is a question of law" (citation omitted)); *Commonwealth v. Hacker*, 15 A.3d 333, 335 (Pa. 2011) (same); *Tritt v. Cortes*, 851 A.2d 903, 905 (Pa. 2004) ("the interpretation of a statute is a question of law, with the objective being to ascertain and effectuate the intent of the General Assembly" (citation omitted)).

whether Ritalin generally falls within the definition of "dangerous drug"—was a question of law reserved for the Court. *Id.* at 1354.

Federal courts similarly recognize that juries may not interpret statutory definitions. The U.S. Supreme Court has made clear that, where "statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard." *Chandris, Inc. v. Landis*, 515 U.S. 347, 369 (1995).

Other states' highest courts likewise have emphatically enforced the requirement that *judges* determine the scope of statutory definitions. In *Devasier v. James*, 278 S.W.3d 625 (Ky. 2009), for example, the Supreme Court of Kentucky held that a trial court erred when it ruled that the jury was to decide the meaning of the term "actual threat" as used in a state statute. The lower court was wrong to send this issue to the jury because the "interpretation of a statute is an issue of law, to be resolved *by the court*." 278 S.W.2d at 631 (emphasis added); *see also Thomason v. Fulton Cnty.*, 663 S.E.2d 216, 217 (Ga. 2008) (rejecting argument that the question of whether self-insurance constitutes "insurance" as used in the Fulton County Code should be decided by the jury because "construction of legislative acts such as these at issue is for the court, not the jury"); *Henrie v. Rocky Mountain Packing Corp.*, 202 P.2d 727, 729 (Utah 1949) (explaining that a jury could not resolve the question relating to the scope of a statutory term because

it "depends on what the legislature meant by that language, and the intent of the legislature is a question of law for the court, and not one of fact for the jury.").

Legal commentators also recognize that interpreting statutes is a function reserved for and best-suited to judges. Allocating to judges the responsibility to interpret statutes makes sense because their legal experience is an asset when one must parse text for its legal significance. *See, e.g.,* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Calif. L. Rev. 1867, 1935 (1966) ("Deciphering the meaning of a legislative enactment ... is clearly a lawyer's job, and the judge is more qualified than the jury to perform the task."); Frederick J. De Sloovere, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 Harv. L. Rev. 1086, 1091 (1933) (explaining that determining the legal effect of a statute's language "remains a matter for the trained faculties of a lawyer and is always of necessity a question of law."); 2A *Sutherland Statutes & Statutory Construction* § 45:3 (7th ed. 2007) ("courts have long held that statutory construction is an issue of law to be decided by judges and not juries").

Conversely, determining whether a witness is credible or whether a specific activity occurred presents issues appropriate for jurors. *See Gen. Elec. Credit Corp. v. Aetna Cas. & Sur. Co.*, 263 A.2d 448, 458 n.21 (Pa. 1970) ("Fundamental to our jury system is the premise that the court determines all questions of law while the jury passes on the credibility of witnesses and determines the facts."); *see also*

Weiner, 54 Calif. L. Rev. at 1869 ("When there is a dispute as to what acts or events have actually occurred, or what conditions have actually existed, the jury has the task of resolving the conflict . . . . Mental as well as physical events present issues for jury determination."). This dichotomy of judge and jury roles unequivocally supports assigning the task of interpreting the meaning of "normal agricultural operations" under the Right to Farm Act to the court.

B. Courts Must Interpret Statutes of Repose to Determine Whether They Apply to Bar a Claim

Statutes of repose are no different from other laws that require courts to adjudicate their scope and applicability. This Court should apply its clear precedent on statutory interpretation and reverse the Superior Court's decision to allow a jury to define the Right to Farm Act.

Other states have ruled that interpreting a statute of repose is the exclusive province of the court. The Wisconsin Supreme Court, for example, held that a trial court erred when it decided that the question of whether a fire protection system was an "improvement to real property" under a statute of repose was an issue to be decided by the jury. *Kallas Millwork Corp. v. Square D Co.*, 225 N.W.2d 454 (Wis. 1975). The court explained:

> The interpretation of the meaning and legal significance of words is particularly within the capabilities and function of a court. A jury finding in respect to the instant case would be irrelevant. There are no facts for the jury to find. Rather the question, where the facts are undisputed, is simply whether those facts fit the legislatively

> prescribed condition. This is a legal question to be resolved on the basis of the common usage of language.

225 N.W.2d at 456; *see also Stone v. United Eng'g*, 475 S.E.2d 439, 449 (W.Va. 1996) (rejecting an asset purchase agreement's characterization of an item and explaining that whether an object is an "improvement to real property" under the state's statute of repose "requires construction of a statute and is, therefore, a question of law for the court."); *St. Louis v. Rockwell Graphic Sys., Inc.*, 605 N.E.2d 555, 556 (Ill. 1992) (acknowledging that determining whether a particular item falls within a term used in a statute of repose is grounded in fact but explaining that resolution of the question is "a question of law.").

Similarly, in *Estate of Shebel v. Yaskawa Electric America, Inc.*, 713 N.E.2d 275 (Ind. 1999), the interpretation of the applicability of a statute of repose hinged on whether a particular party was the "initial user or consumer" of a product. The Indiana Supreme Court rejected plaintiffs' arguments that a court could not determine whether a party was the initial user or consumer "as a matter of law where conflicting inferences could be drawn from the facts." 714 N.E.2d at 277. In rejecting this contention, the court held that the issue of "who is a 'user or consumer' is purely a legal question" for the court to decide. *Id.* at 279 (quotation and citation omitted). Significantly, the Indiana Supreme Court also rejected plaintiffs' expert testimony on the applicability of the relevant statutory term on the grounds that an expert cannot opine on how a statutory term is to be

interpreted. *See id.* at 280; *see also Adair v. Koppers Co.*, 741 F.2d 111, 114 (6th Cir. 1984) (rejecting expert testimony as to whether a conveyor was an "improvement to real property" under an Ohio statute of repose because such testimony invaded on the court's responsibility to "as a matter of law appl[y] th[e] facts to its construction of the statute.").

The Superior Court's decision in this case departs sharply from the requirement that a court must interpret the terms used in a statute of repose. By placing the meaning of "normal agricultural operations" in a jury's hands, the majority overlooked the judicial duty of statutory interpretation and undercut the intent of the Right to Farm Act. Inconsistent jury determinations under the Act would deprive farmers and their contractors of the certainty necessary to invest in the Commonwealth's agricultural sector. The Superior Court decision sows confusion in Pennsylvania law regarding how statutes are defined and applied.

III. The RTFA Protects All Agricultural Activities, Including Land Application of Biosolids

Statutes of repose like the RTFA present jurisdictional and statutory interpretation issues that a court must decide. Independent of the Court's resolution of these threshold questions, proper construction of the Right to Farm Act itself compels reversal of the Superior Court. Farming with biosolids readily fits under the Act's sweeping definition of "normal agricultural operations," and the Superior Court erred in reversing the trial court's decision that the statute of repose applies

here. This definition reflects the General Assembly's robust intent "to conserve and protect and encourage the development and improvement of [Pennsylvania's] agricultural land for the production of food and other agricultural products." 3 P.S. § 951. The majority opinion below failed to address the plain meaning of the Act, which resolves this appeal in favor of the Farm Parties.

The Statutory Construction Act ("SCA"), 1 Pa.C.S. §§ 1501-1991, guides the Court's approach to reading the RTFA. In summarizing the SCA, the Court recently emphasized that "[t]he object of statutory construction is to ascertain and effectuate the General Assembly's intent." *Mercury Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 55 A.3d 1056, 1067 (Pa. 2012). Most importantly, "[t]he plain language of a statute is, as a general rule, the best indicator of such legislative intent." *Id.* at 1067-68. When the statute's language is unclear, the Court looks beyond the statute's four corners to determine what the legislature meant and may consider the following:

> [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 1068 (internal citations omitted).

The all-encompassing definition of farm activities in the Act is decisive and therefore the Court need not look beyond the Act's text to decide this appeal. In

any event, the factors identified in *Mercury Trucking* and the SCA powerfully support concluding as a matter of law that biosolids use is a normal agricultural operation. These authorities, particularly the positions in favor of Appellants taken by PaDEP, the Pennsylvania Department of Agriculture, and the Pennsylvania Attorney General, resolve any question of whether the General Assembly intended the RTFA's statute of repose to protect farming with biosolids.

A. The Definition of "Normal Agricultural Operations" Includes Farming with Biosolids

The language that the General Assembly chose when it defined the activities that the RTFA protects unmistakably covers the agricultural use of biosolids. The Act's far-reaching definition of "normal agricultural operations" provides protection to virtually any practice that the Commonwealth's farmers adopt to help them cultivate their crops. *See Mercury Trucking*, 55 A.3d at 1067 ("The plain language of the statute is, as a general rule, the best indicator of legislative intent."). The Superior Court's decision does not credit the legislature's objective, codified in the RTFA, to protect farming generally from untimely nuisance suits.

1. The Definition Encompasses a Multitude of Farming Practices, As Underscored by the 1998 Amendment

"Normal agricultural operations" means "activities, practices, equipment and procedures that farmers adopt, use or engage ... in the production, harvesting, and preparation for market or use of agricultural ... crops and commodities." 3 P.S.

§ 952. The General Assembly expanded this definition in a 1998 amendment, further enlarging the Act's protections. Before 1998, the Act confined its protection to farming practices that were "customarily and generally accepted." The amendment deleted this limiting language and increased the scope of protected activities to "include[] new activities, practices, equipment and procedures consistent with technological development within the agricultural industry." Act of May 15, 1998, P.L. 441, No. 58 § 2. The definition, by its terms, reaches as many farming methods as possible, including those not yet in existence.

Fertilizing crops with biosolids obviously fits the definition of a normal agricultural operation. The RTFA's protections attach whenever there is (1) a farmer (2) engaging in an "activity" or "practice" (3) involved in the production of an agricultural crop or commodity. *See* 3 P.S. § 952. There is no dispute that Pennsylvania's farmers have for decades applied biosolids as a fertilizer to help them cultivate crops to sell on the market. The statutory analysis can and should end here.[4]

2. The Superior Court's Requirement that the Word "Biosolids" Be Included in the Act is Flawed

The Superior Court decided that the General Assembly, had it wanted to protect biosolids, should have specifically mentioned them in the definition of

[4] The Superior Court also did not heed the straightforward approach to this question it took in *Horne*. Without having to resort to a large factual record, the *Horne* court readily concluded that a poultry farm, even one using an uncommon "decomposition house," for dead chickens, "clearly is a 'normal agricultural operation' as defined by the Right to Farm Act." 728 A.2d at 958.

normal agricultural operations, "an option available to the legislature at the time...." 90 A.3d at 47 (App. A at 21). The majority's reading of the Act overlooks this Court's rules on statutory interpretation and disregards the all-inclusive language used to define protected farm activities.

The Superior Court's approach ignores the RTFA's use of the term "includes," a word that dispenses with any need for the legislature to list all of the myriad farm activities covered by the Act. Several months ago, this Court reiterated that "it is widely accepted that general expressions such as 'including' . . . that precede a specific list of included items are to be considered as words of enlargement and not limitation." *Department of Envtl. Prot. v. Cumberland Coal Res., LP*, 4 WAP 2013, 5 WAP 2013, 2014 Pa. LEXIS 2512, at *29 (Pa. Sept. 24, 2014) (citation omitted). "Normal agricultural operations," as that term is used in the RTFA, "includes" activities, practices, and procedures that farmers adopt. 3 P.S. § 951. The General Assembly's choice to precede this list with this term of expansion conclusively shows that the activities listed in the definition are "not an exhaustive list of items that fall within the definition...." *Cumberland Coal*, 2014 Pa. LEXIS 2512, at *30. The Superior Court majority's insistence that biosolids must be listed distinctly in order to be covered by the RTFA is plain error.

3. The Superior Court Improperly Considered Whether a Farm Activity Is a Nuisance in Deciding Whether It Is Protected

The Superior Court further misconstrued the Right to Farm Act when it suggested that the degree to which a farming activity is a nuisance is relevant to whether it is a normal agricultural operation. This is circular reasoning that defeats the purpose of the Act. The RTFA recognizes that farming practices may give rise to nuisance suits, but provides that these claims must be brought within a one-year window. *See* 3 P.S. § 954(a). The premise of the Act is that a plaintiff has a colorable nuisance claim, but the Act bars claims outside the statute of repose. The RTFA forecloses any inquiry into nuisance liability.

Notwithstanding the purpose and design of the statute, the majority opinion analyzed whether the statute of repose could apply by examining evidence that could potentially support finding a nuisance. The court discussed Plaintiffs' deposition testimony alleging that biosolids odors were a nuisance, as well as their expert's testimony opining that land application should have followed a set of "recommended management practices" to reduce odors. 90 A.3d at 50 (App. A at 26-27). This discussion cast aside the objective definition of "normal agricultural operations" in favor of a subjective examination of whether and to what extent the Farm Parties' biosolids use may have created a nuisance, an examination that the Act precludes when a claim is untimely.

In determining that the application of biosolids is a normal agricultural operation as a matter of law, a court must focus on the type of farm work at issue and whether it fits within the Act's objective definition, not the subjective degree of nuisance allegedly caused by the farm work. The Superior Court's reasoning that an activity alleged to be a nuisance cannot be protected as a normal agricultural operation will result in costly lawsuits in the precise circumstances where the legislature intended to forestall litigation.

B. The Commonwealth's Position that Biosolids Farming Is a Normal Agricultural Operation Deserves Deference

The inclusion of land application of biosolids as a normal agricultural operation under the Act's plain language is confirmed by the views of three Commonwealth agencies that appeared on Appellants' side in the trial court and the Superior Court. Both the Statutory Construction Act and this Court's precedent support giving some deference to the state's views on this important issue. 1 Pa. C.S. § 1921(c)(8) ("the intention of the General Assembly may be ascertained by considering . . . administrative interpretation of [the] statute"); *Mercury Trucking*, 55 A.3d at 1082-83 ("'[w]hile this Court ultimately maintains the final responsibility to interpret or construe statutes, this function is appropriately informed by the approach of the expert administrative agency.'" (quoting *Nationwide Ins. Co. v. Schneider*, 960 A.2d 442, 450 n.8 (Pa. 2008) (alteration in original)). All three Commonwealth agencies involved in agriculture, the state's

biosolids program, and the Right to Farm Act—the Pennsylvania Department of Agriculture, the Pennsylvania Department of Environmental Protection, and the Pennsylvania Office of Attorney General—take the position that land application is protected under the Act. These agencies' views are persuasive that farming with biosolids is a normal agricultural operation.

The Superior Court's analysis gave no deference to the state agencies. The majority never acknowledged the position of three expert agencies that filed briefs supporting the Appellants. The Pennsylvania Department of Agriculture ("PDA") and the Pennsylvania Office of Attorney General ("OAG") both have expertise regarding the RTFA and land application of biosolids. The Attorney General enforces the provisions of Act 38, also known as "ACRE" (Agriculture, Communities and Rural Environment), 3 Pa. C.S. §§ 311-318, which is intended "to resolve conflicts that may arise from the regulation of normal agricultural operations at the local level." PDA/OAG Super. Ct. Amicus Br. 2. The Department of Agriculture has broad authority over "all aspects of agricultural production and practices" in Pennsylvania and is "statutorily-recognized . . . to provide the necessary expert opinion and input to the Attorney General on what constitutes a 'normal agricultural operation.'" *Id.* at 4. Both agencies therefore drew on their familiarity with how to determine which farming practices fall within the ambit of "normal agricultural operations."

The PDA and OAG brief opined that the RTFA's objectives required finding that biosolids are shielded by the Act as a normal agricultural operation. OAG and PDA highlighted the fact that "the agricultural use of biosolids is recognized as a normal agricultural practice by the Department of Agriculture and the Penn State University College of Agricultural Sciences." *Id.* at 8. The agencies also expressed the concern that "[t]he intent of the General Assembly to encourage the beneficial use of land applying biosolids ... to agricultural operations from nuisance suits pursuant to the Right to Farm Act will be severely undermined if [the Superior Court] does not affirm the lower court's ruling that this agricultural practice falls within the definition of a normal agricultural operation under the Right to Farm Act." *Id.* Most importantly, Plaintiffs' interpretation of the statute, according to PDA and OAG, would "discourage farmers from investing in establishing new normal agricultural operations . . . [and] produce absurd results and render the Act meaningless." *Id.* at 15.

The Pennsylvania Department of Environmental Protection, the Commonwealth agency responsible for permitting and overseeing biosolids generation and use, also took the position that biosolids are a normal agricultural operation. The General Assembly has charged PaDEP with running "a comprehensive program to regulate" biosolids use in agriculture. PaDEP Super. Ct. Amicus Br. 2. Rules adopted by the Environmental Quality Board regulate

biosolids application, and PaDEP has issued "a general permit for the beneficial use of biosolids in land application." *Id.* PaDEP's opinion reflected over thirty years of experience regulating and encouraging biosolids use.

Much like its sister agencies, the PaDEP declared that the purposes of the RTFA would be undermined if a court found the Act did not cover biosolids. PaDEP highlighted the widespread use of biosolids and stressed the "important benefits to the municipalities that generate biosolids and the farmers that use them." *Id.* Turning to the statute itself, PaDEP argued that "protections afforded to normal agricultural operations from nuisance actions under the Right-To-Farm-Act are vital to encouraging" agricultural reuse of biosolids. *Id.* PaDEP warned of the consequences that would flow from an adverse decision in this case: "Given the General Assembly's intention, as expressed through various statutes, to encourage the beneficial use of biosolids on agricultural land, the exclusion of [biosolids application] from the scope of normal agricultural operations under the Right-To-Farm Act would result in the very mischief that the General Assembly intended to remedy." *Id.* at 16.

The Commonwealth brings to this issue front-line experience overseeing and protecting Pennsylvania's agricultural activities. The agencies understand how the Superior Court's interpretation of the RTFA could render the Act's protections meaningless and ultimately discourage farmers from investing in their agricultural

operations. The collective view of three agencies that farming with biosolids is a normal agricultural operation, when coupled with the plain text of the RTFA, provides commanding support for finding that biosolids are protected under the Act as a matter of law.

C. Pennsylvania Statutes and Cases Recognize Biosolids as a Normal Farming Activity

1. Biosolids Application Is an Established and Accepted Agricultural Practice

The Commonwealth's position favoring land application of biosolids reflects more than the experience of three agencies. The agencies' opinions are based in Pennsylvania statutes, regulations, and case law that treat biosolids application as an ordinary farming practice that should be encouraged. These other sources of law provide further unequivocal evidence that the plain meaning of "normal agricultural operation" includes fertilizing crops with biosolids. *See* 1 Pa. C.S. § 1921(c)(5) ("the intention of the General Assembly may be ascertained by considering . . . [the] former law, if any, including other statutes upon the same or similar subjects."). The Superior Court majority glossed over this large body of law and instead erroneously relied on one Commonwealth Court decision under a different statute that is readily distinguishable.

First, the Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.101-6018.1003, and its regulations classify biosolids recycling as a "normal farming

operation," providing compelling support for a similar interpretation under the RTFA. For the purposes of SWMA programs, "normal farming operations" include "agricultural utilization of septic tank cleanings and sewage sludges which are generated offsite." 35 P.S. § 6018.103. PaDEP's regulations also define "agricultural utilization" to include "land application of sewage sludge for its plant nutrient value or as a soil conditioner...." 25 Pa. Code § 271.1. Moreover, the General Assembly entrusted PaDEP with the "power" and "duty" to "encourage the beneficial use or processing of municipal waste or residual waste" upon finding that such use does not harm human health or the environment. 35 P.S. § 6018.104(18). PaDEP determined that land application of biosolids is a beneficial use that should be encouraged and has developed a regulatory program that ensures application is conducted in a manner protective of human health and the environment. *See, e.g.*, Defs.' 2012 S.J. Ex. FF (R. 241a-242a).

Second, the Commonwealth Court relied on the SWMA to find that farming with biosolids is an agricultural activity protected as a prior non-conforming use under zoning law. In *Hempfield Township v. Hapchuk*, 620 A.2d 668 (Pa. Commw. Ct. 1993), the Commonwealth Court determined that the application of sewage sludge for farming purposes comported with the prior, non-conforming agricultural use of a parcel. To answer the question whether use of sewage sludge was "agricultural," the court looked to SWMA and noted that "the General Assembly

has defined 'normal farming operations' to include the 'agricultural utilization of septic tank cleanings and sewage sludges which are generated off-site.'" *Id.* at 672 (citation omitted). The court also observed that Pennsylvania's courts "used the terms 'agricultural' and 'farm' interchangeably," such that the different terms used in the zoning ordinance and SWMA, respectively, did not alter its analysis. *Id.* at 672. The *Hempfield Township* opinion concluded that the "activities defined as normal farming operations are precisely the same activities which the Hapchuks contend are agricultural" and vacated an injunction against spreading biosolids that the Township had obtained. *Id.*

Third, the Nutrient Management Act, 3 Pa. C.S. §§ 501-522, offers yet more evidence that the General Assembly intended to promote and protect biosolids use under the RTFA. The Nutrient Management Act established a comprehensive regulatory program for nutrient management for certain agricultural operations. 3 Pa. C.S. § 502. The General Assembly's recognition that the use of biosolids is a normal agricultural operation is apparent from the definition of "nutrient" used in the statute: "A substance or recognized plant nutrient, element or compound which is used or sold for its plant nutritive content or its claimed nutritive value. The term includes, but is not limited to, livestock and poultry manures, compost as fertilizer, commercially manufactured chemical fertilizers, *sewage sludge* or combinations thereof." *Id.* § 503 (emphasis added). In the General Assembly's view, sewage

sludge (*i.e.*, biosolids) use has become so common in agriculture that the legislature saw fit to define it as a "nutrient," just like any other agricultural fertilizer. This Court must ensure that the RTFA is read in a manner that is consistent with the General Assembly's other enactments, which recognize, regulate and encourage the use of biosolids as an integral part of farming.

2. The Superior Court Relied on an Inapplicable Commonwealth Court Case Rather Than the Wealth of Pennsylvania Law Supporting Biosolids Use

The Superior Court majority failed to apply or analyze the well-developed law in Pennsylvania recognizing and supporting farm use of biosolids. With minimal explanation, the Superior Court majority rejected the assertion that "PaDEP's regulatory definition of 'normal farming operations' under the SWMA or the Commonwealth Court's interpretation of this definition in the *Hempfield* case compel[] a conclusion that the use of biosolids qualifies as a 'normal agricultural operation' as a matter of law." 90 A.3d at 47-48 (App. A at 21). The majority opinion contains no discussion at all of the Nutrient Management Act. The majority merely pointed to "subsequent decisions [where] the Commonwealth Court has emphatically ruled to the contrary," but discussed only one case: *Office of Attorney General v. East Brunswick Township*, 956 A.2d 1100 (Pa. Commw. Ct. 2008). *East Brunswick* provides little support for the majority's decision and is distinguishable, as explained below and in the amicus brief of the Attorney

General, which was a party to *East Brunswick* and is the office charged with enforcement of the statute at issue in that case. In any event, *East Brunswick* cannot outweigh the text of the Right to Farm Act and the many Pennsylvania authorities discussed above that support covering biosolids under the Act.

East Brunswick turned on statutory and procedural grounds that are absent from this case. In *East Brunswick,* the Attorney General challenged a local ordinance regulating land application of biosolids under an ACRE provision that authorized the Office to seek injunctions against local ordinances that interfere with normal agricultural operations. Although ACRE borrows the RTFA's definition of "normal agricultural operations," ACRE specifically contemplates that fact-finding may be necessary to determine whether a farming activity is protected. It provides that the Attorney General may consult the Secretary of Agriculture and Pennsylvania State University to determine whether an ordinance interferes with a normal agricultural operation. 3 Pa. C.S. § 314(d). The Commonwealth Court specifically rested its conclusion that "an evidentiary, not a legal, determination" was required in *East Brunswick* on this provision in ACRE. 956 A.2d at 1115. This procedure, which was vital to the court's reasoning, is nowhere to be found in the RTFA.

The *East Brunswick* decision is also of limited value because it ruled on a motion for summary relief when there was no evidence regarding farming with

biosolids, in stark contrast to the factual and legal record here. Shortly after the Attorney General filed a complaint against East Brunswick Township challenging its ordinance that sought to ban corporations from using biosolids as fertilizer, the Office moved for summary relief under Pa. R.A.P. 1532(b). The Commonwealth Court denied the Attorney General's summary relief motion because there was "no evidentiary record, not even an affidavit" showing that land application of biosolids was a normal agricultural operation. *E. Brunswick*, 956 A.2d at 1115-16 ("In the absence of any evidence we must, therefore, deny summary relief.").

Here, the Farm Parties have presented a complete record on which a court can find that application of biosolids is a normal agricultural operation. The trial court made such a finding after distinguishing *East Brunswick*. *See* Trial Ct. Op. 10 (App. B. at 10). Further, *East Brunswick* is inapposite because the relevant provision of the RTFA, unlike ACRE, presents a jurisdictional issue that courts must decide as a matter of law. In *East Brunswick* the burden of proof was on the Attorney General in its motion for summary relief. 956 A.2d at 1113. In contrast, the issue presented here places on Plaintiffs bear the burden to establish jurisdiction.

The Superior Court adopted *East Brunswick* uncritically without addressing that case's inconsistent reasoning. The Commonwealth Court in *East Brunswick* asserted the PaDEP's rules encouraging and regulating the agricultural use of

biosolids are not germane to biosolids' status under ACRE because PaDEP adopted these standards pursuant to the SWMA, a statute "not intended to promote agriculture." *Id.* at 1115. This reasoning is plain error because the PaDEP rules directly support agricultural use of biosolids and the title of the organic law under which the regulations were promulgated is irrelevant to the simple question of whether farming with biosolids is a farm practice. Further, the *East Brunswick* court ignored similar Nutrient Management Act regulations that support farms' use of biosolids. These regulations, which implement a statute expressly intended to promote environmentally sound farming, should have been relevant to the court's analysis under the standard it set out. The Superior Court erred by adopting this flawed analysis.

In short, the Superior Court's reliance on *East Brunswick* was misplaced. That case was resolved on procedural grounds under a different statute than the RTFA, and rested on reasoning that does not withstand scrutiny. The Superior Court should have focused on the RTFA's broad definition of normal agricultural operations. To the extent the court needed to look beyond the Act's plain language, it should have looked to state law that expressly discusses biosolids and agriculture rather than a single case that turns on its preliminary, no evidence posture and an incomplete survey of state law.

IV. The Record Compels a Finding That the Application of Biosolids Is a Normal Agricultural Operation

The trial court's legal conclusion that application of biosolids is a normal agricultural operation under the Act is amply supported by the statutes, regulations, case law, and the executive branch positions discussed above. To the extent that evidence regarding decades of farming with biosolids in Pennsylvania is necessary, the record below (as found by the trial court) and the positions of eleven amici, representing interests as diverse as the City of Philadelphia and the Farm Bureau, provide an overwhelming basis for finding that the Act protects biosolids. Were this a jury question, which it is not, no rational jury could find otherwise.

The trial court ably summarized the evidence regarding the history and scope of biosolids use in Pennsylvania:

> 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 . . . provided additional information on the land application biosolids program in its Amicus Brief, including facts, statistics, and the permit process. . .Information provided by DEP states that the United States Environmental Protection Agency developed regulations on biosolids in 1993.

Trial Ct. Op. 10-12 (App. B 10-12). After discussing this persuasive evidence, the trial court concluded:

> 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."

Id. at 13 (App. B at 13).

The Superior Court majority, however, rejected the trial court's determination and the weight of the evidence. In a cursory review of the evidence, the majority suggested that 700 farms using biosolids was an unimpressive number. The Superior Court's rationale here again strayed from the text of the Right to Farm Act, which sets no quantitative threshold for a farm practice to qualify as a normal agricultural operation.

The record includes briefs and evidence filed by a diverse array of amici curiae representing farmers, cities and towns, and wastewater professionals, as well as the three Commonwealth agencies with direct experience in Pennsylvania's biosolids program, agriculture, and the RTFA. All of these amici marshaled numerous facts, laws, and their own experience to demonstrate that the use of a bulk organic fertilizer like biosolids is a normal agricultural operation across the Commonwealth.

Multiple groups representing entities responsible for managing and applying biosolids laid out for the Superior Court evidence showing that biosolids are commonly used in farming. For example, in their amicus brief before the Superior Court, the Mid-Atlantic Biosolids Association ("MABA"), the Pennsylvania Water Environment Association ("PWEA"), and the Pennsylvania Septage Management Association ("PSMA") explained to the court that biosolids application is "an important part of modern farming" in Pennsylvania. MABA Super. Ct. Amicus Br. 6. These three associations collectively "represent the interests of hundreds of Pennsylvania municipalities, dozens of private contractors, and thousands of individual professionals, all of which are charged with protecting the public health and the Commonwealth's water environment through responsible treatment of wastewater, including solids recycling, and who have considerable experience and expertise in these matters." *Id.* at 3. These amici supported their position that the application of biosolids is a normal agricultural operation:

> PaDEP's online database of regulatory actions provides information on 728 Pennsylvania farms in 56 counties which are currently approved by PaDEP to land apply biosolids. . . [and] 254 Pennsylvania POTWs [that] are currently permitted to recycle their biosolids on farmland. More than a dozen private companies using trained operators work to serve farmers with biosolids produced by POTWs. It is estimated that approximately 125,000 tons of biosolids from POTWs in Pennsylvania are used in soil fertilization and conditioning each year. . . .[B]iosolids' use on farmlands is widely accepted by farmers, research scientists and regulatory officials in Pennsylvania, as it is throughout the country.

Id. at 16.

The amicus brief filed by the Pennsylvania Municipal Authorities Association ("PMAA"), which represents 720 Pennsylvania water and sewer authorities, and the Allegheny County Sanitary Authority ("ALCOSAN") highlighted the value that biosolids provide to farmers as "a valuable soil conditioner and a high quality fertilizer...." PMAA/ALCOSAN Super. Ct. Amicus Br. 6. These amici directed the court's attention to how experience has shown that biosolids "are a viable substitute for manure and chemical fertilizers," such that their use in farming has become "widely accepted in Pennsylvania." *Id.* at 9.

The City of Philadelphia also stressed to the Superior Court in its amicus brief that "[t]he City's long history of production and safe use of biosolids for agricultural purposes in Pennsylvania and elsewhere proves that the practice is a 'normal agricultural operation' protected by the Right-to-Farm Act." Phila. Super. Ct. Amicus Br. 5. The City explained that "[o]ver one-third of all biosolids produced by the City since 1990 have been used at farms, with upwards of two million tons of biosolids applied as fertilizer, while another 500,000 tons have been marketed commercially as mulch for use in landscaping and other horticultural applications." *Id.* at 4. The City also indicated that as of 2008, "the City is recycling 100% of its biosolids through a diversified mix of uses including agricultural consumers in Pennsylvania and as far away as Florida." *Id.*

Groups representing Pennsylvania's farmers, including the Pennsylvania Farm Bureau and PennAg Industries Association ("PennAg"), also filed amicus briefs below. PennAg, a trade association affiliated with over 600 farmers and agribusinesses, urged the Superior Court to affirm the lower court's determination that the application of biosolids—which it described as "an organic fertilizer"—is a normal agricultural practice. Notably, PennAg explained that "[o]rganic fertilizer has been used on Pennsylvania farm land as long as the Commonwealth has existed and the use of biosolids as a form of organic fertilizer is an established, common, well-regulated, and safe method of fertilization and soil conditioning at Pennsylvania farms." PennAg Super. Ct. Amicus Br. 8. PennAg also indicated that "[t]he use of biosolids as fertilizer . . . is a normal agricultural operation, particularly since the application of biosolids is not 'new' but has been successfully practiced and regulated for many years in Pennsylvania and the United States." *Id.* at 10.

The views of these amici, who contributed to the robust record below, show that only one finding can be made on this record: biosolids, while a nuisance in the eyes of some, are indisputably a normal agricultural operation entitled to full protection under the RTFA's statute of repose. Pennsylvania's farmers, as well as the businesses and cities that rely on and work with them, ask that the Court apply the Act as written to dismiss this case.

CONCLUSION

The Farm Parties respectfully request that this Court reverse the Superior Court and hold that (i) interpreting the Right to Farm Act presents a legal question on a jurisdictional issue that a court must resolve and (ii) that application of biosolids is a normal agricultural operation under the Act as a matter of law.

The Court should interpret the RTFA's statute of repose to give Pennsylvania famers, cities, their contractors and lower courts a definitive answer: applying biosolids, a widespread and well-established recycling and farm practice, is protected by the Act's one-year statute of repose. This is a fair result that gives neighbors of biosolids applications and other farm activities ample time to bring tort claims regarding farm activities before the statute of repose bars claims.

This Court should also determine that trial courts must decide the threshold jurisdictional and statutory interpretation issues presented by the Act. Such a decision will further the statutory objective of shielding farmers and their contractors from litigation after they have carried out an accepted farm practice for one year and clarify the primacy of courts in deciding jurisdictional issues.

Dated: December 23, 2014

Respectfully submitted,

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CERTIFICATE OF WORD-LIMIT COMPLIANCE

I certify that the foregoing principal brief complies with the word limitation of Pa. R.A.P. 2135(a)(1), in that the word count of the brief, excluding the cover, table of contents, table of citations, proof of service, appendices, and this certificate, is 13,329 words based on the word count of the word processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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Tab

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2014 PA Super 77

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Appellants	:	
v.	:	
SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS AND STEVE TROYER,	:	
Appellees	:	No. 119 MDA 2013

Appeal from the Order entered December 28, 2012,
Court of Common Pleas, York County,
Civil Division at No. 2008-SU-003249-01

BEFORE: DONOHUE, OTT and PLATT*, JJ.

OPINION BY DONOHUE, J.: **FILED APRIL 15, 2014**

Appellants, Ralph Gilbert, Gloria Gilbert, Michelle Torgerson, Edwin Torgerson, Melda Bittorf, Beverly Cox, William Cox, Kimberly Miles, Clea

*Retired Senior Judge assigned to the Superior Court.

Fockler, John Fockler, Linda Eckert, Scott Eckert, William Strine, Kenny Jasinski, Dennis Jasinski, Kathryn Jasinski, Joseph Jasinski, Patricia Unversagt, Megan Jacobs, Barbara Unverzagt, Donna Parr, Jeff Fodel, Wendy Fodel, Jennifer Jasinski, John Jasinski, Judy Queitzsch, Jean Fry, Rick Mcsherry, John Freese, Donna Lynn Freese, Jeff Van Voorhis, Susan Lee Fox, Terrence Fancher, and Donna Fancher (collectively, the "Residents"), appeal from the trial court's order granting summary judgment in favor of Synagro Central, LLC and Synagro Mid-Atlantic (together "Synagro"), George Phillips ("Phillips"), Hilltop Farms ("Hilltop"), and Steve Troyer ("Troyer") (collectively, the "Farm Parties"). Because we conclude, *inter alia*, that issues of material fact remain with respect to whether the use of biosolids in this case is a "normal agricultural operation" under the Right To Farm Act, 3 P.S. §§ 951-957 (the "RTFA"), we reverse the trial court's order and remand the case for further proceedings consistent with this decision.

The Residents all own or reside at properties located adjacent to a 220-acre farm in New Freedom, York County, Pennsylvania (the "Farm"), owned by Phillips since 1986. On this farmland, Phillips owns and operates Hilltop Farms, a farm business. Since 2003, Troyer has leased portions of the farmland from Phillips, and has planted and harvested crops, including corn and soybeans. Synagro contracts with municipalities to recycle and transport biosolids for land applications, and in 2005 obtained a permit from the Pennsylvania Department of Environmental Protection (the "PaDEP") to

provide "land application and long-term storage services" of biosolids to Phillips at Hilltop Farm.

According to the Residents, biosolids (sometimes referred to as "sewage sludge"), is a "viscous, semi-solid mixture of bacteria, virus-laden organic matter, toxic metals, synthetic organic chemicals, and settled solids removed from domestic and industrial waste water at sewage treatment plants." Amended Complaint, 7/23/2010, at ¶ 53. Sewage sludge contains "prescription drug products and their biologically active metabolites, synthetic chemicals, and other industrial chemicals, waste, 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, and can cause rashes and burns." ***Id.*** at ¶¶ 55-56.

Beginning in March 2006 and continuing until April 2009, approximately 11,635 wet tons of biosolids were applied to fields at the Farm, including as follows:

- Over three days in March 2006, approximately 1,113 tons of biosolids were applied on three fields (nos. 7,9, and 11) totaling approximately 67 acres (an overall average of 16 and one half tons per acre, or about seven pounds per square yard);

- In May 2006, approximately 437 tons were applied on two fields (nos. 1 and 3) totaling approximately 48 acres over two days (an overall average of about nine and one half tons per acre);

- Over three days in September 2006, approximately 1,100 tons were applied on two fields (nos. 2 and 5)

totaling approximately 40 acres (an average of more than 27 tons per acre, or about 11 pounds per square yard);

- In late March through mid-April 2007, approximately 1,504 tons were applied on four fields (nos. 7,9,11, and 12) totaling approximately 74 acres (an average of about 20 tons per acre);

- In late April and May 2007, approximately 1.301 tons were applied to one field (no. 14) of approximately 54 acres (an average of about 24 tons per acre);

- Over three days in July 2007, approximately 1,774 tons of biosolids were applied on six fields (nos. 1,3,6,8,10, and 13) totaling approximately 100 acres (an average of less than 18 tons per acre, or about 7.5 pounds per square yard);

- In January and February 2008, approximately 1,593 tons were applied to six fields (nos. 6,7,8,9,10, and 11) totaling approximately 110 acres (an average of about 13 and one half tons per acre);

- In October 2008, approximately 424 tons were applied on three fields (nos. 1,4, and 8) totaling approximately 59 acres (an average of about 13 and one half tons per acre); and

- In March and April 2009, approximately 1,430 tons were applied to eight fields (nos. 2,3,5,9, and 11-14) totaling approximately 120 acres (an average of 12 tons per acre).

Farm Parties' Summary Judgment Exhibits J and K. The biosolids were spread over the surface of the fields and were not immediately tilled or plowed into the soil. ***Id.*** at Exhibit F. According to the Residents, as soon as the spreading of biosolids at the Farm began, they immediately noticed

extremely offensive odors, "typically smelling like a herd of dead, rotting deer." Amended Complaint, 7/23/2010, at ¶ 86.

The application of the biosolids was monitored by the PaDEP and the York County Solid Waste Authority, and three notices of violation were issued, although none involved odors emanating from the Farm.[1] Farm Parties' Summary Judgment Exhibits at Exhibits O, P, and Q. In October 2009, Snyagro notified the PaDEP that it was suspending the use of biosolids at the Farm. ***Id.*** at Exhibit S.

On July 3, 2008 and July 10, 2008, the Residents filed two similar three-count complaints. On December 1, 2008, the trial court consolidated the two actions. On July 23, 2010, with leave of court the Residents filed a joint Amended Complaint, which sets forth three counts. In Count I, the Residents allege that the biosolids activities of the Farm Parties 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, the Residents allege that the Farm Parties have acted negligently because the Farm Parties failed in their duty to properly handle and dispose of the biosolids in a manner to avoid the potential harm to the Residents. In Count III, the Residents allege that biosolids activities of the Farm Parties

[1] Two of the violations, received in March 2006 and April 2009, alleged that biosolids had been spread beyond designated target areas. The Farm Parties contend that they took immediate corrective actions in response. The third notice was issued in June 2007 for tilling a field too soon after application of biosolids.

constitute a trespass onto their land. The Residents seek injunctive relief, compensatory and punitive damages, and counsel fees and costs.

On July 25, 2011, the Farm Parties filed a Joint Motion for Summary Judgment, and the Residents filed a response in opposition. On October 14, 2011, the trial court denied the motion for summary judgment, stating as follows:

> Because RTFA does not specifically mention sewer sludge or biosolids, it is not clear, as a matter of law, that the application of biosolids is a 'normal agricultural operation' under the protection of the RTFA. Even though each side refutes the other's position whether the application of sewer sludge/biosolids is a normal agricultural operation, neither side has presented any supporting evidence.
>
> * * *
>
> Because [the Farm Parties] have not provided any supporting evidence to show what constitutes 'normal agricultural operations' or that application of biosolids is a 'normal agricultural operation,' the Motion for Summary Judgment is denied.

Trial Court Opinion, 10/14/2011, at 8-9.

On July 2, 2012, after discovery, the Farm Parties filed a second Joint Motion for Summary Judgment, and the Residents again filed a response in opposition. In an opinion and order dated December 28, 2012, the trial court granted the motion for summary judgment, concluding that the Residents' nuisance count was barred by the statute of repose set forth in

section 954(a) of the RTFA and that the Residents had failed to plead a *prima facie* claim for negligence or trespass.

This timely appeal followed, in which the Residents present the following two issues for our consideration and determination:

> 1. Whether the trial court erred in granting summary judgment and holding that the Residents' nuisance and negligence claims were barred by the one-year limitation in the [RTFA].
>
> 2. Whether the trial court erred in granting summary judgment and holding that the Residents failed to plead *prima facie* claims for negligence and trespass.

Residents' Brief at 2. The following parties have submitted *amicus curiae* briefs, all in support of the position of the Farm Parties: the PaDEP, the Office of the Attorney General of the Commonwealth of Pennsylvania and the Pennsylvania Department of Agriculture, the City of Philadelphia, the Pennsylvania Municipal Authorities Association and the Allegheny County Sanitary Authority, the Pennsylvania Farm Bureau, the PennAg Industries Association, and the Mid-Atlantic Biosolids Association, the Pennsylvania Water Environment Association, and the Pennsylvania Septage Management Association.

Our standard of review with respect to a trial court's decision to grant or deny a motion for summary judgment is as follows:

> A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.

> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a nonmoving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will view the record 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.

JP Morgan Chase Bank, N.A. v. Murray, 63 A.3d 1258, 1261-62 (Pa. Super. 2013) (quoting ***Murphy v. Duquesne Univ. of the Holy Ghost***, 565 Pa. 571, 590, 777 A.2d 418, 429 (2001)).

For their first issue on appeal, the Residents contend that the trial court erred in granting summary judgment in favor of the Farm Parties with regard to whether section 954(a) of the RTFA bars the Residents' nuisance claim.[2] Our legislature passed the RTFA in 1982 in an effort to "protect agricultural operations from the encroachment of nonagricultural uses and the nuisance suits which inevitably follow." ***Horne v. Haladay***, 728 A.2d

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[2] The trial court also ruled that section 954(a) bars the Residents' negligence claim because the facts that support the negligence claim mirror those that support the nuisance claim. Trial Court Opinion, 12/28/2012, at 24-28. We will discuss the dismissal of the Residents' nuisance claim herein below.

954, 956 (Pa. Super. 1999). Section 951 provides the following legislative policy statement:

> **§ 951. Legislative policy**
>
> It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It 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.

The limitations on nuisance actions are set forth in the statute of repose in section 954 of the RTFA, and require a plaintiff either to file the nuisance action within one year of the inception of the agricultural operation or a substantial change in that operation, as provided in subsection 954(a), or to base their nuisance claim on a violation of a federal, state or local statute or regulation, as provided in subsection 954(b).

> **§ 954. Limitation on public nuisances**
>
> **(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 approved prior to the commencement of such expanded or altered operation pursuant to section 6 of the act of May 20, 1993 (P.L. 12, No. 6), known as the Nutrient Management Act, and is otherwise in compliance therewith: Provided, however, [t]hat nothing herein shall in any way restrict or impede the authority of this State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law.
>
> (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 (emphasis added).

The parties agree that only the bolded portion of subsection 954(a) is applicable in this case, as neither side contends that the physical facilities at the Farm have been substantially expanded or altered. In the trial court, the Residents argued that the three notices of regulatory violations (mentioned herein above) implicated subsection 954(b), thereby negating application of the statute of repose here. In its opinion granting summary judgment,

however, the trial court ruled that subsection 954(b) did not apply in this case because the Residents did not allege in the Amended Complaint that any of their alleged injuries were the result of these violations. Trial Court Opinion, 12/28/2012, at 20-21. The Residents have not appealed this determination.

By its express terms, the statute of repose set forth in subsection 954(a) applies to bar a nuisance action only if three requirements are met. First, the agricultural operation at issue must have an established date of operation at least one year prior to the filing of the lawsuit. Second, the conditions or circumstances constituting the basis of the nuisance action must have existed substantially unchanged since the established date of operation. And third, the conditions or circumstances constituting the basis of the nuisance action must be a "normal agricultural operation," as that term is defined in 3 P.S. § 952.[3]

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[3] The Dissent contends that whether the Farm Parties' use of biosolids constitutes a "normal agricultural operation" is an issue beyond the scope of this Court's purview in deciding this appeal, since whether the trial court properly applied subsection 954(a)'s statute of repose must be determined based only on the identity of the parties, the commencement date of the application of biosolids, and the filing dates of the Residents' complaints. Dissenting Opinion at 3.

We note that neither the trial court, the Farm Parties, nor any of the *amicus curiae* have advocated such a position before this Court. To the contrary, all plainly agree that the statute of repose in subsection 954(a) applies only to protect "normal agricultural operations" against nuisance suits filed beyond the one-year deadline. ***See, e.g.***, Farm Parties' Brief at 19 ("the statute expressly protects 'normal agricultural operations'"). As a result, a

With respect to the first requirement, the trial court agreed with the Residents that the "agricultural operation" at issue here is that conducted at the Farm and that its "established date of operation" is 1986 when Phillips purchased the property. Trial Court Opinion, 12/28/2012, at 18-19. The Farm Parties question why the "established date of operation" should be set at the date of Phillips' acquisition of the farmland in 1986, since the land had been used for farming for many years prior to this date. Farm Parties' Brief at 28-32. The Farm Parties do not contend, however, that determination of this issue is necessary in this context, since whether the "established date of operation" is 1986 or some earlier point in time, in either event the Residents' lawsuit was not filed until 2008, well beyond the one-year requirement in subsection 954(a).

Before addressing the second and third requirements for application of subsection 954(a), we must determine what precisely constitutes the "the conditions or circumstances complained of as constituting the basis for the nuisance action." The Residents contend that this phrase refers to the odors and health effects resulting from the use of biosolids at the Farm, while the Farm Parties argue instead that the phrase connotes an "objective, operational change" in the agricultural operations at the Farm. Residents'

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determination of whether the Farm Parties' use of biosolids in this case was a "normal agricultural operation," as that phrase is used in section 954(a) of the RTFA, was unquestionably an issue before the trial court and, hence, likewise an issue for this Court to decide on appeal.

Brief at 27; Farm Parties' Brief at 34. In resolving this dispute, we note that the goal and purpose of statutory interpretation is to ascertain legislative intent and give it effect, and that the plain language of the statute is, as a general rule, the best indicator of that intent. 1 Pa.C.S.A. § 1921(a); ***Mohamed v. Com., Dept. of Transp., Bureau of Motor Vehicles***, 615 Pa. 6, 18, 40 A.3d 1186, 1193 (2012); ***Mercury Trucking, Inc. v. Pa. PUC***, __ Pa. __, __, 55 A.3d 1056, 1067-68 (2012).

In our view, neither of the proposed interpretations adequately captures the legislature's intent here. The Residents' exclusive focus on the effects of the nuisance ignores that the "conditions and circumstances" at issue must constitute the "basis for the nuisance action." Likewise, nowhere in the relevant language is there any reference limiting the scope of the subsection to "operational changes."

Our Supreme Court elucidated the basis for a nuisance action in ***Kramer v. Pittsburgh Coal Co.***, 341 Pa. 379, 380, 19 A.2d 362, 363 (1941):

> In legal phraseology, the term 'nuisance' is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage. The distinction between trespass and nuisance consists in the former being a direct infringement of

> one's right of property, while, in the later, the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it.

Id. at 380, 19 A.2d at 363 (citations and internal quotation marks omitted).

Accordingly, to sustain a nuisance action, a plaintiff must allege both (1) a use of property or conduct by a property owner that (2) results in material annoyance, inconvenience, or discomfort to another person or to the public. As a result, the phrase "conditions or circumstances complained of as constituting the basis for the nuisance action," must refer to the Farm Parties' application of biosolids at the Farm, as "complained of" in the Residents' Amended Complaint, that has resulted in foul odors and other harmful effects on the Residents.

With this definition in mind, we turn to the second requirement for application of subsection 954(a) – whether the "conditions or circumstances complained of as constituting the basis of the nuisance action" have existed substantially unchanged since the established date of operation. The trial court ruled that organic fertilizers had been used at the Farm since at least 1986, and that because biosolids are just another form of organic fertilizer, no substantial change had occurred. Trial Court Opinion, 12/28/2012, at 20. In our view, this was error, since, as just established, the "conditions or circumstances complained of as constituting the basis of the nuisance action" refers not just to the use of an organic fertilizer at the Farm, but rather to

the use of an organic fertilizer ***that resulted in extremely foul odors and health effects***. The basis for the Residents' nuisance claim is not merely that the Farm Parties' changed the type of fertilizer used at the farm, but rather than the change in fertilizers resulting in severe nuisance conditions.

Substantial evidence in the record establishes a genuine issue of material fact with respect to whether the switch to biosolids in 2006 constituted a substantial change. Numerous Residents testified that the odors experienced on their properties in 2006 and thereafter were extremely offensive and noxious, smelled like dead animals, and was so bad that on many occasions they could not leave their homes. For example, one Resident indicated that the smell was such that "you couldn't even go outside" and that it "smelled like death." Scott Eckert Dep. at 36-37. The Residents also testified that they had long been familiar with the odors from animal manures and had never objected to these smells. T. Fancher Dep. at 22; M. Torgerson Dep. at 93-94; J. Freese Dep. at 48 ("I enjoy the smell of manure. I think it is the most down-to-earth country smell that you could smell."). According to the Residents, the Farm Parties' use of biosolids created odors that were far worse than comparable odors from animal manures previously used at the farm. T. Fancher Dep. at 35-36 (biosolid use "changed the way we lived" and was far worse than animal manures); S. Fox Dep. at 112 (biosolids had a "nauseating, repulsive stench" far worse than cow manure); R. McSherry Dep. at 28-29 (animal manure has a quick

smell that soon leaves you, but biosolids "was a lot stronger odor, and it stayed constantly").

For these reasons, we conclude that the certified record indicates that a material issue of fact exists with respect to whether the Farm Parties' use of biosolids at the Farm constituted a "substantial change" from prior operations. We nevertheless conclude, however, that the Farm Parties satisfied the second requirement for application of the RTFA's statute of repose, since the alleged substantial change occurred more than one year before the Residents filed their lawsuits in this case. The certified record plainly establishes that the Farm Parties began to apply biosolids in large quantities at the farm in March 2006, more than two years prior to the filing of the Residents' two lawsuits on July 3, 2008 and July 10, 2008. A substantial change does not eliminate subsection 954(a)'s one-year statute of repose entirely, but rather merely resets it, permitting the filing of a nuisance action within one year from the date of the substantial change. ***Horne***, 728 A.2d at 956. Accordingly, even if the Residents could prove at trial that the Farm Parties' use of biosolids constituted a substantial change, their lawsuits would still not satisfy the timeliness requirements under subsection 954(a).[4]

[4] Assuming that the use of biosolids is a "normal agricultural operation," an issue discussed herein below.

The Residents offer two arguments in opposition to this conclusion, neither of which we find to be persuasive. First, the Residents contend that no language in subsection 954(a) indicates that the one-year time period resets after a substantial change, and that as a result after a substantial change occurs, the RTFA no longer bars nuisance actions. Residents' Brief at 33. In ***Horne***, however, this Court decided to the contrary. In that case, the agricultural operation (a poultry business) began in November 1993, the defendant constructed a decomposition house in August 1994, and the appellant filed suit in November 1995. ***Horne***, 728 A.2d at 956. We ruled that subsection 954(a) barred appellant's lawsuit even if construction of the decomposition house constituted a substantial change, as suit was not filed until more than one year after its completion. ***Id.***

Moreover, we agree with the Farm Parties that the Residents' proposed interpretation of subsection 954(a) is inconsistent with legislative intent. Section 951 of the RTFA sets forth a clear legislative policy 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. The Residents' interpretation, pursuant to which the statute of repose specifically designed to accomplish this legislative mandate is eliminated after any substantial change resulting in a nuisance, fails to accomplish this fundamental legislative goal.

Second, the Residents argue that even if the one-year time period resets after a substantial change, the Farm Parties' application of a large quantity of biosolids in July 2007 constituted a second substantial change. Residents' Brief at 37. According to the Residents, the Farm Parties applied 1.8 million pounds of biosolids over a weekend in July 2007, and the extremely hot temperatures exacerbated the intensity of the odors. ***Id.*** An increase only in the extent of the nuisance conditions, however, cannot constitute a substantial change, since the use or conduct that formed the basis for the Residents' nuisance claims – namely the application of biosolids – did not change at all. The RTFA's statute of repose would be rendered entirely ineffectual if plaintiffs could continue to restart the one-year time period by pointing to increases over time in their perception of the degree of the offensive conditions.

The third requirement under the RTFA's statute of repose in subsection 954(a) is that the practice in question must qualify as a "normal agricultural operation." The RTFA defines "normal agricultural operation" as follows:

> **"Normal agricultural operation."** 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 and is:
>
> > (1) not less than ten contiguous acres in area; or

> (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least $10,000.
>
> The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134), known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

3 P.S. § 952. Practices that do not qualify as "normal agricultural operations" are not protected under the RTFA. The trial court ruled that "the 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." Trial Court Opinion, 12/28/2012, at 13.

On appeal, the Farm Parties contend that the application of biosolids on farmland is a "normal agricultural operation" as a matter of law, without any need to review the evidentiary record. Farm Parties' Brief at 17-21. In this regard, the Farm Parties point out that in 1998, the legislature amended the definition of "normal agricultural operations" to delete a prior limitation of "customary and generally accepted" activities, practices, equipment, and

procedures engaged in "year after year," and instead added the phrase "new activities, practices, equipment and procedures consistent with technological development within the agricultural industry." ***Id.*** at 20. The trial court concurred with the Farm Parties that the use of biosolids is indeed a new practice "consistent with technological development within the agricultural industry," citing to regulations authorizing the regulated use of biosolids promulgated by the United States Environmental Protection Agency ("EPA") in 1993 and the PaDEP in 1997. Trial Court Opinion, 12/28/2012, at 12. The trial court further noted that PaDEP regulations define "normal farming operations" under Pennsylvania's Solid Waste Management Act ("SWMA") to include using waste to improve soil, and that the Commonwealth Court, in ***Hempfield Twp. v. Hapchuk***, 620 A.2d 668 (Pa. Commw. 1993), has interpreted this regulatory definition to conclude that the application of sewer sludge is a "farming and agricultural use." ***Id.*** at 672; Trial Court Opinion, 12/28/2012, at 12.

Contrary to these arguments, however, nowhere in the definition of "normal agricultural operation" did the legislature include any language suggesting that the application of biosolids on farmland meets this definition. At the time of the amendment of the definition in 1998, the EPA (in 1993) and the PaDEP (in 1997) had both issued regulations authorizing the use of biosolids on farmland, but the legislature did not include the use of biosolids in its amended definition as a new practice "consistent with technological

development within the agricultural industry." A specific mention of biosolids was undoubtedly an option available to the legislature at that time, since other practices (*e.g.*, custom work) and types of equipment (*e.g.*, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment) are clearly identified. As such, we cannot agree with the contention that the legislature's amendment of the definition in 1998 was specifically intended to incorporate the application of biosolids as a "normal agricultural operation."

We likewise reject the contention that the PaDEP's regulatory definition of "normal farming operations" under the SWMA or the Commonwealth Court's interpretation of this definition in the ***Hempfield*** case compels a conclusion that the use of biosolids qualifies as a "normal agricultural operation" as a matter of law. To the contrary, in subsequent decisions the Commonwealth Court has emphatically ruled to the contrary. In ***Com., Office of Atty. Gen. ex rel. Corbett v. East Brunswick Twp.***, 956 A.2d 1100 (Pa. Commw. 2008), for example, the Attorney General of Pennsylvania brought an action in the Commonwealth Court pursuant to Act 38, 3 P.S. §§ 311-318, which directs the Attorney General to review local ordinances upon the request of any owner or operator of a "normal agricultural operation" and to determine whether the local ordinance enforces the policy set forth in section 953 of the RTFA not to impede "normal agricultural operations." 3 P.S. §§ 311-318. Act 38 adopts and

incorporates the RTFA's definition of "normal agricultural operation." ***Id.*** at §§ 312; 952.

In ***East Brunswick***, the Attorney General challenged a local ordinance regulating the application of biosolids on farmland as fertilizer. For three reasons, a three-judge panel of the Commonwealth Court concluded that summary judgment in favor of the Attorney General was not warranted, since whether the use of biosolids is a "normal agricultural operation" is "a factual determination based upon evidence" rather than a legal determination based upon the SWMA regulations or its prior decision in ***Hempfield***:

> First, the legislature did not expressly incorporate by reference Section 103 of the SWMA into Act 38, as it did expressly incorporate [the definition of 'normal agricultural operation'] of the [RTFA]. Indeed, Section 103 provides that its definitions are to be followed "when used in this act," *i.e.*, the SWMA; it does not expand its definitions for use in other statutes, such as Act 38. Further, the regulation upon which the Attorney General relies was not adopted by the Department of Agriculture under authority of the [RTFA]. Rather, it was adopted by [PaDEP] under the SWMA, a statute not intended to promote agriculture but to regulate 'solid waste practices.' Section 102 of the SWMA, 35 P.S. § 6018.102.
>
> Second, Act 38 directs the Attorney General to seek expert opinions from the Secretary and Dean of the College of Agricultural Sciences at Penn State to determine what constitutes a 'normal agricultural operation.' 3 Pa.C.S. § 314(d). This suggests, at a minimum, that the determination of what constitutes a 'normal agricultural operation' is an evidentiary,

> not a legal, determination. Here, the Township vehemently challenges the finding that the application of sewage sludge to land is either 'normal' or even 'agricultural.' It argues 'corporate ... sewage sludge hauling' is an industrial and municipal activity. Township Brief in Support of Preliminary Objections at 10–11.
>
> Third, as noted by the Township, nowhere in Act 38 is there any mention of sewage sludge or its application to land. Similarly, [the definition of 'normal agricultural operation' of the [RTFA]], which has been incorporated into Act 38, says nothing about sewage sludge. Because the Attorney General has filed for summary relief, there is no evidentiary record, not even an affidavit, on which to make the factual finding that 'sewage sludge application' is a 'normal agricultural operation' and not 'industrial waste disposal,' as asserted by the Township.

East Brunswick, 956 A.2d at 1115-16 (footnote omitted). We find the reasoning of the Commonwealth Court on these points to be persuasive.

Finally, the Farm Parties argue that courts should decide what constitutes a "normal agricultural operation" as a matter of law since there is "no suggestion in the RTFA that it requires evidentiary hearings or jury trials to determine what is a normal agricultural operation, and reading this into the statute would eliminate the certainly that is the hallmark of a statute of repose." Farm Parties' Brief at 27. In this regard, the Farm Parties contend that statutes of repose are jurisdictional in nature, and thus their scope and applicability pose questions of law for courts. Farm Parties' Brief at 15-16. We agree that statutes of repose are jurisdictional in nature, and that as a result their ***scope***, as determined by statutory interpretation, presents a

question of law for courts to decide. ***See, e.g.***, ***Smith v. W.C.A.B.***, 543 Pa. 295, 300, 670 A.2d 1146, 1148-49 (1996).

With respect to the ***applicability*** of statutes of repose, however, issues of fact are often determinative, and a party may avoid summary judgment by identifying sufficient evidence in the record to establish that one or more issues of material fact remain for consideration by the eventual finder of fact. In ***McConnaughey v. Building Components, Inc.***, 536 Pa. 95, 637 A.2d 1331 (1994), for example, our Supreme Court reversed a grant of summary judgment in favor of a product manufacturer pursuant to 42 Pa.C.S.A. § 5536, a statute of repose applicable to construction projects. ***Id.*** at 102, 637 A.2d at 1335. The Supreme Court concluded that a genuine issue of material fact remained with respect to the extent of the manufacturer's involvement in the planning, design, or construction of the structure at issue. ***Id.*** Likewise, in ***Prigden v. Parker Hannifin Corp.***, 974 A.2d 1166 (Pa. Super. 2009), this Court quashed as interlocutory an appeal from a trial court's order denying summary judgment, on the grounds that the trial court properly determined that issues of fact remained regarding the applicability of a statute of repose under the General Aviation Revitalization Act, 49 U.S.C. § 40101. ***Id.*** at 1172; ***see also Stewart v. Precision Airmotive, LLC***, 7 A.3d 266, 277 (Pa. Super. 2010), *appeal denied*, 615 Pa. 779, 42 A.3d 294 (2012) (same).

We must turn then to the evidentiary record to determine whether a material issue of fact exists with respect to whether the Farm Parties' use of biosolids, as described in the Residents' Amended Complaint, is a "normal agricultural operation." The trial court, in granting summary judgment, found persuasive evidence offered by the Farm Parties and *amici* showing that "over the past 20 years, [PaDEP] 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." Trial Court Opinion, 12/28/2012, at 10-11. PaDEP statistics further showed that more than 70 sites in York County had been approved for the use of biosolids on farmland in the past 15 years. ***Id.*** at 11. The trial court found it significant that the PaDEP closely regulates this practice. ***Id.***

In response to the Residents' contention that 700 farms constitutes only 1% of the 63,163 farms in Pennsylvania and thus provides little evidence that the use of biosolids on farmlands is either a normal or widespread practice, the trial court responded by pointing out that the 1% calculation may be misleading because the total number of farms also includes various types of non-agricultural operations, like livestock and poultry farms. ***Id.*** at 11-12. The trial court reached no finding of fact, however, as to what a more accurate percentage of farms using biosolids might be. Instead, the trial court observed that the definition of "normal agricultural operation" is silent as to numbers, and thus "to find that

biosolids are not a normal agricultural operation simply based on the fact that the 700 sites constituted only 1% of total farms goes beyond the plain language of the definition, as well as the intent of the RTFA." ***Id.*** at 12.

Essentially, then, the statistics regarding the number of Pennsylvania farms using biosolids are not determinative, one way or the other, of whether the practice is a "normal agricultural operation." In this regard, we note that just as the definition is silent as to numbers, it is also silent with regard to the effect, if any, of governmental regulation. While it is undoubtedly true that the application of biosolids on farmland is closely regulated by the PaDEP, nothing in the definition suggests that governmental regulation of the practice should play any substantial role in determining whether it is a "normal agricultural operation" under the RTFA. As indicated herein above, the PaDEP began regulating the use of biosolids in 1997, but when the legislature amended the definition of "normal agricultural operation" in 1998, no language was added to delineate that the use of biosolids was intended to be included within its scope.

Neither the trial court nor the Farm Parties have directed this Court to any other evidence in the record to establish as a matter of law that the use of biosolids is a "normal agricultural operation." The Residents, on the other hand, point to a substantial quantity of evidence to show that the Farm Parties' particular use of biosolids in this case was not normal or routine and failed to conform to accepted EPA and industry practices. For example,

evidence of record, including deposition testimony from several of the Residents, suggests that the Farm Parties took no steps to mitigate odors and other nuisance conditions resulting from their use of biosolids, and had no odor management or nuisance control plans. As such, the Residents argue that "it is not 'normal' for a farm to send odors unlimited in intensity, duration, frequency, or character" across and onto neighboring properties. Residents' Brief at 39. The Residents have submitted an affidavit from an expert on EPA recommended management practices for the use of biosolids. ***Id.*** at 40. According to this affidavit, these management practices include "selecting remote sites and fields away from neighbors, minimizing storage time for sewage sludge, developing an odor control plan, avoiding land applications during certain wind or weather conditions, ... and having an alternative disposal option for particularly malodorous batches." ***Id.*** The Residents contend that testimony from representatives of the Farm Parties establishes that they made no attempts to comply with any of these management practices. ***Id.*** at 11-12.

In our view, the certified record on appeal does not demonstrate as a matter of law that the Farm Parties' use of biosolids at the Farm constitutes a "normal agricultural operation," as that term is defined by the RTFA. The Farm Parties contend that the use of biosolids is "one of the largest and most successful recycling undertakings in America and Pennsylvania," and one regularly used by Pennsylvania farmers. Farm Parties' Brief at 14. The

Residents, conversely, contend that the use of biosolids is not a widespread practice, is used by only about 1% of the farms operating in Pennsylvania, and was in any event not "normal" as specifically employed by the Farm Parties in this case. These arguments should be put to a jury for resolution. Summary judgment is reserved only for those cases in which it is clear that no issues of material fact remain and that the moving party is entitled to judgment as a matter of law. ***See, e.g., Toy v. Metropolitan Life Ins. Co.***, 593 Pa. 20, 34, 928 A.2d 186, 195 (2007). With respect to the issue of whether the application of biosolids is a "normal agricultural operation," issues of material fact remain and therefore the trial court erred in granting summary judgment.

For their second issue on appeal, the Residents contend that the trial court erred in granting summary judgment on their claims for negligence and trespass. With respect to the Residents' negligence claims, we find no error. To prove a negligence claim, it is well-established that the plaintiff must establish that the defendant owes the plaintiff a duty "to conform to a particular standard of conduct toward another." ***See, e.g., Atcovitz v. Gulph Mills Tennis Club, Inc.***, 571 Pa. 580, 586, 812 A.2d 1218, 1222 (2002). The trial court concluded, and we agree, that the Residents have not identified any duty under Pennsylvania law that requires a property owner to use his or her property in such a manner that it protects neighboring landowners from offensive odors or other nuisance conditions.

Trial Court Opinion, 12/28/2012, at 26-27. As this Court held in ***Horne***, while it is true that a nuisance claim can be founded on negligent conduct, a negligence claim cannot be based solely on facts that establish a nuisance claim. ***Horne***, 728 A.2d at 960. As in ***Horne***, the operative facts here establish that the Residents have asserted nuisance claims, not negligence claims – namely claims based upon a use of property that "is not wrongful in itself, but only in the consequences which may flow from it." ***See Kramer***, 341 Pa. at 381, 19 A.2d at 363.

With respect to the Residents' trespass claims, we agree with the Farm Parties that the Residents have waived most of these claims on appeal. In their Amended Complaint, the Residents allege that the Farm Parties committed a trespass by releasing biosolids "into the environment" and thus caused them to enter onto and contaminate the Residents' properties "whether in solid, particulate, or gaseous state." Amended Complaint, 7/23/2010, at ¶ 405. In granting summary judgment dismissing the Residents' trespass claims, the trial court ruled that under Pennsylvania law "intrusions and effects which come through the air, such as noise, odors, smoke, interference with light and air, and the like" have predominated been treated as nuisances rather than trespasses. Trial Court Opinion, 12/28/2012, at 31. On appeal, the Residents have included no argument in their brief to support their claims that the airborne dissemination of odors from the Farm Parties' use of biosolids constitutes a trespass. Accordingly,

these claims are waived. ***See, e.g.***, ***Commonwealth v. Jackson***, 494 Pa. 457, 459 n.1, 431 A.2d 944, 945 n.1 (1981) (holding that the failure to address a claim in the argument section of an appellate brief waives consideration of the claim).

Instead, in their appellate brief the Residents restrict their argument to the trespass claims of four Residents, Wendy and Jeff Fodel and Donna and John Freese. Wendy Fodel testified at her deposition that brown water ran across a street from the Farm onto her property. W. Fodel Dep. at 78-81. Jeff Fodel testified that Troyer had deposited stone in a little stream on the Farm, and that "[i]t hit that stone and went right across the street on my property." J. Fodel Dep. at 155. Donna Freese testified that she observed "large chunks" of biosolids on her property. D. Freese Dep. at 83. Her husband testified that biosolids were diverted onto his property after having been applied on a severe slope directly across the street. J. Freese Dep. at 63-67. He further testified that he informed the person applying the biosolids of the condition, but "he just happily went on his way." ***Id.*** at 66-68.

Section 158 of the Restatement (Second) of Torts governs trespass claims in Pennsylvania:

> **§ 158 Liability for Intentional Intrusions on Land**
>
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, 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); ***Smith v. King's Grant Condo.***, 614 A.2d 261, 267 (Pa. Super. 1992), *affirmed*, 537 Pa. 51, 640 A.2d 1276 (1994). The comment to clause (a) provides that "it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land," and that instead "[i]t is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." ***Id.*** at Comment.

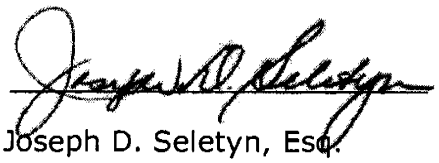
Based upon our review of the deposition testimony of the Fodels and the Freeses, we must conclude that they have offered sufficient evidence to create issues of material fact precluding the dismissal of their trespass claims. These four Residents all contend that biosolids, both in liquid and solid forms, have entered their properties directly from the Farm. Moreover, the testimony of Jeff Yodel and John Freese provides evidence that the entry of biosolids onto their properties was the result of conduct by the Farm Parties "with knowledge that it will to a substantial certainty result in the entry of the foreign matter" – including the placement of stone in a stream on the Farm diverting contaminated water onto the Yodels' property, and the

placement of biosolids on a severe slope directly across the street from the Freeses' property.

Order reversed. Case remanded to the trial court for further proceedings consistent with this decision. Jurisdiction relinquished.

Platt, J. files a Dissenting Opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014

J-A32014-13

2014 PA Super 77

RALPH GILBERT, GLORIA GILBERT, MICHELLE TORGERSON, MELDA BITTORF, BEVERLY COX, WILLIAM COX, KIMBERLY MILES, CLEA FOCKLER, JOHN FOCKLER, LINDA ECKERT, WILLIAM STRINE, KENNY JASINSKI, DENNIS JASINSKI, KATHRYN JASINSKI, JOSEPH JASINSKI, PATRICIA UNVERZAGT, MEGAN JACOBS, BARBARA UNVERZAGT, DONNA PARR, JEFF FODEL, WENDY FODEL, JENNIFER JASINSKI, JOHN JASINSKI, JUDY QUEITZSCH, JEAN FRY, RICK McSHERRY, JOHN FREESE, DONNA LYNN FREESE, JEFF VAN VOORHIS, SUSAN LEE FOX, TERRENCE FANCHER AND DONNA FANCHER, Appellants v. SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS AND STEVE TROYER Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 119 MDA 2013

Appeal from the Order Entered December 28, 2012,
In the Court of Common Pleas of York County,
Civil Division, at No. 2008-SU-003249-01.

BEFORE: DONOHUE, OTT, and PLATT*, JJ.

DISSENTING OPINION BY PLATT, J.: **FILED APRIL 15, 2014**

* Retired Senior Judge assigned to the Superior Court.

I respectfully dissent. In my view, Appellants' complaint was untimely filed, based on the one-year statute of repose at 3 P.S. § 954(a). Therefore, I would affirm the trial court's decision.

The leaned Majority concludes that "issues of material fact remain with respect to whether the use of biosolids in this case is a 'normal agricultural operation'" to determine that Appellees' conduct fell outside the statute of limitation set forth in the Right to Farm Act (RTFA) at 3 P.S. § 954(a). (Majority Opinion, at 2). I believe this conclusion is unwarranted.

It is well-settled that "the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." ***Hopkins v. Erie Ins. Co.***, 65 A.3d 452, 460 (Pa. Super. 2013) (citation omitted).

The Majority correctly concludes that the circumstances constituting the basis of the nuisance action, the application of biosolids on Appellees' farm, began in March 2006, and Appellants filed their complaint in July 2008. (Majority Opinion, at 3-5, 13-14, 15-17).

The Majority contends, however, that the application of biosolids fails to qualify as a "normal agricultural operation," in order to apply the statute of repose. (***Id.*** at 18). It acknowledges that there are EPA and industrial guidelines on biosolid application, which strongly suggests that the use of biosolids is, contrary to its determination, a normal agricultural practice under 3 P.S. § 952. (***Id.*** at 19-20, 26). Instead, the Majority concludes that there remains a genuine issue of material fact as to whether the use of biosolids "was in any event not 'normal' as specifically employed by the Farm Parties in this case." (***Id.*** at 27). However, this exception is unwarranted, because it conflates our standard for grant of summary

judgment with the question of law raised by whether the statute of limitations has run. ***See Wilson v. Transp. Ins. Co.***, 889 A.2d 563, 570 (Pa. Super. 2005).

The cases relied on by the Majority do not stand for its assertion that "[w]ith respect to the ***applicability*** of statutes of repose, . . . issues of fact are often determinative, and a party may avoid summary judgment by identifying sufficient evidence in the record to establish that one or more issues of material fact remain for consideration by the eventual finder of fact." (Majority Opinion, at 23); ***see, e.g. McConnaughey v. Building Components***, 637 A.2d 1331 (Pa. 1994) (genuine issue of material fact regarding whether appellee was involved in allegedly tortious conduct).

Here, there is no genuine issue of material fact as to the identity of the parties, the date of commencement of the application of biosolids, or the date on which Appellants filed their complaint. ***See Hopkins***, ***supra*** at 460. We cannot reach the question of whether the application of biosolids "was in any event not 'normal' as specifically employed by the Farm Parties in this case" because Appellants' complaint was not timely filed. (***Id.*** at 27). Thus, I believe that the Majority erred in sidestepping the statute of limitations in order to reach the issues raised by Appellants' untimely nuisance claim.

Therefore, I would conclude that the trial court correctly determined that summary judgment was appropriate where Appellants' complaint was untimely under the one-year statute of limitation under the RTFA at 3 P.S. § 954(a). ***See Horne v. Haladay***, 728 A.2d 954, 954 (Pa. Super. 1999), *appeal denied*, 745 A.2d 1223 (Pa. 1999).

I would affirm the grant of summary judgment by the trial court. Accordingly, I respectfully dissent.

Tab

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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.	:	Motion for Summary Judgment
SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS, and STEVE TROYER, Defendants	:	

PROTHONOTARY
2012 DEC 31 AM 11:45
JUSTICE CENTER
YORK, PA

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

12/31/12

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
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FILED

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

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3 P.S. § 951

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES
TITLE 3 P.S. AGRICULTURE
CHAPTER 14B. PROTECTION OF AGRICULTURAL OPERATIONS FROM NUISANCE SUITS AND ORDINANCES

Current through Regular Session Act 2013-88, 91, 93 to 97, 99 to 103

§ 951. Legislative policy

It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It 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.

CREDIT(S)

1982, June 10, P.L. 454, No. 133, § 1, effective in 60 days.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Title of Act:
An Act protecting agricultural operations from nuisance suits and ordinances under certain circumstances. 1982, June 10, P.L. 454, No. 133.

3 P.S. § 952

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES
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CHAPTER 14B. PROTECTION OF AGRICULTURAL OPERATIONS FROM NUISANCE SUITS AND ORDINANCES

Current through Regular Session Act 2013-88, 91, 93 to 97, 99 to 103

§ 952. Definitions

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Agricultural commodity." Any of the following transported or intended to be transported in commerce:

(1) Agricultural, aquacultural, horticultural, floricultural, viticultural or dairy products.
(2) Livestock and the products of livestock.
(3) Ranch-raised fur-bearing animals and the products of ranch-raised fur-bearing animals.
(4) The products of poultry or bee raising.

(5) Forestry and forestry products.
(6) Any products raised or produced on farms intended for human consumption and the processed or manufactured products of such products intended for human consumption.

"Municipality." A county, city, borough, incorporated town, township or a general purpose unit of government as established by the act of April 13, 1972 (P.L. 184, No. 62), > [FN1] known as the "Home Rule Charter and Optional Plans Law."

"Normal agricultural operation." 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 and is:

(1) not less than ten contiguous acres in area; or
(2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least $10,000.

The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment

and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134), > [FN2] known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

CREDIT(S)

1982, June 10, P.L. 454, No. 133, § 2, effective in 60 days. Amended 1996, June 12, P.L. 336, No. 52, § 1, imd. effective; 1998, May 15, P.L. 441, No. 58, § 1, imd. effective.

> [FN1] > 53 P.S. § 1-101 et seq. (repealed); > 53 Pa.C.S.A. § 2901 et seq.

> [FN2] > 3 P.S. § 1901 et seq.

3 P.S. § 953

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES
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§ 953. Limitation on local ordinances

(a) Every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every municipality that defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.

(b) Direct commercial sales of agricultural commodities upon property owned and operated by a landowner who produces not less than 50% of the commodities sold shall be authorized, notwithstanding municipal ordinance, public nuisance or zoning prohibitions. Such direct sales shall be authorized without regard to the 50% limitation under circumstances of crop failure due to reasons beyond the control of the landowner.

CREDIT(S)

1982, June 10, P.L. 454, No. 133, § 3, effective in 60 days. Amended 1992, March 19, P.L. 17, No. 6, § 1, effective in 60 days.

3 P.S. § 954

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES
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Current through Regular Session Act 2013-88, 91, 93 to 97, 99 to 103

§ 954. Limitation on public nuisances

(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 approved prior to the commencement of such expanded or altered operation pursuant to section 6 of the act of May 20, 1993 (P.L. 12, No. 6), > [FN1] known as the Nutrient Management Act, and is otherwise in compliance therewith: Provided, however, That nothing herein shall in any way restrict or impede the authority of this State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law.

(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.

CREDIT(S)

1982, June 10, P.L. 454, No. 133, § 4, effective in 60 days. Amended 1998, May 15, P.L. 441, No. 58, § 2, effective in 60 days.

> [FN1] > 3 P.S. § 1706 (repealed); see now, > 3 Pa.C.S.A. § 506.

3 P.S. § 955

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Current through Regular Session Act 2013-88, 91, 93 to 97, 99 to 103

§ 955. Water damages

The provisions of section 4 > [FN1] shall not affect or defeat the right of any person, firm or corporation to recover damages for any injuries or damages sustained by him or it on account of any pollution of, or change in condition of, the waters of any stream or on account of any flooding of lands to any such person, firm or corporation.

CREDIT(S)

1982, June 10, P.L. 454, No. 133, § 5, effective in 60 days.

> [FN1] > 3 P.S. § 954.

3 P.S. § 956

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES
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Current through Regular Session Act 2013-88, 91, 93 to 97, 99 to 103

§ 956. Saving clause

(a) This act shall not be construed to invalidate any contract made prior to its effective date nor shall it be construed to apply to any suit brought prior to its effective date.

(b) The provisions of this act shall not affect or defeat the intent of any federal, state or local statute or governmental regulation except nuisance ordinances as they apply to any normal agricultural operation.

CREDIT(S)

1982, June 10, P.L. 454, No. 133, § 6, effective in 60 days.

3 P.S. § 957

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES
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Current through Regular Session Act 2013-88, 91, 93 to 97, 99 to 103

§ 957. Severability

If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

CREDIT(S)

1982, June 10, P.L. 454, No. 133, § 7, effective in 60 days.