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.

Appeal from the April 15, 2014 Order of the Superior Court of Pennsylvania No. 119 MDA 2013

BRIEF OF APPELLEES RALPH GILBERT, et al.

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INTRODUCTION

Appellants Synagro Central, LLC, Synagro Mid-Atlantic, George Phillips, Hilltop Farms, and Steve Troyer (hereafter collectively "Synagro or the Synagro Parties") have appealed the Superior Court's interlocutory decision denying their motion for summary judgment on the basis of the one-year limitation on nuisance actions in the Right to Farm Act (RTFA), 3 Pa. Stat. § 951 *et seq.*, and remanding this case for trial. The Synagro Parties and their *amici*, however, ignore the RFTA's explicit terms, the primary issues the motion for summary judgment raises, and virtually all of the evidence of record. Their interpretation of the RTFA focuses on only three words in the statute. Without regard to the express language of the entire RTFA, the allegations in this case, or the facts, they seek a ruling that the application of sewage sludge, regardless of what that sludge contains, how it is applied, or the effects its application has on nearby residents, is *always* a "normal agricultural operation" in Pennsylvania.

But that is not the issue in this case. Plaintiffs Ralph Gilbert, Gloria Gilbert, *et al*. ("Residents") do not contend – and have never contended – that the mere application of sewage sludge, without more, *always* or *ever* creates or constitutes a nuisance. Nor do they maintain that the application of sewage sludge is *always* or *never* a "normal agricultural operation." Instead, Residents are focused on, to quote from the RFTA, 3 Pa. Stat. § 954(a), the "conditions or circumstances

complained of as constituting the basis for the nuisance action" in this case: the application of enormous amounts of putrid-smelling sewage sludge at the Phillips Farm from 2006 to 2009 without any odor control plan and in violation of the EPA's and Synagro's own recommended management practices, causing significant odor and health problems. The issue in this case is whether the Synagro Parties produced undisputed evidence that those "conditions or circumstances," to quote again from the RTFA, "existed substantially unchanged since the established date of operation" of the Phillips Farm and are "normal agricultural operations." 3 Pa. Stat. § 954(a).

As the Superior Court held, they did not. To the contrary, the undisputed evidence in the record is that the "conditions or circumstances complained of" here *did not* "exist . . . substantially unchanged since the established date of operation" and *are not* "normal agricultural operations." For that reason, the Synagro Parties' motion for summary judgment was properly denied. Notwithstanding this, however, the Superior Court misinterpreted the RTFA as having a "reset" mechanism that restarts the RTFA's one-year limitation on nuisance actions whenever there is a "substantial change" in a farm's operations. This interpretation is inconsistent with the RTFA's text and correcting this legal error provides an alternative basis for denying the motion for summary judgment.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Synagro Parties are entitled to summary judgment under the Pennsylvania Right to Farm Act's one-year limitation on nuisance actions—which applies "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"—when they did not submit any evidence, much less uncontroverted evidence, that the "conditions or circumstances complained of" have existed "substantially unchanged since the established date of operation" or are "normal agricultural operations"?

The Superior Court answered this question in the negative.

COUNTER-STATEMENT OF THE CASE

A. Basis for Suit and Residents' Claims

Residents are thirty-four individuals who own or reside at properties near a farm owned by Appellant George Phillips (the Phillips Farm). Some of their homes are directly across the street from it. Strine Dep. 63 (R. 353a); Map, Coble Dep. Ex. 2 (R. 383a). Phillips purchased the farm and began operations on it in 1986. Phillips Aff. (R. 557a). From 1986 to 2006, Residents lived next to the Phillips Farm without experiencing offensive odors or flies. *E.g.*, Cox Dep. 9, 62-

63 (R. 5b, 6b)[1] (resident since 1993); J. Fockler Dep. 22, 55-57 (R. 8b, 9b) (resident since 1966); John Jasinski Dep. 8, 88 (R. 28b, 29b) (resident since 1971); Strine Dep. 23, 130 (R. 35b, 37b); *id.* at 63, 70, 114, 141 (R. 353a, 354a, 357a, 359a) (resident since 1991). In March 2006, however, the Synagro Parties began applying enormous amounts of sewage sludge at the Phillips Farm. Synagro Br. 6. Between March 2006 and April 2009, the Synagro Parties applied 11,635 tons (23,270,000 pounds) of sewage sludge on fourteen fields on approximately 54 days. *Id.*

The sewage sludge was applied without any plan for controlling odors, in violation of the U.S. Environmental Protection Agency's (EPA's) recommended management practices. For example, EPA's fact sheet on "Odor Control in Biosolids Management" states that "[p]roper facility design, operation, management, control and careful oversight are necessary to minimize odors" and that "[w]ater quality professionals have a responsibility to mitigate nuisance odors." EPA Biosolids and Residuals Management Fact Sheet: Odor Control in Biosolids Management at p. 1 (R. 578a). The Synagro Parties failed to follow EPA's recommended practices to reduce offensive odor conditions, including selecting remote sites and fields away from neighbors, minimizing storage time for

[1] Pages 1b-47b are in the Supplemental Reproduced Record that is being filed with this brief.

sewage sludge, developing an odor control plan, avoiding land application during certain wind or weather conditions, incorporating or injecting sludge into the soil to reduce odors, and having an alternative disposal option for particularly malodorous batches.[2] *See* pp. 6-7 below.

The sewage sludge was also applied in violation of Synagro's own recommended management practices. Synagro's management plan for disposing of sewage sludge from the Derry Township plant required Synagro to determine if weather conditions "would increase the potential for nuisance conditions" and, if such a potential existed, consider implementing several management practices, including "minimiz[ing] the length of time biosolids sit in stockpiles." Contract and Bid for Biosolids Disposal, Derry Township Municipal Authority at SYN-0002628 (R. 581a). The plan also required Synagro to prepare an odor management plan in three areas: prevention, complaint response, and corrective actions. *Id.* at SYN-0002632 (R. 582a). The plan stated that a "concerted effort will be made to manage biosolids in a manner that prevents the development of odors." *Id.* The corrective actions included applying lime on stored biosolids, moving operations to remote areas, and ceasing spreading operations until weather

[2] *See id.* at 3 (R. 579a); EPA Guide to Field Storage of Biosolids 62 (R. 577a) ("Practices to Reduce the Potential for Unacceptable Off-Site Odors: . . . Avoid or minimize storage of biosolids during periods of hot and humid weather if possible . . . Minimize storage time").

conditions were more favorable for odor dispersion. *Id.*[3] Synagro's Director of Technical Services, Lisa Williams, testified that Synagro's options for odor mitigation include tilling, limiting sludge storage time, not applying sludge in hot and humid weather, and using sludge disposal sites remote from residences. Williams Dep. 124-25 (R. 431a-32a).[4]

Synagro's own employees testified that they did not follow any of these recommended practices and did *nothing* to mitigate odors or other impacts from the sludge disposal at issue in this case. Reider Dep. 75-76 (R.426a) (Synagro did nothing to control odors and had no odor management plan); Coble Dep. 53, 163-64I (R. 376a, 379a) (Synagro made no changes to control odors, and took no steps to address odor complaints); *id.* at 53 (R. 376a) (not aware of any malodorous batches diverted); *id.* at 26 (R. 373a) (sewage sludge was surface applied rather than injected or incorporated); Hushon Dep. 96, 155 (R. 390a, 391a) (Synagro had

[3] Synagro's management plan for a different disposal project contained a backup plan to dispose of biosolids at a landfill if its storage sites could not be used, and stated that "the storage site will be located in an area that will minimize any potential odor problem for surrounding communities." Bid for Biosolid Disposal, City of York, PA at SYN-0005584-85 (R. 584a-85a). Synagro used sludge from York and Derry at the Phillips Farm. Williams Dep. 236 (R. 43b).

[4] The biosolids industry's National Manual of Good Practice for Biosolids similarly recommends minimizing the length of time biosolids are stored, maintaining a high pH, and warns that applying biosolids without incorporation creates a significant potential for malodor. Coble Dep. 184-87 (R. 2b-3b); Hushon Dep. 166-67 (R. 17b).

no goal or priority to minimize storage time); Klunk Dep. 109, 134 (R. 400a, R. 401a) (not aware that Synagro had any odor management or nuisance control plan); *id.* at 170 (R. 33b) (sludge applied in July 2007 was stored for minimum of four months); *id.* at 183 (R. 403a) (not aware of EPA guidance to minimize storage time to minimize odor impacts).

The combination of Synagro's failure to follow EPA, industry, and its own guidance, and the atypically odorous material applied at the Farm, resulted in an extreme situation. The odors created by the sludge application were highly offensive. Cleo Fockler said "of all the smells I've ever smelled, this is no exaggeration, it was the most horrendous smell I ever smelled." C. Fockler Dep. 41 (R. 313a). William Strine said it smelled worse than a herd of dead animals and worse than burning flesh in a car accident. Strine Dep. 72-73 (R. 355a). *See also* G. Gilbert Dep. 31 (R. 329a) (smell was worse than dead animals); Cox Dep. 65 (R. 291a) ("smelled like dead animals"); Eckert Dep. 36-37 (R. 301a-02a) (smelled "like death"); Joseph Jasinski Dep. 56 (R. 335a) (smelled "like a dead, rotting flesh type of situation").

Residents are not strangers to odors generated by farms. Almost all of the Residents have lived on or near farms, raised animals, or grown crops. *See e.g.*, C. Fockler Dep. 11 (R. 312a); Strine Dep. 47 (R. 36b); John Jasinski Dep. 29-30 (R.

334a); VanVoorhis Dep. 8-9 (R. 366a-67a); Fox Dep. 26-28 (R. 321a). Terry Fancher has a pig farm directly behind his home, and Cleo Fockler has "been a farm girl all my life." Fancher Dep. 22-25 (R. 306a-07a); C. Fockler Dep. 41 (R. 313a). Dennis Jasinski and William Strine worked on farms, John Fockler grew up on a farm, and John Freese lived on a farm. D. Jasinski Dep. 16-17 (R. 332a); Strine Dep. 25-26 (R. 352a); J. Fockler Dep. 7 (R. 315a); Freese Dep. 9 (R. 326a). Residents have cleaned stalls, spread manure, and otherwise experienced farm odors. *E.g.*, Strine Dep. 25-26 (R. 352a); J. Fockler Dep. 75 (R. 317a). They are familiar with farm smells, and do not object to manure odors. Fancher Dep. 22 (R. 306a); Torgerson Dep. 93-94 (R. 364a). John Freese testified that "I enjoy the smell of manure. I think it's the most down-to-earth country smell that you could smell." Freese Dep. 48 (R. 327a).

The odors created from the Synagro Parties' operations were extreme and nothing like those from applying normal fertilizer or manure. William Strine lived across the street from the Phillips Farm for fifteen years before sludge application began in 2006, and testified that the sludge smelled "completely different than what I had prior experienced." Strine Dep. 63, 70 (R. 353a, 354a). Other Residents living near the Phillips Farm agreed that the smell was distinguishable from various manures and much more offensive. *See* Queitzsch Dep. 22, 40-41 (R. 348a, R.

350a) (sludge smell was different from cow and chicken manure and of a different intensity than before); Fancher Dep. 35-36 (R. 308a) ("It's no comparison" between sludge smell and animal manure smell; sludge smell "changed the way we lived" and animal manure smell did not); VanVoorhis Dep. 174-75 (R. 370a) (animal manure "doesn't smell like something rotting and dead" and doesn't have a "fishy" and "chemical" smell like the sludge did); Fox Dep. 112 (R. 323a) (biosolids had a "nauseating, repulsive stench" unlike cow manure); J. McSherry Dep. 110 (R. 342a) ("this smell had no comparison to the normal land applications of regular manure that were spread on the farms"); R. McSherry Dep. 28-29 (R. 345a-46a) (manure is a quick odor and then leaves you, but biosolids "was a lot stronger odor, and it stayed constantly"). Even Synagro's Pennsylvania operations director, Rick Hushon, agreed that sewage sludge smells different than cow, chicken or horse manure. Hushon Dep. 175 (R. 392a). He said sewage sludges "have a unique and different odor from other manures." *Id.* at 274 (R. 394a).

The sewage sludge itself not only smelled nothing like manure, it also smelled worse than normal sewage sludge. Synagro's own officials admitted that not all sewage sludge is alike, because each treatment plant that produces sewage sludge has different sources. Williams Dep. 97 (R. 41b) (sludge odors vary from plant to plant). Some of the sludge applied at the Phillips Farm came from the

Lancaster treatment plant. *Id.* at 333 (R. 45b). Synagro's own employees admitted that it created unusually putrid odors. Hushon Dep. 51-52 (R. 16b); Williams Dep. 185 (R. 42b) ("clearly [Lancaster] started to have more odor issues that some of the other sources"); *id.* at 323-26 (R. 44b) (on days with bad mixing, the plant's sludge was "rotten, putrid and offensive"). The odor problems from application of that sludge at other farms at other times were insignificant and were "nothing of the level of what happened at the Phillips Farm." *Id.* at 333-34 (R. 45b).

The health effects of the sludge application on Residents were also extreme. Many Residents experienced burning eyes, sore throats, coughing, headaches and nausea. Bittorf Dep. 28-29 (R. 295a-96a) (sore throat, burning eyes, headaches); W. Fodel Dep. 119 (R. 14b) (burning sore throat coupled with irritated eyes and nausea); Strine Dep. 140-41 (R. 358a-59a) (irritated eyes, runny nose, increased cough, and sore throat); Fancher Dep. 144-45 (R. 309a-10a) (chronic cough); Fox Dep. 94, 170 (R. 322a, 324a) (nausea, burning eyes, cough); K. Jasinski Dep. 114, 128-29 (R. 340a, 31b) (irritated eyes, cough, sore throat, gagging, nausea); VanVoorhis Dep. 144, 271-72 (R. 369a, 371a) (headache, nausea).

The odors had severe and unusual effects on Residents' use and enjoyment of their property. Residents felt like they were prisoners in their homes and could not go outside because the smell was overwhelming. Jacobs Dep. 25 (R. 20b); D.

Jasinski Dep. 33-34, 122 (R. 22b, 23b) (smell was so strong he could taste it); J. Jasinski Dep. 49, 64 (R. 25b, 26b) ("we were prisoners in our own home"); C. Fockler Dep. 41 (R. 313a). One Resident kept her windows entirely closed for four weeks. Bittorf Dep. 23, 45-48 (R. 294a, 297a). Children could not go outside to play. J. Fodel Dep. 58, 76 (R. 11b, 12b). Residents were also plagued by swarms of flies when sewage sludge was applied. Strine Dep. 114 (R. 357a) ("the flies were so bad that by the time I pulled this thing [sticky fly strip] out, before I could get it pinned up in my barn, it was loaded"); VanVoorhis Dep. 131 (R. 368a) ("in 2007 my horses were covered with black flies. They were eating them alive.").

Residents complained repeatedly to the Synagro Parties about these nuisance conditions. Phillips Dep. 132 (R. 418a) (Phillips knew of complaints in 2006); Hushon Dep. 277 (R. 18b) (Synagro received nine odor complaints in 2006). Synagro's manager said that the number of complaints about sludge application at the Phillips Farm was "unusually high." Williams Dep. 291 (R. 435a). Despite these complaints, the Synagro Parties continued applying sewage sludge and did nothing to control the odors. Phillips Dep. 132 (R. 418a); Reider Dep. 76 (R. 426a); Coble Dep. 53 (R. 376a).

Residents also complained repeatedly to their local officials. More than 460 citizens in the community signed local petitions opposing the Synagro Parties'

continued disposal operations. 9/10/07 Shrewsbury Township Letter (R. 609a). Based on complaints voiced by many residents at a Township hearing, Shrewsbury Township officials complained to the state DEP about effects "so horrendous as to cause immediate vomiting, eye and ear irritation and suspicion of serious illness to indigenous species, humans and farm animals." *Id.*; 9/5/07 Minutes 3-4 (R. 561a-62a). Local and state governmental officials held a special meeting to discuss the complaints, where Synagro "acknowledged that recent spreading operations . . . could have been conducted in a better manner." Multi-Agency Meeting Minutes 4 (R. 763a). The Shrewsbury Township Board of Supervisors complained in writing to DEP and state officials that they were "extremely disappointed by the failure, inability or unwillingness of the DEP and county agencies to effectively resolve this very real threat to the health, safety and welfare of our citizens." Township Memo (R. 851a).

B. Residents' Nuisance Action and the End of the Sludge Use

Because of this inaction by the Synagro Parties and state officials, Residents filed two three-count Complaints against the Synagro Parties in July 2008. *See* Amended Complaint (R. 437a). Count I alleged that the Synagro Parties' hauling, spreading and applying of sewage sludge at the Phillips Farm created a private nuisance. Count II alleged that the Synagro Parties negligently breached their duty

to properly handle and dispose of sewage sludge. Count III alleged that the Synagro Parties' activities constituted a trespass on Residents' land. Residents sought both damages and injunctive relief. The York County Court of Common Pleas consolidated the two complaints in December 2008.

In April 2009, the sewage sludge applications at the Phillips Farm ended. In October 2009, Synagro officially notified the Pennsylvania Department of Environmental Protection (PaDEP) that it was suspending land application of the sewage sludge at the Phillips Farm. Synagro Br. 7. Synagro terminated its contract with the Phillips Farm in October 2009 after the PaDEP sent the Phillips Farm three Notices of Violation related to its sludge applications. *Id.*, App. B at 20-21; Hushon Dep. 298-302 (R. 396a-97a).[5] Also in October 2009, the court denied the Synagro Parties' second and fourth Preliminary Objections. In particular, the court held that Residents were not barred from bringing tort-based claims by the Pennsylvania Solid Waste Management Act or the Nutrient Management and Odor Management Act. In July 2010, Residents amended their complaint. (R. 437a). Between October 2010 and November 2012, the parties exchanged document requests, filed expert reports, and took depositions of thirty-four Residents, eight

[5] Residents are no longer seeking injunctive relief because sludge applications at the Phillips Farm ceased in 2009. Residents are only seeking damages for the applications that occurred from July 2006 (two years prior to the filing of their complaint) until April 2009.

Synagro employees, two former township supervisors, Phillips, his employee Larry Martin, and his lessee Troyer who farmed the land. *See* Dep. Excerpts (R. 290a-436a).

C. The Synagro Parties' Two Motions for Summary Judgment

In July 2011, the Synagro Parties moved for summary judgment, arguing that Residents' claims were barred by the one-year limitation on nuisance actions in the RTFA. Synagro Br., App. B at 4. In October 2011, the court denied that motion, holding that "[b]ecause the 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 protection of the RTFA." *Id.*; Order (R. 1a).

In July 2012, the Synagro Parties again moved for summary judgment, arguing for the second time that Residents' claims were barred by the one-year limitation on nuisance actions in the RTFA, and challenging the legal sufficiency of those claims on other grounds. By its terms, the RTFA only applies here if "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." 3 Pa. Stat. § 954(a).

In opposition to this second motion, Residents submitted the extensive deposition evidence described above and showed that "the conditions or

circumstances complained of as constituting the basis for the nuisance action"—the application of enormous amounts of putrid-smelling sewage sludge at the Farm, without any odor control plan and in violation of the EPA's and Synagro's own recommended management practices, causing significant odor and health problems—did not exist "substantially unchanged since the established date of operation" of the Phillips Farm and were not "normal agricultural operations."

In support of their motion, the Synagro Parties submitted ***no evidence*** that "the conditions or circumstances complained of as constituting the basis for the nuisance action" had existed "substantially unchanged since the established date of operation" or were "normal agricultural operations." Instead, on the first issue, the Synagro Parties argued that application of sewage sludge was not a substantial change, relying solely on three paragraphs in George Phillips' affidavit that do not address "the conditions or circumstances complained of":

> 10. Fertilization has always been an important tool used by farmers, and my farm is no exception. During every year of my ownership of Hilltop Farms, we have fertilized using a combination of organic and chemical fertilizers. Organic fertilizers used on the property include cow manure, hog manure, chicken litter, and biosolids generated by nearby waste-water treatment plants and managed by Defendant Synagro.
>
> 11. After completion of a permit application process pursuant to Pennsylvania Department of Environmental Protection Regulations in 2005 that included public notice, biosolids were first applied on my farm in March, 2006. Biosolids were used as organic fertilizer consistently from 2006 until 2009.

> 12. Crop growth and yield on my farm was excellent when biosolids were used as organic fertilizer.

Phillips Aff. (R. 558a). In addition, despite the clear requirement of the statute that the Synagro Parties prove that "the conditions or circumstances complained of" existed "substantially unchanged since the established date of operation" of the Phillips Farm, they argued that the one-year limit in the RTFA bars this nuisance action because it automatically resets and begins to run again whenever a "substantial change" takes place.

On the second issue, the Synagro Parties submitted evidence that 700 farms in Pennsylvania are applying sewage sludge. Def. SJ Br. 16 (R. 555a). That amounts to about 1% of the farms in Pennsylvania, which totaled 52,365 in 2002. Def. SJ Ex. Y 10 (R. 213a). Synagro had contracts to apply sewage sludge to about 30,000 acres over a recent five-year period (Willams Dep. 253-54 (R. 433a)), while Pennsylvania had 5,120,685 acres of farms in 2002 (Def. SJ Ex. Y 10 (R. 213a)). That means that less than 1% of the farm acreage in Pennsylvania is permitted for the use of sewage sludge.

Synagro also submitted its sludge application permit, service logs, state inspection reports for the Farm, and general information about the use of sewage sludge in crop production. Def. SJ Exs. E-NN (R. 11a-289a). Based on that

evidence (and *amici* briefs), the Synagro Parties argued that the application of sewage sludge is *without exception* a "normal agricultural operation" and that, as a result, regardless of what the sludge consists of, how it is applied, or the effects its application may have, all nuisance actions stemming from the application of sewage sludge are subject to the RTFA's one-year limitation on nuisance actions.

D. Court of Common Pleas' Decision Granting Summary Judgment

In December 2012, the Court of Common Pleas entered an order granting the Synagro Parties' motion for summary judgment and dismissing Residents' action. Synagro Br., App. B; *Gilbert v. Synagro Cent., LLC,* 2012 Pa. Dist. & Cnty. Dec. LEXIS 323 (Pa. Comm. Pl. York Cnty.). The court held that the RTFA barred Residents' nuisance and negligence claims, and that Residents failed to plead a proper prima facie case for both negligence and trespass.

E. Superior Court's Decision

Residents appealed. In April 2014, the Superior Court affirmed the dismissal of Residents' negligence claims, but reversed the dismissal of Residents' nuisance and trespass claims and remanded the case for trial. Synagro Br., App. A; *Gilbert v. Synagro Cent., LLC*, 90 A.3d 37 (Pa.Super. 2014). With respect to Residents' nuisance claim, the Superior Court relied on this Court's decision in *McConnaughey v. Building Components, Inc.*, 536 Pa. 95, 102, 637 A.2d 1331,

1335 (1994), to find that the applicability of statutes of repose can depend on determinations of factual issues, and that "a party may avoid summary judgment by identifying sufficient evidence in the record to establish" such issues. App. A at 24.

Reviewing the evidence in the record, the Superior Court found that "[n]umerous Residents testified that the odors experienced on their properties in 2006 and thereafter were extremely offensive and noxious, smelled like dead animals, and w[ere] so bad that on many occasions they could not leave their homes." App. A at 15. Residents "had long been familiar with the odors from animal manures and had never objected to these smells." *Id.* The odors from the sewage sludge "were far worse than comparable odors from animal manures previously used at the farm." *Id.* The Superior Court also found that Residents introduced evidence that the Synagro Parties' use of sewage sludge at the Phillips Farm "was not normal or routine and failed to conform to accepted EPA and industry practices." App. A at 26. This included evidence that the Synagro 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." App. A at 27.

Based on this factual record, the Superior Court held that (1) there was a

factual dispute as to whether the Synagro Parties' applications of sewage sludge at the Phillips Farm were a "substantial change" under the RTFA, but, despite that dispute, the one-year limitation on nuisance actions in the RTFA "reset" and started running again when the "substantial change" took place, so it barred this action, and (2) there was a factual dispute as to whether the application of sewage sludge "complained of as constituting the basis for the nuisance action" here was a "normal agricultural operation" under the RTFA, requiring a remand for trial. App. A at 16, 28. The Superior Court also held that Residents failed to state a claim for negligence, and that four Residents offered sufficient evidence to create issues of material fact precluding dismissal of their trespass claims. App. A at 28-29. Residents' negligence and trespass claims are not at issue in this appeal. Residents' trespass claims have been remanded for trial regardless of the outcome of this appeal.

This Court granted the Synagro Parties' petition for discretionary review, which said the issue presented was "whether the Superior Court incorrectly interpret[ed] the RTFA by requiring a jury trial to determine that the land application of biosolids falls within the Act's definition of 'normal agricultural operations.'" That, however, is not what the Superior Court did. It held that the evidence required a jury trial on whether the application of sewage sludge

"complained of" in this case was a "normal agricultural operation." It also held that the Synagro Parties were not entitled to summary judgment because there was no undisputed evidence that the application of sewage sludge "complained of" in this case "existed substantially unchanged since the established date of operation" of the Phillips Farm, but that this factual dispute did not matter because the RTFA's one-year limitation automatically "reset" and began running again whenever a "substantial change" took place.

If, however, as the statute provides, the limitation does not "reset," this Court has an alternative basis for affirming the Superior Court's holding that the RTFA does not apply. Residents were not required to file a cross-petition for discretionary review to preserve that alternative issue, because the judgment below granted Residents the relief they sought by remanding their nuisance claim for trial. *Lebanon Valley Farmers Bank v. Com.*, 83 A.3d 107, 112 (Pa. 2013) ("this Court refuses to require such a filing where the court's holding granted the relief sought, although based on an alternate reasoning.")

SUMMARY OF ARGUMENT

The Synagro Parties failed to meet their burden of establishing that no genuine issue of fact exists as to whether the RTFA's one-year limitation on nuisance actions bars Residents' nuisance claim. Section 954(a) of the RTFA

provides that "[n]o nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more" if "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." This language establishes three case-specific factual requirements for the one-year limitation to apply. In this case, the undisputed factual evidence shows that the first requirement for applying the one-year limitation is met, and the second and third requirements are not.

The first requirement for applying the limitation in the RTFA is that the "agricultural operation" had an "established date of operation" that was a year or more prior to suit. As a legal matter, the "agricultural operation" means the Phillips Farm. As a factual matter, the "established date of operation" of that farm was 1986, and Residents filed their action in 2006, more than one year later. Both lower courts therefore properly held that the first requirement is met. The alternative theory the Synagro Parties advanced below was that (1) the "agricultural operation" refers to the challenged farm practice, rather than the whole farm, and (2) the "established date of operation" refers to the date the challenged farm practice began, rather than when the farm was first "lawfully in operation." That theory violates the RTFA's express language and was properly rejected by both

lower courts.

The second requirement for applying the limitation in the RTFA is that the "conditions or circumstances complained of as constituting the basis for the nuisance have existed substantially unchanged since the established date of operation." Since the legal basis for a nuisance action is interference with the plaintiffs' use and enjoyment of their property, the relevant "conditions or circumstances" are the application of sewage sludge at the Phillips Farm together with the resulting offensive odors and other harmful effects on Residents. The undisputed evidence in this case shows that sewage sludge was not applied until 2006 and that those offensive conditions did not exist "substantially unchanged" since 1986.

The Superior Court correctly recognized that the Synagro Parties had not met their burden of showing that the undisputed evidence proved the "conditions or circumstances complained of" here had existed "substantially unchanged" since 1986. But that court then erred as a legal matter in holding that, even if the conditions did increase substantially in 2006, the one-year limitation "reset" in 2006, making Residents' filing of their complaint in 2008 untimely. There is no language in the RTFA that supports a reset under this exception to the RTFA. The one-year limitation began to run only in 1986, and Residents' nuisance claim was

only subject to the normal two-year statute of limitations.

The third requirement for applying the limitation in the RTFA is that "the conditions or circumstances complained of as constituting the basis for the nuisance action . . . are normal agricultural operations." This language means that "normal agricultural operations" are determined on a case-by-case, not a categorical, basis, because they depend on the particular conditions complained of in the case before the court. The RTFA also defines "normal agricultural operations" to include "new activities, practices, equipment and procedures *consistent with technological development within the agricultural industry*." 3 Pa. Stat. § 952 (emphasis added). The undisputed evidence shows that the applications of sewage sludge in this case did not conform to EPA and industry management practices developed to control odors and involved the application of atypically offensive sludge and therefore cannot qualify as "normal agricultural operations." The Synagro Parties and their *amici* cite no factual evidence to even suggest that Pennsylvania farmers have regularly applied gag-inducing sewage sludge in the irresponsible and uncontrolled manner that it was applied in this case.

Synagro's main argument is that "normal agricultural operations" means all activities on a farm, including the use of sewage sludge, regardless of how the activities are conducted or the deleterious effects they may have. According to

Synagro, it is irrelevant if a farm uses incredibly foul-smelling sewage sludge and forces residents to become prisoners in their homes. That argument is directly inconsistent with the RTFA. "Normal agricultural operations" and "consisten[cy] with technological development in the agricultural industry" must be determined in the factual context of the particular circumstances "complained of" in the particular nuisance action before the court. Those phrases do not mean everything and anything that farmers do, regardless of how they do it or its effects on the farms' neighbors.

Finally, Synagro is wrong that the court, not the jury, must decide whether the sewage sludge use in this case was a "normal agricultural operation." The RTFA's language requires a case-specific factual inquiry into that issue. This Court held in *McConnaughey*, 536 Pa. at 102, 637 A.2d at 1335, that the application of a statute of repose can hinge on disputed issues of fact, and that those disputes must not be resolved by summary judgment. This case raises the same type of case-specific factual issues that *McConnaughey* did.

The Synagro Parties failed to present undisputed evidence that all three of the RTFA's factual requirements are met. This Court should therefore affirm the Superior Court's decision denying their motion for summary judgment, reverse its ruling that the one-year limitation on nuisance actions in the RTFA "reset" in 2006,

and remand this case for trial.

ARGUMENT

I. The Synagro Parties Are Only Entitled to Summary Judgment if the Undisputed Evidence Shows that the Three Factual Requirements for Application of the One-Year Limitation on Nuisance Actions in the RTFA Are Met.

The procedural posture of this case is that the Synagro Parties moved for summary judgment on the issue of whether the one-year limitation on nuisance actions in the RTFA, 9 Pa. Stat. § 954(a), barred Residents' nuisance action. The Pennsylvania Rules of Civil Procedure that govern summary judgment instruct, in relevant part, that the court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Pa.R.C.P. 1035.2(1). Under the Rules, a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. Note to Pa.R.C.P. 1035.2. In considering the merits of a motion for summary judgment, a court views 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. *Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435, 438 (2001). Finally, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. *Marks v. Tasman*, 527 Pa. 132, 589 A.2d 205, 206

(1991). It is not the court's function upon summary judgment to decide issues of fact, but only to decide whether there is an issue of fact to be tried. *Fine v. Checcio*, 582 Pa. 253, 273, 870 A.2d 850, 862 (2005).

At the summary judgment stage, the movant bears the burden of proving that no genuine issue of material fact exists. *Stimmler v. Chestnut Hill Hosp.*, 602 Pa. 539, 562, 981 A.2d 145, 159 (2009). Thus, in this case, the Synagro Parties have the burden of establishing that no genuine issue of material fact exists as to whether the RTFA's one-year limitation on nuisance actions bars Residents' nuisance claim. Residents, as the non-moving parties, "must adduce sufficient evidence on an issue essential to [their] case and on which [they] bear[] the burden of proof such that a jury could return a verdict in [their] favor." *Ertel v. Patriot-News Co.*, 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996).

An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion. *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 585, 812 A.2d 1218, 1221 (2002). Since the issue as to whether there are no genuine issues as to any material fact presents a question of law, this Court's standard of review is *de novo*. *Fine*, 582 Pa. at 265, 870 A.2d at 857.

The RTFA does not prevent all nuisance actions against farming operations.

Instead, a nuisance suit is barred only if the specific enumerated statutory conditions exist. The RFTA's one-year limitation on nuisance actions, 3 Pa. Stat. § 954(a), explicitly states that three case-specific factual requirements must be met for it to apply.[6] To identify those three factual requirements, it is helpful to reformat the relevant portion of § 954(a) in outline form:

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,
[1st exception] 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
[2nd exception] 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

[6] In an attempt to portray the issue in this case as "jurisdictional," the Synagro Parties argue that § 954(a) is a statute of repose. However, the Legislature designated it as a "limitation." In addition, it is not a statute of repose because it does not "eliminate[] a plaintiff's cause of action . . . regardless of when the plaintiff's injury occurs." *Vargo v. Koppers Co., Eng'g & Const. Div.*, 552 Pa. 371, 375, 715 A.2d 423, 425 (1998). Repose periods run and expire regardless of whether an injury has occurred or has been discovered. That is not the case here. Under § 954(a) of the RTFA, a plaintiff's cause of action for nuisance is not eliminated or barred after the one-year limitation expires if "the conditions complained of" have not "existed substantially unchanged" since the established date of operation of the farm and are not "normal agricultural operations."

> date of bringing such action, or
>
> (2) been addressed in a nutrient management plan. . .

3 Pa. Stat. § 954(a) (bracketed language and formatting added).

Thus, the RTFA imposes a one-year limitation on nuisance actions against agricultural operations, with two exceptions. The first exception applies when the "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." The second exception applies if a farm substantially expands or alters its physical facilities and other conditions are met. The present case involves only the first exception. No party contends that the Farm has substantially expanded or altered its physical facilities.[7]

By its express terms, the first exception bars a nuisance action involving a substantial change only if its three requirements are met. First, the agricultural operation must have an established date of operation at least one year prior to the filing of the nuisance action. Second, the conditions or circumstances constituting the basis of the nuisance action must have existed substantially unchanged since the

[7] We only quote and mention the second exception because, as we discuss in Part III.C. below, the second exception is relevant to the legal issue of whether the one-year limit in the first exception "resets" each time there is a substantial change. The language in the second exception supports a reset of the limit each time there is a physical alteration, but the language in the first exception is different and does not support *any* "reset" when there is a substantial change.

established date of operation. And third, the conditions or circumstances constituting the basis of the nuisance action must be "normal agricultural operations."

These three RTFA requirements raise factual issues: (1) when the farm began operations, (2) whether the alleged nuisance conditions have existed substantially unchanged since that time, and (3) whether the alleged nuisance conditions are normal agricultural operations. The RTFA specifically connects the second and third factual determinations to the "conditions or circumstances complained of as constituting the basis for the nuisance action." That language requires a case-specific analysis of the "conditions or circumstances complained of," and whether those conditions or circumstances have existed substantially unchanged and are normal agricultural operations.

In this case, those three factual requirements were the subject of more than thirty depositions and extensive document discovery. As we explain below, the undisputed evidence shows that the first requirement is met—and that the second and third requirements are not met. That being so, the Superior Court correctly denied the Synagro Parties' motion for summary judgment.

II. The Undisputed Evidence Shows that the First Requirement Is Met: The "Agricultural Operation" Was in Lawful Operation "for One Year or More Prior to the Date" This Action Was Filed.

The first requirement is that the "agricultural operation" had an "established date of operation" that was a year or more prior to suit. The "agricultural operation" in this case means the Phillips Farm, and the "established date of operation" of that farm is 1986. Since Residents filed their action in 2006, more than one year later, the first requirement is met. The facts on this issue are undisputed. Therefore, both courts below correctly found that the first requirement is met. Synagro Br., App. B at 18-19; App. A at 12.

The Synagro Parties raised an alternative legal argument below that the first requirement was met because Residents' nuisance claim was filed more than one year after the Synagro Parties began applying sewage sludge in March 2006. Synagro 7/2/12 Br. 11-13. This argument, which they do not raise in their brief and have abandoned here, stemmed from erroneous interpretations of two terms in the RFTA. We address it here because a proper interpretation of those two terms supports Residents' argument in Part III.C below that the one-year limitation in the RTFA does not "reset" and restart whenever there is a substantial change. The Synagro Parties' argument below was that the RTFA's first requirement was met because the "agricultural operation" in the first clause of the one-year limitation

means the practice being challenged and the "established date of operation" means the date that practice began.

A. Synagro's Alternative Theory that "An Agricultural Operation" Refers to the Challenged Farm Practice, Rather than the Whole Farm, Violates the RTFA's Explicit Terms.

The Synagro Parties argued below that "an agricultural operation" means the challenged farm practice, not the farm itself. Synagro 7/2/12 Br. 11. Both of the lower courts rejected this argument and agreed with Residents that the "agricultural operation" is the Phillips Farm, not its practice of applying sewage sludge. Synagro Br., App. B at 18; App. A at 12. That interpretation is correct. The "agricultural operation" is defined as the target of the nuisance action—who the nuisance action is "brought against." Nuisance lawsuits are brought against a farm "which has… been in operation," not a specific operation on the farm. In addition, while the RTFA refers to "normal agricultural operations," that term is defined in § 952 to mean "the activities, practices, and procedures that farmers adopt, use or engage in" and is therefore different from "an agricultural operation." "Normal agricultural operations" may be conducted on "an agricultural operation," but the first term refers to the farm's practices, and the second term refers to the farm itself.

Furthermore, three sections of the RTFA refer to an agricultural operation and only make sense if that term means a farm. Section 954(a) refers to "the

physical facilities of such agricultural operations," section 951 refers to "agricultural operations" that are "sometimes forced to cease operations," and section 953(a) refers to "any agricultural operation conducted in accordance with normal agricultural operations." Thus, "an agricultural operation" refers to the farm itself.

B. Synagro's Alternative Theory that the "Established Date of Operation" Is When the Challenged Farm Practice Began, Rather than When the Whole Farm Began Operations, Violates the RTFA's Explicit Terms.

The Synagro Parties argued below that the "established date of operation" means the date when an operation on the farm began, not the date when the whole farm began operations. Synagro 7/2/12 SJ Br. 11. Both of the lower courts rejected this argument and agreed with Residents that the "established date of operation" is when the whole Farm began operations, which was in 1986. Synagro Br., App. B at 18; App. A at 12. Again, that interpretation is correct.

By its plain language, the "established date of operation" refers back to the antecedent "operation" in the prior clause, which provides that the statute only applies if the "agricultural operation" has been "in operation for one year or more." The natural reading of a statutory term is to connect it to its antecedent. This is consistent with the "last antecedent rule of statutory construction, which advises that a proviso usually is construed to apply only to the provision or clause

immediately preceding it." *Pennsylvania Dept. of Banking v. NCAS of Delaware*, LLC, 596 Pa. 638, 651, 948 A.2d 752, 760 (2008). The progression of statutory terms also supports this conclusion, with "an agricultural operation" coming first, the length of that "operation" coming second, and the "established date of [that] operation" coming third.

Synagro's alternative and contrary interpretation below was that the "established date of operation" refers to the challenged farm practice, which is a subset of "normal agricultural operations." That interpretation violates the last antecedent rule, because "normal agricultural operations" follows, rather than precedes, the "established date of operation." Thus, the "established date of operation" is the date that the whole farm began operations, not when a farm practice started.

III. The Undisputed Evidence Shows that the Second Requirement Is Not Met: The "Conditions or Circumstances Complained of as Constituting the Basis" for this Nuisance Action Have Not "Existed Substantially Unchanged Since the Established Date of Operation."

The second requirement is that the one-year limitation on nuisance actions does not apply unless the "conditions or circumstances complained of as constituting the basis for the nuisance have existed substantially unchanged since the established date of operation." A substantial change is measured in terms of the "conditions or circumstances complained of" in Residents' nuisance action. The

undisputed evidence shows that the "conditions or circumstances complained of" in this case did not exist "substantially unchanged" since the Phillips Farm began operations in 1986. They started in 2006 and constituted a substantial change, which is why this lawsuit was filed. The Superior Court recognized that a material question of fact existed as to whether conditions changed substantially in 2006, but then erred in holding that this substantial change simply "reset" and restarted the one-year limitation in 2006, making Residents' filing of their complaint in 2008 untimely.

A. A Substantial Change Is Measured in Terms of the "Conditions and Circumstances Complained of" in Residents' Nuisance Claim.

The Synagro Parties argued below that the "conditions or circumstances complained of as constituting the basis for the nuisance action" meant the "objective, operational change" in agricultural operations, while Residents contended that the relevant "conditions or circumstances" meant the change in nuisance odors and effects. Synagro Br., App. A at 12. The Court of Common Pleas sided with Synagro and held that this clause referred to the "use of biosolids as fertilizer," without any analysis of its nuisance effects. *Id.*, App. B at 20.

The Superior Court correctly rejected this interpretation, because "nowhere in the relevant language is there any reference limiting the scope of the subsection to 'operational changes.'" *Id.,* App. A at 13. The Superior Court stated that the

relevant "conditions or circumstances" must constitute the "basis for the nuisance action." *Id.* Relying on *Kramer v. Pittsburgh Coal Co.*, 341 Pa. 379, 380, 19 A.2d 362, 363 (1941), the Superior Court stated that the basis of a nuisance action is (1) the 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. App. A at 13-14. This Court stated in *Kramer* that the act causing the nuisance "is not wrongful in itself, but only in the consequences which may flow from it." 341 Pa. at 380, 19 A.2d 363. Thus, *Kramer* teaches that the defendant's conduct or operations alone cannot be the basis of a nuisance action, because a nuisance action can only be based on the consequences that flow from that conduct or those operations.[8] The "conditions or circumstances complained of as constituting the basis for the nuisance action" therefore must mean the defendant's conduct or operations *together with* an interference with the plaintiffs' use and enjoyment of their property. Consequently, the Superior Court correctly concluded that the relevant "conditions or circumstances" in this case constitute "the application of

[8]Courts addressing cases that raise both negligence and nuisance claims make this same distinction. "[N]egligence analysis requires the court to address the reasonableness of the *defendant's conduct,* while the nuisance analysis requires the court to address the reasonableness of the *interference* with the plaintiff's property *irrespective of the reasonableness of the defendant's conduct in creating or maintaining the interference.*" *Ramik v. Darling Int'l, Inc.*, 60 F. Supp. 2d 680, 688 (E.D. Mich. 1999) (emphasis in original).

biosolids at the Farm . . . that has resulted in foul odors and other harmful effects on the Residents." Synagro Br., App. A at 14.

As a result, a substantial change in those "conditions or circumstances" is likewise measured not only in terms of the objective difference between original and new farm practices, but also in terms of the difference perceived by neighboring residents between the farm conditions "since the established date of operation" and the nuisance conditions alleged in the Residents' complaint. That does not mean a farm must maintain initial conditions without change forever in order to qualify for the RTFA's one-year limitation on nuisance actions. The initial conditions set the baseline for measuring whether conditions have "existed substantially unchanged" since the "established date of operation." New or different farming practices are protected so long as they do not substantially increase the offending condition or nuisance level. New practices that lessen that level, maintain the same level, or even increase the level, though not substantially, continue to receive protection under the RTFA. This interpretation protects the settled expectations of the residents who have lived near the farm since its established date of operation, while also allowing farmers to adopt new practices. Residents expecting a relatively constant farm experience are protected from the shock of a new sensory overload. This interpretation strikes an appropriate balance

between agricultural operators and residents in the neighboring community.[9]

B. The Undisputed Evidence Shows that the Synagro Parties Did Not Begin Using Sewage Sludge Until 2006, Twenty Years After the Established Date of Operation, and that Use Was a Substantial Change.

The undisputed evidence shows that, for twenty years between 1986 and 2006, the Phillips Farm did not apply sewage sludge, and the nearby residents did not bring a nuisance action or complain about the conditions it created. Conditions changed dramatically in March 2006 after sewage sludge was applied for the first time. Residents submitted extensive evidence, including oral testimony, that the odors from sludge application were extremely offensive and intolerable, they had never experienced similar odors before, they were familiar with normal farm and manure odors, and the odors from animal manure and sewage sludge were very different. *See* pp. 3-12 above. Residents also submitted depositions from

[9] Right-to-farm statutes throughout the country codified the common law defense of "coming to the nuisance." *Vicwood Meridian P'ship v. Skagit Sand & Gravel*, 123 Wash. App. 877, 882, 98 P.3d 1277, 1280 (2004). They were passed "in response to urban dwellers moving into agricultural areas and then filing nuisance suits because of the odors associated with farming, which threatened many farms in existence." *Id.* Here, several Residents lived at their homes prior to the establishment of the Phillips Farm in 1986. For example, Dennis Jasinski, who is 55, has lived on the same farm adjacent to the Phillips Farm his entire life. D. Jasinski Dep. 6-7 (R. 331a). Similarly, John Fockler has lived next to the Phillips Farm since 1966. J. Fockler Dep. 22, 55-57 (R. 8b, 9b). They did not "come to the nuisance;" the new, mismanaged use of gag-inducing sewage sludge brought the nuisance to them.

Synagro's own employees, who admitted that the number of odor complaints after March 2006 was "unusually high" and that sewage sludge has "a unique and different odor from other manures." Williams Dep. 291 (R. 435a); Hushon Dep. 274 (R. 394a).

In contrast, Synagro submitted no evidence to show that its use of sewage sludge and the resulting odors and flies were not a substantial change. Synagro's evidence, which consisted solely of three paragraphs in George Phillips' affidavit, merely stated in general terms that his farm always used a combination of organic and chemical fertilizers and that sludge application began in March 2006. Phillips Aff. 2 (R. 558a). Synagro submitted no evidence that the noxious odors and swarming flies experienced after March 2006 existed at any time prior to March 2006. Synagro submitted no evidence of any kind that the "circumstances or conditions complained of . . . existed substantially unchanged since the established date of operation."

The Superior Court summarized the evidence relating to substantial change as follows:

> 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").

Synagro Br., App. A at 15-16. The Superior Court concluded 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." *Id.* at 16. Thus, there is no basis for granting summary judgment to Synagro on the second RTFA requirement.

C. The Superior Court's Decision that the One-Year Limit on Nuisance Actions "Resets" When There Is a Substantial Change Violates the RTFA's Explicit Terms.

Despite its conclusion that there was a factual dispute about substantial change, the Superior Court granted summary judgment to the Synagro Parties on the second requirement. The Superior Court reasoned that, even if there was a substantial change in March 2006, it occurred more than one year before Residents filed their nuisance claim in July 2008. The Superior Court interpreted the one-year limit in the RTFA to "reset" whenever there is a substantial change, which in

this case was when sludge applications began in 2006. Synagro Br., App. A at 16. In doing so, the Superior Court misinterpreted the plain language of the statute.

The RTFA provides that a nuisance action is barred if "an agricultural operation . . . has lawfully been in operation for one year or more" prior to filing of the lawsuit and "the conditions or circumstances complained of" in the nuisance action "have existed substantially unchanged since the established date of operation and are normal agricultural operations." This language means that a nuisance action is barred only if all of these conditions are satisfied. If any of those conditions are not satisfied, the RTFA's limitation on nuisance actions does not apply. Thus, if the nuisance action is filed more than one year after the farm "has lawfully been in operation," or even twenty years after the farm "has lawfully been in operation," but the conditions complained of as constituting the basis for the nuisance have not "existed substantially unchanged" since the "established date of operation," the RTFA is no bar to the nuisance action, and the action is subject to Pennsylvania's normal two-year statute of limitations. 42 Pa.C.S. § 5524(7).[10]

[10] Where, as here, the sludge applications and resulting nuisance continued for years, "the statute runs only from the happening of each actual injury." *Stout v. Kindt*, 24 Pa. 449, 452 (1855). Each interference with plaintiff's use and enjoyment is a new nuisance, and the plaintiff can obtain injunctive relief and damages for the two years preceding each violation. *Ashtabula River Corp. Group II v. Conrail, Inc*., 549 F. Supp. 2d 981, 984 (N.D. Ohio 2008); *Haenchen v. Sand Products Company*, Inc., 626 P.2d 332, 334 (Okla. App. 1981); *Piccolini v.*

There is no language in the RTFA that suggests that the one-year limit "resets" when there is a substantial change. The one-year limitation begins to run *only once*—on the established date of operation—and *does not* "reset" when there is a substantial change.

The Superior Court's interpretation is also illogical. The court allowed the one-year limitation to "reset" when the first and second requirements of the substantial change exception are met, even though the third requirement relating to normal agricultural operations is not. The statute cannot be read to "reset" when only two-thirds of the requirements for the substantial change exception are met. Furthermore, the statute is framed in the negative—the one-year limit applies *only if* the conditions are "substantially unchanged." The statute does not contain any trigger tied to when there *is* a substantial change.

In addition, the lack of a one-year "reset" for substantial changes is supported by the difference between the timing language in the RTFA's first exception, based on conditions that "have existed substantially unchanged," and its second exception, based on a substantial expansion or alteration. In the latter case, the RTFA provides that a nuisance action is barred if "the expanded or substantially altered facility has . . . been in operation for one year or more prior to

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Simon's Wrecking, 686 F.Supp. 1063, 1076 (M.D. Pa.1988).

the date of bringing such action." This means that the one-year limit begins to run on the established date of operation of the substantial *expansion or alteration* of the facility, and therefore *does* reset whenever there is a substantial expansion or alteration.

The difference between the language of the two exceptions is telling, and shows that the legislature intended for them to be treated differently. To provide a comparable basis for a reset based on a substantial change, the legislature would have stated that a nuisance action is barred "if the conditions or circumstances complained of have existed substantially unchanged *for one year or more prior to the date of bringing such action*." But that is not what the legislature did. Instead, it stated that a nuisance action is barred "if the conditions or circumstances complained of have existed substantially unchanged *since the established date of operation*." As we have explained above in Part II, both lower courts correctly decided that the established date of operation is the date that the whole farm began operating. In this case, that was in 1986. The one-year limit therefore ran from 1986. There is no textual basis for resetting the one-year limit each time a substantial change takes place, especially when the change in this case was in 2006—twenty years after the established date of operation.

The Superior Court cited *Horne v. Haladay*, 728 A.2d 954, 956 (Pa.Super.

1999), to support its interpretation, but that case is distinguishable. After the poultry operation in that case began, the only change "which could even be considered substantial" was the addition of a decomposition house and the plaintiffs conceded that "conditions *have improved* since the decomposition house was placed into operation." *Id.* (emphasis added). A nuisance action can only meet the RTFA's first exception, however, if the "conditions complained of" are worse than the conditions that existed in the past. The first RTFA exception, therefore, did not apply. Thus, the only RTFA exception available to the plaintiff was based on Haladay's alteration of his physical facilities by building a decomposition house. That alteration triggered a reset under the second RTFA exception, which applies only to physical alterations. *Id.* Consequently, the "reset" in that case stemmed exclusively from the second exception.[11]

In contrast, in this case, Residents satisfy the first exception but not the second. The second exception does not apply because the Synagro Parties did not expand or alter any physical facilities to apply sewage sludge. The first exception does apply because the conditions have not "existed substantially unchanged."

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[11] In an alternative ruling, the *Horne* court held in a three-sentence footnote that, even if there had been a substantial change, plaintiff's action was still untimely because the one-year limitation on nuisance actions "reset" as a result of the change. 728 A.2d at 957 n. 1. That alternative ruling is incorrect. The court did not provide any analysis to explain that ruling, and it finds no support in the statutory text.

Consequently, there is no reset and the RTFA's one-year limitation is inapplicable.

The Superior Court also reasoned that Residents' interpretation was inconsistent with the legislature's general policy in § 951 to limit nuisance actions. Synagro Br., App. A at 17. But there is no inconsistency. The Legislature's objective was not to create a bar to all nuisance actions or even all nuisance suits filed after one year. Instead, it stated that it intended to "limit[] the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances." 3 Pa. Stat. § 951. Those limits are defined in § 954(a) and that section defines two exceptions to the one-year bar when there are substantial changes or physical alterations. But there is no specific policy in § 951 or language in § 954(a) supporting a reset of the one-year limit beyond the one in the second exception resulting from physical alterations.

Thus, the Superior Court erred as a matter of law in holding that, even if there was a disputed factual issue about whether the conditions complained of had "existed substantially unchanged," it was immaterial because the one-year limit reset when the substantial change occurred in 2006 and the action was not filed within one year thereafter. Synagro Br., App. A at 16. The first exception in section 954(a) does not create a moving baseline for determining the timeliness of nuisance claims. The one-year limit is measured from the time the Phillips Farm

began operations in 1986, not when each new farming practice on that farm began. As a result, Residents' action is not barred by the RTFA's one-year limitation on nuisance actions and this case should be remanded for trial.

IV. The Undisputed Evidence Shows that the Third Requirement Is Not Met: The "Conditions or Circumstances Complained of as Constituting the Basis" for this Nuisance Action Are Not "Normal Agricultural Operations"

The third requirement that must be met for the RTFA's one-year limitation on nuisance actions to apply is that "the conditions or circumstances complained of as constituting the basis for the nuisance action . . . are normal agricultural operations." This language means that "normal agricultural operations" are determined on a case-by-case, not a categorical, basis. The RTFA also defines "normal agricultural operations" to include "new activities, practices, equipment and procedures *consistent with technological development within the agricultural industry*." 3 Pa. Stat. § 952 (emphasis added). Given this language, the Court must consider whether the conditions at the Phillips Farm were consistent with recommended sludge management practices in the industry.[12] The undisputed

[12] Management and operating practices are widely considered to be a form of technology. For example, the Clean Water Act defines the "best available control technology" for water pollution control to include "operating practices." 33 U.S.C. § 1311(b)(2)(A), cross-referencing *id.,* § 1314(b)(2)(A). The Clean Air Act defines an "emission standard" to control air pollution to include a "work practice or operational standard." 42 U.S.C. § 7602(k). Pennsylvania defines "best available

evidence shows that the applications of sewage sludge in this case did not conform to EPA and industry management practices to control odors and involved the application of atypically offensive sludge and, for these reasons and others, cannot qualify as "normal agricultural operations."

A. The Undisputed Evidence Shows that Synagro's Application of Putrid-Smelling Sewage Sludge at the Phillips Farm Without Any Odor Controls Did Not Conform With EPA's and Synagro's Recommended Procedures, Was Inconsistent with Technological Development in the Industry, and Caused Severe Odor and Health Problems

The Synagro Parties introduced no evidence whatsoever to show that "the conditions or circumstances complained of as constituting the basis for the nuisance action" were "normal agricultural operations." In contrast, Residents submitted reams of evidence to show that they *were not* "normal agricultural operations," including evidence that the sewage sludge was extraordinarily putrid-smelling, that its application was mismanaged, and that its health effects were extreme. *See* pp. 3-12 above. The Synagro Parties had no odor management or nuisance control plan. Reider Dep. 76 (R. 426a); Coble Dep. 53, 163-64 (R. 376a, 379a); Klunk Dep. 109, 134 (R. 400a-01a). They took no steps to mitigate nuisance conditions and odor, even after Residents complained repeatedly about

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control technology" for air pollution to include a "work practice" or "operational standard." 25 Pa. Code § 121.1.

extremely offensive odors. Phillips Dep. 167 (R. 421a); Martin Dep. 36, 71, 113 (R. 408a, 409a, 412a). Both the EPA and Synagro itself have recommended the use of management practices to control and reduce odor—including selecting remote sites and fields away from neighbors, minimizing storage time for sewage sludge, developing an odor control plan, avoiding land application during certain wind or weather conditions, incorporating or injecting sludge into the soil to reduce odors, and having an alternative disposal option for particularly malodorous batches. *See* pp. 4-7 above.

As the Superior Court found, however, the Synagro Parties did none of these things. They "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." Synagro Br., App. A at 27. As a result, the Synagro Parties' use of sewage sludge here "was not normal or routine and failed to conform to accepted EPA and industry practices." *Id.* at 26.

In this case, the absence of any odor management plan or odor controls was highly significant and had extremely offensive effects. By applying such noxious sludge without any odor controls, the Synagro Parties forced Residents to be prisoners in their homes for weeks on end and subjected them to horrible odors, flies and health problems. Neither the Synagro Parties nor any of their *amici*

addresses the failure to conform to industry practices and the effects of that failure on Residents.

In contrast to the voluminous evidence presented by Residents, the Synagro Parties submitted no evidence showing that the "conditions or circumstances" experienced by Residents were "consistent with technological development in the agricultural industry." The Synagro Parties did not identify any other situation in which similar extreme effects have occurred near a farm anywhere in Pennsylvania. Nor did they dispute in any way that odor control and mitigation is a normal and common practice in the agricultural industry.

At best, the Synagro Parties suggest that their sludge operations were properly permitted and were performed in a manner that is consistent with EPA and state regulations concerning sewage sludge. Synagro Br. 5-7. But, in terms of odor, compliance with those regulations is meaningless. Synagro's national manager of technical services testified that "[o]dor is not really regulated from EPA or the state agencies." Williams Dep. 53 (R. 40b). EPA's regulations under 40 C.F.R. Part 503 "do not specifically address the management of odors." *Id.* at 50 (R. 39b); *see also* EPA Fact Sheet (R. 579a) ("Federal Biosolids Regulations do not regulate odors"). An industry manual on biosolids states that "[u]nfortunately, meeting regulatory requirements for protecting human health and

the environment does not guarantee adequate odor control." National Manual of Good Practice for Biosolids, Ch. 1, p. 5 (National Biosolids Partnership 2005) (R. 47b). Consequently, regulatory compliance and nuisance avoidance are not co-extensive, and these odor controls are an additional and necessary component of normal agricultural operations consistent with technological development in the industry.

Thus, the undisputed evidence shows that the Synagro Parties' practices were not "normal agricultural operations." As a result, the third RTFA requirement is not met, and the case must be remanded for trial, particularly with respect to how sewage sludge was used and applied in this particular case.

B. Synagro's Argument that the RTFA Applies to All Activities on a Farm, Including the Use of Sewage Sludge, Regardless of How Those Activities Are Conducted or the Effects They May Have, Violates the RTFA's Explicit Terms.

The Synagro Parties' position is that odor control measures and the effects of sludge application are irrelevant to determining what "normal agricultural operations" are. In their view, sludge application must be deemed "normal" as a matter of law regardless of what the sludge consists of, how it was applied, or the deleterious effects it has on neighbors. Synagro Br. 26, 38-39. The Synagro Parties contend that the RTFA "forecloses any inquiry into nuisance liability" and

that "normal agricultural operations" is "defined *without limit* as all 'activities, practices and procedures' used by farmers." *Id.* at 14, 38 (emphasis added). The Synagro Parties believe the RTFA'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." *Id.* at 35. They also argue that "normal agricultural operations" are determined on a categorical basis, by evaluating simply whether farms in Pennsylvania normally use them. By that standard, they argue that "[f]ertilizing crops with biosolids" is the relevant category, and that category "obviously fits within the definition of a normal agricultural operation." Synagro Br. 36.

Thus, according to the Synagro Parties, if a farm uses incredibly foul-smelling sewage sludge, does nothing to control odors, generates smells like a herd of dead animals after sludge is applied, and prevents neighbors from opening their windows for four weeks, that is "normal" and must be accepted. Under this interpretation, it would not matter if the sewage sludge was radioactive, contaminated with carcinogens, or caused Ebola. Applying it would still be a "normal agricultural operation" subject to special protection under the RTFA.

The Synagro Parties' position is directly inconsistent with the statutory language in two respects. First, the RTFA does not refer to any *category* of farm

activities. Instead, it looks at whether the "the conditions or circumstances complained of as constituting the basis for the nuisance action" are "normal agricultural operations." This means that "normal agricultural operations" are *not* judged as a categorical matter or in the abstract, but as a site-specific matter in the factual context of the particular circumstances "complained of" in the particular nuisance action before the court. The third requirement, like the second requirement, involves a case-specific, fact-intensive determination. An analysis of the actual facts about how sludge was applied and its consequences in this case is therefore necessary to apply the RTFA correctly and as written.

Residents did not allege in their complaint, nor argue in their summary judgment papers, that the application of sewage sludge is *never* a "normal agricultural operation" in the Commonwealth of Pennsylvania. Residents are not trying to prove that proposition in this case, nor must they do so to prevail. Some applications at other farms may indeed be "normal agricultural operations." The "conditions or circumstances complained of" here do not involve what happened at other farms. What matters is what occurred at the Phillips Farm in this case. The undisputed evidence shows that what occurred were not "normal agricultural

operations."[13]

Second, the RTFA defines "normal agricultural operations" to mean operations "consistent with technological development in the agricultural industry." When that development includes odor control measures, those measures are relevant to the issue of what operations are normal. Normal agricultural operations do not include anything that farmers do, regardless of how they do it.

The words "consistent with technological development" necessarily require an analysis of whether the particular nuisance conditions complained of in a specific case are consistent with industry standards. Actions falling in a particular category of farm activities can be "normal agricultural operations" or not, depending upon, among other things, whether they are "consistent with technological development in the agricultural industry." For example, in *Commonwealth v. Barnes*, 427 Pa.Super. 326, 337-38, 629 A.2d 123, 129 (1993), the court rejected Synagro's categorical approach and held that the defendants

[13] The only evidence of record about applications at other farms shows that approximately 1% of the farms in Pennsylvania are applying sewage sludge and that less than 1% of the farm acreage in Pennsylvania is permitted for the use of sewage sludge. *See* pp. 16 above. It does not show what the sludge consists of, how it is applied, or the effects that its application has. It does not prove that the application of sewage sludge is always—or in this case is—a "normal agricultural operation."

were not engaged in a "normal agricultural operation" because they did not show that it was "a normal practice in the horse farming industry to neglect horses that are no longer wanted and are going to be . . . sold for dog food." 629 A.2d at 129. This was despite the fact that raising horses itself may well be "normal" in other circumstances.

Similar situations that would be inconsistent with technological development can be hypothesized. Suppose a farm consistently over-applies toxic pesticides, to such an extent that they flow into and poison the local water supply, making neighbors ill and destroying the ability of nearby farms to operate. Or a farmer fails to remove dead livestock from its farm for weeks and instead piles them up against a fence adjacent to neighboring property. In each case, under Synagro's theory, applying pesticides and managing livestock are what farmers do, so these activities would be categorically protected as "normal agricultural operations" under the RTFA. But those activities are likely to be inconsistent with accepted management practices and not protected under the RTFA.

Thus, the RTFA does not create a "one size fits all" test of applicability. It does not shield all activities in a category regardless of their impacts or their conformity with industry standards. If it did, after the one-year limitation on nuisance actions elapsed, farmers would have blanket immunity to interfere with

the quality of life of neighboring residents. Consequently, the Synagro Parties' theory of categorical and unlimited RTFA applicability must be rejected.

C. Synagro's Argument that the Court, Not the Jury, Should Decide Whether the Sewage Sludge Use in this Case Was a "Normal Agricultural Operation" Is Contrary to This Court's Decision in *McConnaughey*

The Synagro Parties devote sixteen pages of their brief to the argument that both the scope and applicability of the RTFA are purely legal questions of statutory interpretation that must be resolved exclusively by the Court, not by the jury. Synagro Br. 15-31. That argument is inconsistent with this Court's decision in *McConnaughey*, 536 Pa. at 102, 637 A.2d at 1335, and with Synagro's own discussion of that case.

In *McConnaughey,* this Court held that the application of a statute of repose can hinge on disputed issues of fact, and that those disputes must not be resolved by summary judgment. *Id.* at 102.[14] In that case, the statute of repose applied to persons who design, plan, supervise, construct, or observe a construction project that improves real property, but not to manufacturers who supply defective

[14] Similarly, for statutes of limitations, where the discovery rule "involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it." *Fine v. Checcio*, 582 Pa. at 268, 870 A.2d at 858. Courts may resolve the matter at the summary judgment stage only "where reasonable minds could not differ on the subject." *Id.*

products for the project. *Id.* at 100-01. The disputed factual issue in that case was the amount of involvement the manufacturer had in the design and planning of the construction of the roof trusses in the real property. *Id.* at 102, n. 5. Because the extent of the manufacturer's involvement was in dispute, the Court held that granting summary judgment was improper. *Id.* at 102.[15]

As we have explained above, this case raises the same caliber of case-specific factual issue that this Court in *McConnaughey* decided was inappropriate for resolution prior to trial. The Superior Court correctly relied on *McConnaughey* and decided that there are disputed issues of fact related to the two determinations regarding substantial change and normal agricultural operations.

Synagro's position is that *McConnaughey* only applies when the statute of repose requires "scrutiny into a defendant's conduct . . . on a particular occasion," not where it involves "a purely legal question of whether a certain category of

[15] This Court's decision in *McConnaughey* is consistent with at least eight other decisions holding that statutes of repose can raise disputed factual issues that cannot be resolved by summary judgment and must be resolved by a jury. *See Covington v. W.R. Grace-Conn., Inc.*, 952 P.2d 1105, 1108 (Wyo. 1998); *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 764 S.E.2d 203, 216 (N.C. Ct. App. 2014); *Mosqueda v. Crawford,* 2014 WL 896620 at *3 (D. Kan. 2014); *Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239, 244 (Tex. App. 1992); *Crawford v. Custom Sign Co.*, 138 So. 3d 894, 898 (Miss. 2014); *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1220 (11th Cir. 1999); *AMCO Ins. Co. v. Emery & Assoc., Inc.*, 926 F. Supp. 2d 634, 647 (W.D. Pa. 2013); *Vander Salm v. Bailin & Associates, Inc.*, 2014 WL 1117017, at *10 (D. Mass. 2014).

activity falls within a statutory definition that qualifies for legal protection under a statute of repose." Synagro Br. 25. But, as we have shown above, that case-specific factual inquiry is exactly what is involved in this case: whether the one-year limitation applies here requires "scrutiny into the defendant[s'] conduct . . . on [this] occasion" to determine whether the three factual requirements of the RTFA are met. As Synagro's own argument makes plain, its categorical approach is inconsistent with the statutory language. The RTFA requires a case-specific analysis of the "conditions or circumstances complained of as constituting the basis for the nuisance action," and whether they "existed substantially unchanged since the established date of operation" and are "normal agricultural operations." Those issues cannot be decided in the abstract or on a "categorical" basis.[16]

It is significant that courts in other states with similar Right to Farm Acts

[16] For that reason, the Synagro Parties' and their *amici's* reliance on extra-record material to argue that sludge application is a "normal agricultural operation" is misplaced. This material includes other state statutes and the views of state agencies, industry trade groups, water and sewer authorities, and farm associations. Synagro Br. 39-54. It is irrelevant whether these groups believe that, in general, sludge application is a normal agricultural operation. That is not the question in this case and they cannot substitute their judgment for the factfinder here. It is also irrelevant whether other statutes generally allow land application of sewage sludge, since that is no substitute for the case-specific determinations required by the RTFA. The Synagro Parties and their *amici* cite no factual evidence to even suggest that Pennsylvania farmers have regularly applied gag-inducing sewage sludge in the irresponsible and uncontrolled manner in which it was applied in this case.

have decided that their application in particular cases can raise disputed fact issues that cannot be resolved summarily. For example, in *Reeves v. Hooton,* 2013 WL 4680529 (Tex. App. 2013), a neighbor sued a farm for causing a nuisance by using a loud propane cannon to deter animals from harming his crops. The farmer moved to dismiss on the ground that the Texas Right to Farm Act barred the action. The language in the Texas statute about the conditions or circumstances having "existed substantially unchanged" is identical to the language in the Pennsylvania statute.[17] The trial court denied the motion, finding that a fact issue existed about whether the conditions or circumstances constituting the basis for the nuisance action had existed substantially unchanged since the established date of operation. *Id.* at *1. That fact issue was resolved by a jury at trial in favor of the neighbor. *Id.* The appellate court held that the factual evidence was sufficient to support the jury's finding. *Id.* at *3.

Similarly, in *Wyatt v. Sussex Surry, LLC,* 74 Va. Cir. 302, 2007 WL 5969399 (Va. Surry Ct. 2007), Synagro moved to dismiss a nuisance claim

[17] The Texas statute provides that: "No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation." Tex. Ann. Code Ann. § 251.004(a).

relating to land application of sewage sludge, arguing that the Virginia Right to Farm Act pre-empted the action. The court denied the motion, finding that the application of that statute raised factual issues that had to be decided by a jury. *Id.* at *2. One of those issues was whether Synagro complied with best management practices. *Id. See also Trosclair v. Matrana's Produce, Inc.*, 717 So. 2d 1257, 1259 (La. Ct. App. 1998) (issue of whether defendant's business was "an agricultural operation conducted in accordance with generally accepted agricultural practices" within meaning of Louisiana Right to Farm Act was a factual issue which must be determined by the trier of fact).

Similarly, in this case, the Synagro Parties failed to present undisputed evidence that all three of the RTFA's factual requirements are met. Consequently, the application of the RTFA to this case cannot be resolved by summary judgment.

CONCLUSION

For these reasons, this Court should affirm the Superior Court's decision denying the Synagro Parties' motion for summary judgment, reverse its ruling that the one-year limitation on nuisance actions in the RTFA "resets" when the "conditions and circumstances complained of" are a "substantial change" in the Phillips Farm's operations, and remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF WORD-LIMIT COMPLIANCE

I certify that the foregoing 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 13,832 words based on the word count of the word processing system used to prepare the brief.

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