IN THE SUPREME COURT OF PENNSYLVANIA

No. 121 MAP 2014

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Appellees,

v.

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

Appellants.

BRIEF FOR THE AMICUS CURIAE PENNSYLVANIA ASSOCIATION FOR JUSTICE

APPEAL FROM THE ORDER OF THE SUPERIOR COURT DATED APRIL 15, 2014 AT No. 119 MDA 2013, REVERSING AND REMANDING THE ORDER OF THE COURT OF COMMON PLEASE OF YORK COUNTY CIVIL DIVISION DATED DECEMBER 28, 2012 AT NO. 2008-SU-003249-01.

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STATEMENT OF INTEREST

The Pennsylvania Association for Justice, *formerly Pennsylvania Trial Lawyers Association*, is a non-profit organization with a membership of over 2,300 men and women of the trial bar of the Commonwealth of Pennsylvania. Since 1968, the Association has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges for any individual, group or entity. Through its *Amicus Curiae* Committee, the Pennsylvania Association for Justice strives to maintain a high profile in the Commonwealth and Federal Courts by promoting, through advocacy, the rights of individuals and the goals of its membership.[1]

[1] No party to this appeal has paid in whole or part for the preparation of this brief.

SUMMARY OF ARGUMENT

Amicus Curiae the Pennsylvania Association for Justice participates in this appeal because it calls in to question a fundamental procedural safeguard in Pennsylvania jurisprudence, the standard by which a motion for summary judgment is denied. Here, the Trial Court and the Superior Court properly found the existence of a material fact as to whether the conduct in question was a normal agricultural operation. As such, Summary Judgment was properly denied.

Amicus Curiae is further concerned that the Appellant Farm Parties seem to be promoting the idea that issues of fact should be determined as a matter of law when a statute of repose is involved. That position is flawed because 1) the provision at issue in the Right to Farm Act is at best a statute of repose conditioned upon the existence of "normal agricultural operations"; 2) the subject provision does not pose an issue of subject matter jurisdiction (and the law cited by Appellant Farm Parties does not support such a proposition) and 3) even if a conditional statute or repose is jurisdictional, issues of fact necessary to apply the statute when subject to a dispute amounting to a material issue of fact should not be determined as a matter of law.

ARGUMENT

I. THIS COURT SHOULD NOT OVERTURN A DECISION DENYING SUMMARY JUDGMENT BASED UPON THE EXISTENCE OF AN ISSUE OF MATERIAL FACT.

The right to a trial on the merits in a civil action is one of the touchstones of both the Pennsylvania and United States civil justice systems. The Pennsylvania Courts have long looked to the Pennsylvania Supreme Court's decision in Nanty-Glo v. American Surety Company, 309 Pa. 236, 163 Atl. 523 (1932) to safeguard the right to trial by jury from motions for summary judgment. In Nanty-Glo, the Pennsylvania Supreme Court held that if a dispositive motion[2] is based on testimony or affidavits of the moving party or his witnesses, unsupported by documentary evidence, then the motion cannot be granted. The Nanty-Glo court explained that the credibility of the facts contained in such testimony or affidavits is self-serving and that the credibility of such testimony is a question of fact which is to be resolved by a jury.[3]

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[2] In Nanty-Glo, the dispositive motion was a directed verdict in an action brought against a surety. The testimony presented at trial against the surety, if believed would have established a right to recovery and was uncontroverted. Nonetheless, the Court recognized that even such evidence was subject to a credibility determination.

[3] There should not be a distinction in the standard for summary judgment based upon whether or not an action is to be determined by a bench trial or jury trial. Even where a judge is the fact finder, the interest of justice and due process is promoted by allowing the parties to present witnesses to testify verbally subject to cross examination before determining credibility and controverted issues of fact.

Pennsylvania case law has since applied the Nanty-Glo rule to motions for summary judgment. See Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (Pa. 1991) Stimmler v. Chestnut Hill Hosp., 602 Pa. 539, 981 A.2d 145 (Pa. 2009).

In McConnaughey v. Building Components, 536 Pa. 95, 637 A.2d 1331 (Pa. 1994), as recognized in this case by the Superior Court, This Court has specifically applied the rule against resolving factual disputes at the summary judgment stage to a statute of repose.

McConnaughey, arose after a barn roof collapsed. The barn had been built more than twelve years prior to the collapse and the question became whether the 12-year construction statute of repose barred an action against the manufacturer of trusses used in the construction of the barn. The trial court granted summary judgment in favor of the truss manufacturer, and was affirmed by the Superior Court. On appeal, the Supreme Court found that an issue of material fact existed as to whether or not the trusses constituted "an improvement to real property" within the meaning of the construction projects statute of repose found at 42 Pa.C.S. 5536.

In this case, whether or not the farming methods employed by the Farm Parties constituted a normal agricultural operation, as explained by the Superior Court, remained a factual issue. In this case, the fact finder may conclude that the use of biosolids is not a normal agricultural operation. In the alternative, the fact

finder may conclude that the use of biosolids in a certain manner is not a normal agricultural operation.[4] In this case, the factual issues regarding the compliance with proper practices as well as the statistics cited by the Appellee neighbors certainly raise an issue of fact as to whether these are normal agricultural operations. Hence, the Superior Court acted properly in holding that Summary Judgment was not warranted. In doing so, the Superior Court vindicated the right to a trial on the merits in this case.

II. REGARDLESS OF WHETHER OR NOT THE SUBJECT PROVISION IS A STATUTE OF REPOSE, THE COURT SHOULD NOT DETERMINE MATERIAL ISSUES OF FACT AS A MATTR OF LAW.

Although the Appellant Farm Parties quickly make a series of arguments 1) that we are dealing with a statute of repose, 2) a statute of repose is an issue of subject matter jurisdiction and 3) subject matter jurisdiction must be decided as a matter of law, their argument attempts to suggest that there is a widespread black-

[4] It is noted that the record in this matter includes EPA publications at R. 576a and 578a that set forth proper practices for the use of biosolids, including limiting their use to remote areas and other measures apparently not observed in this case. Although this Amicus defers to the Appellee neighbors concerning the factual issues in this case, it can be determined that EPA fact sheet compliant practices may or may not be normal agricultural operations but those which are non-compliant are not normal agricultural operations. Even without expertise in this area, the Amicus can readily understand from the extreme effects of the practice in the instant case why the Appellee neighbors would expect to be able to obtain a judicial remedy. Amicus takes no position on the desirability of using biosolids in general, but realizes that where dramatic hardship is imposed upon neighboring landowners, the courts should be open to protect their rights and an overzealous interpretation of the Right to Farm Act closes the Courts to these citizens.

letter rule addressing this issue. To the contrary, these are matters in which there is not widespread consensus.

Initially, it should be noted that the term "statute of repose" is broad, vague and subject to varying definition. It has been observed that "The term 'statute of repose' can create analytical difficulties because it often lacks a precise definition..." Josephine Herring Hicks, The Constitutionality of Statutes of Repose, 38 Vand. L Rev. 627, 628 (1985). Furthermore, "Not all statutes of repose operate identically." Id.

In determining whether a statue of repose implicates subject matter jurisdiction, it is necessary to consider the jurisdictional statute which applies to trial courts in the Commonwealth of Pennsylvania found at 42 Pa.C.S. 931. Section 931 provides:

> **(a)** ***General rule.*** -- Except where exclusive original jurisdiction of an action or proceeding is by statute or by general rule adopted pursuant to section 503 (relating to reassignment of matters) vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas.

42 Pa.C.S. § 931

Nothing in the Right to Farm Legislation serves to divest this jurisdiction. The Section at issue merely states:

> **(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, ...

3 P.S. § 954.

Clearly, the Right to Farm Act does not contain language explicitly abrogating jurisdiction after a period of one year. Nor does the section at issue state that it is a statute of repose. Indeed, it is hard to term the section at issue as a pure statute of repose since it is conditional upon the existence of normal agricultural operations.

Even if the Section at issue were a pure statute of repose, the argument that the Appellant Farm Parties raise fails analytically. The crux of their argument is that when a statute of repose applies, no underlying cause of action exists thereby denying a court subject matter jurisdiction. If this type of analysis were to be consistently followed, any demurrer would become a jurisdictional issue and all demurrers could be determined as a matter of law.

Perhaps the Appellant Farm Parties may say that a demurrer is not jurisdictional because the Court must determine facts before it can determine that no cause of action exists. The Appellant Farm Parties would then be correct in pointing out that the argument to treat demurrers as jurisdictional issues presents a classic example of bootstrapping. However, the position advanced by the Appellant Farm Parties is no less an example of classic boot strapping.

The position of the Appellant Farm Parties is further undermined by closely examining the cited legal authority. The key link in the Appellant Farm Parties' position is the argument that statutes of repose are jurisdictional. In support of this, they offer a string citation, of which only one case is from This Court, that being Smith v. WCAB, 543 Pa. 295, 670 A.2d 1146 (Pa. 1996). However, that case does not contain a holding that statutes of repose are jurisdictional. In fact, the holding was that the defense of Section 413(a) of the Workers Compensation Act can be waived. Indeed, the argued proposition would rely upon much extrapolation, which can hardly be said to constitute established law. Hence, this Court does not have definitive precedent on this crucial issue.

The precedent cited for the proposition that jurisdictional issues must be determined as a matter of law is equally unsupportive of the proposition that the cases were cited for. More specifically, the cases cited by the Appellant Farm Parties are not controlling for the following reasons:

- In MCI Worldcom, Inc. v. PUC, 577 Pa. 294, 844 A.2d 1239 (Pa. 2004), the Court held that appeals from the PUC involving interconnections were solely within federal jurisdiction. This case did not require the Court to pass upon facts.
- In Harris-Walsh, Inc. v. Dickson City, 420 Pa. 259, 216 A.2d 329 (Pa. 1966) the Court found that there was no equity jurisdiction only if there was no

adequate remedy at law. Although the Court explored whether there was an adequate remedy at law, the issue did not seem to turn on resolution of a disputed set of facts.

- Both Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (Pa. 1999), and Commonwealth v. Cruz, 578 Pa. 325, 852 A.2d 287 (Pa. 2004) involved the issue of jurisdiction in proceedings pursuant to the Post Conviction Relief Act (The PCRA) where the petition was filed untimely. In neither case did the disposition of the issue require the Court to resolve a factual dispute.
- Alter v. Pa Gas, 532 A.2d 913 (Pa. Commw. 1987) was not a Supreme Court decision. In any event, the issue involved was personal, not subject matter jurisdiction. In the present case, the argument made by the Appellant Farm Parties is that a statute of repose presents an issue of subject matter jurisdiction.

The Appellant Farm Parties also generally cite examples where courts are called upon to determine factual issues as a matter of law. However, the suggestion that This Court should expand the list of occasions when a court may determine a factual question as a matter of law would be contrary to This Court's approach in its recent decision in Tincher v. Omega Flex, 104 A.3d 328 (Pa. 2014). There, in a products liability action, the Court addressed whether it should continue to follow its prior decision in Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d

1020 (1978). Azzarello held that in a products liability action, under Section 402A of the Restatement (Second) of Torts, it was the function of the Court to determine whether or not a product was unreasonably dangerous. The Tincher Court ultimately determined that it would no longer follow Azzarello and that the question of whether the product was unreasonably dangerous would be a question for the finder of fact.

In addressing the various criticisms of the Azzarello decision, the Court observed that:

> the practical reality, as exemplified by the matter before us, is that trial courts simply do not necessarily have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous except perhaps in the most obvious of cases.

Tincher, at 380.

The same type of issue is applicable here. The question of, under the facts of a particular case, what constitutes a normal agricultural operation is not something that the Courts as a whole have special insight into.[5] Furthermore, the Tincher Court's observation above, when read in its full context reveals that the

[5] It appears that one of the Appellant Farm Parties' arguments is that statutory interpretation is the role of a Court. Such a position ignores the fact that once a statute has been interpreted, it must be applied to a specific factual situation. Surely the Appellant Farm Parties are not suggesting that the Courts do not routinely instruct juries on the meaning of a statute and thereafter allow the jury to apply the facts to the statute. A ready example of how this routinely occurs is that the Courts routinely interpret the motor vehicle code and then instruct a jury on "negligence per se" in civil motor vehicle negligence cases.

Court also struggled with the question of what information was to be applied in making an Azzarello determination and at what stage.[6]

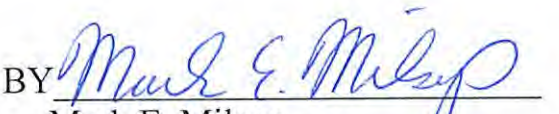
[6] Here, the issue of what information should have been used and at what stage demonstrates why the Superior Court cannot be overruled. Here, the motion at issue was scheduled as a motion for summary judgment. The applicable standard requires only a showing that there is a material issue of fact for the non-moving party to prevail. Hence, having chosen to proceed by Motion for Summary Judgment, the Appellant Farm Parties cannot complain because their motion was denied due to the existence of an issue of material fact.

CONCLUSION

Although the issue of biosolids is not of particular interest to this Amicus, the process involved is of tantamount concern. As such, the conclusion that the trial court properly denied summary judgment should be affirmed. Because there was a material issue of fact as to what constitutes normal agricultural operations, the right to summary judgment was not established. Likewise, existing case law does not establish that the Right to Farm Act creates a pure statute of repose. At best, the statute of repose is conditional upon the existence of a normal agricultural operation. Furthermore, such a conditional statute of repose would not create a jurisdictional issue; and even if the issue were jurisdictional, the underlying factual issue was not to be determined as a matter of law.

For all of the foregoing reasons, Amicus the Pennsylvania Association for Justice requests that the Superior Court be affirmed.

Respectfully submitted,

BY 

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the within brief meets the requirements of Pa.R.A.P. No. 2135 regarding word counts and page limits in that the number of pages of the principal portion of the brief is 12 pages and thereby deemed compliant.

BY _____
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