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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 AMICI CURIAE JOSEPH NEWBERGER, EARL SCHUCKMAN, AND PAUL SOLOMON IN SUPPORT OF APPELLEES

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EPA, Biennial Review of 40 CFR Part 503 As Required Under the Clean Water Act Section 405(d)(2)(C): Reporting Period 2007 Biennial Review (2009), *available at* http://water.epa.gov/scitech/wastetech/biosolids/upload/br2007_summary_final.pdf 42

EPA, Biennial Review, Use and Disposal of Biosolids (Sewage Sludge) http://water.epa.gov/scitech/wastetech/biosolids/ (last updated Dec. 5, 2014) 42

EPA, *Targeted National Sewage Sludge Survey Report*, Fact Sheet No. EPA 822-F-08-006 (Jan. 2009), http://water.epa.gov/scitech/wastetech/biosolids/#tnsss 41

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae Paul Solomon, Earl Schuckman, and Joseph Newberger ("Amici") served on the Shrewsbury Township Board of Supervisors ("the Board") during the time in which Appellants Synagro Central, LLC, *et al.* ("the Synagro Parties") spread sewage sludge on 300 acres of property owned by Appellant George Phillips ("the Phillips Site"). Mr. Newberger served as Supervisor from 2002 until 2007, Mr. Schuckman from 1999 until 2009, and Mr. Solomon from 2000 until 2011, returning in 2014 as Chairman of the Board.

As members of the Board, Amici bore legal responsibility for "the general governance of the township and the execution of legislative, executive and administrative powers," in order to secure, among other things, "the health, safety and welfare of the citizens of the township." 53 Pa. C.S. § 65607(1). In this capacity, Amici – along with their two other fellow Supervisors – conducted all official Township business.[1] They presided over monthly Board meetings, conducted hearings for comment on matters of public concern, responded to residents' complaints, received petitions, enacted and enforced local land-use

[1] Subsequent to the events at issue here, the Board vested many of the powers discussed above in the newly established office of Township Manager. *See* Shrewsbury Twp., Pa., Code chap. 1, pt. 5 (2011), *available at* http://ecode360.com/28517089.

ordinances, and spoke on behalf of the Township through correspondence and special meetings with county and state authorities. From Amici's perspective, the application of sewage sludge at the Phillips Site was unlike any other problem to arise during their tenure.

Amici currently reside in Shrewsbury Township, as they have for many years. As both residents and leaders of their community, Supervisors enjoy a broad view of the competing needs of the local economy, including agricultural businesses; residents, many from farming families; and the larger Susquehanna Valley ecosystem. Amici's interests are in the health and welfare of Township inhabitants, the rural way of life, the conservation of its plant and animal species, the fertility of its lands, and its continued success and prosperity. Just as these interests have suffered as a result of the Synagro Parties' conduct, they would be vindicated if the responsible parties were held to account for some portion of the harm they have caused.

Amici take no position on the Synagro Parties' claim that depositing leftover municipal and industrial waste on farmland is, in the abstract, "beneficial." The practice did not appear in Shrewsbury Township in the abstract, as it is described

in the numerous fact sheets[2] appended to briefs filed earlier with the Court, but as a tangible threat to the health, safety and welfare of Township residents. Through public meetings, concerned emails and phone calls, and visits to the affected areas, Amici came to see very clearly what Synagro's sewage sludge meant to the people of Shrewsbury Township: 11,000 tons of putrid feculence appearing by the pre-dawn truckload, stored uncovered on concrete pads, slung and slathered across nutrient-saturated fields and then simply left – whether to simmer in stifling summer temperatures, mingle with excess precipitation, or sit idly in freezing temperatures and await the spring thaw. *See* Defs.' 2012 SJ Ex. M (R. 181a-83a). Amici heard pleas for assistance from residents – of the Township and of other municipalities, too – the "degree, type, [and] scope" of which were unparalleled during Amici's tenures. Pls.' SJ Ex. YY ¶ 5 (R. 570a-71a). The reports Amici received described odors so intense that they permeated "into the cars and clothing of area residents," who were forced to keep their windows shut for up to two months as a result. Pls.' Resp. to Defs.' 1st Mot. for SJ Ex. 15 (R. 850a). Amici worked with experts, regulators, residents, and the Synagro Parties to resolve these

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[2] Or "public relations propaganda," as a federal judge put it at an earlier stage of the case. *See* Memorandum Opinion Remanding to State Court 10/9/08 at 5-6 (unreproduced record).

problems, ultimately without satisfactory resolution. *See id.* (R. 849a-50a) (letter from Board summarizing multi-agency meeting at which residents and farmers alike raised concerns including "impacts on their health, the use of their properties, incurred costs, possible loss of livestock, property values, and their overall quality of life"); Pls.' SJ Ex. VV (R. 559a-63a).

As residents and leaders of a small town in south-central Pennsylvania who have devoted considerable portions of their lives to agriculture and to the success of agricultural communities, Amici support the aims of the Pennsylvania Right to Farm Act ("RTFA"). The General Assembly, like many of the 49 sister legislatures that have enacted their own RTFAs, perceived that as "nonagricultural land uses extend into agricultural areas," 3 Pa. C.S. § 951, new suburban homeowners might use nuisance suits to displace settled farm families, threatening the future of these established communities as well as the broader economic and social fabric of which they are part. In recognition of the vital role agriculture plays for the Commonwealth and its 14 million inhabitants, the RTFA "limit[s] the circumstances under which [these] operations may be the subject matter of nuisance suits," *id.*, by allowing farmers to demonstrate, as an affirmative defense, that any allegedly injurious practices were simply "normal agricultural operations" that "have existed substantially unchanged" since the established date of the farm,

id. § 954(a). Amici appreciate this policy objective, and aim to keep it consistent with the safety, livability and health of Shrewsbury Township and similar communities. In particular, and as relevant to this case, Amici seek to prevent the RTFA's misapplication, as a shield for harmful practices that are far outside the pale of normal agricultural operations.

COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This appeal questions whether the Synagro Parties are entitled to summary judgment on their RTFA affirmative defense. Under the Pennsylvania Rules of Civil Procedure, summary judgment is warranted only when there is "no genuine issue of any material fact as to a necessary element" of the defense. Pa. R.C.P. No. 1035.2. The Synagro Parties, as the movants, must adduce facts sufficient to establish a right to the claimed defense that is "clear and free from doubt." *Marks v. Tasman*, 589 A.2d 205, 206 (Pa. 1991) (internal citation omitted). Whether they have met this burden is a question of law, which the Court reviews de novo. *See Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010).

COUNTER-STATEMENT OF THE QUESTION INVOLVED

Have the Synagro Parties demonstrated the complete absence of any issues of material fact as to whether the conditions or circumstances of sewage sludge use on the Phillips Site meet the criteria necessary for a valid RTFA defense?

The court below answered in the negative.

COUNTER-STATEMENT OF THE CASE

Amici hereby adopt and incorporate by reference the Counter-Statement of the Case contained in the Brief of Appellees Ralph Gilbert, *et al.* ("the Residents").

SUMMARY OF ARGUMENT

This appeal is about whether the application of enormous quantities of toxic sewage sludge over cropland in Shrewsbury Township, resulting in unprecedented foul odors and negative health effects, is or is not entitled to the RTFA's affirmative defense. The RTFA defense applies only when "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. C.S. § 954(a). Because the RTFA defines these criteria in general terms, without explaining when, if ever, sludge spreading meets that definition, the inquiry here is a predominately factual one. Furthermore, as the extensive record in this case reveals multiple bona fide factual disputes concerning the manner in which sewage sludge was used on the Phillips Site, the Superior Court correctly remanded for trial.

The overwhelming weight of precedent from the other states, all of which have enacted right-to-farm laws with similar immunity provisions, holds that such

statutes provide affirmative defenses. This view is consistent with precedent from Pennsylvania's own appellate courts. In this case, the Synagro Parties have raised an RTFA defense, and they bear the burden of proving that the factual prerequisites for such a defense are met. The Synagro Parties' attempt to reclassify the RTFA as a "jurisdictional requirement," thereby shifting the burden of proof to the Residents, lacks merit. Further, the plain language of the RTFA indicates that the "substantial change" and "normal agricultural operations" criteria limit the availability of the RTFA defense. These criteria serve the Act's fundamental purpose of providing measured protection of rural Pennsylvanian communities and their local agricultural economies. The Synagro Parties' attempt to expand the RTFA to "*all* agricultural activities," Appellants' Brief at 33 (emphasis added), inappropriately rewrites and expands the statute.

Sewage sludge is not analogous to manure or commercially-prepared fertilizer, and the excessive sludge-spreading activities at the Phillips Site created offensive, pervasive and lingering odors that not only affected nearby residents but also dramatically affected the public character of Shrewsbury Township. These activities were a substantial change from prior operating conditions and were not "normal agricultural operations," and the Superior Court's order remanding for trial was correct and should be affirmed.

ARGUMENT

I. THE RTFA PROVIDES AN AFFIRMATIVE DEFENSE, WHICH IS NONJURISDICTIONAL AND PLACES THE BURDEN OF PROOF ON THE SYNAGRO PARTIES

The RTFA establishes an affirmative defense, not a jurisdictional prerequisite. It frees the operator of "an agricultural operation" from liability in any "nuisance action" if three statutory conditions are met — *i.e.*, if (1) the operation has lawfully been in operation for one year or more prior to the date of the nuisance action, (2) the condition or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation, and (3) the condition or circumstances complained of are normal agricultural operations. 3 Pa. C.S. § 954(a). Even if all the allegations in the nuisance complaint are true, the defendant will prevail if it demonstrates that all elements of its affirmative defense are also met. Subject-matter jurisdiction, on the other hand, is a mandatory prerequisite. Although a claim that jurisdiction is absent is properly plead as a preliminary objection, jurisdictional prerequisites cannot be waived and can thus be raised at any time, by any party or by the Court itself. *See* Pa. R.C.P. 1030; Pa. R.C.P. 1032(a); *Zappala v. Brandolini Prop. Mgmt., Inc.*, 909 A.2d 1272, 1282 & n.9 (Pa. 2006).

A. The RTFA Is an Affirmative Defense

This Court has defined an "affirmative defense" as "a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true." *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1095-96 (Pa. 2012) (quoting BLACK'S LAW DICTIONARY 186 (2d Pocket Ed. 2001); *see also Lewis v. Spitler,* 403 A.2d 994, 998 (Pa. Super. Ct. 1979) ("An affirmative defense is distinguished from a denial of the facts which make up a plaintiff's cause of action in that a defense will require averment of facts extrinsic to plaintiff's claim for relief."). Affirmative defenses must be plead as new matter and are waived if not properly raised. *See, e.g.*, Pa. R.C.P. 1030; *Reott,* 55 A.3d at 1095-96; *Romaine v. Workers' Comp. Appeal Bd. (Bryn Mawr Chateau Nursing Home)*, 901 A.2d 477, 485 (Pa. 2006). Defendants bear the burden of proof, including for purposes of summary judgment. *See Norbeck v. Allenson*, 293 A.2d 92, 94 (Pa. Super. Ct. 1972) ("[A]ffirmative defenses are those as to which the defendant has the burden of proof").

The operative section of the RTFA reads, in relevant part:

> **Limitation on public nuisances.**
>
> (a) No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the condition 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. C.S. § 954 (hereinafter "the RTFA defense"). The effect of this provision is to allow the operator of "an agricultural operation" to raise an affirmative defense against any "nuisance action." Even if all the allegations in the nuisance complaint are true, a defendant's assertion of the facts and arguments specified in § 954(a) will, if true, defeat the nuisance claim.

The facts and arguments that must be proven by the Synagro Parties in this case are the three requirements identified by the Superior Court:

> First, the agricultural operation at issue must have an established date of operation at least one year prior to the filing of the lawsuit. Second, the conditions or circumstances constituting the basis of the nuisance action must have existed substantially unchanged since the established date of operation. And third, the conditions or circumstances constituting the basis of the nuisance action must be a "normal agricultural operation," as that term is defined in 3 Pa. C.S. § 952.

Gilbert v. Synagro Cent., LLC, 90 A.3d 37, 43 (Pa. Super. Ct. 2014) (footnote omitted). Even under the reasoning of the Court of Common Pleas (which erroneously granted the Synagro Parties' motion for summary judgment), the RTFA issue was an affirmative defense, which the Synagro Parties could sustain

only by adducing sufficient evidence *See Gilbert v. Synagro Cent., LLC*, No. 2008-SU-3249-01, 2012 Pa. Dist. & Cnty. Dec. LEXIS 323, *11 (Pa. Comm. Pl., York Cnty. Dec. 28, 2012).

Several opinions of Pennsylvania's appellate courts indicate that the relevant opinions indicate that the defense is an affirmative one – not a jurisdictional bar. *See Horne v. Haladay*, 728 A.2d 954, 955 (Pa. Super. Ct. 1999) (defendants raised RTFA defense "in their new matter," only "mov[ing] for summary judgment" after "additional pleading and discovery"); *see also Boswell v. Skippack Twp.*, No. 389 M.D. 2006, 2012 WL 8670346, at *6 (Pa. Commw. Ct. June 27, 2012), *aff'd*, 67 A.3d 757 (Pa. 2013) (affirming trial court holding "that Landowners did not meet their burden of proving that their use of" noisemaking device to repel deer "constitutes a 'normal agricultural operation'").[3] Even in the context of a criminal law (Pennsylvania's cruelty to animals statute), defining the offense specifically to exclude actions constituting "normal agricultural operations," the Superior Court held that the exception was "entirely separable from the clause defining the offense and . . . therefore a 'matter of defense.'" *Commw. v. Barnes*,

[3] Plaintiffs in *Boswell* sought to enjoin enforcement of a noise ordinance under § 953 of the RTFL, arguing that their use of a sound-making devise to protect their tree farm from deer constituted "normal agriculture operations," and that the noise ordinance was invalid to the extent it precluded their use of the device. 2012 WL 8670346, at *1.

629 A.2d 123, 130 (Pa. Super. Ct. 1993) (quoting 18 Pa. C.S. § 5511(c)); *see also Commw. v. Balog*, 672 A.2d 319, 324 (Pa. Super. Ct. 1996) (holding that defendant "failed to bring himself within the scope of [§ 5511(q)'s] exception for 'normal agricultural operations'") (alteration omitted).

When interpreting similar enactments by their respective legislatures, sister courts have overwhelmingly concluded that RTFAs are affirmative defenses. *See, e.g.*, *Lima Twp. v. Bateson*, 838 N.W.2d 898, 906 (Mich. Ct. App. 2013) ("[W]e hold that a party relying on the RTFA as a defense to a nuisance action has the burden to prove that the challenged conduct is protected under the RTFA."); *Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003) (RTFA is an affirmative defense); *Parker v. Obert's Legacy Dairy, LLC*, 988 N.E.2d 319, 321 (Ind. Ct. App. 2013) (same); *Soukop v. ConAgra, Inc.*, 653 N.W.2d 655, 656 (Neb. 2002) (same); *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 651 (Miss. 1995) (same); *Weinhold v. Wolff*, 555 N.W.2d 454, 462 (Iowa 1996) (same); *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC*, 123 Cal. Rptr. 2d 479, 486 (2002) (same); *Curtis v. Parchman*, No. M2013-01489-COA-R3-CV, 2014 WL 819424, at *5 (Tenn. Ct. App. Feb. 27, 2014) (same); *see also Eulrich v. Weaver Bros.*, 846 N.E.2d 542 (Ohio Ct. App. 2005) (holding that RTFA's statutory immunity defense against nuisance actions had been waived); *Finlay v. Finlay*, 856 P.2d 183,

188 (Kan. Ct. App. 1993) (stating that "defendant must satisfy three conditions to be protected by the [Kansas RTFA]"); *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1421-22 (W.D.N.Y. 1993) (under New York RTFA, "burden is on the party pursuing the [agricultural] practice to show that it is sound"); *Lane v. Cashman*, No. MMXCV126008324, 2014 WL 2854017, at *2 (Conn. Super. Ct. May 21, 2014) (designating Connecticut's RTFA a "special defense").[4]

B. The RTFA Does Not Operate As a Jurisdictional Bar

Despite clear indications that § 954(a) operates as an affirmative defense, the Synagro Parties mistakenly insist that it is a "jurisdictional requirement." Appellants' Brief at 16. To the contrary, neither the relevant statutory text nor the relevant caselaw supports the argument that this provision is intended as a jurisdictional bar. *See* 3 Pa. C.S. § 954(a).

As the unanimous Court explained in *Heath v. Workers' Compensation Appeal Board (Pa. Bd. Prob. & Parole)*, "the test for determining whether a court has jurisdiction of the subject matter is the competency of the court to determine controversies of the *general class* to which the case presented for its consideration

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[4] "Special defenses" under Connecticut law are equivalent to affirmative defenses under Pennsylvania law. *Compare* Conn. Gen. Stat. § 10-50 *with* Pa. R.C.P. 1030.

belongs." 860 A.2d 25, 29 (Pa. 2004) (quoting *Strank v. Mercy Hosp. of Johnstown*, 102 A.2d 170, 172 (1954) (emphasis in original)). In *Heath*, this Court overturned a ruling that barred, on jurisdictional grounds, an employee's Workers' Compensation Act ("WCA") claim seeking compensation for injuries suffered in the workplace. *See id.* at 28. The WCA defines compensable injuries to exclude injuries caused by personal disputes between employees. *Id.* at 30 (describing the "personal animus exception"). Whether the claimant's injury fell within the definitional exclusion (so that the personal animus exception would apply) was described as a question of fact, which "ha[d] nothing whatsoever to do with" whether a court was empowered to decide "controversies of the general class" at issue (*i.e.*, claims petitions filed by "an employee who alleges that he was injured during the course of his employment"). *Id.* at 29, 30.

Similarly, Pennsylvania courts possess subject-matter jurisdiction to hear "controversies of the general class" of nuisance suits against agricultural businesses, the availability of the RTFA defense notwithstanding. While the provision defeats some common law nuisance suits filed against agricultural operations more than one year after the established date of operation, other similar nuisance actions are not barred. Clearly, the distinction does not turn on the general class of operation against which the nuisance suit is directed, but on

whether "the conditions or circumstances . . . constituting the basis for the nuisance action have existed substantially unchanged since the established date of operations and are normal agricultural operations." 3 Pa. C.S. § 954(a). *See Gilbert*, 90 A.3d at 43 (stating that § 954(a) "applies to bar a nuisance action *only if* three requirements are met") (emphasis added). This case, like *Heath*, thus involves a purely affirmative defense referring to specific "conditions or circumstances," not a jurisdictional provision barring a general class of actions.

Nor is there any merit to the theory that the RTFA defense is jurisdictional because it is a "statute of repose" that "completely abolish[es] and eliminat[es] a party's cause of action." Appellants' Brief at 17-18 (quoting *Abrams v. Pneumo Abex Corp.*, 981 A.2d 198, 211 (Pa. 2009)).[5] In a recent opinion, this Court explained when statutory time-bars, such as statutes of limitation or statutes of repose, are jurisdictional and when they are not:

> Where a statute of limitations pertains to a common law right of action, the expiration of the limitations period does not operate to extinguish the common law right, but only the remedy that

[5] Amici agree with Residents that the RTFA defense is not a statute of repose because any immunity it provides will necessarily be contingent on future events. *See Holubec*, 111 S.W.3d at 37 (stating that "if the one-year period prescribed in [Texas' remarkably similar RTFA defense provision, V.T.C.A., Agric. Code §] 251.004(a) is a statute of repose, it is unique both because it is conditional and because it is so short").

> may be obtained by the person asserting that right. However, as a general principle, where the right of action arises out of a statute, such as the Workers' Compensation Act, "there is no right of action unless asserted in accordance with the provisions of the statute." Therefore, the statutory right of action is inextricably tethered to the provisions of the statute creating that right, including any temporal limitations established therein.

Cozzone ex rel. Cozzone v. Workers' Comp. Appeal Bd. (Pa Mun./E. Goshen Twp.), 73 A.3d 526, 541 (Pa. 2013) (citations omitted). Under *Cozzone*, it is readily apparent that the RTFA defense is not jurisdictional.[6] Section 954(a), by its terms, "pertains to a common law right of action" (nuisance), not a "right of action aris[ing] out of a statute" (*e.g.*, WCA benefit claims). *See Cozzone,* 73 A.3d at 541. Accordingly, whether the timing component in § 954(a) makes the RTFA defense a "statute of repose," a "statute of limitations," or otherwise, it "does not operate to extinguish the common law right." *Id.*[7] Rather, it operates as an

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[6] Because it is unclear whether "abolish[ing] *a party's* cause of action" in a specific case, Appellant's Br. At 17-18 (emphasis added), is the same as nullifying "the competency of the court to determine controversies of the *general class* to which the case presented for its consideration belongs," *Heath*, 860 A.2d at 29, it cannot be assumed that *Abrams* referred to subject-matter jurisdiction.

[7] The Synagro Parties rely on a line of Commonwealth Court cases including *Beisswanger v. Workers' Comp. Appeal Bd. (NGK Metals Corp.)*, 808 A.2d 984 (Pa. Commw. Ct. 2002), *app. denied*, 818 A.2d 505 (Pa. 2003), and *Sharon Steel Corp. v. Workmen's Comp. Appeal Bd. (Myers)*, 670 A.2d 1194 (Pa. Commw. Ct. 1996). *See* Appellants' Brief at 18. Since these cases involved "right[s] of action . . . created by [t]he [WCA] which also contains the limitation . . .

affirmative defense, which, if adequately supported by the party raising it, prevents recovery on an otherwise valid cause of action.

Both principles – from *Heath* and from *Cozzone* – were anticipated by *McConnaughey v. Building Components, Inc.*, 637 A.2d 1331, 1333 (Pa. 1994). There, the Court reversed an award of summary judgment to defendant manufacturer, obtained pursuant to "the twelve year statute of repose," for civil actions brought against a furnisher of construction of any improvement to real property. 637 A.2d at 1332 (citing 42 Pa. C.S. § 5536(a)). *McConnaughey* involved, on the one hand, a cause of action sounding in common-law tort, rather than statutory right, *see Cozzone*, 73 A.3d at 541, and on the other, a statutory defense hinging on "the extent of [defendant's] involvement" in the construction of a particular building, rather than defendant's membership within a general class of industry, *see Heath*, 860 A.2d at 25. Although the *McConnaughey* Court recognized § 5536(a) as a "statute of repose," it treated the provision as an affirmative defense – not a jurisdictional requirement –, stating that "[t]he party moving for protection under the statute of repose must show" its satisfaction of the

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being considered," they are distinguishable under *Cozzone*. 73 A.3d at 541; *see also id.* at 542 (discussing *Sharon Steel*).

three criteria identified in the statutory text. 637 A.2d at 1333. The Synagro Parties' contention that *all* statutes of repose are jurisdictional contradicts *McConnaughey* and should therefore be rejected.[8]

II. THE RTFA DEFENSE DOES NOT APPLY WHERE CONDITIONS AT AN AGRICULTURAL OPERATION HAVE SUBSTANTIALLY CHANGED

Amici concur with and fully support Residents' argument that "the conditions or circumstances constituting the basis of the nuisance action must have existed substantially unchanged since the established date of operation" for the RTFA defense to apply. *Gilbert*, 90 A.3d at 43.[9] Amici therefore urge this Court

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[8] The final line of cases the Synagro Parties rely on for their "jurisdictional" point is inapposite. *See* Appellants' Brief at 19-20 (discussing *Commw. v. Cruz*, 852 A.2d 287 (Pa. 2004); *Commw. v. Fahy*, 959 A.2d 312 (Pa. 2008). *Cruz* and *Fahy* involved the Post-Conviction Relief Act ("PCRA"), which vests courts with "original jurisdiction" over enumerated petitions for relief filed by those convicted of capital offenses. *See* 42 Pa. C.S. § 9545. Synagro quotes *Cruz* for the statement that "time limits are jurisdictional in nature." *See* Appellants' Brief at 19. In fact, *Cruz* stated that "*the PCRA* time limits are jurisdictional in nature." 852 A.2d at 292 (emphasis added). *Cruz*'s holding was focused on the specific intent of the legislature, as revealed by, *e.g.*, the statutory origin of the right subject to the time bar, *see* Pa. C.S. § 9545(a) (establishing "[o]riginal jurisdiction" over PCRA petitions). Nor is it true that the *Cruz* Court "categorically determined whether jurisdiction existed as a matter of law," without regard to any disputed facts. Appellants' Brief at 19. In fact, the Court remanded "for a limited hearing where appellant [would] be afforded the opportunity to prove" his incompetence, and thus escape the time bar. *Cruz,*852 A.2d at 288.

[9] The only exception applies to operations that underwent substantial expansion or alteration of their *physical facilities* at least one year prior to the date of filing. 3 Pa. C.S. § 954. But as the Superior Court noted, "neither side contends that the physical facilities at the Farm have been substantially expanded or altered" in this case. *Gilbert,* 90 A.3d at 43.

to uphold the Superior Court's finding that "a material issue of fact exists with respect to whether the Synagro Parties' use of [sewage sludge] at the Farm" starting in 2006 "constituted a 'substantial change' from prior operations," and to reverse the Superior Court's ruling that the one-year limitation on nuisance action in the RTFA "resets" under the statutory language at issue in this case. *See id.* at 45-46.

Here, the "conditions or circumstances . . . constituting the basis of the nuisance action" involve "not merely . . . the type of fertilizer used at the [Phillips Site]," but also the connection between that type of fertilizer (*i.e.*, sewage sludge) and the "severe nuisance conditions," such as "extremely foul odors and health effects." *Id.* at 45. The "'established date of operation' is 1986 when [Appellant] Phillips purchased" the Phillips Site. *Id.* at 44. Accordingly, the question on the second prong of the RTFA defense is whether, as of the time of filing, the offensive and obnoxious conditions arising out of the particular fertilizer used on the Phillips Site had existed substantially unchanged since 1986. Clearly they had not, and the second prong is not satisfied. As Amicus Earl Schuckman, who served as Supervisor from 1999 to 2009, stated in his affidavit:

> 4. Prior to the land application of sewage sludge in 2006 on the Phillips Farm, there were no major concerns or complaints raised regarding the fertilization practices on the Phillips Farm.

> 5. The Phillips Farm's use of sewage sludge beginning in July 2006 led to significant concern and complaints, which were very different in degree, type, scope and impact than those prior to that time. These included complaints about the significant odors, runoff from the [sludge-application] fields . . . , contaminated drinking water wells, impact on wildlife and natural habitat, as well as . . . possible health impacts from the vast array of harmful constituents known to be found in sewage sludge. I had not seen or experienced this scope, type and level of complaints and impacts before 2006.

Pls.' SJ Ex. YY (R. 570a-71a). The change in conditions surrounding fertilizer usage on the Phillips Site in 2006 was not only substantial as to residents – it was substantial to Shrewsbury Township as a whole. Accordingly, even if this Court accepts the Synagro Parties' primary contention on appeal (involving a strained interpretation of the term "normal agricultural operations," *see* Sections III & IV *infra*), it should still affirm the Superior Court's order remanding for trial, as the Synagro Parties fail to satisfy all three elements of the RTFA defense.

III. THE RTFA DEFENSE APPLIES ONLY TO "NORMAL AGRICULTURAL OPERATIONS"

Because the RTFA is an affirmative defense, rather than a jurisdictional bar, the remaining issue is straightforward: whether the Synagro Parties have adduced sufficient undisputed evidence to show that their excessive and reckless use of sewage sludge on the Phillips Site met the statutory requirements, including the

requirement that this activity constitute "normal agricultural operations." They have not. Conversely, Residents have presented a substantial body of evidence – including affidavits, expert reports, and testimony from over thirty depositions – indicating that sewage sludge is not generally akin to manure or chemical fertilizers, that it is toxic and environmentally unsafe, and that the Synagro Parties' use of sludge on the Phillips Site was irresponsible and not "consistent with technological development within the agricultural industry," 3 Pa. C.S. § 952, and therefore not "normal agriculture operations."

In an effort to evade examination of their actions and liability for the ensuing harm, the Synagro Parties twist and stretch the meaning of "normal agricultural operations" beyond reason. According to the Synagro Parties, the definition of "normal agricultural operation" *must* apply "whenever there is (1) a farmer (2) engaging in an 'activity' or 'practice' (3) involved in [sic] the production of an agricultural crop or commodity." Appellants' Brief at 36. Under their theory, neither serial mismanagement, nor utter neglect, nor the community-wide devastation that may result could ever suffice to remove an agricultural practice from the RTFA's protections. Such a reading ignores the express language, structure and purpose of the statute.

The RTFA defines "normal agricultural operations" as a subset of agriculture-related activities – namely, those "that farmers adopt, use or engage" in a manner "consistent with technological development within the agricultural industry." 3 Pa. C.S. § 952. Whether a particular activity falls within this subset cannot be determined without applying the general terms of the definition to the specific facts of the case. Nonetheless, the Synagro Parties posit that "*all* agricultural activities" are "normal agricultural operations." *See* Appellants' Brief at 33 (emphasis added). Their overbroad theory – like the alternative argument that language from a provision of the Solid Waste Management Act should be read onto the RTFA's definition of "normal agricultural operation" – should be rejected.

A. Whether the Synagro Parties' Sludge Spreading Meets the Definition Of "Normal Agricultural Operations" Depends On A Fact-Sensitive, Case-By-Case Inquiry

To qualify for the RTFA's nuisance defense, the "conditions or circumstances complained of as constituting the basis for the nuisance action" must be "normal agricultural activities." Pa. C.S. § 954(a). These, in turn, are defined as "[t]he activities, practices, equipment and procedures that farmers adopt, use or engage in the production . . . of agricultural . . . crops and commodities, . . . includ[ing] new activities[] [and] practices . . . consistent with technological development within the agricultural industry." 3 Pa. C.S. § 952.

1. Applying a statutory definition to an actual case or controversy presents a mixed question of law and fact

Determining whether specific "conditions or circumstances . . . are normal agricultural operations" requires a finding as to what those actual conditions are and whether they conform to the illustrative language in the definition of normal agricultural operations. This is a question not of statutory interpretation, but of statutory application.

Accordingly, the facts are crucial to resolving the central issue in this case. Statutory interpretation is a pure question of law, but the application of a statute is a mixed question of law and fact. *See Commw. v. Hanson*, 82 A.3d 1023, 1035 n.18 (Pa. 2013) (unlike statutory construction, "application of [statutory] requirements to particular controversies entails resolution of mixed questions of law and fact") (citations omitted).[10] Mixed questions are ordinarily resolved by the jury in the first instance, *see In re Condemnation by Pa. Tpk. Comm'n of 14.38 Acres in Fee Simple*, 698 A.2d 39, 42 (Pa. 1997), meaning they are rarely decided

[10] The academic commentary relied on heavily in the Synagro Parties' question-of-law analysis, *see* Appellants' Brief at 30, endorses just such a distinction between interpretation and application of statutes, concluding that, "[a]s a working rule, the task of law application should be entrusted to the jury, unless there are compelling reasons in a given case why the court should perform this function. *See* Stephen A. Weiner, *The Civil Jury Trial and the Law/Fact Distinction*, 54 CALIF. L. REV. 1867, 1919 (1966).

on motion for summary judgment, *see Farabaugh v. Pa. Tpk. Comm'n*, 911 A.2d 1264, 1287 (Pa. 2006) (explaining that summary judgment on mixed questions is "inappropriate" except in "clear cases") (internal quotation omitted). *See also Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. ----, 134 S. Ct. 852, 868 (2014) (Scalia, J., concurring in part and dissenting in part) (mixed questions "cannot be withdrawn from the jury unless the facts and the law will reasonably support only one conclusion on which reasonable persons . . . could [not] differ") (internal marks omitted).

Appellants fail to grasp the interpretation/application distinction, *see, e.g.*, Appellants' Brief at 27 ("The *application* of the Right to Farm Act to this case is an exercise in statutory *interpretation*.") (emphases added). They contend that "interpretation of the RTFA's definition of a normal agricultural operation is simply a question of statutory interpretation that is the court's responsibility," *id.*, and urge the Court to "apply its clear precedent on statutory interpretation and reverse the Superior Court's decision to allow a jury to define the [RTFA]," *id.* at 31.

In fact, the Superior Court interpreted the RTFA itself – by considering the plain language of § 954(a), which limits protection to "conditions and circumstances . . . [that] are normal agricultural operations," and the definition of

"normal agricultural operations" set out at § 952, and rejected the Synagro Parties' contention that the definition is "all-encompassing" or "all-inclusive." *See Gilbert*, 90 A.3d at 47; Appellants' Br. at 34, 37. The majority opinion held that applicability of the RTFA defense to this case depends on unresolved issues of material fact, and that summary judgment was therefore inappropriate. 40 A.3d at 50. By fixating on an uncontested truism – that statutory interpretation is a question of law – the Synagro Parties miss the crux of the Superior Court's analysis: the distinction between statutory interpretation, which is exclusively a judicial function, and statutory application, which is not.[11]

2. Whether an agricultural activity constitutes a "normal agricultural operation" turns on the nature of that activity, its acceptance among farmers and the way it is employed in a given case

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[11] Authority relied upon by the Synagro Parties does not support their position that statutory application *is* statutory interpretation. The first decision, *Giant Eagle, Inc. v. Workers' Comp. Appeal Bd. (Givner)*, 39 A.3d 287 (Pa. 2012), simply states that "*when* 'the issue is the proper interpretation of a statute, it poses a question of law.'" Appellants' Br. at 28 (quoting *Giant Eagle,* 39 A.3d at 290) (emphasis added). It says nothing about applying statutes to specific facts. Their second case, *Commonwealth v. McKetta*, 364 A.2d 1350 (Pa. 1976), is readily distinguishable. *McKetta* addressed whether Ritalin was a "dangerous drug" within the meaning of a statutory definition that explicitly included any drug limited by federal law to prescription use only. *Id.* at 1352 (quoting 35 Pa. C.S. § 780-2(h)). Because the parties stipulated that the substance was in fact Ritalin, *id.*, and "that Ritalin is [so] limited," *id.* at 1355, all material facts had been conceded. *McKetta*, then, did not "unequivocally reject" the jury's role in "determin[ing] whether *an* item falls under *a* statutory definition," Appellants' Brief at 28 (emphases added), but simply applied a precise statutory to undisputed facts.

As the trial court noted, the definition of "normal agricultural activities" is vague; it "does not elucidate what may comprise 'activities, practices, equipment, and procedures.'" 2012 Pa. Dist. & Cnty. Dec. LEXIS 323 at *8. It provides illustrative examples, including "crop dryers, feed grinders, saw mills, hammer mills, [and] refrigeration equipment," but does not address other "equipment [or] procedures," like the mechanized spreading of sewage sludge. 3 Pa. C.S. § 952. Accordingly, it is not capable of categorical application in this case. *Cf. Dep't of Envtl. Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (Pa. 2014) ("[A]ny additional matters purportedly falling within [a] definition, but that are not express, must be similar to those listed . . . .").

Significantly, the statutory definition encompasses not *all* activities, practices and procedures, but only "*the* activities, practices. . . and procedures . . . that farmers adopt, use or engage" in for the specified purposes. 3 Pa. C.S. § 952 (emphasis added). By using the definite article ("the"), this definition both limits which activities, practices, equipment and procedures are normal, and clarifies that some agricultural operations will be abnormal or outside of the scope of the definition. *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) ("[I]t is a rule

of law well established that the definite article 'the' particularizes the subject which it precedes.") (internal citations omitted).[12]

Moreover, the reference to "farmers" rather than "*any* farmers," "*some* farmers," or some precise number of farmers (e.g., *one or more* farmers; *at least five percent of* farmers), 3 Pa. C.S. § 952, indicates that "normal agricultural operations" are those "that farmers," in general, adopt or use. *See Gen. Am. Life Ins. Co. v. Rausch*, No. CIV. A. 3:96-CV-3253, 1999 WL 1013260, at *5 (N.D. Tex. Nov. 5, 1999) (noun that "is plural and is not qualified by a phrase such as 'one or more,' or 'some of,'" requires consideration of group "as a whole"); *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (use of "haulage equipment" without preceding article would mean "haulage equipment in general"). In addition, the verbs "adopt, use or engage in" are stated in the simple present tense, without any conditional modifiers (*e.g.*, *may* adopt, *can* adopt, *have ever* adopted), *see* 3 Pa. C.S. § 952, indicating that an agricultural practice is not normal merely because a farmer or farmers *rarely* or *occasionally* engage in that practice to grow crops, *see Creamer v.*

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[12] "The" is a "word of limitation" that lacks the "indefinite or generalizing force of 'a' or 'an'," *Slater*, 231 F.3d at 4-5, and thus serves to confirm what is otherwise clear from statutory context: that some "agricultural operation[s]" must be "[ab]normal," and so excluded.

Twelve Common Pleas Judges, 281 A.2d 57, 61 (Pa. 1971) ("[T]he use of the present tense implies a continuity or timelessness in the event or state of affairs being considered, as distinguished from a single event relating only to a definite moment in time.") (footnote omitted); *State ex rel. Miller v. Anthony,* 647 N.E.2d 1368, 1373 (Ohio 1995) (holding that statute's use of present tense indicated "habitual action").

The statute also provides that "new activities, practices, equipment and procedures" must be "consistent with technological development within the agricultural industry" to count as "normal agricultural activities." This explicit language invites fact-intensive, case-by-case inquiries regarding both Appellants' "practices" and "technological development within the agricultural industry."[13] This Court has long held findings "relative to the actual conditions and circumstances presently prevalent" within a specific Pennsylvania industry to be

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[13] The Synagro Parties point out that the General Assembly redacted the phrase "customarily and generally accepted" at the same time it added the language discussed above, and that the redaction and addition were complementary. Appellants' Brief at 36. Thus a practice may not be excluded *solely* because it is a new practice, rather than a tradition or custom. Yet the Synagro Parties fail to recognize that the legislature replaced one limitation (customary acceptance) with another (consistency with technological developments). The substituted definitional element is patently fact-sensitive, as noted above, and further undermines the Synagro Parties' contention that § 952 establishes a "decisive" definition. *Id.* at 34.

"findings of fact." *Harrisburg Dairies v. Eisaman*, 11 A.2d 875, 877 (Pa. 1940); *see also Price v. New Castle Refractories Co.*, 3 A.2d 418, 421 (Pa. 1939).

B. The Synagro Parties' Interpretation Violates the RTFA's Language And Structure And Fails To Distinguish Relevant Appellate Precedent

The Synagro Parties offer two interpretive theories, but these neither comport with the RTFA's plain terms nor advance a rational view of the statutory structure and purpose. They first contend that "normal agricultural operations" is "all-encompassing" and means "all agricultural activities." Appellants' Brief at 33-36. Such a definition is unsustainable on its face, and has been rejected by several well-reasoned decisions of the Commonwealth and Superior Courts. As an alternative, the Synagro Parties argue that the definition of "normal agricultural operation" specifically includes the entire category of sewage sludge spreading activities, as a result of specific language found in a completely different statutory provision – the definition of "normal farming operations," found in the Solid Waste Management Act, 35 Pa. C.S. §§ 6018.101 *et seq.* ("SWMA"). *See* Appellants' Brief at 43. This attempt to meld two distinct statutory terms, each with its own statutory definition, clearly violates legislative intent and has no merit.

1. The Synagro Parties' interpretation ignores the statutory distinction between "agricultural operations" and "normal agricultural operations"

First, the statutory phrase "normal agricultural operations" – or more specifically, the distinction between this phrase and "agricultural operations" – must be given effect and not regarded as a mere superfluity. A basic canon of statutory interpretation requires that "every statute . . . be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. § 1921(a). *See also SEIU Healthcare Pa. v. Commw.*, 104 A.3d 495, 503 (Pa. 2014) ("[I]n construing a statute, courts must attempt to give meaning to every word, as it is not to be assumed that the legislature intended any language to be mere surplusage."). The Synagro Parties' theory, that "all agricultural activities" are "normal agricultural operations," violates this long-standing rule for the following reasons.

First, § 954(a) of the RTFA applies to "agricultural operation[s]" creating "conditions or circumstances . . . [that] are normal agricultural operations." 3 Pa. C.S. § 954(a). In addition, § 953(a) specifically prohibits local ordinances from defining as nuisances "agricultural operation[s] conducted in accordance with *normal* agricultural operations." *Id.* § 953 (emphasis added). In both instances, adopting the Synagro Parties' expansive interpretation of "normal agricultural operations" would render the quoted language meaningless. If all agricultural

operations were normal agricultural operations, there would be no reason to single out agricultural operations that give rise to, or "are conducted in accordance with," normal agricultural operations. Yet that is precisely what the General Assembly did.

As discussed above, §§ 953(a) and 954(a) use the distinction between "agricultural operations" and "normal agricultural operations" to define and delimit the scope of the RTFA's protections – whether from municipal ordinances, see *id.* § 953(a), or from nuisance suits, *see id.* § 954(a). The Superior Court's interpretation, which distinguishes "normal agricultural operations" as those which are practiced by a significant number of farmers on a regular basis and in accordance with current industry standards, effectuates the sort of workable distinction relied on by the General Assembly when it codified §§ 953(a) and 954(a). The Synagro Parties' overbroad approach would nullify this crucial distinction and provide complete immunity to virtually all agricultural operations, despite contrary legislative intent.[14]

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[14] Giving effect to the distinction between "agricultural operations" and "normal agricultural operations" carries out the General Assembly's explicit aim "to *limit the circumstances in which* agricultural operations may be the subject of nuisance actions" – not to bar all such actions filed after a definite period of time. 3 Pa. C.S. § 951. If the General Assembly had meant to limit the time for filing nuisance actions against agricultural operations, that is what it would have said. *See id.* It did not do so. And if the RTFA defense were a statute of limitations or repose, it

In an attempt to minimize the overbreadth of their interpretation, the Synagro Parties suggest two limits to the scope of "normal agricultural operations." Yet both limits are contrary to the statutory text. First, the Synagro Parties contend that "normal agricultural operations" excludes practices or activities if they are illegal. But to argue that this is the limitation intended by the "normal agricultural operations" requirement ignores that the RTFA also – separately – preserves "the right of any person . . . to recover damages" for injury caused by any agricultural operation "which is conducted in violation of any Federal, State or local statute." 3 Pa. C.S. § 954(b); *Gilbert*, 90 A.3d at 42 (noting that the RTFA requires that the plaintiff either file under § 954(a), or "base their nuisance claim on a violation of a federal, state or local statute or regulation, as provided in subsection 954(b)"). Thus, meeting the "normal agricultural operations" criterion is clearly more than a matter of avoiding legal violations.

The second limit suggested by the Synagro Parties is that the activity or process at issue must be undertaken by a farmer "involved in the production of an agricultural crop or commodity." Appellants' Brief at 36. This interpretation

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would read: "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" – *period*. 3 Pa. C.S. § 954(a). It does not do so.

would yield absurd results, since it would shield from nuisance action virtually any activity or practice – however extreme or careless – so long as it is "involved in" some form of agricultural production. *See Bowser v. Blum*, 807 A.2d 830, 835 (Pa. 2002) ("the first principle of statutory construction is that courts will not interpret legislative enactments in a manner which imputes absurdity to the legislative enactment") (internal quotation omitted). The use of noisemaking devices, an issue raised in *Boswell*, serves to illustrate the absurdity of the Synagro Parties' argument. *See* 2012 WL 8670346. There, the trial court had concluded that "the general use of noise devices . . . to repel deer" is common as a means of successfully harvesting agricultural crops or commodities. *Id.* at *4. As the Commonwealth Court held, that does not mean *any* source of distressing, high-decibel noise would automatically constitute a "normal agricultural operation." *Id.* Yet under the Synagro Parties' interpretation, it would mean just that. A farm could, for instance, host year-long, outdoor rock concerts without fear of nuisance liability so long as the loud music scared away grazing animals. This of course is not what the General Assembly intended when it chose to limit the RTFA defense to "normal agricultural operations," and the Synagro Parties' interpretation should therefore be rejected.

2. Caselaw interpreting "normal agricultural operation" correctly describes its applicability as a mixed question of law and fact

In rejecting the Synagro Parties' overbroad reading of the RTFA, the Superior Court joined a long line of Commonwealth Court decisions taking this same approach. Every one of the appellate decisions to address the applicability of "normal agricultural operations" in a given case has reached the same conclusion: "this threshold question is a mixed question of fact and law." *Commw. v. Locust Twp.*, 49 A.3d 502, 517 (Pa. Commw. Ct. 2012); *see also Commw. v. E. Brunswick Twp.*, 956 A.2d 1100, 1115-16 (Pa. Commw. Ct. 2008) (whether the use of sludge is a "normal agricultural operation" is "a factual determination based upon evidence"); *Boswell v. Skippack Twp.*, No. 389 M.D. 2006, 2012 WL 8670346, at *6 (Pa. Commw. Ct. June 27, 2012), *aff'd*, 67 A.3d 757 (Pa. 2013) (whether defendant's use of a deer deterrent device "qualifies as a 'normal agricultural operation' cannot be determined as a matter of law; rather, it is assessed based upon the evidence"); *Commw. v. Packer Twp.*, No. 432 M.D. 2009, 2010 WL 9519038, at *2 (Pa. Commw. Ct. Mar. 17, 2010) (whether sludge application is a "normal agricultural operation" requires weighing of factual evidence, thus "the issue is not clear as a matter of law").

The Synagro Parties fail to distinguish or refute the holdings of any of these cases. Instead, they cite to *Horne v. Haladay*, an opinion which they claim "readily concluded" that the chicken farm at issue was a normal agricultural operation without "resort to a large factual record." Appellants' Brief at 36 n.4. But *Horne* gives no indication that the parties even disputed the "normal agricultural operations" criterion, and its dictum on this point was properly disregarded by the court below. *See* 728 A.2d 954.

3. Definitional language in the SWMA cannot expand the RTFA's definition of "normal agricultural operations"

The argument that the definition of "normal farming operations" in SWMA somehow supports a similar interpretation of "normal agricultural operations," as defined by § 952, was squarely considered – and rejected – by the Commonwealth Court in *East Brunswick*, *see* 956 A.2d at 1115 (noting that SWMA "provides that its definitions are to be followed 'when used in this act,'" and "does not expand its definitions for use in other statutes") (quoting 35 Pa. C.S. § 6018.103). The Synagro Parties raise the same argument on appeal, *see* Appellants' Brief at 43-46, but it is unavailing for the same reasons provided in *East Brunswick*. *See* 956 A.2d at 1114-16. The General Assembly "include[d] the agricultural utilization of . . . sewage sludges which are generated off-site" in the SWMA definition of "normal

farming operation," but did not do so in the RTFA definition of "normal agricultural operation. *Compare* 35 Pa. C.S. § 6018.103 *with* 3 Pa. C.S. § 952.[15] As a rule of statutory interpretation, this disparate inclusion or exclusion of a specific term in otherwise similar provisions is presumed to be intentional and meaningful. *See Fonner v. Shandon, Inc.*, 724 A.2d 903, 907 (Pa. 1999).[16]

East Brunswick applies to the instant case, despite the Synagro Parties' attempts to distinguish it. First, pointing out that *East Brunswick* involved § 952's definition of "normal agricultural operations" via the incorporating provision of the Agriculture, Communities and Rural Environment Act ("ACRE"), they contend that "[a]lthough ACRE borrows the RTFA's definition of [normal agricultural

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[15] Maine's high court recently adopted the same approach to a similar situation arising under the Maine RTFL and another agriculture-related statute:

> By the plain language of the statute, this particular protection is not extended to agricultural composting operations. 7 M.R.S. § 154 (2013). Agricultural composting operations are expressly included in section 153, which protects a "farm, farm operations, *or agricultural composting operation*" from being "considered a public or private nuisance." 7 M.R.S. § 153 (2013) (emphasis added). This would suggest that the omission in section 154 was intentional.

Dubois Livestock, Inc. v. Town of Arundel, 103 A.3d 556, 562 n.7 (Me. 2014).

[16] Appellants' reliance on *Hempfield Township v. Hapchuck*, 620 A.2d 668 (Pa. Commw. Ct. 1993), which looked to the SWMA only in the absence of a definition within the local zoning ordinance at issue, is unavailing for just that reason. As noted in *East Brunswick*, the fact that "the terms 'agricultural' and 'farming' are interchangeable" as a general matter cannot overcome clear and unambiguous legislative intent to define the terms differently in the RTFA and SWMA. 956 A.2d at 1115.

operations], ACRE specifically contemplates that fact-finding may be necessary to determine whether a farming activity is protected." Appellants' Brief at 47. This is a distinction without a difference. To be sure: ACRE does more than "*borrow* the RTFA's definition" of normal agricultural operation – it incorporates it wholesale. *See Tinicum Twp. v. Nowicki*, 99 A.3d 586, 592 (Pa. Commw. Ct. 2014) ("[3 Pa. C.S. §] 312 incorporates the definition of "normal agricultural operation" from Section 2 of the Right to Farm Act."); *E. Brunswick*, 956 A.2d at 1115 ("[T]he legislature did not expressly incorporate by reference Section 103 of the SWMA into [ACRE], as it did expressly incorporate Section 2 of the Right-to-Farm Act."). Simply put, the ACRE definition *is* the RTFA definition, and if "fact-finding may be necessary" under one, then "fact-finding may be necessary" under the other.[17]

Second, the Synagro Parties argue that the "complete record" submitted in this case presents a "stark contrast" to the meager record considered in *East Brunswick*, Appellants' Brief at 47-48, thereby conceding that their motion turns on the sufficiency of the evidence. If accepted at face value, this point at once

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[17] The two statutes differ in how they allocate responsibility for this fact-finding. While ACRE places some authority in Office of the Attorney General, *see* 3 Pa. C.S. § 314(d), RTFA leaves this authority where the common law placed it: in the hands of the judicial fact-finder.

belies the Synagro Parties' position that "[t]he application of the RTFA to this case is an exercise in statutory interpretation," *id.* at 27, and affirms the Superior Court's distinction between interpretation and application of statutory provisions, *see Gilbert,* 90 A.3d at 49. Indeed, the Synagro Parties' evidentiary support in this case is just as meager as that offered by the Attorney General in *East Brunswick*, and thus its motion for summary judgment is similarly meritless.

IV. APPELLANTS' SLUDGE-SPREADING ACTIVITIES DO NOT CONSTITUTE "NORMAL AGRICULTURAL OPERATIONS" AS A MATTER OF LAW AND THEY ARE NOT ENTITLED TO SUMMARY JUDGMENT

A motion for summary judgment will fail unless completely supported by the record in every material respect. Residents have adduced considerable evidence – much of it undisputed – indicating that the Synagro Parties' sewage sludge activities were inherently different from normal crop-related practices, that they were performed negligently if not recklessly, that they deviated drastically from typical operational conditions on the Phillips Site in question, and that, on the whole, they were not "consistent with technological development within the agricultural industry." 3 Pa. C.S. § 952. Indeed, as the Shrewsbury Township Board of Supervisors recounted in a letter, the impacts of the spreading of sewage sludge on the Phillips Site was "so horrendous as to cause immediate vomiting, eye

and ear irritation and suspicion of serious illness to indigenous species, humans and farm animals." Pls.' SJ Ex. III (R. 609a).

The Superior Court, looking at the same record and interpreting it the same way, concluded that the Synagro Parties had fallen well short of meeting their burden on motion for summary judgment. As the majority below held, the "conditions or circumstances complained of" – and not merely an abstraction thereof – must constitute "normal agricultural operations." *Gilbert*, 90 A.3d at 45. Because the Synagro Parties neither contest this point of law nor adduce any facts that tend to show that the deposition of sewage sludge on crop fields "result[ing] in extremely foul odors and health effects" on nearby residents is at all normal, *id.*, they are not entitled to summary judgment. This Court should affirm, and remand for trial.

A. Sewage Sludge Is *Not* Analogous To Manure Or Commercially-Prepared Fertilizer

Sewage sludge consists of "human waste, hospital waste, industrial waste, storm water runoff, radioactive waste, and hazardous and toxic waste that is either flushed down a toilet or goes down a drain." Pls.' SJ Ex. XX ¶ 13a (R. 565a). It is a "viscous, semi-solid mixture of bacteria, virus-laden organic matter, toxic metals, synthetic organic chemicals, and settled solids removed from domestic and

industrial waste water at sewage treatment plants." Amended Complaint filed July 23, 2010 ¶ 53 (R. 457a).

This indiscriminate mixing of so many chemical and biological agents, produces a concoction that is simply "not comparable" to ordinary animal manure. *See* Pls.' SJ Ex. XX ¶ 16a (R. 567a). Sewage sludge creates a strong, "remarkably low[-threshold]" odor, Pls.' SJ Ex. OOOO ¶ 6f (R. 788a), which neighbors have described as "typically smelling like a herd of dead, rotting deer." *Gilbert*, 90 A.3d at 40 (internal quotation omitted). Because it originates from commercial, chemical, industrial, biological, and general household waste, most sewage sludge contains "high concentrations of toxic contaminants," including pharmaceuticals and their biologically active metabolites. Pls.' SJ Ex. ¶ 13 (R. 565a) (internal quotation omitted); *see also* Pls.' SJ Ex. OOOO ¶ 6e (R. 788a). The number of chemicals that may be present in sewage sludge is constantly rising, so that no treatment process imaginable could address all hazardous constituents in existence at a given time. *See* Pls.' SJ Ex. OOOO (R. 795a) (observing that 500 to 1,000 new chemicals enter commerce in the U.S. each year and that the "toxicity and health effects" of these chemicals and their derivatives "remain mostly unknown"). To date, the U.S. Environmental Protection Agency ("EPA") has made only limited efforts "to understand potential pollutants in sewage sludge and in the

environment." EPA, *Biosolids: Targeted National Sewage Sludge Survey Report*, Fact Sheet No. EPA 822-F-08-006 (Jan. 2009), http://water.epa.gov/scitech/wastetech/biosolids/#tnsss (last updated May 6, 2012). For example, the first national survey even to estimate which pharmaceuticals, steroids and hormones may be present in sewage sludge and at what concentrations" was not performed until 2009. EPA, *Targeted National Sewage Sludge Survey Report*, Use and Disposal of Biosolids (Sewage Sludge), http://water.epa.gov/scitech/wastetech/biosolids/#tnsss (last updated Dec. 5, 2014). As a result sewage sludge application exposes communities to an ever-expanding number of hazards, and far exceeds the usual levels of nuisance generated by all other types of fertilizer. *Id.*

Because of the fundamental differences between sewage sludge and manure fertilizer, sludge is subject to its own distinct regulatory regime. Yet the existence of regulations is by no means a guarantee of the safety or effectiveness of the practice itself. As an initial matter, no sewage sludge regulations even purport to address odors. To the extent that some federal rules, these have come under repeated fire from the EPA Inspector General for being insufficient to "assure the public that current land application practices are protective of human health and the environment." *McElmurray v. U.S. Dep't of Agric.,* 535 F. Supp. 2d 1318,

1321 (S.D. Ga. 2008) (internal quotation omitted); *see also Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562 (5th Cir. 1997) (describing "land application of sludge" as a "controversial" practice and observing that "experts have yet to reach a consensus on the safety of land application of sludge"). Moreover, the standards underlying federal regulations have not kept up with the times. For example, while § 405(d) of the Clean Water Act requires EPA to conduct a review of its sewage sludge standards at least every two years in order to regulate new pollutants where sufficient data exists, *see* 33 U.S.C. § 1345(d), the Agency has failed to conduct a biennial review since 2009. *See* EPA, Standards for the Use or Disposal of Sewage Sludge, 68 Fed. Reg. 75,531, 75,533 (Dec. 31, 2003).[18]

For their part, Pennsylvania's rules also fail to address comprehensively the harms likely to result from the use of sewage sludge. Despite the constantly changing nature of sludge, the Pennsylvania Department of Environmental

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[18] *See also* EPA, Biennial Review, Use and Disposal of Biosolids (Sewage Sludge), http://water.epa.gov/scitech/wastetech/biosolids/ (last updated Dec. 5, 2014) (listing no reviews since 2009). Even when the required biennial reviews have been conducted, these reviews and any subsequent rulemaking are limited by the availability of data, and the EPA has cited lack of access to sufficient exposure and toxicity data upon which to base any new guidelines as the basis for declining to update the applicable regulations. *See, e.g.*, EPA, Biennial Review of 40 CFR Part 503 As Required Under the Clean Water Act Section 405(d)(2)(C): Reporting Period 2007 Biennial Review 7-9 (2009), *available at* http://water.epa.gov/scitech/wastetech/biosolids/upload/br2007_summary_final.pdf.

Protection ("PaDEP") has not updated its pathogen testing regulations since their initial adoption in 1997. *See* 25 Pa. Admin. Code § 271.932 (1997). The required tests, moreover, account for fecal coliform density only, *id.* § 271.932(b), and do not address pathogens such as viruses, prions, protozoa, or parasites, much less non-pathogenic contaminants such as toxic metals, pharmaceuticals.

B. The Synagro Parties Did Not Conform To Acceptable Management Practices And Their Activities Did Not Measure Up To Technological Standards Within the Agricultural Industry

The Synagro Parties did not follow accepted best practices for minimizing the known effects of sewage sludge applications upon the surrounding community. For example, despite the number of odor complaints generated by sludge use on the Phillips Site, which a Synagro employee admitted was "unusually high," Pls.' SJ Ex. QQ (R. 435a), the Synagro Parties continued land-applying at excessive rates, *see infra* at 48. Synagro's Area Environmental Manager testified that no plan whatsoever was implemented to control odors from the Phillips Site. Pls.' SJ Ex. NN (R. 426a). Nor did the Synagro Parties handle the spreading itself with any particular care, as demonstrated by an event in which sludge was accidentally flung onto a neighbor's property. In 2009, Commonwealth authorities responded to a call by Charlie Fair, whose property abuts the Phillips Site, and concluded that sewage sludge had been spread onto Mr. Fair's property "in violation of the Clean

Streams Law . . . , [the SWMA], and [PaDEP] rules and regulations," and that such "activities and conditions . . . constitute[d] a public nuisance." PaDEP 4/13/09 Notice of Violation, Defs.' 2012 S.J. Ex. Q, at SYN – 0001598 (unreproduced record). When Amicus Paul Solomon responded to a call from a concerned resident in 2007, he observed that sludge had been spread unevenly, up to a depth of four to five inches. *See* Defs.' 2012 SJ Ex. M (R. 162a).

A typical industry manual advises sludge appliers to follow "common sense," and refrain from spreading on "hot, humid" days with "little air movement." *See* Pls.' SJ Ex. XXX (R. 692a). Synagro itself recommends against spreading sludge during such hot and humid weather, the time when it is likely to create particularly offensive odors. Pls.' SJ Ex. QQ (R. 431a-32a). Yet, in flagrant disregard for this advice, the Synagro Parties spread approximately 11,635 tons of wet sewage sludge on the farm between March 2006 and April 2009, over the course of nine multi-day spreading events. *Gilbert*, 90 A.3d at 39. The largest application caused the most widespread, noxious and offensive odors: over a three-day period in July 2007, the Synagro Parties applied approximately 1,774 tons of sewage sludge, notwithstanding the sweltering conditions or the volume of complaints. *Id.* at 40.

EPA has issued guidance on methods to minimize offensive odors during application, including tillage to incorporate sludge into the soil, limiting total sludge storage time, covering stored sludge piles, and avoiding spreading during certain weather conditions. *See* Pls.' SJ Ex. BBB (R. 577a); Pls.' SJ Ex. CCC (R. 579a); *see also* Pls.' SJ Ex. OOOO (R. 803a). However, Synagro employees did not follow these guidelines on the Phillips Site. *See* Pls.' SJ Ex. KK (R. 400-01a, 403a); Pls.' SJ Ex. II (R. 376a-78a). Sewage sludge was stored uncovered, Pls.' SJ Ex. II (R. 374a, 377a), tilling was not practiced prior to the complaints after the 2007 incident, *id.* (R. 373a) and spreading occurred without regard to extreme heat, humidity, and winds, *see* Pls.' SJ Ex. OOOO (R. 803a).

The odors caused by sludge application were substantially more offensive, pervasive, and lingering than odors associated with traditional manure use. Many people living in Shrewsbury Township are accustomed to the odors associated with traditional manure fertilizers and do not find these farm practices to be objectionable. *See, e.g.*, Pls.' SJ Ex. G (R. 306a); Pls.' SJ Ex. DD (R. 364a); Pls.' SJ Ex. N (R. 327a). The odors experienced in connection with the Synagro Parties' application of sewage sludge, though, were of a different order of magnitude than what the community had previously experienced – they were far

more offensive than traditional manure odors, requiring neighbors to change their daily habits and activities and even causing them to feel physically ill.

C. The Synagro Parties' Application Of Sewage Sludge On the Phillips Site Was Unlike Other Pennsylvania Farm Practices

Despite the Synagro Parties' suggestions that the application of sewage sludge is so widespread that it should be categorically considered "normal," the number of Pennsylvania farmers using sewage sludge is probably quite low. Indeed, their claim is weakened by the fact that, as their own summary judgment exhibits indicate, "data on the disposal of biosolids nationally and in Pennsylvania are limited." Defs.' 2012 SJ Ex. Z (R. 220a); *see also* Defs.' 2012 SJ Ex. Y (R. 212a) (indicating that Pennsylvania does not summarize information on either "amounts of . . . sewage sludge used or disposed" or "end use/disposal practices").

Another illustration of the major shortcomings in the Synagro Parties' depiction of the industry is a PaDEP fact sheet providing information on the number of "active permitted sites" applying sewage sludge. *See* Defs.' 2012 SJ Ex. DD (R. 378a). Yet there is no way to glean from the fact sheet whether "sites" means farms, mine reclamation areas, or something else.[19] Moreover, referring to

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[19] The fact sheet does not explain what "permitted" means. Even assuming it refers to PAG-08, which applies to Synagro's operations at the Phillips Site, this would still not explain what kinds of sites are represented. *See* 35 Pa. Bull 6,663, 6,689 (Dec. 10, 2005) (identifying PAG-08 as the

"permitted sites" is misleading, since "[l]and application is permitted under a general permit issued separately from NPDES permits" and "[i]n most cases, *no site permit is issued*." Defs.' 2012 SJ Ex. Y (R. 207a) (emphasis added). Instead, sludge-spreading "sites are 'registered' under the facility that utilizes them." *Id.* This registration system makes an accurate assessment of the number of farms using sewage sludge all the more fraught, because wastewater treatment facilities are "often unaware of the final disposal location when these services are outsourced to a contractor." Defs.' 2012 SJ Ex. Z (R. 226a).

Even assuming that PaDEP's numbers were correct, the use of sewage sludge would still not be categorically "normal." First, PaDEP's estimate of the number of sludge-application sites (700) accounts for just one percent of the Commonwealth's farms. *See* Defs.' 2012 SJ Ex. Y (R. 213a) (numbering 52,365 farms as of 2002). Synagro contracted to apply sewage sludge to about 30,000 acres of farmland within a recent five-year period, Pls.' SJ Ex. QQ (R. 433a), which amounts to roughly .6 percent of the state's farmed acreage, Defs.' 2012 SJ Ex. Y (R. 213a) (5,120,685 acres as of 2002). These figures suggest that sewage sludge application has a very low acceptance rate among Commonwealth farmers,

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"General Permit for Beneficial Use of Nonexceptional Quality Sewage Sludge by Land Application to Agricultural Land, Forest, a Public Contact Site or a Land Reclamation Site").

notwithstanding the purported "economic benefits" accruing to farmers who choose sludge over conventional fertilizers. *See* Brief of Amici Curiae Mid-Atlantic Biosolids Ass'n 12.

Second, the PaDEP fact sheet is fundamentally inapposite to the Synagro Parties' RTFA defense, since it addresses sewage sludge use only at the highest level of abstraction far removed from the condition- and circumstance-level on which the RTFA defense operates. *See Gilbert*, 90 A.3d at 45 (question is whether sludge use "result[ing] in extremely foul odors and health effects" on nearby residents is normal agricultural operation). Volumes of specific evidence strongly indicate that the actual sewage sludge used by the Synagro Parties, and the actual way they applied that sludge to the Phillips Site, are likely rare even among the small percentage of farms that do apply sludge. For example, evidence introduced by the Synagro Parties reports a "typical application rate" of 3 tons per acre. Defs.' 2012 SJ Ex. Y (R. 213a), whereas application rates at the Phillips Site ranged from 9 to 27 tons per acre – nearly nine times greater than the average rate. *Gilbert*, 90 A.3d at 39-40. In addition, while "most sewage sludge application sites in Pennsylvania have had fewer than 10 applications," Defs.' 2012 SJ Ex. KK (R. 279a), the Phillips Site received 54 in less than four years, *see* Brief in Support of Defs.' Mot. for SJ (R. 551a).

Ultimately, the excessive, poorly-managed application of sewage sludge described above created a traumatic environment for members of the community. *See* Pls.' 2012 SJ Ex. KKKK (R. 768a-82a). These events hurt the town's reputation and were detrimental to quality of life. Community members were left "extremely disappointed by the failure . . . of [PaDEP] and county agencies to effectively resolve this real threat to the[ir] health, safety and welfare." Pls.' Resp. to Defs.' 1st Mot. for SJ Ex. 15 (R. 851a). As a result of the application of sewage sludge at the Phillips Site, Shrewsbury Township was dramatically impacted, with community members flocking to public hearings, *see* Pls.' SJ Ex. VV (R. 559a-63a), and more than 460 residents petitioning the Board of Supervisors for relief, *see* Pls.' SJ Ex. MMM (R. 610a-28a).

Rural Pennsylvanians can reasonably be expected to anticipate – and tolerate – the odors and inconveniences presented by normal agricultural operations. But the harm arising out of the Synagro Parties' conduct in this case was altogether different, extending well beyond the order of normal inconveniences that the RTFA protects. The conditions or circumstances at issue in other cases will likely differ, and should be judged accordingly. The pure question-of-law approach treats different cases alike to a degree that is not reflected in the legislative history or plain text of the RTFA. Consideration of the above factual and case-specific

factors make clear that the Synagro Parties' practice was inconsistent with the definition of "normal agricultural operations."

CONCLUSION

Amici urge this Court to uphold the Superior Court's ruling, which affirms an important reality: expanding RTFA immunity without regard to its limiting terms does not help Pennsylvania's farm families – it hurts them. The RTFA was not written as a license to allow landowners to lease farmland out at will, provided only that what their clients have in mind bears a colorable relation to something, *anything* "agricultural." Nothing in its text requires that the Synagro Parties be allowed to dump enormous quantities of their most unusually fetid batches of toxic sludge on a site situated as near to as many dozen homes as the regulations will allow, no matter how obnoxious this would be. Contrary to the submissions of the Synagro Parties and their several supporting amici, neither the egregious facts they endeavor to keep from the jury nor the aggressive doctrinal positions they advance are consistent with the intent of the General Assembly, as manifest in the text of the RTFA. Amici therefore join Residents in respectfully requesting this Court to affirm the ruling of the Superior Court and remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF WORD-LIMIT COMPLIANCE

I certify that the foregoing principal brief complies with the word limitation of Pa. R.A.P. 2135(a)(1), in that the word count of the brief, excluding the cover, table of contents, table of citations, proof of service, and this certificate, is 13,301 words, based on the word count of the word processing software used to prepare this brief.

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