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

REPLY BRIEF FOR APPELLANTS

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

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INTRODUCTION

Appellees ("Residents") devote little of their brief to defending the Superior Court's error in delegating interpretation of the Right to Farm Act, 3 P.S. §§ 951-954 ("RTFA"), to a jury. Instead, Residents revive their failed argument that the Act only protects conditions that existed when a farm was founded, no matter how many years ago, and that new agricultural operations undertaken at a farm are not protected if they cause different impacts from those caused by the original farm. The Superior Court and the trial court below, as well as a prior Superior Court panel, rejected this extreme argument and this Court should, too.

The most glaring omission from Residents' brief is any discussion of the purpose of the RTFA. Their interpretation would eviscerate the Act's protections for Pennsylvania farms and expand tort liability. The RTFA's stated purpose and legislative history compel the conclusion that after a year of operation, farm activities like fertilizing fields with biosolids are shielded from tort suits. Despite clear legislative intent, Residents claim that the Act only protects baseline conditions existing at a farm's founding, perhaps centuries ago. This extraordinary reading would gut the law and must be rejected.

Residents also ignore the law and history that have long recognized fertilizing farms with biosolids as a common and beneficial agricultural practice.

They do not address the coalition of eleven diverse amici (including two Pennsylvania agencies) that endorse and rely on farming with biosolids. A large body of statutes, regulations, permits, and experience with biosolids across the Commonwealth also demonstrates that biosolids application is a normal agricultural operation protected by the RTFA as a matter of law. Residents fall back on florid allegations regarding the smell of biosolids fertilizer at Phillips Farm (that would be contested at trial), which only begs the question of why they waited two years and four months after biosolids application began to bring this suit, well outside of the one-year window allowed under the Act.

Residents' strident opposition to farm use of biosolids does not change its status as one of the "activities, practices . . . and procedures that farmers adopt, use or engage" that are entitled to protection under the RTFA. Their disapproval of biosolids recycling underscores why the RTFA is needed, particularly for odorous operations like using a bulk organic fertilizer. Residents' argument that if a farm practice is a nuisance, it is not protected under the RTFA because it is not "normal," turns the Act on its head. Central to the Act is that a court – not a jury – makes an objective analysis of whether a farm practice qualifies as a normal agricultural operation (regardless of the allegations) and whether the suit was brought outside of one year after the practice started.

Residents' argument that a jury, not a judge, should interpret the Act likewise disregards its purpose. The RTFA's goal to bar litigation, and alleviate the burden of a jury trial, can only be achieved if the Act is interpreted by a judge as a matter of law. Residents fail to acknowledge that the purpose of a statute of repose is to foreclose litigation and that relegating the Act's interpretation to a jury denies that relief. The Court should interpret the RTFA consistent with the legislature's unequivocal intent to protect Pennsylvania farm operations from suit after one year.

I. Residents' Narrow Reading of the RTFA Nullifies the Act's Protections for Farmers

Residents focus on alternative arguments rather than the issue on which the Court granted review, revealing the weakness of their position on the issue at hand: the Superior Court's erroneous delegation of legal interpretation to a jury. Their contention that the RTFA offers no protection for modern farming and is limited to shielding the baseline of nuisance conditions at a farm's founding requires a strained reading of the text and ignoring the purpose of the Act. Two Superior Court panels and the trial court below appropriately did not adopt Residents' approach.

Residents' tortured characterization of the text of the RTFA begins by "reformat[ing]" the language in section 954(a) to support their view. Residents' Br. 27. Instead, the Court should focus on the text enacted:

> 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(a). The plain reading of the RTFA protects agricultural practices from nuisance suits one year after their adoption or a substantial change.

Residents' determination to drastically narrow the statute also runs afoul of the Act's expansive definition of protected farming practices in section 952 and its express intent to protect farming in section 951, which are underscored by two amendments expanding the Act's protections. As required for an effective statute of repose, the General Assembly chose broad language that sets objective standards for determining whether the RTFA's protections attach. Residents seek a statute that will only bar suits where a farmer can somehow prove to a jury that the alleged nuisance has existed unchanged since the farm's inception. This position is at odds with the RTFA's foremost goal: "limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits …." 3 P.S. § 951.

A. "Agricultural Operation" and "Established Date of Operation" Refer to Discrete Farming Practices, Not an Entire Farm

Residents sidestep the RTFA's text and purpose in their argument that an "agricultural operation" and its "date of operation" refer, respectively, to all of

Phillips Farm and 1986, the year Mr. Phillips purchased the farm. Residents' Br. 30. They attempt to redefine these terms in a manner that would undercut the RTFA by rooting its protections in a farm's distant past. A sound reading of section 954(a) limits the definition of an agricultural operation and its date of establishment to particular farming activities. Here, biosolids application is the agricultural operation, and it was established in 2006 (a date Residents do not dispute) when land application at Philips Farm began.

1. An Agricultural Operation is a Farming Practice

With minimal explanation, Residents assert that "'agricultural operation' is defined as the target of the nuisance action," which they interpret to mean the farm itself.[1] Residents' Br. 31. This reading is the first step in their breathtaking notion that the RTFA only protects baseline nuisance conditions that existed when a farm started. Residents overlook how an "operation" is normally a process or activity, not the larger place where it occurs. *See Am. Heritage Dictionary* 1233 (4th ed. 2006) (defining "operation" as "[a] process or series of acts involved in a particular form of work ….").

In addition to applying the plain meaning of "operations," statutory interpretation requires review of the entire RTFA and in particular the definition of

[1] The Superior Court declined to address whether the term "agricultural operation" refers to an entire farm because the Court agreed with Farm Parties that a substantial change in the operation resets the statute of repose, which was sufficient to decide the case. *See Gilbert v. Synagro*, 90 A.3d 37, 43-44 (Pa. Super. 2014) (Opening Br., App. A at 12).

"normal agricultural operations" in section 952, which definition is decisive of the key issues in this case. "Agricultural operations" are a broad category of farming practices and activities, of which "normal agricultural operations" are a subset. The statute defines the narrower term as

> [t]he *activities, practices, equipment and procedures* that farmers adopt, use or engage … in the production, harvesting and preparation for market or use of agricultural … crops and commodities and [meets area or income thresholds]. The term includes new *activities, practices, equipment and procedures* consistent with technological development within the agricultural industry.

3 P.S. § 952 (emphasis added). This detailed statutory definition governs how "agricultural operation" is interpreted. See 2A *Sutherland Statutory Construction* § 47:7 (7th ed. 2007) ("When a legislature does define statutory language, its definition usually is binding …."); *cf. Housing Auth. of Chester v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 946 (Pa. 1999) ("When the meaning of a word or phrase is clear when used in one section, it will be construed to mean the same thing in another section of the same statute." (citation omitted)).

Applying this definition to the statute of repose in section 954, "agricultural operations" are "activities, practices, equipment, and procedures," not the entity conducting them or the land on which they occur. Activities that are not for agricultural purposes, are used on a scale of insufficient size or income, or are inconsistent with technological development are agricultural operations, but are not "normal." The definition says nothing about a larger "farm" of any kind.

An activity-focused interpretation, unlike Residents' reading, harmonizes the term's use throughout the Act. Both sections 953(a) and 954(b) refer to agricultural activities being "conducted" either "in accordance with normal agricultural operations" in section 953(a) or "in violation of" law in section 954(b). 3 P.S. §§ 953(a), 954(b). A business entity or plot of farmland cannot be "conducted," but it is natural to say that *activities* are conducted in a particular manner. Residents' reading, like many of their arguments, does not mesh with the RTFA's text or its purpose to protect farms.

2. The Date a Farming Practice Begins Is Its "Established Date"

Residents' reasoning that "the established date of operation" in section 954(a) means the founding of the farm, and therefore only nuisance conditions that existed at the founding are protected after a year, hollows out the RTFA; it would rarely bar a suit. To the contrary, the date of establishment is when an activity that is the subject of a nuisance suit begins. This standard is consistent with a prior Superior Court's decision tying the RTFA's application to farm activities, not when the "farm" itself began. *See Horne v. Haladay*, 728 A.2d 954, 955 (Pa. Super. 1999) (applying the RTFA to the challenged farm practice rather than the larger farming enterprise). Here, the parties do not dispute that this date occurred in 2006, when land application of biosolids at Phillips Farm began and the Residents

complained of odors. Defs.' 2012 S.J. Exs. A (R. 558a), J (R. 114a-141a), K (unreproduced record).

The Court should not accept Residents' vague standard that ties protection of the Act to the farm's long-ago conditions. This interpretation flouts the RTFA's purpose. Even if the RTFA does not explicitly define the date of establishment to mean when a particular activity starts, the Act must be read to advance the General Assembly's intent. *See* 1 Pa. C.S. § 1921(a) (ambiguous text must be interpreted consistent with "the object to be obtained"); *Malt Beverages Distributors Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1153 (Pa. 2009) ("As in all cases where a latent ambiguity in the statute exists, we resort to the canons of statutory construction to discover the Legislature's intent."); *City of Phila. v. Ridge Ave. Passenger Ry. Co.*, 102 Pa. 190, 195 (1883) (a court faced with an ambiguous statute must "resort to the reason and sprit of the law … in order that we may learn the intention of the legislature."). The legislature enacted the RTFA to expressly limit litigation against farms, "protect[ing] and encourag[ing] the development and improvement of its agricultural land," and investment in farming. 3 P.S. § 951. Rather than limit lawsuits, Residents' elusive standard would invite lengthy disputes over when a farm began operations and what it smelled like then, a fact-intensive and likely futile inquiry that could reach back centuries at some farms.

Residents' default date – 1986, the year George Phillips purchased an existing farm and began farming the land – is also inconsistent with the Act's purposes. Residents' Br. 30, 32. Not only is the date of purchase mentioned nowhere in the statute, but, taken together with Residents' position that "[t]he initial conditions [at founding] set the baseline for measuring whether conditions have 'existed substantially unchanged,'" Residents' position would force farms passed down over generations to face different baselines for immunity from nuisance suits than similarly-situated farms that differ only in ownership history. Residents' Br. 36. These old farms would enjoy less protection than new farms, plainly contrary to the goals of the Act, and would discourage investment in them.

B. A Substantial Change at the Farm Resets the One-Year Repose Period and Must Be Defined Objectively

The courts below did not hesitate to find that the RTFA's one-year repose period reset when a new farming practice like biosolids application began, regardless of whether George Phillips' 2006 switch from manure to biosolids was a substantial change. When a new farm practice starts, the one year window for neighbors to sue resets. Residents continue to battle this essential aspect of the RTFA, arguing that any substantial change on a farm forever extinguishes the Act's protections. This interpretation contradicts the RTFA's language and purpose, which resets the one-year window in response to an objective change in farm operations.

1. A Substantial Change Resets the RTFA's One-Year Repose Period

A key ruling below in both the Superior Court and the trial court was that the beginning of biosolids use in 2006 (with accompanying odors) "reset" the one-year period to bring suit, but Residents did not sue until 2008. The Superior Court determined that a reset was the only interpretation of the RTFA consistent with the statute's goal of reducing nuisance suits against farmers. *See Gilbert*, 90 A.3d at 46 (Opening Br., App. A at 17) (Without the reset, the RTFA would to "fail[] to accomplish this fundamental legislative goal."). This holding marked the second time the Superior Court recognized that the RTFA's intent and structure require that the repose window resets upon a substantial change at a farm. *See Horne*, 728 A.2d at 957.

The reset mechanism, essential to a coherent and effective RTFA, flows from the Act's language. Section 954(a) prohibits suits "against an agricultural operation … in operation for one year or more … where the conditions or circumstances complained of … have existed substantially unchanged since the established date of operation …." 3 P.S. § 954(a). This language specifies that the one-year limitations period runs from an agricultural operation's date of establishment when there was no substantial change. Implicit in this provision – and driven by the Act's definition of "normal agricultural operation," which

protects new farming practices that could intensify a farm's offsite impacts – is that a substantial change starts a new one-year window, after which lawsuits are barred.

With little support from the RTFA's text and no regard for its protections, Residents seek a "once-out-always-out" statute that eliminates coverage of the Act forever upon a "substantial change" at the farm. They would have the Act's protections fall away "even twenty years after the farm 'has lawfully been in operation,'" resulting in few instances where the protections attach. Residents' Br. 40.

All seven Pennsylvania judges who have decided cases under the RTFA have recognized that the RTFA's protections for farmers require that a substantial change resets the Act's repose period. In *Horne*, the Superior Court dismissed nuisance and negligence claims against a poultry farm by concluding that the RTFA's one-year period runs from "the inception of the agricultural operation or within one year of a substantial change …." 728 A.2d at 957. The *Horne* court concluded that the suit was barred even if the poultry farm's new decomposition operation was a substantial change.[2] *Id.* at 957 n.1. In this case, the Superior Court affirmed the trial court on this issue, determining that the interpretation that Residents advance would defeat the Act's purpose. *See* 90 A.3d at 46 (Opening Br., App. A at 17). These judges all recognized how a reset provision is

[2] Residents incorrectly claim that the reset in *Horne* was based on the RTFA provision regarding physical expansion of farms. *See* Residents' Br. 43.

fundamental to the RTFA, a conclusion shared by the Pennsylvania Secretary of Agriculture when the RTFA was passed. Letter from Penrose Hallowell to All Members of the House of Reps., re House Bill 1823 at 2 (Right to Farm) (Dec. 4, 1981) (Farm Parties' Super Ct. Br., App. B) ("existing farming operations which change their operations, *i.e.*, from a grain operation to a livestock operation" are protected from nuisance actions after one year).

These courts also correctly identified the consequences of Residents' position and its inconsistency with the Act. Courts may consider an interpretation's harmony with the statute's purpose. 1 Pa. C.S. § 1921(c)(4),(6). The General Assembly passed the RTFA to ensure that farmers would not be "discouraged from making investments in farm improvements, " and to "encourage the development and improvement of … agricultural land …." 3 P.S. § 951. Residents' construction would permit suits against Phillips Farm at any time unless the farm maintains the conditions that existed in 1986. More generally, farms that adopt new technologies or develop new lines of business would lose forever their protection from untimely suits under the RTFA because the nuisance complained of would very likely differ from baseline conditions at the time of a farm's founding. Residents themselves have said as much: "[F]arms cannot use a new practice that creates a nuisance when there was none before." Residents' Super. Ct. Br. 31.

Finally, the reset interpretation is consistent with similar right-to-farm acts. A recent law review article described how right-to-farm laws reset the statute of repose based on the onset of a new or changed farm activity:

> [M]any state right-to-farm statutes contain language that resets the statute of repose to the beginning of the time period if the agricultural operation makes a "substantial change." [citing, *e.g.*, 3 L.R.S.§ 3:3603, a Louisiana similar to the RTFA] Other states include provisions that specifically exclude changes in the agricultural operation from restarting the statute of repose.

Rusty Rumley, *A Comparison of the General Provisions Found In Right-To-Farm Statutes*, 12 Vt. J. Envtl. L. 327, 338-39 (2011) (internal citations omitted). The General Assembly chose to adopt a reset, rather than the language other states use to provide none. The Court should affirm this essential reading of the RTFA.

2. Residents' Subjective Definition of Substantial Change Lets Plaintiffs Decide Whom the Act Protects

Residents believe that "the difference perceived by neighboring residents" in nuisance conditions caused by a farm is the appropriate trigger for a substantial change that reopens the window to sue. Residents' Br. 36. A subjective standard would rob the Act of the objective certainty that is the hallmark of a statute of repose. The Act provides a clear demarcation for the running of the statute of repose because substantial change refers to a change in farm operations, not perceived effects. The RTFA reads, "the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially

unchanged ….” 3 P.S. § 954(a). As the Superior Court found, the “conditions or circumstances complained of” in a nuisance claim “must refer to the Farm Parties’ application of biosolids at the Farm ….” *See* 90 A.3d at 44 (Opening Br., App. A at 14). The RTFA only functions as intended if it uses an objective criterion (*e.g.*, commencing a farm practice that produces odors), rather than a plaintiff’s subjective and potentially self-interested perceptions of alleged changes to nuisance conditions.

Residents’ push for a subjective standard also disregards the structure of section 954(a). Broad statutory terms receive their meaning from more specific terms associated with them. *See Mountain Vill. v. Bd. of Supervisors of Longswamp Twp.*, 874 A.2d 1, 8-9 (Pa. 2005) (the scope of the term “consultant” was determined by the statute’s reference to engineers and similar professionals). In section 954(a), the term “conditions or circumstances” is used in conjunction with terms that reference only farm operations, such as “normal agricultural operations.” The broader conditions or circumstances are properly read only to refer to activities when placed in the right context.

The “conditions or circumstances” that are targeted must also be normal agricultural operations for protection to attach; the operations are defined as activities or practices, not how they are perceived. *See* 3 P.S. § 952. Under Residents’ reading, the RTFA’s statutory bar would turn on litigation over baseline

nuisance conditions many years ago and how they had changed over time. Farmers would have to litigate suits to the same extent, if not more, as if the RTFA did not exist. Tellingly, Residents never explain how or why the legislature would enact an RTFA so narrow and difficult to apply.

C. The RTFA Defines Normal Agricultural Operations Categorically and Includes Fertilizing Crops With Biosolids

Residents and their amici implicitly recognize that interpretation of what constitutes a "normal agricultural operation" is a legal question by vigorously arguing that this Court should interpret the term to exclude biosolids or include a negligence standard. Their interpretation of the RTFA has little statutory grounding, flouts the Act's pro-farming goals, and misses the premise of the RTFA: normal agricultural operations can cause nuisance conditions. The RTFA shields these operations from suits after one year.

Consistent with the stated purpose to protect farming, the General Assembly defined normal agricultural operations broadly and inclusively and twice amended the law to extend its reach. Residents' complaints about the breadth of farm practices covered by the Act should be directed to the legislature. The RTFA's reach enables the statute of repose to be readily and objectively applied with little or no fact-finding, particularly for legally-approved farm practices that, like biosolids, only occur pursuant to a permit. The definition covers "[t]he activities, practices, equipment and procedures that farmers adopt … in the production,

harvesting and preparation for market or use of agricultural … crops and commodities ….” 3 P.S. § 952. It further covers new activities or practices that are “consistent with technological development in the agricultural industry.” *Id.* The legislature used sweeping terms, without any requirement as to how a farmer works the land or whether a particular process is generally accepted (a provision the legislature dropped from the RTFA in the 1998 amendment, discussed below). Residents’ lengthy arguments that land application at Phillips Farm could have been done better with fewer odors incorrectly attempts to apply their merits arguments to narrow section 952.

1. The Definition of “Normal Agricultural Operations” Does Not Specify How a Farm Practice Must be Conducted

a. The RTFA Contains No Requirement for Farmers to Use Best Practices

Reviving another issue twice decided against them, Residents attempt to import a negligence standard into the RTFA. Both courts below dismissed Residents’ negligence claims. Although they did not appeal those rulings, Residents argue that a jury issue exists because the definition of normal agricultural operation should dictate *how* an activity is conducted. Instead, the legislature only required that a practice not be in violation of law or regulations. 3 P.S. § 954(b). Residents do not contest that the Farm Parties met this standard and

instead assert that "compliance with … regulations is meaningless." Residents' Br. 48.[3]

Residents cast aside the categorical terms of "activities, practices . . . and procedures" used by farmers to suggest that the language "new practices . . . consistent with technological development" in the definition somehow requires determination of "consisten[cy] with recommended sludge management practices in the industry." Residents' Br. 45 & n.12. Residents misconstrue the statute's use of this term, how the definition works, and land application of biosolids. First, the term applies to "new" farm practices and requires merely that they have some recognized technological basis, such as a new form of chemical fertilizer. Biosolids application is not new; it has occurred across the country as a regulated activity since the 1970s. *See, e.g.*,58 Fed. Reg. 9248, 9250 (Feb. 19, 1993) (USEPA discussion of the history of biosolids regulation). Second, "technology" should be construed consistent with its common usage, which does not connote using a method in any particular manner. *See* 1 Pa. C.S. § 1903(a) (requiring the use of common meaning); *Webster's Third New Int'l Dictionary* 2348 (1981) (defining technology as "a technical method of achieving a practical purpose."). The term

[3] Amici Newberger, Schuckman and Solomon's ("Newberger Amici") cast aspersions on biosolids recycling by wrongly alleging that the Farm Parties over-applied biosolids and applied biosolids containing toxins. *See* Newberger Amicus Br. ["Newberger Br."] 48, 50. Residents have never alleged that biosolids were applied at an improper rate or contained chemicals above EPA and PaDEP limits. *See* Trial Ct. Op. 21 (Opening Br., App. B. at 21) (dismissing Residents' reliance on NOVs relating to spreading and tilling because they were unrelated to the alleged nuisance).

does not support Residents' attempt to redefine "normal agricultural operations" to "best modern practices," and doing so would have absurd results, penalizing poorer farmers who use less technologically advanced methods (*e.g.*, noisier and dustier machinery or, as in this case, bulk organic fertilizers rather than anhydrous ammonia or other chemicals).

Residents' reading would only work if the RTFA contained (which it does not) the best practices requirement found in other states. *See, e.g.*, Kan. Stat. Ann. § 2-3202(a) (protecting farming practices as long as they are "consistent with good agricultural practices …."); Wyo. Stat. Ann. § 11-44-103(a)(i) (requiring protected practices to "[c]onform[] to generally accepted agricultural management practices …."). Pennsylvania did not qualify the definition of normal agricultural operations in this way. The legislature only required that the practices not be in violation of law, a standard satisfied by the Farm Parties.

b. The RTFA's Protections Do Not Turn on a Practice's Acceptance

Newberger Amici try a different tactic, arguing contrary to the Act's history that normal agricultural operations defy categorical application because they must attain an unspecified level of acceptance. They try to parse the articles, tenses and forms used in the definition of normal agricultural operations to support their reading. *See* Newberger Br. 25-28. However, the definition previously contained the requirement that Amici now try to resuscitate. In 1998 the legislature removed

the requirement that practices had to be "customarily and generally accepted." Act of May 15, 1998, P.L. 441, No. 58, § 2. In fact, since the RTFA's enactment, the General Assembly has seen fit only to *expand* the definition's scope, not limit it. Two years prior to the 1998 amendment, the legislature broadened the definition to encompass equipment. Act of June 12, 1996, P.L. 336, No. 52, § 1. Amici strain to restore a requirement that the General Assembly deleted from the RTFA nearly twenty years ago.

Newberger Amici's linguistic exercise itself fails to show why the Court should disregard this compelling legislative history. For example, contrary to Amici's argument, the definite article "the" does not limit the range of farm practices that the RTFA protects. When a modifier follows a noun preceded by a definite article, the article requires that noun to encompass *all* circumstances described by the modifier. *See Patricca v. Zoning Bd. Of Adjustment of Pitt.*, 590 A.2d 744, 751 (Pa. 1991) (the phrase "the residents of the neighborhood" in a zoning ordinance means *all* residents of the neighborhood, without exception). The RTFA's definition follows its nouns with the modifier "that farmers adopt, use or engage." The legislature's wording in this circumstance clarifies activities or practices to mean *all* activities that one or more farmers engage in, so that the definition's expansive language is consistent with the General Assembly's

objective of protecting all legitimate agricultural practices, without regard to any acceptance threshold.

c. Case Law Construing Other Statutes Does Not Limit the RTFA's Categorical Protections

Lacking support in the Act for a subjective standard, Residents and their amici resort to citing non-RTFA cases. They do not address how the court in *Horne v. Haladay* accepted that a decomposition house for dead poultry was protected by the RTFA as a matter of law, even though the case involved allegations that operations were carried out unreasonably. 728 A.2d at 955-59. Residents instead rely on a case interpreting an animal cruelty law, ruling that starving horses was not a normal agricultural operation. *See Commonwealth v. Barnes*, 629 A.2d 123 (Pa. Super. 1993). They ignore how the relevant statute, 18 Pa. C.S. § 5111(q), defines "normal agricultural operation" differently from the RTFA, and that the court could not discern *any* agricultural purpose in the record. *See* 629 A.2d at 132.

Newberger Amici similarly relied on an unpublished ACRE decision to argue that the RTFA specifies how an agricultural activity is conducted. *See Boswell v. Skippack Twp*, 2012 WL 8670346, at *1, *4 (Pa. Cmwlth. 2012). The court primarily based its reasoning on ACRE, a statute empowering the Attorney General and certain private parties to challenge ordinances that burden agriculture. *See id.* at *4. Furthermore, *Boswell* involved a challenge to a local ordinance that

would restrict the use of loud devices to deter pests, markedly different from a state-permitted practice like land application. *See id.*

2. A Robust RTFA Does Not Free Farming From Regulation

Residents brazenly claim that the Act gives farmers "blanket immunity to interfere with the quality of life of neighboring residents." Residents' Br. 53-54. The RTFA is a statute of repose that bars only certain tort suits brought a year after the farm operation begins. It does not diminish state or federal regulation, nor does it prohibit *timely* nuisance suits or a person's ability to oppose regulatory approval of some practices, a step taken by many of the Residents regarding Phillips Farm.

No repose applies if otherwise protected farming activities violate local, state or federal law. 3 P.S. § 954(b). Residents concede that the land application at Phillips Farm was lawful and this qualification to the Act is unavailable to them. *See* Residents' Br. 48. Consequently, Residents' concerns regarding biosolids containing excessive pathogens or metals or irresponsibly applied pesticides are unfounded because these unlawful practices would not be protected by the Act. *See, e.g.*, 40 C.F.R. § 503.32 (regulating trace bacteria and metals in biosolids); 7 Pa. Code §128.103 (prohibiting use of a "pesticide in a manner that endangers man or the environment …."); 7 U.S.C. § 136j(a)(2)(G) (prohibiting pesticide use "in a manner inconsistent with its labeling.").

Besides misreading the RTFA, Residents overlook other available remedies. For example, many of the Residents filed appeals with the Environmental Hearing Board in 2007 and 2008 to challenge the PaDEP's permit issued for Phillips Farm. *See Fox v. Commonwealth*, 2011 WL 4943758 (Pa. EHB May 12, 2011) (dismissing permit challenge). In short, properly reading the RTFA will not give farmers carte blanche. Prospective plaintiffs are free to bring suits within one year, after that time when a farmer breaks the law, or to seek administrative relief.

3. Pennsylvania Agencies and Laws Recognize Biosolids As an Accepted Farming Practice

Residents wrongly dismiss as "irrelevant" the large body of Pennsylvania law and agency authorizations for biosolids use, which demonstrate that it is a normal agricultural operation as a matter of law. Residents' Br. 56 n.16; Newberger Br. 35. Rather than address this evidence of legislative intent, Residents and their amici focus on the percentage of farms using biosolids – a factor not found in the statute – and criticize government regulation of biosolids recycling.

Contrary to Residents' position, statutes and agency interpretations are important tools of statutory interpretation, and they are on point for the question before the Court. *See* 1 Pa. C.S. §1921(c)(5),(8). The Farm Parties highlighted the Solid Waste Management Act and the Nutrient Management Act, not to import their definitions, but as evidence that Pennsylvania law has long recognized

biosolids application as an ordinary farm activity. Pennsylvania DEP's and USEPA's large regulatory programs approving and governing agricultural biosolids use standing alone establish that biosolids use is a normal agricultural operation as a matter of law. *See* Opening Br. 43-46.

Equally important are the positions taken by three state agencies in this case that the General Assembly intended to protect biosolids. These entities have decades of experience implementing the General Assembly's agricultural and environmental laws. The Office of Attorney General, Department of Agriculture, and Department of Environmental Protection all interpret the RTFA's definition to encompass biosolids application. *See id.* at 39-43. Based on their years of regulating Pennsylvania agriculture, they have determined that "the agricultural use of biosolids is recognized as a normal agricultural practice …." PDA/OAG Super. Ct. Amicus Br. 8.

Farmers' use of biosolids is so widespread that nearly a third of public treatment works in Pennsylvania recycle biosolids to farms. PMAA/ALCOSAN /NACWA Amicus Br. 18. The farmers using these biosolids have realized improvements in crop yields and drought resistance. MABA/PWEA/PSMA Amicus Br. 12. Municipalities, including Pittsburgh and Philadelphia, also rely on this beneficial agricultural practice. The City of Philadelphia has found that agricultural biosolids use "reduces the City's use of landfill space, and creates an

economically and ecologically sustainable wastewater management system." Phila. Amicus Br. 1. The Superior Court overlooked this record that establishes conclusively that biosolids application is a normal agricultural operation.

4. Residents and Their Amici Misrepresent the Farm Parties' Operations

Residents and Newberger Amici's disparagement of Phillips Farm, while irrelevant to the RTFA, omits crucial facts. The Farm Parties were not free to spread biosolids without regard for odors. Pennsylvania DEP, York County and the municipalities generating the biosolids used at Phillips Farm visited the site over thirty times and monitored for odors. *See* Defs. S.J. Exs. M (R. 148a-201a), N (R.202a-203a) (inspection reports). Even though regulations prohibit application in a manner that "cause[s] odors," the Farm Parties never received a notice of violation relating to smells. 25 Pa. Code § 275.203(b). The Farm Parties took the Residents' concerns into account; they suspended land application for nearly six months after Residents complained about odors in July 2007. *See* Defs' S.J. Ex. J (R.114a-141a) (logging biosolids application).

II. The Superior Court Failed to Answer the Dispositive Legal Question of Whether Farming With Biosolids is a Normal Agricultural Operation

Residents and amici argue that no question of law exists and treat interpreting and defining the RTFA as a factual issue for a jury. To the contrary, the prolix legal debate over the RTFA that has consumed hundreds of pages of

briefing in three courts since 2012 underscores that interpretation of the Act is an important *legal* issue. The ultimate decision should be straightforward. All parties agree that the Farm Parties applied biosolids in 2006 and Residents saw it as a nuisance. The question is whether this farm activity comes under the statutory definition of normal agricultural operations.[4]

The Newberger Amici and Pennsylvania Association for Justice ("PAJ") try to distinguish between application and interpretation of the RTFA to deflect attention from the core legal question. *See* Newberger Br. 24 (contending that the Farm Parties "fail to grasp the interpretation/application distinction."); PAJ Amicus Br. ("PAJ Br.") 10 n.5 (claiming the Farm Parties' position "ignores the fact that once a statute has been interpreted, it must be applied …."). But there is no factual application for a jury to undertake. The parties agree on what farm practice caused the alleged nuisance – here, biosolids application – and only a legal question remains: whether that activity falls under the definition of normal agricultural operations. Application is a matter of whether the case is dismissed or goes to trial.

[4] Residents contend that summary judgment rules regarding disputed facts control the outcome of this case. *See* Residents' Br. 25-26. To the contrary, the procedural posture of the case does not require weighing disputed facts because the RTFA statute of repose is a legal issue. Motions for summary judgment may present purely *legal* issues that courts must resolve. *See Milliken v. Jacono*, 103 A.3d 806, 809 (Pa. 2014) (summary judgment motion raising a statutory interpretation question "presents a pure question of law ….").

A. Courts Decide Statutory Definitions

Amici's attempt to address the crucial legal issue in this case shows that their interpretation/application dichotomy relies on a misapprehension of what statutory interpretation requires. They flatly assert that "the Superior Court interpreted the RTFA itself" without any discussion of what the court actually did or the court's obligations. Newberger Br. 24. Statutory interpretation involves "'ascertain[ing] and effectuat[ing] the intention of the General Assembly.'" *Landay v. Rite Aid of Pa., Inc.*, 104 A.3d 1272, 1282 (Pa. 2014) (citation omitted). Although a statute's plain language may clearly show legislative intent, a court may need to look to other sources. *See Mercury Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 55 A.3d 1056, 1068 (discussing evidence of legislative intent); 1 Pa. C.S. §§ 1501-1991 (codifying principles of statutory interpretation).[5]

Amici fail to distinguish *Commonwealth v. McKetta*, 364 A.2d 1350 (Pa. 1976), a case where the Court emphasized judicial primacy over juries in statutory interpretation. *McKetta* was not a case where the court "simply applied a precise statutory [definition]." Newberger Br. 25 n.11. The statute in *McKetta* was not "precise"; its definition of "dangerous drug" did not explicitly cover the particular

[5]That the issue here is interpretive renders irrelevant PAJ's discussion of *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014). *Tincher* required jury resolution because "trial courts simply do not … have the expertise…" to determine whether a product is unreasonably dangerous. 104 A.3d at 380. By contrast, courts are clearly suited to discerning legislative intent in a statutory definition. *See* Opening Br. 30 (discussing unanimous legal scholarship opining that judges are uniquely suited to statutory interpretation).

medication at issue. The Court held that the trial court, rather than a jury, must determine what the legislature meant, reiterating that statutory interpretation is exclusively a judicial function. *See* 364 A.2d at 1352. Once the Court determined the definition's meaning, it found no facts in dispute. *See id.* at 1353-54. Similarly, in this case, all parties agree that the Farm Parties engaged in biosolids application. They need a *court* to determine whether the RTFA covers this activity.

B. The Superior Court Should Have Interpreted the Definition of Normal Agricultural Operations

1. The Superior Court Opinion Makes Little Attempt to Construe the Definition

The Superior Court majority avoided the necessary discussion of legislative intent by engaging in what it deemed "application" rather than "interpretation" – the same flawed dichotomy offered by Residents' amici. Although finding that "issues of material fact remain," the court did not identify which facts the General Assembly intended to be "material." 90 A.3d at 51 (Opening Br., App. A at 28). The opinion merely notes that "[a] specific mention of biosolids was undoubtedly an option available to the legislature" as a basis for rejecting the Farm Parties' arguments. *Id.* at 48 (Opening Br., App. A at 21). Similarly, the court observed that the statute is "silent with regard to the effect, if any, of government regulation." *Id.* at 50 (Opening Br., App. A at 26). Under *McKetta* and canons of statutory interpretation, these observations are the beginning, not the end, of a court's work.

As discussed in the Farm Parties' opening brief, the rules of statutory interpretation compel the conclusion that biosolids application falls under the definition of normal agricultural operation. Opening Br. 35-45. By finding an issue ripe for the jury, the Superior Court undermined the RTFA by leaving an interpretive – and strictly legal – question for resolution by a jury.

2. The Commonwealth Court's *East Brunswick* Decision Involves Another Statute, Is Distinguishable, and Is Flawed

Newberger Amici, like the Superior Court before it, cast aside interpreting the RTFA and instead cite one case to justify sending this case to a jury: *Commonwealth v. East Brunswick Twp.*, 956 A.2d 1100 (Pa. Cmwlth. 2008). *East Brunswick* is not persuasive because it (1) explicitly turns on statutory provisions not found in the RTFA, (2) placed the burden on the moving party, which the RTFA does not require here, and (3) unjustifiably disregarded relevant provisions of state law. Opening Br. 47-49; PDA/OAG Amicus Br. 17-23. The decision fails to analyze the definition of normal agricultural operations, observing only that the definition does not specify "what are normal 'activities, practices, equipment, and procedures,'" and does not mention biosolids specifically. 956 A.2d at 1114-15 (internal citation omitted). Without further analysis of legislative intent, the court concluded that Act 38 required "an evidentiary, not a legal determination" because the statute permits the Attorney General to seek opinions regarding the definition's application. *Id.* at 1115. That opinion, contrary to the positions of the Newberger

Amici and the Superior Court, based its conclusion in a separate statute and did not interpret the RTFA.

Failing to recognize the flaws in *East Brunswick* and how Act 38 differs from the RTFA, the amici rely heavily on that case's (mostly unpublished) progeny. Like their parent, these cases do not interpret the definition of normal agricultural operations. Rather, each simply follows *East Brunswick*'s holding that ACRE (not the RTFA) requires an evidentiary determination. *See Commonwealth v. Locust Twp.*, 49 A.3d 502, 517 (Pa. Cmwlth. 2012); *Boswell*, 2012 WL 8670436, at *6; *Commonwealth v. Packer Twp.*, 2010 WL 9519038, at * 2 (Pa. Cmwlth. 2010). Unlike those decisions under ACRE, this case squarely presents the question of what the legislature meant by normal agricultural operations in the RTFA's statute of repose.

III. The RTFA Is a Jurisdictional Bar to Suit That a Court Must Address Before a Suit May Proceed

Residents barely address the Farm Parties' argument that the RTFA presents a jurisdictional bar to suit, attempting only to retract their admission that the Act is a statute of repose. Amici acknowledge that jurisdictional issues are almost always legal issues for the court. Accordingly, they argue that the RTFA is somehow not a statute of repose, contrary to the position of the Superior Court. 90 A.3d at 49 (Opening Br., App. A at 23-24). The Act extinguishes jurisdiction over claims after a period of time, and the statute's qualifications do not make it otherwise.

Likewise, the argument that the RTFA is an affirmative defense ignores the terms of the RTFA and this Court's holdings regarding the differences between the two an affirmative defense and a statute of repose.

A. The RTFA is Not an Affirmative Defense Because It Is a Statute of Repose

Newberger Amici portray the Act as just another affirmative defense, overlooking this Court's teaching that statutes of repose are *not* affirmative defenses. In *Vargo v. Koppers Co.*, 715 A.2d 423 (Pa. 1998), the Court distinguished statutes of repose from statutes of limitation, stating that statutes of repose need not be pleaded as affirmative defenses. 715 A.2d at 426 n.1 ("[A] statute of repose is not waived if not pled as an affirmative defense …."). In Pennsylvania, statutes of repose have a jurisdictional status above that of an affirmative defense and consistent with this status, and courts determine the scope of the statute of repose as a matter of law. *See id.* at 426-27 (determining a door machine is not an improvement to real property).

Residents try to disavow their admission that the Act is a statute of repose. *Compare* Residents' Super. Ct. Reply Br. 1 ("Residents agree that the RTFA is a one-year statute of repose …."), *with* Residents' Br. 27 n. 6 ("[I]t is not a statute of repose …."). Residents were right the first time. Under this Court's precedent, the RTFA is a statute of repose as long as it capable of eliminating a plaintiff's claim "regardless of when the plaintiff's injury occurs." *Vargo*, 715 A.2d at 425. As

explained above, the RTFA cuts off a plaintiff's right to sue one year after a farm activity begins or that farm activity changes, regardless of when harm is alleged to have occurred. Even under Residents' erroneous interpretation of the Act, the statute can cut off liability before a plaintiff is harmed – a farm operating completely unchanged for more than one year is immune from suit, irrespective of whether anyone is harmed.

Newberger Amici, again failing to consider Pennsylvania's RTFA, argue that the Act is not a statute of repose based on cases interpreting right-to-farm laws in other states that use different mechanisms for blocking suits. Newberger Br. 12-13. In many states, farms qualifying for protection are simply deemed not to constitute a nuisance. *See, e.g.*, Kan. Stat. Ann. § 2-3202(a) (providing that protected farm activities "are presumed to be reasonable and do not constitute a nuisance …."). Other states explicitly designate their acts as "defenses," or they create rebuttable presumptions. *See, e.g.*, Tenn. Code Ann. § 43–26–103(a) (rebuttable presumption); Ohio Rev. Code Ann. § 929.04 (statute creates "a complete defense"). These disparate out-of-state statutes reflect the particular methods other states selected, not the repose language used in the RTFA.

B. The Act Withholds Jurisdiction Over a Class of Untimely Lawsuits

Newberger Amici do not dispute that Pennsylvania statutes of repose generally create jurisdictional bars. *See, e.g., Beisswanger v. Workmen's Comp.*

Appeal Bd., 808 A.2d 984, 986 (Pa. Cmwlth. 2002); *see also* Opening Br. 18-19. Instead, by insisting that the RTFA requires fact-finding instead of interpretation, Amici seek to analogize the Act to different laws that on their terms turn on facts to decide whether the jurisdictional bar applies. Amici rely on *Heath v. Workers' Comp. Appeal Bd.*, 860 A.2d 25 (Pa. 2004), in which a statute required a fact-specific finding regarding whether one person intended to injure another for personal reasons to forego workers' compensation coverage. Moreover, the *Heath* court noted that the statute did not cover "'the *general class* to which the case presented for [the court's] consideration belongs,'" but rather facts relating to a particular incident. *Id.* at 181 (quoting *Strank. v. Mercy Hosp. of Johnstown*, 102 A.2d 170, 172 (Pa. 1954)). The RTFA is obviously different by applying its protection to a vast category of farm practices that does not require scrutiny of the individual farm practice, particularly in a case where the farm is permitted by the state to undertake the activity, as with land application.[6]

Nor can the Act be characterized as a statute of limitations that typically would be an affirmative defense. Section 954 provides that "[n]o nuisance action shall be brought" when the suit is filed outside its one-year timeframe. Statutes of limitations, by contrast, define when a cause of action must be brought after

[6] Newberger Amici also rely on *Cozzone v. Workers' Comp. Appeal Bd.*, 73 A.2d 526 (Pa. 2013), but this case only addresses when time limits are elements of statutory claims, not jurisdictional principles. 73 A.2d at 541. PAJ does not identify a reason why the RTFA does not affect jurisdiction. It simply asserts that "[n]othing in the [Act] serves to divest this jurisdiction." PAJ Br. 6.

accrual of a specific plaintiff's claim, which will always be a factual issue. *See, e.g.*, 42 Pa. C.S. § 5524 (providing that certain actions "must be commenced within two years."). The RTFA also turns on objective determinations regarding when a farming practice begins or is modified. *See supra* at 5-14. A jurisdictional limitation is consistent with the Act's purpose, which is to limit when "agricultural operations may be the *subject matter* of nuisance suits …." 3 P.S. § 951 (emphasis added). The amici ignore the General Assembly's intent to proscribe suits from being brought at all.

C. *McConnaughey*'s Approach to a Statute of Repose Question Supports the Farm Parties

Residents make only a modest attempt to argue that the RTFA presents a jury issue – the very question on which the Court granted review. Residents, like the Superior Court, rely heavily on *McConnaughey v. Building Components, Inc.*, 637 A.2d 1331 (Pa. 1994), yet fail to apply the interpretive steps this Court took in *McConnaughey* to the RTFA or recognize the fact-bound nature of the provision at issue in *McConnaughey*.

McConnaughey assumes that a court interprets the statute and therefore supports judicial interpretation of the RTFA. In *McConnaughey*, the Court *first* interpreted the statute of repose by elucidating precisely which categories of persons the General Assembly intended to protect: those involved in "planning" or "furnishing the design" of a construction project. 637 A.2d at 1334. This

interpretation guided the Court's analysis of whether the information in the record fit within these categories. *See id.* at 1335. This first analytical step was missing in this case because the Superior Court did not investigate whether a normal agricultural operation includes biosolids.

McConnaughey concerned whether a manufacturer was a person "*involved* in the design, planning, *supervision … or observation of the construction of an improvement to real property*" under the statute of repose in 42 Pa. C.S. § 5536. 637 A.2d at 1334 (emphasis in original). This statute required an analysis of the manufacturer's level of involvement in building a barn – a question of degree that centered on a discrete event. *Id.* at 1335. With the parties at loggerheads on basic facts, that statute's fact-intensive standard permitted the case to go to a jury.

In contrast to the provision in *McConnaughey*, the Act is not at all fact-bound. The RTFA categorically bars Residents' claims so long as Residents brought suit more than one year after either (1) a farming activity began at Phillips Farm or (2) that agricultural activity underwent a substantial operational change, *and* (3) the activity fits the objective definition of normal agricultural operations. None of these factors require "the case-specific determinations" that Residents demand. Residents' Br. 56. Rather, consistent with its legislative design, the RTFA is based on objective criteria. The trial court correctly found that biosolids application met this expansive standard and dismissed Residents' untimely suit.

CONCLUSION

The outpouring of amici support for a strong Right to Farm Act underscores the need for the Court to clarify that this statute of repose should be interpreted by courts to give full effect to the legislature's intent to shield potentially nuisance-creating farm practices from litigation after a year of operation. Residents' insistence that the Act only protects conditions that existed when a farm was founded and that the Act requires a jury trial would deprive farmers of the protection the Act intended. The Court should interpret the RTFA as written and intended, reverse the Superior Court, and direct dismissal of all nuisance claims as time-barred by this statute of repose.

Dated: April 6, 2015

Respectfully submitted,

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CERTIFICATE OF WORD-LIMIT COMPLIANCE

I certify that the foregoing reply brief complies with the word limitation of Pa. R.A.P. 2135(a)(3), as expanded by order of the Court on March 19, 2015, in that the word count of the brief, excluding the cover, table of contents, table of citations, proof of service, appendices, and this certificate, is 8,479 words based on the word count of the word processing system used to prepare the brief.

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