IN THE
INDIANA COURT OF APPEALS

Case No. 18A-PL-00645

MARTIN RICHARD HIMSEL, JANET HIMSEL, ROBERT LANNON, and SUSAN LANNON,	)	
Appellant-Plaintiffs,	)	Appeal from Hendricks Superior Court #4
vs.	)	Cause No: 32D04-1510-PL-150
SAMUEL T. HIMSEL, CORY M. HIMSEL, CLINTON S. HIMSEL, 4/9 LIVESTOCK LLC, and CO-ALLIANCE, INC.,	)	The Honorable Mark A. Smith, Judge
Appellee-Defendants	)	

APPELLANTS' PETITION FOR REHEARING

Kim E. Ferraro (#27102-64)
Hoosier Environmental Council
541 S. Lake St.
Gary, Indiana 46403
Phone: 219/464-0104
Email: kferraro@hecweb.org

ATTORNEY FOR APPELLANTS

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I. STATEMENT OF ISSUES

The Himsels and Lannons respectfully request this Court to reconsider its Opinion 18A-PL-645 of April 22, 2019 ("the Opinion") affirming summary judgment on their tort claims and to correct the following errors:

A. Summary judgment is not warranted under Indiana's Right to Farm Act ("RTFA") on negligence and trespass claims that arise from the same occurrence as a nuisance claim.

B. The RTFA does not require a plaintiff to exhaust administrative remedies before bringing a tort claim against an agricultural operation.

C. The RTFA does not limit the scope of agricultural operator's duty of care to mere regulatory compliance.

D. If a decision to change the type or size of an agricultural operation is unreasonable under the circumstances, the decision constitutes negligent operation under the RTFA.

E. Summary judgment is not warranted under the RTFA on a nuisance claim against an agricultural operation that becomes a nuisance after its first year of operation, when there is evidence that the operation would have been a nuisance during that first year.

II. SUMMARY OF ARGUMENT

In its Opinion, this Court construed Indiana's Right to Farm Act ("RTFA") beyond its plain terms and intended scope. The RTFA provides agricultural operations with immunity from nuisance liability only when certain conditions are met; namely, a showing that the nuisance is not negligently caused, and the nuisance-causing form of the operation would not have been a nuisance had it existed when the operation began. Ind. Code § 32-30-6-9(a) and (d)(2). And, because the RTFA is an affirmative defense and a statute in derogation of the common law, its terms are to be strictly construed against the party seeking its protection. *Smith v. Dunn Hosp. Grp. Manager, Inc.*, 61 N.E.3d 1271, 1274 (Ind. Ct. App. 2016).

Nevertheless, the Court abandoned this and other rules of statutory construction to conclude that the RTFA provides sweeping immunity not only for nuisance, but negligence and trespass as well, so long as the offending agricultural operation is located in an area historically used for some sort of farming (Opinion ¶¶19-25), has complied with regulations (Opinion ¶27), and the plaintiffs failed to pursue administrative remedies (Opinion ¶26)—rulings that have no foundation in the express provisions of the RTFA.

In addition, the Court's Opinion breaks with fundamental principles of tort and administrative law which do not require a plaintiff to exhaust administrative remedies before bringing a tort claim and do not consider a defendant's regulatory compliance to be a *per se* defense

to tort liability. The Court also failed to follow Indiana's summary judgment standard by ignoring evidence that supports each element of the Himsels and Lannons' distinct tort claims that, at minimum, creates genuine fact issues precluding summary judgment on those claims. Accordingly, the Himsels and Lannons respectfully request this Court to grant their Petition for Rehearing and correct these errors as more fully discussed below.[1]

III. ARGUMENT

A. The RTFA Does Not Immunize Agricultural Operations From Negligence and Trespass Claims that Arise From the Same Occurrence as a Nuisance Claim

The Court's Opinion affirms summary judgment on the Himsels and Lannons' distinct negligence and trespass claims concluding that holding otherwise "would eviscerate [the RTFA] and deny the [CAFO Operators] the protection intended by the Legislature when it passed the [RTFA]." (Opinion at ¶¶27, 28 and FN 8) However, it is the Court's ruling that fails to give effect to the Legislature's stated intent in passing the RTFA; namely, to "limit[] the circumstances under which agricultural operations may be deemed to be a nuisance." Ind. Code § 32-30-6-9(b) (emphasis added).

Claims for nuisance, negligence and trespass are distinct causes of action in Indiana, and are analyzed separately even when they arise from the same facts. *See, e.g., KB Home Indiana Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 304 (Ind. Ct. App. 2010) (separately analyzing nuisance,

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[1] By construing the RTFA to prevent the Himsels and Lannons from obtaining *any* remedy for the damages they have suffered due to the CAFO Operators' tortious conduct, the Court's Opinion renders the RTFA unconstitutional as applied under the Open Courts Clause in Article I, Section 12 of the Indiana Constitution. And, by interpreting the RTFA to allow a continuing trespass on the Himsels and Lannons' properties, the Court's Opinion renders the RTFA unconstitutional as applied under the Takings clauses of the U.S. and Indiana constitutions. This Petition does not address these constitutional concerns. However, the Himsels and Lannons reserve their right to raise them on transfer to the Indiana Supreme Court if the following errors are not corrected.

negligence and trespass claims arising from environmental contamination). Nuisance law protects the right to reasonably use property without interference. *Indiana Motorcycle Ass'n v. Hudson*, 399 N.E.2d 775, 778 (Ind. Ct. App. 1980). Trespass protects the right to exclusively possess property. *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999). Both trespass and nuisance may be deliberate, negligent, or an unintended byproduct of an intentional act. *See e.g. Bonewitz v. Parker*, 912 N.E.2d 378, 380, 384 (Ind. Ct. App. 2009) (finding an actionable nuisance from a mycelium furnace even though the operator took care to minimize its impact); *Hawke v. Maus*, 226 N.E.2d 713, 717 (Ind. Ct. App. 1967) (holding that intentional trespass requires only that the "act which results in the trespass" be intentional). In contrast, liability in negligence depends not on the kind of harm caused, but on whether reasonable care was used. *Harradon v. Schlamadinger*, 913 N.E.2d 297, 300 (Ind. Ct. App. 2009). Because nuisance, negligence and trespass claims are distinct, the RTFA's limitation on nuisance has no effect on negligence and trespass.

Indeed, when interpreting a statute, a court is to be "mindful of both what it 'does say' and what it 'does not say.'" *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016). The RTFA has nothing to say about "limiting the circumstances" under which an agricultural operation can be held liable for negligence or trespass. To the contrary, the RTFA expressly states that its protections do not apply to nuisances that are negligently caused. Ind. Code § 32-30-6-9(a).

Furthermore, the Court's policy justification is out of place when there is no ambiguity in the law itself. *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016) (statutory construction begins with the presumption that the legislature "says what it means and means what it says"); *Clippinger v. State*, 54 N.E.3d 986, 989 (Ind. 2016) ("we assume that the language in a statute was

used intentionally"); *State v. I.T.*, 4 N.E.3d 1139, 1143 (Ind. 2014) ("[a]n unambiguous statute needs no interpretation"); *Miller v. Town Bd. of Sellersburg*, 88 N.E.3d 217, 218 (Ind. Ct. App. 2017) ("unambiguous statutes leave no room for judicial construction"). Rather, when a statute is clear, a court simply applies its unambiguous language, which is the "best evidence" of the legislature's intent. *Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016).

The Court's Opinion cites to a Texas case holding that Texas' RTFA bars trespass claims. (Opinion at ¶28) But that case is inapposite because it relies on construction of Texas' unique law that differs from Indiana's. Indeed, the Texas RTFA has no negligence exception like Indiana's and has provisions that protect agricultural operations from all civil liability in some circumstances. *See* Tex. Agric. Code Ann. § 251.006(a). Moreover, a nuisance in Texas is defined to include a physical invasion of property and, therefore, includes trespass. *Ehler v. LVDVD, L.C.*, 319 S.W.3d 817, 823 (Tex. App. 2010). Conversely, Indiana's nuisance statute defines nuisance as an interference with "the comfortable enjoyment of life or property" and, therefore, does not include trespass. Ind. Code § 32-30-6-6.

Indiana's RTFA provides immunity from nuisance suits, only. The Court's ruling otherwise improperly substitutes the Court's judgment for that of the Legislature, which was definitively expressed in 2005 when it amended the "significant change" provision in RTFA subsection (d)(1). *See* Ind. P.L. 23-2005. At that time, it had been a decade since this Court held in *Lever Bros. Co. v. Langdoc* that evidence of invasion by noxious materials could give rise to actions in nuisance, negligence, and trespass. 655 N.E.2d 577, 583 (Ind. Ct. App. 1995). Yet the Legislature still limited the RTFA's application only to nuisance. *See* Ind. P.L. 23-2005. Had the legislature intended for the RTFA to bar tort claims beyond nuisance, it would have had to do so explicitly. *Smith,* 61 N.E.3d at 1274 ("when the legislature enacts a statute in derogation of

common law, [courts] presume that the legislature is aware of the common law, and does not intend to make any changes beyond what is declared in express terms or by unmistakable implication"). Thus, the Court's determination that the RTFA bars negligence and trespass claims was error.

B. The RTFA Does Not Require a Plaintiff to Exhaust Administrative Remedies

The Court's Opinion holds that the Himsels and Lannons' "nuisance claim fails as a matter of law" under the RTFA because "they did not seek judicial review" of county zoning approvals for the CAFO and "did not appeal issuance of [the IDEM] permits" for the CAFO which, according to the Court, provided the Himsels and Lannons "ample due process." (Opinion at ¶26) Nowhere in the plain text of the RTFA can such a rule be found. Thus, the Court's holding is error for that reason alone. *Smith,* 61 N.E.3d at 1274.

In addition, there is no evidence that the zoning and IDEM approvals were improperly issued. Accordingly, had the Himsels and Lannons sought review of those decisions, they would have futilely wasted everyone's time and resources. Consequently, if the Court's ruling stands, it will have the perverse effect of prompting more litigation against new CAFOs, not less, by neighbors who will be forced to bring baseless administrative appeals just to preserve their right to sue for damages should a CAFO cause harm down the road.

Moreover, the Court's exhaustion rule breaks with established Indiana law in the following respects:

1. Courts decide tort claims, not county or state agencies

This Court has confirmed that "a plaintiff raising a common law negligence claim need not exhaust administrative remedies." *S.E. Ind. Nat. Gas Co. v. Ingram,* 617 N.E.2d 943, 949 (Ind. Ct. App. 1993). The reason: courts decide tort claims, not administrative agencies. *Id.* at 950. As such, "questions of duty, breach of duty, causation and injury have traditionally fallen within the

competence of the judiciary and its fact-finding jury" and "[d]eference is not granted [to an] agency's legal conclusion . . . because regardless of the facts and law found by the agency, neither the jury nor the court will be bound by the [agency's] determinations." *Id.* at 947. Without a doubt, the CAFO's zoning and IDEM approvals decided issues of zoning and environmental law only. They did not and could not have adjudicated any aspect of the Himsels and Lannons' tort claims.

And, contrary to the Court's Opinion that pursuing administrative appeals would have provided the Himsels and Lannons with "ample due process" (Opinion at ¶26), such appeals cannot provide an award of damages and are, therefore, "no remedy at all for a common law tort." *S. E. Ind. Nat. Gas Co. v. Ingram,* 617 N.E. 2d at 950. In sum, the Court's Opinion that the Himsels and Lannons forfeited their right to sue for damages because they did not exhaust administrative remedies, allows a county and state agency, not a jury, to decide the Himsels and Lannons' tort claims thereby impairing "the very substance of [their] right to jury trial protected by the Indiana Constitution." *Id.* at 951.

2. The RTFA does not provide a per se defense to negligence based on compliance with regulations

The Court' Opinion concludes the CAFO Operators' regulatory compliance means they were not negligent in siting or operating their CAFO and, therefore, the negligence exception to RTFA immunity does not apply. (Opinion at ¶27). But for the Court's conclusion to make sense requires a showing that the scope of the CAFO Operators' duty of care is limited to regulatory compliance by the RTFA, and no such showing has been or could be made in this case.

Specifically, "[d]uties which may be the basis of a negligence action may arise by statute or by operation of law." *S. E. Ind. Nat. Gas,* 617 N.E.2d at 951. In Indiana, those who want to operate CAFOs certainly have a statutory duty to comply with applicable regulations. But apart

from that, they also have a common law duty to use due care. *Id.* at 953 ("the law imposes but one common law duty and that duty is to use due care [which] . . . is the same for all relations, without regard to the facts of the case").

Whether due care is exercised is distinct from whether statutory requirements have been met. *S. E. Ind. Nat. Gas Co. v. Ingram*, 617 N.E.2d at 950 ("the test of reasonable care aris[es] from common law" and is "a wholly distinct standard dependent largely upon the circumstances of the case and upon what a jury may decide a reasonably prudent person would have done under the circumstances.") This distinction is why Indiana courts have long recognized that compliance with regulation does not preclude tort liability. *See e.g., Bonewitz v. Parker*, 912 N.E.2d 378, 382 (Ind. App. 2009), *trans. denied.* (whether a land use "is in accord with various rules and regulations does not require a finding [that] the use is reasonable.")

As discussed above, had the legislature intended for the RTFA to limit the scope of an agricultural operator's duty in tort to regulatory compliance, it would have had to do so explicitly. *Smith,* 61 N.E.3d at 1274. Yet nothing in the RTFA's plain text says anything about the scope of an agricultural operator's duty, much less explicitly state that it is limited to regulatory compliance. As discussed below, the Himsels and Lannons designated evidence that supports each element of their negligence claim, including operational negligence. The Court should have considered this evidence, along with evidence of regulatory compliance.

C. <u>If the Decision to Change the Type or Size of an Agricultural Operation is Unreasonable, it is "Negligent Operation" under the RTFA</u>

The Court's Opinion concludes that building and siting a CAFO cannot be "negligent operation" under the RTFA. (Opinion at ¶27). This view ignores the "substantial change" provision of the RTFA which states that converting from one type of agricultural operation to another is not

a "significant change" that would remove the RTFA's protection, but is part of the ongoing operation. Ind. Code § 32-30-6-9(d)(1). Put another way, the decision to switch from growing crops to producing 8,000 hogs in a CAFO is no less "operational" than a decision to switch from growing corn to soybeans. If that decision is negligent—i.e., unreasonable under the circumstances—it is "negligent operation." To hold otherwise writes the "significant change" provision out of the statute.[2]

Such a reading also eliminates the duty for agricultural operators to exercise reasonable care. Therefore, since there are no regulatory limits on the size or scale of CAFOs, the Court's interpretation allows 80,000-head hog skyscrapers with surrounding lakes of hog waste to be built on any farm field in Indiana, because no matter how extreme, unreasonable, or harmful, no such decision would ever be considered "negligent operation." The RTFA cannot be read to allow such an unjust and absurd result.

D. The Court Ignored Evidence Precluding Summary Judgment on Negligence and Trespass

Indiana's summary judgment standard is aimed at protecting a party's day in court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014); *Simon Prop. Grp., L.P. v. Acton Enterprises, Inc.*, 827 N.E.2d 1235, 1239–40 (Ind. Ct. App. 2005) (summary judgment is "a lethal weapon generally disfavored as an alternative to trial"). Accordingly, unlike federal practice, "Indiana imposes a more onerous burden: to affirmatively negate an opponent's claim." *Hughley v. State*, 15 N.E.3d at 1003. Under this standard, the bar is set deliberately low for the non-movant: any sworn testimony may suffice to create a genuine issue of material fact. *Id.* at 1004. Nonetheless,

[2] And, if the decision to switch from crops to CAFO is not part of the ongoing operation, then the RTFA would not protect the CAFO.

the Court's Opinion affirms summary judgment on the Himsels and Lannons' trespass and negligence claims, despite credible evidence designated in support.

1. The Court ignored undisputed evidence of trespass

The Court's Opinion rejects the Himsels and Lannons' trespass claim as "artful pleading" and "purportedly based on the unlawful physical intrusion of the CAFO's noxious emissions" and allegations that those emissions "are chemical compounds that result in a physical, space-filling invasion into their homes." (Opinion ¶28) (emphasis added, internal quotation removed). But the Himsels and Lannons did far more "allege" a physical invasion, they provided credible, expert testimony and scientific evidence of that fact.

Specifically, the Himsels and Lannons designated the affidavit of Dr. Mark Chernaik who has a Ph.D. in biochemistry and environmental toxicology from John Hopkins University. (App. VI: 173-195) In his affidavit, Dr. Chernaik details the results of air testing he conducted at the Himsels and Lannons' homes which confirmed dangerous levels of ammonia from the CAFO at an order of magnitude above ordinary outdoor levels, and emissions of volatile fatty acids at levels 28 times the odor threshold. (App. VI:181-189) Consistent with the scientific literature detailed in Dr. Chernaik's affidavit and the designated affidavit of Charles McGinley, P.E. (App. VI:160-168), exposure to these noxious chemicals burn the Himsels and Lannons' noses, throats and eyes making it difficult for them to live, eat and sleep (App. VII:147, 152, 170), and is well known to threaten their health. (App. VI:162-164) Moreover, Dr. Chernaik unequivocally confirmed that, "although gaseous and therefore invisible to the naked eye, . . . volatile fatty acids and ammonia found on the Himsels' and Lannons' properties . . . are *space-filling* compounds." (App. VI:192-193) The Court cannot ignore this material evidence.

In Indiana, a trespass can take the form of invasion by noxious materials. *Lever Brothers*, 655 N.E.2d at 582. While the invasion must be physical, if the evidence conflicts as to whether the invasion is physical, the question is one for the jury. To illustrate, in *Indiana Michigan Power*, this Court upheld the denial of summary judgment on trespass by electromagnetic field because "the legal and the scientific communities are currently divided over the precise nature of EMF and its ability to create a trespass." 717 N.E.2d at 228. There is no reason for a different result here.

The CAFO Operators did not designate any evidence indicating that the noxious pollutants from their CAFO are not physical. Nor did they suggest any material distinction between the CAFO's emissions and the invisible, intangible virus particles in *TDM Farms v. Wilhoite Family Farm, LLC*, 969 N.E.2d 97, 109 (Ind. Ct. App. 2012), or the innocuous seeds of wetland plants in *B&B, LLC v. Lake Erie Land Co.*, 943 N.E.2d 917, 927 (Ind. Ct. App. 2011), both of which were sufficient to support a trespass. Indeed, the CAFO Operators acknowledge that their argument—that noxious CAFO emissions are not physical—is contrary to the "modern understanding of science." (Appellees' Br. 33-34) The Court erred in affirming summary judgment on trespass.

2. The Court ignored material evidence of negligence

The Himsels and Lannons brought a distinct negligence claim (App. III:006-008) that, as discussed above, is not limited by the RTFA. In support, they presented extensive expert testimony on the applicable standard of care, specific breaches of that standard, and of the harm that was foreseeably and proximately caused by those breaches. (*See* Appellants' Br. at 33-38 for a detailed discussion of the evidence designated in support of each element of negligence.) They also identified multiple reasonable and well-supported inferences of negligence based on the designated evidence including *inter alia* that the CAFO Operators violated the Emergency Planning and Community Right-to-Know Act, a federal statute intended to prevent harm from the effects of

ammonia releases—deemed "extremely hazardous" under EPRCA. (Appellants' Br. at 37) Notably, these inferences—which must be construed in the Himsels and Lannons' favor—do not depend on a "negligent siting" theory, but relate to CAFO's day-to-day operations. This evidence precludes summary judgment on negligence. *Harradon*, 913 N.E.2d at 300 ("summary judgment is rarely appropriate [in negligence cases] because such cases are particularly fact sensitive and are governed by a standard of the objective reasonable person—one best applied by a jury after hearing all of the evidence").

E. The RTFA Does Not Protect an Agricultural Operation that Becomes a Nuisance After its First Year of Operation, if it Would Have Been a Nuisance During that First Year

Subsection (d) of the RTFA is unambiguous. It states that once an agricultural operation has been in continuous operation for more than one year, it is protected by the RTFA only if it would not have been a nuisance during that first year. Ind. Code § 32-30-6-9(d). The Court's Opinion impermissibly stretches this straightforward language to mean that as long as farming "generally" would not have been a nuisance "in or around" the first year, then the at-issue operation is protected. (Opinion at ¶¶20, 24-25) In other words, the Court's Opinion writes the one-year of continuous operation requirement out of the statute, and holds that because a wheat field would not have been a nuisance in the first year, the RTFA protects all possible agricultural operations after that first year.

The Seventh Circuit's decision in *Dalzell v. Country View Family Farms, LLC*, 517 F. App'x 518 (7th Cir. 2013), illustrates why the Court's reading of subsection (d) is wrong. In that case, the plaintiff argued that the RTFA did not apply to protect a 2,800 hog CAFO because it was built in 2007 after the plaintiff had already moved to the area. *Id.* at 518. In rejecting that argument, the court explained, "the land [where the CAFO sits] appears to have been in agricultural use since

1956, long before plaintiffs bought their parcels, if not earlier [and] . . . [p]laintiffs do not contend that the [the CAFO] would have been a nuisance in the 1950s." *Id.* at 519.

Breaking with *Dalzell*, the Court here nevertheless concludes that requiring a defendant to establish that his nuisance-causing operation would not have been a nuisance in year one, "would eviscerate the protections of the RTFA." (Opinion at ¶25). But, as discussed above, such policy concerns are out of place when a statute is clear, *Miller v. Town Bd. of Sellersburg*, 88 N.E.3d at 218, and in derogation of the common law requiring strict construction. *Smith,* 61 N.E.3d at 1274.

And, even though the CAFO Operators' have the summary judgment burden to *negate* the Himsels and Lannons' claims, they made no attempt to establish when their operation began, what type of operation it was, and whether it would have been a nuisance to then-existing land uses. Instead they and their *amici* argued that requiring such evidence would "chart a course for agricultural extinction." (Pork Producers' Br. at 12) Such a prediction is wildly overblown considering how easily the Himsels and Lannons were able to provide this evidence.

Specifically, they established that the Himsels' farmhouse has stood since 1926 (App. VIII: 152) *before* crop farming began at the CAFO site in 1941. (App. III:72, 191) They located historical maps from 1904 showing a schoolhouse approximately a quarter-mile away. (App. VIII:159) They provided evidence that their properties and the CAFO property had always been zoned rural-*residential* where CAFOs were prohibited—and that the rural-residential zoning designation continued when Hendricks County updated its zoning ordinance in 2008. (App. VIII:23, 52) They established that none of the surrounding farms produced noxious emissions comparable to those later emitted by the CAFO. (App. VII:191-192, VIII:10). And they demonstrated that the *only* thing that changed "in the vicinity" was the CAFO site itself when it was rezoned in 2013 from "AGR-Agriculture Residential" to "AGI-Agriculture Intense." (App.

VIII:31) This rezoning allowed an industrial-scale CAFO in an area of established rural-*residential* uses, where CAFOs are *still* forbidden except at the CAFO site. (App. VIII:22-23) Construed in the Himsels and Lannons' favor, this evidence establishes that the CAFO, had it been built in 1941, would have been nuisance to Himsel family living in the Himsel's home, just as it is now and is, therefore, not entitled to RTFA protection.

Finally, the Court's construction that the RTFA does not apply because the Himsels somehow "came to the nuisance" once they retired from farming in 2000 and decided to live out their retirement in Richard Himsel's life-long home (Opinion at ¶¶20-24) is particularly unjust. Telling farmers that they lose their property rights upon retirement unless they pack up and move, cannot be what the Legislature had in mind when it sought to protect Indiana's farmers with the RTFA.

IV. CONCLUSION

For all the foregoing reasons, this Court erred in affirming summary judgment in this case. Accordingly, the Court should grant this Petition for Rehearing and correct its Opinion.

Respectfully submitted,

/s/ Kim E. Ferraro
Kim E. Ferraro, Attorney No. 27102-64
Hoosier Environmental Council
541 S. Lake St.
Gary, Indiana 46403
Phone: 219/464-0104
Email: kferraro@hecweb.org

Attorney for the Plaintiff-Appellants
MARTIN RICHARD HIMSEL
JANET HIMSEL
ROBERT LANNON
SUSAN LANNON

WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F), I verify that this Appellants' Petition for Rehearing contains no more than 4,200 words, excluding items listed in Appellate Rule 44(C).

/s/ Kim E. Ferraro
Kim E. Ferraro

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Petition for Rehearing was delivered this 22nd day of May, 2019, to the following persons, via the Court's E-Filing System:

Christopher J. Braun
Jonathan P. Emenhiser
Justin A. Allen
Plews, Shadley, Racher & Braun LLP
1346 North Delaware Street
Indianapolis, Indiana 46202

Patricia McMath
Office of Indiana Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770

Kyle A. Lansberry
Brandon W. Ehrie
Lewis Wagner, LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202-6150

Martha R. Lehman
Smith Amundsen, LLC
Capital Center, South Tower
201 North Illinois Street, Suite 1400
Indianapolis, Indiana 46204

Todd J. Janzen
Brianna J. Schroeder
Janzen Agricultural Law, LLC
8425 Keystone Crossing, Suite 111
Indianapolis, Indiana 46240

Daniel P. McInerny
Andrew M. McNeil
Bose McKinney & Evans, LLP
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204

Gregory E. Steuerwald
Graham T. Youngs
Steuerwald, Hannon & Witham, LLP
106 North Washington Street
P.O. Box 503
Danville, Indiana 46122

/s/ Kim E. Ferraro
Kim E. Ferraro