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IN THE
INDIANA COURT OF APPEALS

Case No. 18A-PL-00645

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

BRIEF OF THE HUMANE SOCIETY OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT-PLAINTIFFS' PETITION FOR REHEARING

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I. INTEREST OF THE *AMICUS CURIAE*

The Humane Society of the United States ("HSUS"), a non-profit organization based in Washington, D.C., is the nation's largest animal protection organization. The HSUS is committed to protecting and enhancing the lives of all animals, and to fostering the humane treatment of farm animals, including those held in intense confinement at concentrated animal feeding operations ("CAFOs"). The HSUS endeavors to protect farm animals through litigation, investigation, legislation, advocacy, and education, which it does on the federal and state level, including in Indiana. The HSUS works with small farmers and communities to improve farm animal management in order to promote animal welfare and public safety. Measures, such as Indiana's Right To Farm Act, as interpreted by this Court, impede these efforts.

II. SUMMARY OF ARGUMENT

The Court erred in dismissing *all* of Plaintiffs' tort claims. Plaintiffs sought relief on several counts, including nuisance, negligence, and trespass. The Court misconstrued Indiana's Right To Farm Act ("RTFA," Ind. Code § 32-30-6-9) well beyond its plain terms and intended scope. The Court found that the law provided a statutory affirmative defense to each of these torts, absent any support for that conclusion in the law's unambiguous text. The Court also erred by deeming Plaintiffs' well-pled trespass and negligence claims as simply "artful pleading" that "repackaged" their nuisance claim as negligence and trespass claims. Or. ¶¶ 28, 45. Further, the Court wrongfully disregarded material evidence that supported these claims. Plaintiffs submitted undisputed evidence that demonstrated statutory violations to support their theory of negligence and evidence of air testing that showed physical invasions on their land in support of their trespass claim. In finding that the RTFA overrides Plaintiffs' trespass claim and by ignoring

evidence that Defendants' farm is causing a physical invasion on Plaintiffs' property, the Court has effected an unconstitutional taking for which Plaintiffs must be reasonably compensated.

III. ARGUMENT

A. The RTFA Does Not Create a Defense to Negligence or Trespass.

Indiana's legislature designed the RTFA to limit the liability of agricultural or industrial operations from nuisance actions if certain conditions are met. I.C. § 32-30-6-9. The law protects an agricultural or industrial operation from no other tort action. *Id.*; *see also ESPN, Inc. v. University of Notre Dame Police Dept.*, 62 N.E.3d 1192, 1195 (Ind. 2016) (statutory interpretation involves being "mindful of both what it 'does say' and what it 'does not say.'"). The Court erred by construing a clear and unambiguous statute beyond its meaning and the legislature's intent.

"[C]anons of statutory construction . . . are only relevant once it is established that the statute in question is ambiguous." *State v. Thakar*, 82 N.E.3d 257, 260 (Ind. 2017) (citing *Rogers v. Martin*, 63 N.E.3d 316, 327 (Ind. 2016)). Here, the plain text of the RTFA contains no such ambiguity, as the Court acknowledges, and clearly encompasses the legislature's "intent to protect the rights of farmers by limiting the circumstances under which farmers are subject to nuisance actions." Or. ¶ 44. The Court's statutory construction analysis should have ended there. *See Thakar*, 82 N.E.3d at 260 (quoting *Rogers v. Martin*, 63 N.E.3d at 327) ("'We thus begin—and end—our analysis' with that plain text."). The Court, however, turned these canons upside down when it determined that the RTFA is clear and unambiguous but then proceeded to read in language to the statute that the Court recognized is unambiguously clear as written. Or. ¶¶ 27-28, 44. The Court has no authority to fill in non-existent gaps in clear statutory text.

Courts should not read into the plain terms of a statute that clearly only creates an affirmative defense to one cause of action (nuisance) a meaning that abrogates other rights. *Mooney v. Anonymous M.D. 4*, 991 N.E.2d 565, 580 (Ind. Ct. App. 2013) ("Statutory procedures [that] are in derogation of common law . . . are to be strictly construed against limiting a claimant's right to bring suit."). Instead, statutes that limit applications of the common law must be strictly construed. *Esserman v. Indiana Department of Environmental Management*, 84 N.E.3d 1185, 1191 (Ind. 2017). Indeed, "when the legislature enacts a statute in derogation of common law, we presume that the legislature is aware of the common law, and does not intend to make any change beyond what is declared in express terms or by unmistakable implication." *Mooney*, 991 N.E.2d at 580 (Ind. App. 2013).

If the legislature intended the RTFA to restrict other tort claims it would have stated as such, as other state legislatures have done. *See, e.g.*, *Aana v. Pioneer Hi-Bred Intern., Inc.*, 2014 WL 4956489, 2 (D. Hawaii 2014); Haw. Rev. Stat. § 165–2 ("'Nuisance' as used in this chapter, includes all claims that meet the requirements of this definition regardless of whether a complainant designates such claims as brought in nuisance, negligence, trespass, or any other area of law or equity."); OR ST § 30.932 (Oregon's RTFA defining "'nuisance' or 'trespass'"); *compare with* I.C. § 32-30-6-6 (defining "Nuisance" as "[w]hatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property.").

The Court erred in relying on a readily distinguishable Texas court opinion interpreting Texas's RTFA under Texas' nuisance jurisprudence. Or. ¶ 28. First, Texas' RTFA does not define nuisance. *Ehler v. LVDVD, L.C.*, 319 S.W.3d 817, 822 (Tex. App. El Paso, 2010) (noting the Texas "Right to Farm Act does not define 'nuisance action.'"). Second, "Texas courts have

continued to broadly define the term." *Id*. at 823. Based on Texas caselaw's broad interpretation of "nuisance," the Texas court "conclude[d] that a trespass action is included in the [statutorily undefined] phrase 'nuisance action.'" *Id*.

Indiana's RTFA does define nuisance, and its definition aligns with Indiana's common law definition of nuisance, and nuisance only. Under Indiana law, "a nuisance is an activity that generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed at least without compensation to those that are harmed." *City of Gary v. Smith & Wesson Corp*., 801 N.E.2d 1222, 1231 (Ind. 2003) (citing *Owen v. Phillips*, 73 Ind. 284 (1881)). "The essence of a private nuisance is the use of property to the detriment of the use and enjoyment of another's property." *Lever Bros. Co. v. Langdoc,* 655 N.E.2d 577, 584 n.3 (Ind. Ct. App. 1995) (citing *Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992)).

Negligence fundamentally differs from nuisance, something the Court was required to assume the legislature understood when it used both terms in the RTFA. "To recover on a theory of negligence, a plaintiff must establish three elements: (1) a duty on the part of the defendant to conform his conduct to a standard of care arising from his relationship with the plaintiff; (2) a failure of the defendant to conform his conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff proximately caused by the breach." *Lever Bros.,* 655 N.E.2d at 580 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991), reh. denied). Moreover, the RTFA distinguishes the two torts by carving out an exception to those farms that create a *nuisance* by operating *negligently*. I.C. § 32-30-6-9(a). Negligent actions are therefore distinct from nuisance causing acts. The RTFA's "negligent operation" exemption thereby underscores the legislature's intent to limit the RTFA to nuisance actions only, and not impede

any other causes of action like negligence. Indeed, when the legislature uses two different terms in the same act it intends for those words to mean two different things. *In re Adoption of B.C.H.*, 22 N.E.3d 580, 585 (Ind. 2014) ("We presume the legislature deliberately used a different term because it intended to communicate a different meaning.").

The Court's reading of the statute makes the RTFA's "negligent operation" exemption meaningless. Under the Court's ruling, the word "nuisance" is read to subsume negligence (as well as trespass). Or. ¶¶ 27-8. Applying the Court's approach results in re-writing the RTFA's negligence exceptive as follows:

> (a) This section does not apply if [negligence,] nuisance[, or trespass] results from the negligent[, noisome, or trespassory] operation of an agricultural … operation….

I.C. § 32-30-6-9. This reading renders the exemption illogically circular, creating an exception to the RTFA defense if "negligence" results from the farm's "negligent operation." Accepting this Court's re-write requires improperly assuming that the legislature intended to exempt farms from a defense to negligence when the farm is operating negligently—i.e., when the negligence is caused by negligence. *ESPN,* 62 N.E.3d at 1196 (A court does "not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result.") (internal quotations omitted).

Trespass also differs from nuisance. "In Indiana, trespass is defined as an unlawful interference with one's person, property, or rights. . . . Any unauthorized intrusion or invasion of private premises or land of another." *TDM Farms, Inc. of North Carolina v. Wilhoite Family Farm, LLC*, 969 N.E.2d 97, 109 (Ind. Ct. App. 2012) (internal quotes emitted). "An action for trespass requires the plaintiff to prove that he was in possession of the land and that the defendant entered the land without right." *Lever Bros.*, 655 N.E.2d at 581–82.

> As distinguished from trespass, which is an actionable invasion of interests in the exclusive possession of land, a private nuisance is an actionable invasion of interests in the use and enjoyment of land. Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances . . ..

Bormann v. Board of Sup'rs In and For Kossuth County, 584 N.W.2d 309, 315 (Iowa 1998) (quoting *Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 439 (Iowa 1942)). Thus, nuisance and trespass are distinct causes of action, often brought at the same time when—as here—a physical invasion interferes with the property rights of both exclusive possession (trespass) and use and enjoyment (nuisance). *See, e.g., B&B, LLC, v. Lake Erie Land Co.,* 943 N.E.2d 917 (Ind. Ct. App. 2011); *Lever Bros.,* 655 N.E.2d at 581*; TDM Farms,* 969 N.E.2d at 109.

While certain elements, such as having a right or land possession, and factual allegations, such as there being an interference, may overlap, the causes of action are not based on identical facts or elements. Nuisance, negligence, and trespass are separate and distinct claims that are available to Plaintiffs. Indeed, Indiana courts have grappled with these separate claims that are often brought together in a legal action. This Court, for instance, examined them in a case asserting claims of negligence, nuisance, and trespass arising from disposal of chemical contaminants into soil. *KB Home Indiana Inc. v. Rockville TBD Corp*., 928 N.E.2d 297, 299 (Ind. Ct. App. 2010). The court did not consider the claims duplicative or an attempt at clever pleading but examined them separately to determine if they failed or survived on their own merit. *Id.* at 302-09. Similarly, the Indiana Supreme Court examined a case pleading common law claims of negligence, trespass, nuisance, and a statutory claim in connection with a manufacturing operation. *Cooper Industries, LLC v. City of South Bend*, 899 N.E.2d 1274, 1277-78 (Ind. 2009). In another Indiana Court of Appeals case, a plant operation was found "liable for negligence, negligent trespass, and nuisance." *Lever Bros*, 655 N.E.2d at 580.

These cases demonstrate how the common law claims of trespass, nuisance, and negligence are distinct claims and have been so since their common law origins. The Indiana legislature would have clearly limited liability for each separate tort if it had intended to restrict the application of these claims against agricultural operations. *Mooney*, 991 N.E.2d at 580 ("when the legislature enacts a statute in derogation of common law, we presume that the legislature is aware of the common law, and does not intend to make any change beyond what is declared in express terms or by unmistakable implication.") (emphasis added). The legislature, however, did not. It merely restricted the ability to sustain a nuisance action against certain businesses when those business are not operating negligently or would have otherwise been a nuisance. I.C. § 32-30-6-9. An agricultural operation, barring exemption, may be protected from nuisance complaints under the RTFA, but that operation does not also have *carte blanche* to engage in trespass or negligence. The RTFA, if applicable, does not interfere with Plaintiffs' ability to maintain suit against a farm under any theory other than nuisance. *See, e.g., City of Benton v. Adrian*, 748 P.2d 679, 685 (Wash. Ct. App. 1988) (permitting a claim of trespass as an alternative to a nuisance claim).

B. The Court Wrongfully Concluded That There Is No Evidence That Indicates Negligence or Trespass.

The Court erred in determining that "[t]he designated evidence provides no indication that the CAFO has been negligently operated," and that despite evidence of "physical, space-filling invasion into their homes" the RTFA precludes trespass. Or. ¶¶ 27, 28. In doing so, the Court ignored undisputed evidence submitted by Plaintiffs and misinterpreted evidence submitted by Defendants.

The Court mistakenly gave significant weight to Defendants' evidence of having permits in support of their argument that these permits inoculated them from tort liability. *See, e.g.*, Or. ¶¶

7, 26. The Court determined that being permitted and not being found in violation of those permits indicates that the CAFO was not negligently operated. Or. ¶¶ 8, 27. But, this has no more merit than an argument that holding a valid driver's license somehow shields a reckless driver from a wrongful death suit. Indeed, "an activity can be lawful and still be conducted in an unreasonable manner so as to constitute a nuisance." *City of Gary*, 801 N.E.2d at 1234*; NAACP v. AcuSport, Inc.*, 271 F.Supp.2d 435, 482 (E.D.N.Y.2003) (pointing out, "[t]he fact that conduct is otherwise lawful is no defense...."); *see also Lever Bros.*, 655 N.E.2d at 581 (quoting *Pitcairn v. Whiteside,* 34 N.R.2d 943, 946 (Ind. Ct. App. 1941), trans. denied) ("One may not always conduct a lawful business on his own premises as he pleases").

However, permit and other regulatory requirements can prove useful in other ways. For instance, a jury may infer negligence from statutory and regulatory violations, even when those violations are not a proximate cause of the plaintiff's injury. *See, e.g., Lachenman v. Stice*, 838 N.E.2d 451, 463 (Ind. Ct. App. 2005), trans. denied (finding that even as to homeowner association guidelines, "evidence regarding *any violation* of the guidelines could be submitted to the trier of fact" to show negligence) (emphasis added); *see also Lever Bros.*, 655 N.E.2d at 580 ("The unexcused or unjustified violation of a duty proscribed by a statute or ordinance constitutes negligence per se if the statute is intended to protect the class of persons in which the plaintiff is included and to protect against the risk of type of harm which occurred as a result of its violation."). Accordingly, a zoning violation may be the basis for a claim of nuisance *per se*, but it does not follow that if a farm complies with zoning, it is not a nuisance, operating negligently or causing trespassing. *See Trickett v. Ochs*, 176 Vt. 89, 95 (Vt. 2003) ("Compliance with the zoning ordinance may be a factor in determining whether defendants' conduct was a

nuisance, but it is not determinative."). Yet, the Court failed to consider evidence of negligence, such as where Defendant exceeded statutory and regulatory requirements. *See, e.g.*, Or. ¶ 27.

Such evidence includes Defendants' failure to report under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 et. seq. ("EPCRA"). At relevant times, the CAFO was subject to the reporting requirements of the EPCRA, which mandates that facilities that release more than a threshold quantity of an "extremely hazardous substance" report that release to local emergency response agencies, and those reports must be made available to the public. 42 U.S.C. §§ 11004, 11044(a). In 2009, the National Pork Producers Council ("NPPC") sent out notice to its members, including Defendants, to report under EPRCA. App. III:004-5, VIII 199-200. Defendants failed to report their emissions as required by EPCRA. App. III:143.

EPCRA is a prophylactic and informational statute which aims to make information regarding release of toxic and hazardous substances available to local and state federal agencies that exist to protect and promote public and environmental health. *In re Cascades Plastics, Inc.*, Doc. No. EPCRA 07-2009-0002, 2009 WL 2943875, 2 (EPA ALJ 2009) ("The purpose of EPCRA is to help local communities protect public health, safety, and the environment from chemical hazards"). EPCRA violations can not only result in massive civil liability (fines of up to $37,500 per day), they can also result in criminal convictions and prison sentences. 42 U.S.C. §§ 9609(c), 9659; 40 C.F.R. §§ 19.1-4. Thus, undisputed evidence of emission releases in amounts that violate EPCRA is patently material evidence. It establishes that when it comes to practices involving their emissions of hazardous substances Defendants were not acting reasonably because they were not even operating lawfully.

Defendants' practice of ignoring its duty to comply with EPCRA made it likely to increase emissions. This is because, according to the U.S. EPA, requiring reporting serves as a check on

hazardous emissions, increasing the likelihood that a facility will take voluntary steps to reduce its emissions below the reporting threshold or eliminate its emissions. EPA, 1 Regulatory Impact Analysis of Reportable Quantity Adjustments Under Sections 102 and 103 of the Comprehensive Environmental Response, Compensation, and Liability Act, at 34 (1985). Thus, evidence of years of noncompliance with EPCRA is material and highly relevant to Plaintiffs' negligence claims. Accordingly, the Court erred in granting summary judgment despite this undisputed material evidence supporting negligence. *See* Appellant's Br. at 38.

Additionally, the livestock industry developed best management practices ("BMPs") for controlling air emission impacts on neighbors that Defendants failed to follow. App. III:63, 79-80. Air testing on Plaintiffs' properties showed unhealthy levels of ammonia and volatile fatty acids from the CAFO. App. VI:174-193. An expert Ph.D. in biochemistry confirmed that these emissions are physical, space-filling chemical compounds. App. VI:192-193. The air testing and expert testimony of Dr. Chernaik that the odorous chemical compounds are space-filling and causing Plaintiffs' harm is evidence of a physical invasion, and, at minimum, create genuine issues of material fact as to trespass. *Id*. Defendants' EPCRA violations and failure to follow industry BMPs are further evidence of defendants' negligence, as these omissions show Defendants failed to exercise reasonable care to avoid causing foreseeable injuries to Plaintiffs. Accordingly, the Court should not have granted summary judgment on Plaintiffs' negligence or trespass claims. *See Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (stating when summary judgment is appropriate).

C. Denying Plaintiffs' Rights Against Trespass under the RTFA Creates a Taking.

The Fifth Amendment of the Constitution provides that private property may not be taken for public use without just compensation. U.S. Const. 5th Am. This prohibition applies to the States

through the Fourteenth Amendment. U.S. Const. 14th Am. Similarly, Article 1, Section 21 of the Constitution of the State of Indiana provides that "[n]o person's property shall be taken by law, without just compensation." Ind. Const. Art. I Sec.21. The federal and state Takings Clauses are "textually indistinguishable" and are construed identically. *Redington v. State*, 992 N.E.2d 823, 835 (Ind. Ct. App. 2013). A government-authorized trespass can be a taking. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 424 (1982).

In *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'l Protection*, a plurality of the U.S. Supreme Court concluded that the Takings Clause prohibits the judiciary from declaring that "what was once an established right of private property no longer exists" unless the property owner in question receives just compensation. 560 U.S. 702, 715 (2010) ("If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.") (emphasis in original). Plaintiffs have an established right of private property in that they have a right to protect their property against trespass. *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc*., 820 N.E.2d 158, 166 (Ind. Ct. App. 2005) (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980)) ("The United States Supreme Court has stated that 'one of the essential sticks in the bundle of property rights is the right to exclude others.'"); *contra* Or. ¶ 36 ("Plaintiffs have no property interest in a particular cause of action or remedy").

Under the Court's decision, the RTFA operates to force Plaintiffs to tolerate trespass on their property, including the invasion of space-filling, odorous chemicals on their land. Dr. Chernaik submitted evidence that these chemical compounds are space-filling, *i.e*., trespassory. App. VI:192-193. Thus, by finding the RTFA precludes Plaintiffs from enforcing their right to be free from trespass, the Court has found that the RTFA strips Plaintiffs of a once established right of

private property. *Stop the Beach Renourishment, Inc.,* 560 U.S. at 715; *Loretto*, 458 U.S. at 435 ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). As such, either the legislature, through the RTFA, or the Court by its interpretation of the RTFA, has taken Plaintiffs' property without just compensation in violation of federal and state Takings Clauses.

IV. CONCLUSION

For the forgoing reasons, the HSUS urges this Court to grant Appellants' Petition for Rehearing.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F), I verify that this Brief of The Humane Society of the United States as Amicus Curiae in Support of Appellant-Plaintiffs' Petition for Rehearing contains no more than 4,200 words, excluding items listed in Appellate Rule 44(C).

/s/ Nicholas C. Huang
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing *Amicus Curiae* Brief in Support of Appellant-Plaintiffs' Petition for Rehearing was delivered this 22nd_ day of May, 2019, to the following persons, via the Court's E-Filing System:

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