IN THE
INDIANA SUPREME COURT

No._____

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 TO TRANSFER

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

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 the court of appeals, impede these efforts.

II. SUMMARY OF ARGUMENT

The appeals court erred in dismissing *all* of Plaintiffs' tort claims. Plaintiffs sought relief on several counts, including nuisance, negligence, and trespass, against Defendants who operate 4/9 Livestock, a CAFO that raises 8,000 pigs in intensive confinement. App. VII:081. These pigs produce "millions of gallons of waste" causing "intolerable emissions." *Id*. Indeed, "Citizen Air Monitoring: Daily Observation Reports" describing perceived conditions of this CAFO report foul, nauseating odors of "toxic manure" and "ammonia" that burn the eyes and mouth and cause agonizing headaches. App. XII:0018-52; XII:115-16. Plaintiffs testified that these problems made it such that they do not go outside to sit on their patios or to garden and friends and family would no longer visit. *See, e.g*., App. VI:047, 051, 071, 073, 076, 084, 098. These harms, and others similarly suffered by neighbors of largescale farms throughout Indiana, will continue unchecked should the lower court's decision stand.

The court below found that Indiana's Right To Farm Act ("RTFA," Ind. Code § 32-30-6-9) provided a statutory affirmative defense to each tort, absent any support for that conclusion in the law's unambiguous text. In doing so, the court misconstrued the RTFA well beyond its plain terms and intended scope, misapplied doctrine, and mischaracterized Plaintiffs' well-pled trespass and negligence claims as simply "artful pleading" that "repackaged" their nuisance claim. Op. ¶¶ 28, 45. Further, the lower court wrongfully disregarded material evidence that reasonable persons could determine 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.

The lower court's errors not only deny Plaintiffs the right to move forward in this case, but also implicate significant concerns with respect to the legal system. In trying to ensure that Plaintiffs stick within the bounds of a particular cause of action, the lower court restricted access to other causes of action unnecessarily and inconsistent with what the legislature specified. The Supreme Court should intervene, not just because the court below got the law as applied to this case wrong, but also to protect against judicial invasion of the province of the legislature, which established the limitations to this statutory defense. Respectfully, this Court should grant Plaintiffs' petition to transfer jurisdiction over this matter because the court of appeals "significantly departed from accepted law or practice." Ind. R. App. P. 57.

III. ARGUMENT

A. The Court of Appeals Improperly Applied the RTFA to Appellants' Properly Pled Separate and Distinct Tort Claims: Negligence, Trespass, and Nuisance.

The court below made several assertions that Plaintiffs attempted to "artfully plead"[1] around the RTFA's defense against nuisance claims by also bringing causes of action for trespass and negligence. Op. ¶ ¶ 27-28 and n. 8. The court of appeals observed that "[d]espite artful pleading, . . . application of the RTFA does not turn on labels." Op. ¶ 28. But, "trespass," "negligence," and "nuisance" are not mere labels, they are long established causes of action that Plaintiffs have

[1] While it is likely the appeals court was using the phrase "artful pleading" colloquially, it is worth noting that the "artful pleading doctrine" involves failing to plead a necessary federal claim to defeat removal, which is not the scenario we have here. *See gh, LLC v. Curtin*, 422 F.Supp.2d 994, 996 (N.D.Ind.,2006); *Nat'l Can Corp. v. Jovanovich*, 503 N.E.2d 1224, 1230 n.10 (Ind.App. 3 Dist.,1987) (rejected on other grounds in *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1273 (Ind.,1994)) (citing *Mitchell v. Pepsi Cola*, 772 F.2d 342, 344 (7th Cir.1985)) ("A plaintiff may not avoid federal jurisdiction by 'artfully pleading' his claim as a state law claim when such claim is in substance a federal question."). As such, the appeals court's "artful pleading" determination may have been the result of a misapplication of doctrine. *See Nat'l Can Corp. v. Jovanovich*, 503 N.E.2d at 1230 n.10 (Ind.App. 3 Dist.,1987) ("We believe that [the] complaint does not present a federal question. Hence, the 'artful pleading' doctrine does not apply to the present case").

a right to invoke to protect themselves against harmful actors like 4/9 Livestock. By improperly framing Plaintiffs' allegations, the court of appeals effectively and improperly found that the RFTA creates an absolute defense for all three torts. The appeals court's mistaken belief that Plaintiffs' negligence and trespass claims were really their nuisance claim "repackaged" to avoid the RTFA is simply another way of stating the RTFA creates a defense to their negligence, trespass, and nuisance claims. Op. ¶¶ 28 ("Plaintiffs' trespass claim is barred by the RTFA"), 45. The effect of the appeals court's holding remains the same regardless of what label the court uses to explain how the RTFA foreclosures these causes of action.

The lower court's "artful pleading" rationale is dangerous because it means that any statutory defense against one specific cause of action may be extended to a defense against other causes of action, especially ones that are based on similar facts. Importantly the court's approach has no limiting principle; it could be applied without constraint to broaden any statutory defense.

This will lead to absurd consequences. Assume, for instance, there is a statutory defense against trademark infringement available to persons using another's trademark for educational purposes. Suppose an employee of the company, Rhodes Widgets™, is also an adjunct professor of entrepreneurship at a local community college and that employee utilizes the company trademark for her class in a project to launch a similar company, also called Rhodes Widgets. The launch of such project company with the same trademarked name would create confusion for consumers and would otherwise be a trademark infringement but for the statutory defense. Fortunately for the company, the employee signed a contract that states an employee cannot appropriate the company's private property for any use. It may be that the statute providing immunity for trademark infringement shields liability from a suit under that theory, but the employer could pursue a case against the employee for breach of contract. The appeals court's

approach could reframe this as a creative manipulation of allegations to get around the relevant statutory defense. This type of thinking severely undercuts the company's legal options and creates sweeping application of a textually limited statute.

Thinking of the "artful pleading" rationale another way. Imagine trespass, negligence, and nuisance simply had different statute of limitations: nuisance has a two-year limit, negligence three, and trespass five. *But see* Ind. Code § 34-11-2-7(3) (The general six-year statute of limitation applying to claims for negligence, trespass, and nuisance). Hypothetically, neighbors experience a negligently operated CAFO that spills manure onto the neighbor's property causing damage and interfering with their use and enjoyment of land. After these neighbors had been suffering harm for four years, they seek legal advice and learn that they have a cause of action for trespass. The appeals court, applying the same logic found in the order below, could toss the suit by invoking its unbounded "artfully pleading" standard, reasoning that plaintiffs had pled around their "true" or "real" cause of action's (nuisance) statute of limitation. The court would, in effect, be re-writing the statute of limitations for trespass actions, as was designated by the legislature in the plain language of the relevant statute. This approach is as unjust as it is unprecedented since trespass is a viable cause of action, distinct from negligence or nuisance, and is a vital property right of property owners.

Fundamentally, Indiana's legislature designed the RTFA to limit the liability of agricultural operations from nuisance actions if certain conditions are met. *See* Ind. Code § 32-30-6-9. The law protects an agricultural operation from no other tort action. *Id*. As such, the RTFA immunity defense cannot be invoked to defend against claims of trespass or negligence as it does not provide a defense to any other claim but nuisance. *Id*. While certain elements of these three torts, 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.

Indeed, Indiana courts have grappled with these separate claims that are often brought together in a legal action. The court of appeals, for instance, examined them in a case asserting claims of negligence, nuisance, and trespass arising from disposal of chemical contaminants into soil. In *KB Home Indiana Inc. v. Rockville TBD Corp*., 928 N.E.2d 297, 299 (Ind. Ct. App. 2010), the plaintiff claimed that the discharge of pollutants onto real property created a nuisance, trespass, and was negligent because the defendant's chemical contaminates "'leached' into the surrounding environment." *Id*. at 300. 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, this 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). The City's trespass and nuisance claims against Cooper Industries arose out of environmental damage done to a site where automobiles were once manufactured. *Id*. These causes of action were viewed as separate even though similar activity underlined each claim. *Id*. In another court of appeals case, a plant operation was found "liable for negligence, negligent trespass, and nuisance. . .." *Lever Bros Co. v. Langdoc*, 655 N.E.2d 577, 580 (Ind. Ct. App. 1995). Each of the claims in *Lever Bros* stemmed from the discharge of blended oil in excess of permitted limits which clogged up pipes and after a heavy rainfall and caused basements to flood and resulted in foul odor. *Id.* at 579-80.

These cases demonstrate how the common law claims of trespass, nuisance, and negligence are distinct claims (despite much overlap in the facts that establish their elements) 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 v. Anonymous M.D. 4*, 991 N.E.2d 565, 580 (Ind. Ct. App. 2013) ("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 businesses are not operating negligently or would have otherwise been a nuisance. Ind. Code § 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.

If the legislature intended the RTFA to provide immunity for 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* Ind. Code § 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.").

Instead, the legislature wrote the statute explicitly to mean that when a nuisance is a result of negligence, the RTFA provides no protection. Ind. Code § 32-30-6-9(a). Indeed, the RTFA distinguishes the two torts by carving out an exception for those farms that create a *nuisance* by

operating *negligently*. *Id*. The RTFA's "negligent operation" exemption underscores the legislature's intent to limit the RTFA to nuisance actions only, and not impede any other causes of action, like negligence, because the legislature's use of two different terms in the same act indicates those words must mean 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.").

Instead, the lower court's reading of the RTFA's "negligent operation" exemption makes it meaningless. Under this reading, the word "nuisance" is read to subsume negligence (as well as trespass). Op. ¶¶ 27-8. Applying the appeals 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….

Ind. Code § 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 the 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. *See ESPN, Inc. v. University of Notre Dame Police Dept.*, 62 N.E.3d 1192, 1196 (Ind. 2016) (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). Clearly, however, "nuisance" and "negligent operation" are more meaningful terms and are not just mere "labels."

The legislature also wrote the RTFA to mean that when a nuisance causing act also creates a trespass—an unauthorized physical invasion on another's property—immunity for that trespass

does not exist under the RTFA. Ind. Code § 32-30-6-9. Trespass and nuisance are distinct claims and, again, it should be assumed the legislature understood that when it drafted the RTFA. *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)) (distinguishing "trespass, which is an actionable invasion of interests in the exclusive possession of land" and "comprehends an actual physical invasion by tangible matter" from a private nuisance, which is an "invasion of interests in the use and enjoyment of land . . . usually by intangible substances . . .."); *Mooney*, 991 N.E.2d at 580. This distinction was lost on the lower court when it relied on a readily distinguishable Texas case to find "Plaintiffs' trespass claim is barred by the RTFA." Op. ¶ 28.

Thus, Plaintiffs' lawsuit is not a matter of "artful pleading" to make the facts fit any cause of action other than nuisance. It is the application of established principles of law to Plaintiffs' evidence that supports each cause of action on its own merit. As such, the appeals court should not have barred each of Plaintiffs' tort claims as foreclosed under the RTFA.

B. The Appeals Court Wrongfully Found That There Is No Evidence That Reasonable Persons May Conclude Indicates Negligence or Trespass.

The court of appeals determined Plaintiffs had simply repackaged their nuisance claim and thus gave no thoughtful consideration to the evidence Plaintiffs submitted in support of their negligence and trespass claims. For example, in evaluating Plaintiffs' negligence claim, the appeals court stated that "[t]he designated evidence provides no indication that the CAFO has been negligently operated by 4/9 Livestock or has violated IDEM regulations." Op. ¶ 27. The lower 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. Op. ¶¶ 27, 28. In doing so, the court

ignored undisputed evidence submitted by Plaintiffs and misinterpreted evidence submitted by Defendants.

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 their duty to comply with EPCRA made it likely that emissions will increase. 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 with a 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.

When the facts presented, such as those above, can be reasonably drawn upon to establish the proximate cause of injury, it is ordinarily a question of fact for the jury to decide. *Gamble v. Lewis*, 85 N.E.2d 629, 633 (Ind.1949) ("If the facts are in dispute, or if reasonable men may draw different conclusions from undisputed facts, the question of negligence is one for the jury"). Accordingly, the appeals 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).

Additionally, the lower court improperly gave significant weight to the fact that Defendants' have permits. *See, e.g.*, Op. ¶¶ 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. Op. ¶¶ 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....").

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 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."); *Jones v. Cary*, 37 N.E.2d 944, 951 (Ind. 1941) ("While the violation of such a statutory regulation does not conclusively establish negligence, it is *prima facie* evidence of negligence and places on the opposing party the duty of producing evidence to show a valid excuse for such violation.").

Accordingly, a permit violation may be grounds for a claim of negligence or nuisance *per se*, but it does not follow that a farm complying with its permits 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 below failed to consider evidence of negligence, such as where Defendants exceeded statutory and regulatory requirements, that reasonable persons could find sustains Plaintiffs' tort claims.

IV. CONCLUSION

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

Respectfully submitted,

Dated: August 12, 2019

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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 to Transfer 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 to Transfer was delivered this 12th day of August 2019, to the following persons, via the Court's E-Filing System:

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