

U.S. Supreme Court’s Denial of Certiorari in *Himsel v. 4/9 Livestock LLC, et. al.* Allows Indiana’s Unjust Right to Farm Act to Stand, Leaving Hoosier Families Without a Remedy When a Polluting Factory Farm Moves in Next Door

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I. Background:

On October 5, 2020, the U.S. Supreme Court denied the Plaintiffs’ Petition for Writ of Certiorari (“Cert Petition”) in *Himsel v. 4/9 Livestock, LLC, et. al.*² The decision leaves intact the Indiana Court of Appeals’ interpretation of Indiana’s Right to Farm Act (“RTFA”) as barring any remedy whatsoever for two Hoosier families who found themselves suffering untenable living conditions and plummeting property values due to a new concentrated animal feeding operation (“CAFO”) with 8,000 hogs built near their homes. *Himsel v. Himsel*, 122 N.E.3d 935, 945 (Ind. App. 2019), *trans. denied, Himsel v. 4/9 Livestock, LLC*, 2020 Ind. LEXIS 111 (Ind. Feb. 20, 2020). As a result, these families are now faced with having to either live with the constant invasion of noxious pig waste emissions from the CAFO that make them sick and keep their grandchildren and friends from visiting, or move away from their life-long homes at a substantial financial loss.

The Defendants claim that this case is a “win for Indiana farmers.^[3]” But the truth is that the Defendants are not farmers and their CAFO is not a farm. The CAFO, unlike a farm, has two 33,500 square-foot hog confinement buildings, each with a massive waste pit underneath for collecting nearly four million gallons of hog feces, urine and other animal waste that is generated annually by the facility. As the waste decomposes in these cesspits, dangerous chemical compounds are released that would harm the animals if allowed to accumulate inside the confinement buildings. To avoid this outcome, the CAFO is equipped with giant ventilation fans that blow the hazardous emissions into surrounding lands, creating unlivable conditions and significant health risks for people living nearby.

And, unlike a farmer who owns his livestock, the owner of the CAFO, Defendant 4/9 Livestock, LLC, does not own the hogs warehoused there. Instead, the Defendant Co-Alliance, LLP, a corporate integrator, pays 4/9 a fixed “pig space” fee to raise continuous batches of 8,000 newly weaned Co-Alliance pigs until they are “finished”—i.e., reach market weight. Indeed, through a one-sided production contract, Co-Alliance dictates every aspect of the CAFO’s operations including prohibiting 4/9 from raising hogs for anyone else, requiring 4/9 to use only the feed and medications supplied by Co-Alliance, and requiring 4/9 to shoulder all responsibility and liability for handling the massive amount of waste generated by Co-Alliance’s hogs.

Ultimately, the 16,000+ Co-Alliance pigs that are “finished” every year at the CAFO are shipped for slaughter, processing, and sale to Tyson, JBS, Smithfield, and other transnational

¹ Ms. Ferraro and HEC represented the Plaintiffs in this matter. Founded in 1983, HEC is Indiana’s largest environmental organization working to address the state’s most pressing environmental problems including the serious public health threats from factory farm pollution. For more information, see www.hecweb.org.

² See SCOTUS Docket No. 20-72 to access the Cert Petition and related briefs at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-72.html>.

³ See Press Release of Plews, Shadley, Racher & Braun, *Huge Win at United States Supreme Court for Indiana’s Farmers and Agricultural Community* (Oct. 5, 2020) at <https://www.psrb.com/2020/10/huge-win-at-united-states-supreme-court-for-indianas-farmers-and-agricultural-community/>.

corporations that control 90% of meat production worldwide, and utilize monopolistic practices that effectively eliminate any notion of fair competition for actual farmers.⁴ This domination of market share is due in part to state and national laws, including states' right to farm laws, that were enacted in the early 1980's to protect family farmers but have been subverted to unfairly benefit the economic interests of these conglomerates. Specifically, the intent of states' right to farm laws was to protect existing farms from urban sprawl by barring unjustified nuisance suits by newcomers who "moved to the nuisance."⁵ However, due to successful lobbying by the powerful meat industry, these laws have been amended to shield newly built factory farms from nuisance lawsuits brought by neighbors who were there first.⁶

Such is the case in Indiana where the RTFA was amended in 2005 to redefine what it means for an agricultural operation to undergo a "significant change" that would otherwise remove the RTFA's protection. Under the amended law, a significant change no longer includes a change in the size, type, or ownership of an agricultural operation, no matter how extreme, offensive, or damaging that change might be. Ind. Code § 32-30-6-9(d)(1). That means a change from growing crops to warehousing 8,000 hogs in a CAFO is no longer deemed "significant," regardless of the harm caused to existing neighbors. Unfortunately, the Indiana Court of Appeals has taken this a step further and concluded that the RTFA bars not only nuisance claims by existing neighbors, but negligence and trespass claims too. *Himsel*, 122 N.E.3d at 943-945.

It is against this backdrop that the Plaintiffs in *Himsel* brought their case to the U.S. Supreme Court, presenting the question of whether Indiana's RTFA—by barring any remedy for the ongoing infringement of their vested property rights—is an unconstitutional taking without just compensation in violation of the 5th Amendment. Contrary to the Defendants' pronouncement, the high Court did not "reject" Plaintiffs' arguments in declining certiorari review.⁷ Nor does the decision mean that the high Court agrees with the lower court's ruling.⁸ Rather, the decision simply leaves the constitutional question presented by the case unresolved at the national level, and allows the Indiana Appeals Court decision to stand.

Unfortunately, in touting their legal victory, the attorneys for the Defendants have publicly accused the Plaintiffs and their non-profit counsel at the Hoosier Environmental Council ("HEC") of pursuing a "frivolous" lawsuit. Defendants also publicly announced "plans" to pass legislation that would "hold organizations like [HEC] financially responsible for lawsuits that target

⁴ See Huffman, Maxwell, et. al., *Consolidation, Globalization, and the American Family Farm*, Organization for Competitive Markets (Aug. 2017) at <https://competitivemarkets.com/wp-content/uploads/2017/08/Consolidation-Globalization-and-the-American-Family-Farm.pdf>; Shefali Sharma, *Mighty Giants: Leaders of the Global Meat Complex*, Institute for Agriculture & Trade Policy (Apr. 10, 2018) at <https://www.iatp.org/blog/leaders-global-meat-complex>.

⁵ See J. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 290–93 (1984).

⁶ See Leah Douglas, *Big Ag is Pushing Laws to Restrict Neighbors' Ability to Sue Farms*, NPR (Apr. 12, 2019), <https://www.npr.org/sections/thesalt/2019/04/12/712227537/big-ag-is-pushing-laws-to-restrict-neighbors-ability-to-sue-farms>; L. Ashwood, et al., *Property Rights & Rural Justice: A Study of U.S. Right-to-Farm Laws*, 67 J. RURAL STUDIES 120, 127 (2019).

⁷ PSRB Press Release at 4, *supra* FN 3.

⁸ The Supreme Court's decision to deny certiorari means only that the Court determined that the circumstances of the lower court decision does not warrant review. Indeed, the U.S. Supreme Court grants certiorari review in only 100-150 of the 7,000-8,000 cases it is asked to review each year.

farmers.^[9]” So that the public and Indiana lawmakers understand just how unfair and incredibly perverse such an amendment would be, this article presents what actually happened in this case, including details of the underlying litigation and appeal that have been mischaracterized by defense counsel. Ultimately, the aim of this article is to underscore for state lawmakers and the public, the critical need to restore the property rights of rural Hoosiers by repealing the 2005 “significant change” amendment to RTFA so that they can protect their communities and Indiana’s countryside from becoming a dumping ground for the meat industry.

II. The Underlying Litigation and Appeal

A. *The Facts:*

The Defendants characterize the Plaintiffs as disgruntled neighbors who brought the lawsuit over occasional “unpleasant farm odors” and their mere “disagreement” with Defendants’ decision to “modernize their farming operation.^[10]” The evidence tells a starkly different story. The Plaintiffs are Richard and Janet Himsel and Robert and Susan Lannon, two elderly couples who have lived happily alongside agriculture in rural Hendricks County almost their entire lives and are accustomed to the typical farm smells associated with country life. The Defendants built their CAFO with 8000 hogs on nearby, vacant cropland surrounded by at least 30 other homes within a quarter to half mile. In so doing, the Defendants did not “modernize” the cornfield, they transformed a quiet, rural community into an industrialized pollution zone.

Indeed, air testing confirmed that the CAFO releases dangerous levels of airborne chemical compounds that create noxious odors much worse than those associated with traditional livestock farms. This testing, conducted by an environmental toxicologist with a Ph.D. in biochemistry from John Hopkins School of Public Health, confirms that unhealthy levels of hazardous ammonia and volatile fatty acids from the CAFO’s cesspools of pig waste are continuously being blown onto the Himsels and Lannons’ properties and are the cause of their complaints of burning noses, throats, and eyes, vomiting and gagging, experiencing the “smell of death,” and other conditions they never endured prior to the CAFO. A nationally renowned real estate appraiser also determined that the Himsels and Lannons’ properties have lost at least half of their market value due to the CAFO. Remarkably, the Defendants testified that they knew locating their CAFO so close and upwind of where people live would predictably cause these harms. Yet, they admitted that they gave no consideration to their neighbors’ concerns that the CAFO would foul the air, impact their health, and diminish property values, because Defendants believed they were sheltered from all liability under the RTFA. It is for these reasons that the Himsels and Lannons brought suit against the Defendants, not over a mere “disagreement” with the Defendants’ use of their land.

B. *Trial Court and Appellate Proceedings*

The Defendants’ assert that the Himsels and Lannons’ claims were “unsupported” and “not accepted by any of the courts.^[11]” But that is demonstrably not true. Plaintiffs’ claims and arguments were well-supported in both fact and law. Indeed, the trial court initially denied

⁹ Samantha Horton, *After Supreme Court Rejects Hearing Right to Farm Case, Both Sides Look to Policy Changes*, WFYI (Oct. 12, 2020) (quoting defense counsel Chris Braun) at <https://www.wfyi.org/news/articles/after-supreme-court-rejects-hearing-right-to-farm-case-both-sides-look-to-policy-changes>.

¹⁰ PSRB Press Release at 1, 3, *supra* FN 3.

¹¹ *Id.* at 3.

summary judgment for Defendants, i.e., *accepting* Plaintiffs’ claims, in a lengthy, well-reasoned opinion following two years of discovery, extensive briefing, and a half-day oral argument. The trial court also withheld judgment on the constitutionality of the RTFA concluding that the issue was unripe due to the remaining fact issues on the underlying tort claims. Notably, the State of Indiana urged the trial court to reach that very outcome based on the State’s view (at the time) that genuine fact issues precluded summary judgment on the tort claims, i.e., that the claims have merit and should reach a jury.

Unhappy with that outcome, the Defendants filed a motion to correct error repeating their same arguments. But this time they were joined by the legal arm of the Indiana Farm Bureau, the Hendricks County Board of Commissioners, and the County Planning and Building Department as *amicus curiae*. In other words, the Defendants enlisted a powerful lobbying group, along with the legislative and administrative branches of county government to weigh in and tell the judicial branch what to do. Shortly thereafter, the trial court reversed itself in a two-paragraph order without explanation and without identifying *any error whatsoever* in its initial opinion. On appeal, two additional *special* interest groups joined with the Defendants—the Indiana Bankers Association and the Indiana Pork Producers Association.

In contrast, Plaintiffs’ claims and arguments were endorsed by law professors and academics from around the country, and several *public* interest organizations including Public Justice, Food & Water Watch, Indiana Farmers Union, Family Farm Action, and the Humane Society of the United States, who filed supporting *amicus* briefs in support of Plaintiffs’ claims on appeal. Furthermore, one of the justices on the Indiana appellate court had second thoughts about the court’s ruling that the RTFA barred all of Plaintiffs’ claims and dissented in the court’s denial of Plaintiffs’ Petition for Rehearing.

Proceedings before the Indiana Supreme Court likewise demonstrate that Plaintiffs’ claims and arguments were well supported. Indeed, out of the 800 or so transfer petitions the Court receives each year, it grants oral argument in only around 50 of them—Plaintiffs’ Petition for Transfer was one of those, and the state high Court’s denial was nowhere close to unanimous. Rather, the decision was split 3-2 with Chief Justice Rush and Justice Goff voting to grant transfer. In other words, the case hinged on the vote of a single state supreme court justice—hardly the decisive legal victory that the Defendants claim to have achieved.

C. Implications of the Indiana Court of Appeals’ Ruling

The Indiana Court of Appeals affirmed the trial court, concluding that the RTFA’s 2005 amendment bars all of the Himsels and Lannons’ tort claims. As to the nuisance claim, the court concluded that since the Defendants’ switch from crops to CAFO was not a “significant change” under the RTFA, the Himsels and Lannons lost their vested property rights to use and enjoy their homes when they moved next to that cropland decades ago. Specifically, the court explained that when the Plaintiffs purchased their land in 1971 and 1994—long before the CAFO existed or the RTFA was amended in 2005—they somehow knowingly “*moved to the potential future nuisance.*” *Himsel*, 122 N.E. 3d at 944 (emphasis added). The appeals court also held that the Himsels and Lannons lost their right to bring a trespass claim even though the RTFA, by its plain language, makes no mention of the word “trespass.” In so doing, the court acknowledged that the trespass claim is based on the “unlawful *physical* intrusion of the CAFO’s noxious emissions into

Plaintiffs' properties and homes," but disregarded the undisputed evidence in support as merely "artful pleading" to side step the RTFA. *Id.* at 945.

The appeals court also held that the Himsels and Lannons' lost their right to bring a negligence claim, even though the RTFA expressly does not protect negligently run operations. Ind. Code § 32-30-6-9(a). This aspect of the court's decision is particularly troubling for several reasons. First, a negligence claim is entirely distinct from nuisance and trespass claims that vindicate property rights. *See, e.g., KB Home Indiana Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 304–09 (Ind. App. 2010) (nuisance, trespass and negligence claims are distinct causes of action, and analyzed separately even when they arise from the same facts). Indeed, nuisance law protects the right to reasonably use property without interference. *See Indiana Motorcycle Ass'n v. Hudson*, 399 N.E.2d 775, 778 (Ind. App. 1980). Trespass protects the right to exclusively possess property. *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. App. 1999). In contrast, liability in negligence depends not on the kind of harm caused, but whether reasonable care was used. *South E. Ind. Natural Gas Co. v. Ingram*, 617 N.E.2d 943, 953 (Ind. App. 1993). This is why Indiana courts have long recognized that a lawful business can still be held liable for causing a nuisance. *Bonewitz v. Parker*, 912 N.E.2d 378, 382 (Ind. App. 2009).

Nevertheless, the appellate court concluded that the decision to locate a CAFO on vacant cropland next to long-established homes—no matter how *unreasonable* and knowingly harmful that decision is—"cannot [as a matter of law] constitute negligent operation under the RTFA." *Himsel*, 122 N.E.3d at 945. In turn, the court found "no indication that the CAFO has been negligently operated" based on the Defendants' argument that they have complied with applicable zoning and regulatory requirements. *Id.* at 944–45. The serious problem with this is that Defendants' regulatory compliance does absolutely *nothing* to alleviate the ongoing harm and invasion of the Himsels and Lannons' property rights. CAFOs are wholly unregulated under federal and state clean air laws. As such, neither the U.S. EPA nor IDEM has the regulatory authority to restrict or limit the dangerous and extremely noxious airborne chemical compounds that CAFOs produce.

That means, under the appellate court's ruling, so long as the CAFO operates pursuant to the very regulations that allow it to confine 8,000 pigs, produce four million gallons of hog feces, urine, and other animal waste each year, and blow the resulting odor and waste particles onto neighboring homes, the CAFO is not, as a matter of law, being negligently operated under the RTFA. This outcome should be of critical concern to state lawmakers and the public because Indiana has around 1,800 confined feeding operations¹² that: (1) have no limits on their air emissions; (2) have no restrictions on their size or number of animals; and yet, (3) they can be located within 400 feet of an existing residence, 100 feet from property lines, and just 300 feet from our lakes, rivers, streams, and wetlands, regardless of the amount of dangerous waste and emissions produced.

Finally, even though the appellate court held that the RTFA bars Plaintiffs' attempt to remedy an ongoing physical invasion that causes untenable living conditions, the court held that the RTFA is not an unconstitutional taking of their property rights. *Id.* at 946-948. In so doing, the

¹² IndianaMap Open Data Hub, *Agribusiness Confined Feeding Operations in Indiana*, at https://gis-indianamap.opendata.arcgis.com/datasets/a87f87ba21134a5f834c4a8f45868789_0.

court acknowledged that the Himsels and Lannons have suffered substantial property value losses—49.5% and 60%, respectively—and that their “property rights are clearly affected” due to the CAFO. *Id.* at 947. Even so, the court concluded that no taking has occurred because Plaintiffs have “not been deprived of all or substantially all economic or productive use of their properties” and the RTFA is “reasonably related to the promotion of the common good.” *Id.* at 947-948.

As Plaintiffs’ argued in their Cert Petition, the appeals court decision is at odds with long-standing Supreme Court jurisprudence confirming that when a law “requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation,” because the right of exclusive possession is “perhaps the most fundamental of all property interests.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)). Indeed, the ancient rights of neighbors to be free from neighborly invasion, whether the kind of invasion that interferes with exclusive possession (trespass) or the kind that interferes with use and enjoyment (nuisance), have always been a key part of the “bundle of rights” that make up “property.” *Loretto*, 458 U.S. at 433. Accordingly, the government’s power to spirit away any one of these fundamental property rights without just compensation is extremely limited. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005). Unfortunately, that is exactly what the State of Indiana has done to the Himsels and Lannons.

III. Conclusion:

The U.S. Supreme Court’s decision not to review this case ends a costly, and incredibly stressful five-year legal battle that the Himsels and Lannons were forced to bring because federal, state, and local government agencies were unable or unwilling to help.¹³ And, because the Indiana Appeals Court ruling now stands, the legal system is a dead end for them too. For that matter, without the assistance of non-profit legal aid, these low-income families would not have been able to even access the courts in the first place.¹⁴ Such an unjust outcome underscores how insidious of a law the RTFA is. It eliminates any possibility that CAFOs in Indiana will be held liable for fouling the air, upending people’s lives, and trampling on the property rights of our fellow citizens in rural communities. As a result, unless the Indiana General Assembly steps in and repeals the “significant change” provision of the RTFA, the monopolistic titans of the meat industry are now free to expand their polluting factory farms in Indiana with impunity.

¹³ As discussed above, there are no limits on CAFO air pollution under state and federal clean air regulations. And, while the county could have denied the Defendants’ rezoning request necessary to build the CAFO, it was not required to do so under the county zoning ordinance.

¹⁴ *See Citizens Lack Affordable Legal Services. HEC is Addressing Indiana’s Environmental Justice Gap* at <https://www.hecweb.org/technical-legal-assistance/>.