19-1692

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

ROBIN BAPTISTE; DEXTER BAPTISTE, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

—v.—

BETHLEHEM LANDFILL COMPANY, A Delaware Corporation doing business as IESI PA BETHLEHEM LANDFILL,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Defendant-Appellee's ("Defendant's") brief demonstrates precisely why the district court's opinion is inconsistent with Pennsylvania nuisance and negligence law. In staking out its position that a nuisance, if sufficiently large, is actionable neither as a private or public nuisance, Defendant deploys reasoning that is almost comical in its circularity. First, Defendant seeks to place a limit on the number of people who can be impacted by a private nuisance, asserting that if that unspecified threshold is exceeded, the nuisance can only be public. Defendant then tries to incorporate that nonexistent limitation into the public nuisance elements by asserting that it is a private nuisance claim, not property interference, which would constitute a special injury. The result of this exercise if one accepts, as the district court did, Defendant's argument, is that one becomes exempt from nuisance liability so long as one ensures that the nuisance is sufficiently large.

Defendant fails to contend with a well-developed body of law in Pennsylvania and under the Restatement regarding the scope of public and private nuisance actions. The key distinction in the character of a nuisance– whether a harm impacts the general public or particular people – turns on the nature of the harm, not some unknown numerical threshold. Defendant utterly ignores the distinction between public and private rights throughout its brief. The right to clean air is a *public* right, and its violation constitutes a public nuisance. Interference with use and enjoyment of property is a violation of *private* rights, which constitutes a private nuisance and

also a special injury where there is a violation of a public right. Private rights do not lose their private character when many people suffer the same violation as a result of the same acts of a defendant.

Defendant's argument regarding Plaintiffs' negligence claims is similarly flawed, ignoring basic tenants of negligence duty and the fact that airborne contamination plainly constitutes a "physical injury" under Pennsylvania negligence law. Also supporting Plaintiffs' position are amici's misplaced arguments regarding the legislature's purported intent to place the regulation of landfills largely outside the scope of judicial intervention. The very legislative schemes to which amici appeal expressly call for the wholesale preservation of individual property rights and their enforcement through the courts.

As Pennsylvania's General Assembly recognized in enacting the Solid Waste Management Act, violations of private property rights cannot be redressed through regulatory oversight. Defendant and amici seek to avoid the enforcement of such rights in the courts not because of any real conflict with the regulatory system, but because they believe that negligent industrial polluters should be immune from liability when it comes to their neighbors. The law provides no such immunity. Defendant casts Plaintiffs' position as representing a "sea change in the common law[,]" but it is plainly Defendant who seeks such a change through the affirmation

of the decision below. *See* Appellee Br. at 38. The District Court's Opinion and Order should be reversed.

I. Amici's Policy Arguments Ignore the SWMA's Savings Clause and the Legislature's Deliberate Preservation of Private Rights of Action to Abate Nuisances and Protect Private Property.

Two sets of amici submitted briefs in support of the District Court's rulings. The National Waste & Recycling Association (the "Association") on the one hand, and the Chamber of Commerce of the United States, the Pennsylvania Chamber of Business and Industry, and the Pennsylvania Farm Bureau (collectively, the "Chamber amici") on the other. Each of these briefs is fatally flawed in its exhaustive appeal for deference to a statutory scheme that expressly preserves causes of action like Plaintiffs'.

Amici's lengthy policy arguments are rebuked by the very legislation on which they are based. "It is declared to be the purposes of [the SWMA] to provide *additional* and *cumulative* remedies." *Hydropress Envtl. Servs. v. Twp. of Upper Mount Bethel*, 575 Pa. 479, 491, 836 A.2d 912, 919 (2003)(citation omitted)(emphasis added). "[T]he remedies afforded under the [act] are not exclusive." *Cty. of Berks v. Allied Waste Indus.*, 66 Pa. D. & C.4th 429, 441 (C.P. 2004). The Solid Waste Management Act includes a savings clause, which expressly preserves the causes of action advanced by Plaintiffs. That section, titled "[e]xisting rights and remedies preserved; cumulative remedies authorized[,]" states that:

> **nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law** or statutory law, criminal or civil, nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, **be construed as estopping** the Commonwealth, **persons** or municipalities, **in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or to enforce common law or statutory rights.** No courts of this Commonwealth having jurisdiction to abate public or private nuisances shall be deprived of such jurisdiction in any action to abate any private or public nuisance instituted by any person for the reasons that such nuisance constitutes air or water pollution.

35 P.S. § 6018.607. "Thus, the legislature obviously had the rights of private citizens in mind when it drafted the Act[] but elected to protect those rights by way of existing common law remedies, such as actions for negligence and nuisance." *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 428 (M.D. Pa. 1989).

This savings clause summarily dispenses with amici's arguments that common-law causes of action undermine the framework established by the SWMA. In enacting the SWMA, the legislature went out of its way to fully preserve all common law rights of action, past, present, and future. The various other enforcement mechanisms described by the Association were intended to be "cumulative" with rights under common law, decisional law, and equity, particularly as it relates to nuisances. 35 P.S. § 6018.607. Further, the SWMA does not provide an overlapping remedy to the damages claimed in this lawsuit. Plaintiffs here seek

primarily money damages that result from a loss in property values and the loss of use and enjoyment of their properties. While the SWMA provides for "Civil Penalties" assessed by the Pennsylvania Department of Environmental Protection, the Act does not provide a money damages remedy to individual victims harmed. *See* 35 P.S. § 6018.605. This, in addition to the savings clause, utterly destroys the notion that the SWMA's regulations were intended to be "comprehensive[,]" as both amici briefs wrongly assert. It is remarkable that, despite offering a lengthy description of the structure of the SWMA, amici omitted any mention of the savings clause.

Further, the Association's brief acknowledges that it was funded (at least in part) by Waste Management of Pennsylvania, Inc. ("WMPA"). There could be no better entity than WMPA to demonstrate that the District Court's opinion toppled the status quo and broke with hundreds of years of precedent. Just a few short years ago, WMPA faced another class action lawsuit alleging public and private nuisance and negligence against a landfill for its odor emissions. *See Batties v. Waste Mgmt. of Pa., Inc.*, No. 14-7013, 2016 U.S. Dist. LEXIS 186335, at *3 (E.D. Pa. May 11, 2016). It settled that case for a total value of $2,000,000, including monetary relief and odor-control measures.[1] *Id.* WMPA was represented in that case by the same

[1] That odor mitigation measures were implemented as a result of the litigation of these claims on behalf of a class of the owners or renters of more than 9,000 households undermines amici's arguments that (1) regulatory oversight is sufficient

counsel that filed the Association's brief in this case. *See Id.* In the entire course of litigating *Batties* up to a class-wide settlement, WMPA and its able counsel never once sought dismissal of any of the causes of action on any of the theories the Association and Defendant now assert are so deeply entrenched in Pennsylvania jurisprudence. Like Defendant, the Association knows that this decision is an outlier, and it is desperate to have that outlier made into paradigm-shifting precedent.

The Chamber amici similarly appeal to the regulatory scheme created by the SWMA, repeatedly invoking the will of the legislature as the appropriate tool for regulating industrial land uses. They make a series of policy arguments against "overlapping nuisance regimes" and the utilization of common-law torts alongside regulatory oversight. The Chamber amici's quarrel, though, is with the very legislature to whom they suggest deference. Far from determining that the SWMA itself should be "comprehensive" or exclusive in its regulation of landfills, as the amici repeatedly and incorrectly assert, the legislature elected for explicit, staunch preservation of the role of tort litigation in protecting private property rights. The Chamber amici's policy arguments should be made to the legislature, which is free to consider them, not to this Court, which is constrained by the law as it is written.

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to remediate nuisances from landfills, rendering tort litigation unnecessary; and (2) a class of around 8,000 households in the instant action somehow expands traditional notions of the limitations of public and/or private nuisance in a way that would create boundless liability.

These policy arguments are remarkably similar to those made to this Court by the defendant-appellee in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013). There, the defendant "argued that allowing such claims to go forward 'would undermine the [Clean Air Act]'s comprehensive scheme, and make it impossible for regulators to strike their desired balance in implementing emissions standards.'" *Id.* at 193. The Clean Air Act also has a savings clause which preserves common law rights of action on behalf of private persons. *Id.* In *Bell*, this Court found that the Plaintiffs' Pennsylvania common-law tort claims for air pollution, brought on behalf of at 1,500 class members, were not preempted by federal Clean Air Act. The Court applied Supreme Court precedent stating that:

> "[a]lthough [source state] nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements."

Id. at 197 (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 498-99 (1987). This sound reasoning demonstrates yet another reason that amici's policy arguments fall flat. In preserving all present and future private rights of action when enacting the SWMA, the legislature chose to impose some "separate standards" which could "create some tension with the permit system" and still chose to empower this "additional authority[.]" *See Id.* This is for good reason because "the nuisance and common law actions in this case are based on specific harms to the use

and enjoyment of real property that are different from the public interest generally in controlling air pollution." *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 89 (Iowa 2014) (finding no displacement of common-law air pollution claims by state regulatory scheme); *see also* 35 P.S. § 6018.605 (granting no remedy of direct money damages to individual property owners harmed by Defendant's violations of the Act). Amici's misguided arguments actually demonstrate the importance of preserving the causes of action asserted by Plaintiffs (as contemplated by the General Assembly), and not eroding them through judicial activism.

II. While Defendant and Amici Erroneously Assert That There is a Numerical Limitation on Private Nuisance and the Special Injury Requirement, They Fail to Identify Just What That Limitation Might Be.

It is impossible to reconcile Defendant's position with the view of nuisance outlined in Section 821B of the Restatement (Second) of Torts, which has been adopted in Pennsylvania. *See Machipongo Land & Coal Co. v. Dep't of Envtl. Prot.*, 799 A.2d 751, 773 (2002). The Restatement makes clear that:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. ***There must be some interference with a public right. A public right is one common to all members of the general public*.** It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. ***Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance*.** If, however, the pollution prevents the use of a public bathing beach or kills the fish in

> a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

Restat. 2d. of Torts, § 821B, cmt. g.

Defendant continues to conflate the harms suffered by the Class and the general public.[2] To be clear, while the harms have the same cause, they remain distinct injuries. Interference with the use and enjoyment of property does not constitute a violation of a public right, no matter how many properties are so impacted. *See* Restatement (Second) of Torts § 821B cmt. g. (1979).[3, 4] Property rights are "individual right[s]" and not "collective in nature." *See* Restat. 2d. of Torts,

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[2] Defendant also continues to conflate the concepts of the Class and the general public by referring to its estimate of the number of persons that reside in the class area instead of the number of persons with a property interest. Defendants' assertions are plainly wrong. Defendant refers to "mere residence in the vicinity of alleged odors" despite the fact that Plaintiffs drew a clear distinction in the class definition in the complaint between those with property interests, of whom the class is comprised, and those without them, who are excluded from the putative class. *See* Appellee Br. at 24. Those residing in the boundaries of the proposed class who do not have such property rights, in addition to people who are employed in the community or visit the community are an additional and separate constituency that are part of the general public, but not part of the putative class.

[3] Defendant cites *Brunner v. Schaffer*, 1 Pa. D. 646, 647-48 (Lehigh Cty. Ct. Com. Pl. 1892) for the proposition that noxious fumes spread over a wide area do not create a special injury. Appellee Br. at 22-23. Defendant attempts to bolster *Brunner* by asserting that it was "ratified" by the Pennsylvania Supreme Court in *Rhymer v. Fretz*, 55 A. 959, 959-60 (Pa. 1903), which it seeks in turn to bolster by virtue of having been cited in *Maroz v. Arcellormittal Monessen LLC*, No. 15-cv-770, 2015 WL 6070172 (W.D. Pa. Oct. 15, 2015). This three-level exercise to lend credence to a 127 year old case is ultimately worthless, because *Brunner* itself distinguishes between injuries to property and violations of public rights.

§ 821B, cmt. g. Pa. Const. art. I, § 27 has been recognized as establishing the sort of rights which when violated constitute a public nuisance. *Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 316 (3d Cir. 1985). It notes that "[t]he people have a right to clean air, pure water…" and other elements of the natural environment. In *Hercules*, the court noted the right to "pure water" formed the basis for the "right common to the general public that was the subject of interference." *Hercules*, 762 F.2d at 316. Here, it is the right to "clean air[,]" which is entirely separate from the private property rights of Plaintiffs and the Class.

Perhaps the best illustration of why Plaintiffs satisfy the special injury requirement comes from Defendant's own example. Defendant cites Illustration 3, Restatement (Second) of Torts, § 821C, cmt. e, which notes "A operates a house of prostitution, which by statute is declared to be a nuisance. This interferes with the use and enjoyment of B's dwelling next door. B can recover on the basis of either the private or the public nuisance." Def. Br. 11. This is a nearly perfect analog to the instant case, where Defendant's landfill is a statutory nuisance by virtue of violations of the SWMA (in addition to the violation of the public's constitutional rights) and also, separately and distinctly, interferes with a defined private property right—the use and enjoyment of Plaintiffs' home. The latter is a special injury.

Defendant does not seriously challenge that interference with use and enjoyment of property can constitute a "special injury." But when the broader impact

to the public is viewed in terms of the salient public right, it becomes clear that this injury to property rights is indeed a special injury. This is true regardless of the number of people who suffer the special injury, so long as that injury remains distinct from the violation of the cumulative, public right. *See* Restatement (Second) of Torts § 821B cmt. g. (1979).[5]

Defendant claims that there is some limit to the number of persons who may suffer a special injury, but neither it nor any amici clearly define that limit. Instead, they merely throw a variety of suggestions against the wall, in an attempt to obfuscate the clear error in the district court's reliance on a misinterpretation of a factually distinct lower court case, *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1481 (E.D. Pa. 1993). Defendant alternatively asserts that the limit is the "neighborhood[,]"[6] "a determinate number of plaintiffs" and "some comparable formulation[.]" Appellee Br. at 17. The Class in this case is not uncountable or indefinite, as even Defendant identifies its size (though erroneously) throughout its

[5] ("In any case in which a private nuisance affects a large number of persons in their use and enjoyment of land it will normally be accompanied by some interference with the rights of the public as well. Thus the spread of smoke, dust or fumes over a considerable area filled with private residences may interfere also with the use of the public streets or affect the health of so many persons as to involve the interests of the public at large.")

[6] This is another effort to rhetorically seize on the purported "neighboring" limitation that Defendant repeatedly misconstrues as meaning anything other than generally proximate contemporaneously-owned properties.

brief. And none of the authority Defendant cites from other states supports the idea that harm that exceeds the size of a "neighborhood" cannot be a special injury, where the harm is to private as opposed to public rights.

Defendant also asserts that Plaintiffs "mischaracterized" the district court's opinion as entailing an assumption that a nuisance could not be both public and private. Appellee Br. at 10. Plaintiffs will leave it to this Court to make that determination, but the district court's opinion plainly does not account for the fact that the two categories are not mutually exclusive. It also ignores the difference between violations of private property rights and public rights such as the right to clean air. Without distinguishing on the basis of the violated right, the district court could only have been relying on the number of people impacted, which would necessarily render the two types of nuisance mutually exclusive.

Defendant also cites to inapposite New York law for the proposition that there is a numerical limitation on private nuisance claimants. This is not, and has never been, the law in Pennsylvania. The Restatement view is that a private nuisance may "affect[] a large number of persons in their use and enjoyment of land[,]" specifically referencing the "spread of…fumes over a considerable area filled with private residences" and also becoming a public nuisance in the process. Restatement (Second) of Torts § 821B cmt. g. (1979). Consistent with the Restatement, no Pennsylvania court has ever applied a numerical limitation to private nuisance. This

includes Defendant's cited authorities, and any suggestion to the contrary is patently misleading. The district court's Order should be reversed.

III. Plaintiffs Have Stated Claims for Negligence. Defendant and Amici Misrepresent the Holding of *Gilbert*, and Airborne Contamination Constitutes a "Physical Injury."

Defendant's plea—and the district court holding—would carve out a novel, judicially-created form of qualified immunity for landfill owners in negligence claims. Defendant's argument is at odds with the most basic principles of common law negligence. To advance their unprecedented legal theory, Defendant and amici assert that *Gilbert* says what it does not. As noted in Plaintiffs' brief, *Gilbert* did not affirmatively conclude that the defendant in that case, much less any category of actor, owed no duty to prevent the emission of odors onto nearby property. It simply recognized that the plaintiffs in that case had failed to identify such a duty. Defendant notes that *Gilbert* entails the application of the rule in Restatement (Second) of Torts, § 371 for the liability of "*possessors* of land to people outside the land for activities carried out on the land." Appellee Br. at 32. Section 371 states that

> [a] possessor of land is subject to liability for physical harm to others outside of the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place.

Id. This is both uncontroversial and irrelevant. Here, Defendant's liability does not arise from the fact that it possesses the land on which the landfill is sited, but from

the acts it carries out on that land. Its liability to Plaintiffs and the Class would be the same if the "activity were carried on at a neutral place." *See Id.*

Nothing in *Gilbert* abrogates the basic principal that an affirmative act imposes a duty to exercise reasonable care – indeed Defendant acknowledges this. Appellee Br. at 34. Defendant then argues that Plaintiffs' claims do not entail such a duty because they have not alleged the sort of "physical" harm or injury necessary to support a claim for negligence. *Id.* But Defendant fails to recognize that in Pennsylvania, "the physical presence of [harmful chemicals] in the air, even if undetectable, constitutes a physical injury to the property for purposes of common law property damage claims." *Gates v. Rohm and Haas Co.*, CIV.A. 06-1743, 2008 U.S. Dist. LEXIS 58036 (E.D. Pa. July 31, 2008); *Menkes v. 3M Co.*, No. 17-0573, 2018 U.S. Dist. LEXIS 84574, at *23 (E.D. Pa. May 21, 2018). This is true whether there is a physical invasion of air contaminants or "an invasion by something otherwise perceptible to the senses, but not necessarily physical, like noise or vibrations." *Gates*, 2008 U.S. Dist. LEXIS 58036 at *10. And "the exposure level need not necessarily present a health risk to make out a property damage claim." *Id.* at *11.

Plaintiffs allege that their property and those of the Class "have been and continue to be physically invaded by noxious odors, pollutants and air contaminants that originate from Bethlehem Landfill." Compl. ¶ 12; A29. Plaintiffs allege that

Defendant has failed to control its emissions so that they "do not constitute a nuisance or hazard to health, safety, or property." *Id.* ¶ 16; A30-31. Plaintiffs therefore satisfy both the "harmful chemical" and "perceptible" impact avenues to property damage.

Because Plaintiffs' injury and damages are indeed a physical injury, Defendant's argument regarding the overlap between Plaintiffs' nuisance and negligence claims also fails. It argues that "Plaintiffs have only pled a nuisance, because they have not pled a negligence *harm* – physical injury." Appellee Br. At 38. But Plaintiffs have indeed pled such a harm, and as noted in their Brief, their negligence claims are not based on the "exact same facts" as their nuisance claims, as Defendant asserts. *Id.* Plaintiffs have alleged each element of negligence, including a long-recognized duty and physical injury. The District Court's ruling as to negligence should be reversed.

CONCLUSION

In what would constitute a *true* sea change in Pennsylvania law, Defendant and its supporting amici seek to close the courthouse doors to property owners so that they may freely profit from their harmful conduct. Those property owners have no other avenue to seek monetary relief. Public and private nuisance actions have always been available to remedy invasions of private property rights in Pennsylvania, regardless of the scope of the nuisance. The General Assembly

expressly preserved this fundamental aspect of state law in the Solid Waste Management Act. Negligence actions, too, are an important tool for the protection of private property. Nothing in *Gilbert* abrogated the general principles of negligence, and the presence of airborne contaminants constitutes physical harm sufficient to support a negligence claim. The District Court's Opinion and Order should be reversed.

Dated: August 26, 2019

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to 3d Cir. L.A.R. 28.3(d), I certify that I am a member in good standing of the bar of this Court.

Dated: August 26, 2019

/s/ Nicholas A. Coulson
Nicholas A. Coulson

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Dated: August 26, 2019

/s/ Nicholas A. Coulson
Nicholas A. Coulson

VIRUS CERTIFICATION & IDENTICAL COMPLIANCE OF BRIEF

I, Nicholas A. Coulson, hereby certify that:

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Dated: August 26, 2019
Detroit, Michigan

/s/ Nicholas A. Coulson
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CERTIFICATE OF SERVICE & CM/ECF FILING

I hereby certify that I electronically filed the foregoing Brief with the Clerk of the Court of the United States Court of Appeals for the Third Circuit via the Court's Electronic Filing System CM/ECF and served electronically upon all counsel of record through that system.

Dated: August 26, 2019

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