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

BRIEF FOR PLAINTIFFS-APPELLANTS
AND JOINT APPENDIX
VOLUME I OF II
(Pages A1 to A18)

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INTRODUCTION

This appeal arises from the dismissal of a class action complaint for public nuisance, private nuisance, and negligence. Plaintiffs-Appellants ("Plaintiffs") are homeowners residing in the vicinity of Defendant-Appellee's ("Defendant's") municipal solid waste landfill. Plaintiffs brought their claims on the basis of Defendant's failure to properly operate and maintain the landfill, which has caused and continues to cause severe noxious odors to substantially impact their ability to use and enjoy their home.

Defendant responded to the Complaint with a Motion to Dismiss. The district court dismissed Plaintiffs' Complaint in its entirety, imposing new restrictions on their nuisance causes of action in contravention of a long line of Pennsylvania precedent. That precedent holds that real property damage, including lost use and enjoyment, is sufficient to support claims for both public and private nuisance without regard to the number of impacted persons. The district court's ruling has the perverse effect of immunizing any actor from nuisance liability so long as they ensure that the nuisance impacts a large number of persons. Further, the district court eschewed longstanding Pennsylvania law which establishes that a person who undertakes affirmative acts has a resulting duty of care.

The dismissal should be reversed and the case remanded.

JURISDICTIONAL STATEMENT

The Complaint filed by Plaintiffs individually and on behalf of a proposed class asserts claims under Pennsylvania common law against Defendant, which is organized under the laws of Delaware and has its principal place of business in Texas. A28-29.

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332(d)(2)(a), because this is a putative class action and the amount in controversy exceeds $5,000,000. A29.

The district court's Opinion and Order dismissed the Complaint in its entirety on March 13, 2019. A3-18.

Plaintiffs filed a Notice of Appeal on March 28, 2019. A1. This appeal is timely under Fed. R. App. P. 4(a)(1)(A).

This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that Plaintiffs did not state a claim for private nuisance because the alleged nuisance impacted too many people. A12-13.

2. Whether the district court erred in concluding that Plaintiffs did not state a claim for private nuisance because it found that their homes are not "neighboring" properties to the nuisance. A13.

3. Whether the district court erred in concluding that Plaintiffs did not state a claim for public nuisance because they had not alleged a "special injury." A8-12.

4. Whether the district court erred in concluding that Plaintiffs did not state a claim for negligence because Defendant owed them no duty. A13-16.

STATEMENT OF RELATED CASES

There are no related cases. This case has not previously been before the Third Circuit.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Plaintiffs Robin Baptiste and Dexter Baptiste filed this action on behalf of a class of their neighbors against Defendant, the owner-operator of a 224 acre waste disposal facility ("landfill"). Defendant's landfill is located in Lower Saucon Township, Pennsylvania and is permitted to accept up to 1,375 tons of waste for disposal on a daily basis. (Complaint, A25-40, ¶¶ 6-7). Landfills, like Defendant's, inherently generate odors when the waste they bury in the landfill decomposes, creating odorous landfill gas, leachate and other byproducts. (*Id.* ¶ 8). Defendant, like similar operators who profit from the disposal of waste, has the legal duty and

responsibility to control the landfill's odorous emissions by capturing and destroying them to prevent them from traveling offsite and impacting the landfill's neighbors. (*Id.* ¶ 9). Unfortunately for Plaintiffs and the putative Class, Defendant has failed miserably to satisfy that duty. In response, Defendant now asserts that it has no such duty in the first place.

The evidence of Defendant's failures is overwhelming. State regulators, local authorities, and area residents have all sounded the alarm about the impacts the landfill has on the surrounding area. People living near the landfill have made countless odor complaints to PADEP. (*Id.* ¶ 15). PADEP, in turn, has issued Defendant numerous citations related to odor emissions, including for failing to apply proper cover, failing to implement a proper landfill gas control and monitoring plan, and failure to utilize proper waste management practice in reducing the potential for offsite odor emissions. (*Id.* ¶ 16). The Township of Lower Saucon has repeatedly notified Defendant of the impacts its foul emissions have on township residents. (*Id.* ¶ 14). Several dozen of these area residents have already reached out to Plaintiffs' counsel, detailing the deleterious impact that the landfill has had on their ability to use and enjoy their homes. (*Id.* ¶ 19).

As a direct and foreseeable result of Defendant's failure to control the landfill's odorous emissions, those emissions are routinely emitted and transported onto Plaintiffs' property. (*Id.* ¶ 18). This occurs on occasions too numerous to

recount individually. (*Id.* ¶ 19). These odors have been described as obnoxious, foul, and nauseating. (*Id.* ¶ 20). Members of the putative class note, among other things, their inability to use outdoor areas of their homes, their inability to host guests due to embarrassment, and even an inability to walk their dogs. (*Id.* ¶ 21). The stench sometimes becomes so pungent that it actually permeates the inside of Class members' homes, despite having closed their doors and windows and remaining trapped indoors. (*Id.* ¶ 22).

II. PROCEDURAL HISTORY

Plaintiffs' Complaint was filed on June 26, 2018, and it asserts claims for private nuisance, public nuisance, and negligence. A25-40. Plaintiffs seek compensatory, injunctive, and punitive relief. A38-39. Defendant filed a Motion to Dismiss under Fed. R. 12(b)(6), asserting that the nuisance alleged by Plaintiffs is too large to be private and lacks the "special injury" necessary to be actionable under a public nuisance theory. It claimed that Defendant owes no duty to Plaintiffs, and that their negligence claim is duplicative of their nuisance claims. It also asserted that neither injunctive nor punitive relief was available to Plaintiffs under Pennsylvania law.[1]

[1] The district court did not reach these arguments, having dismissed Plaintiffs' complaint in its entirety. Plaintiffs submit that these issues are appropriately addressed only on remand, but to the extent that the Court may consider them, Plaintiffs rely on the arguments made in their brief to the district court.

The district court dismissed Plaintiffs' Complaint in its entirety, finding that they had failed to state claims for public nuisance, private nuisance, or negligence. A3-18. The district court broke new legal ground with respect to its basis for dismissal of each of the three causes of action, despite well-established precedent contravening its holdings.

Private Nuisance

The district court found that Plaintiffs failed to state a claim for private nuisance because it asserted that the nuisance was public, and therefore could not be private. A12-13. It also found that at a distance of approximately 1.6 miles from the landfill, Plaintiffs could not satisfy a "neighboring" element of the private nuisance cause of action that the court determined exists under Pennsylvania law. A13.

Public Nuisance

The district court found that Plaintiffs failed to state a claim for public nuisance because too many people were impacted by the type of harm suffered by Plaintiffs for that harm to be considered as the sort of "special injury" necessary to support this cause of action. A8-12.

Negligence

The district court found that Plaintiffs failed to state a claim for negligence because they had not identified any duty that Defendant owed to them under

Pennsylvania law, since there could be no duty to prevent odors from entering one's neighbors property. A13-16.

Plaintiffs timely filed a Notice of Appeal on March 28, 2019. A1.

SUMMARY OF ARGUMENT

1. The district court erred in concluding that Plaintiffs did not state a claim for private nuisance because the alleged nuisance impacted too many people.

The district court appeared to assume that if the nuisance was public, it could not also be private. Pennsylvania law makes clear that a nuisance can be both public and private, and that any nuisance that impacts people's ability to use and enjoy their homes is necessarily a private nuisance. The district court ffunctionally imposed a limitation on the number of people who can be impacted by a private nuisance, but no such limitation exists under Pennsylvania law.

2. The district court erred in concluding that Plaintiffs did not state a claim for public nuisance because it found that their homes are not "neighboring" properties to the nuisance.

The district court concluded that at a distance of 1.6 miles, Plaintiffs' home is located too far from Defendant's landfill to assert a private nuisance claim against it. The district court imposed a "neighboring" limitation on the property that does not exist under Pennsylvania law, and was based on a misapplication of caselaw

limiting nuisance actions to instances involving discordant, contemporaneous land uses.

3. The district court erred in concluding that Plaintiffs did not state a claim for public nuisance because they had not alleged a "special injury."

In similar fashion to its ruling on Plaintiffs' private nuisance claim, the district court concluded that Plaintiffs alleged a nuisance which impacted too many people for the impacts to themselves to constitute the special injury necessary to support their public nuisance claims. Here again, there is no upper limit on the number of people who can be impacted in this way, and the salient consideration is the impact to the Plaintiffs' home and property. In combination with the court's ruling on Plaintiffs' private nuisance claims, if this is allowed to stand it would have the perverse impact of immunizing any actor from nuisance liability so long as the actor ensures that the nuisance impacts a sufficiently large number of persons.

4. The district court erred in concluding that Plaintiffs did not state a claim for negligence because Defendant owed them no duty.

The district court cited a single case in which the plaintiffs failed to *identify* a duty owed to them by the defendants in a case that involved odors and particulate in support of the notion that there can *never* be a duty to refrain from emitting airborne pollutants onto one's neighbors. A long line of Pennsylvania caselaw reveals this interpretation to be clearly erroneous. Plaintiffs have alleged duties arising from

Defendant's affirmative acts in operating a landfill which comport with duties long established under the law of the Commonwealth.

ARGUMENT

I. Standard of Review

A district court's decision on a motion to dismiss under Rule 12(b)(6) is subject to de novo review. *McTernan v. City of York, Pa.*, 577 F.3d 521, 526 (3d Cir. 2009). "[A]ll well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the plaintiffs, and all [reasonable] inferences must be drawn in favor of them." *Id.; see Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 242 (3d Cir. 2008). This Court's role in reviewing dismissal on a Rule 12(b)(6) motion is to "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cty. Of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (internal quotation marks omitted).

II. The District Court Erred in Determining that the Complaint Fails to State a Claim for Private Nuisance

The district court dismissed Plaintiffs' private nuisance claims because it concluded that (1) their allegations constituted a public nuisance (albeit one that it determined was not actionable), and therefore not a private nuisance; and (2) the location of their home, 1.6 miles away from the landfill, renders it too far to be considered a "neighboring" property. A12-13. The district court ignored that (1) a nuisance can be both public and private, and (2) there is absolutely no distance

limitation in the law of private nuisance. The "neighboring" requirement refers only to the character of a private nuisance action.

A. There is no upper limit on the number of people who may be impacted by a private nuisance.

The number of persons impacted is simply not a threshold issue for the existence of a private nuisance. Pennsylvania has acknowledged the Restatement of Torts (Second) section 822 for private nuisance.

> The section declares:
> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
> (a) intentional and unreasonable, or
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Youst, 94 A.3d at 1072 (citing Restatement (Second) of Torts § 822). The Restatement, as recognized by Pennsylvania courts, contains definitions for "intentional invasion" and "unreasonable." *Id.* It does not place a limitation on the number of persons who may be impacted. Rather, in a section entitled "Who Can Recover for Private Nuisance[,]" the restatement provides:

> For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including
> (a) possessors of the land,
> (b) owners of easements and profits in the land, and
> (c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment.

Restatement (Second) of Torts, § 821E. Plaintiffs clearly fall into the first category and are such may bring claims for private nuisance. There is no element that involves consideration of the number of impacted plaintiffs. The district court developed this element from its erroneous determination that if a nuisance is public, it must therefore not be private. A12-13.

"The difference between a public and a private nuisance does not depend upon the nature of the thing done but upon the question whether it affects the general public or merely some private individual or individuals." *Phillips v. Donaldson*, 269 Pa. 244, 246, 112 A. 236, 238 (1920) (see also *Karpiak v. Russo*, 450 Pa. Super. 471, 676 A.2d 270, 272 (1996) ("a public nuisance does not exist unless a nuisance exists and affects the community at large and not merely the complaining parties.") While the number of people affected is relevant to determining the nature of a nuisance, public and private nuisances are not mutually exclusive. Any public nuisance can also be a private nuisance. This is because it is the nature of the injury that determines whether or not a private nuisance exists, including in the presence of a public nuisance.

The district court erred because a nuisance can be both public and private. *Youst v. Keck's Food Serv.*, 2014 PA Super 121, 94 A.3d 1057, 1071 ("A nuisance may be public, private, or both public and private.") (citing *Pa. Soc'y for the Prevention of Cruelty to Animals v. Bravo Enters., Inc.*,428 Pa. 350, 360, 237

A.2d 342 (Pa. 1968)); *accord Umphred v. VP Auto Sales & Salvage, Inc.*, No. 6062 OF 2014, 2014 Pa. Dist. & Cnty. Dec. LEXIS 332, at *16 (C.P. Oct. 27, 2014) affirmed at *Umphred v. VP Auto Sales & Salvage, Inc.*, 122 A.3d 1143, 2015 Pa. Super. Unpub. LEXIS 1904 (2015); see also *Marques v. Bunch,* 18 Pa. D. & C.3d 371, 380 (C.P. 1980). The number of impacted persons can determine if a particular nuisance rises to the level of a public nuisance, but property damage, including loss of use and enjoyment, suffices for actionability as either a private nuisance or a public nuisance that creates special injury.

Until this case, no court applying Pennsylvania law had set an upper limit on the number of persons who could be impacted by a private nuisance, whether or not it was also a public nuisance. If, beyond the impact to the public right, there are impacts to the plaintiff's use and enjoyment of their home, that alone is sufficient. *Umphred*, 2014 Pa. Dist & Cnty. Dec. LEXIS 332, at *24("[i]f a nuisance interferes with the public right and with the use and enjoyment of the plaintiffs land, it is also a private nuisance."). In *Umphred*, the plaintiffs proved that the defendant's "business operation is a private and a public nuisance." *Id.* at *27.

Plaintiffs' Complaint pleads each element of a private nuisance cause of action under both the Restatement and Pennsylvania law. That the nuisance impacted some number of people less than an unspecified threshold is not a required element. The district court's determination should be reversed.

B. There is no proximity requirement in the law of private nuisance.

The district court also determined that Plaintiffs' property was too far from the landfill to be impacted by a private nuisance. It reached this result by adopting an argument Defendant advanced which thoroughly misstated the "neighboring" property requirement. This mistaken position seizes upon caselaw which forecloses private nuisance actions by anything other than concurrent land users. *See, e.g., Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3d Cir. 1985) (description of contemporaneous "neighboring" property to explain why actions by purchaser of real estate against seller of that same real estate do not support private nuisance cause of action). "[T]he goal of nuisance law is to achieve efficient and equitable solutions to problems created by discordant land uses. In this light nuisance law can be seen as a complement to zoning regulations, (citation) and not as an additional type of consumer protection for purchasers of realty." *Id.*

The "neighboring" characterization merely describes private nuisance actions as those which arise from impacts caused to nearby properties. It does not impose some upper limit on what may constitute a neighboring property. Earlier this year in *Leety v. Keystone Sanitary Landfill* (Case No. 2018-CV-1159)(C.P. Jan 24, 2019), the Court of Common Pleas of Lackawannna County explicitly rejected this argument. ADD1-12. That case is a landfill odor nuisance class action which for all relevant purposes is functionally identical to the instant case. There, the defendant

asserted that the plaintiff's private nuisance claim should be dismissed because her property was not alleged to be near enough to the landfill at issue to be considered "neighboring." The court held that the defendant's

> contention that the putative class action representative must own or possess a "neighboring" property to assert an action for private nuisance is without merit. No such "neighboring" requirement exists in the law and Keystone's attempt to add the element of "neighboring" to Plaintiff's elements is rejected.

ADD6.

The court in *Leety* was correct in finding that there is no "neighboring" element in Pennsylvania's cause of action for private nuisance. The term has been used in numerous cases to describe the nature of a private nuisance, not what is necessary to prove it. By its very nature a private nuisance will impact persons within its vicinity, but there is no threshold distance limitation within the cause of action. For example, in *Noerr v. Lewistown Smelting & Refining, Inc.*, 60 Pa. D&C 2d 406, 414 (pa.Com.Pl. 1973) the plaintiffs prevailed in a bench trial on nuisance and negligence claims against a nuisance that was "approximately one and one-half miles northeast from plaintiffs' house and barn, approximately 3,000 feet east from farmland leased by plaintiffs and used in their farm operation, and approximately one and one half miles west from other land leased by plaintiffs and used in their farm operation." Similarly, in *Karpiak v. Russo,* a trial was held on claims by "home-owners who live near appellees' landscaping supply business." *Karpiak v. Russo,*

450 Pa. Super. 471, 473 (Pa. Super. Ct. 1996). And in *Tiongco v. Sw. Energy Prod. Co.*, 214 F. Supp. 3d 279, 285 (M.D. Pa. 2016), the court expressly noted that the plaintiff's home was a quarter mile from the nuisance. But again, the location of her home was not a threshold issue. This case is no different. Further, even if "neighboring" properties were an element of the cause of action, Plaintiffs' home is indeed a "neighboring" property of the landfill. "Neighbor" is not synonymous with "next door neighbor." Merriam-Webster dictionary defines "neighbor" as "one living or located near one another."[2] Plaintiffs and the class all reside *near* defendant's landfill.

Nuisances that inherently affect many people over a large geographic area routinely give rise to private nuisance actions. In *Diehl v. CSX Transp., Inc.*, 349 F. Supp. 3d 487, 494-95 (W.D. Pa. 2018), the plaintiff brought private nuisance claims on behalf of a class of approximately 1,000 residents impacted by a trail derailment. Those claims were based in part on the fact that the Defendant "create[ed] noxious fumes and odors that Plaintiff could smell insider her home." *Id.* The court refused to dismiss the plaintiff's private nuisance claim for failure to state a claim, detailing the elements of the claim at length:

> Pennsylvania follows the Restatement (Second) of Torts definition of private nuisance. According to the Restatement:

[2] https://www.merriam-webster.com/dictionary/neighbor?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last accessed May 30, 2019).

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.
>
> When analyzing a private nuisance claim under the Restatement, 'the key question is whether one person has impaired another person's private right of use or enjoyment of their land.

Diehl v. CSX Transp., Inc., 349 F. Supp. 3d 487, 507-08 (W.D. Pa. 2018) (citations and internal quotation marks omitted). Despite the fact that the plaintiff asserted a private nuisance that impacted approximately 1,000 geographically dispersed people, the court made no mention of the number of class members or their proximity to the nuisance in its analysis of this claim.

Here, while the number of impacted persons is relatively large, Plaintiffs have stated claims for private nuisance because they have alleged the requisite interference with the use and enjoyment of their own property. See, e.g., *Maroz v. Arcelormittal Monessen LLC*, No. 15cv0770, 2015 U.S. Dist. LEXIS 140660, at *10-11 (W.D. Pa. Oct. 15, 2015) ("This Court concurs with Plaintiffs that they have asserted a valid claim for private nuisance, based solely upon their allegations claiming they have lost the use and enjoyment of their land and have borne decreased

property values.")[3]. There is simply no authority for the proposition that this additional unfounded element should be grafted onto Plaintiffs' cause of action and their private nuisance claims therefore dismissed. To the contrary, Pennsylvania law is replete with cases in which private nuisance causes of action were advanced despite the fact that the underlying conduct impacted a large number of people.

Plaintiffs have pled each element of a private nuisance cause of action. The distance between the nuisance and Plaintiffs' property is not such an element. The district court's determination should be reversed.

III. The District Court Erred in Finding that the Complaint Fails to State a Claim for Public Nuisance

The district court found that Plaintiffs failed to allege "special harm"[4] and therefore failed to state a claim for public nuisance. A11. It arrived at this conclusion by determining that "Plaintiffs allege no reason other than their proximity to the landfill to prove that they suffered a special harm[,]" despite Plaintiffs' repeated references to the impacts to their homes and property. (*Id.*). The court reasoned that if Plaintiffs suffered a special harm, all households within an equal or lesser distance

[3] Certain of the instant Plaintiffs' counsel were also involved in *Maroz.* That case, which involved allegations of air pollution from a coke manufacturing facility, claimed impacts to thousands of residents across a large geographic area, just like this one.

[4] This requirement is alternatively referred to in the opinion and in the caselaw as special injury, special harm, and harm over and above that suffered by the community.

of the landfill must have suffered a special harm, and that this necessarily resulted in a number of impacted persons so large ("thousands") that it could not constitute a special injury. A11-12.

The district court largely based its opinion in this regard upon its interpretation of *In re One Meridian Plaza Fire Litig.*, 820 F.Supp. 1460 (E.D. PA 1993), *rev'd on other grounds sub nom. Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270(3rd Cir. 1993), *cert. denied sub nom. Ejay Travel, Inc. v. Algemeen Burgerlijk Pensioenfonds*, 511 U.S. 1107 (1994). *One Meridian Plaza* is a roughly 26-year-old district court opinion which grappled with the outer limits of liability stemming from a fire in a commercial skyscraper, and it reads like a law school hypothetical fact pattern. The plaintiffs included people who were employed by tenants of the building and left behind personal effects which were destroyed, neighbors who were temporarily blocked from accessing their places of business, and salespeople who asserted that they were deprived of potential business by being unable to sell to tenants of the building because of the fire. There were numerous individual plaintiffs in addition to five putative classes and seventeen defendants. Among the claims alleged were negligence, negligence per se, public nuisance, and private nuisance.

The *One Meridian Plaza* Court asserted that "Pennsylvania courts have never explicitly considered the issue" of what constitutes special or peculiar harm. *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1481 (E.D. Pa. 1993). It turned

to Section 821C of the Restatement, including the comments thereto. That section requires that:

> [i]n order to recover for damages in an individual action for public nuisance, one must have suffered a harm of kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

Id. It then considered the "two underlying bases for [the plaintiffs'] assertion that they have suffered special harm: denial of access to land and pecuniary loss[,]" each of which was addressed by an official comment to Restatement § 821C. Considering only those categories of harm, the Court observed that "I believe that the above cited cases and the Restatement are all in agreement: where there are a large number of plaintiffs, the harm those plaintiffs suffered is not special." *One Meridian Plaza*, 820 F.Supp. at 1481. "As a matter of law I find that the only parties who may have suffered peculiar harm as a result of the closure of the streets due to the fire were those businesses who can show with reasonable certainty that they lost profits due to the closure of the streets and who suffered a substantial lack of access." *Id.*

Like other courts in Pennsylvania, *One Meridian Plaza* recognizes that the Restatement is authoritative on public and private nuisance under Pennsylvania law. *See Id; Diess v. Pa. DOT*, 935 A.2d 895, 904 (Pa. Commw. Ct. 2007); *Umphred v. VP Auto Sales & Salvage, Inc.*, No. 6062 OF 2014, 2014 Pa. Dist. & Cnty. Dec. LEXIS 332, at *24 (C.P. Oct. 27, 2014). What the *One Meridian Plaza* court did not

recite from the Restatement is comment *e* to Section 821C, which provides without qualification that

> when the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one. In this case the harm suffered by the plaintiff is of a different kind and he can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance.

Restat 2d of Torts, § 821C, comment *e* (2nd 1979).

The district court seized upon the *One Meridian Plaza* court's assertion that "where there are a large number of plaintiffs, the harm those plaintiffs suffered is not special." A10. But this ignores the real test that applies under the Restatement and Pennsylvania law, including *One Meridian Plaza*. Property damage caused by a nuisance, including interference with use and enjoyment of land, is inherently sufficient to support causes of action for both public nuisance (as a special injury) or private nuisance. Restat 2d of Torts, § 821C, comment *e* (2nd 1979). The number of persons impacted is not a threshold issue. This is demonstrated by the fact that in the approximately 26 years since the case was decided, no Pennsylvania court appears to have ever imposed a numerical limitation on the number of persons who could be impacted by a special injury – until now. Nor was such a limitation imposed prior to the decision. Even in *One Meridian Plaza*, the court did not dismiss the claims of any plaintiffs who could "show with reasonable certainty" that they "lost profits" and "suffered a substantial lack of access[,]" independent of its general

reference to numerical limitations. The court recognized that the special injury requirement is, at bottom, about the nature and extent of the harm.

As one court in this circuit noted, the Supreme Court of Pennsylvania has held that "a private action for a public nuisance can be maintained only by one suffering a particular loss or damage beyond that suffered by all others affected by the nuisance" for more than 200 years. *Kuhns v. City of Allentown*, 636 F. Supp. 2d 418, 436 (E.D. Pa. 2009) (citing *Edmunds v. Duff*, 280 Pa. 355 (1924); *Hughes v. Heiser*, 1 Binn. 463, 468 (Pa. 1808) (additional citations omitted). But outside of the district court in this case, and arguably the *One Meridian Plaza*, no court appears to have ever imposed an upper limit on the number of persons such a "particular loss or damage" may impact. *See Id.* This includes numerous instances wherein "[t]he Third Circuit, following Pennsylvania decisions and the Restatement of Torts, has repeatedly reached the same result: 'In order to recover damages in a private action for public nuisance, a plaintiff must have suffered a harm of greater magnitude and of a different kind than that which the general public suffered.'" *Id*. (citing *Allegheny General Hospital v. Phillip Morris Inc.*, 228 F.3d 429, 446 (3d Cir. 2000); *Peco v. Hercules Inc.*, 762 F.2d 303, 315-16 (3d Cir. 1985)) (additional citations omitted).

Countless cases have recited the elements of a private cause of action for public nuisance, making no mention of any quantitative or qualitative numerical limitation on the number of impacted persons. And activities that inherently affect

many people routinely give rise to private rights of action for public nuisance. In fact, as the *One Meridian Plaza* Court observed and the district court quoted, "[p]ublic nuisances, by definition, affect many people." A9 (quoting *One Meridian Plaza*, 820 F. Supp. at 1481). None of those cases applied any ceiling to the number of persons who might be impacted by the special harm.

The *One Meridian Plaza* Court's observation is neither applicable here nor essential to that case's holding. The only way to reconcile it with Pennsylvania law is to view it as an effort to explain the limits on liability along the lines of the economic loss doctrine, but through a different avenue. In fact, it has been explicitly criticized for having done so. *Duquesne Light Co. v. Pa. Am. Water Co.*, 2004 PA Super 160, ¶ 18, 850 A.2d 701, 706; *Ricchiuti v. Home Depot Inc.*, 412 F. Supp. 2d 456, 459 n.2 (E.D. Pa. 2005) ("In *Duquesne Light*, the Pennsylvania Superior Court rejected the reasoning of *In re One Meridian Plaza Fire Litigation*, 820 F. Supp. 1460 (E.D. Pa. 1993), in which the district court found that economic losses are recoverable under a public nuisance claim. The superior court argued that the long-standing Pennsylvania public policy to bar economic damages for tortious conduct contradicts the reasoning of the district court that the requirement for a unique or peculiar harm ''serves the same purpose as the economic loss doctrine: to limit liability arising from an event.'"). This case is about a different sort of injury, property damage, which under the Restatement and interpreting caselaw is

independently sufficient to support a private right of action. *See, e.g., Umphred*, 2014 Pa. Dist & Cnty. Dec. LEXIS 332, at *24. But rather than following the clear path established by hundreds of years of precedent, the district court seized on *One Meridian Plaza*'s observation and extended it even further. In so doing, it became the first court applying Pennsylvania law to hold that there is an upper limit on the number of persons who may be impacted by a special injury, though it did not say what that limit might be.

Most other states also follow the Restatement view in requiring a special injury. Caselaw makes clear that the overwhelming view is that there is no numerical limitation on the number of impacted persons, and that property damage alone is sufficient to state such a claim.

> That more than one, or in fact a considerable number closer to it, had the use and enjoyment of their property curtailed and restricted in the manner described does not mean that each of them have not received injury which differed in kind and not merely in degree from the community generally.

Karpisek v. Cather & Sons Constr., Inc., 117 N.W.2d 322, 326 (Neb. 1962).

> The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance; and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief.

Id. at 327 (citing 66 C. J. S., Nuisances, § 79, p. 835). "Pleading a diminution in value of one's home and property qualifies as special damages for purposes of

establishing standing in a public nuisance suit." *Cangemi v. United States*, 939 F. Supp. 2d 188, 206 (E.D.N.Y 2013) (quoting *Black v. George Weston Bakeries, Inc*., No. 07–CV–0853, 2008 WL 4911791, at *7 (W.D.N.Y. Nov. 13, 2008). "[T]he public nuisance as to the person who is specially injured thereby in the enjoyment or value of his lands becomes a private nuisance also." *Baker v. Saint-Gobain Performance Plastics Corp.*, 232 F. Supp. 3d 233, 248 (N.D.N.Y. 2017)(quoting *Kavanagh v. Barber*, 131 N.Y. 211, 30 N.E. 235, 235 (N.Y. 1892)). "When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one. In this case the harm suffered by the plaintiff is of a different kind and he can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance." *Willmschen v. Trinity Lakes Improvement Ass'n*, 362 Ill. App. 3d 546, 554, 298 Ill. Dec. 840, 847-48, 840 N.E.2d 1275, 1282-83 (2005) (quoting Restatement (Second) of Torts § 821C, Comment *e*)*; see also Frady v. Portland Gen. Elec. Co.*, 55 Or. App. 344, 349, 637 P.2d 1345, 1349 (1981) (same).

Another landfill owner recently raised the same "special injury" argument as Defendant in an Ohio federal court, where it was flatly rejected:

> Beck also alleges an injury distinct from that suffered by the public at large. The general public includes anyone who must suffer the consequences of being in the presence of the alleged odors—people

> who live in the area like Beck, but also people who work in the area or travel through the area. Beck's alleged injury as a property owner is distinct from the alleged injury suffered by the general public.

Beck v. Stony Hollow Landfill, Inc, No. 3:16-cv-455, 2017 U.S. Dist. LEXIS 65874, at *9 (S.D. Ohio May 1, 2017).

Again, the district court erroneously concluded that because it found the nuisance to be public, it must not be private. It bears repeating that a nuisance can be both public and private, and it should be noted that a private right of action for public nuisance is often conflated with a private nuisance in the caselaw. This further undermines the notion that there is an upper limit on the number of persons who can be impacted by a special injury or a private nuisance. For example, "[i]f a nuisance interferes with the public right and with the use and enjoyment of the plaintiffs land, it is also a private nuisance. 'In this case the harm suffered by the plaintiff is of a different kind and he can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance." *Umphred*, 2014 Pa. Dist & Cnty. Dec. LEXIS 332, at *23-24 (C.P. Oct. 27, 2014) (citing Restatement § 821C, Comment d). What this means is that (1) a plaintiff can state claims for both public and private nuisance; and (2) where there is interference with a public right, interference with the use and enjoyment of the plaintiff's land is sufficient to create a private right of action for public nuisance.

In *Marques v. Bunch*, the defendant's sludge dumping activities resulted in an odor that both interfered with the public and the use and enjoyment of landowners. 18 Pa. D & C.3d 371, 383-84 (C.P. 1980). The Court held that "Bunch's sludge dumping has resulted in a foul and obnoxious odor that constitutes a private nuisance to surrounding landowners, as well as constituting a private nuisance." *Id.*

Defendant also asserted below that Plaintiffs' public nuisance claims must fail because they "have not alleged a violation of the right of the general public." As an initial matter, the actual legal standard is not whether a right of the general public is violated but whether the nuisance "affects the community at large." *Karpiak v.* Russo, 676 A.2d 270, 274-75 (1996)[5]. But as discussed above, the nuisance does affect community at large, which includes more than just the putative class. For one, the putative class does not include occupants of homes in the Class Area who are neither owner-occupants nor renters. It also does not include those who have reason to travel in and through the area, to shop, work, visit friends or family, or for any other purpose. Since the odors are dispersed throughout the area, these other

[5] It cannot be seriously argued that the Defendant has not interfered with a right common to the general public. One need look no further than to Pennsylvania's constitution to determine that in the Commonwealth, "[t]he people have a right to clean air." Pa. Const. Art. I, § 27 (*see also Fisher v. Am. Reduction Co.*, 189 Pa. 419, 429, 42 A. 36, 39 (1899) ("The plaintiffs had a right to pure untainted, uncontaminated, inoffensive air, at least as pure as it may be consistent with the compact nature of the community in which they lived.")).

elements of the "community at large" are thereby affected, as noted by the court in *Beck*. Those suffering a special injury are only one subset of the community (property owners and renters); the community at large is generally affected by the nuisance.

Further, as the district court correctly observed, Article VI of the Solid Waste Management Act (1980 Act 97)[6] provides that:

> Any violation of any provision of this act, any rule or regulation of the department, any order of the department, or any term or condition of any permit, shall constitute a public nuisance. Any person or municipality committing such a violation shall be liable for the costs of abatement of any pollution and any public nuisance caused by such violation.

This provides an additional basis for finding the existence of a public nuisance, which combines with Plaintiffs' special injury to substantiate their cause of action.

IV. The District Court Erred in Finding that the Complaint Fails to State a Claim for Negligence

A. Defendant owes Plaintiffs a legal duty.

In dismissing Plaintiffs' negligence claim, the district court found that Plaintiffs did "not submit any legal argument to show that Defendant had a duty to

[6] "When the legislature validly pronounces a particular state of affairs to be a nuisance prejudicial to the public health, it is as much so as if the proscribed situation had been considered a nuisance… at common law, and may be prohibited by the same remedies." *Commonwealth ex rel. Shumaker v. N.Y. & Pa. Co.*, 367 Pa. 40, 49, 79 A.2d 439, 444 (1951) (quoting *Commonwealth v. Dietz,* 285 Pa. 511, 519, 132 A. 572 (1926)).

Plaintiffs other than that which is allegedly imposed by statute or regulation." A15. The court found that the Pennsylvania Solid Waste Management act could not be the basis for a duty, and therefore that Plaintiffs had failed to state a claim for negligence. (*Id.*) It also cast Plaintiffs' claims, to the extent that Defendant's duty might be predicated on statute, as negligence per se claims. (*Id.*)

Plaintiffs did indeed advance legal argument to show that Defendant owed Plaintiffs duties other than those imposed by statute or regulation. Plaintiffs' counsel argued that "this is…the run of the mill negligence duty that…one has when one undertakes an affirmative act[.]" (A74:4-6). Counsel noted that this standard was recently reaffirmed by the Supreme Court of Pennsylvania in *Dittman v. UPMC*, 196 A.3d 1036, 1046-47 (Pa. 2018); (A74:6-9).

> This Court has observed that '[i]n scenarios involving an actor's affirmative conduct, he is generally 'under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.' The *Seebold* Court explained that '[t]his duty appropriately undergirds the vast expanse of tort claims in which a defendant's affirmative, risk-causing conduct is in issue.' Indeed, this Court noted that 'many judicial opinions on the subject of negligence do not specifically address the duty element,' not because they 'fail to see duty as an element of negligence, but because they presume the existence of a duty where the defendant's conduct created a risk.'

Dittman, 196 A.3d at 1046-47 (citations omitted). In other words, Defendant, affirmatively engaging in landfilling conduct, is under a duty to Plaintiffs to exercise the care of a reasonable man to protect them against an unreasonable risk of harm

arising out of the act. Defendant's "affirmative, risk-causing conduct is in issue." *See Id.* It is axiomatic that there is generally a duty where it is the defendant's conduct that created a risk.[7] "Common-law duties stated in general terms are framed in such fashion for the very reason that they have broad-scale application." *Id.* (quoting *Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co.*, 106 A.3d 27, 40 (Pa. 2014)). "Like any other cause of action at common law, negligence evolves through either directly applicable decisional law or by analogy, meaning that a defendant is not categorically exempt from liability simply because appellate decisional law has not specifically addressed a theory of liability in a particular context." *Id.* (quoting *Scampone v. Highland Park Care Center, LLC*, 618 Pa. 363, 57 A.3d 582, 599 (Pa. 2012)).

The same or similar duty has been found in the context of power plants, brass smelters, natural gas extraction, road construction, and more. See *Noerr v. Lewistown Smelting & Ref., Inc.*, 60 Pa. D. & C.2d 406, 453 (C.P. 1973) (negligence included failing to install and properly operate adequate pollution controls); *Kamuck v. Shell Energy Holdings GP, LLC*, No. 4:11-CV-1425, 2012 U.S. Dist. LEXIS

[7] "A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm." *Widdoss v. Huffman*, 62 Pa. D. & C.4th 251, 255 (C.P. 2003). "[W]here an injury is sustained to real property as a result of the negligence of another, the property owner is entitled to damages…" *Clark v. Fritz*, 151 A.3d 1139 n.22 (Pa. Super. Ct. 2016).

59113, at *32-33 (M.D. Pa. Mar. 19, 2012) ("[the] complaint outlines a duty of care owed by the Defendants arising out of their drilling and natural gas extraction activities); *Hartle v. FirstEnergy Generation Corp.*, Civil Action No. 08-1019, 2014 U.S. Dist. LEXIS 36509, at *2 (W.D. Pa. Mar. 20, 2014); *Butts v. Sw. Energy Prod. Co.*, No. 3:12-CV-1330, 2014 U.S. Dist. LEXIS 111637, at *22 (M.D. Pa. Aug. 12, 2014). Pennsylvania courts have long held that when it comes to the emission of offensive gasses from industrial operations, whether liability will attach depends on whether (as here) there is negligence, recklessness, or ultrahazardous conduct. *Waschak v. Moffat*, 379 Pa. 441, 455, 109 A.2d 310, 317-18 (1954).

There is no novel duty at issue here. Plaintiffs' Complaint alleges that a properly run landfill will capture and destroy odorous landfill gas, which Defendant has failed to do. The Defendant's duty is not to prevent all odors from reaching Plaintiffs' property, but to operate its landfill with due care to prevent harm to its neighbors. "Of course, it is not to be questioned that the defendant had the right to do its work…but all this could be done contemporaneously with the use of due care in protecting the property of the plaintiffs and, to the extent that the defendant failed in doing this, it is liable in damages." *Dussell v. Kaufman Constr. Co.*, 398 Pa. 369, 377, 157 A.2d 740, 744 (1960).

Gilbert v. Synagro Corp. does not support the district court's ruling. There, the court noted that "at no point in the Complaint, Plaintiffs' Response In Opposition,

or the support brief do Plaintiffs clarify what legal duty Defendants, as transporters, haulers, spreaders, marketers or users, owed to Plaintiffs to protect Plaintiffs against the alleged unreasonable risks and injuries." *Gilbert v. Synagro Cent., LLC*, No. 2008-SU-3249-01, 2012 Pa. Dist. & Cnty. Dec. LEXIS 323, at *37 (C.P. Dec. 28, 2012). *Gilbert* involved only the question of whether the plaintiffs in that case had put forth any duty that a "transporter, hauler, spreader, marketer, or user" of organic fertilizer, in general, owes his neighbors with respect to the spread of odors, particulates, and flies. *Id*. The case does not stand for the proposition that the spread of emissions of odor or particulate can never be violative of a legal duty. The court merely observed that the "Plaintiffs failed to allege a legally recognized duty and this Court cannot determine any duty or obligation recognized by the law requiring Defendants to conform to a certain standard of conduct for the protection of Plaintiffs against unreasonable risks." In contrast, Defendant's duties to Plaintiffs arise from specific affirmative acts, as specified above. Defendant is a major industrial operation whose affirmative acts create its emissions as well as its duties to its neighbors. Pennsylvania law has always imposed a duty of care in such situations, and *Gilbert* does not change that.

"Our case law affords great protection to property owners who suffer damage at the hands of a tortfeasor." *Welsh v. City of Phila.*, 16 Phila. 130, 143 (1987). Pennsylvania courts have long recognized the duty of care owed by industrial

operators, like Defendant, to nearby residents. It is true that this duty has not often been analyzed in judicial opinions, "because," as noted in *Dittman*, "[courts] presume the existence of a duty where the defendant's conduct created a risk." *Dittman,* 196 A.3d at 1047 (quoting *Seebold v. Prison Health Services, Inc.*, 618 Pa. 632, 57 A.3d 1241 n.21 (Pa. 2012)). Notably however, the court in *Leety* recently rejected the same argument Defendant makes here, finding that the plaintiff had adequately alleged the violation of a duty to adhere to landfill industry standards of care. ADD7.

Plaintiffs' claims are based on violations of the common law duties imposed upon all people, specifically including industrial operators, as a consequence of their own affirmative acts. However, at least one court has indicated that a comparable duty arises from the Pennsylvania Air Pollution Control Act ("APCA").[8] Another has indicated that provisions of the APCA and the SWMA provide support for the existence of duties. "[T]he reporting requirements of the APCA might not implicate any duty owed to plaintiffs. The court, however, cannot determine that no evidence of a violation of the APCA would be relevant to the standard of care applicable to a duty owed to plaintiffs…In line with the court's findings with respect to the APCA,

[8]"We are persuaded that the stated purpose of APCA brings that act within the scope of Restatement (Second) of Torts § 286 and that the duties set forth in section 4008 of APCA and section 123.31(b) of the code should, therefore, govern as the standard of care." *Goldsborough v. Columbia Borough*, 48 Pa. D. & C.3d 193, 197-98 (C.P. 1988).

the jury may consider evidence of the violation of the SWMA as evidence of negligence." *Hartle*, 2014 U.S. Dist. LEXIS 36509, at *17-20.

Further, even if Pennsylvania had not recognized similar or identical common law and statutory duties for decades, there would be ample basis for imposing such a duty on Defendant. "To assist us in identifying a previously unrecognized duty, we rely upon five factors: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." *Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 222 (Pa. 2018) (quoting *Althaus v. Cohen*, 562 Pa. 547, 553, 756 A.2d 1166, 1169 (2000)). Plaintiffs are residents of the community in which Defendant has undertaken to operate. While waste disposal obviously has social utility, there is much less social utility in doing it negligently. The nature of the risk is the depravation of public property rights, and it is plainly foreseeable in that the consequences of poorly managed landfill emissions are well known. The consequences of imposing this duty are to hold landfill operators to the appropriate industry standard and improve conditions for those residing near landfills. There is very clearly an overwhelming public interest in imposing such a duty, consistent with Pennsylvania public policy:

> [i]mplicit…is the right to protect one's property from harm, whether it be in the form of decreased valuation, insufficient water supply, excessive dust, noise, pollution, or some other cause. . . When the property at issue is someone's home, the owner's right to protect the viability of his property is even more personal. The purchase of a home is often considered to be one of, if not the, most significant investments an individual can make during his lifetime. **To deny an individual the right to protect his interest in the property he calls home would violate public policy.**

Markwest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd., 183 A.3d 516 (Pa. Commw. Ct. 2018).

Plaintiffs' claims do not raise a novel issue of duty. Defendant receives and buries waste at its landfill, and undertakes landfill management activities that are supposed to prevent odorous emissions from escaping. Affirmative acts like these have always been held to create duties. The district court erred in finding that Plaintiffs had not alleged any recognized duty, and that finding should be reversed.

B. Plaintiffs' Negligence Claims Rely on Facts Beyond Those at Issue in Their Nuisance Claims.

The district court did not reach Defendant's argument that Plaintiffs' negligence claims were impermissibly duplicative of their nuisance claims. In addition to the aforementioned legal duties, Plaintiffs' negligence claims rely on numerous allegations that are not necessary to their nuisance claims, rendering them legally distinct. In order to establish that Defendant created a nuisance, it is not necessary that Plaintiffs prove that Defendant breached any particular duty or acted

unlawfully. The nuisance claims focus on the harm to Plaintiff, the reasonableness of that harm, and whether Defendant caused it. Further, the nuisance claim stands on its own given the Solid Waste Management Act's establishment of a per se public nuisance for violations of that act. (1980 Act 97, Article VI).

Relying on *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. 1999), Defendant contended below that Plaintiffs' negligence claims must be dismissed as a matter of law because it is purportedly duplicative of their private nuisance claims. *Horne* is inapposite. Plaintiffs' negligence claims are not limited to the facts that establish their nuisance claims. The negligence claims include allegations of Defendant's acts and conduct that are beyond what is necessary to prevail on Plaintiffs' private nuisance claims. (See, e.g., A29-32 ¶¶ 11; 18; 20; 21). Further, in *Horne*, the threshold issue was that "appellees' operation of their poultry farm is an infringement upon the use of appellant's property which "is not wrongful in itself, but only in the consequences which may flow from it and, thus, is properly a nuisance claim." *Horne*, 728 A.2d at 960. Here, Plaintiffs allege that Defendant's facility has indeed been operated in a wrongful, illegal manner in violation of its permits and applicable regulations, as demonstrated by its numerous citations for the very conduct here at issue. Plaintiffs' negligence claims therefore fall outside the scope of *Horne*'s holding.

CONCLUSION

The district court improperly required Plaintiffs to satisfy elements of private and public nuisance claims that do not actually exist. This outcome has the perverse effect of immunizing the creator of a nuisance from property damage liability so long as it ensures that the nuisance is sufficiently large. It further failed to recognize well-established duties that Defendant owed to Plaintiffs, and therefore improperly dismissed Plaintiffs' negligence claims. The district court's dismissal of each of Plaintiffs' claims should be reversed, and the case remanded to the district court.

Respectfully submitted,

Dated: June 23, 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: June 24, 2019

/s/ Nicholas A. Coulson
Nicholas A. Coulson

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

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because this document, excluding the parts of the document exempted by Fed. R. App. P. 32(f), contains 8,860 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

Dated: June 24, 2019

/s/ Nicholas A. Coulson
Nicholas A. Coulson

VIRUS CERTIFICATION & IDENTICAL COMPLIANCE OF BRIEF

I, Nicholas A. Coulson, hereby certify that:

The electronic version of this brief is identical to the text version in the paper copies filed with the court. This document was scanned using Bitdefender Endpoint Security Tools, product version 6.2.18.884, engines versions 7.70079 (with updated virus definition file as of June 24, 2019) and no viruses were detected.

Dated: June 24, 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: June 24, 2019

/s/ Nicholas A. Coulson
Nicholas A. Coulson

JOINT APPENDIX
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBIN BAPTISTE and DEXTER BAPTISTE, on behalf of themselves and all others similarly situated,	)
Plaintiffs,	) Case No. 5:18-cv-02691-CFK
vs.	) HON CHAD F. KENNEY
BETHLEHEM LANDFILL COMPANY d/b/a IESI PA BETHLEHEM LANDFILL, a Delaware Corporation,	)
Defendant.	)

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given Robin Baptiste and Dexter Baptiste, Plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the Court's Memorandum and Order dismissing their claims ([Doc. No. 33; 34]) entered in this action on the 14th day of March, 2019.

Respectfully submitted,

Dated: March 28, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice list.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 28, 2019

By: _____*/s/Nicholas A. Coulson*_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBIN BAPTISTE AND DEXTER BAPTISTE, *Plaintiffs,*	:	CIVIL ACTION
v.	:	No. 18-2691
BETHLEHEM LANDFILL COMPANY, et al. *Defendant*	:	

OPINION

I. INTRODUCTION

Plaintiffs Robin Baptiste and Dexter Baptiste allege that the landfill operated by Defendant emits noxious odors which cause material injury to Plaintiffs' property and seek relief for their claims of public nuisance, private nuisance, and negligence. ECF No. 1. Plaintiffs also bring this action on behalf of a class of persons who are "owner/occupants and renters of residential property within a 2.5-mile radius of the Bethlehem Landfill Company Facility." ECF No. 1 at ¶ 35. Before the Court is Defendant's Motion to Dismiss (ECF No. 7), Plaintiffs' Opposition (ECF No. 24), and Defendant's Reply (ECF No. 25). For the reasons that follow, the Court grants Defendant's Motion to Dismiss (ECF No. 7). Accordingly, Plaintiffs' Complaint (ECF No. 1) is dismissed.

II. STANDARD OF REVIEW

When reviewing a motion to dismiss, the Court "accept[s] as true all allegations in plaintiff's complaint as well as all reasonable inferences that can be drawn from them, and [the court] construes them in a light most favorable to the non-movant." *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 426 (3d Cir. 2018) (quoting *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955)). "The plausibility determination is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786-87 (3d Cir. 2016) (quoting *Iqbal*, 550 U.S. at 679).

Finally, courts reviewing the sufficiency of a complaint must engage in a three-step process. "First, the court 'must take note of the elements [the] plaintiff must plead to state a claim.'" *Id.* at 787 (alterations in original) (quoting *Iqbal*, 550 U.S. at 675). "Second, [the court] should identify allegations that, 'because

they are no more than conclusions, are not entitled to the assumption of truth.'" *Id.* (quoting *Iqbal*, 550 U.S. at 679). Third, "'[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Id.* (alterations in original) (quoting *Iqbal*, 550 U.S. at 679).

III. BACKGROUND

Plaintiffs bring class action claims of public nuisance, private nuisance, and negligence against Bethlehem Landfill Company d/b/a ESI PA Bethlehem Landfill ("Defendant landfill"), claiming that the landfill owned by Defendant releases "pollutants, air contaminants, and noxious odors, causing material injury to Plaintiffs' property." ECF No. 1 at ¶ 1. Plaintiffs Robin Baptiste and Dexter Baptiste reside at 397 South Oak Street, Freemansburg, Pennsylvania. *Id.* at ¶¶ 2, 3. Plaintiffs allege that at all relevant times, Defendant has owned and operated a landfill, a 224-acre waste disposal facility, located at 2335 Applebutter Road, Bethlehem, Northampton County, Pennsylvania. *Id.* at ¶ 3. Plaintiffs claim that a "properly operated landfill will not cause offensive offsite odor impacts," and that Defendant landfill "has been the subject of frequent complaints from residents in nearby residential areas." *Id.* at ¶¶ 11, 13. Plaintiffs allege that the Township of Lower Saucon has "repeatedly notified Defendant of residents' discomfort from the stench the landfill continuously emits" and that area residents have "made

countless complaints to the Pennsylvania Department of Environmental Protection [PADEP] regarding odors from Defendant's facility." *Id.* at ¶¶ 14-15. Plaintiffs claim that Defendant landfill also has a "well documented history of repeated failures in the proper maintenance and management of the landfill," including:

- April 16, 2012, Order of Compliance issued by the Water & Sewer Resources Director for the Township of Saucon with $45,243.51 in fines.
- April 10, 2014, PADEP found Defendant in violation for not complying with permit conditions by not placing an intermediate cover atop the trash piles at the end of each day;
- August 27, 2019, PADEP found Defendant in violation because intermediate cover did not prevent vectors, odors, blowing litter, etc.;
- May 12, 2015, PADEP issued a NOC for Defendant's failure to maintain intermediate covers to prevent odors and cover solid waste. PADEP also noted Defendant's failure to implement a gas control and monitoring plan;
- June 24, 2015, PADEP found Defendant's intermediate cover did not prevent vectors, odors, blowing litter, etc. and gas monitoring was still inadequate;
- May 7, 2018, PADEP found Defendant not in compliance with Pennsylvania's Solid Waste Management Act and Municipal Waste Management rules for various violations.
- *Id.* at ¶ 16.

Plaintiffs further allege that Defendant has "failed to install and maintain adequate technology to properly control the landfill's emissions" such that there are odors on Plaintiffs' property "on occasions too numerous to recount individually." *Id.* at ¶¶ 17-18. Plaintiffs allege that eighty-five households have already contacted Plaintiffs' counsel documenting the odors they attribute to

Defendant landfill, which they claim precludes them from using the outside areas of their property and even occasionally permeates the walls of their homes and requires them to keep all windows and doors sealed shut. *Id.* at ¶¶ 19, 21, 22. Plaintiffs allege that these "malodorous emissions" have "substantially impacted the Class Members' ability to use and enjoy their homes," including the "loss of the use and enjoyment of their property," as well as a reduction in the value of the homes of Plaintiffs and the Class Members. *Id.* at ¶¶ 23, 24. Plaintiffs allege that the odors have "interfered with Plaintiffs' use and enjoyment of their property, resulting in damages in excess of $5,000,000." *Id.* at ¶ 26. Plaintiffs further allege that Defendant was negligent and reckless in failing to "construct, maintain, and/or operate the landfill," which caused the interference of odors with Plaintiffs' enjoyment of their property and which Plaintiffs allege are "especially injurious to the Class as compared with the public at large." *Id.* at ¶ 28.

Plaintiffs allege that the class would include "[a]ll owner/occupants and renters of residential property within a 2.5 miles radius of the Bethlehem Landfill Company Facility," excluding Defendant, which includes more than "8,400 households within a 2.5 mile radius of the landfill." *Id.* at ¶¶ 35, 37.

IV. DISCUSSION

A. COUNT I: Public Nuisance

A public nuisance is an "unreasonable interference with a right common to the general public." *Kuhns v. City of Allentown*, 636 F. Supp. 2d 418, 438 (E.D. Pa. 2009). For a private party to state a claim for a public nuisance, they must allege that they suffered a special or specific injury different than that which was suffered by the public. *Pennsylvania Soc. for Prevention of Cruelty to Animals v. Bravo Enterprises, Inc.*, 428 Pa. 350, 359 (1968). This injury must be "over and above the injury suffered by the public generally." *Id.* at 360. In other words, the harm must be of "greater magnitude and of a different kind than that which the general public suffered." *Kuhns*, 636 F. Supp. 2d at 436–37 (internal citations omitted). "The law requires greater and different injury because (1) it is difficult to 'draw[ ] any satisfactory line for [any] public nuisance' and (2) 'to avoid multiplicity of actions [,] invasions of rights common to all of the public should be left to be remedied by public action by officials.'" *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 446 (3d Cir. 2000). "[I]t has long been established in Pennsylvania that the injunction of such a public nuisance must be sought by the proper public authorities." *Pennsylvania Soc. for Prevention of Cruelty to Animals*, 428 Pa. at 362 (holding that the SPCA does not have any greater property right in the prevention of cruelty to animals than the general public).

Plaintiffs have alleged a public nuisance but have not shown how they or the members of the proposed class have suffered special harm that would allow them to pursue a private action for this public nuisance. "Public nuisances, by definition, affect many people." *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1481 (E.D. Pa.), *reversed on other grounds sub nom. Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3rd Cir. 1993), *cert. denied sub nom. Eray Travel, Inc. v. Algemeen Burgerlijk Pensioenfonds*, 511 U.S. 1107 (1994).

Plaintiffs claim that a properly operated landfill would not cause offensive offsite odor impacts. ECF No. 1 at ¶ 11. The PADEP is tasked with administering and enforcing the Solid Waste Management Act ("SWMA"), which regulates landfills such as Defendant landfill. *See Berks Cty. v. Dep't of Envtl. Prot.*, 894 A.2d 183, 186 (Pa. Commw. Ct. 2006) ("The [PA]DEP is the agency of the Commonwealth of Pennsylvania authorized to administer and enforce, *inter alia*, the Solid Waste Management Act . . . 35 P.S. §§ 6018.101-6018.1003, . . . and the rules and regulations promulgated thereunder, including the Municipal Waste Management Regulations ["MWMR"], 25 Pa. Code Chapters 271-285."). The SWMA further empowers PADEP to "administer the solid waste management program," and "conduct inspections and abate public nuisances." 35 Pa. Stat. Ann.

§ 6018.104. The SWMA also explicitly provides that any violation of the provisions of the SWMA shall constitute a public nuisance:

> Any violation of any provision of this act, any rule or regulation of the department, any order of the department, or any term or condition of any permit, shall constitute a public nuisance.
> 35 P.S. § 6018.601

The language in the SWMA along with the fact that the PADEP is tasked with regulating landfills in Pennsylvania supports the conclusion that the improper operation or maintenance of Defendant landfill, and any resulting odors, constitutes a public nuisance and affects the community at large.

However, Plaintiffs fail to allege a private action for this public nuisance because they do not show how their injury is over and above the injury suffered by public generally. "[W]here there are a large number of plaintiffs, the harm those plaintiffs suffered is not special." *In re One Meridian*, 820 F. Supp. at 1481. The court in *In re One Meridian*, in deciding a motion to dismiss a public nuisance claim following a fire, held that "only parties who may have suffered peculiar harm as a result of the closure of the streets due to the fire were those businesses who can show with reasonable certainty that they lost profits due to the closure of the streets and who suffered a substantial lack of access." *Id.* The Court additionally found that "[a]ll other plaintiffs were not uniquely affected by the

closure of the streets," and including them in the suit would "generalize the harm." *Id.*

The Complaint alleges that Plaintiffs' property, which is a direct distance of 1.6 miles from Defendant landfill,[1] along with a proposed class of greater than 8,400 households over 19 square miles, has been "physically invaded by noxious odors, pollutants and air contaminants" originating from Defendant landfill. ECF No. 1 at ¶¶ 12, 36. Plaintiffs seem to assume that, because they have alleged that their property is filled with odors from Defendant landfill, they suffer an injury of greater magnitude as compared to the "general public," which Plaintiffs argue is composed of those who live in the area plus those who have reason to travel or visit in the area. ECF No. 24 at 5. However, because Plaintiffs allege no reason other than their proximity to the landfill to prove they suffered a special harm, it would necessarily follow that all households within a 1.6 mile radius of Defendant landfill—assuming at the very least that Plaintiffs suffered a special harm—had suffered a special harm as well because of the improper operation and maintenance of Defendant landfill. Thus Plaintiffs' proximity alone, which again would

[1] The Complaint alleges that Defendant landfill is located at 2335 Applebutter Road, Bethlehem, Northampton County, Pennsylvania, and that Plaintiffs live at 397 South Oak Street, Freemansburg, Pennsylvania. Complaint at ¶¶ 2, 3. The Court thus takes judicial notice of the fact that the direct distance between Plaintiffs' home and Defendant landfill is 1.6 miles and that there is a river between the two properties. *See* FRCP 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.")

necessarily require that thousands of other households also have a special harm, does not demonstrate how Plaintiffs are uniquely harmed by Defendant landfill over and above the general public. Thus, Plaintiffs have failed to state a private claim for public nuisance against Defendant, and this claim must be dismissed.

D. COUNT II: Private Nuisance

Plaintiffs have also failed to state a claim for private nuisance. The Supreme Court of Pennsylvania in *Waschak* adopted Section 822 of the Restatement of Torts to govern private nuisance cause of actions. *Waschak v. Moffat*, 379 Pa. 441, 449 (1954). "A defendant is liable for a private nuisance under [] section [822] only if its conduct was a 'legal cause of an invasion of another's interest in the private use and enjoyment of land.'" *Cavanagh v. Electrolux Home Prod.*, 904 F. Supp. 2d 426, 434 (E.D. Pa. 2012) (quoting Restatement (Second) of Torts §822). This invasion must also be "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." *Karpiak v. Russo*, 450 Pa. Super. 471, 476 (1996); *see also Cavanagh*, 904 F.Supp. at 433. Both Pennsylvania and federal decisions have limited "private nuisance cases to situations involving [visitors] to a premises or neighboring landowners." *Cavanagh*, 904 F. Supp. at 435 (*citing Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3d Cir. 1985)).

The main difference between the public and private nuisance causes of action is that the public nuisance is common to all members of the public alike, whereas a private nuisance affects a member of the public. *Phillips v. Donaldson*, 112 A. 236, 238 (Pa. 1920). The improper operation or maintenance of a landfill resulting in odors, ECF No. 1 at ¶ 11, is an "inconvenience or troublesome offense that annoys the whole community in general," and not "some particular person," and thus constitutes a public nuisance rather than a private nuisance. *Phillips*, 269 Pa. at 246. Furthermore, because Plaintiffs live a direct distance of 1.6 miles from Defendant landfill, with many other properties and the Lehigh River between them, *see supra* n. 1, Plaintiffs' property is not a *neighboring* property to the landfill. Therefore, Plaintiffs' claim that the improper operation of the landfill is a private nuisance is inconsistent with the "historical role of private nuisance law as a means of efficiently resolving conflicts between *neighboring*, contemporaneous land uses." *Philadelphia Elec. Co.*, 762 F.2d at 314. The allegations Plaintiffs make regarding Defendant landfill affect the community at large and not Plaintiffs' property in particular. Thus, Plaintiffs have failed to state a claim for private nuisance against Defendant, and this claim must be dismissed.

C. COUNT II: Negligence

Lastly, Plaintiffs claim that Defendant landfill is liable to Plaintiffs on a theory of negligence. The elements of a cause of action based upon negligence to

Pennsylvania are "(1) a duty or obligation recognized by the law requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) defendant's failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; (4) actual loss or damage resulting to the plaintiff." *R.W. v. Manzek*, 585 Pa. 335, 346 (2005). To determine whether the defendant has a duty to the plaintiff, the court must consider: "(1) the relationship between the parties; (2) the utility of the defendant's conduct; (3) the nature and foreseeability of the risk in question; (4) the consequences of imposing the duty; and (5) the overall public interest in the proposed solution." *Id.* Defendant argues that it does not have a duty to protect its neighboring landowners from offensive odors or other nuisance conditions. ECF No. 7 at 19; *see also Gilbert v. Synagro Cent., LLC*, 90 A.3d 37, 51 (Super. Ct. Pa. 2014), *rev'd on other grounds*, 131 A.3d 1 (Pa. 2015) (holding that plaintiffs "have not identified any duty under Pennsylvania law that requires a property owner to use his or her property in such a manner that it protects neighboring landowners from offensive odors or other nuisance conditions.")

The only argument Plaintiffs offer in claiming that Defendant has a duty to Plaintiffs to protect them and other properties within a 2.5 mile radius from odors is that Defendant is required to "minimize and control public nuisances from odors" under 25 Pa. Code § 273.218 (MWMR), and that Defendant landfill must

be governed by a plan that "[p]rovide[s] for the orderly extension of municipal waste management systems . . . in a manner which will not create . . . public nuisances" under 35 P.S. § 6018.201 (SWMA). Plaintiffs do not submit any legal argument to show that Defendant had a duty to Plaintiffs other than that which is allegedly imposed by statute or regulation. However, the Restatement of Torts § 822 states that the "court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively . . . to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public." Restatement (Second) of Torts § 288(b) (1965). Thus, unlike the Pennsylvania Storage Tank and Spill Prevention Act, a violation of which Plaintiffs argue creates negligence per se, the SWMA cannot give rise to a claim of negligence per se because it is intended to benefit the public generally and not a particular group. *See Tri-County Bus. Campus Joint Venture v. Clow Corp.*, 792 F.Supp. 984, 995 (E.D.Pa.1992) ("[Defendant] correctly notes . . . that a plaintiff cannot . . . [initiate] a cause of action for negligence per se based on SWMA violations.")

Furthermore, although it is not framed as such, by predicating Defendant's duty to Plaintiffs on the statute alone and arguing that negligence exists because "Defendant has violated [the] duties" imposed on it by Pennsylvania law as a landfill operator, Plaintiffs put forth a negligence per se claim. ECF No. 24 at 8;

see Russell v. Chesapeake Appalachia, L.L.C., No. 4:14-CV-00148, 2014 WL 6654892, at *3 (M.D. Pa. Nov. 21, 2014) ("The concept of negligence per se allows a litigant, and ultimately a court, to invoke a statute to supply elements of a negligence claim (e.g. duty and breach), when a defendant violates a statute that is designed to prevent the particular harm at issue and meets other applicable criteria."). Yet, as previously noted, "a plaintiff cannot circumvent the lack of such a private cause of action [in the SWMA] by initiating a cause of action for negligence per se based on SWMA violations." *Tri-City Bus. Campus Joint Venture v. Clow Corp.*, 792 F. Supp. 984, 995 (E.D. Pa. 1991) (*citing Flack v. Timmons*, 374 Pa. Super. 417, 543 A.2d 148, 152 (1988)); *see also Centolanza v. Lehigh Valley Dairies, Inc.*, 430 Pa. Super. 463, 477 (1993), aff'd, 540 Pa. 398, 658 A.2d 336 (1995) ("[T]here is no underlying right to bring a private action" under the SWMA, and "private persons may only intervene under the SWMA in actions brought by the [PADEP]."). Plaintiffs do not assert any other arguments supporting their claim that Defendant has a duty to Plaintiffs to protect them from odors on their property and thus have failed to state a claim for negligence.

Lastly, while the Court does not opine on whether Plaintiffs' claims for injunctive relief are barred by the doctrine of primary jurisdiction, having dismissed all causes of action, Plaintiffs' request for punitive and injunctive relief must also be dismissed.

V. CONCLUSION

For the reasons stated above, the Court grants Defendant's Motion to Dismiss the Complaint (ECF No. 7).

DATED: 3-13-2019

BY THE COURT:

CHAD F. KENNEY, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBIN BAPTISTE AND DEXTER BAPTISTE, *Plaintiffs,*	:	CIVIL ACTION
v.	:	No. 18-2691
BETHLEHEM LANDFILL COMPANY, et al. *Defendant*	:	

ORDER

AND NOW, this 12th day of **March 2019**, upon consideration of Defendant's Motion to Dismiss (ECF No. 7), Plaintiffs' Response thereto (ECF No. 24), and Defendant's Reply in support of its Motion to Dismiss (ECF No. 25), it is hereby **ORDERED** and **DECREED** Defendant's Motion to Dismiss (ECF No. 7) is **GRANTED**. Plaintiffs' Complaint (ECF No. 1) is thus **DISMISSED**.

BY THE COURT:

CHAD F. KENNEY, JUDGE

ADDENDUM

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Proposed Class Action Plaintiffs	:	**CIVIL ACTION**
v.	:	
KEYSTONE SANITARY LANDFILL	:	
Defendant	:	**2018 CV 1159**

MEMORANDUM AND ORDER

MINORA, S.J.

This matter comes before the Court by way of Preliminary Objections filed by Defendant, Keystone Sanitary Landfill ("Keystone"), to the Amended Complaint of Plaintiffs, Tamara Leety on behalf of herself and all others similarly situated. The amended complaint alleges a class action against Keystone for the release of "noxious odors and air contaminants" onto the properties of the putative class members, causing damage to same under theories of private nuisance and negligence. Keystone's objections to the Amended Complaint may be fairly summarized as follows:

1.) A demurrer, pursuant to Pa. R.C.P. 1028 (a)(4), alleging that Plaintiffs' claim constitutes an impermissible collateral attack on "facially-valid permits" issued by the Pennsylvania Department of Environmental Protection ("DEP"), violative of "the doctrine of administrative finality;"

2.) A demurrer asserting that Plaintiffs' negligence claim fails to allege with specificity any duty of care purportedly owed to Plaintiffs by Keystone, thereby failing to allege an element necessary to that cause of action;

3.) A demurrer to the nuisance claim for a lack of standing due to the alleged failure to plead that the putative class representative, Ms. Leety, "owns," "controls," or "regularly occupies" property which is "neighboring" the purported source causing damage to her property;

4.) The failure of the Amended Complaint to conform to a rule of court, under Pa. R.C.P. 1028 (a)(2), for an alleged failure by counsel to conform to the certification requirement of a signatory to a pleading as prescribed by Pa. R.C.P. 1023.1; and

5.) A lack of specificity, pursuant to Pa. R.C.P. 1028 (a)(3), by failing to identify in the Amended Complaint (i) the "air" or "airborne contaminants" that allegedly entered onto Plaintiffs' property and, as previously alleged, (ii) the specific duty of care that was purportedly owed Plaintiffs by Keystone.

We shall now address the Preliminary Objections seriatim.[1] [2]

I. Demurrers

The standard to be applied by this Court in addressing a preliminary objection in the form of a demurrer is well-settled. Namely, such an objection is properly granted where the contested pleading is legally insufficient. Preliminary objections in the nature of a demurrer require the Court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. All material facts set forth in the pleading and all inferences reasonably

[1] In a footnote to its Brief in support of its Preliminary Objections, Keystone alleges that Plaintiffs, in filing their response to the Preliminary Objections, were one day outside the twenty-day timeframe within which a responsive pleading must be filed. *See* Pa. R.C.P. 1026(a). Without formally addressing the merits of this argument, we summarily dismiss it as the twenty-day period following service of a preceding pleading within which every pleading subsequent to the complaint must be filed has been interpreted liberally and is permissive rather than mandatory. Weaver v. Martin, 655 A.2d 180, (Pa. Super. 1995).

[2] Likewise presented in a footnote to the aforesaid Brief, Keystone alleges the verification in Plaintiffs' reply to its Preliminary Objections were violative of Pa. R.C.P. 1024 as the non-party making the verification failed to set forth the source of his knowledge and the reason why the verification was not made by the party. *See* Pa. R.C.P. 1024 (c). "While *we do not, of course, condone willful noncompliance with our procedural rules, a hyper technical reading of each clause,* and a blind insistence on precise, formal adherence, benefits neither the judicial system nor those utilizing that system." *See Monroe Contract Corp. v. Harrison Square, Inc.*, 405 A.2d 954, 958 (Pa. Super. 1979). Therefore, we reject this contention.

deducible therefrom must be admitted as true. Thus, the question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. Weirton Medical Center, Inc. v. Introublezone, Inc., 193 A.2d 967, 972 (Pa. Super. 2018) citing Barton v. Lowe's Home Ctrs., Inc., 124 A.3d 349, 354 (Pa. Super. 2015) (quoting Weiley v. Albert Einstein Med. Ctr., 51 A.3d 202, 208–09 (Pa. Super. 2012) (citations omitted)).

A. Amended Complaint precluded as collateral attack on administrative determination.

As we believe the parties would acknowledge, Keystone is a municipal solid waste landfill located in the Boroughs of Dunmore and Throop, Lackawanna County, which operates under a permit issued by the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter "DEP"). In this objection, Keystone strenuously contends that Plaintiffs' Amended Complaint is foundationally unsound as the commencement of the instant action serves as an impermissible collateral attack on DEP's issuance to Keystone of its operational permit. Keystone specifically asserts that once DEP issued the subject permit, Plaintiffs only recourse was to file a timely appeal to the Pennsylvania Environmental Hearing Board to challenge the permit. Keystone further contends that Plaintiffs, having failed to exercise the administrative appeal, are now precluded as a matter of law from seeking relief in state court. It further argues that allowing this lawsuit to proceed would frustrate "the doctrine

of administrative finality," which precludes a collateral attack of an administrative action in state court.

In support of its assertion, Keystone cites authority which, while emphasizing the importance of "administrative finality," is inapplicable at present. *See* Department of Environmental Protection v. Peters Twp. Sanitary Authority, 767 A.2d 601 (Pa. Cmnwlth. 2001) (where the application of the doctrine of administrative finality was in the context of an appeal by DEP of a decision of the Environmental Hearing Board); Delaware Riverkeeper v. Department of Environmental Protection, 879 A.2d 351 (Pa. Cmnwlth. 2005) (where administrative finality was discussed in the context of a petition for review of a decision of the Environmental Hearing Board). Were Plaintiffs asking this Court to review the propriety of DEP's issuance of the subject permit, we would agree that such would be beyond our purview. However, neither of these cases stands for the principle which Keystone seeks to advance – that administrative finality precludes Plaintiffs from instituting this lawsuit.

As Plaintiffs contend, our understanding of this lawsuit likewise is not that it represents a challenge to the issued permits, but rather raises allegations that Keystone, negligently or otherwise, is the source of odors and contaminants which are deleterious to the proposed class action plaintiffs. Keystone has not presented and we are not aware of any authority which prohibits Plaintiffs from bringing such an action or this Court from entertaining same. Accordingly, we overrule this objection.

B. Putative class action representative has failed to plead facts sufficient to establish standing to bring a nuisance claim.

For guidance on the law of private nuisance, we first turn to Karpiak v. Russo, 676 A.2d 270 (Pa. Super. 1996), which, as relevant at present, reads as follows:

In Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954), our Supreme Court adopted Restatement of Torts § 822 as the law of Pennsylvania. In Kembel v. Schlegel, 329 Pa. Super. 159, 478 A.2d 11 (1984), [our Superior Court] ruled that the successor section in the Restatement (Second) of Torts § 822 contained the authoritative definition of the tort of private nuisance. Id. at 272.

According to the Restatement (Second) of Torts:

For a private nuisance[,] there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including:

(a) possessors of the land,
(b) owners of easements and profits in the land, and
(c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment.

Restatement (Second) of Torts § 821E.

While the definition of "owner" is self-explanatory, who is a "possessor" of land requires further clarification. In that regard:

A possessor of land is:

(a) a person who is in occupation of the land with intent to control it or
(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Restatement (Second) of Torts § 328E.

In the instant Amended Complaint, Plaintiffs plead only that the putative class action representative "resides" at her property without alleging in further detail the nature of her ownership or possessory interest, as they must under the Restatement (Second). To satisfy the elemental requirements for establishing a private nuisance claim, the nature of Plaintiffs possession or ownership must be clarified to provide satisfaction of the required elements. As an example, I resided in my parents' home while growing up. Despite that status, I did not have any ownership or possessory rights to meet the required element of the Restatement (Second). Accordingly, this inartful pleading must be corrected.

Meanwhile, Keystone's additional contention that the putative class action representative must own or possess a "neighboring" property to assert properly an action for private nuisance is without merit. No such "neighboring" requirement exists in the law and Keystone's attempt to add the element of "neighboring" to Plaintiff's elements is rejected. Therefore, we sustain in part and overrule in part this objection of Keystone to the Amended Complaint.

C. The Amended Complaint fails to aver sufficiently the specific duty of care owed to Plaintiffs by Keystone relative to their negligence claim.

In Pennsylvania, the elements of a cause of action based upon negligence are:

(1) a duty or obligation recognized by the law requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks;
(2) defendant's failure to conform to the standard required;

(3) a causal connection between the conduct and the resulting injury;
(4) actual loss or damage resulting to the plaintiff.

R.W. v. Manzek, 888 A.2d 740 (Pa. 2005). (Citations omitted). In its Preliminary Objections, Keystone asserts that Plaintiffs have failed to satisfy the primary elemental requirement of a negligence action by failing "to allege the nature and origin of any specific duty of care purportedly owed" by it to Plaintiffs. (Keystone's Preliminary Objections ¶16).

> When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011) (citation omitted).

A review of the Amended Complaint reveals that Plaintiffs have sufficiently pled and met its burden. In particular, Plaintiffs aver that Keystone "has a duty to exercise ordinary care and diligence" (Plaintiffs' Amended Complaint ¶50) and that "[i]ndustry standards of care exist" (Plaintiffs' Amended Complaint ¶51) in relation to establishing a duty allegedly owed by Keystone to Plaintiffs. As a result, we overrule Keystone's objection in this regard.

II. Failure to Conform to Rule of Court

Keystone asks this Court to sustain an objection pursuant to Pa.

R.C.P. 1028(a)(3) in that it asserts the Amended Complaint fails to conform to the obligation of Pa. R.C.P. 1023.1(c)(3) by violating the evidentiary support requirement for a signatory to a pleading. More particularly, Keystone contends that the Amended Complaint amounts to an "imaginary pleading" of "the exact type" violative of Pa. R.C.P. 1023.1(c)(3). Meanwhile, the specific requirement advanced by Keystone reads as follows:

> (c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances...
>
> (3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....

Rule 1023.1(c)(3), Pa. R.C.P.

In addressing this objection, we find guidance in the Explanatory Comment to Rule 1023.1. Especially noteworthy is the following:

> New Rule 1023.1 requires that a pleading, written motion or other paper directed to the court be signed. The signing, or the filing, submitting or later advocating, a document is a certification as described in the rule. A court may impose sanctions for violation of the certification. Thus the rule imposes the duty on the attorney or, if unrepresented, the party signing the document to satisfy himself or herself that there is a basis in fact and in law for the claim or defense set forth in the document.
>
> Rule 1023.1, therefore, requires some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. However, this rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The standard is one of reasonableness under the circumstances....

> This rule recognizes that sometimes a litigant may have good reason to believe that a claim or defense is valid but may need discovery, formal or informal, to gather and confirm the evidentiary basis for the claim or defense. If evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Rule 1023.1(c) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses....

Rule 1023.1, Pa. R.C.P., Explanatory Comment.

As advised by the Explanatory Comment, we must reject Keystone's contention. Namely, we are satisfied that, for pleading purposes, counsel for Plaintiffs properly concluded that "there is a basis in fact and in law for the claim(s)" he alleges in the Amended Complaint. So guided, this Court, in applying a "reasonableness" standard of review and not inclined to "chill" the appropriate zealousness of counsel in advocating for his clients by pursuing such a claim cognizable in fact and in law, must overrule the instant objection of Keystone.

III. Lack of Specificity

Pa R.C.P. 1028 (a)(3) allows a party to object to a pleading which allegedly lacks sufficient specificity. In this regard, it is axiomatic that Pennsylvania is a fact-pleading jurisdiction; a complaint must therefore not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim. Youndt v. First Nat. Bank of Port Allegany, 868 A.2d 539 (Pa. Super.2005). Accordingly, a pleader must set forth concisely the facts upon which his cause of action is based. Bouchon v. Citizen Care, Inc.,

176 A.3d 244 (Pa. Super. 2017). To determine if a pleading is sufficiently specific, a court must ascertain whether the facts alleged are sufficiently specific to enable a defendant to prepare his defense. Unified Sportsmen of Pennsylvania v. Pennsylvania Game Com'n (PGC), 950 A.2d 1120 (Pa. Cmwlth. 2008).

At present, Keystone contends that Plaintiffs have violated the specificity requirement by failing to identify (1) the "air" or "airborne contaminants" that allegedly infringed upon the properties of Plaintiffs, and (2) with regard to the claim of negligence, the specific duty or standard of care that was purportedly owed to Plaintiffs by Keystone. Having above addressed in a different context Keystone's assertion that the Amended Complaint insufficiently pleaded the required element of duty of care, we now summarily reject Keystone's restated objection in this regard. As for the alleged insufficiency of "air" or "airborne contaminants," we find that at this stage of the proceedings, Keystone has been adequately placed on notice of Plaintiffs' theory of liability so to be able to prepare its defense. Further, discovery can provide the detail sought by Keystone regarding what "air" and/or airborne contaminants. Consequently, Keystone's Preliminary Objection as to an alleged lack of specificity in the Amended Complaint is overruled.

An appropriate Order now follows.[3]

---

[3] Though not presented in its Preliminary Objections, Keystone raises in its aforesaid Brief a contention that Plaintiffs' negligence action should be dismissed as it "merges" with their nuisance claim. Assuming, *arguendo*, that this objection is properly raised, we nevertheless substantively overrule the putative objection as a nuisance claim, unlike an action for negligence, does not require a breach of a duty of care to be actionable, thus not satisfying a requirement for merger of causes of action.

TAMARA LEETY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED	:	**IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY**
Proposed Class Action Plaintiffs	:	**CIVIL ACTION**
v.	:	
KEYSTONE SANITARY LANDFILL	:	
Defendant	:	**2018 CV 1159**

ORDER

AND NOW, this 24th day of January, 2019, in accordance ,with the foregoing Memorandum, **IT IS HEREBY ORDERED** that the Preliminary Objection of Defendant, Keystone Sanitary Landfill, in the nature of a demurrer pursuant to Pa. R.C.P. 1028(a)(4), relative to the standing of the putative class action representative, Tamara Leety, to aver properly a claim for private nuisance without the required detail of ownership or possession is **SUSTAINED** and Plaintiffs, Tamara Leety on behalf of herself and all others similarly situated, are afforded leave of court to amend their complaint and file within twenty (20) days of the date of this Order their Amended Complaint accordingly.

FURTHER, IT IS HEREBY ORDERED that all remaining Preliminary Objections raised by Defendant are **OVERRULED**.

BY THE COURT:

_____, **S.J.**
Carmen D. Minora, Senior Judge

cc: Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R.Civ.P. 236 (a)(2) by mailing time-stamped copies to:

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