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 DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Bethlehem Landfill Company (formerly known as IESI PA Bethlehem Landfill Corporation), is a wholly-owned subsidiary of its direct parent, Waste Connections of Pennsylvania, Inc. Bethlehem Landfill Company has several indirect parents: Waste Connections US Holdings, Inc.; Waste Connections Holdings Ltd.; IESI-BFC Holdings Inc.; Waste Connections of Canada Inc.; IESI-BFC Holdings Inc.; 2068076 Alberta ULC; and Waste Connections, Inc. Waste Connections, Inc. is a publicly held corporation trading on the Toronto Stock Exchange and the New York Stock Exchange under the symbol WCN.

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STATEMENT OF THE ISSUES

1. Did the district court correctly determine that a private nuisance claim on behalf of approximately 8,400 households across 20 square miles failed to state a claim for relief on the grounds that Plaintiffs' allegations "affect the community at large and not Plaintiffs' propert[ies] in particular"? A13.

2. Did the district court correctly determine that a private claim for public nuisance on behalf of approximately 8,400 similarly-situated households failed to state a claim for relief on the grounds that their allegations did not demonstrate "how Plaintiffs are uniquely harmed by Defendant landfill over and above the general public"? A12.

3. Did the district court correctly apply Pennsylvania precedent and dismiss Plaintiffs' negligence claim where the negligence claim, arising out of Defendant's use of its property, is duplicative of Plaintiffs' nuisance claims and Defendant owed no duty of care to protect Plaintiffs from odors? A16.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Per L.A.R. 28.1(a)(2), Bethlehem Landfill Company ("Bethlehem" or "Landfill") states that this case has not been before this Court previously, and that it is not aware of any other case or proceeding that is in any way related, completed, pending, or about to be presented before this Court or any other court or agency.

STATEMENT OF THE CASE

The important facts in this case can be stated in one sentence: Two plaintiffs are attempting to maintain a nuisance action on behalf of more than 20,000 putative plaintiffs in households located across a nearly 20-square-mile area in Northampton County based on odors allegedly emitted from a local landfill. The procedural history is equally simple. The court below granted a motion to dismiss under Fed. R. Civ. P. 12(b)(6) essentially on the grounds that this is far too many private plaintiffs to bring a nuisance claim.

Bethlehem Landfill Company owns and operates a municipal solid waste landfill located at 2335 Applebutter Road, in Lower Saucon Township, Pennsylvania, south of Steel City. Since the 1950s, the Landfill has been an important local waste disposal location for residents and businesses of Bethlehem, the township, and surrounding communities. Compl. ¶¶ 3, 6; A28-29. The Pennsylvania Department of Environmental Protection ("PADEP") comprehensively regulates and regularly inspects operations at the Landfill.[1] Compl. ¶ 16; A30-31.

[1] The Landfill holds a Solid Waste Management Permit from PADEP, which oversees the Landfill's compliance with the Commonwealth's regulations governing solid waste disposal under authority delegated to Pennsylvania by the U.S. Environmental Protection Agency under Subtitle D of the Resource Conservation and Recovery Act. *See* Compl. at 12, ¶ F (prayer for relief); A39; *see also generally* 25 Pa. Code Chapters 271, 273. The Landfill also holds a Clean Air Act Title V operating permit issued by PADEP, as well as permits governing

As shown in the image below,[2] commercial and industrial uses surround the Landfill on the south and southwest, including the City of Bethlehem's wastewater treatment plant. Undeveloped, rural land lies to the northeast, east, and southeast, making it an ideal location for a landfill. A47-48. The Landfill has few residential neighbors; Plaintiffs' residence is approximately 1.6 miles west of the Landfill, across the Lehigh River, at 397 South Oak Street, Freemansburg, Pennsylvania. Compl. ¶ 2; A28.

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the management and discharge of wastewater and stormwater. Pennsylvania's regulations, as enforced by PADEP through the Landfill's solid waste management permit, govern every aspect of the Landfill's operation in detail through numerous technical operational plans approved by PADEP. *See* 25 Pa. Code Chapters 271, 273. Among other things, the regulations dictate types and quantities of waste that the Landfill may accept, 25 Pa. Code §§ 273.201, 237.221; types of materials it may use for daily, intermediate, and final cover, *id.* §§ 273.232-273.234; the operation of its leachate collection and treatment system, *id.* § 273.275; and the operation of its landfill gas collection and control system, *id.* § 273.292. The Landfill's air permit also governs the destruction or beneficial reuse of landfill gas through flaring or delivery to an electric generating station. *See* 25 Pa. Code Chapter 123 (air emission standards for specific contaminants, including odors (§ 123.31)), Chapter 127, Subchapter G (requirements for Title V operating permits); 25 Pa. Code § 122.3 (adopting federal Standards of Performance for New Stationary Sources); 40 C.F.R. Part 60, Subparts CC, CF, WWW, XXX (air emission performance standards for new sources at municipal solid waste landfills).

[2] The satellite image of the Landfill and its surroundings was included in the briefing below, A47-48, and the trial court took judicial notice of the addresses of the parties and the distance and topography between them. A11 n.1. "[I]t is well-settled that courts… may take judicial notice of the map of a general area and consider the location of events in rendering a decision." *United States v. Harris*, 884 F. Supp. 2d 383, 395 (W.D. Pa. 2012); *see also* Fed. R. Evid. 201(b)(2).

Google Maps image of the Landfill and area to the west, including Landfill (yellow) and Plaintiffs' property (red). This image represents an area approximately two miles wide.

Plaintiffs filed their complaint on June 26, 2018, bringing claims against the Landfill for private nuisance, public nuisance, and negligence. A25-40. Plaintiffs also sought class status, alleging a class of owner/occupants and renters of residential property within a 2.5-mile radius of the Landfill comprising more than 8,400 households, or likely more than 20,000 individuals.[3] Compl. ¶¶ 35-36; A33. Based on its radius, the proposed class area is approximately 20 square miles.

According to the Complaint, the Landfill's odors have commonly impacted the use and enjoyment of thousands of properties and caused their values to decrease. The Complaint articulates no difference between the alleged injury to

[3] The 2010 U.S. Census determined an average household size of 2.58 people per household. *See* U.S. Census, *Households and Families: 2010* https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf.

the Plaintiffs and that allegedly suffered by the other 20,000 people in the putative class. Compl. ¶ 21; A32.

The Landfill moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that private nuisance is an action among neighbors and is unavailable to an indeterminate group of more than 20,000 plaintiffs. The Landfill likewise argued that Plaintiffs could not bring an action for public nuisance because their proposed class of tens of thousands of members did not allege "special injury," different in degree and kind from the harm alleged to the community. Finally, the Landfill argued that there is no legal duty of care in Pennsylvania for industrial site operators – or any property owners – to prevent nuisance impacts, and that the alleged facts therefore did not support a negligence claim.

The court below agreed on all points and dismissed the case in its entirety on March 13, 2019. *See* A12-13 (private nuisance); A8-12 (public nuisance); A13-16 (negligence). Plaintiffs appealed.

SUMMARY OF THE ARGUMENT

This case exemplifies how private nuisance and negligence remedies are inappropriate for claims regarding the public impacts of large, regulated infrastructure facilities. Plaintiffs cannot plead nuisance – private or public – because, as framed by Plaintiffs' Complaint, there are simply too many people allegedly affected. Contrary to Plaintiffs' mantra, there *is* an upper numerical limit

on private nuisance plaintiffs – it is the number that is large enough to be uncountable or indefinite. At that point a private nuisance becomes a public matter, enforceable only by public authorities except where a plaintiff can show a "special injury," distinct from that of the community. This is a well-established legal principle. Plaintiffs and the 20,000 people they seek to represent may have remedies through PADEP or local governments, but they do not have common-law nuisance remedies in court.

The Bethlehem Landfill is a legally permitted facility serving a vital purpose for thousands of individuals, local governments, businesses, and institutions in the Lehigh Valley. This lawsuit, sounding fundamentally in nuisance, is unavailable to a group of more than 20,000 private plaintiffs who do not claim any personal, particularized harms distinct from the regional odors they allege. State regulators or local governments could act on these alleged facts, but private plaintiffs cannot.

By their nature, purpose, and longstanding precedent, private nuisance claims concern disputes between neighboring property owners. Yet Plaintiffs, who themselves live more than a mile and a half from the Landfill, claim that the alleged nuisance affects more than 8,400 other households – likely more than 20,000 individuals – some of whom may live more than four miles away from Plaintiffs. The law in Pennsylvania and across the country limits private nuisance actions to a few neighbors, a "determinate" or "definite" number of plaintiffs

whose judicial claims resemble a zoning enforcement action and are permissible as such. By contrast, neither Plaintiffs nor their far-flung fellow class members necessarily live anywhere near the Bethlehem Landfill, and they cannot bring a collective private nuisance claim.

Similarly, private causes of action for public nuisance are rare and narrow and have not been pled here. A plaintiff must allege a "special" injury – a harm distinct in kind and degree from the alleged harm to the public, which otherwise must be addressed by public authorities like PADEP. By asserting that the Landfill's odors have resulted in injury to Plaintiffs and more than 20,000 other individuals in a common fashion, Plaintiffs have not alleged a distinct special injury to support a public nuisance claim by private individuals, and cannot plausibly do so.

Plaintiffs also plead negligence, but negligence claims must be premised on the breach of a recognized duty. Pennsylvania does not recognize a duty to protect neighbors from nuisance, including offsite odors resulting from a property owner's legal use of its land. Such a duty would reduce nuisance to a mere branch of negligence law and this is not the law in Pennsylvania. Plaintiffs' negligence claim is actually a nuisance claim and must be dismissed.

ARGUMENT

I. A Viable Private Nuisance Action is Limited to Actual Neighbors.

The trial court correctly dismissed Plaintiffs' private nuisance claim because private nuisance actions are fundamentally for neighbors, not residents of entire regions. The Baptistes live 1.6 miles from the Bethlehem Landfill and purport to bring their claim on behalf of more than 20,000 people across 20 square miles, but a grievance on that scale is not a "nuisance" dispute among neighbors; it is a regional governance issue and must be addressed by a government, not a court, under public nuisance principles. *See* A9; A12 (quoting *Cavanagh v. Electrolux Home Prod.*, 904 F. Supp. 2d 426, 435 (E.D. Pa. 2012) (citing *Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3d Cir. 1985))). The issue before this Court is not whether a claim could *ever* be brought by a neighbor against a landfill. Rather, the question is whether the Baptistes can do so, given that they live at such a distance from the Bethlehem Landfill that their claim, if true, would sweep in thousands of other potential plaintiffs in identical circumstances. On these facts, the trial court's ruling was an accurate and unremarkable application of Pennsylvania law, which distinguishes between large nuisance actions that affect the general public and smaller local disputes that affect only a few.

The distinction between public nuisance and private nuisance actions is critical here; Judge Kenney described the difference succinctly: "[T]he public

nuisance is common to all members of the public alike, whereas a private nuisance affects a member of the public." A13 (citing *Phillips v. Donaldson*, 112 A. 236, 238 (Pa. 1920)). Plaintiffs have seized on this statement and repeatedly mischaracterize it in their brief, asserting wrongly that the trial court held that "if a nuisance is public, it must therefore not be private." Appellant Br. at 7-11 (citing A12-13). This was not what the trial court held. It is well-known that a nuisance can, in some circumstances, be both private and public, and the court below said nothing to the contrary.[4] *See infra*, § IIA. Rather, the court concisely described the distinction between the essential character of a public nuisance claim and that of a private nuisance claim – a distinction that is black-letter law.

Contrary to Plaintiffs' arguments, that distinction *is* fundamentally a matter of the reach of the nuisance. Private nuisances are local in scope, affecting only a few neighbors, and so can be handled by courts as a complement to zoning law. *Phillips*, 112 A. at 238 ("The difference between a public and a private nuisance does not depend upon the nature of the thing done, but upon the question whether

[4] Plaintiffs' mischaracterizations of the trial court's holding are not subtle. "The district court appeared to assume that if the nuisance was public, it could not also be private." Appellant Br. at 7. "The district court dismissed Plaintiffs' private nuisance claims because it concluded that… their allegations constituted a public nuisance… and therefore not a private nuisance[.]" *Id.* at 9. "The district court ignored that… a nuisance can be both public and private[.]" *Id.* "The district court developed this element from its erroneous determination that if a nuisance is public, it must therefore not be private." *Id.* at 11. "The district court erred because a nuisance can be both public and private." *Id.*

it affects the general public or merely some private individual or individuals."). *See also Hercules*, 762 F.2d at 314 (applying Pennsylvania law) ("We believe that [vacating a private nuisance judgment for a non-neighbor] is consonant with the historical role of private nuisance law as a means of efficiently resolving conflicts between neighboring, contemporaneous land uses.") (emphasis in original). By contrast, public nuisances are wider-scale, affecting whole neighborhoods or communities, and are therefore presumptively a matter for government, not courts. *See Karpiak v. Russo*, 676 A.2d 270, 274-75 (Pa. Super. 1996) (involving four nearby households) ("a public nuisance does not exist unless a nuisance exists and affects the community at large and not merely the complaining parties.") (emphasis in original).[5]

Plaintiffs try to blur and collapse the distinction between the two causes of action. They suggest that a private nuisance claim may be unlimited in size and scope, and that there is no scale beyond which a private nuisance ceases to be

[5] Plaintiffs are correct that these can theoretically overlap, but that occurs – unlike here – only where both the small-scale character of a private nuisance and the broader general character of a public nuisance coexist in the same set of facts. In other words, a nuisance activity may have more than one offsite effect, one limited in scope and the other widespread. *See, e.g.*, Illustration 3, Restatement (Second) of Torts, § 821C, cmt. e ("A operates a house of prostitution, which by statute is declared to be a nuisance. This interferes with the use and enjoyment of B's dwelling next door. B can recover on the basis of either the private or the public nuisance."). Thus such a circumstance only arises where *viable* private and public nuisances are alleged. *See infra*, § IIA.

private and must be brought as a public nuisance, subject to the limitations of that action. Under Plaintiffs' theory, private nuisance allegations can never be so widespread that they become a matter of fundamentally public concern. Appellant Br. at 10-17. The law of nuisance is to the contrary.

The difference in scope between private and public nuisance was set forth clearly by a New York federal court two years ago, consistent with cases applying Pennsylvania law. The discussion belies Plaintiffs' most basic argument. In short, a private nuisance becomes public, redressable by public authorities only, when the number of people affected gets too big:

> [A] private nuisance – "actionable by the individual person or persons whose rights have been disturbed" – must affect a relatively small number of people. *Copart Indus., Inc. v. Consol. Edison Co. of N.Y.*, 362 N.E.2d 968, 971 ([N.Y.] 1977); *accord Scribner v. Summers*, 84 F.3d 554, 559 (2d Cir. 1996); *see also* 81 N.Y. Jur. 2d *Nuisances* § 6 (2013) ("A private nuisance has been defined as one which violates only private rights and produces damages to but one or a few persons."). If not, the wrong becomes a public nuisance. *E.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985). While the former gives rise to a private right of action, the latter is remedied through governmental action or litigation. *Shore Realty*, 759 F.2d at 1050; *532 Madison* [*Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*], 750 N.E.2d [1097], 1104 [(N.Y. 2001)]; *see also* 81 N.Y. Jur. 2d, *supra*, § 4 ("The difference between a public and a private nuisance is significant, primarily because … only the public, through the proper officer, may sue to enjoin or abate a public nuisance whereas only a private individual may sue to abate a private nuisance.").

> When the injury in question "is 'so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn'" and a private nuisance is precluded. *532 Madison*, 750 N.E.2d at 1105 (quoting William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1015 (1966)). Indeed, as stated by then-Chief Judge Cardozo, the number affected need not be "very great"; an injury is sufficiently widespread to constitute a public nuisance whenever it may "[]reasonably be classified as a wrong to the community." *People v. Rubenfeld*, 172 N.E. 485, 486 ([N.Y.] 1930).

Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233, 247-48 (N.D.N.Y. 2017); *see also Cangemi v. United States*, 939 F. Supp. 2d 188, 205 (E.D.N.Y. 2013) (nuisance becomes public where it is "committed in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community") (citation omitted).

Courts across jurisdictions echo the fundamental distinction between private nuisances affecting a "few" or a "small number" of people,[6] and public nuisances

[6] *See, e.g.*, *Duff v. Morgantown Energy Assocs.*, 421 S.E.2d. 253, 257 (W. Va. 1992) ("The distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person or a limited number of persons only.") (quoting *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945)); *Wietzke v. Chesapeake Conference Ass'n*, 26 A.3d 931, 943 (Md. 2011) ("public nuisance is an injury to the public at large or to all persons who come in contact with it, while private nuisance is an injury to an individual or a limited number of individuals only.") (quotation omitted); *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 705 (Ariz. 1972) ("The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small

affecting a "considerable number."[7] Though derided as outlandish in Plaintiffs' brief, this principle is not remotely controversial.

Pennsylvania law is no different and the Commonwealth's courts laid out these principles many decades ago. In Pennsylvania a private nuisance becomes a public nuisance when it is big enough to potentially affect an entire *neighborhood* in an indistinguishable way. *See, e.g.*, *Gavigan v. Atl. Refining Co.*, 186 Pa. 604, 613 (1898) (where oil tanks drained directly into a neighbor's cellar, a private nuisance existed, in addition to any public nuisance, because the invasion was "distinguishable from that suffered in common by others in the same neighborhood.") (emphasis added).[8] A Pennsylvania court later expressed the

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number of persons[.]"); *W.G. Duncan Coal Co. v. Jones*, 254 S.W.2d 720, 723 (Ky. 1953) ("The only difference between a private nuisance and a public nuisance is the extent or scope of the injurious effect. The former affects an individual or a limited number of individuals only. The latter affects the public at large, or such of them as may come in contact with it.") (emphasis added to all).

[7] *See, e.g.*, *Copart*, 362 N.E.2d at 971 ("[Public nuisance] consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place[,] or endanger or injure the property, health, safety or comfort of a considerable number of persons[.]") (emphasis added); *see also Quiroz v. ALCOA Inc.*, 416 P.3d 824, 833 (Ariz. 2018) ("considerable number of persons"); *Hale v. Ward Cty.*, 818 N.W.2d 697, 705 (N.D. 2012) (same); *Atkinson v. City of Pierre*, 706 N.W.2d 791, 795 (S.D. 2005) (same); *Champlin Petroleum Co. v. Bd. of Cty. Comm'rs of Okla. Cty.*, 526 P.2d 1142, 1145 (Okla. 1974) (same); *State v. Turner*, 18 S.E.2d 372, 375 (S.C. 1942) (same) (citations and quotations omitted from all).

[8] More recent decisions in Pennsylvania tend to reference the geographic scope of a public nuisance claim more vaguely as the "community" or the

same principle by reference to the number of people affected similarly by the nuisance: When the number of potential plaintiffs becomes too many to actually count – *i.e.*, an "indeterminate" number – a private nuisance becomes public. *See Commonwealth ex rel. v. VonBestecki*, 30 Pa. D&C 137, 14 (Dauphin Cty. Ct. Com. Pl. 1937) ("A private nuisance is one that affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public.") (emphasis added).[9]

"public." But "neighborhood" is still a valid definition in Pennsylvania, as it is elsewhere. *See, e.g., Evans v. Asarco, Inc.*, No. 04-cv-94, 2011 WL 1842775, at *2 (N.D. Okla. May 16, 2011) ("There is no reference [in this case] to a public nuisance which affects a community, neighborhood, or considerable number of persons besides the plaintiffs themselves."); *Hartung v. Milwaukee Cty.*, 86 N.W.2d 475, 485 (Wis. 1957) ("If an entire neighborhood is adversely affected, this is sufficient to constitute a public nuisance[.]") (citing 39 Am. Jur., Nuisances, 288 § 10; 66 C.J.S. Nuisances § 2, 732 n.53); *A.B. v. Wal-Mart Stores, Inc.*, No. 14-cv-422, 2014 WL 4965514, at *3 (S.D. Ind. Oct. 3, 2014) ("A public nuisance affects an entire neighborhood or community, while a private nuisance affects only one individual or a determinate number of people.") (citations omitted); *see also Grundy v. Thurston Cty.*, 117 P.3d 1089, 1092 (Wash. 2005) ("A nuisance 'which affects equally the rights of an entire community or neighborhood' is a public nuisance.") (quoting Rev. Code Wash. 7.48.130); *Bolbol v. Feld Entm't, Inc.*, No. C 11-5539, 2013 WL 257133, at *7 (N.D. Cal. Jan. 23 2013) ("A public nuisance is 'one which affects at the same time an entire community or neighborhood, or any considerable number of persons[.]'") (quoting Cal. Civil Code § 3480) (emphasis added to all).

[9] This formulation of the maximum size of a private nuisance – involving the highest number of plaintiffs that is still "determinate" or "definite" – has not arisen more recently in Pennsylvania than in *VonBestecki*, but it remains good law in Pennsylvania and in many other states. *See, e.g., Schaeffer v. Gregory Vill. Partners, LP*, 105 F. Supp. 3d 951, 967-68 (N.D. Cal. 2015) ("A private nuisance is one that affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public."); *City of Gary v.*

In more recent years, Pennsylvania courts have reconfirmed these principles in shorthand, referring repeatedly to the essential character of a private nuisance as an action between *neighbors*. *See, e.g.*, *Hercules*, 762 F.2d at 314 (historical role of private nuisance law in Pennsylvania is "as a means of efficiently resolving conflicts between neighboring, contemporaneous land uses.") (emphasis in original) (collecting authority); *Cavanagh*, 904 F. Supp. 2d at 435 (collecting Pennsylvania cases "limiting private nuisance cases to situations involving [temporary visitors] or neighboring landowners"); *Cassel-Hess v. Hoffer*, 44 A.3d 80, 82 (Pa. Super. 2012) (*adjacent* neighbor's actions allegedly caused mosquito-infested standing water on edge of plaintiff's property); *Kembel v. Schlegel*, 478 A.2d 11, 14-15 (Pa. Super. 1984) (defendants' neighboring transportation business allegedly invaded plaintiffs' use and enjoyment of *adjacent* properties); *Whitemarsh Township v. Cummings*, 72 Montg. 389 (Montg. Cty. Ct. Com. Pl. 1957) (claim alleged as public nuisance properly considered private nuisance where it affected only seven nearby households).

Shafer, No. 07-cv-56, 2007 WL 3019918, at *3 (N.D. Ind. Oct. 4 2007) ("In Indiana, courts have held that a private nuisance 'affects only a single person or a determinate number of people.'") (emphasis added to both); *Hale*, 818 N.W.2d at 704 (same); *LaVigne v. First Cmty. Bancshares, Inc.*, 215 F. Supp. 3d 1138, 1147 n.3 (D.N.M. 2016) (same); *Gibbs v. Gardner*, 80 P.2d 370, 373 (Mont. 1938) (same); *Hundley v. Harrison*, 26 So. 294, 296 (Ala. 1899) (same); *Hopi Tribe v. Ariz. Snowbowl Resort LP*, 430 P.3d 362, 365 (Ariz. 2018) ("definite" number); *Horner v. State*, 49 Md. 277, 278-79 (1878) (same) (citations and quotations omitted from all).

Whether the line between private and public nuisance is drawn at the level of the "neighborhood," a "determinate" number of plaintiffs, or some comparable formulation, two things are clear: (1) there *is* a number of plaintiffs above which a private nuisance becomes public; and (2) the Baptistes' claims fall plainly on the public side of that line. Plaintiffs purport to plead a common harm shared by "in excess of 8,400 households," or more than 20,000 people (assuming the Pennsylvania average of 2.5 people per household). Compl. ¶ 36; A33. This is not a claim allegedly affecting a few neighbors; indeed it is more than ten times the population of Plaintiffs' borough of Freemansburg, and is a significant minority of Northampton County and a colorable fraction of the entire Lehigh Valley.[10] The number of potential plaintiffs is obviously indeterminate and far more than neighborhood-wide; in any case it is far too high for a private nuisance action. A private nuisance action of such a size would simply be a *de facto* public nuisance action, but without the latter action's limitations. *See infra*, § II.

The court below found that "because Plaintiffs live a direct distance of 1.6 miles from Defendant landfill, with many other properties and the Lehigh River

[10] See U.S. Census, *American Fact Finder, Freemansburg borough, Pennsylvania* https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml; U.S. Census, *Quick Facts, Northampton County, Pennsylvania* https://www.census.gov/quickfacts/northamptoncountypennsylvania; Lehigh Valley Live, *New Census numbers show how the Lehigh Valley's population has swelled from 2010 to last year* (April 18, 2019) https://tinyurl.com/yyroly69.

between them… Plaintiffs' property is not a *neighboring* property to the landfill." A13 (emphasis in original). The court reinforced this point by noting that the "allegations Plaintiffs make regarding Defendant landfill affect the community at large and not Plaintiffs' property in particular." *Id.* Judge Kenney then did nothing more than apply hornbook nuisance law to conclude that the Complaint failed to state a claim for private nuisance. *Id.*

Plaintiffs assert that Pennsylvania law is "replete with cases" involving large numbers of potential plaintiffs, Appellant Br. at 17, and that nuisances over a large geographic area "routinely" give rise to private nuisance actions, *id*. at 15, but cite only two cases in support: *Diehl v. CSX Transp., Inc.*, 349 F. Supp. 3d 487 (W.D. Pa. 2018); and *Maroz v. Arcelormittal Monessen LLC*, No. 15-cv-770, 2015 WL 6070172 (W.D. Pa. Oct. 15, 2015); Appellant Br. at 15-17.[11] Neither of these cases confronts the argument raised here about the comparative scope of public and private nuisances. The same is true of the cases cited by Plaintiffs' *amici* –

[11] Plaintiffs reference a third case, *Leety v. Keystone Sanitary Landfill*, No. 2018-cv-1159 (Lackawanna Cty. Ct. Com. Pl. 2018); Appellant Br. at 13. The scope of the alleged private nuisance action is unclear from Plaintiffs' addendum. While the court holds, without analysis, that "neighboring" is not an element of a private nuisance, the only case cited by the court for that holding is the Pennsylvania Superior Court's decision in *Karpiak.* That decision explains: "This action was instituted by home-owners who live near appellees' landscaping supply business." 676 A.2d at 271. Neither *Leety* nor *Karpiak* confronts the difference between public and private nuisance, and neither addresses the arguments raised here.

none addresses the particular arguments raised here.[12] Neither Plaintiffs nor *amici* cite any case holding that a private nuisance action can encompass an unlimited number of people in an unbounded area, yet never become a public nuisance subject to a "special injury" limitation. No such case exists.

The importance of the "special injury" limitation in public nuisance actions is explained below; *see infra*, § II. Without it, much land use policy would migrate to the domain of the courts.

II. Plaintiffs Cannot Bring a Public Nuisance Claim Because They Allege No Distinct Special Injury.

The lower court correctly held that Plaintiffs failed to allege a private claim for public nuisance because no facts were alleged to show how they have been

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[12] Two cases raised by *amici* require brief discussion. *Butts v. Sw. Energy Prod. Co.*, No. 12-cv-1330, 2014 WL 3953155 (M.D. Pa. Aug. 12, 2014), was a private nuisance lawsuit by just five individuals, and did not implicate the issue presented here: a private nuisance claim by more than 20,000 people spread across nearly 20 square miles. *Id.* at *1. And *amici* misrepresent the holding of *Rowe v. E.I. DuPont De Nemours & Co.*, 262 F.R.D. 451 (D.N.J. 2009) – the *Rowe* court did *not* "certify[] private nuisance claims on behalf of 14,000-15,000 residents within [a] two-mile area[.]" *Amici* Br. at 12. The *Rowe* plaintiffs *sought* certification on that scale, 262 F.R.D. at 455, but the court found that the "vast majority" of these 14,000-15,000 people were public water customers without a viable private nuisance claim, and so certified only a small subclass of plaintiffs whose private wells were allegedly affected by the contamination, highlighting that the class reflected an "identifiable group." *Id.* at 462. That class was apparently in the range of 100 potential plaintiffs, not 15,000. *See* DuPont Opposition to Motion for Class Certification, 2009 WL 4922404, at § II.B ("As of June 2009, DuPont had sampled 99 private wells[.]"). Accordingly, *Rowe* does not support Plaintiffs' argument that a private nuisance action can exist where the nuisance allegedly affects tens of thousands of people.

"uniquely harmed." A11. The Baptistes simply cannot overcome black-letter law that requires "special injury" for a private action on a public nuisance claim; they plead no such injury and this issue needs little of the Court's attention. The difference between a public and a private nuisance is exactly what the labels suggest: A public nuisance action is *public*, addressing a public harm, redressable by public authorities. A private plaintiff may prosecute a public nuisance only where the plaintiff suffers "special injury." "Special injury" public nuisance actions are not intended for thousands of people; plaintiffs do not suffer a "special injury" merely by virtue of living in an area affected by an alleged public nuisance. In some circumstances, a valid *private* nuisance claim can qualify as a "special injury" for the purpose of a *public* nuisance action. But not here, because, as addressed above, Plaintiffs have no private nuisance action.

A. Where a nuisance is public, it may be addressed only by public authorities unless a private plaintiff suffers "special injury."

The parties agree about the basic definition of a public nuisance: an "unreasonable interference with a right common to the general public." *See Machipongo Land and Coal Co., Inc. v. Commonwealth*, 799 A.2d 751, 773 (Pa. 2002) (citing Restatement (Second) of Torts, § 821B(1)). And they agree that only public authorities can enforce a public nuisance: "It has long been established in Pennsylvania that the injunction of such a public nuisance must be sought by the proper public authorities." *Pa. Soc'y for Prevention of Cruelty to Animals [SPCA]*

v. Bravo Enters., Inc., 237 A.2d 342, 362 (Pa. 1968) (citing, *inter alia*, *Rhymer v. Fretz*, 55 A. 959, 960 (Pa. 1903)). A public nuisance is the sole province of public authorities because otherwise every alleged nuisance would subject the defendant to a patchwork of conflicting lawsuits from numerous aggrieved plaintiffs. *See Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 446 (3d Cir. 2000) (applying Pennsylvania law) (quoting Restatement (Second) of Torts, § 821C cmt. b (1979)) ("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."). The absence of a private right of action to abate a purely public nuisance is a longstanding, core protection for public nuisance defendants like the Landfill.

This shield means that private plaintiffs may sue for a public nuisance only where the plaintiffs "are specifically injured by the public nuisance over and above the injury suffered by the public generally." *See Pa. SPCA*, 237 A.2d at 348 (citing *Rhymer*, 55 A. 959). "[O]ver and above" means "a plaintiff must have suffered a harm of greater magnitude and of a different kind than that which the general public suffered." *Allegheny Gen. Hosp.*, 228 F.3d at 446 (citing Restatement (Second) of Torts, § 821B(1); *Pa. SPCA*, 237 A.2d at 348). A private plaintiff may not sue merely because he or she is among the members of the public affected by a public nuisance – the private plaintiff must be specially affected; in a distinct manner; to a distinct degree. *Id.*

A Pennsylvania trial court decision explains the "special injury" requirement[13] in the same context at issue here:

> The line of distinction, as we understand it, between a public and a private nuisance, is that the public nuisance is a nuisance that is common to all the neighborhood where it is committed, as well as those of the public who may be traveling in that vicinity. A private nuisance is one where the injury to the party complaining is personal to himself or to his property. It must differ in degree and kind from the injury which the people generally in that vicinity suffer from.
>
> […]
>
> If the injury is of such a character as to poison the air, so that all the people who, having a right to come within the vicinity where it was maintained, if they had come would have suffered from it, he would be guilty of maintaining a public nuisance, and no action would lie against him by any of his neighbors who suffered because of this general discomfort, for the maintenance of a private nuisance. That which would disturb the public generally, or those of the public who had the right to go in the vicinity of such disturbing and unhealthy odors and gases, would be a public nuisance, but if poisoned water from such putrefying mass would run upon an individual's land and poison his cattle, or if the unhealthy and poisonous gases escaping from the corrupt and putrefying flesh should make his family ill, then, because of his injury, differing in degree and kind from which the general public suffered while going within the neighborhood, he would have a [private] right of action for damages for the maintenance of a [public] nuisance.

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[13] The *Brunner* court refers to "private nuisance," but in context it is clear that the court is describing what we now call a "private action for public nuisance," where a private plaintiff alleges special injury from a public nuisance.

Brunner v. Schaffer, 1 Pa. D. 646, 647-48 (Lehigh Cty. Ct. Com. Pl. 1892).

The *Brunner* court makes clear that the general rule – that in the absence of "special injury" a defendant is shielded from private lawsuits claiming a purely public nuisance – includes a shield against exactly the type of lawsuit at issue here: allegations of "general discomfort" where a nuisance "poison[s] the air, so that all the people who… if they had come [within the vicinity] would… suffer[] from it[.]" *Id.* The allegation of widely-dispersed airborne emissions across an entire neighborhood is a claim for public nuisance without "special injury," and is redressable solely by public authorities like PADEP.

Moreover, it is clear on the face of the Complaint that there *is* such a recourse to public authorities. The Complaint confirms the regulatory and oversight role of PADEP among other entities, including the public's ability to petition PADEP to take action, and PADEP's willingness to do so where warranted. Compl. ¶ 15; A30 ("Area residents have made countless complaints to the Pennsylvania Department of Environmental Protection ('DEP') regarding odors from Defendant's facility."); *id.* ¶ 16; A30-31 (citing violations). Plaintiffs even seek injunctive relief "consistent with Defendant's permit and regulatory requirements," which of course are implemented by PADEP. Compl. at 12, ¶ F (prayer for relief); A39.

B. Plaintiffs do not suffer a "special injury" merely by virtue of living in an area affected by an alleged public nuisance.

Plaintiffs argue, on behalf of their proposed class, that their "special injury" is in their status as "property owners and renters," which is allegedly distinct from non-owner, non-renter occupants in the area, as well as from "those who have reason to travel in and through the area, to shop, work, visit friends or family, or for any other purpose." Appellant Br. at 26-27. But in Pennsylvania, mere residence in the vicinity of alleged odors does not qualify as a "special injury" for the purpose of public nuisance.

The alleged nuisance in *Brunner* – odor from a slaughter-pen – is essentially identical to the nuisance alleged here: "odors which filled the air, and which, entering into the open windows of the plaintiff's house, produced inconvenience and discomfort to herself and the members of her family." 1 Pa. D at 648-49. As here, the plaintiff in *Brunner* claimed a private right to sue for public nuisance, notwithstanding the neighborhood-wide character of the odors. *Id.* at 647. But the Pennsylvania court would not allow it: The plaintiff's allegations were "precisely what was suffered by all the others in that locality…. It was the pollution of the atmosphere that they breathed, the noisomeness of the smells, which was common to all alike, for which she sought redress." *Id.* at 649. Residence – as distinct from mere visitor status – was irrelevant. "[T]he public nuisance is a nuisance that is common to all the neighborhood where it is committed, as well as those of the

public who may be traveling in that vicinity." *Id.* at 647 (emphasis added). For the purpose of "special injury," Plaintiffs are not distinct from members of the public passing through their neighborhood; neither are they distinct from the many thousands of other households that Plaintiffs allege have suffered the same harm. *See, e.g.*, *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1481 (E.D. Pa. 1993) ("[T]he 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.").[14]

The Supreme Court of Pennsylvania ratified the key principle of *Brunner* a few years later in a case that was cited as good law as recently as 2015.[15] In *Rhymer v. Fretz*, the Pennsylvania Supreme Court held that a neighbor could not sue privately to enjoin the enlargement of a church across the street on the grounds that construction operations on the site would put the neighborhood at risk of fires. 55 A. 959, 959-60 (Pa. 1903). The nuisance was common to all neighborhood *residents* and that meant the residents suffered no "special injury":

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[14] *Vacated in part on other grounds*, 1993 WL 224167 (E.D. Pa. June 14, 1993) (vacating dismissal of claims mistakenly dismissed as voluntary), *rev'd sub nom. on other grounds, Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993) (only on grounds of applicability of Foreign Sovereign Immunities Act).

[15] Plaintiffs' counsel were involved in *Maroz*, which cited *Rhymer* as good law on public nuisance. Plaintiffs themselves cite *Maroz* in their brief. Appellant Br. at 16.

> The danger from fire and the deprivation of the enjoyment and use of property are therefore, as alleged in the bill, common to all the property and persons residing in the vicinity of the proposed structure. The anticipated injury or damage to the property of the plaintiff by the erection of the building will be the same in character and degree as that which will result to the property of every other person in the neighborhood. […] We are of opinion that the bill avers no facts showing any danger or injury likely to result from the erection of the proposed structure which is special to the plaintiff and not common to all the property owners in the vicinity.

Id. at 960 (emphasis added). In other words, local residency and property ownership do not confer any "special injury" standing to defeat the general rule that public nuisance is unenforceable by private plaintiffs. *Id.* This is the law in Pennsylvania, and Plaintiffs cite no Pennsylvania authority to the contrary.

C. A valid private nuisance action *may* qualify as a "special injury" – but does not here, where there is no valid private nuisance action.

In addition to claiming "special injury" as landowners and residents, Plaintiffs attempt to assert such standing for their public nuisance claim on the mere basis that they have also alleged a private nuisance. Plaintiffs cite comment *e* to Section 821C of the Restatement (Second) of Torts for the undisputed point that a private nuisance can coexist with a public nuisance, and that a valid private nuisance action may itself be a "special injury" that allows a private plaintiff to bring an action for public nuisance. Appellant Br. at 19-20 (citing § 821C, cmt. e). But as previously noted, it is not contested here that public and private nuisances

may overlap in the same set of facts, and it is likewise uncontroversial that a *valid* private nuisance may, under certain circumstances, constitute "special injury" in a public nuisance claim. But Plaintiffs ignore the key distinction: *There is no valid private nuisance action in this case,* for the reasons set forth above, and so comment *e* is irrelevant. A *nonviable* private nuisance action is not a "special injury."

As an example in support of their argument under comment *e*, Plaintiffs offer the unpublished Superior Court decision *Umphred v. VP Auto Sales & Salvage, Inc.*, No. 1372 MDA 2014, 2015 WL 6965725 (Pa. Super. June 24, 2015), in which the court cites comment *e* (then lettered as comment *d*) to hold that a validly-proved private nuisance was a "harm… of a different kind" – a special injury – and therefore supported a public nuisance action as well. *Id.* at *10 (citing § 821C, cmt. d). The nuisance in that case was an unlicensed, unpermitted scrap metal recycling business that was causing extreme noises that were held to constitute an invasion of the property rights of plaintiffs, whose property was located only "30-45 feet" away. *Id.* at *2. These factors were sufficient to support an injunction on the grounds of a *private* nuisance, independently of any public nuisance. *Id.* In turn, based on the facts of the case, that viable private nuisance claim constituted a "special injury" for the purpose of an otherwise-existing *public* nuisance claim, per § 821C, comment *e* (then *d*). *Id.*

Nothing in this set of facts is controversial – or helps Plaintiffs here. If Plaintiffs could allege a valid private nuisance, then that private nuisance liability potentially could be a "special injury" giving them standing to sue for public nuisance (assuming an otherwise-viable public nuisance claim). *See* Restatement (Second) of Torts, § 821C, cmt. e; *see also Umphred*. But Plaintiffs do not allege a valid private nuisance; *see supra*, § I. A nonviable private nuisance claim cannot support "special injury." If the mere assertion of a private nuisance claim were enough, regardless of viability, the "special injury" requirement would be automatically satisfied in every nuisance complaint and would be meaningless as a limitation on mass public nuisance actions.

D. To empower public authority and avoid disproportionate liability, "special injury" public nuisance, like private nuisance, is limited.

Ultimately the private and public nuisance claims both fail for the same basic reason: There are too many potential plaintiffs, and so the law puts their claims in the hands of public authorities in order to avoid a deluge of private lawsuits with the potential for "exorbitant," disproportionate liability. *See One Meridian Plaza*, 820 F. Supp. at 1481. The same limitation that applies to private nuisance actions also applies to "special injury" private actions for public nuisance; mass nuisance actions make no more sense in the guise of "special injury" public nuisance claims than in purely private claims. In public nuisance law, "special" injury means *limited* injury: "[W]here there are a large number of plaintiffs, the

harm those plaintiffs suffered is not *special*." *Id.* (emphasis added); *see also id.* (quoting *Nebraska Innkeepers, Inc. v. Pittsburgh–Des Moines Corp.*, 345 N.W.2d 124, 130 (Iowa 1984)) ("the fact that plaintiffs assert this claim on behalf of the entire retail business communities of South Sioux City, Nebraska and Sioux City, Iowa implies that whatever damages have been suffered by plaintiffs have also been suffered by the entire business community and, therefore, such damages are *public* in nature rather than *special*.") (emphasis in original). The doctrine of "special injury" standing in public nuisance actions cannot merely be an end-run around the inherent size limitations of private nuisance actions: If 20,000 plaintiffs cannot bring 20,000 private nuisance actions, they cannot bring 20,000 "special injury" public nuisance actions either. Either way, the matter belongs in the hands of public authorities in the absence of an actual "special injury."

Plaintiffs attack *One Meridian Plaza* on grounds that have nothing to do with the principle set forth above. They criticize the case for ignoring comment *e* to Restatement Section 821C (recognizing that public and private nuisances can coexist under the same set of facts in some instances), Appellant Br. at 19-20, but nothing the court did in *One Meridian Plaza* is inconsistent with comment *e* – the court allowed the same ten plaintiffs to bring both public and private nuisance claims, a result that accords with the principle in comment *e* that the two types of nuisance can coexist. 820 F. Supp. at 1481-82. Plaintiffs also criticize the court's

holding regarding the relationship between public nuisance and the economic loss doctrine, Appellant Br. at 22-23, but that aspect of *One Meridian Plaza* has nothing to do with this case. Contrary to Appellant's argument, *One Meridian Plaza* is not a "law school hypothetical fact pattern," *id.* at 18; it is a thorough examination of how nuisance law is correctly applied in a case with a large number of potential plaintiffs. Its reasoning bars Plaintiffs' public nuisance claims.

III. A Negligence Claim is Unavailable Because the Landfill Owes No Legal Duty to Plaintiffs to Prevent a Nuisance.

Plaintiffs' theory of the Landfill's alleged negligence has shifted over the course of this short litigation and appeal. They argued in briefing papers below that their claim was for negligence *per se* because the Landfill was allegedly in violation of Pennsylvania solid waste law, A14-15, but they backed away from that position at oral argument after it became clear that this position was untenable.[16] *See* A73 ("With respect to our negligence claims [and duty of care]… [u]pon further review of that issue, it does appear that the more recent and comprehensive analysis of that [issue] states that[,] no[,] [solid waste law] cannot be the basis of,

[16] *See Russell v. Chesapeake Appalachia, L.L.C.*, 2014 WL 6634892, at *3 (M.D. Pa. Nov. 21, 2014) ("[V]iolations of SWMA do not provide a basis for a negligence action because the statute is intended to benefit the public generally, not a particular group, as required by the negligence *per se* standard."); *Centolanza v. Lehigh Valley Dairies, Inc.*, 658 A.2d 336, 341 (Pa. 1995) ("SWMA was never meant to be used in legal actions instituted by private citizens.") (citing *Fleck v. Timmons*, 543 A.2d 148 (Pa. Super. 1988)).

of a nuisance *per se* action.").[17] Instead, Plaintiffs introduced a new theory at oral argument – that the Landfill's legal duty of care arose from the "affirmative act" of running a landfill. *Id.* at A73-74. This is the position Plaintiffs take in this appeal.

Plaintiffs are wrong as a matter of law, no matter which theory of negligence they proffer. The law in Pennsylvania is that there is no legal duty, as a matter of negligence law, to prevent a nuisance. Plaintiffs' negligence claim is merely a repackaged nuisance claim, and as such, Pennsylvania law disallows it where there are 20,000 potential plaintiffs all affected the same way.

A. Landfill operators in Pennsylvania owe no legal duty in tort to protect neighbors from odors, or from nuisance more generally.

The specific rule of this case was set forth by the Superior Court of Pennsylvania in *Gilbert v. Synagro Cent., LLC*: There is no legal 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." 90 A.3d 37, 51 (Pa. Super. 2014). The Supreme Court of Pennsylvania affirmed this holding. *Gilbert v. Synagro Cent., LLC,* 131 A.3d 1, 23 (Pa. 2015). The rule is dispositive of Plaintiffs' negligence claim.

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[17] It is notable that Plaintiffs' counsel conflated the concept of nuisance *per se* and negligence *per se* in his argument on this point. Among other reasons, Plaintiffs' negligence claim fails because it is, if anything, just a nuisance claim. *See infra*, § IIIB.

The *Gilbert* rule is a particular application of the more general rule stated in Restatement (Second) of Torts, § 371 for the liability of possessors of land to people outside of the land for activities carried out on the land. Section 371 provides that a possessor of land is subject to "liability for physical harm to others outside the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place." *Id.* (emphasis added).[18] For the purpose of negligence analysis, "physical harm" in Section 371 includes both bodily harm and harm to the physical condition of property. *See* Restatement (Second) of Torts, § 497; *see also Phila. Elec. Co. v. James Julian, Inc.*, 228 A.2d 669, 670 n.1 (Pa. 1967) (applying Section 497). The duty of care at issue here is the duty to prevent *physical harm* to persons or property, not the duty to prevent mere nuisance, like odors. But Plaintiffs do not allege physical harm in this case – neither to persons nor property. The gravamen of the complaint is odors, and the alleged loss of use and enjoyment of property as

[18] Pennsylvania courts regularly apply Section 371. *See, e.g., Lavelle v. Grace*, 34 A.2d 498, 501 (Pa. 1943) (highway injuries where steam obstructed visibility); *Simon v. Hudson Coal Co.*, 38 A.2d 259, 260 (Pa. 1944) (drowning death where water discharged across plaintiffs' property); *LaForm v. Bethlehem Twp.*, 499 A.2d 1373, 1384 (Pa. Super. 1985) (drowning death alleged on basis of town stormwater management activities).

a result of the odors. Plaintiffs make no substantive damages allegations beyond odors.

While Plaintiffs make a cursory effort to allege property damages, in Pennsylvania property damages require physical damage to property, and Plaintiffs make no allegation regarding any alleged physical damage their property might have incurred. *See Menkes v. 3M Co.*, No. 17-cv-573, 2018 WL 2298620, at *7 (E.D. Pa. May 21, 2018) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 798 (3d Cir. 1994)). Their property damage claims are purely conclusory: They claim that the odors "have caused property damage, including lost property value," Compl. ¶ 25; A32, and that "[a]s a further direct and proximate result of the foregoing conduct of the Defendant," they "suffered damages to their property as alleged herein." Compl. ¶ 58; A37.[19] But these "property damage" allegations are mere words without content. Plaintiffs offer no facts about how odors might have physically damaged their property, or which components of the property were damaged, or how such damage might or might not be reparable, or the alleged cost of such repairs. The mere conclusory recitation of an element of a claim – like "property damage" – is not cognizable. *See James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012) ("we disregard rote recitals of the elements of a cause of action, legal conclusions, and mere conclusory statements.").

[19] The second ¶ 58.

As a practical and legal matter, Plaintiffs have not alleged that they incurred bodily harm or property damage.[20] They allege only nuisance damages – the invasion of a property interest – not any physical harm. But nuisance damages are not enough to support a negligence claim, because there is no legal duty in tort to prevent nuisance damages.

Plaintiffs' own theory of duty – that the Landfill incurred a legal duty by undertaking the "affirmative act" of operating a landfill – is misplaced for the same reason. Plaintiffs are narrowly correct that an "affirmative act" may impose a duty "to exercise the care of a reasonable man to protect [others] against an unreasonable risk of harm to them arising out of the act." Appellant Br. at 28 (citing *Dittman v. UPMC*, 196 A.3d 1036, 1046-47 (Pa. 2018)). But Plaintiffs are ignoring the key phrase: the duty is to protect others against an unreasonable risk of *harm*. And the law is clear that in this context, "harm" means *physical* harm, not mere nuisance. That is what Section 371 and *Gilbert* collectively say: Someone conducting activities on property has a duty to prevent *physical* harm to outsiders, Restatement § 371; but a property owner need not protect outsiders from

[20] Plaintiffs' claim for "lost property value" is not available under Pennsylvania law in the absence of an allegation that the property damage is permanent. *See Lobozzo v. Adam Eidemiller, Inc.*, 263 A.2d 432, 437 (Pa. 1970). Where physical damage to property is remediable, the measure of damages is the cost of repair, unless that cost would exceed the value of the property. *Id.* Here, Plaintiffs have not alleged permanent damage, and they have not pled repair costs.

a *nuisance*, like odors. *Gilbert*, 90 A.3d at 51. Plaintiffs' own citations make this point: "Where an injury is sustained to real property as a result of the negligence of another, the property owner is entitled to damages…[.]" Appellant Br. at 29 n.7 (citing *Clark v. Fritz*, 151 A.3d 1139, 2016 WL 2625235, *6 n.22 (Pa. Super. 2016)) (emphasis added). But Plaintiffs do not allege an "injury to real property."

The Landfill owed no legal duty merely to prevent nuisance. Accordingly, in the absence of an allegation of "physical harm," a negligence claim must fail.

B. Plaintiffs' negligence claim is just a repackaged nuisance claim, and cannot be brought independently in Pennsylvania.

A cause of action is determined by its content, not its label: If a claim sounds in nuisance, it does not become a negligence claim merely because a plaintiff wishes to frame it that way. *See, e.g.*, *Horne v. Haladay*, 728 A.2d 954, 960 (Pa. Super. 1999) ("Since appellant's negligence claim is really a nuisance claim, we find it is time-barred by operation of [the statute of repose in the Pennsylvania Right to Farm Act]."). Here, Plaintiffs label their third claim "negligence," but it is actually just a nuisance claim in a different guise, subject to the limitations of a nuisance claim. As such, it fails for the reasons set forth above at §§ I-II.

The differences between nuisance and negligence were examined by the Supreme Court of Pennsylvania in *Kramer v. Pittsburgh Coal Co.*, in which the court held that a key difference was in the harm alleged:

> In legal phraseology, the term 'nuisance' is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecedent [sic], or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage. Nuisance is distinguishable from [ne]gligence.

19 A.2d 362, 363 (Pa. 1941) (quoting 46 C.J. 645, 646, 650) (citations omitted) (emphasis added). The court distinguished between negligence and nuisance *harms*: Nuisance damages are "annoyance, inconvenience, discomfort or hurt" that are sufficiently material to require a *presumption* of damage. *Id.* Negligence damages, by contrast, are actual physical injuries to person or property. *Supra*, § IIIA. This is true even where nuisance claims are founded on allegedly "unlawful" use of property or personal conduct; a defendant's conduct may be "unlawful" and still constitute only a nuisance, not negligence, if the resulting harm is in the "annoyance/inconvenience" category rather than a physical injury. 19 A.2d at 381.[21]

[21] The plaintiff in *Kramer* brought a negligence claim but wanted it to be treated as a nuisance claim – in some ways a mirror image of the instant case. In *Kramer*, the plaintiff alleged actual property damage "caused by dust deposited on and in [the property]" from a coal cleaner in a nearby mine, 19 A.2d at 363, and having alleged actual property damage, the plaintiff permissibly framed his complaint as a negligence claim. *Id.* at 363-64. The jury, however, found no negligence liability, so the plaintiff on appeal questioned whether negligence was actually the proper standard, *id.* at 364, apparently arguing that the case should have been evaluated by the jury under a more forgiving "absolute liability"

Based on *Kramer*, the Superior Court of Pennsylvania has twice held that a negligence action may not be based on the same facts as a nuisance action – in other words, that a plaintiff may not repackage a pure nuisance claim as a negligence claim. *See Horne*, 728 A.2d at 955-960 (holding that negligence claim was barred as a *de facto* nuisance claim because "the exact same facts support both appellant's nuisance and negligence claims"); *Gilbert*, 90 A.3d at 51 ("As in *Horne*, the operative facts here establish that the Residents have asserted nuisance claims, not negligence claims"). In *Gilbert*, the Superior Court noted that "while it is true that a nuisance claim can be founded on negligent conduct, a negligence claim cannot be based solely on facts that establish a nuisance claim." *Id.* The plaintiffs' purported negligence claim in that case was therefore actually a nuisance claim, and as such was barred by the one-year limitation in the Pennsylvania Right to Farm Act, 3 P.S. §§ 951-957. *Id.*

These holdings are doctrinally sound: To allow a plaintiff to plead a *negligence* claim on mere *nuisance* facts would mean that there is a legal duty of care in tort that requires reasonable actors to prevent nuisances. This is in direct conflict with the clear rules discussed above in Restatement Section 371 and

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nuisance standard instead. *Id.* The court held that negligence and nuisance are distinguishable, and that the plaintiff, "having stated and tried his case solely as one of negligence, could not expect to have it passed upon as one of nuisance generally, irrespective of negligence." *Id.*

Gilbert. It would also make nuisance a mere subtype of negligence, notwithstanding the *Kramer* holding that the two claims are distinguishable. The holding is also well-grounded in policy: A legal duty in tort for a property owner to refrain from lawful activities that create nuisance conditions offsite would make activities like landfills and farming functionally impossible, notwithstanding approval and regulation by public authorities.

Here, Plaintiffs have only pled a nuisance, because they have not pled a negligence *harm* – physical injury. Plaintiffs' factual allegations support only a nuisance claim, and a negligence claim cannot be based on the "exact same facts." *Horne,* 728 A.2d at 955-960. Plaintiffs' negligence claim cannot be brought independently in Pennsylvania.

CONCLUSION

The Baptistes seek to vastly expand public and private nuisance liability to grant nuisance plaintiffs tremendous power to regulate major public infrastructure like landfills through tort verdicts. This Court, sitting in interpretation of Pennsylvania law, cannot undertake the sea change in the common law that Plaintiffs seek. Instead, the Court should reiterate that Pennsylvania, like most states, firmly distinguishes between private and public nuisances, limits private nuisances to disputes between neighbors, limits private action on public nuisances to plaintiffs suffering distinct injuries, and does not impose an impossible tort duty

of preventing offsite nuisance odors by allowing negligence actions based on nuisance facts. This Court should affirm the dismissal of Plaintiffs' lawsuit for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

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Respectfully submitted:

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I, Eric L. Klein, hereby certify that:

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Dated: August 5, 2019

/s/ Eric L. Klein
Eric L. Klein

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Eric L. Klein

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I, Eric L. Klein, hereby certify that on this 5th day of August, 2019, the foregoing brief was electronically filed with the U.S. Court of Appeals for the Third Circuit via the Court's CM/ECF filing system. Seven (7) paper copies were sent via Federal Express Next Business Day Delivery to the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit, and service was made upon all counsel of record through the Court's electronic docketing system (CM/ECF).

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/s/ *Eric L. Klein*
Eric L. Klein

CERTIFICATION OF BAR MEMBERSHIP

I, Eric L. Klein, hereby certify that I am a member in good standing of the bar of the U.S. Court of Appeals for the Third Circuit.

Dated: August 5, 2019

/s/ *Eric L. Klein*
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