

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KELLY BRANTON; SHAWN BRANTON; MITCHELL	:	
BRANTON, a Minor, by Kelly Branton and Shawn	:	
Branton, Guardians; LILLY BRANTON, a Minor, by	:	
Kelly Branton and Shawn Branton, Guardians; BECK	:	
BRANTON, a Minor by Shawn Branton, Guardian;	:	
PAT COURTWRIGHT; PHILIP COURTWRIGHT;	:	
GARY E. JOHNSON; GEORGINA B. JOHNSON;	:	
CAROL KLINE; RICHARD LONG; ANN MCKEAN;	:	CV-2013-01,502
THOMAS J. MCKEAN; DEBORAH A. MUTHLER;	:	
STEPHEN K. MUTHLER; STEPHEN P. RICE;	:	
SUSAN RICE; and KIM SHIPMAN,	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	CIVIL ACTION
NICHOLAS MEAT, LLC; BRETT BOWES d/b/a	:	
BOWES FARM; CAMERER FARMS, INC.;	:	
WILLIAM R. CAMERER, III; and	:	
JAB LIVESTOCK, LLC,	:	JURY TRIAL DEMANDED
Defendants.	:	

OPINION AND ORDER

This matter arises out of a dispute related to the generation, transportation, storage, and land application of organic wastewater by Defendants. Pending before this Court are two (2) sets of preliminary objections filed by Defendants against Plaintiffs’ First Amended Complaint. On August 8, 2013, Defendant Nicholas Meat, LLC (“Defendant Nicholas Meat”) filed the initial set of preliminary objections. On August 16, 2013, Defendants William R. Camerer, III, and Camerer Farms, Inc. (collectively “Defendants Camerer”) filed the second set of objections. On September 9, 2013, Defendant Brett Bowes d/b/a Bowes Farm (“Defendants Bowes”) filed a petition to join the objections lodged by Defendants Camerer and Nicholas Meat. On September 19, 2013, Defendant JAB Livestock, LLC (Defendant JAB) also filed a petition to join the

objections of Defendants Camerer and Nicholas Meat. Following oral argument held on October 2, 2013, it is hereby ORDERED and DIRECTED as follows.

I. Objections of Defendant Nicholas Meat

a. Failure to Comply with Rules of Civil Procedure: Amendment

Pa. R.C.P. 1028(a)(2)

Initially, Defendants object to Plaintiffs' filing of an amended complaint without leave of court. Pa. R.C.P. 1033 provides for the amendment of pleadings; this rule states:

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Id. In this matter, Plaintiffs filed an initial complaint on June 14, 2013. Four (4) days later, on June 18, 2013, Plaintiffs filed their First Amended Complaint. Plaintiffs subsequently served Defendants with the First Amended Complaint, not its initial complaint.

During argument, Defendants alleged that they *may be prejudiced* by the filing of the First Amended Complaint based upon a statute of limitations defense. At this stage in the proceeding, looking at the First Amended Complaint, this Court cannot conclude if a statute of limitations defense exists. Both the Defendants and the Court will be able to evaluate any potential statute of limitations claim once a Second Amended Complaint is filed. Therefore,

Defendants' potential statute of limitations claim is in not waived by this ruling. However, at this time, the Court believes that Defendants were not prejudiced by the filing of the First Amended Complaint on June 18, 2013. Defendants' objection is **OVERRULED**.

b. Failure to Comply with Rules of Civil Procedure: Verification

Pa. R.C.P. 1028(a)(2)

Defendant Nicholas Meat's next objection pertains to the verification of Plaintiffs' First Amended Complaint. Pa. R.C.P 206.3 and 1024(a) mandate that a party must verify every pleading containing factual averments, not appearing of record. Plaintiffs failed to attach an appropriate verification to its First Amended Complaint. Additionally, Plaintiffs' initial complaint lacked a proper verification. Plaintiffs attempted to cure this deficiency by adding a verification to their response to Defendants' objections. However, the "cured" verification is signed *only* by Plaintiff Kelly Branton. The Court does not believe that this verification is sufficient. Therefore, Defendants' objection is **SUSTAINED**. Within twenty (20) days, Plaintiffs shall file a Second Amended Complaint, attaching a verification signed by each party plaintiff or the plaintiff's parent or natural guardian if the plaintiff is a minor.

c. Insufficiently Specific Pleading

Pa. R.C.P. 1028(a)(3)

Next, Defendants argue that the averments lodged against them lack specificity. Pa. R.C.P. 1019 outlines the contents of pleadings and general and specific averments; that rule provides that "[a]verments of time, place and items of special damage should be specifically stated." Pa. R.C.P. 1019(f). Presently, Defendants argue that Plaintiffs' averments are not specific as to: 1. the particular plaintiff asserting the claim, and 2. the particular defendant that

the claim is lodged against. The Court agrees. Therefore, Defendants' insufficiency objections are **SUSTAINED**. Plaintiffs shall file a Second Amended Complaint within twenty (20) days. In their Second Amended Complaint, Plaintiffs shall plead individual counts for each individual party plaintiff with special damages set forth. The Second Amended Complaint should also include averments of time and place of the nuisance and negligence and should identify which party committed what specific acts or omissions constituting nuisance or negligence.

d. Nuisance Demurrer

Pa. R.C.P. 1028(a)(4)

Defendant Nicholas Meat objects to the complaint on the grounds of legal insufficiency of a pleading (demurrer) for the nuisance claim. It asserts that Nicholas Meat cannot be liable for nuisance because the claim does not arise from Nicholas Meat's use of its own property and "Nicholas' operation in Loganton, Pennsylvania is not in close proximity" to Plaintiffs' property or the property where the "residual waste" is stored and applied. See, *Defendant Nicholas Meat's Preliminary Objections*, ¶¶ 48 -50.

Plaintiffs respond that there is no requirement that a nuisance arise from the use of one's own property. Plaintiffs assert that nuisance "can result from a person's improper, indecent, or unlawful conduct." *Plaintiffs' brief*, at 7, citing *Kramer v. Pittsburg*, 19 A.2d 362, 363 (1941). Plaintiffs assert that "there does not appear to be any case law in Pennsylvania holding that property ownership is a prerequisite to being found liable for nuisance." *Id.*

Defendant Nicholas Meat does not cite any case that holds that proximity of land and use of one's own property are required for a nuisance claim. *Defendant Nicholas Meat's Brief*, at 14,

citing, Summ. Pa. Juris 2d, § 21:1 to suggest proximity of land is required and 21:2 to suggest that private nuisance lies only “between neighboring, contemporaneous land users.” *Defendant Nicholas Meat’s Brief*, at 14. Defendant cites *Kramer v. Pittsburg*, 19 A.2d 362, 363 (1941) for the language that refers to the “unlawful use by a person of his own property” to support its assertion that use of one’s own property is required. Defendant asserts that nuisance connotes the use of one’s own property which disturbs a neighboring property. *Defendant Nicholas Meat’s Brief*, at 14.

Pennsylvania has adopted the RESTATEMENT (SECOND) OF TORTS §822 for nuisance claims. *Waschak v. Moffat*, 379 Pa. 441, 448-449 (Pa. 1954).¹ That Section provides the following.

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. RESTATEMENT (SECOND) OF TORTS §822 (1979)

Nothing in the Restatement requires proximity of land or the use of one’s own property to impose liability. The case cited by both parties, *Kramer, supra*, refers to both unlawful *conduct* as well as unlawful use of one’s *own property*. The Court agrees with Plaintiffs that there does not appear to be any controlling cases specifically holding that the use of one’s own property is a

¹The Court adopted the first Restatement of Torts but subsequent courts have noted the minimal differences with the second version and referred to the second version in their opinions. See, *Kembel v. Schlegel*, 478 A.2d 11, 14-15, n.3 (Pa. Super. Ct. 1984) “We recognize that the Moffat court actually adopted the version of § 822 that appeared in the first Restatement of Torts. The substantive differences between the two versions, however, are minimal. Thus, we will refer to Restatement (Second). See *Hughes v. Emerald Mines Corp.*, 303 Pa.Super. 426, 433-34, 450 A.2d 1, 4-5, (1982).” Therefore, this Court will refer to the second version for ease of reference.

prerequisite to impose liability for nuisance. However, many Pennsylvania Courts have explained that “[t]he term "nuisance" contemplates the unreasonable use by one person of his personal or real property such as to create an interference with the activities or pursuits of another.” *Diess v. Pennsylvania Dept. of Transportation*, 935 A.2d 395, 905 (Pa.Cmwlth. 2007), *citing*, *Groff v. Borough of Sellersville*, 314 A.2d 328 (Pa. Cmwlth. 1974).

The Court believes that the claim for nuisance against Nicholas Meat for generating “residual waste,” which is stored by other Defendants on property in close proximity to the Plaintiffs, is similar to a nuisance claim against a manufacturer in products liability where the product leaves the manufacturer and allegedly creates a nuisance at a separate location. The Pennsylvania Supreme Court has not decided whether a nuisance claim applies to product liability. *Cavanagh v. Electrolux Home Products*, 904 F. Supp. 2d 426 (E.D. Pa. Oct. 18, 2012). In *Cavanagh*, the Court granted summary judgment in favor of the manufacturer and denying the claim for nuisance. The Court relied on the fact that plaintiffs voluntarily brought the manufacturer’s product, a dehumidifier, into their home when it allegedly caused a fire creating the alleged nuisance on their property. In dicta, the Court noted that its conclusion was “supported by Pennsylvania and federal decisions limiting private nuisance cases to situations involving strangers to a premises or neighboring landowners.” *Id.* *Cavanagh*, 904 F. Supp. 2d at 435. (citations omitted)

Since this matter is currently at the pleading stage, and a more specific complaint should be forthcoming which could clarify the extent, if any, of factual allegations in support of the nuisance claim against Nicholas Meat, this Court will **DENY** the objections at this time. Defendant Nicholas Meat’s demurrer for nuisance is **OVERRULED**.

e. Per Se Negligence or Private Cause of Action Demurrer

Pa. R.C.P. 1028(a)(4)

Defendant Nicholas Meat demurs to claims for a private cause of action or negligence per se in this matter, asserting that Plaintiffs may not assert a private cause of action under the Solid Waste Management Act (“SWMA”), 35 P.S. § 6018.101, *et. seq.* or the Pennsylvania Code. See, Defendant Nicholas Meat’s Preliminary Objections, ¶¶ 51-52.

Plaintiffs have not asserted negligence per se or a private cause of action under the Solid Waste Management Act (“SWMA”), 35 P.S. § 6018.101, *et. seq.* or the Pennsylvania Code. In their brief and at oral argument Plaintiffs denied making such claims. See, e.g., *Plaintiffs’ Memorandum In Opposition to the Preliminary Objections of Defendants, William R. Camerer, III, and Camerer Farms, Inc. to Plaintiffs’ First Amended Complaint*, at 6-8. In its brief, Defendant Nicholas Meat agreed that the Court need not address its demurrer with regard to negligence per se or a private right of action because the Plaintiffs have conceded that they are not pursuing those claims. *Brief in Support of Preliminary Objections To First Amended Complaint By Defendant Nicholas Meat, LLC*, at 15, n.5. At oral argument, Defendants raised the issue. Also, Defendant Camerer joined this objection. See, *Camerer Objections*, at 8-9. Therefore, the Court has considered the issue. The Court concludes that Plaintiffs have not asserted negligence per se or private cause of action.

The content of Plaintiffs’ complaint supports the Court’s conclusion. Plaintiffs’ complaint alleges only two counts: one for nuisance and one for negligence. The complaint includes a section for general allegations of fact and a section related to violations of regulations, codes and statues in separate headings. Neither of those sections contains a “wherefore clause.”

Both of those sections appear to be allegations of fact in support of the subsequent sections labeled “Count I” and “Count II.” The two sections labeled as counts both contain a “wherefore clause.” Accordingly, this Court finds that Plaintiffs have not alleged negligence per se or a private cause of action under SWMA or the Pennsylvania Codes. Therefore, Defendants’ objection to the assertion of such claims as a cause of action is **DENIED**. The objection to the assertion of negligence per se or a private cause of action is **OVERRULED**.

f. Negligence Demurrer

Pa. R.C.P. 1028(a)(4)

Next Defendants argue that Plaintiffs’ negligence claim should be dismissed because the law precludes Plaintiffs from using facts that are predicated upon a nuisance claim to support a negligence claim as well. *See Horne v. Haladay*, 728 A.2d 954, 960 (Pa. Super. Ct. 1999), *appeal denied*, 754 A.2d 1223 (Pa. 1999). This Court agrees.

The *Horne* Court was presented with *almost* the same operative facts that are presently before this Court, albeit at a different procedural posture. In *Horne*, our Superior Court addressed the trial court’s grant of summary judgment regarding plaintiff’s negligence claim against defendants. The *Horne* plaintiffs brought a claim against defendants *Haladay* in both nuisance and negligence based upon the operation of defendants’ poultry business. Plaintiffs’ negligence and nuisance claims survived the pleading stages; however, upon a motion for summary judgment, the trial court granted defendants’ request to dismiss the negligence claim.

On appeal, our Superior Court affirmed. In its opinion, our Superior Court noted the difference between nuisance and negligence claims. However, the Court also provided:

[w]hile nuisance is distinguishable from negligence, we find that the distinction does not support [plaintiff's] right to pursue a negligence action in this case.

Presently, the exact same facts support both [plaintiff's] nuisance and negligence claims. [Plaintiff] ignores the fact that [defendant's] operation of their poultry farm is an infringement upon the use of [plaintiff's] property "which is not wrongful in itself, but only in the consequences which might flow from its[,]” and, thus, is a proper nuisance claim.

Horne, 728 A.2d 960. Since our Superior Court agreed with the trial court that the negligence claim was really a nuisance claim (which was time-barred by operation of 3 Pa. C.S. § 954), the trial court's grant of summary judgment was affirmed.

In light of the lack of specificity of the Plaintiffs complaint, and given that this matter remains at the pleading stage, the Court cannot conclude that Plaintiffs negligence claim is based upon overlapping facts which are really a nuisance claim. As Plaintiffs have been Ordered to file a more specific amended complaint, this Court will **DENY** the objections at this time. Defendants' demurrer for negligence is **OVERRULED**.

g. Attorneys' Fees and Costs Demurer

Pa. R.C.P. 1028(a)(4)

In Plaintiffs' responses to Defendants' preliminary objections, Plaintiffs withdrew their requests for attorneys' fees and costs. Plaintiffs confirmed this withdrawal at the time of oral argument. Therefore, Defendants' demurrer is **SUSTAINED**, and Plaintiffs' request for attorneys' fees and costs in ¶¶ 83 and 92 of their First Amended Complaint are **STRICKEN**.

h. Punitive Damages Demurrer

Pa. R.C.P. 1028(a)(4)

Additionally, in ¶¶ 83 and 92 of Plaintiffs' First Amended Complaint, Plaintiffs request the Court to award them punitive damages. At the time of oral argument, the parties advised the Court that they were going to prepare a stipulation regarding Plaintiffs' punitive damages claim. Therefore, the Court will **DEFER** ruling on this objection at this time. If a stipulation is not prepared regarding this objection, Defendants shall advise the Court so that the Court can make a ruling on this objection.

II. Objections of Defendants Camerer

Defendants Camerer's objections mirrored Defendant Nicholas Meat's objections in part. The Court will now rule on those objections not previously ruled upon.

a. Failure to Comply with Rules of Civil Procedure: Amendment

Pa. R.C.P. 1028(a)(2)

As previously stated, this objection is **OVERRULED**.

b. Failure to Comply with Rules of Civil Procedure: Verification

Pa. R.C.P. 1028(a)(2)

As previously stated, this objection is **SUSTAINED**.

c. Failure to Comply with Rules of Civil Procedure: Motion Cover Sheet

L205.2

This objection is **OVERRULED**. When a cover sheet is required, the failure to provide one typically results in a non-compliance order from the Court with notice that a cover sheet is required for further scheduling or action by the Court.

d. Insufficiently Specific Pleading

Pa. R.C.P. 1028(a)(3)

As previously stated, this objection is **SUSTAINED**. Plaintiffs shall file a Second Amended Complaint within twenty (20) days. In their Second Amended Complaint, Plaintiffs shall plead individual counts for each individual party plaintiff with special damages set forth. The Second Amended Complaint should also include averments of time and place of the nuisance and negligence and should identify which party committed what specific acts or omissions constituting nuisance or negligence.

e. Nuisance Demurrer

Pa. R.C.P. 1028(a)(4)

As previously stated, this objection is **OVERRULED** at this time.

f. Punitive Damages Demurrer

Pa. R.C.P. 1028(a)(4)

As previously stated, the Court will **DEFER** ruling on this motion until notified further by Defendants.

g. Attorneys' Fees and Costs Demurrer

Pa. R.C.P. 1028(a)(4)

As previously stated, this objection is **SUSTAINED**.

i. Insufficiency Specificity and/or Individual Liability of Defendant Demurrer

Pa.R.C.P. 1028(a)(4)

Defendant Camerer objects to holding Defendant Mr. Camerer individually liable in this matter. *See, Defendant Camerer's preliminary objections*, at 12-13. However, in its brief,

Defendant Camerer asserts that the Plaintiffs agreed to voluntarily dismiss Mr. Camerer from the lawsuit without prejudice. *Camerer Defendants' Brief in Support of Preliminary Objections*, at 17-18. Therefore, the Court will **DEFER** ruling on this objection at this time. If a stipulation is not executed and filed regarding this objection, Defendants shall advise the Court so that the Court can make a ruling on this objection.

III. Objections of Defendant JAB

At the time of oral argument, Defendant JAB raised *Connor*^[1] objections to ¶¶ 49 and 87 of Plaintiffs' First Amended Complaint. Specifically, Defendant JAB objects to the language "but not limited to the following" in ¶ 49 and "but not limited to" in ¶ 87. In essence, *Connor* provides that failing to object to indefinite, insufficient or non-specific language in a complaint results in waiver of an amplification of those allegations. In this instance, the Court **SUSTAINS** Defendant's *Connor* objections, as the above-mentioned phrases are too broad and in violation of *Connor*. These phrases are **STRICKEN** from Plaintiffs' First Amended Complaint.

The Court enters the following Order.

ORDER

AND NOW, this ___ day of October, 2013, for the reasons stated herein, it is hereby ORDERED and DIRECTED as follows:

1. Defendants' objections for failure to comply with rules of civil procedure regarding Plaintiffs' amendment of its initial complaint are **OVERRULED**.

2. Defendants' objections for failure to comply with rules of civil procedure regarding the verification of Plaintiffs' First Amended Complaint is **SUSTAINED**. Within twenty (20) days, Plaintiffs shall file a Second Amended Complaint attaching a verification executed by each party plaintiff. If the party plaintiff is a minor, the minor's parent or natural guardian shall sign the verification on behalf of the minor.

3. Defendants' objection for insufficient specificity of a pleading is **SUSTAINED**. Plaintiffs shall file a Second Amended Complaint within twenty (20) days. In their Second Amended Complaint, Plaintiffs shall plead individual counts for each individual party plaintiff with special damages set forth. The Second Amended Complaint should also include averments of time and place of the nuisance and negligence and should identify which party committed what specific acts or omissions constituting nuisance or negligence.

4. Defendant's objection for legal insufficiency of a pleading (demurrer) for a nuisance claim without allegations of proximity or use of one's own property is **OVERRULED**. Since this matter is currently at the pleading stage, and a more specific complaint should be forthcoming which could clarify the extent, if any, of factual allegations in support of the nuisance claim, this Court will **DENY** the objections at this time.

5. Defendants' objection to the assertion of negligence per se or a private cause of action is **OVERRULED** because the Court finds that Plaintiffs have not alleged negligence per se or a private cause of action under SWMA or the Pennsylvania Codes.
6. Defendants' objection for legal insufficiency of a pleading (demurrer) for negligence claims based upon facts that constitute a nuisance is **OVERRULED**. In light of the lack of specificity of the Plaintiffs complaint, and given that this matter remains at the pleading stage, the Court cannot conclude that Plaintiffs negligence claim is based upon overlapping facts which are really a nuisance claim. This Court will **DENY** the objections at this time.
7. Defendants' demurrer to Plaintiffs' claims for attorneys' fees and costs, found in ¶¶ 83 and 92 of Plaintiffs' First Amended Complaint is **SUSTAINED**. These claims shall be **STRICKEN** from Plaintiffs' Second Amended Complaint.
8. Upon agreement of the parties, the Court **DEFERS** ruling on Defendants' demurrer to Plaintiffs' claims for punitive damages, found in ¶¶ 83 and 92 of Plaintiffs' First Amended Complaint, at this time. Defendants may petition the Court for a further ruling on this demurrer if the parties fail to reach a stipulation on the issue.
9. Defendants Camerer's objection for failure to comply with rules of civil procedure regarding Lycoming County Local Rule L.205 is **OVERRULED**.
10. Upon the apparent agreement of the parties to enter a stipulation, the Court **DEFERS** ruling on Defendant Camerers' objection to holding Defendant Mr. Camerer individually liable in this matter. If a stipulation is not executed and filed regarding this objection, Defendants shall advise the Court so that the Court can make a ruling on this objection.

11. Defendant JAB’s *Connor* objections to the phrases “but not limited to the following” in ¶ 49 and “but not limited to” in ¶ 87 are **SUSTAINED**. These phrases shall be **STRICKEN** from Plaintiffs’ Second Amended Complaint.

BY THE COURT,

Date

Richard A. Gray, J.

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[1] *Connor v. Allegheny General Hospital*, 461 A.2d 600, 603 n.3 (Pa. 1983).