

**IN THE COURT OF COMMON PLEAS OF  
LYCOMING COUNTY, PENNSYLVANIA**

JAMES CALLAGHAN,	: No. CV 22-00721
ROCIO RETANA-CALLAGHAN,	:
ANDREW KRIGER, AMBER KRIGER,	:
SALVATORE GIAMPAPA,	:
MILLIE GIAMPAPA,	:
PAMELA TRAVIS, HOWARD PROBST,	:
SHARON PROBST, NEAL BARR, and	:
LINDA BARR,	:
Plaintiffs	:
VS	:
	:
WILLIAMSPORT AREA SCHOOL DIST.,	: Civil action, Law
LORI BAER, DR. JANE PENMAN,	:
CODY DERR, PATRICK DIXON,	:
JENNIFER LAKE, LISA NIBBLE,	:
STAR POOLE, BARBARA REEVES and	:
ADAM WELTEROTH,	: Preliminary Objections
Defendants	:

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ORDER

This matter came before the Court on December 19, 2022, for oral argument on Defendants’ Preliminary Objections to the Amended Complaint. For the reasons more fully set forth below, those Preliminary Objections are granted in part, and denied in part.

**Plaintiffs’ Amended Complaint**

Plaintiffs’ Amended Complaint alleges that Defendant Williamsport Area School District constructed a playground on real property owned by the District, adjacent to homes owned by the Plaintiffs. Plaintiffs allege that visitors to the playground make noise, leave trash, and use the playground for both legal and illegal activities, all of which disturbs the Plaintiffs. Plaintiffs do not claim that the noise, trash, or illegal activities are the direct result of any act by the Defendants. Rather, Plaintiffs claim that the trash and noise and illegal activities are the result of the conduct of unnamed visitors to the playground. Plaintiffs allege that they “are no longer free to enjoy their back yards” as a result of that visitor conduct.

The Amended Complaint asserts claims in Nuisance and Trespass and Eminent Domain. In the course of oral argument, counsel for Plaintiffs conceded that the individual Defendants are only named for the purpose of confirming jurisdiction over the Williamsport

Area School District, and that no individual liability is sought. For that reason, those Defendants will be dismissed from the matter, without prejudice to re-file.

### **The Test for Consideration of Preliminary Objections in the Nature of a Demurrer**

Preliminary objections in the nature of a demurrer should be granted where the contested pleading is legally insufficient. *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa.Super.2001) (citing Pa.R.C.P. 1028(a)(4)). “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.” *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805 (Pa.Super.2007) (quoting *Cardenas*, 783 A.2d 317 at 321). All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Id.*

*Cooper v. Church of St. Benedict*, 2008 Pa.Super. 171, 954 A.2d 1216 (Pa.Super. 2008). In reviewing preliminary objections, “[a]ll well-pled facts in the complaint, *and reasonable inferences arising from those facts*, are accepted as true. However, unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion need not be accepted.” *Richardson v. Wetzel*, 74 A.3d 353, 356 (Pa. Cmwlth. Ct. 2013) (quoting *Wilson v. Marrow*, 917 A.2d 357, 361 n. 3 (Pa. Cmwlth.2007) (*emphasis added*)). “The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.” 16 Pa.R.C.P. § 1019(a). “The purpose of this rule is to require the plaintiff to disclose the material facts sufficient to enable the adverse party to prepare the case.” *Bennett v. Beard*, 919 A.2d 365, 367 (Pa.Cmwlth. 2007). “Pennsylvania is a fact-pleading jurisdiction; consequently, a pleading must not only apprise the opposing party of the asserted claim, ‘it must also formulate the issues by summarizing those facts essential to support the claim.’” *Wetzel*, 74 A.3d at 356–57 (quoting *Sevin v. Kelshaw*, 611 A.2d 1232, 1235 (Pa. Super.1992)).

### **Discussion**

#### Nuisance

Pennsylvania law recognizes two types of nuisances, public nuisance and private nuisance. A public nuisance is an unreasonable interference with a right common to the general public. *Baptiste v. Bethlehem Landfill Company*, 965 F.3d 214, 220 (3d Cir. 2020). “When a public nuisance interferes with an individual's personal rights, such as the right to use and enjoy “private land,” the aggrieved person has a private cause of action to remedy the infringement of his personal rights.” *Id.* at 220-221. To sustain a private claim on a public

nuisance theory, “a plaintiff must have suffered a harm of greater magnitude and of a different kind than that which the general public suffered. *Id.* at 221. It has long been the law of this Commonwealth that “No one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon that degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells.” *Yale & Towne Manufacturing Company, Inc. v. City of Philadelphia*, 348 Pa. 595, 36 A.2d 321 (Pa. 1944).

Our Supreme Court has observed that “To constitute a nuisance, it is not enough that the activity complained of is offensive to the eye, creates mental discomfort, or makes the vicinity less attractive.” *Young St. Martin’s Church*, 64 A.2d 814, 817 (Pa. 1949). *City of Erie v. Gulf Oil Corporation*, 150 A.2d 351 (Pa. 1959). In that matter, the trial court sustained preliminary objections in the nature of a demurrer to a complaint in equity filed by a group of residents who sought to enjoin the construction of a large storage tank. The complaint asserted a claim in nuisance, and alleged that construction of the tank (within 1,000 feet of numerous dwellings) would result in danger to nearby residents and depreciation of property values, and would thus constitute a public nuisance. Our Supreme Court affirmed the granting of the demurrer, noting that “persons living in a community or neighborhood must subject their personal comfort to the commercial necessities of carrying on trade and business.” 150 A.2d at 353.

The Amended Complaint contains no allegation that any conduct by any of Defendants caused the noise, trash, or alleged illegal activity. At best, it appears that the District has constructed a playground on District property, and that the playground has attracted users who make noise, leave trash, and undertake activities which Plaintiffs regard as inconsistent with a quiet, residential neighbor. While that may be true, Plaintiff has not pled facts to allege that Defendants have interfered with the standard of comfort of his locality.

### Trespass

In addition to potential relief from a public or private nuisance, a property owner who is materially harmed as the result of a trespass to their property by a governmental entity that possesses the power of eminent domain has the option to proceed with a common law claim for trespass, or to file a petition seeking the appointment of a board of viewers pursuant to 26 Pa.C.S.A. Section 502. See, *Wagner v. Borough of Rainsburg*, 714 A.2d 1164 (Pa.Cmwlth.

1998). Since no declaration of taking was filed in this matter, Plaintiffs' claim would presumably be a claim for a de facto taking, pursuant to 26 Pa.C.S.A. Section 502(c).

The test to be employed in judging Defendants' demurrer is whether the allegations set forth in the Amended Complaint are sufficient to establish with certainty that the law will permit no recovery. All doubt must be resolved in favor of the non-moving party. *Gregory v. Pennsylvania State Police*, 160 A.3d 274, 276 (Pa.Cmwlt. 2017), citing *Stilp v. Commonwealth*, 927 A.2d 707, 709 (Pa. Cmwlt. 2007), *aff'd*, 596 Pa. 493, 946 A.2d 636 (2008). While the facts alleged in the Amended Complaint fail to satisfy the requirements of 26 Pa.C.S.A. Section 502(c), and appear insufficient to allege either the creation of a nuisance or a trespass to real property, the Court is not yet convinced that those causes of actions could not be sufficiently asserted in an amended pleading. For that reason, the Court will permit the Plaintiffs one additional opportunity to assert their claims.

**AND NOW**, this 23<sup>rd</sup> day of December, 2022, Defendants' Preliminary Objections to the Amended Complaint filed November 9, 2022, are granted in part and denied in part. Plaintiffs are directed to file an Amended Complaint within twenty (20) days of the date of filing of this Order. In the event that Plaintiffs elect to seek the appointment of a board of viewers, Plaintiffs are directed to proceed pursuant to 26 Pa.C.S.A. Section 502(c). In the event that Plaintiffs elect to proceed with a claim in trespass, Plaintiffs are directed to plead sufficient facts to allege the existence of a trespass upon their property. In the event that Plaintiffs elect to proceed with a claim for creation of a public or private nuisance, Plaintiffs are directed to plead sufficient facts to allege the existence of an infringement of their personal rights which causes significant harm.

Nothing set forth herein is intended to preclude the Plaintiffs from alleging multiple causes of action in the alternative, as permitted by Pa.R.C.P. 1020(c).

This matter is dismissed as to the individual defendants without prejudice to re-file.

By The Court,

Hon. William P. Carlucci, Judge

CC.

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