5A

IN THE CHANCERY COURT FOR _____ COUNTY, TENNESSEE

Plaintiffs,	)	
v.	)	**NO.**
Defendants.	)	

PRE-TRIAL BRIEF

COME NOW the Plaintiffs and would respectfully submit the following pre-trial brief in support of their positions in the above-captioned cause of action.

Statement of Facts

Plaintiffs are citizens and residents of _____ County, Tennessee residing at _____. The Defendant, John is a citizen and resident of _____ County, Tennessee, residing at _____. The Defendant, Joe, is a citizen and resident of Macon County, Tennessee, residing at _____. The Defendant, James is a citizen and resident of _____ County, Tennessee, residing at _____, which property is adjacent to the property of the Plaintiffs.

The Plaintiffs are property owners in _____ County, Tennessee.

The Plaintiffs sold some of their acreage such that they are now the owners of a tract of property which consists of one hundred thirty-six and one-half (136.5) acres, more or less, which is outlined in the office of the Tax Assessor in _____ County, Tennessee to which map reference is hereby made.

The Defendants, John and Joe own property located in the 18th Civil District of _____ County, Tennessee totaling in excess of 600 acres. The tract which shares common boundaries with

the property owned by the Plaintiffs is approximately 23 acres, and it is this property that is occupied by Defendant James. The Defendants, John and Joe, acquired this property in the 18th Civil District on February 18, 1967. One parcel is for one hundred and one (101) acres, more or less and the deed is of record in _____ in the Register's Office for _____ County, Tennessee. The second parcel which shares a common boundary with the property of the plaintiffs is for twenty-three (23) acres, more or less and the deed is of record in the Register's Office for _____ County, Tennessee.

The Defendant James operates a piggery upon the 23 acre tract owned by the Defendants John and Joe, which tract lies above and shares a common boundary with Plaintiff's property. These swine operations began in approximately 1986 with just a few head, some twenty years subsequent to the Plaintiffs' first purchasing their property, and have grown in size and scope since that time.

This piggery emits disagreeable, offensive, nauseating odors and water pollution that are intolerable to Plaintiffs and have caused them great discomfort, sickness, and deprived them of the enjoyment of their property, all to their physical, emotional, and financial detriment.

Defendants' property is at a higher elevation than is the Plaintiffs' property, and the pigs on the Defendants' property are kept on top of a hill. The hogs and pigs, approximately 600 in number consisting of litters from 48 sows, another 48 sows which are in a gestation period, plus 15 boars, have stripped the land of its natural vegetation, which, in addition to the added elevation of Defendants; property, has caused rainwater runoff with concentrated hog and pig waste, manure and urine to run onto the Plaintiffs' property. This renders portions of the Plaintiffs' property unusable for any purpose. The runoff of rain water, concentrated with mud, hog waste, manure and urine from the property owned by the Defendants Joe and John drains onto the Plaintiffs' property, ponds and

backs up onto Plaintiffs' land in front of their home, then flows to a roadway which bisects the Plaintiffs' property, flows under and over the surfaced roadway, collects into a small swell, as it flows on and across the Plaintiffs' property.

The Plaintiffs' property has in the past been serviced by three (3) underground wells which, throughout the majority of the time that the Plaintiffs have owned their property, have been suitable as a water supply for farm usage and human consumption. However, in recent years, since the commencement and subsequent substantial growth of the swine growing operation of the Defendants' piggery, the rainwater runoff with concentrated hog waste, manure and urine has percolated through the soil and polluted the Plaintiffs' well-water sources with fecal coli form and fecal strep. These wells have become so contaminated because of this percolation and contamination that the Plaintiffs' well water is no longer safe for use for farm usage, or for human consumption or bathing. Due to the destruction of Plaintiffs' wells, Plaintiffs are deprived of the use of these wells and are now required to tap into and purchase water from a public utility, all to their financial detriment. As a direct and proximate result of the contaminated water, the Plaintiffs have developed and suffered from kidney infections, swelling around eyes, symptoms of hepatitis, increased blood pressure causing them to have to take increased dosages of medication, skin infections to the point they could no longer bath in the water, etc. Their water closets, sinks, commodes and other plumbing fixtures produced muddy, murky water full of sediment which coated and corroded the pipes and plumbing fixtures. The plaintiffs were forced to connect to the public water system and their entire plumbing system had to be flushed numerous times and for long periods at a time before the water from the public water system was safe for human usage.

Moreover, the runoff of groundwater concentrated with mud, hog manure and urine from

Defendants' property and swine producing operation which regularly flows onto Plaintiffs' property, has killed and destroyed portions of Plaintiffs' pasture and hay, thereby depriving Plaintiffs of the use and profits from their property, all to their financial detriment.

As a direct and proximate result of the above-described facts, the reasonable market value of the Plaintiffs' property has been decreased, as evidenced by two reductions in the appraised value of the Plaintiffs' property by the Equalization Board of _____ County, Tennessee. In addition, the reasonable rental value of the property has also been diminished as a direct and proximate result of the above-described facts.

The Plaintiff has suffered and continues to suffer from extreme emotional distress as a direct and proximate result of the existence and operation of the piggery, the reduction in value to his land, the contamination of his wells, the loss of use and enjoyment of his land, and the worry and anxiety caused thereby. He has been forced to seek care from his family physician and from a psychiatrist for this emotional distress, as well as take medication for this emotional distress, all of which has required him to expend his own funds for the payment of these doctors and prescription bills. This emotional distress has caused him physical, emotional and financial detriment.

ISSUES OF LAW

I. A noxious odor is considered a nuisance under Tennessee Law.

II. Right to Farm Act is void, unenforceable, without meaning, and inapplicable to the case at bar.

III. T.C.A. 43-26-103 is unconstitutional under both the Federal constitution and the Constitution of the State of Tennessee.

IV. Waste and water runoff that originate on Defendants' property and cross Plaintiffs'

property thereby causing damage, is actionable trespass and a nuisance.

V. The operation of a piggery and its resulting run-off of waste, manure and urine onto the Plaintiffs' property have contaminated the Plaintiffs' wells, making them unusable for farm operation or human consumption, causing the Plaintiffs to have to subscribe to public utility water supplies, reducing the value of their land, and causing them inconvenience, all to their financial detriment.

VI. the Defendants are in violation of the federal Clean Water Act, as well as the Tennessee Water Control Act.

VII. Plaintiffs are entitled to compensatory and punitive damages, as well as consequential damages arising out of the Defendants' maintenance of the nuisance, the trespass, and the violation of the Federal and State Clean Water Acts described hereinabove.

Statement of Law

I. A noxious odor is considered a nuisance under Tennessee law.

> "A nuisance in legal parlance extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property."
> City of Nashville v. Neven, 12 Tenn. App. 336; Yarbrough v. Louisville & N.R. Co.,11 Tenn.App. 456 (1930).

> "Nuisance" is anything which annoys or disturbs free use of one's property, or which renders its ordinary use or physical occupation uncomfortable, extends to everything that endangers life or health, gives offense to senses, violates laws of decency, or obstructs reasonable and comfortable use of property."
> Jenkins v. CSX Transp., Inc., 906 S.W.2d 460 (1995)

> "Where Defendant maintained smelting works, the fact that they could not be operated without giving rise to noxious vapors was no defense to an action for damages caused by such nuisance." Signal Mountain Portland Cement Co. v. Brown, 141 F. 2d 471 (1900).

It has long been held under Tennessee law that private parties may proceed against an odor source under the principles of public or private nuisance. As quoted above, the Tennessee Court of Appeals held in 1995, in the case of Jenkins v. CSX Transp., Inc., 906 S.W.2d 460, 462 that anything that disturbs the free use of one's property or which renders its ordinary use or physical occupation uncomfortable constitutes an actionable nuisance. Those conditions that may constitute nuisance extend to everything that endangers life or health, *gives offense to the senses*, violates the laws of decency or obstructs the reasonable and comfortable use of the property. (Emphasis added). Jenkins v. CSX Transp., Inc. (id)

These conditions include odor problems. As early as 1850, the Tennessee Supreme Court stated that various trades and occupations may become "very great nuisances...by infecting the air with noisome smells." Kirkman v. Handy, 30 Tenn. 279, 281, 11 Humph. 406, 409 (Tenn. 1850). In 1899, the Supreme Court of Tennessee ruled as follows:

> "The pollution of the atmosphere with noxious or offensive effluvia, gases, stenches or vapors, thereby producing material discomfort and annoyance, or injury to health or the enjoyment of property, is such an invasion of a right as to create a nuisance. An unwarranted impregnation of the atmosphere to the detriment of another by such offensive odors and smells is an actionable nuisance." *Kolb v. Mayor of Knoxville,* 76 S.W.823, 824 (Tenn. 1903) (citations omitted).

II. The Right to Farm Act is void, unenforceable, without meaning, and inapplicable to the case at bar.

In 1982, the Tennessee legislature attempted to create a rebuttable presumption that a farm or farm operation was not a nuisance if the farm or farm operation conforms to

> "...generally accepted agricultural and management practices according to regulations promulgated by the Department of Agriculture in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5." T.C.A. 43-26-102.

However, the Department of Agriculture has never promulgated rules or regulations defining

generally accepted agricultural and management practices, and this statute, creating this rebuttable presumption in derogation of common law as defined hereinabove, is therefore without meaning.

Tennessee law states that statutes in contravention of common law must be strictly construed. Austin v. Shelby Co., 640 S.W.2d 852 (1982). This case had to do with the construction and interpretation of the Tennessee Governmental Tort Liability Act, and in holding that the statutory law must be strictly construed, the Court held:

> "...the doctrine of Sovereign Immunity has been a part of the common or case law of this state for a considerable period of time....The Tennessee Governmental Tort Liability Act is clearly in contravention of that common law. Therefore, such acts must be strictly construed." *Olsen v. Sharpe* (1950) 191 Tenn 503, 235 S.W.2d 11." Austin v. Shelby (Supra)

Plaintiffs would show that the Tennessee statute found at T.C.A. 43-26-103 and headed "Farms presumed not nuisances" is statutory law that is in derogation of the common law as defined hereinabove. In common law any enterprise that produces a noxious odor that causes one to be unable to enjoy the use of one's property due to endangerment of life or health, offense to the senses, or violation of the laws of decency, is a nuisance. Any statute in derogation of that common law should therefore be strictly construed.

Since the Tennessee Department of Agriculture has failed, chosen or refused to promulgate the regulations assumed by the statute, then it becomes impossible for this Court or the public to know how to rebut the presumption, to know what activities constitute generally accepted agricultural and management practices, and what activities would fail to conform to these standard practices. It is therefore impossible to conclude that the rebuttable presumption exists at all. The burden of rebutting the statutory presumption should not be placed on the Plaintiffs.

This statute should be declared unenforceable and inapplicable and this case should go

forward as a nuisance case.

III. T.C.A. 43-26-103 is unconstitutional under both the Federal constitution and the Constitution of the State of Tennessee.

Moreover, Plaintiffs will show that said statute is unconstitutional. The Plaintiffs will show unto this Honorable Court that a statutory immunity from nuisance suits results in a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution, and in violation of Article I, Section 21 of the Constitution of the State of Tennessee. Plaintiffs will rely on the case of Bormann, et al v. Board of Supervisors in and for Kossuth County, Iowa, et al, 584 NW2d 309; Iowa Sup. Lexis 214 (1998), in support of these allegations of unconstitutionality. A copy of this Iowa Supreme Court case is attached hereto.

In summary, the facts of the Bormann case are as follows: In January 1995, the Defendant Board of Supervisors for Kossuth County, Iowa, upon application made by property owners Girres, also defendants in the case, approved the classification of defendants' lands as an "agricultural area." By so doing, the Board triggered the operation of Iowa Code Section 352.22(1)(a), giving the defendant applicants immunity from nuisance suits.

Iowa Code Section 352.11(1)(a) provides as follows:

> "A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9."

The Code section goes on to state that this immunity will not apply in the following instances:

1. Where the nuisance results from a violation of a federal statute, regulation, state statute or

rule.

2. Where the nuisance results from the negligent operation of the farm or farm operation.

3. Where the injury to person or property caused by the farm or farm operation occurred before creation of the agricultural area;

4. Where the suit arises out of injury sustained because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion into another person's land, unless the injury or damage is caused by an act of God.

Iowa state law defines nuisance similarly to Tennessee case law, and also provides similarly for civil remedies, in Iowa Code Section 657.1:

> Whatever is injurious to health, indecent or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Iowa Code Section 657.2 enumerates several specific instances of nuisance:

> "1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals or the public.
>
> 2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others....
>
> 4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

In finding the Iowa immunity to liability for nuisance for the agricultural area unconstitutional, the Supreme Court of Iowa held as follows:

> 1. That there is a constitutionally protected private property interest at stake.

"Thus, the nuisance immunity provision in section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate 'offensive smells' on their property which without the easement would permit affected property owners to sue the applicants for nuisances." (Citations omitted) Bormann et al v. Board of Supervisors et al, *Id*, at p. 316.

2. The easement is a protected property right subject to the requirements of the Federal and Iowa Constitutions.

"Easements are property interests subject to the just compensation requirements of the Fifth Amendment to the Federal Constitution (citations omitted) Easements are also property interests subject to the just compensation requirements of our own Constitution." (citations omitted) Bormann et al v. Board of Supervisors et al. *Id,* at p. 16.

3. The creation of the easement has resulted in a taking.

"*Richards* is viewed as recognizing the property interest or right to be free from special and peculiar governmental interference with enjoyment. (Citations omitted) The taking involved no kind of physical taking or touching--none whatever. Viewed in this light, *Richards* entirely does away with the requirement of a physical taking or touching. (It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or thing itself, so long as it affects its free use and enjoyment....)(Citations omitted) Bormann et al v. Board of Supervisors et al, *Id,* at p. 318.

4. The power of the legislature to control and regulate nuisances is restricted.

"With regard to private nuisances,

> "...the power of the legislature to control and regulate nuisances is not without restriction and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably....It has been broadly stated, as an additional limitation to the power of the legislature, that...the legislature may not authorize the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has

> no power to authorize the maintenance of a nuisance injurious to private property without due compensation. 66 C.J.S. *Nuisances.* Section 7, at 738 (1950).

"Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards*, holding that 'while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking. *Richards,* 233 U.S. at 553, 34 S. Ct. At 657, 58 L. Ed. at ____(additional citation omitted) (An act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property; except upon condition that just compensation be first made to the owners.)" Bormann et al v. Board of Supervisors et al, *Id,* at p. 318 - 319.

5. The Iowa Code Section 352.11(1)(a) granting immunity to agricultural areas from liability for injury to person or property arising out of an action for nuisance is unconstitutional.

"In enacting section 352.11(1)(a) the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution....Accordingly, we hold unconstitutional and invalidate that portion of section 352.11(1)(a) that provides for immunity against nuisance suits. We reach this result under the Fifth Amendment to the Federal Constitution and also under article I, section 18 of the Iowa Constitution....with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners , and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.

The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly--we think flagrantly--unconstitutional. Bormann et al v. Board of Supervisors, et al *Id,* at p. 322.

Plaintiffs will show that the Tennessee statute attempting to grant immunity to farmers from

nuisance actions arising out of their farm operations is similarly unconstitutional, both under the federal and Tennessee Constitutions, along the same lines of reasoning outlined hereinabove and in Bormann. Tennessee law also prohibits a taking of property without just compensation, and Plaintiffs will show that the Defendants' statutorily protected farming operation substantially interferes with the use and enjoyment of their property so that it has effectively been taken from them in violation of the federal Constitution and the Constitution of the State of Tennessee.

IV. Waste and water runoff that originate on Defendants' property and cross Plaintiffs' property thereby causing damage, is actionable trespass and a nuisance.

Plaintiffs will show unto this Honorable Court that the Defendants have so changed the natural condition of their real property by the operations of this piggery and allowing more that 100 sows and boars and some 500 pigs to forage and eat away all the vegetation, that the amount of water that flows from the Defendants' property onto the Plaintiff's property has been greatly increased, and that it brings with it concentrated amounts of hog manure, urine and waste from these 600 hogs and pigs, thereby damaging the Plaintiffs' property, rendering portions of the property unusable, causing a noxious odor upon the Plaintiffs' land, interfering with the use and enjoyment of their property, and decreasing the market value and the rental value of the Plaintiffs' land.

Moreover, the flow of this increased amount of water, with the urine, manure and wastes from these pigs, over the lands of the Plaintiffs constitute an actionable trespass.

The Court of Appeals of Tennessee, Eastern Division, in holding one landowner liable for damage caused to an adjacent landowner by excessive run-off from the Defendant landowner's property, stated as follows:

"The law regarding a change in natural drainage is well-settled in this jurisdiction. If

> the owner of higher lands alters the natural condition of his property so that surface waters collect and pour in concentrated form or in unnatural quantities upon lower lands, he will be responsible for all damages caused thereby to the possessor of the lower lands". (Citations Omitted)
>
> It is equally well-settled that 'a wrongful interference with the natural drainage of surface water causing injury to an adjoining landowner constitutes an actional nuisance.' (Citations Omitted). Also, a nuisance is 'anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable.' Generally, a nuisance does not depend upon negligence although negligence may exist. The nuisance consists of the harmful effects or the danger of the thing. Zollinger v. Carter, 837 S.W.2d 615 (Tenn. App. 1992), at pp. 614-615.

In the Zollinger case, the Plaintiffs sued the Defendants, developers of a subdivision adjacent to their property, alleging that their residence was flooded and damaged because of a change in surface water drainage caused by Defendants' development of the adjacent properties. Plaintiffs charged that the Defendants had made a substantial change in the contours of the land, denudation of the lane, and other changes which had resulted in an increase of surface water runoff and consequential flooding of their land. The trial court held in favor of the Plaintiffs, and the Defendants appealed. The Appellate Court upheld and affirmed the judgment of the trial court, and the Supreme Court of Tennessee denied permission to appeal that case on August 24, 1992.

In a more recent case, Pryor v. Willoughby, 36 S.W.3d 829 (Tenn. App. 2000), the Court of Appeals for the Middle Section addressed the issue of the proper measure of damages on a nuisance claim. In that case, the Plaintiffs sued the Defendants because when the Defendants built their house on property adjacent to the Plaintiff's property, the lay of the land was so changed as to alter the course of drainage of water from Plaintiff's property, causing rainwater to pool and stand on Plaintiff's property. This pooling and standing of water on their property caused Plaintiff's septic tank to fail to work properly, causing backup and flow of sewage into the Plaintiff's house. The

Plaintiffs were required to have their septic tank and field lines uncovered, their septic tank pumped, and the lid of the septic tank had to be left off. This state of affairs continued from April 29, 1996 until December of 1996, when the Defendants finally corrected the drainage problem. By that time, the Plaintiffs' yard was so saturated with water that they were required to install new field lines and a new septic tank, and their septic tank could not be permanently closed until March of 1997.

The trial court found at the conclusion of the proof that the actions of the defendants constituted both a nuisance and a trespass on the plaintiff's property. The trial court entered its judgment, holding that the plaintiffs were entitled to recover the expenses they incurred to correct the damage that their property had suffered as a result of the defendants' wrongful interference with the natural drainage of surface water, and also awarded damages for the discomfort, inconvenience, embarrassment and emotional distress suffered by the Plaintiffs. Plaintiffs filed a motion to alter or amend the judgment, arguing that their damages should also include the lost rental value of their property during the period of the nuisance. The trial court denied their motion and the Plaintiffs appealed.

In holding that the Plaintiffs were entitled to the loss of rental value of their property during the period of the nuisance, in addition to all the other damages awarded to the Plaintiffs by the trial court, the Appellate Court stated as follows:

> "...A party that has been subjected to a nuisance may be entitled to several types of damages. These damages may include the cost of restoring the plaintiff's property to its condition prior to the creation of the nuisance, personal damages such as inconvenience and emotional distress, and injury to the use and enjoyment of her property. Such damages are not mutually exclusive. (Citations omitted)
>
> A temporary nuisance is one that can be corrected by the expenditure of labor and money. (Citations omitted) In cases of temporary nuisance, the normal way to measure injury to the use and enjoyment of property is the decrease in rental value of

the property while the nuisance exits. (Citations omitted)

> ...In reversing the trial court, we therefore grant the appellants a judgment of $20,000.00 for the loss of rental value of their property during the period of the nuisance. This judgment is in addition to the amounts awarded the plaintiffs by the trial court. Post-judgment interest will accrue on the $20,000 from the date this opinion is filed." Pryor v. Willoughby, 36 S.W.3d 829 (Ct. App. 2000)(Perm. App denied 1/8/01)

In reviewing these cases, the following should be noted:

1. They both deal with issues arising out of damages incurred by Plaintiffs when Defendants alter the natural flow of water from their property onto or over adjacent properties.

2. In at least one of the cases, (Pryor) the Plaintiffs sued on both trespass and nuisance, and the courts treated the causes of action as if they were one and the same. In other words, it can be argued that the nuisance of having the natural flow of water altered such that a Plaintiff's property is flooded or damaged is also a trespass. In the Zollinger case, Plaintiffs sued on both negligence and nuisance, and the court stated in dicta that in a nuisance case, the nuisance does not rely on the negligence of the Defendant but on the harmful effects or dangers thereof. Plaintiffs will argue that the same holds true of a cause of action arising out of trespass.

3. In a footnote to the Pryor case, the Court stated that while Tennessee courts have used other measures to value the injury to use and enjoy the property, such as loss of profits in a business, etc., the most reliable measure of damages will be the diminution of rental value when the damaged property is residential property. Plaintiffs will show that their property which has suffered the damages arising out of Defendants' trespass and nuisance, is in fact residential property and their home.

Tennessee courts have defined trespass as follows:

> "Any physical force, however slight, against the person or possession of another, without regard to the motive, if unauthorized by the law, is in itself and essentially a trespass, and the gist or gravamen of an action of trespass vi et armis. The criterion of trespass...is force directly applied." Luttrell v. Hazen, 35 Tenn. 20 (1855)
>
> "A peaceable entry does not mean merely unaccompanied with actual violence, or breach of the peace. In law, every entry upon the soil of another, in the absence of a lawful authority, without the owner's license, is a trespass. And it matters not that there was no actual force, for the law implies force, and damage likewise, in every unauthorized entry, or trespass quaere clausum fregit (citation omitted) Norvell v. Gray's Lessee, 31 Tenn. 96 (1851)

Plaintiffs will show that the flow of water, waste, and manure from the Defendants property over onto the Plaintiffs property is not only a nuisance, but that it is also a trespass, that it is actionable, and that the Plaintiffs are entitled to all damages they have incurred as a result of said trespass.

V. The operation of the piggery and its resulting run-off of waste, manure and urine onto the Plaintiffs' property has contaminated the Plaintiffs' wells, making them unusable for farm operations or human consumption, causing the Plaintiffs to have to subscribe to public utility water supplies, reducing the value of their land, and causing them inconvenience, all to their financial detriment.

Plaintiffs will prove that the Plaintiffs, prior to the commencement of operations of the Defendants' piggery, enjoyed the use of three separate wells on their property; that the water derived from these wells was safe, clean and acceptable for both farm usage and for human consumption; that the Plaintiffs did in fact use the water from all these wells for both farm usages and for human consumption. However, since the commencement of the operations of the Defendants' piggery, the wells have become contaminated and the water there from is no longer suitable for either farm usage or for human consumption. Plaintiffs have experienced physical illnesses resulting from their

consumption of the polluted waters. Plaintiffs have experienced discomfort, embarrassment and emotional distress as a result of learning that their only water source had become contaminated, that they had in fact been drinking contaminated water, and that they could no longer use the water from these wells. They were required to subscribe to a public water utility in 1997, and have incurred public utility water bills in the average amount of $45. - $50. per month ever since, and will continue to incur these water bills in similar amounts every month for so long as they occupy their home.

Plaintiffs will present expert testimony to show the nature of the contamination of the water from their wells, as well as testimony that will establish that the Defendants' piggery is the source of the contamination.

> "It is well-settled law that if a person render the water of another impure by filth, offal, or other substance, to his injuries, he thereby creates a nuisance, under our statute as well as the common law, which can be abated as such." Love v. Nashville Agricultural and Normal School, 146 Tenn 550, 243 S.W.304 (1922).

> "The pollution of a person's water supply has been recognized as conduct amounting to a private nuisance. W. Keeton, *Prosser and Keeton on the Law of Torts*, Section 87 n. 9 & 10 (5th ed. 1984); Prosser, *Private Action for Public Nuisance,* 52 Va.L.Rev. 997, 1019 n. 175 (1966). Thus the Restatements notes: The pollution of waters is one form of conduct that may result in a private nuisance...when there is interference with another's interest in the private use and enjoyment of land. Pollution may also result in a public nuisance...when there is interference with a right common to all members of the public...*Restatement (Second) of Torts Section 832, comment b (1977)* Wayne County v. Tennessee Solid Waste Disposal Board, 756 S.W.2d 274 (Tn. Ct. App. 1988)

VI. The Defendants are in violation of the federal Clean Water Act, as well as the Tennessee Water Control Act.

Plaintiffs will show that the Defendants are discharging pollutants into the waters of the United States, without a permit, and in violation of the federal Clean Water Act, 33 U.S.C. 1251, et seq. and in violation of the Tennessee Water Control Act, T.C.A. 69-3-101 et seq.

"Section 301(a)(**5) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Section 1311(a) imposes an absolute prohibition on the discharge from a point source of pollutants into any water of the United States by any person unless such a discharge is in compliance with Section 301, 302, 306, 307, 318, 402, and 404.

This prohibition applies when all of the following elements are present:

1. a person

2. discharge of a pollutant to

3. navigable waters

4. through a point source

5. while not in compliance with certain other provisions of the FWPCA, e.g. NPDES permit or pretreatment standards." United States of America v. Velsicol Chemical Corporation , 438 F. Supp. 945 (1976).

"The goal of the CWA [Clean Water Act] is to eliminate the discharge of pollutants into navigable waters. 33 U.S.C. Section 1251. Except as permitted under certain exceptions, 'the discharge of any pollutant by any person shall be unlawful.' 33 U.S.C. Section 1311 (a). One exception is granted for discharges allowed by a National Pollutant Discharge Elimination System [NPDES] permit issued pursuant to 33 U.S.C. Section 1342. The 'discharge of a pollutant' is defined as 'any addition of any pollutant to navigable waters from any point source." 33 U.S.C. Section 1362 (12). 'The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.' 33 U.S.C. Section 1362 (14). Every identifiable point that emits pollution is a point source which must be authorized by a NPDES permit. *United States v. Earth Sciences, Inc., 599 F. 2d (**11) 368 (10th Cir. 1979); 40 C.F.R. 122.1(b)(1).* Legal Environmental Assistance Foundation, Inc., and Natural Resources Defense Council, Inc., v. Donald Hodel, Secretary, United States Department of Energy, et al 586 F. Supp. 1163; 1984.

The Clean Water Act of the State of Tennessee was passed by the Tennessee Legislature in 1977 for the stated purpose, among others, of recognizing the rights of the people of Tennessee to

enjoy unpolluted waters. T.C.A. 69-3-108 states in part as follows:

> (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
>
> (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
>
> (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
>
> (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
>
> (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;
>
> (7) The construction, installation or operation of a concentrated animal feeding operation;
>
> (8) The discharge of sewage, industrial wastes, or other wastes into a well or a location that is likely that the discharged substance will move into a well, or the underground placement of fluids and other substances which do or may affect the waters of the state;..." T.C.A. 69-3-108 (as amended 1998)

Plaintiffs will present proof and expert testimony that the Defendants have been guilty of all the above-quoted sections, placing them in violation of the Tennessee Clean Water Act, damaging and polluting the wells of the Plaintiffs as well as the waters of the State of Tennessee, and subjecting themselves to fines and civil penalties as prescribed by T.C.A. 69-3-115.

Plaintiffs would point out to this Court that T.C.A. 69-3-120(g) exempts farm operations from the Tennessee Clean Water Act, and the Plaintiffs will challenge that exemption on the same

constitutional grounds as outlined hereinabove in Statement of Law III. Plaintiffs would also point out that said section excepts discharges from a "discernible, confined, and discrete water conveyance," and Plaintiffs will show that the Defendants hog operation creates such a discharge.

VII. Plaintiffs are entitled to compensatory and punitive damages, as well as consequential damages arising out of the Defendants' maintenance of the nuisance, the trespass, and the violation of the Federal and State Clean Water Acts described hereinabove.

Plaintiffs will show unto this Honorable Court that the Defendants are liable under Tennessee case law for the following damages:

1. Compensatory damages for the loss of rental value of the Plaintiffs' property during the Defendants' maintenance of the nuisance, as per Henegar v. International Minerals and Chemical Corp., 354 S.W.2d 69 (1962);

2. Compensatory damages for the diminution of value of Plaintiffs' property as a result of the Defendants' maintenance of the trespass, as per Stone v. Harris, 1987 WL 13400 (Tenn. App. 1987);

3. Punitive damages for the Defendants' maintenance of the trespass, as per Meighan v. U.S. Spring Communications Co., 924 S.W.2d 632 (1996);

4. Consequential damages flowing from and arising out of the Defendants' maintenance of the trespass, as per Damron v. Roach, 23 Tenn. 134 (1843), which damages will include damages arising out of the inconvenience, discomfort, embarrassment and/or emotional and physical illness and distress brought about by the maintenance by the Defendants of the trespass and the nuisance upon the Plaintiffs' land.

The Tennessee Court of Appeals, in 1927, addressed the issue of proper damages in a similar factual setting in the case of Love v. Nashville Agricultural and Normal School, 6 Tenn App 104,

(Tenn. Ct. App. 1927). There, the Defendant was found to have polluted the spring of the Plaintiff with sewage, and, in confirming the trial court's judgment in favor of the Plaintiff in the amount of $4,500.00, the Court stated as follows:

> "The general rule is that where one pollutes a spring or stream, if the evidence shows that the injury is permanent and irreparable, the measure of damages is the difference in the market value of the property before and after the creation of the nuisance, but where the injury is not permanent and the nuisance is temporary or abatable (and the court will not presume that the nuisance will continue), the measure of damages is the depreciation in the rental value of the property caused by the nuisance; but it is proper to consider the impairment of the owner's use and comfortable enjoyment of the property, together with such other special damages as may be pleaded and proved. (Citations omitted)....It results that all the assignments of error are overruled and the decree of the Chancellor is affirmed. Love v. Nashville Agricultural and Normal School (supra).

Plaintiffs would further bring to the attention of this Honorable Court the unreported case of Myers v. King, 1987 WL 6549 (1987), wherein a judgment of the _____ County Chancery Court in favor of the Plaintiffs was appealed to the Tennessee Court of Appeals. In that case, the Plaintiffs, who purchased farm land adjacent to the Defendants' farm land after the Defendants had commenced operations of a chicken farm, took note that a sludge-like material was draining through a culvert under the road onto their farm from the farm property of the Defendants. The material was traced back to a lagoon on the Defendants' property, where was collected the manure from the Defendants' chicken houses. The material drained onto the Plaintiffs' property into a pond, through another pond, and then into a creek. In 1983, some ten years after they had purchased their property, Plaintiffs noticed that their well water had developed a foul odor, that that water left a deposit around the faucet and in the commode, that their clothes washed in the water developed an unpleasant odor. Testing was performed and revealed that the well water was highly polluted with fecal coli form and fecal streptococcus; further testing indicated that the pollutants entered the well from a crevice in the

rock upstream from the Plaintiffs' ponds. Independent witnesses concluded that the pollutants came from the Defendants' egg farm. Plaintiffs were required to stop using the well water; haul water for their own personal uses from their son's home for 53 days, and to construct a water line from a public water source to the farm.

The Court of Appeals addressed several issues regarding the proper award of damages in this case, but essentially held that the Chancery Court correctly found a temporary nuisance under the fact situation as proven; that the Chancellor correctly awarded damages to the Plaintiffs arising out of the Plaintiffs' discomfort and inconvenience in learning that they had been drinking contaminated water, and out of their having to physically haul water to their home for personal use; and further, that the Plaintiffs were entitled to additional damages that the court identified as "incidental damages," such as the cost of digging new ponds, and the value of the loss of crops on the polluted farm land. (No proof was offered regarding the diminution of the rental value of the Plaintiffs' property.)

The Court stated as follows:

> "Having concurred in the chancellor's conclusion that the nuisance was temporary, we turn to the question of damages. 'The measure of such damages is the injury to the value of the use and enjoyment of the property, which may be measured to a large extent by the rental value of the property, and extent that rental value is diminished.' *City of Murfreesboro v. Haynes,* 18 Tenn. App. 653, 82 S.W.2d 236 (1935). However, it is also proper to consider the impairment of the owner's use and comfortable enjoyment of the property together with such special damages as may be pleaded and proved. *Love v. Nashville Agricultural and Normal Institute, 146 Tenn. 550, 243 S.W. 304 (1922).* These special damages may include the reasonable cost of restoration necessitated by any physical injury to the land, *Citizens Real Estate and Loan Company, Inc. V. Mountain States Development Corporation,* 633 S.W.2d 763 (Tenn. App. 1981)....Myers v. King, (supra).

Plaintiffs will respectfully show unto this Honorable Court that they have been damaged in

that the market value of their property has been diminished as a result of the Defendants' nuisance and trespass across their property; that the fair rental value of their property has been diminished as a result of the Defendants' nuisance and trespass across their property; that they have incurred extreme physical and emotional discomfort, illness, embarrassment and inconvenience; that they have incurred substantial expenses as a result of this discomfort, illness, embarrassment and inconvenience, including but not limited to doctors' bills, prescription costs, costs to use water from a public utility source; costs of testing the water in their wells and the streams and springs on their property; loss of the use of their wells; and loss of enjoyment of their own property.

CONCLUSIONS

Plaintiffs are entitled to a judgment against the Defendants, enjoining them from any further nuisance or trespass across, on or near their property, and awarding them both compensatory and punitive damages in an amount to be proven at trial and determined by this Honorable Court.

Respectfully submitted,

_____

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