No. 19-1019

IN THE

United States Court of Appeals for the Fourth Circuit

JOYCE MCKIVER; DELOIS LEWIS; DAPHNE MCKOY; ALEXANDRIA McKOY; ANTONIO KEVIN MCCOY; ARCHIE WRIGHT, JR.; TAMMY LLOYD; DEBORAH JOHNSON; ETHEL DAVIS; AND PRISCILLA DUNHAM,

Plaintiffs-Appellees,

and

DENNIS MCKIVER, JR.; LAJUNE JESSUP; DON LLOYD, Administrator of the Estate of Fred Lloyd; TERESA LLOYD; TANECHIA LLOYD; CARL LEWIS; ANNETTE MCKIVER; KAREN MCKIVER; BRIONNA MICKIVER; EDWARD OWENS; DAISY LLOYD;

Plaintiffs,

v.

MURPHY-BROWN, LLC, d/b/a Smithfield Hog Production Division.

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of North Carolina
Civil Case No. 7:14-cv-180-BR

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April 29, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Tillman J. Breckenridge Date: January 15, 2019

Counsel for: Plaintiffs-Appellees

CERTIFICATE OF SERVICE

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I certify that on January 15, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Tillman J. Breckenridge
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January 15, 2019
(date)

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TERESA LLOYD;

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PRISCILLA DUNHAM;

ANNETTE MCKIVER;

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BRIONNA MCKIVER;

EDWARD OWENS;

DAISY LLOYD; Plaintiffs - Appellees

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INTRODUCTION

This suit is not the tip of any spear, and North Carolina's economy will be just fine. This is a private nuisance action where both sides presented their evidence to a jury, and the jury reached a verdict after weighing that evidence. The judicial process did exactly what it was supposed to do, and Murphy-Brown does not claim that there was insufficient evidence for the jury's finding that Murphy-Brown's actions diminished the plaintiffs' use and enjoyment of their properties.

North Carolina already has a Legislature and Governor, elected by its people, to set North Carolina policy. They have enacted punitive damages caps, so Murphy-Brown's screams of a $25 million verdict and a "runaway jury" right at the outset of its brief fail when (1) it quietly admits 10 pages later that the judgment here is actually $3.25 million, and (2) the rest of its brief fails to assert the final award is excessive. No one needs this Court to rescue agribusiness.

Indeed, at Murphy-Brown's urging, the state Legislature enacted *changes* to its Right to Farm Act for any future lawsuits, but the Legislature specified that those changes apply to "causes of action commenced or brought on or after" its effective date. Apparently, that is

not enough for Murphy-Brown, and it asks the Court to interpret legislation contrary to clear legislative intent. The Court should decline.

The Court also should not override the state Judiciary and its well-settled common law regarding the availability of nuisance damages for loss of use and enjoyment of property. Nor should the Court override the district court's necessary exercise of its discretion, which resulted in rulings favorable and unfavorable to both sides in this litigation.

Importantly, the Court should not override the jury. The opening brief is a jury argument extolling the virtues of Murphy-Brown, lauding its purported efforts to find a solution to a problem that it insists does not exist, and pointing the finger at everyone else. Murphy-Brown already made these arguments to a jury, and that jury unanimously rejected them, as did all four subsequent juries.

The jury heard that Murphy-Brown's lagoon-and-sprayfield system and its plumes of hog feces is not the only economically-feasible method of managing hog waste. The jury heard about Murphy-Brown's noisy and smelly trucks. The jury heard that Murphy-Brown knew about the harm it inflicted on neighbors. And the jury heard that Murphy-Brown's purported efforts to find solutions were pretext.

North Carolina has a duly elected Legislature, Governor, and Judiciary. For better or worse, those bodies have already limited the ability of suits like this to force agribusiness to respect the community. North Carolina does not need this Court to dictate new state law policies and disregard the jury to extinguish the only accountability Murphy-Brown will likely ever have to its neighbors.

STATEMENT OF THE CASE

A. The plaintiffs' ancestors move onto their property nearly a century ago and raise families there.

Plaintiffs are neighbors of Murphy-Brown's hog growing operation called Kinlaw Farms (the "Operation"). The plaintiffs are all members of an extended family that has been on the property for almost a century. JA7759.

JA7158. Plaintiff Archie Wright was born on his family's property in 1948. JA2077. Now, a fifth generation of Wrights lives there. JA7759, 7790.

Plaintiff Daphne McKoy was born on her family's property in 1967. JA7248-49. She grew up on the land, went away to college, returned, and is now raising her family there. JA7249-50. Daphne's brother, Dennis Junior, and her mother, Joyce, and sisters, LaJune and Delois, all have homes there. JA7158-59, 7250, 7261, 7267-68, SA8.

When Daphne was younger, the area now occupied by the Operation was woodland with fresh air. JA7248, 50. Growing up, Daphne played in the surrounding fields and woods to the Cape Fear River, visited with family, and cooked outside. JA7251. Now there are trucks, buzzards, flies, noise, and hog odor. JA7248. Living near family is comforting, but the neighborhood has changed—children cannot play outside as much, JA7253, and they cannot go into the woods. JA7253. Trucks wake her up in the middle of the night. JA7274.

The hog odor is not always bad; it is intermittent. JA7256. One Easter Weekend Daphne had family in town, but they did not go outside

because of the stench. JA7256-57. Daphne also endures odor from the "dead truck," which transports rotting hog carcasses. JA7260-62.

Sometimes the smell permeates the house when the windows are closed. JA7263. Indeed, Daphne's daughter does not bring friends over or spend time outside after one said her house stinks. JA7266-67. Daphne testified that the hog operation interferes with her use and enjoyment of her home. JA7278, 7305-06.

Antonio McKoy, Daphne's son, lives with Daphne and his sister. JA7253, 65. The odor stops Antonio from going outside when he wants, and the smell gets into his clothes. JA7311-12. The odor embarrasses him—his friends notice when he gets on the bus or when they visit. SA12. Antonio awakes to trucks that roll by at all hours of the night, honking their horns at the gate. JA7309-10.

Odor from the Operation also embarrasses Antonio's sister, Alexandria McKoy, and it has affected her reputation. JA7318-20. Alexandria must go inside when the odor gets particularly bad, and flies are pervasive—even getting into her hair. JA7317.

Fifty-seven-year-old Ronnie McKiver moved onto his property as an elementary-schooler in the 1970s. SA12. He lives there with his wife, son, and grandchild. JA7325.

Since the Operation was built, the McKivers have fewer family gatherings, and they monitor their children more carefully because of the trucks. JA7325-27. Because of the odor, Ronnie cannot not open his windows as he did prior to the Operation. JA7328-29.

More witnesses testified about the Operation's pervasive effects on their lives. JA7338-40, 7756-57, 7791-92, 7913-14, 7948-50. Deborah Johnson's grandchildren do not visit anymore. JA7941. Ethel Davis moved her bedroom to the back of her house to avoid truck noise. JA7950, 52.

The Neighbors knew complaining would not cause Murphy-Brown to do anything meaningful about the odor. JA7353, 7806. These witnesses and more told the jury that the Operation substantially interferes with the use and enjoyment of their homes. JA7316, 7319-20, 7332, 7354, 7774, 7913.

B. In 1994, Murphy-Brown engineers, designs, and sites the Operation 1,500 feet from its closest neighbors—hog waste spews into the air and onto Neighbors' homes.

Defendant Murphy-Brown—which, as the caption notes, does business as "Smithfield Hog Production Division"—controls the operations that produce hogs for Smithfield Foods. *See post*, § C. Since the 2015 "one-Smithfield" initiative, JA7435-36, Murphy-Brown calls itself "Smithfield"—both publicly and in the courtroom. JA5864-5918 (calling Murphy-Brown "Smithfield" 33 times in opening statement). And the Operation here has a posted sign declareing it a "Smithfield" operation. JA7561, 7640.

The land was not purchased by the owner until Murphy-Brown's predecessor, Murphy Family Farms, approved it for a hog operation. JA1988, 2001-07. In 1994, Murphy-Brown engineered, designed, and sited the Operation 1,500 feet from its closest neighbors and within a half-mile of 22 neighbors. JA7158. And it "admits that a predecessor was aware that there were existing homes in the vicinity prior to the siting and construction of Kinlaw Farm." JA2010. Murphy-Brown at all times owns the hogs that generate the waste, and it wrote the Operation's waste utilization plan. JA2013, 6765-69, 7817. The primary sources of

odor are the sheds, huge open "lagoons" filled with hog waste, and sprayfields. JA6196. Under Murphy-Brown's waste management plan, sprayfield canons fire eight million gallons of hog feces dozens of feet into the air of the neighborhood every year. JA6196, 6200.

The Operation has 12 open-sided, concrete sheds designed by Murphy-Brown, and holding over 1,200 hogs each. JA6197-98. The Operation houses up to 18,000 hogs at a time. JA6908.

JA9695. Hogs are packed into pens and live in a brown covering that is not dirt—it is their own feces. JA6762, 6907, 9696. Without ventilation, that many hogs in such a tight space would trap noxious gasses and kill them. JA6198-99. Murphy-Brown's design releases those gasses into the air that neighbors breathe.

Meanwhile, Murphy-Brown's hogs produce roughly as much fecal material as a city the size of Asheville each day. JA6201. Their waste collects on the floor or falls through slats. The hogs live in their feces and urine. JA6201-02. The hog waste is flushed, raw and untreated, into an open-air lagoon. JA6201-02. The hogs live in a brown covering that is not dirt—it is their own feces. JA6907, 9696.

The Operation has three lagoons, JA6947, each with a capacity of eight million gallons, JA6203. By design, the lagoons create a strong odor as gasses bubble up and are released. JA6926-27. The spray of Murphy-Brown's hog waste also releases odorous gasses into the air, including ammonia, JA6958-59. The gasses are volatile, move easily, and make workers sick. JA5934-39. Sprayfield odors can travel for miles, so of course they affect the plaintiffs' homes, which are within a half-mile of the Operation. JA6960.

Epidemiological studies have shown that industrial hog operations using the lagoon-and-sprayfield system have adverse effects on neighbors. People who live near them suffer respiratory and gastrointestinal problems, excessive coughing, breathing difficulty, and

sinus problems. JA1062-63. Neighbors' blood pressure elevates when odor is strong and hydrogen sulfide levels in the air are higher. JA1081.

Neighbors avoid some of these health effects by diminishing their own use and enjoyment of their properties. JA1065. They do not open windows or go outdoors as often. JA1058, 1259-60, 1282. Neighbors also have difficulty planning and hosting events. JA1086-87.

Murphy-Brown's hog farms produce a miasma of over 300 chemical compounds that synergistically form a unique and strong odor *if no effort is taken to properly abate the problem*. JA5936, 6206, 6208-09, SA5. Thankfully, companies can abate the odors, noise, and vermin. JA1177-78, 2224, 6985, 7245. Lagoons can be covered, which eliminates odor. JA6986. One local hog grower covered his lagoons and testified that neighbors told him the oppressive odors subsided. JA8158-59. But Murphy-Brown has refused to pay for covers at its operations, JA7904, even though—as its director admitted—Murphy-Brown knows covers will eliminate odor from the lagoons, JA7480.

Covering the lagoons at all 2,000 North Carolina sites would cost about one sixth of Murphy-Brown's revenue for *two years*, JA7891, or one quarter of Smithfield Foods/WH Group profits for *one year*, JA7906.

Indeed, Murphy-Brown's president admitted that investing in covers would result in *savings* long-term. JA7898-7900. For instance, a cover would initially cost $243,000 and save $638,000 over the next 20 years. JA7900, 7957.

Lagoon sludge also exacerbates odor. JA6926-28, 35. But Murphy-Brown did not design the lagoons with a sludge accumulation zone to prevent this. JA6936, 42. Other lagoon designs not implemented by Murphy-Brown can also reduce odor. JA6947, 50.

Murphy-Brown also unnecessarily placed the private entrance road—and its resulting 18-wheeler traffic—just feet from the Neighbors' houses. JA2024, 7271-72, 7815, 7918.

JA8109. It solely controls the truck schedules, JA7647-49, 7832, and it schedules them all hours of the day and night without regard for neighbors. The Neighbors provided voluminous evidence of trucks

waking them up, and trucks even honking loudly when the gate is not open. *E.g.*, JA7295, 7309-10. For example, one night in 2016, at least 12 trucks went through between midnight and 6 am. *E.g.*, JA7272-73, 7290-94. "Dead trucks" leave horrible smells, JA7260-61, in addition to the highly unpleasant noise with rumbling, honking, braking, and pigs squealing that other trucks bring, JA7309-10, 7918-19. All trucks also present hazards for children. JA7276, 7325-27.

Murphy-Brown can abate these nuisances by adjusting its trucking schedules. JA7647-49, 7832. And it can abate vermin problems by closing the boxes that hold dead hogs, using refrigerated dead boxes, composting dead hogs, and cleaning up spilled feed. JA808, 7867-68, 8154-55, 8168-69. Indeed, in an effort to avoid punitive damages in subsequent trials, Murphy-Brown has bragged that, following the verdict in this case, it implemented many of those solutions. *Gillis v. Murphy-Brown, LLC,* No. 7:14-cv-000185-BR, 2018 U.S. Dist. LEXIS 202015 at *2-3 (E.D.N.C. Nov. 28, 2018).

C. Murphy-Brown controls the growers.

Contract growers produce 90 percent of Murphy-Brown's hogs. JA7879. Murphy-Brown imposes "guidelines"—standard operating

procedures—that growers must follow, JA6770-6899, 7628, and growers sign a Murphy-Brown adhesion contract. JA7629, 9282-9321. These documents allow Murphy-Brown to:

1. direct grower management procedures, JA7630;
2. mandate design and construction of operations, JA7631, 7638;
3. require technological enhancements, JA7634;
4. require capital investments, JA7635,
5. dictate how many hogs are placed at a given operation, JA7641, 63; and
6. control hog waste management, lagoon construction, and lagoon maintenance, JA7656-62, 64-65.

Murphy-Brown controls grower activities right down to how the grass is mowed. JA7639. It can change these operating procedures at any time, and growers must comply or default. JA7633, 36. Absent default, Murphy-Brown can crush the grower by providing fewer hogs to the grower and thereby limiting pay. JA7645. But Murphy-Brown has never intervened with a grower regarding odor, JA7655, or monitored odor at any operation before these lawsuits, JA7656.

Murphy-Brown could end lagoons and sprayfields right now. JA7413. Indeed, its President admitted that Smithfield can implement

technology that has been found technically and environmentally superior by mandating it and helping pay for it. JA7878, 80.

D. The North Carolina government finds hog operations using the lagoon-and-sprayfield system like Kinlaw to be health hazards, bans new similar operations, and obtains an agreement from the hog industry to modify existing operations.

In the early 1990s, public outcry grew about hog operations using the lagoon-and-sprayfield system and odor. JA21-24, 7559. Don Butler, a former Smithfield director, admitted that Murphy-Brown and Smithfield Foods were aware of these increasing complaints. JA7466.

Counties began restricting zoning for hog operations, JA7450, 7547, 7557-58, but Wendell Murphy, the founder of Murphy-Brown's predecessor, stopped those efforts. As a member of the Legislature, Murphy co-sponsored a bill that prohibited counties from protecting residents from hog operation nuisances with zoning laws. JA7444-45.

Murphy-Brown also tried to thwart government attempts to study the problem, including intimidating researchers and study participants. JA1067-69. Murphy-Brown's influence on local authorities left people reluctant to say anything that would have a negative impact on it. JA5952.

Finally, two hog operations were proposed near Pinehurst just before the U.S. Open golf tournament. JA7532. The state representative was concerned about the hog odor affecting tourism in his district and crafted a moratorium banning new lagoon-and-sprayfield operations and requiring a plan for the conversion of existing lagoons and sprayfields. JA7464, JA7555. The ban was applied to the whole state and has been in place since 1997. JA7464, 7533-56, SA15. The conversion of existing lagoons and sprayfields has never taken place.

Murphy-Brown failed to abate nuisances at existing hog farms. It stymied neighbors' attempts to receive help from the government at every turn, even pushing through modifications to draft hog odor regulations rendering them ineffective. JA7500-02. In 1999, the Governor officially announced his intention to end the lagoon-and-sprayfield system in North Carolina. JA7700-03. In 2000, Smithfield Foods signed an agreement with the government to fund research for replacement technologies for the lagoon-and-sprayfield system (the "Smithfield Agreement"). JA7564, 7714-40.

Don Butler admitted that the research confirmed the existence of superior technologies. JA6694-97, 7568-70. Smithfield had to implement

those technologies if they were found to be "economically feasible," but Smithfield had allies on the committee who argued *no* net increase in costs would be "economically feasible." JA7573-76. The economic feasibility analysis did not consider Smithfield's profits or ability to pay. JA7576-77.

Murphy-Brown claims it was unaware that the nuisance caused by the lagoon-and-sprayfield system on Murphy-Brown's operations bothered neighbors, M-B Br. 20-22. But the evidence demonstrates that Murphy-Brown was front and center fighting these efforts to address widespread nuisance complaints for 28 years. JA7443-45.

In 2013 the neighbors filed complaints in North Carolina state court against Murphy-Brown and the contract growers. JA8116-42. However, after learning the full extent of Murphy-Brown's control over the operations causing the nuisance and the growers' powerlessness to address it, the neighbors dismissed those cases and re-filed them in federal court against Murphy-Brown only. JA140.

E. A jury awards the neighbors compensatory and punitive damages of over $50 million, and that award is statutorily capped at $3.25 million.

At the trial level, Murphy-Brown filed numerous motions requesting, among other things, rulings that the statute of limitations bars the suit and that a 2017 Right to Farm Act Amendment limited the damages in these cases to diminution in fair market value. Murphy-Brown further contended that the growers were indispensable parties to the suit even though they were well-aware of the litigation and had never sought to intervene.

The district court denied the motions and set the first handful of cases for trial. After a nearly five-week trial, the jury returned a verdict awarding each plaintiff $75,000 in compensatory damages and $5 million in punitive damages. JA9177-79. Under North Carolina law, the district court reduced the punitive damages to $250,000 and entered judgment against Murphy-Brown for $3.25 million. JA9188-90.

SUMMARY OF THE ARGUMENT

The jury correctly found that Murphy-Brown substantially interfered with the Neighbors' use and enjoyment of their homes, and Murphy-Brown's conduct was willful and wanton by following the district

court's correct statements of law in the jury instructions and determining that Murphy-Brown's defenses were not credible.

1. Neither the district court nor the jury accepted Murphy-Brown's attempts to blame the grower for the nuisance. The district court correctly instructed the jury that Murphy-Brown could be liable if it knew the Operation was likely to cause a nuisance. And none of this renders the grower a necessary and indispensable party. The issue is moot since the grower has not claimed an interest, but regardless the grower's rights are not impaired, and the litigation between the Neighbors and Murphy-Brown wholly resolved the claims between them.

2. Murphy-Brown is to blame for the nuisance here, and punitive damages are appropriate. It knew about the nuisance the lagoon-and-sprayfield system and its own *requirements* for hog operations create when they are sited near residences. Murphy-Brown willfully and wantonly did nothing to abate the problems, even though it had ample resources to do so. The Neighbors did not need to prove the participation of officers, but they did. The Neighbors did not need to refute Murphy-Brown's pretextual claims that it tried to abate the nuisance-causing

conditions—all while feigning ignorance that the conditions caused nuisances—but they did.

3. Murphy-Brown has no refuge in amendments to the Right to Farm Act that were enacted while this case was pending. Those amendments significantly change the damages previously available under North Carolina law in agricultural nuisance actions and are therefore not retroactive. The North Carolina Legislature made that intent clear when it stated in the law that the amendment applies only to cases "commenced or brought" after its effective date, and then the bill sponsors in both houses stated that the bill would not apply to pending cases.

4. The district court acted within its discretion when it refused to bifurcate the trial. Murphy-Brown ignored its burden to establish efficiency of bifurcation both at the district court and here, and its assertion of prejudice fails in light of the fact that *all* of the evidence it claims should have been held for a punitive damages phase was relevant to Murphy-Brown's liability for nuisance. The Neighbors had to prove the loss of enjoyment of their homes *and* that Murphy-Brown had the

means to abate the nuisances. Murphy-Brown admits that profitability is relevant to that discussion.

5. Evidence of Murphy-Brown's revenue was relevant to the nuisance claims and therefore admissible. And because Murphy-Brown's president testified that Smithfield Foods and WH Group would fund any abatement of the nuisances, their profits were relevant, too. Nor did the district court err by excluding some of Dr. Dalton's "expert" testimony. She admitted in deposition that her conclusion was unsupportable under North Carolina law. Dr. Rogers did not, and he competently testified regarding odorous chemical movement. Murphy-Brown tried to discredit his testimony with its own expert but failed. In any event, Murphy-Brown cannot establish that it was unduly prejudiced by any of these decisions.

6. Finally, North Carolina's three-year statute of limitations does not bar this suit. Murphy-Brown attempts to apply a standard for permanent nuisances to this very abatable nuisance, again attempting to escape responsibility.

The Court should affirm the judgment on the jury's verdict.

ARGUMENT

I. Murphy-Brown cannot foist liability for its operations' design and the pollution from its trucks on the growers.

Section V of Murphy-Brown's brief blames the growers, even though Murphy-Brown controls them. Section VII of the brief argues that the growers are indispensable parties even though Murphy-Brown did not file any third party claim against them, and they did not intervene. The jury rejected Murphy-Brown's blame-the-growers theory, and so should the Court.

1. Murphy-Brown claims the district court erred by applying Restatement (Second) of Torts Section 427B to instruct the jury that "a party is liable for nuisance 'if it employs an independent contractor to do work which that party knows or has reason to know to be likely to involve the creation of a nuisance.'" M-B Br. 46. Murphy-Brown's "vicarious liability" premise is invalid because (1) the jury instruction applies direct—not vicarious—liability, and (2) the jury's punitive damages findings indicate that it did not find Murphy-Brown vicariously liable. Murphy-Brown is directly responsible for the excessive odor, noise, and vermin from its operations.

In *Shockley v. Hoechst Celanese Corporation*, a district court recognized that South Carolina would adopt Section 427B based on similar common law decisions. 793 F. Supp. 670, 674 (D.S.C. 1992), *aff'd in part, rev'd in part,* 996 F.2d 1212 (4th Cir. 1993) (unpublished). North Carolina law is no different. "An employer may be held liable for negligently retaining an employee or independent contractor where that employee commits a tortious act and, prior to the act, the employer knew or had reason to know that it may reasonably occur." *Bordini v. Donald J. Trump for President, Inc.*, No. COA18-409, 2009 WL 114050 (N.C. Ct. App. Jan. 2, 2019) (unpublished). Notably, the North Carolina "may reasonably occur" standard is *lower* than the jury instruction's "likely to result" language. Any error in the jury instructions advantaged Murphy-Brown.

North Carolina's general rule against liability for the acts of independent contractors—which echoes Restatement (Second) of Torts § 409—does not change the analysis. The comments to Section 427B state it is an exception to Section 409, and it applies "particular[ly] where the contractor is directed or authorized by the employer to commit such a trespass or to create such a nuisance, and where the trespass or nuisance

is a necessary result of doing the work." Section 427B cmt. b. It "is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result." *Id.*

Murphy-Brown acknowledges that North Carolina law recognizes exceptions to the general rule against liability for acts of independent contractors for (1) retention of control and (2) negligent hiring or retention. M-B Br. 48. However, Murphy-Brown fails to address them or the fact that they mirror the comments to Section 427B.

Instead, Murphy-Brown attacks a straw man, asserting there is no "vicarious liability" for hiring an independent contractor who is likely to create a nuisance. M-B Br. 47. That is true, but irrelevant. Employers are *directly* liable for controlling the manner and method of an independent contractor's tortious work, just like they are directly liable for negligent hiring and retention. *See Little v. Omega Meats I, Inc.*, 615 S.E. 2d 45, 48 (N.C. 2005) (liability for independent contractor's tort is "not based upon vicarious liability, but rather is a direct claim against the employer based on the actionable negligence of the employer in negligently hiring").

Here, Murphy-Brown designed an operation using its lagoon-and-sprayfield system, repeatedly placed its hogs in the Operation, and *mandated* the conduct that created the nuisances, JA6255, 6770-6899, 7631-32, issuing an extensive "grower manual" with mandatory operating procedures. JA6770-6899. Violation of these procedures by a grower is a default of the adhesion contract with Murphy-Brown. JA6255, 7636.

Moreover, Murphy-Brown was aware of the hog odor, trucking noise, and other nuisances that were "likely to result" from these practices, or that these nuisances "may reasonably occur." *See* § II.B., *post*. The district court did not err by instructing the jury accordingly.

2. The district court did not abuse its discretion by concluding that the growers are not necessary and indispensable parties to these nuisance cases. Under Rule 19(a)(1)(B), a party is necessary if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . impair or impede the person's ability to protect the interest." Kinlaw Farms never *claimed* an interest in the district court, and a purportedly "required" party must assert its interest at the trial level. *Ward v. Apple, Inc.*, 791 F.3d 1041,

1051 (9th Cir. 2015) (reversing district court dismissal for failure to join indispensable party).

Nor was Kinlaw Farms a necessary party. "[A] person's status as a joint tortfeasor does not make that person a necessary party, much less an indispensable party." *Huber v. Tayler*, 532 F.3d 237, 250-52 (3d Cir. 2008) (internal citation and quotation marks omitted). In *American Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005), this Court affirmed that a supervisor's potential liability was "separate and apart from that of" the employer in an employment dispute. *Id.*; *see also Delta Financial Corp. v. Paul D. Momanduras & Associates*, 973 F.2d 301, 304 (4th Cir. 1992) (partnership was not necessary and indispensable party in dispute among partners because its "absence will not 'leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.'" (quoting Fed. R. Civ. P. 19(a)))

Murphy-Brown's reliance on *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 553 (4th Cir. 2006), underscores how Kinlaw Farms is *not* necessary. There, (1) a contract term was deemed illegal, and (2) the beneficiary of the contract term was not a party. *Id.*; *see also Home*

Buyers Warranty Corp. v. Hanna, 750 F.3d 427, 434 (4th Cir. 2014) (party was necessary when case adjudicated the terms of its contract). Here, no contract term was deemed illegal, and the beneficiary of the cited contract term, Murphy-Brown, is a party. Murphy-Brown *chose* to stop sending hogs to the Operation after the verdict. Contractual interests satisfy Rule 19 only when the contract itself is invalidated, or equitable relief forbids performing. *Ward*, 791 F.3d at 1053. Neither is the case here.

Moreover, the growers are not indispensable. Under Rule 19(b) courts consider (1) how a judgment would prejudice the absent or existing parties, (2) protections in the judgment, relief, or other measures that can prevent prejudice, (3) the judgment's adequacy, and (4) whether the plaintiff would have an adequate remedy after dismissal for nonjoinder. Fed. R. Civ. P. 19(b). Every factor weighs against Murphy-Brown.

First, Murphy-Brown chooses whether to send hogs to growers, and Murphy-Brown could continue to populate Kinlaw Farms by putting odor control and better trucking measures in place. The judgment does not impair any legally protected interest of Kinlaw Farms.

Further, Murphy-Brown can preempt the asserted prejudice to the growers by acting consistent with its obligations. Further still, the judgment is adequate and settles the whole dispute.

Finally, dismissal would not leave an adequate remedy after the parties have spent so much time and energy litigating these issues to five jury verdicts. And the interests of the grower—who testified at trial—are wholly in alignment with Murphy-Brown's.

II. The record reflects abundant evidence to support the jury's award of punitive damages.

A. Standard of Review.

Murphy-Brown's claim that this issue is reviewed *de novo* is misleading. *See* M-B Br. 16-17. An appellate court may only overturn a jury verdict if plaintiffs have not "present[ed] evidence sufficient for a reasonable jury to award punitive damages." *Vandevender v. Blue Ridge of Raleigh, LLC*, 901 F.3d 231, 241 (4th Cir. 2018) (reversing a district court's refusal to enter the jury's punitive damages award), *amended on other grounds,* No. 17-1900, 2018 WL 6181633 (4th Cir. Nov. 27, 2018); *see also Eriksen Const. Co. v. Morey*, 129 F.3d 1259 (4th Cir. 1997) ("In reviewing a district court's decision on a motion for judgment as a matter of law, this court neither weighs the evidence nor judges the credibility

of the witnesses."). "If reasonable minds could differ about the verdict," the court is "obliged to affirm." *King v. McMillan*, 594 F.3d 301, 312 (4th Cir. 2010) (internal citation and quotation marks omitted).

Murphy-Brown also makes mischaracterizations of the record that are unconnected to any purported error and thus waived. For example, Murphy-Brown complains that counsel called Murphy-Brown "Smithfield" during the trial, M-B Br. 29 & n.6. Murphy-Brown did the same—33 times in the opening, and 41 times in closing. *See* JA5864-5918, 9053-9113.

Murphy-Brown also attempts to undermine the district court with incomplete record excerpts. Using an ellipsis, Murphy-Brown omits the key portion of the district court's explanation for not having the opportunity to review in advance "the volume of filings," *i.e.*, they "occur[ed] just before we began this trial." JA6182.

Murphy-Brown's other excerpts occurred in the context of the court lamenting the parties' unwillingness to "agree on things and to talk to each other about matters before they present them." JA7852. And while the court took "responsibility" for perhaps not reigning in counsel sooner, counsel for both sides expressly acknowledged the court's admonishment

against further improper counsel commentary during witness examination. JA7852-53.

Responding to each of Murphy-Brown's mischaracterizations not actually raised as issues on appeal is not an effective use of limited space. In the end, Murphy-Brown does *not* argue insufficiency of evidence supporting the jury's finding that the Operation substantially impairs the Neighbors' use and enjoyment of their properties. The Neighbors similarly supported their request for punitive damages, and Murphy-Brown does not challenge the amount of punitive damages awarded.

B. Murphy-Brown engaged in willful and wanton conduct.

"The purpose of punitive damages . . . is two-fold: to punish the wrongdoing of the defendant and to deter others from engaging in similar conduct." *Rogers v. T.J.X. Cos.*, 404 S.E.2d 664, 666 (N.C. 1991). North Carolina law allows punitive damages if a defendant is liable for compensatory damages and engaged in (1) fraud, (2) malice, or (3) willful or wanton conduct related to the compensated injury. N.C. Gen. Stat. § 1D-15(a). Willful or wanton conduct is "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury,

damage, or other harm." N.C. Gen. Stat. § 1D-5(7). An act is willful when "done knowingly and of set purpose," and wanton when "done needlessly, manifesting a reckless indifference to the rights of others." *Robinson v. Seaboard Sys. R.R.*, 361 S.E.2d 909, 914 (N.C. 1987) (internal marks omitted). "A breach of duty may be wanton and willful while the act is yet negligent." *Id.*

"A corporation may be subject to punitive damages based on a theory of direct liability where the corporation's acts or policies constitute the aggravating factor." *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 737 (N.C. App. 2009). It is then unnecessary to point to a particular officer, director, or manager's actions. *Id.*

Here, the jury heard ample evidence of Murphy-Brown's knowledge of, and therefore conscious and intentional disregard of and indifference to, the nuisance Murphy-Brown caused the Neighbors, and much of it came in the form of knowledge and actions of officers, directors, or managers. As this Court previously noted, industrial hog operations are a "predictably messy business," *In re Murphy-Brown, LLC*, 907 F.3d 788, 792 (4th Cir. 2018), and Murphy-Brown has known for decades that its "messy business" is a nuisance when placed near residences.

Murphy-Brown's knowledge of the nuisance-causing characteristics of the lagoon-and-sprayfield system and its effects when placed close to neighboring communities is indisputable. It knew of the nuisance caused by its operations certainly no later than 1992 when Murphy-Brown corporate officer, Don Butler, heard nuisance complaints from neighbors at a Bladen County Commissioners' meeting. Those complaints led Bladen County to enact a ban on any new hog operations *within a mile of homes* due to neighbors' nuisance complaints. *See* JA7426-29, 7448-52. Murphy-Brown's predecessor opposed the County's efforts and ultimately defeated them. *See* JA7453-56. Two years later Murphy-Brown sited the Operation in Bladen County *1,500 feet* from the McKivers and Wrights. In its corporate files, Murphy-Brown collected hundreds of newspaper articles documenting neighbors' complaints from the lagoon-and-sprayfield system. *See, e.g.*, JA7524, 57-59.

In 1998, Murphy-Brown received a study of the social consequences of hog operation odor sponsored by the Legislature and recognizing that "[o]dor and other waste issues have a variety of social impacts and implications. These generally involve nuisance problems for neighbors." JA8252. Murphy-Brown's corporate representative admitted that the

company knew of a well-known and peer-reviewed study by epidemiologist Dr. Steve Wing regarding the negative effects—including nuisance—of industrial hog operations using the lagoon-and-sprayfield system on neighbors. JA7380-81. Murphy-Brown knew of the State Department of Health's understanding of the negative effects of hog odor—"[W]e can tell folks they aren't crazy. They aren't imagining these symptoms." JA8256-57.

Murphy-Brown knew of another well-known and peer-reviewed study conducted by Dr. Susan Schiffman from Duke University showing depression and mood alteration in neighbors of hog operations. JA7376-77. Murphy-Brown admitted that the Neighbors' complaints here mirror complaints by the hog operation neighbors in those studies. JA7403. Murphy-Brown knew that the purpose of both the moratorium and the Smithfield Agreement was to eliminate the lagoon-and-sprayfield system because of its effects on neighbors. JA7533-35, 7699, 7700-02. The Governor called for the elimination of the lagoon-and-sprayfield system because of problems including odor. JA7700-03.

Murphy-Brown has received complaints of odor from the neighbors of its operations for decades, *see, e.g.*, JA7523-24, 8259, and it vehemently opposed further regulation of hog operations, *see, e.g.*, JA7529-31.

In spite of this history, Murphy-Brown intentionally engaged in a course of conduct intended to preserve its purported ignorance of the nuisance caused by the Operation specifically. Murphy-Brown had the opportunity to test samples taken at the Operation to learn more about the impact on the Neighbors, but it destroyed them rather than accept the consequences of the results. JA5190, 8610. It already knew the result—this is an endemic problem to the lagoon-and-sprayfield system used in Murphy-Brown's design and Murphy-Brown's methods. So claiming ignorance from a lack of complaints about this particular location rings hollow.

Regarding this operation, the jury heard and saw that hogs are smeared with feces and feces covers hog shed surfaces. JA6758-64, 6907, 7160. The evidence also demonstrated that the Operation houses close to 18,000 hogs, JA6908, generating approximately 153,000 pounds of feces and urine every day, JA6932, stored in three open-air pits less than a half-mile from the Neighbors' homes, JA7158-59; and that odor-causing

contaminants and pollutants leave the Operation's hog sheds and travel through the air of the neighborhood, JA6911-14. Murphy-Brown knew hog operations impact neighbors and inspected the conditions of this operation, but had no policy of surveying neighbors and never once asked how the Neighbors were getting along with Murphy-Brown's hogs. *See* JA7283, 8519-21.

The jury heard and saw that Murphy-Brown trucks routinely travel within feet of the homes, waking the Neighbors and spreading odor and dust. *See* JA7260-62, 7290-7295, 7832.

The jury heard and saw evidence that Murphy-Brown's "dead box" method of dead hog disposal caused the presence of flies and dozens of buzzards at Neighbors' homes. *See* JA7286, 7317, 7560, 7757, 7794-95, 7867, 7913-14. And the jury heard evidence that alternatives to the dead box, including composting or incineration, could have solved these issues. *See* JA8168-69.

Murphy-Brown also knew that covers would eliminate the hog odor from the lagoons because the Missouri Attorney General forced Murphy-Brown to implement covers in response to nuisance conditions there. JA5235-36, 7892-7901. Despite all of this knowledge, for decades

Murphy-Brown placed thousands of its hogs, in an operation just like those that were the subjects of Dr. Wing's and Dr. Schiffman's studies, 1,500 feet from the Neighbors. Murphy-Brown stored millions of gallons of its hogs' waste in open lagoons just like those banned by the moratorium, to be sprayed into the air of the Neighbors. JA2010, 4597, 6954, 7158-59. And Murphy-Brown did all of this with full knowledge that feasible alternatives exist. Plaintiffs presented ample evidence demonstrating that Murphy-Brown knew of the nuisance conditions at the Operation and disregarded them.

C. Murphy-Brown's officers, directors, and managers participated in the willful and wanton conduct.

Punitive damages also are appropriate because Murphy-Brown's officers, directors, and managers *did* participate in and condone the willful and wanton tortious conduct. N.C. Gen. Stat. § 1D-15. The record reflects that Murphy-Brown's officers, directors, and managers knew their practices impacted neighbors for decades and continued to use them. *See, e.g.*, 7523-24, 7529-31, 8259.

Murphy-Brown executives knew the very purpose of the Smithfield Agreement was to address the nuisances caused by close proximity of lagoon-and-sprayfield-using hog operations to residential neighborhoods.

JA7564-65, 7876. Murphy-Brown executives also knew that research under the Smithfield Agreement discovered multiple technologies superior to the lagoon-and-sprayfield method. JA7565, 7876-77. Officers admitted they knew this alternative technology was refined in 2007 and again in 2013, and its cost was cut by more than half. JA6694-6701, 7876-77. An executive wrote in 1999 that he "believe[d] it is a foregone conclusion that we will be forced to transition to different waste treatment technology over the next few years," but that he intended to postpone the inevitable. JA7699. Murphy-Brown has successfully postponed for 20 years.

Murphy-Brown's president Gregg Schmidt alone provided sufficient testimony to support a punitive damages award. Schmidt knew about complaints of hog odor interfering with neighbors' daily activities, SA21, and the Smithfield Agreement. SA22-24. Schmidt knew about technology superior to the lagoon-and-sprayfield system and agreed that, as president of the company, he could implement them at Murphy-Brown's operations, including Kinlaw. SA24-27.

Incredibly, Murphy-Brown opted to preserve the lagoon-and sprayfield systems *even without knowing the cost of implementing new*

technology. SA27-28. Schmidt specifically admitted that odor-eliminating technology discussed in a 2007 NC State report could be implemented if Murphy-Brown wanted to. JA7876-77.

As the district court noted in *Artis*, no later than "the filing of this action . . . defendant learned of these plaintiffs' complaints, yet it did nothing to lessen the effects of the nuisance, making defendant's conduct more reprehensible." *Artis v. Murphy-Brown LLC*, No. 7:14-CV-00237-BR, 2019 WL 1103406, at *6 (E.D.N.C. Mar. 8, 2019). Thus, Murphy-Brown's claim of ignorance of the nuisance conditions at the Operation is not credible. The record contains ample evidence that Murphy-Brown's officers, directors, and managers both participated in and condoned the conduct supporting punitive damages.

D. Conduct may be willful or wanton even if a defendant does not intend for the harm to occur or takes preventative measures.

Murphy-Brown was entitled to argue, and did, that its "efforts" undermined finding willful and wanton conduct. The Neighbors presented evidence establishing that Murphy-Brown's purported efforts to control odor were a sham. The jury was entitled to believe that and reject Murphy-Brown's defense. *See Jones v. Pulte Home Corp.*, No. 5:07-

CV-473-H(3), 2009 WL 10689701, at *3 (E.D.N.C. Feb. 11, 2009) (court allowed issue of punitive damages to go to jury despite evidence that a developer "took reasonable measures . . . to prevent stormwater from draining onto neighboring property").

In cases declining to allow punitive damages, the facts reflect (1) a particular danger, (2) the defendant admitting and attempting to remedy the particular danger, and (3) the effort—though made in good faith—failing, with injury resulting. *See Faris v. SFX Entm't, Inc.*, No. 304CV08, 2006 WL 3690632, at *5 (W.D.N.C. Dec. 12, 2006) (tortfeasor admitted safety hazard and made "unwittingly ineffective efforts" to fix it); *see also Schenk v. HNA Holdings, Inc.*, 613 S.E.2d 503, 508-09 (N.C. App. 2005) (defendant's corporate policies were specifically designed to protect workers).

Murphy-Brown's witnesses testified that it researched alternative waste technologies because they were required to under the Smithfield Agreement that resolved a potential lawsuit, JA8796, and any efforts to improve feed conversion were not to reduce odor, but to lower production costs, JA8696-97. Thus, Murphy-Brown's actions did not even rise to the

level of the defendant's preventative actions in *Pulte Home*, which were insufficient to bar punitive damages. 2009 WL 10689701, at *3.

Murphy-Brown cannot have it both ways: it cannot claim both that no nuisance exists and that it undertook measures to control or abate the nuisance. Indeed, Murphy-Brown claims (without record citation) that it "justifiably believed that if the farm was bothering its neighbors, someone would have said something." M-B Br. 20. However, the jury heard evidence that Don Butler implemented a complaint-based system for Murphy-Brown, knowing full-well that the Department of Air Quality had found that complaint-based regulatory systems are least efficient. JA7487, 7492-93, 7499, 7502.

Evidence of Murphy-Brown's involvement with regulators—mischaracterized by Murphy-Brown as "lobbying efforts"—was relevant to refute its defense of ignorance of industrial hog operation nuisance, not to punish Murphy-Brown for lobbying. Murphy-Brown relies on alleged compliance with a regulatory system, but to the extent Murphy-Brown operates under a permit, it is a water—not air—permit. JA9221-23. Murphy Brown praises itself for its ISO 14001 certification, but this certification has no application to the Operation and does not limit odor

emissions. SA18, 42. The "inspections" Murphy-Brown relies on, M-B Br. 19, come once a year, with advance notice, and are primarily a records review. SA31. Chemicals, gasses, odors, and other air emissions are not covered. JA9221-23. And to the extent there are odor regulations, Murphy-Brown's efforts made them "so vague and subjective that enforcement will be difficult,"—which a Murphy-Brown executive commented "may be to our benefit"—is highly relevant and admissible. JA7502.

Moreover, Murphy-Brown has waived any permit shield argument, rendering amici's assertions on the subject inappropriate. *United States v. Buculei*, 262 F.3d 322, 333 n.11 (4th Cir. 2001). Instead, Murphy-Brown claims that the regulators should have "alert[ed]" Murphy-Brown to what Murphy-Brown already knew—that its operations are nuisances to neighbors. M-B Br. 19. The regulators are not tasked with managing the operations' odor, buzzards, flies, noise, and trucks, and none of the cited statutes suggest otherwise.

Finally, Murphy-Brown seeks to insulate itself from liability for punitive damages because its "corporate grandparent" Smithfield Foods entered into and paid for the Smithfield Agreement. And Murphy-Brown

brought to trial as its corporate representative a Smithfield Foods employee who testified about Smithfield Foods' plans to reduce greenhouse gas emissions at Murphy-Brown hog operations. SA34-39. Yet at the same time, Murphy-Brown argues that the district court committed reversible error by admitting evidence of Smithfield Foods' and WH Group's profits and compensation as relevant to Murphy-Brown's financial ability to mitigate the nuisance. M-B Br. 26-29. It doubled down on this hypocrisy by touting other purported remedial measures Smithfield Foods was engaged in or paid for. M-B Br. 21

Regardless, a determination under the Smithfield Agreement that odor-eliminating technology was not economically feasible is at most informative—and certainly not dispositive—of the reasonableness of Murphy-Brown's failure to implement such technology, especially since neither Murphy-Brown's nor Smithfield's profitability was considered in the analysis. JA7576-77. Neither the regulatory regime nor Murphy-Brown's purported "efforts" to correct a problem it refuses to acknowledge justifies usurping the jury's punitive damages findings.

III. The 2017 Right to Farm Act amendment only applies to causes of action filed after the amendment's effective date.

A. The amendment is a substantive change that only affects claims filed after its effective date.

North Carolina takes a consequentialist approach to deciding whether a new law applies to pending cases, though textual analysis yields the same result—the Right to Farm Act amendments are changes in damages law that do not affect this litigation, contrary to Section IV of Murphy-Brown's brief. To determine whether a new law applies to pending cases, the court decides whether the legislature intended to change the law or clarify its meaning. *Ray v. N.C. Dep't of Transp.*, 727 S.E.2d 675, 681 (N.C. 2012). "A clarifying amendment . . . does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment." *Id.* A clarifying amendment thus applies to cases pending when it becomes effective. *Id.* An altering amendment is a "substantive change in the law," and it only applies to cases filed after the amendment's effective date. *Id.* at 682.

Determining whether an amendment is a clarifying or altering one "requires a careful comparison of the original and amended statutes." *Id.* (internal citation and quotation marks omitted). Absent evidence to the

contrary, *an amendment is presumed to be altering*. *See Smith v. Mercer*, 172 S.E.2d 489, 494 (N.C. 1970) ("If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt should be resolved against such operation.").

Courts consider: (1) legislative intent; (2) whether the statute, pre-amendment, was ambiguous or unclear—whether it had a "hole" to fill; (3) whether the amendment codified existing common law; and (4) whether the amendment was remedial. *See, e.g.*, *Bryant v. United States*, 768 F.3d 1378, 1380 (11th Cir. 2014); *Ray*, 727 S.E.2d at 681. Here, all factors establish that the 2017 amendment is an altering one that only applies prospectively.

1. The Legislature did not intend to apply the 2017 amendment retroactively.

Murphy-Brown mischaracterizes the legislative history by contending that "the General Assembly deleted text that would have ensured that the amendment did not affect pending litigation." M-B Br. at 45 (internal citation and quotation marks omitted). It omits that the initial draft of the amendment expressly stated that the amendment *would* apply to pending cases.

The first effective date provision stated that the act "is effective when it becomes law and applies to actions filed, arising, *or pending* on or after that date." JA2227-28 (emphasis added). The House of Representatives then carefully debated, considered, and ultimately adopted an amendment that changed the effective date provision to provide: "This act is effective when it becomes law and applies to causes of action arising on or after that date. *This act shall not affect pending litigation*." JA2331-32 (emphasis added).

The House adopted this language to guard against constitutional challenges, as one lawmaker noted: "If we're changing the law we cannot apply it retroactively, that's what makes it unconstitutional and that is why you should support the [change]." JA2320; *see also* JA2291-92, 2308 (raising similar concerns). Representative Blackwell noted that "the defendant [Murphy-Brown] is worried about losing and so they're asking us to pull their chestnuts out of the fire. Folks, that's not the legislature's job. Let the courts decide." JA2293. And as Murphy-Brown's authorities establish, "North Carolina courts reject statutory interpretations that the legislature itself has rejected." *See* M-B Br. 45 (citing *FormyDuval v. Bunn*, 530 S.E.2d 96, 102 (N.C. 2000) and *State ex rel. Utils. Comm'n v.*

Queen City Coach Co., 63 S.E.2d 113, 117 (N.C. 1951)). The Legislature flat rejected retroactive application.

After the House adopted the 2017 amendment, the Senate included a slight variation on the effective date provision stating: "This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date." JA2847. Bill sponsor Senator Jackson stated that the 2017 amendment "does not pertain to anything dealing with pending lawsuits." JA2812-13. When asked whether the intent of the effective date language was "to ensure that the rest of this bill does not have any impact on pending legislation," Senator Jackson responded: "Yes, that is correct." JA2807. House Representative and bill sponsor Jimmy Dixon also acknowledged that the Senate's version of the 2017 amendment, which the Legislature ultimately enacted, made it "crystal clear" that the new law "maintain[ed] absolutely zero retroactivity relative to causes of action filed." JA2820.

2. The 2017 amendment did not fill any "hole" in the RTFA.

A statute that fills some "hole" in an ambiguous or unclear statute is more likely to be a clarifying one. *Bryant*, 768 F.3d at 1385 (interpreting North Carolina law). For example, in *Ray*, the Supreme

Court of North Carolina interpreted an amendment to the State Tort Claims Act as clarifying because it addressed the public duty doctrine—a doctrine that necessarily impacted the act's operation but was previously unaddressed by the statute. 727 S.E.2d at 682. Similarly, in *Ferrell*, the court interpreted a statute regulating the sale of property by the Department of Transportation but did not address how to determine a price. 435 S.E.2d at 311 (N.C. 1993). The Legislature then passed a new statute clarifying how to set the price for such sales. *Id.* at 315.

By contrast, "an amendment to an unambiguous statute indicates the intent to change the law." *Childers v. Parkers, Inc.*, 162 S.E.2d 481, 484 (N.C. 1968). In *Thornton v. City of Raleigh*, the court found that an amendment to a statute addressing workers' compensation decisions altered—rather than clarified—the statute. The court reasoned that the amendment did "not clarify an otherwise unclear portion of the statute, but rather change[d] the substance of the law by imposing a new duty" on the commission. No. 13-533, 2013 WL 6096919 at *2 (N.C. App. Nov. 19, 2013) (unpublished). And in *Bryant v. United States*, the Eleventh Circuit, applying North Carolina law, found that a "brand new" exception

to a statute was an altering amendment rather than a clarifying one. 768 F.3d at 1385.

The 2017 RTFA amendment did not fill a hole. It added a new section and concept, specifically limiting the compensatory damages for nuisance actions against agricultural operations to diminution in fair market value. *See* N.C. Sess. Laws 2017-11 (H.B. 467). In the amendment, the legislature created an exception for agricultural nuisance cases "from whole cloth." *Bryant*, 768 F.3d at 1385.

3. The 2017 amendment did not codify common law.

Clarifying amendments codify common law and do not significantly depart from prior jurisprudence. The 2017 RTFA amendment departed from common law. Damages expressly were not limited to rental value. *Whiteside Estates, Inc., v. Highlands Cove, L.L.C.*, 553 S.E.2d 431, 438 (N.C. App. 2001) ("A plaintiff need not establish loss of fair market value in the property . . . to support damages in nuisance. These items are one method for measuring damages after substantial injury is proven."); . And pre-amendment cases allowed for the recovery of compensatory damages for loss of use and enjoyment, which the amendment prohibited. *See, e.g., Broadbent v. Allison*, 626 S.E.2d 758 (N.C. App. 2006)

(upholding instruction for answer "such dollar amount that you find the plaintiffs have proved by the greater weight of the evidence that the value of their real property has been damaged, *and in addition any damages you find that the plaintiffs have suffered for the loss of use and enjoyment of their property*.) (emphasis added); *Hanna v. Brady*, 327 S.E.2d 22, 25-26 (N.C. App. 1985) (upholding nuisance damages for "physical pain, annoyance, stress, deprivation of the use and comfort of one's home"). Such cases date back to over a century ago. *See, e.g.*, *Thomason v. Seaboard Air Line Ry.*, 55 S.E. 198, 204 (N.C. 1906) (approving jury instruction for nuisance damages requiring the jury to consider "inconvenience, discomfiture, and unpleasantness sustained").

4. The 2017 amendment was not remedial in nature.

"Remedial legislation is presumed to operate retroactively." *Bailey v. State*, 526 S.E.2d 657, 662 (N.C. 2000). "[R]emedial statutes . . . which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing" do not concern the prohibition on retroactive application. *Smith*, 172 S.E.2d at 495.

An amendment may not be applied retroactively when it takes away vested rights, such as "compensatory damages . . . [which] vest in a plaintiff upon injury." *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 12 (N.C. 2004); *see also Smith*, 172 S.E.2d at 493-94 (statute affecting substantive rights not retroactive). Here, there is no question that the 2017 amendment affects substantive rights if applied retroactively—specifically, the right of the Neighbors, and others, to seek certain forms of compensatory damages in private nuisance actions against agricultural operations. Applying the amendment to this case would strip substantive rights from the Neighbors. Thus, Murphy-Brown has satisfied none of the applicable considerations for overcoming the presumption of an altering amendment.

B. The amendment's text establishes that it only affects claims filed after its effective date.

To the extent Murphy-Brown seeks refuge in the amendment's text, no safe harbor exists. The amendment plainly states that it "is effective when it becomes law and applies to causes of action commenced or brought after that date." JA2847. Murphy-Brown contends that the word "clarify" in the title establishes that the effective date language does

not mean what it says. M-B Br. 41-42. But the cases Murphy-Brown relies on do not support that proposition.

In *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) and *Bowen v. Mabry*, 572 S.E.2d 809, 811 (N.C. App. 2002), the effective date provision was expressly retroactive. In *Cobey v. Simpson*, 423 S.E.2d 759, 763 (N.C. 1992), the North Carolina Supreme Court relied on "clarify" in the title when the statute was otherwise ambiguous. None of Murphy-Brown's authorities provides that the word "clarify" in the title trumps the plain language of the statute and all other indicia that the amendment is a change in the law. And in *Bryant*, the Eleventh Circuit expressly recognized that "clarifying" in the title is not a trump card. 768 F.3d at 1382-84 (amendment question was an altering one based on the statute's operation); *see also Wilson v. N.C. Dep't of Commerce*, 768 S.E.2d 360, 366, n.3 (N.C. App. 2015) ("to clarify" in title is not dispositive of whether act is clarifying or altering).

C. Applying the amendment retroactively would be unconstitutional.

The Court should not construe the amendment as retroactive and thereby place its constitutionality in question. *See Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 444 (1984)

("When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty."); *Beck v. Communications Workers of America (C.W.A.)*, 776 F.2d 1187, 1198 (4th Cir. 1985); *North Carolina v. Fulcher*, 243 S.E.2d 338, 349 (N.C. 1978) ("[I]f a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality . . . the courts should construe the statute so as to avoid the constitutional question.").

If construed to apply retroactively, the amendment would deprive the Neighbors of a vested property right, violating the Takings Clause. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994) ("The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'"). It also would violate the North Carolina constitutional provisions for open courts and due process and against takings. JA2792-96, 2798-2800; *see also Osborn v. Leach*, 47 S.E. 811, 813 (N.C. 1904) (the right to recover damages for a committed tort is a vested property right protected by the constitution); *Rhyne*, 594 S.E.2d at 12 (quoting *Osborn*).

The 2017 amendment affects substantive rights—specifically, the right of the Neighbors, and others, to seek certain forms of compensatory damages in private nuisance actions against agricultural operations. Applying the 2017 RTFA Amendments to the Neighbors' vested claims would violate the United States and North Carolina constitutions.

IV. It was within the district court's discretion to deny bifurcation of the trial.

The district court did not err by denying Murphy-Brown's motion to bifurcate the trial, addressed at Section II of the opening brief. Rule 42(b) permits bifurcation "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b). District courts have considerable discretion in exercising the power. *F & G Scrolling Mouse, L.L.C. v. IBM Corp.*, 190 F.R.D. 385, 387 (M.D.N.C. 1999) (citing *White v. Bloomberg*, 501 F.2d 1379, 1385 (4th Cir. 1974)). "Bifurcation is the exception; not the rule," *L–3 Commc'ns Corp. v. OSI Sys., Inc.*, 418 F.Supp.2d 380, 382 (S.D.N.Y. 2005), and the party requesting separate trials has the burden to convince the court. *Thomas v. Babb*, No. 5:10-CV-52-BO, 2015 WL 1275393, at *1 (E.D.N.C. Mar. 19, 2015).

Federal courts should not "defer," M-B Br. 31, to state law on matters addressed by the Federal Rules of Civil Procedure. *Nestor v.*

Textron, Inc., 888 F.3d 151, 163 (5th Cir. 2018) ("To hold (as Textron seems to suggest) that the mere presence of [net worth] evidence necessitates bifurcation would be to upend our federal discretionary framework and replace it with a judicial analogue to Texas's statutory mandate."). Bifurcation is only appropriate if the moving party establishes it will (1) promote greater convenience to the parties, witnesses, jurors, and the court, (2) be conducive to expedition and economy, and (3) not result in undue prejudice to any party. *F&G Scrolling Mouse*, 190 F.R.D. at 387.

"[D]enial of a motion to bifurcate is appropriate where there is substantial overlap in the evidence that will be used to prove both liability and punitive damages." *Edmark Auto, Inc. v. Zurich Am. Ins. Co.*, No. 115CV00520BLWCWD, 2019 WL 1002952, at *2 (D. Idaho Mar. 1, 2019); *McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861, 871 (7th Cir. 1994) ("[S]ince the evidence usually overlaps substantially, the normal procedure is to try compensatory and punitive damage claims together with appropriate instructions to make clear to the jury the difference in the clear and convincing evidence required for the award of punitive damages."). Here, the district court found that "there is overlap

in the evidence regarding compensatory and punitive damages, and therefore, bifurcation would not promote convenience or be conducive to expedition and economy." JA5302. That justifies affirmance.

Like its bifurcation motion below, Murphy-Brown's opening brief is silent on judicial economy and efficiency considerations underlying Rule 42(b), which were the stated grounds for the district court's decision to proceed with the ordinary course of a single trial. JA5302. Murphy-Brown focuses solely on one part of the bifurcation analysis—purported prejudice to Murphy-Brown from admitting evidence of Murphy-Brown's (1) knowledge of the negative effects on industrial hog operations on neighbors, (2) executive compensation, and (3) lobbying efforts. These categories of evidence are relevant to nuisance liability and are not related solely to punitive damages.

Evidence of what Murphy-Brown calls "lobbying efforts" is directly relevant to Murphy-Brown's knowledge and its nuisance liability assertions that it is "heavily regulated" and compliant with applicable permitting. Murphy-Brown's executive compensation is probative to show that it could "avoid the harm in whole or in part without undue hardship." Restatement (Second) Torts § 830. If the cost to remedy

"would not prevent the profitable operation," then it is more likely the nuisance is unreasonable. *Id.* § 830, illus. 1.

Notably, there is no prejudice. In addition to the fact that uncontested evidence of Murphy-Brown's revenues made the point, Murphy-Brown has conceded the lobbying evidence is relevant for punitive damages liability, calling it "punitive-damages evidence." M-B Br. 31. Given that, bifurcation would have made no difference. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) ("Whenever the district court orders a bifurcated trial [under Rule 42(b)], the jury should be required, *in the first phase, to determine whether punitive damages are to be awarded*." (emphasis added)).

Murphy-Brown does not cite a case where this Court found an abuse of discretion by failing to bifurcate, and this case is no place to start. Indeed, Murphy-Brown ignores that "[a]ny potential prejudice resulting from combined trials can be remedied by protective measures, including cautionary warnings, limiting instructions, and other instructions to the jury." *Welch v. Logan Gen. Hosp., LLC*, No. 2:15-cv-01022, 2015 WL 3797148, at *3 (S.D. W. Va. June 18, 2015) (citation omitted). Instead, it relies on an assumption that something went awry

because a different jury in a different trial with different plaintiffs and different evidence did not enter the same compensatory damages award (though it did award $75,000, the same as the awards here, to the one plaintiff in *Gillis* whose residency fully predated the existence of the nearby farm). M-B Br. 31-32. That false equivalency does not justify reversal, particularly given the ample evidence supporting liability that Murphy-Brown does not challenge. *See Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 15 (2d Cir. 1988) ("[W]e are not persuaded that proof pertaining to Cahill's net worth prejudiced the jury's determination of liability").

V. None of the district court's evidentiary decisions raised in the Opening Brief were erroneous.

A. The district court properly admitted evidence of Murphy-Brown's ability to pay to obviate the nuisance and a punitive damages award.

The district court did not err—as Murphy-Brown claims at Section II—by admitting evidence of Murphy-Brown, Smithfield Foods, and WH Group's ability to pay to abate nuisances. "Except under the most 'extraordinary' of circumstances, where that discretion has been plainly abused," this Court will not overturn a trial court's Rule 403 decision.

Cisson v. C.R. Bard, Inc. (In re C.R. Bard, Inc.), 810 F.3d 913, 920 (4th Cir. 2016).

Here, the evidence was highly probative. Murphy-Brown cites Restatement (Second) of Torts § 830 to state that the Neighbors had to prove the nuisance could be abated "without undue hardship." M-B Br. 28 (internal marks omitted). And its authority reflects that relative profitability is probative for whether abatement would cause hardship. M-B Br. 28. In fact, Murphy-Brown told the jury that it was not profitable and says so again in its opening brief. JA7439, M-B Br. 26 n.5. But Murphy-Brown is a wholly-owned subsidiary of a for-profit integrated pork producer, first Smithfield Foods, Inc. and then WH Group from 2013 on. Indeed, Murphy-Brown financials are in the Smithfield annual reports, as well as the WH Group annual reports post-2013. JA4016-17.

Murphy-Brown's president Gregg Schmidt testified that if the hog production division wanted to cover lagoons, Smithfield or WH Group would pay for it. JA7880, 7908. Indeed, the purportedly irrelevant parent company, Smithfield Foods, signed the Smithfield Agreement committing it to fund research on better systems and committing it to

provide financial assistance to convert lagoon-and-sprayfield systems on contract grower operations. JA7726. It stands to reason that the profitability of the companies that would pay to abate the nuisances was admissible to show that abatement would not render the enterprise "considerably less profitable." *See* M-B Br. 28.

Moreover, Murphy-Brown opened the door by claiming it was not profitable and would face undue hardship. Murphy-Brown further opened the door by relying on the Smithfield Agreement—funded by Smithfield Foods—as a defense to the Neighbors' nuisance claims.

Murphy-Brown's claims of prejudice are similarly untenable. The claim that counsel emphasized a China connection is unsupported by the record. Counsel used the word "China" or "Chinese" a total of three times in opening and twice in closing. JA5813-14, 9010. This was consistent with the district court's ruling on a motion *in limine*, in which it observed that because the Chinese ownership was "a fact," it could be mentioned, but not advanced as a basis to punish Defendant. JA5727. Notably, Murphy-Brown did not object that these mentions violated the district court's *in limine* ruling. Regardless, any purported prejudice is alleviated

by North Carolina law reducing the punitive damages award to $250,000 per plaintiff, well within constitutionally allowable confines.

B. The district court did not abuse its discretion by excluding portions of Dr. Pamela Dalton's testimony.

Murphy-Brown contends at Section III that the Court abused its discretion by excluding Dr. Dalton's opinion that there was no odor nuisance, which she based on a purported odor study. The Court reviews exclusion of expert testimony for abuse of discretion. *GE v. Joiner*, 522 U.S. 136, 141-43 (1997). An expert testifying on an ultimate issue must use the correct legal standard. If an expert testifies using the wrong standard, it will not be helpful to the jury and will be confusing and prejudicial. *Kopf v. Skyrm*, 993 F.2d 374, 377-78 (4th Cir. 1993) (while "[a]n opinion is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact, . . . such an opinion may be excluded if it is not helpful to the trier of fact under Rule 702").

Whether Murphy-Brown caused a nuisance from the odor, trucks, buzzards, flies, noise, or otherwise was an ultimate issue for trial with numerous factors. JA9165. When deposed, however, Dr. Dalton admitted that she did not know the North Carolina legal standard for nuisance. JA4763-64. And she used the wrong standard in her report,

opining that unless odor reaches a seven-to-one dilution-to-threshold standard, it is not a nuisance. JA4715.

Murphy-Brown faults the district court for stating that "North Carolina 'has not adopted a dilution to threshold ratio or any other objective standard for assessing whether an odor is objectionable,'" M-B Br. 37, but conceded below "that the 7:1 dilution standard is *not* the legal standard for what constitutes a nuisance in North Carolina." *McKiver* ECF 113 at 10-11. Murphy-Brown's assertion of administrative reliance on the standard—not raised below and thus not preserved—is belied by evidence that the agency does not use it. *McGowan*, No. 7:14-CV-00182-BR, ECF 153-4 (NC Division of Air Quality "Odor Evaluation" presentation slides, excerpt: "If D/T is used it must be 7:1 or less. *DAQ is not currently using that method*." (emphasis added)). Indeed, the record reflects that personnel evaluating odor at an operation experimenting with superior technologies used a 2:1 Nasal Ranger setting, which is lower than 7:1. JA9452.

Dr. Dalton also undermined her conclusion on the ultimate question by admitting that, if a Plaintiff testified the odors were annoying, she could not state whether that was reasonable or

unreasonable. JA4824. Of course, "significant annoyance" is one measure of "substantial interference" under the North Carolina nuisance standard. JA189. Dr. Dalton further admitted that annoyance is inherently subjective. JA4825-26. Overly subjective expert opinion is excludable. *See JFJ Toys, Inc. v. Sears Holdings Corp.*, 237 F. Supp. 3d 311, 322 (D. Md. 2017) (expert testimony "rooted in subjective belief" does not suffice).

Murphy-Brown also cannot establish prejudice. The district court "exclude[d] Dr. Dalton's testimony about the odor monitoring study and her opinion regarding the lack of odor nuisance emanating from Kinlaw Farm." JA 8596. The district court did *not* exclude Dr. Dalton's "opinion about the unreliability of self-report of odor." *Id*.

The Court also did not exclude "Dr. Dalton's testimony regarding the biology of olfaction and factors that influence individual perception of and response to odor." *Id*. n.2. When Murphy-Brown called Dr. Dalton at the third trial—under the same *Daubert* ruling—the district court allowed her to testify in multiple areas, underscoring the ruling's limited impact. *Artis*, No. 7:14-CV-00237-BR, ECF 263. For example, Dr. Dalton

testified regarding her own experience of odor at the hog operation, over the plaintiffs' objection. *Id.* at 8:5-24, 41:8-14, 44:3-54:10.

C. The district court properly admitted the expert testimony of Dr. Rogers.

Defendant seeks to frame Plaintiffs' expert Dr. Rogers as having been permitted to testify at will on inadmissible topics as comparison to Dr. Dalton. Of course, admitting one side's expert does not require blindly admitting the other side's expert, and the district court excluded testimony from experts on both sides. Moreover, Murphy-Brown's counter-expert to Dr. Rogers, Dr. Clancy, testified extensively. M-B. Br. 34-35. Dr. Rogers testified that a DNA marker known as Pig2Bac is only found in hog feces and was found on the Neighbors' homes, which is further evidence that the compounds and chemicals constituting hog odor travel to the Neighbors' property. Murphy-Brown chose to attack Dr. Rogers's methodology with its own expert witness, Dr. Clancy. M-B. Br. 34-35. These criticisms go only to the weight of the testimony, not its admissibility, and they were comprehensively refuted at trial. JA6189-6215, 6907-6995, 7164-7247, 8605-8670.

On Murphy-Brown's contention that Dr. Rogers conceded that odor is outside the area of his expertise, the record reflects that he is an expert

in the area in which Plaintiffs have designated him—odor as it pertains to the chemicals that cause odor and how they move through the environment. JA5182-84, 6194-96. Dr. Rogers further clarified that "part of waste management engineering also deals with odor," and "[i]n that regard, I have expertise in odor." JA4413.

The district court qualified Dr. Rogers as "an expert in environmental engineering . . ., animal waste management engineering and technology, and microbiology." JA 6185. Defendant complains there was no *Daubert* hearing, but a *Daubert* "hearing is not necessary in all cases, as the submissions of the parties may provide a sufficient basis to determine if the proffered testimony is admissible." *Id.* *See also United States v. Beasley*, 495 F.3d 142, 150 (4th Cir. 2007) (holding that a district court's decision on whether to hold a *Daubert* hearing is reviewed only for abuse of discretion).

The district court specifically explained that it had read the parties' "fully briefed" arguments and would "rely on the briefs" unless the court felt that "oral argument will help me in the decision process," at which point the court would "advise you and call on you for that." JA6183-84. Moreover, Murphy-Brown ignores that Dr. Rogers testified for four days,

including two days of cross-examination, and Defendant brought its own expert designated solely to criticize him. In the next four trials, two different judges admitted Rogers' testimony without limitation—including testimony regarding Pig2Bac.

VI. North Carolina's three-year statute of limitations does not bar this action.

A. The district court properly decided, as a matter of law, that the nuisance was a recurring one.

Murphy-Brown's assertion at Section VI of its opening brief that the statute of limitations bars this action is unsupportable because these are recurring nuisances. Nuisances are like trespasses and may cause plaintiffs repeated injuries, each of which has its own statute of limitations accrual. A recurring nuisance "gives successive causes of action as successive injuries are perpetrated," and the statute of limitations bars actions involving the expired trespasses. *Anderson v. Town of Waynesville*, 164 S.E. 583, 587 (N.C. 1932); *see Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 596 (N.C. 1990) (quoting *Anderson*).

Examples of temporary, recurrent, renewing, or abatable nuisances or trespasses include: noxious gases and odors emitted from an oil refinery, *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 690 (N.C. 1953); the pollution of water and land on a plaintiff's farm as a result of a

defendant emptying raw sewage and other garbage from a cotton mill into nearby bodies of water, *Morrow v. Florence Mills*, 107 S.E. 445, 446 (N.C. 1921); and the flooding of land adjacent to an improperly maintained drain for a railroad track, *Perry v. Norfolk S. R. Co.*, 87 S.E. 948, 949 (N.C. 1916). The policy provides incentive to abate a nuisance by authorizing a plaintiff to file successive suits to recover damages for the recurring nuisance. *Phillips v. Chesson*, 58 S.E.2d 343, 346–47 (N.C. 1950) ("the defendant's willingness to abate or remove the cause of damage may be stimulated when repeatedly mulcted in damages by reason of its continued maintenance" of the nuisance).

For a "continuing" or permanent nuisance, a plaintiff is entitled to "permanent damages," or damages to compensate for a nuisance that *cannot be removed or abated*. *See Langley v. Staley Hosiery Mills Co.*, 140 S.E. 440, 441 (N.C. 1927). That is to compensate a plaintiff "for the entire damage" at once. *Id.* In these cases, "the injured party may accept or ratify the feature of permanency and sue at once for the entire damage." *Webb v. Virginia-Carolina Chem. Co.*, 87 S.E. 633, 634 (N.C. 1916). Permanent nuisances or trespasses include "a substantial building or other structure of a permanent character," *Langley*, 140 S.E.

at 441; *Webb*, 87 S.E. 633, 634 (N.C. 1916), such as a railroad, *Ridley v. Seaboard & R.R. Co.*, 24 S.E. 730 (N.C. 1896).

Here, the odor, flies, buzzards, and noise from trucks and squealing hogs are recurrent, abatable nuisances. *Cf. Morgan*, 77 S.E.2d at 690 (it is not an oil refinery, but the operation of it, which causes noxious gases and odors to pollute plaintiffs' lands); *Duval*, 77 S.E. at 312 (it is not the construction of a road or a drain for the road, but the improper maintenance of that drain which causes flooding on plaintiff's land). The hog operation itself is not necessarily a nuisance, and the Neighbors have not claimed (nor do they need to) that hog farming is a nuisance *per se*. The record reflects that Murphy-Brown is in a position to abate these nuisances and should be incentivized to do so.

B. Trial testimony confirmed that the nuisance is a recurring, abatable one.

The district court also properly declined to submit a statute-of-limitations jury instruction. Trial testimony confirmed that odor, buzzards, flies, and trucks are a recurring and abatable nuisance.

As outlined above, Murphy-Brown can reduce odor and flies from the hog farm using alternative technology, such as lagoon covers, or by injecting hog waste into the soil directly. *See, e.g.*, JA2525, 2527, 2688,

5235-36, 5247-48, 8158-59, 8177, 8791-92. Murphy-Brown can reduce flies and buzzards by eliminating "dead boxes" for deceased hogs and instead implementing technology such as incineration or composting. *See, e.g.*, JA8154-55. Murphy-Brown can also reduce the disruption of trucks waking the Neighbors up in the middle of the night by scheduling traffic only during waking hours. *See, e.g.*, JA7641, 7648-49, 7870.

Don Butler testified that Appellant informs its hog farmers: "[I]f you know that the neighbors have some special event planned; wedding, cookout, whatever, refrain from doing land applications [spraying of hog waste] out of respect for your neighbors." JA7470. The fact that Murphy-Brown can eliminate the nuisance on particular days shows that it is both recurring and abatable.

Citing the Neighbors' testimony, Murphy-Brown claims the nuisance is a single, permanent one (or "continuing," as Murphy-Brown describes it). Murphy-Brown cites testimony in which Daphne McKoy said that conditions have "always been the same," JA7300; Archie Wright said that buzzards "fly all the time," JA7795; Tammy Lloyd said that odor is "always annoying" and there are "hogs squealing all the time," JA7754-55; and Priscilla Dunham said traffic from trucks annoyed her "all the

time, day and night," JA7917. Murphy-Brown interprets these statements to mean that, for example, Tammy Lloyd heard hogs squealing, and trucks drove by Priscilla Dunham's house, *literally* all the time. That is a preposterous over-literal interpretation of figurative speech. And when asked whether they were literally bothered by odor or other sources of nuisance every day, the Neighbors testified that the nuisance was not constant, and some days they did not experience a nuisance at all. *See, e.g.*, JA7256, 7750. The district court thus properly held that the statute of limitations did not bar the Neighbors' suit. Murphy-Brown had the power and ability to abate these nuisances. Now, finally being held liable, it has an incentive to do so.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that the judgment below be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this Brief of Appellee is proportionately spaced and contains 12,550 words excluding parts of the document exempted by Rule 32(a)(7)(B)(iii).

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April 29, 2019

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on April 29, 2019, the Brief of Appellee was served on all parties or their counsel of record through the CM/ECF system.

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