No. 19-1019

IN THE

United States Court of Appeals for the Fourth Circuit

JOYCE MCKIVER, et al.,
Plaintiffs-Appellees,

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. 7:25-cv-180BR

BRIEF AMICUS CURIAE OF LAW PROFESSORS WITH EXPERTISE IN TORT AND REGULATORY LAW

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May 3, 2019

CORPORATE DISCLOSURE STATEMENT

No amici have parent corporations or are publicly held corporations.

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STATEMENT OF INTEREST OF AMICUS CURIAE

This amici curiae brief is submitted on behalf of 8 (eight) professors of law and academics who teach administrative law and tort law at law schools in North Carolina and throughout the United States ("Amici"). A complete list of amici is provided in Appendix 1. All parties have consented to the filing of this brief and no party's counsel has authored this brief or contributed money to the brief's preparation.

Amici have researched and written about the role of tort law in compensating persons harmed by the unreasonable conduct of others in light of regulatory legislation that is intended to protect people from environmental

harms. The goal of amici is to facilitate a just and fair accommodation of tort and regulatory law in this context.

SUMMARY OF THE ARGUMENT

This brief is submitted to the court to explain the reasons why it has long been established that compliance with a regulatory standard does not establish a defense to liability per se and is only evidence that a regulated entity may have engaged in reasonable behavior. This brief further argues that it would undermine both the goals of tort law and regulatory law if a rule were adopted that treated regulatory compliance as conclusive evidence of reasonable behavior, and a per se defense to tort liability, including punitive damages.

Part I establishes why it serves the purpose of both tort law and environmental law that regulatory compliance is only evidence of reasonable behavior and not dispositive of the issue of liability. There are several reasons for this. Tort law and the regulatory system guard against separate and distinct injuries. Tort law is prescriptive and serves to compensate those who have been injured. Regulation is prospective and seeks to avoid injury in the future. While each system protects distinct interests, they work in complementary ways. A tort verdict can alert regulators that the regulatory system has failed to provide reasonable protection of the people the agency is required to protect.

In addition, the compensation and deterrence aspects of the tort system compensate and protect regulatory beneficiaries when a regulatory system fails to do so due to regulatory capture, which legal scholarship defines as undue industry influence over a regulatory agency. And, as legal scholarship has also established, disadvantaged citizens are often most at risk of injury from the unreasonable actions of producers and other industrial concerns. When regulation fails in this regard, the tort system can step in to address this failure, providing a measure of equity and justice.

Part II explains that for the foregoing reasons the rule that regulatory compliance is only proof of reasonable behavior in tort law is widely accepted in both federal and state law. Because regulatory compliance is not a conclusive defense, it follows that a plaintiff can seek both compensatory and punitive damages. Barring punitive damages on the ground of regulation compliance stands tort law on its head. Such a rule would mean that a defendant engaged in unreasonable behavior is responsible for compensatory damages, but a defendant *willfully* engaged in unreasonable behavior cannot be liable for punitive damages despite its more egregious behavior.

Accordingly, the suggested argument that an actor that complies with a regulation may not be found liable for maintaining a nuisance and may not be subjected to punitive damages should be seen as erroneous. The argument is

inconsistent with established law and further stands contrary to the purpose of both our common law tort system and regulatory regimes.

INTRODUCTION

Meat production "is a predictably messy business," *In re Murphy-Brown, LLC,* 907 F.3d 788, 792 (4th Cir. 2018), and the scale and quality of the mess that comes with intensive methods of animal production, such as those at issue in these proceedings, boggles comprehension. Contemporary animal production methods have moved away from the idealized vision of the American farm to enterprises that look more like factories, where animals are confined in concentrated populations while being fed, "finished", and prepared for slaughter. Pork Production on Factory Farms, https://www.farmsanctuary.org/learn/factory-farming/. Such concentration of animals inevitably leads to corresponding concentrations of untreated animal waste.

The enormous amounts of untreated animal waste streaming from concentrated animal feeding operations generate, which is almost universally exempt from sanitary handling, often equals in volume the waste generated by a mid-sized city. Depending on the number and type of animals, a CAFO can generate between 2,800 and 1,600,000 tons of untreated manure a year. Government Accountability Office, *EPA Needs More Information and a*

Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern, Sept 2008. The 1.6 million tons of animal waste at the higher end of this range is more than 1.5 times the amount of sewage generated by the City of Philadelphia in a year. *Id*. Total animal waste from CAFO's generate 13 times more waste than does the human population of the United States each year. Joann Burkholder, et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 ENV. HEALTH PERSP. 308, 312 (2007) (GAO Report). To this point, evidence in these proceedings showed that the CAFO operated by Appellants generated more waste each day than the City of Asheville, NC. JA 6201.

In contrast to a city, however, where waste is pumped through sanitary sewage systems to water treatment facilities before being discharged into the environment, CAFO waste receives no active treatment at all, and is not even transported through sanitary piping systems. GAO Report at 2. Because the volume of waste produced exceeds what can be used for agronomic purposes at any given time, the waste from CAFO units is pumped into large, open air, unlined pits and stored in these lagoons until it is applied to crop land as nutrients. GAO Report at 3.

Because lagoon and spray field waste management systems store and manage millions of gallons of raw sewage, they necessarily involve real and

significant environmental and public health hazards. Manure contains a plethora of contaminants that are harmful to environmental and human health, including: large amounts of nitrogen and phosphorus; pathogens including E. coli; animal growth hormones; antibiotics; chemical cleaning additives used to clean equipment; animal blood and tissue; silage leachate; agricultural chemicals found in feed stock; and copper sulfate used in the care of hooved animals. Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and their Impact on Communities*, National Association of Local Boards of Health, 2-11 (2010). The environmental problems created by CAFO's directly impact human health and welfare. People are adversely affected by contaminated air and degraded water quality, by disease that spreads from CAFO's lagoons and spray fields, and from a diminished quality of life caused by odors, insects, vectors, reduced property values, and industrial activities including trucking. *Id*.

Because of these extensive risks, scholars have been alarmed by the failure of regulation to adequately address these hazards and have supported the civil justice system as a supplement and backup when regulation fails to deter unreasonable behavior. *See, e.g.,* Vanessa Zboreak, *Keeping It Fresh: Exploring the Relationship Between Food Laws and Their Impact on Public Health and Safety*, 5 WAKE FOREST J.L. & POL'Y 147 (2015); Michelle

Buckley, *This Waiting Game Stinks: The Lack of EPA Progress in Regulating Emissions from Animal Agriculture*, 2 ARIZ. J. ENVTL. L. & POL'Y 1 (2011); Danielle J. Diamond, *Illinois' Failure to Regulate Concentrated Animal Feeding Operations in Accordance with the Clean Water Act*, 11 DRAKE J. AGRIC. L. 185 (2006); Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505 (2005); Larry C. Frarey & Staci J. Pratt, *Environmental Regulation of Livestock Operations*, 9 NAT. RESOURCES & ENV'T 8 (Winter 1995). In this brief, amici explain how the common law and the regulatory systems work in a complementary manner to protect citizens from these known harms and failures.

ARGUMENT

I. BOTH TORT LAW AND ENVIRONMENTAL REGULTION ARE SERVED BY THE RULE THAT REGULATORY COMPLIANCE IS EVIDENCE OF REASONABLE BEHAVIOR BUT NOT A DEFENSE TO LIABILTY PER SE.

Although regulation has important advantages over the civil justice system in addressing risky activities, such as the being preventative, state common law remedies serve as an invaluable complement to federal and state positive law. Marshall S. Shapo, *Tort Law and Environmental Risk*, 14 PACE ENVTL. L. REV. 531 (1997) (finding "tort is an important element in the social response to environmental hazards"). The civil justice system interacts with environmental law in ways that serve the purposes of both regulatory and tort

law. The rule that regulatory compliance is only evidence of reasonable behavior is the bedrock of this interaction because the tort system steps in when regulation fails to prevent unreasonable behavior. *See id*. at 531 ("Even with a proliferation of environmental laws and regulations, tort law is sometimes the first line of legal protection for persons threatened, or injured, by such hazards."); Robert V. Percival, *Responding to Environmental Risk: A Pluralistic Perspective*, 14 PACE ENVTL. L. REV. 513, 528 (1997) (noting "[w]hen regulators neglect to control risky activities that cause widespread harm, the common law is society's primary vehicle for responding" to such activities").

As we relate, there are a number of reasons for the failure of regulation to require reasonable precautions, and when this happens, tort law alerts regulators that they have failed to deter unreasonable behavior. At the same time, the civil justice system compensates citizens for injuries that were not prevented, and this in turn provides a preventive impact that the regulatory system is not providing. And, when the plaintiffs are among our most vulnerable and disadvantaged citizens, the tort system provides a measure of equity and justice that regulation failed to provide.

A. The failure of regulation to deter unreasonable behavior makes the tort system a necessary and useful backup for regulation.

Legal scholarship has identified a number of reasons for why regulation can fail to require reasonable protections. The regulatory system can fail for reasons are beyond the control of regulators including insufficient funding, information limitations, outdated authorizing statutes, political interference or indifference, and a demoralized civil service. RENA STEINZOR & SIDNEY A. SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC, 4-5 (2010); William B. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction,* 82 N.Y.U. L. REV. 1547, 1593-94 (2007). At other times, regulation fails because of "regulatory capture" which occurs when an industry is able to exert control over an agency that has been charged with regulating the industry, and the agency as a result acts in the industry's interest rather than in the public interest. Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS L. REV. 101, 104 (2012).

The adoption of policies that favor regulated entities does not necessarily result from capture. The policies can also be in the public interest. But when regulators consistently adopt regulatory policies favored by regulated entities or consistently fail to adopt regulations that are necessary to protect the public, scholars conclude that regulatory capture is a likely

explanation. *Id.*; Justin Rex, *Anatomy of Regulatory Capture: An Organizational Typology for Diagnosing and Remedying Capture*, Regulation & Governance (2018), available at https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12209.

Whatever the cause of regulatory failure, the civil justice system stands ready to step in to protect people from unreasonable behavior:

> Plaintiffs and their lawyers have incentives to challenge the status quo, ferret out error or mistake, and prompt change despite uninterested regulators, possibly ignorant public interest groups, and resistant industry. The ultimate decisionmakers—courts and juries—are also not invested in defending earlier regulatory actions.

Buzbee, *supra*, at 1589. As a result, the "basic duty of reasonable care applies to everyone, regardless of their power or status." Emily Hammond et al., *TSCA Reform Preserving Tort and Regulatory Approaches* 24 (Oct. 2013) available at http://www.progressivereform.org/articles/TSCA_IssueAlert_1309.pdf.

It is unnecessary for a court to know why the regulatory system has failed in this case or any other. The rule that regulatory compliance is only evidence of reasonable behavior makes it possible for tort law to step in when regulation has failed to prohibit unreasonable behavior by allowing juries to make that determination if the facts support it. The reason for the regulatory failure is not relevant; it is enough to know that state common law remedies

serve as an invaluable complement to federal and state positive law when regulatory failure.

B. The tort system both compensates and protects citizens when regulation fails to deter unreasonable behavior.

Ideally, regulation would prevent harm to citizens as the result of unreasonable behavior, but when regulation fails to do so, tort law performs its traditional function of compensating victims for the harms they have suffered. *See id*. at 4 (noting "[o]ur courts provide an orderly process for victims to seek compensation when they are injured, thereby restoring the victims' freedom and opportunities"). As a result, regulation exists in a complementary relationship to the common law, each offering different deterrent effects intended to protect individuals and the public from harm within distinct time frames.

Although the award of damages for injuries after the fact has some deterrent effect, its principal purpose is to compensate victims who have been harmed. The common law of torts has developed as a set of rules to implement the unimpeachable principle that a person should be fairly compensated for injuries caused by the violation of his legal rights. *See Heck v. Humphrey*, 512 U.S. 477, 483 (1994). Tort law, including nuisance, operates on a

retrospective basis, where each case examines the particular facts surrounding a victim who has been harmed by an actor. The ultimate goal of this retrospective analysis is to determine appropriate compensation for the harm that has already occurred. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("Every state has a body of tort law serving its compelling interest in ensuring that victims are compensated by those who harm them.") Thus, in the instant case, Plaintiffs were awarded damages for harm that has been caused by Defendants. The damage has been done.

In contrast, regulatory schemes are prospective in nature and application. Regulations do not focus on compensating victims for injuries that have been sustained, but instead, focus on preventing societal harms in the future. Regulations are not designed to either provide compensation for harms that have been committed or to hold tortfeasors accountable for actions that have been performed either negligently or willfully. *See* Mary Lyndon, *Tort Law and Technology*, 12 YALE J. OF REG. 137, 172 (1995). Regulatory requirements are prescriptive in nature, attempting to avoid future injuries, but it is an almost a priori conclusion that say that injuries may still occur. When such injuries do occur as the result of unreasonable behavior not prevented by

regulation, the common law relevant to injury to person and property provides the remedy.

The foundational difference between regulation and common law remedies means that a state regulatory scheme should not foreclose an award of damages to a party who has been harmed by another's negligence or willful misconduct. As stated above, the common law system is built upon the principal that every person should be fairly compensated for harm committed to them. To deny those who have been harmed access to the damages they are due under the common law for their injuries and losses would be the equivalent of saying that those who are injured should bear the cost of their injuries, even while the benefits go to another, despite the unreasonable behavior of the defendant.

Such an outcome would not only be contrary to the complementary roles of the common law and regulation, it would renounce the common law tort system's secondary purpose: deterrence. *See United Construction Workers v. Laburnam Construction Corp.*, 347 U.S. 656, 663-64 (1954) (the court's will not "cut off the injured respondent from his right to recovery" under state tort laws even when regulatory schemes are in place, because to do so would "deprive [the injured] of its right to recover without compensation," leading to a grant of immunity from liability for tortious

conduct.); *see also Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 251 (1984) (recognizing that tort remedies must be maintained to assure judicial recourse for those injured by illegal conduct.) The civil justice system creates an incentive for risk producers to avoid unreasonable behavior in order to avoid potential liability because of the potential for liability. *See* Jean Macchiaroli Eggen, *The Synergy of Toxic Tort Law and Public Health: Lessons from a Century of Cigarettes*, 41 Conn. L. Rev. 561, 564-65 (2008) (recognizing that tort law has traditionally served compensatory and regulatory functions in the health and safety context); Leon Green, *Tort Law Public Law in Disguise*, 38 Tex. L. Rev. 1, 1 (1959) (referring to tort law as a form of public regulation "in disguise").

And when information generated through tort litigation feeds back into the regulatory system, it alerts regulators to reexamine past regulatory decisions and develop better regulations. Buzbee, *supra* at 1599; Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2068-70 (2000) (referencing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992)); *see also* Emily Hammond et al., *supra*, at 10 (nothing that the "litigation brought on behalf of victims of asbestos exposure was particularly successful in uncovering crucial risk data that the EPA had otherwise been unable to obtain through its [regulatory] authorities.").

As Professor Lucinda Finley has stressed concerning products liability, the civil justice system "has played a notable role in bringing . . . serious safety problems to light, and in prompting long overdue regulatory action …." Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DePaul L. Rev. 335, 369 (1999); *see also* David Rosenberg, *The Dusting of America: A Story of Asbestos - Carnage, Cover-up and Litigation*, 99 HARV. L. REV. 1693, 1695 (1986) (book review) (finding asbestos litigation not only revealed the dangerousness of that product, it compensated the victims and deterred future malfeasance).

None of these functions would be possible if compliance with regulations that permit unreasonable behavior become a regulatory shield for risk producers such as CAFOs. If compliance were conclusive evidence of reasonableness, citizens would receive no compensation for their juries despite the inadequate nature of the regulatory regime, tort law would not incentivize such entities to take reasonable protections in the absence of regulatory requirements, and regulators would not be altered to the inadequacy of regulation.

C. When a regulation fails to protect vulnerable and disadvantaged citizens, the tort system can provide a measure of equity and justice.

Environmental justice has as its goal the equal protection from environmental hazards for all people regardless of their race, income, culture, and social class. Environmental Protection Agency, Learn About Environmental Justice, available at https://www.epa.gov/environmentaljustice/learn-about-environmental-justice. Likewise, Executive Order 12,898, directs federal agencies that environmental justice must be part of every agency mission "[t]o the greatest extent practicable and permitted by law." Executive Order 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994), 59 Fed. Reg. 7629 (Feb. 16, 1994) (codified at 3 C.F.R. 859). Relatedly, the North Carolina Equal Justice Program intends "that North Carolinians have fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies." North Carolina Environmental Quality, *Environmental Justice*, available at https://deq.nc.gov/outreach-education/environmental-justice. In short, "the environmental justice movement … has long-recognized the interconnections between the

environment and social justice." Alice Kaswan, *Environmental Justice and Environmental Law,* 24 FORDHAM ENVTL. L. REV. 149, 169 (2013).

These commitments acknowledge "[p]eople of color and the poor disproportionately live in the communities that are overburdened by pollution and under-protected by industry and government." Eileen Gauna, Catherine A. O'Neill, & Clifford Rechtschaffen, *Environmental Justice* 1 (March 2005), available at http://www.progressivereform.org/articles/EJ_505.pdf. There is "a solid body of empirical evidence documenting that environmental harms and benefits are unequally distributed in society." *Id.* at 4. One reason is that "[l]ow-income communities and communities of color suffer disproportionately when environmental laws are inadequately enforced and businesses violate requirements, because these communities host a disproportionate share of polluting facilities." *Id.* at 5-6. And "[b]y far the greatest number of environmental justice challenges arise in the course of permit proceedings." *Id.* at 7.

Scholars have emphasized how tort law can serve the ends of environmental justice:

> Its very nature as a form of private law designed to promote the interests of particular individuals, rather than the more general public at-large, promotes outcomes that are more sensitive to the particular interests, including corrective justice claims, of these communities. For example, tort law can provide compensatory remedies that can

> address the disparate burdens imposed on minority and poor communities.

Tseming Yang, *Environmental Regulation, Tort Law and Environmental Justice: What Could Have Been*, 41 WASHBURN L.J. 607, 617 (2002). In particular, the civil justice system "works best when it compensates those who suffer negative impacts that stem from a lack of political or economic strength. It can provide justice when a lack of resolve paralyzes government policy makers." Gerald J. Williams, *Environmental Justice in America*, Trial (December 2003), at 60 (book review).

The capacity of tort law to provide a measure of equity and justice to vulnerable and disadvantaged citizens would be erased if regulatory compliance were made conclusive evidence of reasonableness in regulation. This loss would disadvantage any citizen, as we argued previously, but the greatest impact would be on vulnerable and disadvantaged citizen who, as noted, are often at the most risk from the failure of industrial facilities to take reasonable precautions.

As a supplement and backup to the regulation, the civil justice system offers a means by which vulnerable and disadvantaged citizens can establish they have been harmed by unreasonable behavior. In these circumstances, the

tort system not only provide compensation, it provides the equal justice that all citizens deserve.

II. COMPLIANCE WITH ENVIRONMENTAL REGULATIONS NEITHER OBVIATES POTENTIAL NUISANCE LIABILITY UNDER STATE LAW NOR EXCLUDES AN AWARD OF PUNITIVE DAMAGES.

A. It is well settled that states may adopt more stringent limitations through state tort and nuisance law notwithstanding the presence of an environmental regulatory scheme, even when the regulated entity has complied with the relevant regulations.

The presence of regulatory permitting systems in North Carolina, such as those that apply to Concentrated Animal Feeding Operations ("CAFO") does not limit the ability of a state to apply more stringent limitations through the common law. CAFO operators who operate a lagoon-and-spray-field waste management system may only do so under a valid permit issued under the Clean Water Act. 33 U.S.C. § 1251, *et seq.,* ("CWA"). The CWA regulates all water pollution into the navigable waters of the United States and empowers the Environmental Protection Agency ("EPA") to control water pollution, *see Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 490-91 (2nd Cir. 2005). One such control mechanism is a permitting system that regulates the discharge of pollution into navigable waters.

The CWA requires any entity that discharges pollutants into the waters of the United States to do so only if covered by a permit under the National

Pollution Discharge Elimination System ("NPDES"). CWA Sec. 402, 33 U.S.C. § 1251 *et seq*. NPDES permits may be issued by the EPA or by states, 33 U.S.C. § 1342. The NPDES permit regulates the amounts of pollutants that are discharged into navigable waters, protecting water quality, fisheries and plant life. Any entity that discharges pollutants into waters of the United States without first having in place a valid NPDES permit violates the CWA. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 102 (2004).

CAFO's are defined to be point sources of water pollution under the CWA, (Part 122.23), and no CAFO may be operated without first receiving an NPDES permit (Part 122.23(d) ("A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.") The State of North Carolina administers a general permit for CAFO operators under the NPDES system, See N.C. Gen. Stat. §§ 143-215, *et seq.*

Citizens affected by nuisance conditions created by discharges of pollutants from a permitted facility retain the right to seek damages for nuisance under state law even though a defendant has complied with the

CWA's requirements. *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987). *Ouellette* considered the extraterritorial application of Vermont tort law, but the Court further considered the issue of whether the CWA preempted individual citizen actions filed under state law. Citing *Milwaukee v. Illinois,* 451 U.S. 304 (1981), *Ouelette* goes on to say, **"States may adopt more stringent limitations [on permitted facilities] through state nuisance law and apply them to in-state dischargers."**

The reasoning of *Ouellette* has also been applied to cases brought under the Clean Air Act (42 U.S.C. § 7401, *et seq.*) to find that the CAA does not pre-empt state common law claims, including claims for nuisance, even when the defendant is in compliance with the CAA permit system. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 196-97 (3rd Cir. 2013) (holding that "the Clean Air Act does not preempt state common law claims"); *see Merrick v. Diageo Ams. Supply, Inc.,* 805 F.3d 685, 695 (6th Cir. 2015) ("What was true for the Clean Water Act holds true for the Clean Air Act."); *Bell v. WestRock CP, LLC,* 2018 U.S. Dist. LEXIS 121979, *4-5 (E.D. Va. July 20, 2018) (accord – "Because the plaintiffs pursue Virginia common law claims against the defendants for emissions alleged to have occurred within Virginia's borders, this Court finds that these claims may proceed despite the defendants' undisputed compliance with the CAA.").

The basis for finding that common law causes of action are retained in the face of federal environmental regulation is written on the face of both the Clean Water Act and the Clean Air Act in each act's relevant "savings clause." Thus, the CWA includes savings clauses that explicitly preserve private remedies for damages to property and allow any person, under common law, "to seek any other relief. . . ." See CWA Sec 1321(o)(2). The statutory language in the Clean Air Act similarly states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief…

42 U.S.C. § 7604(e).

> Except as otherwise provided…nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution…

42 U.S.C. § 7416.

This language has expressly been held to extend the reasoning under the CWA, articulated by the Supreme Court in *Ouellette*, to citizen actions brought under state law in areas regulated by the CAA. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 195 (3rd Cir. 2013) ("[g]iven that we find no meaningful difference between the Clean Water Act and the Clean Air Act

for the purposes of our preemption analysis, we conclude that the Supreme Court's decision in *Ouellette* controls this case, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located.")

Nor are North Carolina citizens denied access to remedies under state tort or nuisance law based upon North Carolina's own efforts to regulate hog CAFO's. The State of North Carolina has a two-part regulatory structure applicable to hog farms. The two components of this structure may be found in the North Carolina General Statutes contained within the Swine Farm Siting Act, N.C. Gen. Stat. §§ 106-800 to 805, ("Siting Act") and the regulations pertaining to Animal Waste Management Systems, N.C. Gen. Stat. §§ 143-215. 10A to 215.10M ("Waste Management Regulations"). *See Craig v. County of Chatham*, 565 S.E.2d 172, 177-78 (N.C. 2002).

The Siting Act expressly provides citizens with the right to seek damages through civil actions:

> **106-804. Enforcement.**
>
> (a) Any person who owns property directly affected by the siting requirements of G.S. 106-803 pursuant to subsection (b) of this section may bring a civil action against the owner or operator of a swine farm who has violated G.S. 106-803 and may seek any one or more of the following:
> (1) Injunctive relief.
> (2) An order enforcing the siting requirements under G.S. 106-803.
> (3) Damages caused by the violation.

There is plainly no language in the Siting Act that indicates any intent to preempt common law actions in tort or nuisance arising from the operation of a hog CAFO and related lagoon-and-spray-field waste management system. Quite to the contrary, North Carolina citizens retain their rights to access the courts seeking relief under state common law. *See* N.C. Gen. Stat. §§ 106-804(d) ("Nothing in this section shall restrict any other right that any person may have under any statute or common law to seek injunctive or other relief."). Similarly, the Waste Management Regulations do not limit private civil claims.

Finally, North Carolina's regulations applicable to hog CAFO odors (15A NCAC 02D.1800 *et seq.*) ("Odor Regulations") plainly intend for enforcement to remain in the hands of private citizens. The Odor Regulations require various controls be employed by a CAFO, but they do not include an enforcement mechanism. The Odor Regulations allow for reports to be made, complaints to be investigated and plans to be drafted - but they do not enable the Director to enjoin an actor, assess a fine or compel another remedy. Lacking any remedy whatsoever, the regulations do not displace common law remedies available to citizens who have been harmed by a nuisance maintained by private actors.

B. While regulatory compliance may be proof of reasonable behavior, it is not conclusive evidence of reasonableness and does not rise to a dispositive defense for tortious actions of maintenance of a nuisance.

1. The rule that regulatory compliance does not prevent tort liability is widely accepted and should be retained in this case.

The rule that regulatory compliance *may* be considered by a jury when determining tort liability, but such compliance is not dispositive of the issue of liability, is widely accepted. Under the common law of torts, compliance with state safety laws and regulations is certainly relevant to the issue of tort liability, *see* J. Goldberg & B. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 449 (2016), but such compliance is only one factor for the jury to consider and is not dispositive in itself. *See, e.g.*, *Doyle v. Volkswagenwerk Aktiengesellshaft*, 481 S.E. 2d 518, 521 (Ga. 1997); *Rucker v. Norfolk & W. Ry. Co*, 396 N.E. 2d 534, 536 (Ill. 1979). *See also Boyd v. L.G. DeWitt Trucking Co., Inc.*, 103 N.C. App. 396, 405 S.E. 2d 91 (1991) (holding that compliance with state trucking regulations does not insulate defendant from tort claim.)

The Restatement is clear on this issue. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY 4(b) (Am. Law Inst. 1998) ("[A] product's compliance with an applicable product safety statute of administrative regulation is properly considered in determining whether the product is

defective with respect to the risks sought to be reduced by the statute or regulation.")

The rule in North Carolina is consistent. A North Carolina, statutes plainly clarifies that regulatory compliance is only one factor to consider when determining whether a defendant has acted unreasonably in product liability cases:

> (a) No manufacturer of a product shall be held liable in any product liability action for the inadequate design or formulation of the product unless the claimant proves that at the time of its manufacture the manufacturer acted unreasonably in designing or formulating the product, that this conduct was a proximate cause of the harm for which damages are sought, and also proves one of the following:
>
> (b) In determining whether the manufacturer acted unreasonably under subsection (a) of this section, the factors to be considered shall include, but are not limited to, the following: …
>
> (4) The extent to which the labeling for a prescription or nonprescription drug approved by the United States Food and Drug Administration conformed to any applicable government or private standard that was in effect when the product left the control of its manufacturer.

N.C. Gen Stat. § 99B-6(b)(4).

And according to the courts, "While compliance with a statutory standard is *evidence* of due care, it is not conclusive on the issue." *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 68 (*quoting* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE

LAW OF TORTS § 30 (5th ed. 1984) and RESTATEMENT (SECOND) OF TORTS § 288C (1965).

2. A claim regulatory compliance should be a defense against punitive damages stands tort law its head.

According to NC Law, punitive damages remain available once a plaintiff establishes liability and "may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1(D)(1); *see also Collier v. Bryant*, 216 N.C. App. 419, 719 S.E. 2d 70 (2011) (punitive damages are available incidental to a cause of action); *see also Hanna v. Brady*, 73 N.C. App. 521, 327 S.E. 2d 22 (1985). Punitive damages may be awarded where the claimant proves the defendant is liable for compensatory damages under the primary claim and then further shows that the existence of fraud, malice, or willful or wanton conduct by clear and convincing evidence. *Austin v. Bald II, LLC*, 189 N.C. App. 338, 658 S.E. 2d 1 (2008).

Regulatory compliance as a defense to liability including liability for punitive damages, in this instance would hardly be logical. As discussed above, plaintiffs in North Carolina are enabled to access the courts to remedy tortious harms even when the tortfeasor is subject to and compliant with a

permit. Having shown the tortfeasor to be liable, it would be illogical to prevent that same plaintiff from recovering from harms that have resulted from willful misconduct, malice or wantonness with indifference to consequences. A contrary rule would mean a culpable actor, having been found liable, is able to avoid the deterrent effect of punitive damages because the actor has acted egregiously and not merely carelessly when harming another.

Several states recognize that regulatory compliance does not preclude an award of punitive damages, notwithstanding the applicable regulation, when there is other evidence showing culpable behavior. *See, e.g., Edwards v. Ethicon, Inc*, 30 F. Supp. 3d 554 (S.D. W.Va. 2014) (finding under Georgia law that regulatory compliance does not preclude an award of punitive damages where, notwithstanding the compliance with applicable safety regulations, there is other evidence showing culpable behavior.); *see also Brand v Mazda Motor Corp*, 978 F. Supp. 1382, 1393 (D. Kan. 1997) (compliance with federal regulatory standards does not cut off liability for punitive damages when the plaintiff is able to prove by clear and convincing evidence that the manufacturer still acted with reckless indifference to consumer safety.). Regulatory compliance remains only a piece of relevant evidence and does not amount to a complete defense to an award of punitive

damages per se. *See Maravell v. R.J. Grondin & Sons*, 914 A.2d 709 (Me. 2007). The plaintiff retains the right to show, through other evidence, willful, malicious or otherwise culpable behavior supporting the award of punitive damages. *See, e.g., Torre v. Harris-Seybold Co*., 9 Mass. App. 660, 671, 404 N.E. 2d 96, 105 (1980); *Jones v. Hutchinson Mfg., Inc*., 502 S.W. 2d 66 (Ky. 1973).

To determine that regulatory compliance is a defense *per se* to punitive damages, and not merely a relevant piece of evidence to be considered by the jury, would be illogical and effectively eviscerate the protections offered to North Carolina's citizens.

CONCLUSION

For these reasons stated here, as well as those arguments made in Appellees brief on behalf of the families who are plaintiffs in this case, this Court should AFFIRM the District Court's judgment and the jury's verdict.

Respectfully submitted

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APPENDIX 1

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I certify that on May 3, 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:

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