Do Wind Farms Constitute a Nuisance or Trespass?

BY JASON L. RICHEY AND JACQUELYN S. BRYAN
Special to the Legal

The expansion of wind energy in the United States over the last decade has resulted in the development of approximately 20 wind farms throughout Pennsylvania. The regulation of these wind farms has generally been performed by the local authorities in whose jurisdictions they are located. It is well known that wind farms from time to time make noise, produce vibrations or create a "flicker" or "strobe" effect (which occurs when the sun is near the horizon and alternating shadows of light and dark are reflected by a wind turbine's blades), all of which have the potential to be heard or seen on properties neighboring the wind farm.

As such, wind farm developers often conduct noise and vibration studies during the development stage to minimize noise and ensure that any noise generated will be within local ordinance limits. Additionally, developers generally attempt to design wind farms to minimize any flicker or strobe effect from the wind turbines.

Nonetheless, even if developers take these precautions and comply with local ordinances, wind farms may find themselves subject to lawsuits filed on behalf of neighbors to enjoin the wind farm's activities or to recover damages allegedly caused by the wind farm's operations. In some cases, plaintiffs may even file such a lawsuit simply because they do not like the aesthetic look of the wind farm. The two common-law causes of action most likely to be asserted by neighbors are the doctrines of private nuisance and trespass to land. However, no Pennsylvania appellate court has yet issued a published decision on the viability of a nuisance or trespass cause of action against a wind farm.

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PRIVATE NUISANCE

An examination of current Pennsylvania law and decisions from other states indicates that a private nuisance cause of action against a wind farm in Pennsylvania may not be viable. A private nuisance is a nontrespassory invasion of another's private use and enjoyment of its land. In Pennsylvania, the invasion must (1) be either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities," and (2) cause the plaintiff "significant harm," as in *Karpiak v. Russo*, 676 A.2d 270, 272 (Pa. Super. Ct. 1996). According to the *Restatement (Second) of Torts*, "significant harm" is that sort of harm "that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."

Pennsylvania courts should not find that noise, vibrations or flicker produced by a wind farm during operation were produced "intentionally and unreasonably." Wind farms obviously do not operate "for the purpose of causing" noise, vibrations or flicker, as in the *Second Restatement*, but rather for the purpose of generating clean energy. Additionally, given the widespread support among many different constituencies for renewable forms of energy, plaintiffs will face an uphill battle in arguing that any such invasion, absent extreme circumstances, is "unreasonable" under Pennsylvania law (such unreasonableness being determined through a balancing of the wind farm's utility to the gravity of its harm). Finally, even plaintiffs who argue that the wind farm's invasion was unintentional will have to establish that the wind farm's conduct was negligent or reckless, or abnormally dangerous, which would be difficult to do.

Cases in other states indicate that nuisance claims based solely on visual impact should not be successful. For example, Texas courts have held that they will not recognize private nuisance causes of action based solely on the aesthetic impact of a wind farm, as in *Ladd v. Silver Star I Power Partners*, No. 11-11-00188-CV, 2013 Tex. App. LEXIS 6065 (Tex. App. 2013), which reaffirmed that Texas law will not uphold standalone visual impact nuisance claims when homeowners do not like the appearance of windmills. *Rankin v. FPL Energy*, 266 S.W.3d 506, 513 (Tex. App. 2008), held that the trial court did not err by instructing the jury to exclude from its consideration the aesthetic impact of the wind farm.

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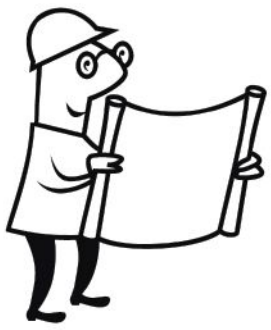

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particularly because such a decision would create an escape hatch for a builder to avoid any liability for latent defects merely because the latent defects arose during subsequent ownership. Such a result would simply be unfair. Rather, in determining the viability of a claim for breach of implied warranty of habitability, courts should consider whether the builder complied with its obligation to construct the property free of defects.

The expansion of the doctrine of breach of implied warranty of habitability, however, is not limitless. A subsequent purchaser must still bring a cause of action for breach of implied warranty of habitability within the 12-year statute of repose.

RIGHTS OF SUBSEQUENT COMMERCIAL PURCHASERS

In December 1994, Premier Hospitality Group-Kittanning, General Hospitality Inc. and Kratsa Corp. purchased a property in Armstrong County, Pa., for the purpose of developing, constructing and operating a hotel. The parties retained Emery & Associates Inc. to construct the hotel. Emery completed construction of the hotel in January 1996. In January 2001, Midmark Star Properties Inc. purchased the hotel. AMCO Insurance Co. insured the hotel.

In December 2008, a fire erupted at the hotel causing approximately $4 million in damages, which AMCO paid to Star. AMCO then brought a cause of action against Emery for negligence, alleging, among other things, that Emery had failed to: (1) comply with the Pennsylvania Fire and Panic Act; (2) install the appropriate draft stopping; (3) install an automatic fire sprinkler system; and (4) construct the hotel in accordance with the East Franklin Township Building Code.

In *AMCO Insurance v. Emery & Associates*, -- F.Supp.2d -- (W.D. Pa. 2013), the court considered Emery's motion for summary judgment wherein Emery argued that it owed no duty to AMCO. The court noted that if no duty exists, then there can be no breach and, thus, no cause of action for negligence. Although the court rejected the notion that Emery owed a duty to AMCO for its alleged statutory violations, the court did find that Emery owed a duty to AMCO under common-law principles.

The court noted that social policy is the most important factor to consider when reconciling the purely legal question of whether a duty exists. The court also considered the relevant factors enumerated by the Pennsylvania Superior Court for deciding whether a duty exists: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of risk imposed and the foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.

While there may not have been a direct relationship between Emery and AMCO, the court found that a contractor should reasonably expect that a commercial property will have multiple owners and that any negligence committed in the construction of the building will affect subsequent purchasers. Moreover, the court found that it was foreseeable that if a contractor failed to comply with the fire code, grave consequences could result. Lastly, the court recognized that public policy strongly favored imposing a duty upon parties that fail to comply with required building codes. As such, the court found that Emery owed a duty to AMCO.

LEVELING THE FIELD

Although the issues of fairness, equality and social policy may not have a place on the competitive sports field, they certainly have a spot in the courtroom when determining the rights of subsequent purchasers against builders. Unless the playing field between a builder and purchaser is leveled, courts will likely continue to impose the burden of properly constructing a property in accordance with all applicable building codes and industry standards on the builder. Absent such compliance, courts will remain willing to protect the rights of property owners to seek retribution from the builder for the cost of repair regardless of whether the owner is the original or subsequent owner. •

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longer garner the benefits from the compromises of the act, while, on the other hand, a new class of plaintiffs could seek remedy through avenues of civil litigation.

General contractors and civil defense firms throughout the state recoiled at the Superior Court's decision and its implications. But, to be clear, since the passage of the act in 1915 and the Supreme Court's decision in *McDonald*, the act has changed in many ways. Amendments to the act obligated all employers in the state to carry workers' compensation insurance coverage or, in the alternative, meet certain requirements to be designated as a self-insured entity. This change significantly reduced the application of the statutory employer defense, yet no change was made to the far-reaching impacts of the defense.

In addition, another amendment to the act created the Uninsured Employer's Guaranty Fund. The UEGF is a fund created by the state that allows an employee to recover workers' compensation benefits when an employer lacks the necessary insurance. While a claim against the UEGF carries some limitations, it does provide coverage for an injured worker where once there was none. Hence, the creation of the UEGF also narrows the need for the statutory employer defense, as a worker injured while working for an employer without workers' compensation insurance, especially on a construction site, would not necessarily need to pursue a claim against the general contractor for workers' compensation benefits. In spite of the limitations associated with a claim against the UEGF for workers' compensation benefits, the UEGF does ensure an outlet for workers' compensation benefits and would also allow for a third-party suit against a general contractor, which would not be entitled to civil immunity. Moreover, although the UEGF has limited funds, the UEGF would be entitled to some reimbursement if the injured worker were to be successful against the general contractor in a civil suit.

The question becomes one of costs and benefits. General contractors argue that construction costs across the state will directly increase as the potential for liability increases. Yet, it is the injured construction worker who is at a disadvantage under the current system. By its very nature, the workers' compensation system limits liability. There is no accounting for pain and suffering or negligence, and there is no jury trial or potential award of compensatory and punitive damages. In *Patton*, the injured plaintiff received an award of $1.5 million, a sum that cannot likely be obtained through a workers' compensation settlement. An injured worker stands to gain much more through a civil suit than a claim under the act. The construction industry is perhaps the only industry in the state that enjoys such broad immunity from civil suit for nondirect employers under the workers' compensation system.

Contractors and civil defense firms may also argue that the Superior Court has overstepped its judicial bounds by modifying the relevant statute — an action that lies squarely in the power of the legislature. But the Superior Court has merely added an interpretive dimension to the statutory employer defense. The Superior Court did not overstep its bounds. It was well within its purview to interpret the body of law surrounding the concept of a statutory employer by issuing a decision that added modern clarification to the statutory employer defense. The decision merely interprets the law in a way that is more responsive to changes in the act since the original conception of a statutory employer was created.

The worlds of law and construction are complementary and consonant. As the skylines of cities are constantly evolving and old buildings are torn down to make way for necessary and modern changes, so too must the law change. With changes in the body of workers' compensation law, the Supreme Court should respond in kind and affirm the decision of the Superior Court. The concept of a statutory employer has become an ancillary defense, yet injured workers are still stifled by its restrictions. The Supreme Court has the opportunity to be the much-needed affirmation, signaling the rightful end — or, at least necessary modification — of the statutory employer defense. •

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Moreover, a plaintiff who "came to the nuisance" (i.e., a plaintiff who purchased property after the wind farm was erected or knew or should have known that the wind farm would be erected) will likely carry a heavier burden in establishing a wind farm's liability in a nuisance claim, as in *Rassier v. Houim*, 488 N.W.2d 635, 638 (N.D. 1992), which applied the common-law "coming to the nuisance" doctrine to bar a resident's private nuisance claim, and *Chase v. Eldred Borough*, 902 A.2d 992, 1001 (Pa. Commw. Ct. 2006), which recognized the common-law "coming to the nuisance" doctrine.

In sum, it is likely to be extremely difficult for plaintiffs to show that a wind farm constructed and operated in compliance with local ordinances and other laws constitutes a private nuisance under the law.

TRESPASS

Similarly, existing case law suggests that plaintiffs are unlikely to be successful in asserting trespass causes of action against wind farms in Pennsylvania. Trespass to land is an intentional tort. A trespass occurs when one intentionally enters land in the possession of another or causes a thing to do so, per the *Second Restatement* and *Bruni v. Exxon*, 52 Pa. D. & C.4th 484, 503 (Pa. Com. Pl. 2001). As such, a plaintiff will need to be able to show that the wind farm caused an "ent[ry]" by some "thing" onto its land, and acted with the "desire to cause the consequences of [its] act" or a "belie[f] those consequences [were] substantially certain to result."

As discussed above, wind farms are built for the purpose of creating energy — not intentionally causing harm to neighbors. Developers go through a permitting process and governmental procedures to build and operate wind farms. As a result, it will likely be difficult for plaintiffs to point to a motive or reason or to offer an explanation as to how a wind farm acted intentionally to enter the plaintiff's land, particularly if the wind farm is in compliance with all applicable laws.

Additionally, the intrusion must be a tangible intrusion onto the plaintiff's land. Unauthorized intangible intrusions (e.g., noise, vibrations or flicker effect) are not likely to constitute a trespass. Indeed, harm caused by nontangible objects can, at best, be considered actionable under the doctrine of nuisance, which is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Adams v. Cleveland-Cliffs Iron*, 602 N.W.2d 215, 222 (Mich. Ct. App. 1999), distinguished

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between trespass and nuisance by stating that "recovery for trespass to land ... is available only upon proof of unauthorized direct and immediate intrusion of a physical, tangible object onto land."

As such, complaints of intangible invasions such as noise, vibrations or flicker from wind farms are not likely to satisfy the elements of a cause of action for trespass. Moreover, the mere threat of an entry onto the plaintiff's land will almost certainly be insufficient to sustain a plaintiff's trespass claim. *Muscarello v. Ogle County Board of Commissioners*, 610 F.3d 416, 425 (7th Cir. 2010), found that a resident's nuisance and trespass claims were not ripe, and the resident's fear of "blade throw" was "too metaphysical."

ENSURING COMPLIANCE

Wind farm developers should conduct detailed noise and vibration studies during the development stage to ensure they are in compliance with all local noise ordinances and are minimizing any potential impact to neighbors from operations. If plaintiffs attorneys in Pennsylvania (like those in other states) file suits against wind farms based on common-law causes of action, courts should not expand such doctrines to allow attacks on wind farms that are in compliance with the law and offer the state an important and growing source of energy to its diverse energy portfolio. •

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sought payment for services rendered and in determining the amount due, OSU deducted the amount paid to the new contractor for completing the lead contractor duties. The contract was executed in 1997, prior to the 1998 statute barring no-damages-for-delay clauses. The court cited several cases from other states that have upheld no-damages-for-delay clauses and stated that "when a contract has an express provision governing a dispute, that provision will be applied; the court will not rewrite the contract to achieve a more equitable result."

In *Cleveland Construction v. Ohio Public Employees Retirement System*, Cleveland Construction Inc. (CCI) was contracted to build portions of a $90 million office tower on East Town Street in downtown Columbus, Ohio. The PERS was found at jury trial to have materially breached its contract with CCI by failing to properly schedule and coordinate the project's various tasks. CCI was awarded $640,298 in damages for the loss of efficiency caused by the PERS's breach. The PERS appealed.

The PERS argued that CCI asserted a claim for acceleration costs, not delay damages, and, therefore, the no-damages-for-delay clause was not applicable. To that argument, the court stated that although the statute did not specifically include the term "acceleration," acceleration costs are associated with project delay and the purpose of the statute was to prevent owners from escaping liability when they have caused a delay. The statute precludes liability for delay; the court went on to hold that the no-damages-for-delay clause in the contract was unenforceable.

VIRGINIA

No-damage-for-delay clauses in the context of public construction projects are statutorily prohibited by Virginia Code § 2.2 4335. That code provision states, "Any provision contained in any public construction contract that purports to waive, release or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy."

In *Blake Construction/Poole & Kent v. Upper Occoquan Sewage Authority*, 266 Va. 564, 587 S.E.2d 711 (2003), the Supreme Court of Virginia applied this statute to a contract dispute between a construction joint venture and public sewage authority. Under the terms of the construction contract, the sewage authority would not be liable to the joint venture for any damages associated with construction delay unless the delay was both unreasonable and a result of bad faith, malice, gross negligence or abandonment on the part of the authority.

Several issues arose during construction, and the joint venture ultimately filed a declaratory judgment action challenging the validity of the clause prohibiting damages for delay based on the language of Virginia Code § 2.2 4335. The public authority argued that the clause was enforceable because a majority of jurisdictions recognize bad faith, malice, gross negligence or abandonment on the part of the project owner as an exception to a clause barring damages for delay. The Supreme Court of Virginia was not persuaded by the public authority's argument:

"Code § 2.2 4335(A) means what it says: 'Any provision ... to waive, release, or extinguish the rights of a contractor ... shall.' The General Assembly's use of the inclusive and comprehensive term 'any' is instructive and mandatory. Without question, the provisions in General Condition 91.L of the contract waive, release and extinguish all unreasonable delay damages available to the contractor, the joint venture, unless the unreasonable delay is coupled with UOSA's bad faith, malice, gross negligence or abandonment of the contract. Such a contract provision contradicts the specific statutory prohibition of Code § 2.2 4335(A). If an expansion or constriction of the blanket prohibition found in Code § 2.2 4335(A) is to be created, that authority must come from the General Assembly and not the parties or the judiciary."

There are no cases from the Supreme Court of Virginia discussing the enforceability of no-damages-for-delay clauses in the context of private construction contracts. However, the U.S. District Court for the Eastern District of Virginia addressed such a clause in a private contract in *McDevitt & Street v. Marriott*, 713 F.Supp. 906 (E.D. Va. 1989) (overruled on other grounds). In that case, a contractor claimed that the project owner was responsible for certain construction delays and therefore liable to the contractor for damages despite a clause in the contract prohibiting such damages. The district court rejected the contractor's argument. While the *McDevitt* case states that no-damages-for-delay clauses in private contracts are enforceable under Virginia law, it can be argued that such clauses yield where the delay is caused by unreasonable, intentional or fraudulent conduct. •

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association is not one of first impression in New Jersey, it is one that is only now coming into the spotlight. The *Port Liberte II* ruling has spread like wildfire through the New Jersey construction defect bar, and bars in Pennsylvania, New York and other states are taking notice. Plaintiffs counsel are now cognizant of the issue and are, at least in theory, requiring that the proper steps be taken to ensure authority to sue has been given by the unit owners. Defense counsel are now reviewing the bylaws and master deeds with greater care and an eye toward strict compliance by the plaintiff association. The *Port Liberte II* ruling has highlighted yet another hurdle that plaintiffs must clear prior to moving forward with litigation. The requirements that must be filled to obtain authority to sue are specific and tedious. Associations and association counsel (who are generally not litigators) have not been shown to have an eye for these details. This is where defendants in construction litigation can make their mark and put the plaintiffs to task virtually before litigation even gets started. Condominium lawsuits are often filed on the eve of the expiration of the statute of limitations. Having a complaint dismissed for lack of standing could very well end the litigation. Litigation for the next phase, *Port Liberte III*, has been filed, so stay tuned. •

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agreements between particular individuals," as the court held in *eToll v. Elias/Savion Advertising*, 811 A.2d 10 (Pa. Super. Ct. 2002).

SPECIALTY SURFACES V. CONTINENTAL (NO COVERAGE)

Specialty Surfaces International v. Continental Casualty, 609 F.3d 223 (3rd Cir. 2010), is a choice-of-law case. Which state's substantive law will be applied to interpret the occurrence requirement? The differences can be considerable. *Gambone* does not provide coverage for damages to the property of third parties arising from faulty workmanship. However, states including New Jersey and California do, as in *Weedo vs. Stone-E-Brick*, where stucco fell on a parked car owned by a third party, and *Geddes & Smith v. St. Paul Mercury Indemnity.*

ROMAN MOSAIC V. LIBERTY MUTUAL (NO COVERAGE)

In *Roman Mosaic and Tile v. Liberty Mutual Insurance*, Civ. Action No. 11-6005, 2012 U.S. Dist. LEXIS 48354 (E.D. Pa. 2012), Roman Mosaic was subcontracted to build shower pans and drains. The subrogee of the owner alleged improper installation, negligence and recklessness and consequent water damage. The court noted that it faced another choice between *Kvaerner* and *Baumhammer*, or, more accurately, *Schuylkill Stone*. The court as much as conceded this case to be indistinguishable from *Schuylkill Stone*, but followed another case from the U.S. District Court for the Eastern District of Pennsylvania (*Westfield Insurance v. Bellevue Holding*) that essentially held that faulty workmanship is faulty workmanship no matter what the context and declined to find an occurrence.

ZURICH V. SHOEMAKER

The county contracted with Shoemaker to construct a jail, and alleged that Shoemaker negligently supervised its subcontractor, enabling the subcontractor to engage in willful misconduct and resulting in damage to both structural elements and personal property of the county jail.

The court found that the case is more like *Kvaerner* than *Baumhammers*. A third party's misconduct is not always an occurrence. Only when it's far less foreseeable than a subcontractor conniving is it an occurrence. Here, the contracting party has brought suit, rather than third parties who are strangers to the matter. Finally, faulty workmanship doesn't qualify. This case falls under *Gambone*.

PRINCIPAL LESSONS

- Whether mistakes on the job site are expected or accidental has little to do with whether the court will find an occurrence.
- The insured will not succeed in a claim against its contractual counterparty, even if the damage spreads far beyond the completed operations zone and even if negligence is alleged.
- A claim by third parties not in contractual privity with the insured may trigger coverage if negligence and breach of industry standards are specifically alleged.
- Negligence and intentional misconduct by the insured's subcontractors are always expected and never accidental.
- Pennsylvania, unlike New Jersey and other states, will not automatically permit faulty workmanship claims as a basis for coverage of tort damages to third parties. However, this limitation may recede with time, and the cases are inconsistent.

Christopher Scufka contributed research to this article. •