

SC93816

IN THE SUPREME COURT OF MISSOURI

LINDA S. LABRAYERE, *et al.*, Appellants,

vs.

BOHR FARMS, LLC, *et al.*, Respondents.

On appeal from the Thirteenth Judicial Circuit Court of Boone County, Missouri

The Honorable Judge Jodie Asel Case No. 11BA-CV04755

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ARGUMENT

INTRODUCTION TO THE ARGUMENT

Respondents take the position throughout their brief that the Legislature had the right to alter the common law cause of action for Private Temporary Nuisance, because the legislature has the right to alter the common law suggesting that this was a lawful and constitutional exercise of that power. Respondents believe this is a complete defense to the Legislature's actions here, but it cannot be. Nuisance at common law has always been a careful balance between the rights of adjoining landowners, with neither being given an advantage over the other:

Generally speaking, our courts have recognized that an owner has the right to the exclusive possession and control of his property, and the right to devote it to such lawful uses as will subserve his interests. *Hoffmann v. Kinealy*, Mo., 389 S.W.2d 745; *Clinic & Hospital, Inc. v. McConnell*, 241 Mo.App. 223, 236 S.W.2d 384. But such rights are not absolutes, for “* * * It is the law that one may not make such an unreasonable, unusual or unnatural use of his property that it substantially impairs the right of another to peacefully enjoy his property.

City of Frederictown v. Osborn, 429 S.W.2d 17 (Mo. App. ED. 1968) (asterisks in original). This balancing of interests was necessary because both landowners have

vested rights in their property and its “bundle of sticks.” Both have the right to use and enjoy their land.

Only when the use of the land by one affects the enjoyment of the land by the other does nuisance law and its balancing of interests come into play. And that common law cause of action has always been rooted more in the common law definitions of property and the various rights owners of land acquire when they buy land, than in the law of remedies. Thus, when the legislature, under the guise of protecting “farming” radically upsets that balance, it alters settled expectations of property owners going back more than two centuries. It is more than just an alteration in a remedy, it is a fundamental shift in the nature of property ownership in Missouri, because anyone living in, or near an agricultural area no longer has the right to enjoy their land. And, if they complain about that inability to enjoy the land, they effectively grant an easement to the tortfeasor that allows them to foul their air and water in perpetuity. Surely the Missouri Constitution and common sense demand better.

I. THE LEGISLATURE CANNOT REDEFINE PROPERTY RIGHTS TO EXCLUDE THE VESTED RIGHT TO ENJOY PROPERTY. (Responds to Respondents' Point I)

There is no doubt the legislature can abrogate the right of a plaintiff to sue for any tort. It could in theory, if it desired, eliminate torts like assault or battery.¹ It could theoretically do this because it can regulate the relationships between its citizens. That is the nature of positive law.² But the Legislature cannot supplant the natural law or redefine the vested rights of property owners under the guise of changing the remedy for a cause of action. When Plaintiffs began occupying their properties, they had the right to the enjoyment of their land so long as that enjoyment did not encroach on the enjoyment of others. *Osborn*, 429 S.W.2d 17. By removing the Plaintiffs' remedies for violations of these rights (by radically altering them so as to make them no remedy at all), the legislature has impaired the vested rights of the property owners.

¹ The public policy of advancing violence by eliminating legal redress for its outcome would likely run afoul of other constitutional principles. *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*, 91 S.Ct. 1999 (1971).

² Jeremy Bentham, a believer in positive law, said that one of the sovereign's first obligations was "to not let people suffer needlessly." Bentham, *Introduction to the Principles of Morals* (1890).

One of the most fundamental rights in the bundle of sticks is the right to exclude others from the land. The right to exclude is so universally held to be a fundamental element of property rights that it falls under the category of interests that the Government cannot take without compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).

When the legislature enacted § 537.296 RSMo. (2012) it removed the right to exclude the particulate-based odors³ and other nuisance conditions of neighboring agricultural operations from the bundle of sticks of every rural landowner. This is an extraconstitutional exercise of governmental power because it removes a remedy for a vested right. And the while the legislature may toy with causes of action, every wrong must have a remedy at law. Art. I, § 14 Mo. Const.

In *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*, 91 S.Ct. 1999 (1971) the issue before the United States Supreme Court was whether courts had an inherent power under the Fourth Amendment to provide for damages for the violation of constitutional rights in the absence of a federal statute granting the right to pursue those damages. After finding no adequate state remedy available the Supreme Court said this:

That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have

³ All odor is particulate. See Footnote 30, Appellants' brief.

been regarded as the ordinary remedy for an invasion of personal interests in liberty. *See Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932)....

Id. at 395-96. In allowing the plaintiff to state a claim for damages, the Supreme Court recognized that if a person had a vested right, there must be a remedy for that right looking back to perhaps the most famous Supreme Court case of all:

‘The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.’ *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

Id. at 397.

Here the Fifth Amendment of the U.S. Constitution and Art. I, § 10 Mo. Const., say that a person may not be deprived of property without due process of law, and the Missouri Constitution says that no person shall be denied the fruits of his labor, Art. I, § 2 Mo. Const, and that private land shall not be taken for public use without compensation, and shall never be taken for private use. Art. I, § 28, Mo. Const. Yet, if this law passes constitutional muster – if the legislature can redefine the remedy so as to abrogate the right to the use and enjoyment of property entirely -- then where are the limits on legislative power to be found? May the legislature require a property owner to give up other property rights without compensation? In short, the right to abrogate or change the common law does have constitutional limits as this Court announced in *Watts v. Lester E. Cox*

Med. Ctr., 376 S.W.3d 633, (Mo. banc 2012) (could not eliminate right to jury trial in common law action).

II. RESPONDENTS, BY NOT MOUNTING A SUBSTANTIAL CONTEST, ESSENTIALLY CONCEDE THAT § 537.296 SUBSECTIONS 3-5 ARE UNCONSTITUTIONAL. THE STATUTORY SCHEME IS NOT SEVERABLE AND THE STATUTE FAILS.

(Reply to Respondents' Point II)

By suggesting that their motion for summary judgment was not based on subsections 3 through 5, Respondents ignore the fact that their affirmative defenses as pleaded were dependent on the entire statute, and overlook the cross-dependence of the statutory scheme. Section 2 depends on the definitions in Section 1, as do sections 3-5. More importantly, Section 5 impermissibly restricts standing in violation of separation of powers and ties directly back to who may sue under Section 2. Thus Sections 1 and 5 are not severable from Section 2, and since Section 5 determines who may pursue the remedy, all sections must fail. This is because the statute is dependent on its definitions and standing is always a threshold question. Therefore Section 2 is “so essentially and inseparably connected with, and so dependent upon” Sections 1 and 5 “that it cannot be presumed the legislature would have enacted the valid provisions without [them]” § 1.140 RSMo. (2013).

Subsection 2 represents a wholesale change to private temporary nuisance law by completely eliminating damages for impairment of quality of life and loss of use and enjoyment of property, which where heretofore required. Subsection 3

mandates that a successful successive action for private temporary nuisance against the same Defendant (or Defendants' successor) means that the conduct of Defendant (or Defendants' successor) shall be deemed a permanent nuisance and that only damages for permanent nuisance would be available. Subsection 3, by limiting subsequent claims for temporary nuisance, and converting them to permanent nuisance claims, is clearly inextricably tied to subsection 2, such that if subsection 3 is invalidated, so must be subsection 2.

Subsection 4 mandates that if a defendant demonstrates a good faith effort to abate a nuisance condition, the nuisance shall not be deemed capable of abatement, and therefore, must be permanent.⁴ In practicality, what this subsection means is that if a defendant shows a "good faith" effort⁵ to abate a nuisance, the nuisance is deemed permanent (even if it is actually temporary, as Missouri courts have routinely found). *Owens v. ContiGroup Co.*, 344 S.W.3d 717 (Mo. Ct. App. WD 2011) ("Here, the use of the land on which the hog operation is located is subject to change and the smell emanating therefrom is the result of the manner in which the land is used and not an inherent quality of the property itself."). A

⁴ As Ken Blanchard says "trying is just a noisy way of not doing something." K. Blanchard *Smart Leadership*, 111 (2010). "Trying" to abate something is not the same thing as a finding that something is not abatable.

⁵ Although providing definitions for other terms in the statute, it provides no guidance on what constitutes a "good faith" effort at abatement.

party injured by the continued temporary nuisance thereafter is denied all compensation for such harm. Therefore, subsection 4, like 3 and 5, is inextricably tied to subsection 2, such that if subsection 4 is invalidated, so must be subsection 2.

Respondents do not even attempt to rescue the legislative determination of standing (§ 5) because it is beyond hope; they simply seek to keep this Court from looking behind the curtain. The Court should not oblige.

Section 537.296 as a whole represents a calculated and concerted effort by its proponents to systematically eliminate the fundamental vested property rights of select Missourians in their use and enjoyment of property. It cannot be presumed that the legislature would have enacted any of its interconnected subsections if any one of them were held to be void as unconstitutional.

Moreover, the trial Court's Order granting summary judgment explicitly states it "declines to find 537.296 RSMo. unconstitutional" without limiting its finding to subsection 2. (LF580)

III. § 537.296 IS UNCONSTITUTIONAL (Reply to Respondents' Point III)

A. TAKINGS ANALYSIS

1. *Use and Enjoyment are Fundamental Rights and The Elimination of a Remedy Makes This a Takings Case.*

Property is more than “bundle of sticks” it is also a bundle of expectations. Among those expectations is the expectation that one will be able to enjoy their property without the omnipresent stench of hog feces and the accompanying horde of disease-carrying flies that result from massive hog farming operations.

Property is defined as including not only ownership and possession but also the right of use and enjoyment for lawful purposes. In fact, the substantive value of property lies in its use. It follows that: the constitutional guaranty of protection for all private property extends equally to the enjoyment and possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution.

Hoffman v. Kinealy, 389 S.W. 2d 745, 752-753 (Mo. banc 1965). (emphasis added).

Property rights consist of intangible things and when a person “is deprived of any of those rights, he is to that extent deprived of his property;” “whenever the

lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property, is *pro tanto*, taken, and he is entitled to compensation.” *State ex rel. Oliver Cadillac Co. v. Christopher*, 317 Mo. 1179, 1190 (Mo. 1927). Missouri has always recognized that the rights of property owners to the use and enjoyment are essential to what constitutes property:

The constitutional guaranty of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the government, or by its authority with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution.

Ex parte Davison, 321 Mo. 370. 375 (Mo. 1928) (citing *Tiedeman’s Limitation of Police Powers*, sec. 122).

2. *Allowing The Creation of a Nuisance Interferes with Appellants’ Property Rights.*

Just as the pork industry dominated the Missouri Legislature and obtained the relief it wanted, so too did it succeed, at least temporarily, in getting this kind of special legislation passed in Iowa. That legislation, like the legislation here, effectively redefined property rights for rural Iowans. The Iowa Supreme Court did not sit idly by and allow the legislature to take away the vested rights of its citizens:

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

Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 319 (Iowa 1998) (citing 66 C.J.S. *Nuisances* § 7, at 738 (1950)). And Missouri courts have always held that any injury to the property of an individual that deprives the owner of the ordinary use of it, is equivalent to a taking and entitles him to compensation. *Tegeler v. Kansas City*, 95 Mo. App. 162, 165 (Mo. App. 1902). This tracks closely with federal constitutional precedent under the Fifth Amendment:

We deem the true rule, under the Fifth Amendment, as under state constitutions containing a similar prohibition to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.

Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1913) (emphasis added). Similarly, grants of authority and privileges to corporate bodies may not be “invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property....” *Richards*, 233 U.S. at 555-556 (citing *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883)).

In evaluating these property rights, this Court should give credence to the fact that property rights are enshrined explicitly in the U.S. Constitution:

This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer’s fields so that they cannot be cultivated or pollute the bleacher’s stream so that his fabrics are stained, or fill one’s dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner’s property. In either instance has the owner any less of material things that he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is a taking of his property in a constitutional sense; of course,

mere statutory authority will not avail for such an interference with private property.

Pennsylvania R. Co. v. Angel, 41 N.J. Eq. 316, 329 (1886).⁶ The case *Richards* relies upon, *Fifth Baptist*, goes even further. It says that interference with use and enjoyment or property requires compensation –

It admits, indeed of grave doubt whether congress could authorize the company to occupy and use any premises within the city limits in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent that would amount to an entire deprivation of its use and enjoyment, without compensation to the owner.

Baltimore & Potomac R.R. v. Fifth Baptist Church, 108 U.S. 317, 331-332 (1883).

⁶ Cited with approval in *Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1913).

3. *There is No “Just Compensation” with Loss of Rental Value.*

Just as the loss of rental value here is asserted to be “fair compensation,” the cases reject it as an index of fair compensation for loss of use and enjoyment of property. Rental value bears no relation to the damages a person sustains for loss of use and enjoyment; they are exclusively within the province of the enlightened conscience of the jury. In *Baltimore & Potomac R.R. v. Fifth Baptist Church*, 108 U.S. 317, 335 (1883) the court was confronted by a nuisance lawsuit brought against a railroad. The railroad answered contending that it was authorized by Congress and that its nuisance was immunized from civil liability in much the same way that the Defendants here argue. The Supreme Court disagreed, and as to damages for the church, found:

But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure.

Id. at 108 U.S. at 335. (emphasis added).

This federal precedent also tracks well with Missouri law which holds that the loss of rental value is “arbitrary and fanciful” and is not an accurate estimate of

the damages sustained by annoyance and discomfort of a nuisance. *McCracken v. Swift & Co.*, 212 Mo. App. 558, 571-572 (1923). The Missouri Supreme Court has expressly rejected the notion that quality of life damages in a temporary nuisance case may be reflected through loss of rental value, stating as follows:

The appellant's contention that the plaintiff's damage is the consequent loss in the rental value of his premises, if any, entirely misses the mark. Plaintiff did not lose the use of his dwelling house, nor is he suing for loss of its rental value; he claims damages for the violation of his right to the comfortable enjoyment of his home. The rule . . . that the measure of damages in an action of this character is the loss in the rental value, is unsound and out of harmony with the controlling decisions in this and other jurisdictions.

McCracken v. Swift & Co., 265 S.W. 91, 92 (Mo. 1924). (emphasis added). This is not only case law, it's common sense. The loss of the rental value presumes that a person affected by a nuisance will pick up and move from his home – land perhaps held by the same family for generations – and obtain an abode distant from the nuisance, and will thereafter rent the property moved from to someone without olfactory sensation. Does the Legislature presume to uproot families that have lived in the same space for generations, give them the lost rental value as “fair

compensation,” and do so in order to accommodate industrialized hog farming? How can this be logical, rational or constitutional?

4. *Penn Central Does Not Apply.*

Like the Respondents here, the defendants in *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998) also argued that the statute providing limited statutory immunity to nuisance suits for agricultural operations should be subject to the takings analysis in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), an analysis that was expressly rejected by the Iowa Supreme Court. *Bormann* is instructive because it relied on the impairment of the use and enjoyment of property as a taking, and refused to apply *Penn Central* to its analysis. It defined a taking this way:

[A] “taking” does not necessarily mean the appropriation of the fee.

It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof. *Phelps v. Board of Supervisors of County of Muscatine*, 211 N.W.2d 274, 276 (Iowa 1973) (holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than previously was a “taking” within the meaning of the Iowa Constitution).

Bormann, 584 N.W.2d at 321. The *Bormann* analysis is the proper evaluation here, and is commended to the Court given the similarity to the issues in this case.

However, even if the Court is required to conduct the *Penn Central* balancing test as to the takings authorized by 537.296(2) the analysis is confined to the use and enjoyment of property, not to the property rights of the plaintiffs generally. *See, e.g., Bormann*, 584 N.W.2d at 313.

5. *The Taking At Issue Is A Private Taking, Not A Public Taking.*

There is a significant difference between the power of eminent domain *Annbar Assoc. v. West Side Redevelopment Corp.*, 397 S.W.2d 635(Mo. banc 1965) where the state's power is used to take private property for a hotel and convention center with obvious economic benefits for the entire community, and the taking at issue here. Respondents claim that this bill generally promotes agriculture. (Resp. Br. at 24-25). But, if the effect of the bill is to make it impossible for family farmers to stomach staying on their land, it penalizes and detracts from family farming. As set forth in the evidence presented to the trial court (LF0493) the net impact on agricultural employment from CAFOs is a fifty percent (50%) reduction "brought about by the movement from diversified family hog farms to CAFOs." *Id.* As the unchallenged expert evidence shows, "CAFOs have generated fewer economic benefits with greater ecological and social costs in Missouri than it states better suited for CAFOs. This disadvantage is systemic and cannot be erased by state legislation preferential to CAFOs." *Id.* Thus the evidence – derived from USDA statistics by a University of Missouri economist – shows that there is no general economic benefit to Missouri, but in fact, a net loss to the community in terms of ecological damage and disruption of the social

network of family farming. There is no evidentiary support anywhere in the record that suggests that this is “beneficial to the ‘general welfare of the community,’” as suggested by Respondents. (Resp. Br. at 27)

More importantly, to suggest that this constitutes a public benefit is to deny the uncontroverted evidence before the trial court and this Court. Summary judgment is founded on evidence, and there simply is no evidence that the legislation here promoted a public taking. The evidence was to the contrary. The bill was passed to protect private industrialized CAFO operations and benefits only a private purpose.

B. EQUAL PROTECTION ANALYSIS

1. *Violation of Mo. Const. Art. I, Sec. II.*

In *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173 (Iowa 2004), the Iowa Supreme Court determined that immunity to nuisance lawsuits violated Iowa’s Equal Protection provision, Art. I, Sec. 1 of the Iowa Constitution, which provided as follows:

All men are, by nature free and equal, and have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Gacke, 684 N.W.2d at 175-176.

The Iowa Supreme Court determined that the plaintiffs desire to enjoy their home free from noxious odors was a right protected by article I, section 1 of the

Iowa Constitution. *Id.* at 177. In determining that the exercise of the police powers of the State of Iowa was not “reasonably necessary” or “unduly oppressive,” the Iowa Supreme Court noted that in analyzing these situations in “substantive due process analysis” it is important to consider whether the effect of a statute is to ‘give an injured person, in essence, no right of recovery.’” *Id.* at 178-179.

The Iowa Supreme Court found that the statute was unconstitutional because it made the property owners subject to the harms without any corresponding benefit and noted that they did not move to the nuisance; the legislature used the police purpose not for the traditional purpose of insuring that individual citizens use their property with due regard to the personal and property rights of others, but the manufacturers were give the right to use their property *without* due regard for the rights of their neighbors. *Gacke*, 684 N.W.2d at 179. Under all the circumstances, the statute was held to be unreasonable and oppressive in violation of article I, section 1 of the Iowa Constitution. *Id.*

Respondents argue that Section 537.296 does not involve a fundamental right. Respondents essentially argue that persons living near agricultural sites have no right to use and enjoy property. In doing so, Respondents ignore the plain language contained in the United States and Missouri Constitutions regarding the nature of property rights.⁷ In addition, Respondents dance around Missouri and

⁷ U.S. CONST. amend V.; U.S. CONST. amend XIV, § 1.; MO. CONST. art I, § 2

United States Supreme Court law which clearly hold that the right to enjoy property is a fundamental right. *Stone v. City of Jefferson*, 293 S.W. 780, 782 (Mo. 1927). Respondents ignore the plain language of *Stone* which unequivocally says that “the right to acquire, hold, enjoy, and dispose of property, real or personal,” is fundamental. *Id.*

Respondents further argue that because *O’Brien v. Ash*, 169 Mo. 283 (1902) is not an equal protection case, its language regarding property rights should be disregarded. However, the plain language of *O’Brien* is very instructive as to the issues presented in this appeal. In *O’Brien*, this Court stated that the right to own and hold property was a natural right and “when acquired under existing law, becomes a vested right, and not subject to be defeated by subsequent legislation.” *O’Brien v. Ash*, 169 Mo. 283, 69 S.W. 8, 11 (1902). The right to use and enjoy property is therefore a fundamental right and the strict scrutiny analysis for equal protection must apply.

Respondents also argue that Appellants did not raise their suspect class argument at the trial court level. Plaintiffs’ Suggestions in Opposition raised the issue of suspect class explicitly. (LF0431-32)

In this instance, rural dwellers that happen to be unfortunate enough to live near agricultural sites that maintain abatable nuisances through continual unreasonable uses of land have effectively been marginalized as a suspect class.

The legislation at issue was clearly promulgated to benefit large mega-farm operations at the expense of rural dwellers.⁸ Because the legislation at issue involves both fundamental rights, and burdens a suspect class, or both, strict scrutiny should apply.

Respondents' suggestion that the state's interest in promoting agriculture is enough to survive strict scrutiny and that subsection 2 is narrowly tailored to achieve this goal is just wrong. To the contrary, while Appellants concede that promoting agriculture is a worthy goal (many persons to have brought agricultural

⁸ Respondents state the basis for 537.296 was to protect agriculture from certain costs associated with nuisance lawsuits. (Resp. Br. at 34). However, Missouri already had a stout "right to farm" law (537.295 RSMo.) and jury instruction (MAI 22.06) which fairly balanced the interests of all parties. Moreover, Amici Curiae "Missouri Farmers" assert, without authority, that the law is necessary to prevent frivolous lawsuits (which are already regulated under 537.295 and 514.205.1) and for Missouri to remain competitive with neighboring states. (Amici Br. at 17). However, none of Missouri's neighboring states, nor any other state to Appellants' knowledge, have ever passed such draconian legislation and had it upheld. Further, Iowa, which currently has far more lax protection against agricultural nuisance lawsuits than Missouri, even before 537.296, remains the number 1 hog producing state in the country. (Amici Br. at A89).

nuisance lawsuits are farmers themselves), the statute is anything but narrowly tailored, as it completely abrogates centuries of precedent and eliminates a certain group's fundamental rights and effects a taking of property without just compensation.

Subsection 5 completely eliminates standing for non-owning occupiers of land, even if they are damaged by an agricultural nuisance in the same way as an owner.⁹ That is not even "narrow tailoring" for a tent-maker.¹⁰ As such, mothers, fathers, grandparents, grandchildren, and other Missourians that may not technically own property, but are nonetheless seriously harmed, simply have no remedy under the law. The broad swipe of the fundamental rights and legal remedies of rural citizens of Missouri and simultaneous carte blanche conferral of authority to perpetrate an abatable nuisance is the antithesis of narrowly tailored.

Missouri nuisance law is already narrowly tailored. See Section I, *supra*.

C. SUBSTANTIVE DUE PROCESS ANALYSIS

1. *Section 537.296 Violates Substantive Due Process.*

⁹ By eliminating standing for such persons, even if the nuisance caused serious physical harm in addition to the deprivation of use and enjoyment of property, such individuals simply would have no remedy.

¹⁰ Ironically, nothing in the statute prevents non-owners from being sued for nuisance.

Respondents agree that substantive due process protects rights that are “deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed” (*Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006)) yet then again assert, without authority, that the right to use and enjoy property is not a fundamental right. For all of the reasons stated herein, the rights at issue here could not be more fundamental. Further, although the instances of violations of substantive due process may be rare, the unprecedented and egregious action by the legislature in authorizing such a drastic impairment of fundamental property rights is even rarer and should not be tolerated. For the same reasons argued above, Section 537.296 is not narrowly tailored and therefore cannot survive the strict scrutiny test.

D. STANDING ANALYSIS

As demonstrated above, Respondents did not challenge Appellants’ standing analysis, but instead argue that the issue is not before the Court. Because standing is a threshold determination, and because it is a judicial function, it is before this Court whether their motion for summary judgment is based upon it or not. See Point II, *supra*.

E. OPEN COURTS ANALYSIS

1. *Section 537.296 Violates Open Courts*

Respondents generally argue that because the legislature generally has the power to make substantive changes to the law, Section 537.296 does not violate

open courts. Article I, § 14 of the Missouri Constitution's Bill of Rights provides for open access to courts:

That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

Mo. Const. Art. I, § 14 (2012).

Respondents' argument is fundamentally flawed because it fails to recognize how the provisions of Section 537.296 impermissibly and artificially change the very nature of temporary nuisance. This artificial construction necessarily means that an aggrieved party will suffer harms from a temporary nuisance and be afforded no adequate remedy at law or in equity.

In the case of temporary nuisance, the defendant is legally obligated to terminate the injury and each day it continues is considered "a repetition of the original wrong, and successive actions accrue as to each injury[.]" *Owens v. Contigroup Companies*, 344 S.W.3d 717, 728 (Mo. App. W.D. 2011). In contrast to temporary nuisance, "[t]he effect of characterizing a nuisance as permanent is to give the defendant, because of his wrongful act, the right to continue the wrong; a right equivalent to an easement." *Cook v. De Soto Fuels, Inc.*, 169 S.W.3d 94, 107 (Mo. Ct. App. ED 2005). The measure for damages for a permanent nuisance is the "difference in the land's market value immediately before and immediately after the injury." *Bruns v. Green*, 157 S.W.3d 368 (Mo. App. E.D. 2005).

Respondents agree that hog farms must constitute a temporary nuisance citing *Owens*. (Resp. Br. at 16). However, Section 537.296 impermissibly and artificially converts what is actually a temporary nuisance to permanent nuisance. The plain language of subsection 3 indicates that if a person brings a subsequent temporary nuisance claim against the same agricultural defendant and the activity is deemed a nuisance, the nuisance shall therefore be considered permanent. And under subsection 4 a temporary nuisance claim can be converted to a permanent nuisance claim simply by showing a “good faith” attempt at abatement. § 537.296 RSMo. (2012).

The language of subsection 537.296.4 invokes serious problems for any temporary nuisance case. Missouri law says a nuisance not capable of abatement is deemed permanent. Therefore, even though agricultural nuisances are temporary by their very nature, and capable of abatement, upon a showing of good faith, the nuisance will artificially be deemed permanent. In such an instance, an aggrieved party would have one only have one lawsuit to recover damages for the condition now artificially deemed a permanent nuisance, even though capable of abatement. However, because the nature of the nuisance remains temporary, when the temporary nuisance conditions continue to be maintained, an aggrieved party

would continue to be injured yet have no right of redress for this subsequent harm. (“[S]uccessive actions accrue as to each injury[.]” *Owens*, 344 S.W.3d at 728.¹¹)

2. *An Analogy to Battery.*

An analogy to the tort of battery is appropriate. What the legislature has done is allow a remedy for the first punch a person throws, irrespective of the degree or amount of damage caused. Thereafter, repeated punches occasion no additional liability. While this analogy may be imperfect, it shows the folly of the enactment. By artificially deeming a clear temporary nuisance as permanent, the statute removes the defendant’s legal obligation to terminate the nuisance. Such a lack of obligation necessarily allows a defendant to continue to create a nuisance and harm others, yet be immune for any liability for damages.

To that end, by completely denying standing to non-owning occupiers of land to bring temporary nuisance claims, Section 537.296.5 also violates open courts (and Equal Protection, as argued above) by allowing harms without a remedy.

F. SPECIAL LAWS ANALYSIS

1. *Appellants Preserved The Article I, § 2 Special Laws Argument.*

¹¹ Curiously, despite the plain language of the statute, Respondents assert that “maintaining a nuisance was unlawful before the enactment of subsection 537.296.2 and remains unlawful today.” (Resp. Br. at 24).

Respondents claim that Appellants never raised the special laws argument at the trial court. (Resp. Br. at 39). Appellants would direct this Court to LF0440-441 where the argument was raised directly and explicitly. Although Appellants have put more meat on the bones of the argument before this Court, given the gravity of the constitutional challenge, Respondents tip their hand to the fact that they view the argument as biting by suggesting otherwise.¹²

2. *Improper Classification*

Respondents believe that this law classifies by geography because it applies to persons with property adjacent to industrial mega-farming operations. (Resp. Br. at 39-40). But in fact, it does not contain geographical terms; it provides a classification on the basis of the character of the land and the class of the tortfeasor. Respondents acknowledge, as they must, that *Jefferson Co. Fire. Prot. Dist. Ass'n v. Blunt*, 205 S.W.3d 866 (Mo. banc 2006) holds that a law is special if it targets one county and excludes similar counties). But they miss the point. Here the statute classifies on the basis of who and where the tortfeasor is. It is not close-ended because any person or entity may join the class of tortfeasors

¹² Respondents assert the same waiver argument with respect to Appellants' Open Courts argument. The same analysis applies. LF0438-441.

protected simply by claiming that their operation is primarily agricultural, irrespective of whether the nuisance emanates from that use or not¹³.

3. *Judicial Notice Proper*

Respondents also chide Appellants for using the Joplin Globe article “as their sole support” for the special laws argument. (Resp. Br. at 41). This is simply not accurate. While Judge Blackmar did pen a screed with regard to the use of newspaper clippings “as evidence,” *Wenzlaff v. Lawton*, 654 S.W.2d 215 (Mo. banc 1983), that was in the context of the statements made in support of an initiative petition amending the state constitution. Statements of legislators made about legislation and published in newspapers of general circulation must be called to the attention of a court if there is no other legislative history. As this Court said:

So there are many classes of things of which the courts take judicial notice, or have judicial knowledge. Some of these are so self-

¹³ The statute purports to apply “where the alleged nuisance emanates from property primarily used for crop or animal production purposes...” Thus if a landfill operator were to close the landfill and plant tomatoes – surely an agricultural use – and a nuisance arose with respect to runoff from the closed landfill, which could be abated, the statute would grant this tortfeasor immunity solely on the basis of the then-existing use of the property rather than the use which actually produced the nuisance.

evident as to be ever present in the mind, so that they naturally enter into a decision of any point to which they have application, as, for instance, knowledge of the order of succeeding days of the week or months or seasons of the year, of the familiar laws of nature, etc. But there are other things, which, from motives of policy, the law requires a court to judicially notice, or have knowledge of, but of which, in reality, it is ignorant. It is the duty of a litigant desiring the advantage of that knowledge to suggest it to the court and to assist the court in examining at the proper sources for actual information.

Christy v. Wabash R. Co., 195 Mo. App. 232, 191 S.W. 241, 245 (1916). Perhaps as importantly, the support for the finding of the specialness of the law was derived from the terms of the statute itself as well as the case law. The newspaper article merely illuminated the motives of the bill's sponsors and its well-funded proponents.

G. NEGLIGENCE ANALYSIS

Summary judgment must be based on facts asserted showing right to judgment as a matter of law. The facts set out at LF150-51 do not address in any respect the "lack of duty" argument advanced at the trial court. In short, the summary judgment based on a failure of a negligence cause of action is completely unsupported by facts showing a right to a judgment as a matter of law. Respondents claim no additional facts were necessary, but to show that there was

no duty arising from negligence, some factual matter had to be articulated showing that lack of duty. Moreover, a defendant may be liable for damage to the property of others, under both negligence and nuisance theories in Missouri, and neither cause of action is exclusive of the other. *See Rychnovsky v. Cole*, 119 S.W.3d 204, 210 (Mo. App. W.D. 2003). Appellants stand on their opening brief in this regard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief was served in full compliance with all rules regarding service of briefs in the Supreme Court, including the mailing of service copies to the Respondent upon acceptance by this Court of the electronic brief.

/s/ Charles F. Speer

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) and, in that the brief contains 7,643 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

/s/ Charles F. Speer