

19-1019

IN THE

United States Court of Appeals for the Fourth Circuit

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

Plaintiffs-Appellees,

and

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

Plaintiffs,

v.

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

On Appeal from The United States District Court for The
Eastern District Of North Carolina, Civil Case No. 7:14-CV-00180

**AMICI CURIAE BRIEF FOR THE NORTH CAROLINA
ENVIRONMENTAL JUSTICE NETWORK AND THE RURAL
EMPOWERMENT ASSOCIATION FOR COMMUNITY HELP
IN SUPPORT OF PLAINTIFF-APPELLEES AND AFFIRMANCE**

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Empowerment Association for Community Help*

May 6, 2019

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

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: Elizabeth Haddix

Date: May 6, 2019

Counsel for: NC Environmental Justice Network

CERTIFICATE OF SERVICE

I certify that on May 6, 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:

Elizabeth Haddix
(signature)

May 6, 2019
(date)

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Date: May 6, 2019

Counsel for: REACH

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INTERESTS OF AMICI

The North Carolina Environmental Justice Network (“NCEJN”) is a non-profit, grassroots, African American-led coalition of organizations that work with low income communities and people of color on climate, environmental, racial, and social injustice issues across the state. NCEJN is dedicated to community-driven solutions, democratic participation, and economic and political equity. NCEJN works to insure environmental justice and promotes economic alternatives that contribute to the development of environmentally safe livelihoods. Its mission is to ensure that environmental policies are based on mutual respect and justice for all peoples, free from illegal discrimination or bias.

One of NCEJN’s primary areas of focus is the adverse impact on health, quality of life, and racial equity imposed by industrial hog operations (“IHOs”) on low income communities and communities of color. NCEJN devotes significant time and resources to document and address the racially disparate effects of IHOs and the lagoon and sprayfield system of waste disposal on neighboring residents—such as odor, flies and other vermin, degraded air and water quality, and harms to mental and physical health.

The Rural Empowerment Association for Community Help (“REACH”) is a non-profit community advocacy organization based in Duplin County, North Carolina. Founded in 2002 by Devon Hall and Dothula Baron-Hall in the

aftermath of Hurricane Floyd, REACH provides services to empower low-income families and people of color. A substantial and critical component of this work involves collaborating closely with scientists and public health researchers to study the health impacts on residents from IHOs in Duplin, Sampson, Bladen and Pender Counties. REACH is a member of NCEJN.

REACH's environmental justice advocacy empowers residents to conduct community-based participatory research, or "citizen science" (e.g., water or air sampling performed under strict quality assurance protocols and in collaboration with environmental scientists, accompanied by daily logs of physical symptoms and environmental conditions). REACH has partnered with scientists at UNC-Chapel Hill and Johns Hopkins University to ensure affected residents gain knowledge about what is in their air and water and how it may affect their health, and thereby empower them to hold individuals, corporations and governmental institutions accountable for decisions that harm their community.

Amici have engaged in direct advocacy, public education, and administrative and legislative efforts targeting the racially discriminatory impacts of IHOs, and particularly the lagoon and sprayfield system, for more than a decade. *Amici* have attended numerous legislative sessions, testified at committee hearings, and helped affected communities present their concerns

to their elected representatives. In 2007, NCEJN led a 51-hour vigil at the state legislature to increase public awareness of the harms of the lagoon and sprayfield system and to persuade elected officials to adopt measures to protect communities. In 2015 they helped organize a mass rally to call attention to the State's failure to protect communities and the environment from pollution from IHOs. More recently, *Amici* engaged with elected officials regarding House Bill 467 and Senate Bill 711, which were introduced in direct reaction to the nuisance litigation at issue in this case. JA 2232-34; 2245-49. These amendments to North Carolina's longstanding nuisance law effectively block access to the courts by neighbors harmed by IHOs, unfairly depriving residents of their property rights.

Amici are uniquely familiar with the facts regarding the hog industry in their communities, the historical and current regulatory regime and its deficiencies, and the pork industry's lobbying power and political influence. *Amici* have a critical interest in this case and in holding the pork industry accountable for the environmental, racial, and quality of life adversities its operations impose on nearby residents. Despite their efforts and the overwhelming anecdotal, scientific, and environmental evidence of the discriminatory harms on surrounding communities, neither the industry nor the state administrators responsible for regulating it have taken the necessary

steps to address the adverse effects. Only the court, through these nuisance claims filed by ordinary citizens, has successfully demanded accountability.

Pursuant to Rule 29(a)(4)(E), counsel affirms that no party, party's counsel, or other third party authored this brief in whole or in part or contributed money to fund its preparation or submission.

ARGUMENT

I. The trial court correctly found that Plaintiffs met their statutory burden when it allowed the jury to consider whether to award punitive damages

To recover punitive damages under North Carolina law, a plaintiff must prove that the defendant is liable for compensatory damages and that one of three possible aggravating factors— "Fraud," "Malice," or "Willful or wanton conduct" — was present and related to the injury for which compensatory damages were awarded. N.C. Gen. Stat. § 1D-15 (2017). "Willful or wanton conduct" is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." *Vandevender v. Blue Ridge of Raleigh, LLC*, 2018 U.S. App. LEXIS 24196, *6–7 (quoting N.C. Gen. Stat. § 1D-5(7)). Proof must be by clear and convincing evidence, and a court reviewing an award of punitive damages must review the evidence under that standard. *Id.* (citing *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640, 643 (2009)).

Punitive damages may be awarded against a corporation only if "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15.

Defendant claims there was insufficient evidence to submit the question of willful or wanton conduct to the jury. Specifically, Defendant asserts that it is insulated from punitive damages because the lagoon and sprayfield system is not a nuisance *per se*, that it took steps to minimize the operation's nuisance impacts on neighbors; that the lagoon and sprayfield system has been "grandfathered" by the state legislature; and that it "did not know" its operation was creating a nuisance. Def. Br. 18.

A. The fact that Defendant's operation was a nuisance *per accidens* rather than a nuisance *per se* has no bearing on punitive damages liability

"Private nuisances are either nuisances *per se* or nuisances *per accidens*." *Elliott v. Muehlbach*, 173 N.C. App. 709, 711, 620 S.E.2d 266, 269 (2005). A nuisance *per se* is always a nuisance under any circumstances, regardless of location or surroundings, while a nuisance *per accidens* becomes a nuisance by reason of its location or manner in which it is constructed, maintained, or operated. *Id.* at 711–12, 620 S.E.2d at 269. In *Moody v. Lundy Packing Co.*, 7 N.C. App. 463, 172 S.E.2d 905 (1970), the court refused to enjoin the construction of a

hog buying facility because the use was permitted by law and therefore not a nuisance *per se*. The court was clear, however, that its decision did not foreclose the possibility that once constructed, the facility could become a nuisance *per accidens*. *Id.* at 468, 172 S.E.2d at 909.

Here, Plaintiffs never alleged that Defendant's actions constituted a nuisance *per se*. They alleged and proved nuisance *per accidens* with substantial evidence that Defendant's operations unreasonably and substantially interfered with Plaintiffs' use and enjoyment of their property, causing substantial injury. That the operation was not a nuisance *per se* has no bearing on Defendant's liability for punitive damages.

Nor does compliance with existing law or regulation "preclude such an award [of punitive damages] if the evidence shows willful misconduct, malice, fraud, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Ogelthorpe Power Corp. v. Estate of Forrister*, 382 Ga. App. 693, 705, 774 S.E.2d 755, 765 (2015) (internal citations omitted). Even if there is alleged compliance with regulations, the question for the court is whether there is other evidence showing culpable behavior by the defendant. *Id.* Plaintiffs presented substantial evidence of such behavior, as summarized in Section D, *infra*.

B. Defendant's "proactive" actions did not address neighbors' nuisance complaints

Defendant claims that it took proactive measures at Kinlaw Farm to protect neighboring residents from the nuisance harms, and that such measures repudiate the punitive damages claim. Def. Br. 22–23. This argument is inconsistent with Defendant's claims that it had no notice of any nuisance. It is further contradicted by Defendant's attempts to undermine and suppress any evidence related to nuisance impacts of IHOs or the lagoon and sprayfield system (discussed in Section D, *infra*).

Defendant's reliance on *Faris v. SFX Entm't, Inc.*, 3:04-CV-08 2006 U.S. Dist. LEXIS 89918 (W.D.N.C. Dec 12, 2006) is misplaced. That case stands for the proposition that willful or wanton conduct cannot be shown where the defendant acknowledged a potential danger or harm, then undertook specific steps to address that harm, even if those steps were ultimately unsuccessful ("Lynch took steps that he thought would correct the problem. That [sic] fact that he was wrong in that assessment does not establish a conscious and intentional disregard to the rights and safety of others." *Id.* at *24).

There is no evidence that Defendant acknowledged the nuisance impacts caused by its operations. To the contrary, even in the face of decades of research, complaints by neighbors and community advocacy for increased governmental protections, Defendant consistently and steadfastly has refused to admit that its

operations create any harms to neighboring residents. *See, e.g.*, JA 1389-1406 (excerpts from Rule 30(b)(6) Deposition of Defendant); JA 7520-22 (Don Butler memo and letter regarding local government health ordinances to protect neighbors from IHOs). Given that denial, Defendant cannot also claim that it has made changes to address its harms.

Even if Defendant *had* acknowledged the harms, there is no evidence that it undertook measures specifically to address them. Although Defendant asserts that it took “proactive steps,” it fails to identify any measures taken to protect neighbors. Instead, Defendant presents a list pertaining to general operations; e.g. feed conversion, a corporate-wide certification system, and standard compliance audits. Def. Br. at 23. These were not steps Defendant took to address the nuisance harms Plaintiffs experienced from Kinlaw Farm, nor could they be, as Defendant denies that there were any such harms. JA 1389-1406.

The critical element in *Faris* and other cases that recognize an attempt to minimize harm as inconsistent with punitive damages claim is that the defendant acted in good faith and adopted remedial measures designed to address the harm or risk of harm that the plaintiff complained of or identified. *See e.g., Collins v. St. George Physical Therapy*, 141 N.C. App 82, 539 S.E.2d 356 (2000)(finding insufficient evidence of willful or wanton conduct where physical therapist attempted to repair broken machine without training or proper parts). That element

is plainly absent in this case, where the evidence shows not that the Defendant took well-meaning but ultimately ineffective action, but rather deliberately ignored, resisted, and rejected any of the well-documented measures that could have helped mitigate the Plaintiffs' injuries. *See, Everhart v. O'Charley's, Inc.*, 200 N.C. App 142, 152, 638 S.E.2d 728, 737 (2009)(punitive damages appropriate where defendant's employee failed to render assistance to patron, distinguishing *Collins* by stating "Mr. Witherspoon did not "ineffectively" attempt to help Ms. Everhart, but rather willfully avoided assisting her.").

C. Defendant's argument that it should be insulated from punitive damages because of the grandfather provision in North Carolina's 2007 ban on lagoons and sprayfields has no merit

Defendant asserts that punitive damages are not recoverable because "North Carolina law specifically protects farms using the lagoon/sprayfield system." Def. Br. at 21. This is a gross mischaracterization of the law. In 2007, the General Assembly unanimously voted to make permanent its 1998 moratorium on the construction of lagoon and sprayfield systems for disposal of manure at industrial animal operations. N.C. Gen. Stat. § 143-215.10I (titled in part, "lagoon and sprayfield systems prohibited"). This statute outlawed waste disposal systems like the one used at Kinlaw Farm. New IHOs now must meet strict performance standards designed to protect public health and the environment, which lagoons

and sprayfields cannot do. A new farm utilizing this outdated, harmful, and polluting system would in fact constitute a nuisance *per se*.

The lagoon and sprayfield ban was enacted after years of high-profile study and debate in which Defendant's officers, directors and managers engaged. *See, e.g.*, JA 2454-65, 2529, 2598, 2604, 2673, 8267. In 1994, the legislature established the Swine Odors Task Force to study "the problem of swine odors and how to reduce them," and found that neighbor reports of odors from operations identical to Defendant's had been "numerous and well-publicized." JA 1431. In 1995, hog lagoon breaches spilled over 20 million gallons of waste into the New River, *Huge Spill of Hog Waste Fuels an Old Debate in North Carolina*, New York Times (June 25, 1995), <https://www.nytimes.com/1995/06/25/us/huge-spill-of-hog-waste-fuels-an-old-debate-in-north-carolina.html>, prompting the Governor to convene a Blue Ribbon Commission on hog waste disposal. *See* Blue Ribbon Study Commission on Agricultural Waste, Report to the 1995 General Assembly, May 16, 1996, <https://ncleg.net/Library/studies/1996/st10736.pdf>. A year after the Commission issued its report, the legislature imposed a moratorium on all new IHOs and directed the Department of Agriculture to "develop a plan to phase out the use of anaerobic lagoons and sprayfields as primary methods of disposing of animal waste at swine farms." JA 7533, 7555.

In 1999, flooding from Hurricane Floyd dumped dead hogs and millions of gallons of hog waste into the state's rivers. JA 168. This disaster led Governor Hunt to declare "lagoons need to be converted" to technologies that do not pollute the air and water. JA 7700. Environmental advocates brought public and private nuisance, trespass and violation of the public trust claims against Defendant for its swine wastewater spills into North Carolina rivers. *See Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002) (without reaching merits, court held plaintiffs lacked standing). The threat of public nuisance litigation by the State Attorney General led the State and the swine industry to sign a consent agreement. The "Smithfield Agreement" established a multi-year process to research and identify alternative technologies to replace lagoons and sprayfields. JA 2529, 2673. After such technologies had been identified, the legislature permanently banned lagoons and sprayfields in 2007. JA 7565; *see* Session Law 2007-253, enacted Aug. 31, 2007, <https://www.ncleg.gov/Sessions/2007/Bills/Senate/PDF/S1465v7.pdf>.

The permanent ban did allow existing swine operations with lagoon/sprayfield systems of waste disposal to "continue to operate under, and ... in compliance with, [the existing Swine General Permit,] including any renewal of the permit." *Id.*, Section 1(b). But Defendant's argument that this provision is a legislative endorsement of lagoon and sprayfield systems is specious and

misapprehends the fundamental premise of grandfathering, which recognizes vested interests in an operation that has failed to keep up with modern standards, but is allowed to continue for a limited time because it was legal at its inception. Section 1(b) was the result of a political compromise with a powerful industry; it is not a legislative endorsement of the lagoon and sprayfield system. In fact, the performance standards in the 2007 law expressly acknowledge the nuisance harms caused by the lagoon/sprayfield system. N.C. Gen. Stat. § 143-215.10I(b)(1)-(5) (requiring swine waste disposal systems to “substantially eliminate” odors “detectable beyond the [operation’s] boundaries,” discharge to surface and ground waters, and “disease-transmitting vectors and airborne pathogens.”).

D. Defendant demonstrated conscious and intentional disregard of and indifference to Plaintiffs’ rights and safety, and knew or should have known that such disregard would likely result in injury, damage, or other harm

Defendant claims it had no notice of any nuisance-related problems at Kinlaw Farm, and that absent such notice, its failure to address the adverse impacts on neighbors cannot be willful or wanton. Despite its prior participation in private nuisance suits, a threatened public nuisance action, and its engagement with the high-profile debate and scientific studies (including the Smithfield Agreement) referenced in Section C, *supra*, Defendant argues that it only had a “general awareness” of nuisance issues related to the lagoon and sprayfield system, which it contends cannot support a claim for punitive damages. Def. Br. 22.

To bolster its argument, Defendant relies on *Finch v. BASF Catalysts LLC*, 1:16-CV-1077, 2018 U.S. Dist. LEXIS 138711 (M.D.N.C. Aug. 16, 2018), a wrongful death case involving exposure to asbestos. *Finch* denied punitive damages because the plaintiff could show only that the defendant was “generally aware” of “broad statements of potential harms under unspecified conditions.” *Id.* at *16. Similarly, in *Lee v. Certainteed Corp.*, 5:13-CV-826-FL, 2015 U.S. Dist. LEXIS 97516 (E.D.N.C. July 27, 2015), the court denied punitive damages because plaintiffs failed to present evidence that the defendant “was actually aware of any particular article or study . . . or otherwise received any of the publications mentioned.” *Id.* at *30. The court’s determination echoed a previous Eastern District ruling that, absent evidence defendants knew or should have known of the studies, plaintiff’s reliance on scientific studies and peer-reviewed articles on the dangers of asbestos is inadequate to support a claim for punitive damages. *Yates v. Air & Liquid Sys. Corp.*, 5:12-CV-752-FL, 2014 U.S. Dist. LEXIS 200285, *30–31 (Feb. 21, 2014).

Finch and the other cases on which it relied are distinguishable from the facts and evidence in this litigation, where Plaintiffs presented overwhelming evidence of the exact type necessary to justify punitive damages. In addition to the evidence of Defendant’s knowledge and disregard of predictable harms to Kinlaw Farm’s neighbors, the record contains substantial evidence of Defendant’s

knowledge and disregard of *the particular harms* caused by operations identical to Kinlaw Farm. Defendant's refusal to mitigate those harms, its efforts to undermine and suppress academic research as well as community complaints and advocacy regarding those harms and to create its own counter-factual studies to discredit the integrity of the research, made it more than reasonable for the jury to find "conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7).

1. Community groups helped lead advocacy efforts regarding the harmful impacts of industrial hog operations on their communities, which Defendant's managers and officers rejected and sought to undermine and suppress

Amici have worked for more than a decade to address the same specific harms suffered by Plaintiffs and have experienced Defendant's persistent tactics to derail those efforts. The Concerned Citizens of Tillery (CCT), the community organization formed in 1978 that later helped form the NCEJN, led the first organized effort to resist the harmful impacts of industrial hog operations. JA 1213, 1226. In 1991, when seventeen new industrialized hog production facilities were proposed for southeastern Halifax County, a "historically under-developed" area home to a "predominantly African-American and low-income population," residents worried that the new facilities, billed as "economic development," would also bring air pollution, noxious odors, groundwater contamination, surface water

pollution, and the loss of independent family farms, farmland, and rural vitality and institutions. Wing S., *Social responsibility and research ethics in community-driven studies of industrialized hog production*, 110 *Environmental Health Perspectives* 437 (2002), 437-38 (“Wing 2002”). CCT worked with county officials to enact a local health ordinance requiring basic environmental protections from IHOs that were lacking in state laws. *See* the CCT website, <http://www.cct78.org/halifax-environment-loss-prevention.html>; *see also* Steve Wing, Gary Grant, Merle Green and Chris Stewart, *Community based collaboration for environmental justice: south-east Halifax environmental reawakening*, 8 *Environment and Urbanization* 129 (October 1996), at 133, <https://journals.sagepub.com/doi/pdf/10.1177/095624789600800214>.

Other counties— including Bladen, where Kinlaw Farm is located— soon followed Halifax’s lead to address the odors and other adversities that these operations impose on neighbors. JA 2474, 7520–22. Alex Hair, whose family has owned a farm in Bladen County for over 90 years, explained that when Murphy Family Farms moved into the area, without permission or notice, it built six swine barns housing thousands of hogs and two anaerobic lagoons 100 yards from Hair’s property line. JA 2454. The odors from the farm and the trucks filled with dead hogs blew onto their land, attracting flies and other vermin; they also had ground water concerns. *Id.* Neighbors described the headaches, nausea, and allergies that

they experienced as a result of these conditions. Hair and his fellow citizens organized, filed regular well-documented complaints, and worked with state representatives beginning in the mid-1990s. But the communities' efforts were no match for the industry's political influence. JA 2454–2461.

Don Butler, then Carroll's Foods Real Estate Manager, sent a memo to the company's president, Sonny Faison, warning that other counties were "jumping on the bandwagon" and that Carroll's Foods should challenge the ordinances to preserve the "potential for expansion of livestock operations in our region." JA 7520. Butler then wrote to the Director of the Bladen County Department of Health threatening to sue the county if it enacted a similar health ordinance. JA 7521–22. After several counties adopted their own health ordinances to protect neighbors from IHOs, the Agribusiness Council filed a legal challenge to their authority. The North Carolina Supreme Court struck down local health and zoning ordinances that, *inter alia*, imposed setbacks buffering residents from sprayfields and requiring groundwater testing, ruling that state law preempted local government action. *Craig v. Cty. of Chatham*, 356 N.C. 40, 565 S.E.2d 172 (2002).

By 1995, community outrage about the industry's disregard for residents' health and property rights gained statewide press coverage. The News and Observer published a Pulitzer Prize winning series detailing the power and influence former state Senator Murphy had over any statutes, rules or local

ordinances regarding industrial swine. JA 7525–31. In 1996, community organizations joined with environmental groups to advocate for a moratorium on the industry’s expansion.

North Carolina banned new swine waste lagoons in 1997, pending the development of permit regulations. N.C. Sess. Law 1997-458. The resulting state-wide General Permit, however, was limited to surface water quality impacts and did not address other concerns raised by neighboring residents. The General Assembly thus directed the North Carolina Environmental Management Commission to develop additional regulations addressing odor at animal operations, which went into effect in 2000. 15A NCAC 02D 1802. However, as Don Butler’s contemporaneous memo to Defendant’s predecessor makes clear, those regulations are so vague as to be virtually unenforceable, a characteristic he concluded “may be to our benefit.” JA 5304. Indeed, on information and belief, the odor rule has never been enforced.

2. Defendant’s managers and officers sought to suppress collaborative research by *Amici*, other community groups and scientific researchers that exposed the harmful impacts of industrial hog operations on neighbors

CCT, REACH and NCEJN shared a mission to document and research the effects of IHOs in their communities and communicate those impacts to the policymakers and corporations with power to protect their health and wellbeing.

Central to *Amici's* community advocacy was their collaboration with UNC epidemiologist Dr. Steve Wing. As REACH's co-founder, Devon Hall declared:

I knew it smelled bad where I lived. But it was only until after I began working with Dr. Wing and talking to people in other communities that I realized how far the problems extended. Residents were angry because of the stench and other problems. But their communities were low-income, minority, rural, and often did not know about each other.

JA 2447.

As Dr. Wing noted in his testimony in this case, such community participation not only enriched the research, it was necessary to the integrity and validity of the results. JA 1283. Dr. Wing wrote that prior to collaborating with REACH and others, “university scientists had conducted many studies related to agricultural technologies, veterinary health, and health of agricultural workers,” but “relatively little research had addressed environmental, social, and health concerns of communities affected by industrial hog production.” Wing 2002, at 438. Health effects proved difficult to measure by traditional research studies that rely on medical records because affected communities lack access to medical care. A dearth of medical records also resulted from community members’ distrust of medical institutions “because of a history of segregation, exclusion and prejudice.” *Id.*

The collaboration between Dr. Wing and other academics and community groups produced a litany of research documenting specific effects of industrial hog

operations on neighbors. JA 617-26, 656-63, 1279-84 5032-39, 5061-70, 5158-93, 5269-79, 8251-55, 8260-66, 8418-28. In one study, CCT, the Halifax County Health Department, and UNC School of Public Health partnered to “quantify systematically the extent to which [IHOs] and their potential impacts on health and quality of life affected communities...” Wing 2002, at 439. Although Dr. Wing and his team analyzed the data, the community developed the research questions, consulted to identify affected populations and data sources, and evaluated data quality. *Id.*

As evidence of community health effects and community appeals to industry and policymakers mounted through the 1990s and 2000s, Defendant and its corporate officers took note. *See, e.g.*, JA 1286, 2598, 2604, 8267. But rather than accepting responsibility and taking corrective action, they sought to undermine the research of Dr. Wing and others, pursued an ongoing campaign to identify and silence research participants, and alternatively ignored and harassed community members who complained about conditions near operations housing Defendant’s hogs.

3. Defendant’s managers and officers sought to undermine and suppress academic research demonstrating the adverse impacts of its hog operations

Defendant retaliated against community members, scientists, and even its own contract growers for exposing its operations’ adverse impacts. Dr. Shane

Rogers testified that while conducting research for EPA on hog farm pollution in North Carolina, he “had to pull out because the farmer let us know that he was getting pressure and was not going to be able to receive more Smithfield hogs if he continued on with the study.” JA 6190-91. Dr. Steve Wing faced personal harassment and threats to his work and career from Defendant’s managers, officers and agents. JA 657-663. In some cases, the industry attempted to use Dr. Wing’s research to learn the identities of study participants; in others, they took actions reasonably inferred to engender fear in Dr. Wing himself. JA 662, Wing 2002, at 437-444.

The NC Pork Council’s intimidation of Dr. Wing led him to safeguard the confidentiality of research participants’ identities and related information. JA 660–63. Dr. Wing took extraordinary measures to maintain the anonymity of community members who participated in rural health assessments, noting the susceptibility of low-income rural communities of color to intimidation and retaliation:

[I]n eastern North Carolina, the pork industry has political influence through county commissions, boards of health, sheriff's departments, and other public institutions. Members of communities near [IHOs] may depend on the industry for their jobs, rent homes or land from owners or operators, and fear reprisal if they participate in research into the health effects of the industry.

JA 662. In preparing for an early health study, he sought and received permission from UNC’s Internal Review Board to get oral consent rather than signatures from

participants, “because a signed consent form would have been the only record of a person’s name.” Wing 2002, at 440. In response to community member concerns, he also removed census block data and hog operation size information that could be used to identify the communities that participated in the study. *Id.*

Dr. Wing’s research provided some of the earliest scientific evidence that IHOs harmed neighbors’ health. While residents living near different types of IHOs experienced comparable rates of miscellaneous symptoms such as muscle aches and hearing problems, “residents near the [IHOs] reported increased numbers of headaches, runny noses, sore throats, excessive coughing, diarrhea, and burning eyes. They also reported many more occasions when they could not open windows or go outside even in nice weather.” *Id.*

The study received broad attention, including by members of the pork industry. Immediately upon its release, attorneys for the NC Pork Council contacted Dr. Wing and demanded that he make available “any and all documentation” related to his report, including “without limitation...the identities of all persons who worked on or contributed to the Study (including persons interviewed).” *Id.*, at 400-41. According to Dr. Wing, “...the primary purpose of the Pork Council’s request appeared to be harassment and intimidation....” *Id.*, at 441. Other efforts to intimidate Dr. Wing were more direct. After appearing before

the North Carolina House Agriculture Committee to present his research, Dr. Wing recalled:

I was approached by another industry lobbyist who introduced himself by handing me his business card. He refused my offer to shake his hand, demanded a copy of our full report, and said that if I did not send him one immediately I would be facing a lawsuit.

Id., at 440.

The industry's harassment and intimidation of Dr. Wing had a chilling effect on research into the health effects of IHOs in North Carolina. After a presentation of his findings at NC State University in 1999, Dr. Wing faced hostile questions from pork producers. Later, an assistant professor at another UNC-system school told him, "I have been conducting research on neighbors of hog operations, but I'm afraid that if I have to deal with legal problems like yours, I'll never get tenure. So I've decided to drop my research for now." *Id.*, at 441-42.

The industry's efforts to intimidate and suppress research – efforts that Defendant's officers engaged in – evince Defendant's knowledge of the harms its operations visited on neighboring residents, and of its concern about potential liability for those harms.

4. Defendant's managers and officers rejected community collaborative efforts to protect neighbors from its hog operations

Immediately following its formation, REACH "publicized the work [it] was doing in the communities to address the hog odors and other environmental

issues.” JA 2446. These efforts included repeated, good faith attempts to inform Defendant of the nuisances caused by its operations. In 2007, EPA awarded REACH a 3-year, \$100,000 grant to “use collaborative problem solving to address the hog odors and other problems complained of by the communities.” JA 2447. Devon Hall explained, “Our stated goals were (1) to empower our community; (2) to obtain stakeholder consensus; (3) obtain positive environmental results; (4) develop a sustainable system, and (5) develop sound management practices.” JA 2448.

As the EPA-funded project got underway, REACH repeatedly asked Defendant to meet with community stakeholders to hear their concerns about the company’s hog operations and to talk about moving forward cooperatively. REACH held “regular monthly and quarterly meetings” and invited “stakeholders including Smithfield managers.” JA 2448. Defendant’s officers, including Kraig Westerbeek and Don Butler, initially attended meetings and heard complaints directly from neighbors about nuisance conditions created by Defendant’s operations. *Id.*

Hall contacted Westerbeek and Butler directly in early 2008 to invite them to attend a conference and make a presentation on Defendant’s behalf. JA 2447. Butler attended the conference. “When Mr. Butler spoke, he said he knew that ‘odor’ was why they were there.” Butler also heard presentations from community

members, including several plaintiffs in the case at bar, who “spoke about problems with flies, odor, dead trucks, water and other issues.” JA 2448.

After the conference, Hall and EPA manager Danny Gogal met with Butler “to start a dialogue to improve communications and relationships between the producers on the one hand, and the neighbors on the other.” JA 2448. Among the possible areas of collaboration were establishing a date for the end of the lagoon and sprayfield system, promoting the use of new hog waste technologies, and encouraging reductions in the concentration of hog production. JA 2448–49.

Defendant’s officers rejected this invitation to collaborate. JA 2449. REACH persisted in efforts to “get Smithfield involved,” asking Westerbeek and Butler directly “to keep working with us” and inviting them to a stakeholder meeting on September 17, 2008. JA 2449. Westerbeek attended the meeting, and both he and Butler met with Mr. Hall and Mr. Gogal the following day. Mr. Hall and Mr. Gogal “asked them to keep working with us stakeholders” on issues such as methane capture and air monitoring at their hog operations. JA 2449. After that meeting, “Kraig Westerbeek and Don Butler would not have further involvement [with REACH].” JA 2449. Shortly thereafter, Defendant’s Public Relations Director communicated that “the company was not willing to sit down with [REACH] for any further discussions on any issues.” JA 2449–50. As the three-year project concluded in 2010, REACH had a final conversation with Westerbeek,

who stated that “Smithfield was not willing to work with us on any projects.” JA 2450.

Defendant’s claim that it “actively reached out to community groups to spread the word” about its complaint system is unsupported by the record, which in fact shows a refusal to engage with residents. JA 2449–52. Mr. Hall, who has attended scores of community group meetings as REACH’s executive director, declared “At all the public meetings where I saw Smithfield representatives, I do not recall [Smithfield] ever telling community members about a complaint system or giving them a number to call.” JA 2449–52.

Nor could residents rely on their state regulatory agency for protection from IHOs. In 2013, *Amici* submitted formal comments to the state Department of Environmental Quality (DEQ) regarding the renewal of the state-wide General Permit for swine operations, which regulates all industrial livestock operations that use the lagoon and sprayfield system for waste disposal. Their comments called on DEQ to modify the permit to comply with the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), and demanded that DEQ “assess the racial and ethnic impact of the permitting program” and “adopt measures that protect communities from pollution from the swine facilities.” *See* Comment Letter to DWR Animal Operations, Dec. 21, 2018, at 2 (describing the 2013 comments), <https://chambersccr.org/wp->

content/uploads/2019/03/Ex.1-REACH-et-al.-Stakeholder-Comments-12212018.pdf.

In 2014, DEQ issued the General Permit without any changes to address discriminatory impacts on communities of color. To address this failure, *Amici* and Waterkeeper Alliance, Inc. filed a Title VI administrative complaint with the EPA, alleging that the General Permit had a racially discriminatory impact. The complaint highlighted that IHOs were disproportionately concentrated in communities of color, noting that African Americans, Latinos, and Native Americans are 1.54, 1.39, and 2.18 times (respectively) more likely than whites to live within three miles of one or more IHOs. Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7, Sept. 3, 2014, https://ncejn.org/wpcontent/uploads/2014/09/ncejn_et_al_complaint_under_titlevi.pdf.

Despite the confidential nature of the Title VI administrative process, the state and national Pork Producers Councils attempted to intervene in the complaint, and even appeared at the first mediation session and demanded to participate, over Complainants' objections. These actions led *Amici* and Waterkeeper Alliance to file a second Title VI complaint, alleging intimidation, retaliation, and interference with the administrative process. JA 1433-34; Complaint Under Title VI of the Civil

Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7, July 11, 2016,

<http://www.ncpolicywatch.com/wp-content/uploads/2016/09/July-11-2016-Letter-from-enviros-to-EPA-OCR.pdf>.

The EPA issued a rare “Letter of Concern” in January 2017, expressing “deep concern about the possibility that African Americans, Latinos, and Native Americans have been subjected to discrimination as a result of NC DEQ’s operation of the Swine Waste General Permit program,” and noting that “although NC DEQ representatives knew that complainants did not want representatives from the National Pork Producers Council and North Carolina Pork Council ...at this confidential meeting, NC DEQ representatives appeared to encourage their attendance and participation.” JA 1427-39. EPA’s letter encouraged the parties to re-engage in mediation, which culminated in a settlement requiring DEQ to implement new measures to ensure compliance with federal civil rights laws. Settlement Agreement between NCEJN, REACH, Waterkeeper Alliance, Inc., and DEQ, May 3, 2018,

https://www.epa.gov/sites/production/files/2018-05/documents/2018-5-7_ncdeq_reach_closure_letter_per_adr_agreement_11r-14-r4_recipien.pdf.

The intimidation recognized by the EPA was nothing new for *Amici*. Their members and staff have contacted DEQ and other government agents, as well as contract growers, multiple times to make complaints of odors,

illegal waste discharge into surface waters, illegally sprayed waste, and flies and buzzards. Not only were these complaints ignored, but in some instances regulators disclosed complainants' identity, resulting in intimidation and retaliation by industry employees or representatives. JA 2446.

In response to DEQ's failure to investigate IHO-related complaints, *Amici* filed a Petition for Contested Case in the North Carolina Office of Administrative Hearings (OAH) alleging that DEQ's failure to investigate those complaints harms non-white residents who are disproportionately burdened by the adverse impacts from IHOs. *See* Petition in 16 EHR 11720; <http://blogs.law.unc.edu/civilrights/2016/12/07/community-organizations-file-for-administrative-hearing-on-deqs-unanswered-citizen-complaints/>. At issue in that case was legislation adopted in 2014 that made complaints and all related information confidential, unless and until DEQ "determines that a violation has occurred." N.C. Gen. Stat. § 143-215.9D. That provision has been, and upon information and belief still is, interpreted by DEQ staff to suppress all information related to a complaint investigation that does not result in agency enforcement action. This interpretation results in misleadingly low numbers of reported complaints against industrial swine operations. The 2017 settlement of that case requires DEQ to publish complaint-related data, which DEQ has yet to do. *See* OAH Settlement Agreement,

<https://ncejn.org/2018/01/environmental-groups-reach-settlement-with-state-regarding-response-to-citizen-complaints/>.

While *Amici* struggle to enforce the terms of the Title VI and OAH settlement agreements – particularly elements related to transparency, accountability, and the implementation of an environmental justice mapping tool to address racially disparate impacts – they also participated in the 2019 administrative process for the renewal of the General Permit. Again, *Amici* submitted public comments to DEQ. Comment Letter to DWR Animal Operations, March 4, 2019, <https://chambersccr.org/wp-content/uploads/2019/03/03-04-2019-REACH-et-al-Swine-General-Permit-comments-Title-VI-rev-heading.pdf>. Again, the agency issued the permit without any provisions to address discriminatory impacts on communities of color. “DEQ Issues General Permits for Swine, Cattle and Wet Poultry,” April 12, 2019, <https://deq.nc.gov/news/press-releases/2019/04/12/deq-issues-general-permits-swine-cattle-and-wet-poultry>. The failure of the State to take seriously its obligations under Title VI underscores the significance of this case (and related nuisance law suits) in protecting the rights of *Amici* and the communities they serve.

In sum, abundant evidence in the record demonstrates that, unlike the asbestos cases on which Defendant relies, Defendant’s managers and officers had

actual knowledge of the research and studies about the harms of its operations, knew that those studies related directly to the waste systems and circumstances at Kinlaw Farm, and worked actively to undermine those studies and discredit and intimidate their authors and participants. The evidence also showed that Defendant had actual knowledge of the harms from its operations specifically in Bladen County, and that it opposed efforts by neighbors and others to recognize and address those harms. These actions demonstrate the “conscious disregard or indifference” supporting the trial court’s ruling on the question of punitive damages.

CONCLUSION

The evidence presented at trial demonstrates that the court was correct in submitting the question of punitive damages to the jury. The decision should be affirmed.

Respectfully submitted, this the 6th day of May, 2019.

JULIUS L. CHAMBERS CENTER FOR CIVIL RIGHTS

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Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief:

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This the 6th day of May, 2019

/s/ Elizabeth Haddix

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I certify that that on May 6, 2019, the foregoing brief was served via the Court's CM/ECF system upon all counsel of record.

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/s/ Elizabeth Haddix

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