Do Wind Farms Constitute a Nuisance or Trespass?

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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, and 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 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.

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 non-trespassory 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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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 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, -- T.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 of care 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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In sum, it is likely to be extremely difficult for plaintiffs to show that a wind farm was injured and operated in compliance with local ordinances and other laws constituting 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 crossed over onto the plaintiff’s property, or some “thing” onto the plaintiff’s land, and acted with the “desire to cause the consequences of [its] act” or a “belief[s] 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 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 intangible 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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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 $840,298 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, 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 deducting the amount paid to the new contractor, enabling the subcontractor 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 Occumpan Sezage 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.

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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 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 plaintiffs’ land will allow a lawsuit to sustain plaintiffs’ trespass claim. Muscardino v. Ogley 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 meta-physical.”

**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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**SPECIALITY 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 are that Continental is in New Jersey, and 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 W eso v. 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 48534 (E.D. Pa. 2012), Roman Mosaic was subcontracted to build shower pans and drains. The subrogue of the owner alleged improper installation, negligence and recklessness and consequent water damage. The court noted that it faced another choice between Kiswerner and Baumbharm, or, more accurately, Schuykill Stone. The court as much as conceded in its own language that it is not the parties or the judiciary.”

The court found that the case is more like Kiswerner than Baumbharm. 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 breached its duty to its owner, 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 Tort causes of action to a contractor on a basis for coverage of tort damages to third parties. However, this limitation may recede with time, and the cases are inconsistent.

Christopher Szefta contributed research to this article.