

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**MERRILL MEST et al.,  
Plaintiffs**

v.

**CABOT CORPORATION et al.,  
Defendants**

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**CIVIL ACTION  
NO. 01-4943**

**MEMORANDUM OPINION AND ORDER**

**RUFE, J.**

**May 14, 2004**

By Order dated April 29, 2004, the Court granted summary judgment in favor of Defendants on statute of limitations grounds with respect to Plaintiffs' claims arising from Defendants' conduct prior to November 10, 1998. However, the Court reserved judgment on Plaintiffs' Motion for Partial Summary Judgment and on the additional arguments raised in Defendants' Motion for Summary Judgment. For the reasons set forth below, Defendants' Motion is granted in part and denied in part, and Plaintiffs' Motion is denied.

**I. FACTUAL BACKGROUND<sup>1</sup>**

The Court previously set forth a detailed recitation of the factual background in its April 29, 2004 Order, and we incorporate those facts as if stated herein.<sup>2</sup> For the sake of clarity, however, a limited synopsis of those facts follows.

Plaintiffs Wayne and Suzanne Hallowell (the "Hallowells") own and operate two non-

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<sup>1</sup> Because genuine issues of material fact exist as to Plaintiffs' Motion for Partial Summary Judgment even when the facts are reviewed in a light most favorable to Plaintiffs, the facts here are recited in Plaintiffs' favor, as the non-moving party on Defendants' Motion for Summary Judgment. See generally Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

<sup>2</sup> 2004 U.S. Dist LEXIS 7497.

contiguous dairy farms, one at 1150 Congo Road, Gilbertsville, Montgomery County, Pennsylvania (the “Congo Road Farm”), and the other at 176 Washington Road, Bechtelsville, Berks County, Pennsylvania (the “Washington Road Farm”) (collectively referred to as the “Hallowell Farms”).<sup>3</sup> The Hallowells and their family have farmed their land for over thirty years, and the land has been in the Hallowell family since approximately 1950.

Plaintiffs Merrill and Betty Mest (the “Mests”) own and operate a dairy farm located at 3059 Keyser Road, Schwenksville, Montgomery County, Pennsylvania (the “Mest Farm”). The Mests have farmed their land for at least forty years. Both the Mests and the Hallowells also lease fields near their farms to grow forage crops for use in their dairy farm operations.

Defendants Cabot Corporation and Cabot Performance Materials (collectively referred to as “Cabot”) have operated a specialty metals manufacturing facility in Boyertown, Pennsylvania (the “Boyertown Facility”) since 1978. The Boyertown Facility was previously owned and operated by Kawecki Berylco Industries, Inc. (“KBI”). The Congo Road Farm is located approximately one mile east of the Boyertown Facility. The Washington Road Farm is located approximately one mile northwest of the Boyertown Facility. The Mest Farm is located approximately four miles southeast of the Boyertown Facility.<sup>4</sup>

As a byproduct of its operations, the Boyertown Facility emits fluoride, which, while not harmful to humans, can cause a disease called fluorosis in cows that eat forage containing significant quantities of fluoride. Plaintiffs allege that fluoride emitted from the Boyertown Facility

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<sup>3</sup> In their Second Amended Complaint, the Hallowells added as plaintiffs their children, the Hallowell Farms Partnership, The Wayne Z. Hallowell Family Revocable Trust, and themselves in their capacities as Trustees of the Trust. Because these additional Plaintiffs’ claims are identical to the Hallowells, this opinion does not refer to these Plaintiffs specifically.

<sup>4</sup> Pls.’ Statement in Opp. at 4.

has been migrating by air to their farms and contaminating their vegetation, causing Plaintiffs' cows to suffer from fluorosis and exhibit resulting symptoms, including stained or "mottled" teeth, decreased milk production, and various reproductive problems.

Since approximately 1976, numerous studies and investigations have been conducted on the Boyertown Facility's emissions and their effect on the surrounding land and Plaintiffs' dairy cows. Plaintiffs initiated some of these studies, while governmental agencies or third parties initiated others. None of the studies conducted before 1999 resulted in a diagnosis of fluorosis in Plaintiffs' cows; several specialists even ruled out fluorosis as the cause of Plaintiffs' cows' problems. However, in 1999, Plaintiffs' expert, Dr. Lennart Krook, investigated Plaintiffs' cows and concluded that they were suffering from fluorosis.

## **II. DISCUSSION<sup>5</sup>**

### **A. Count I – Nuisance**

The Supreme Court of Pennsylvania has adopted the Restatement (Second) of Torts as the definition of private nuisance.<sup>6</sup> As explained in Karpiak v. Russo, 676 A.2d 270, 272-73 (Pa. Super. Ct. 1996), the relevant sections of the Restatement provide:

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<sup>5</sup> The familiar summary judgment standard of review applies here. Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To avoid summary judgment, disputes must be both 1) material, meaning concerning facts that are relevant and necessary and that might affect the outcome of the action under governing law, and 2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the nonmoving party. Matsushita Elec. Indus. Co., Ltd., 475 U.S. at 587.

Jurisdiction is proper due to diversity of citizenship. See 28 U.S.C. § 1332.

<sup>6</sup> Waschak v. Moffat, 109 A.2d 310, 314 (Pa. 1954); Kembel v. Schlegel, 478 A.2d 11, 14 (Pa. Super. Ct. 1984).

§ 822. General Rule

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is 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.

The Restatement indicates that a defendant is not subject to liability for an invasion unless the invasion caused significant harm, which is defined as:

§ 821F. Significant Harm

There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.

Comment C to section 821F further explains the meaning of significant harm:

c. Significant harm. By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or private nuisance. . . . In the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land before he can have a cause of action.

. . . .

When [the invasion] involves only personal

discomfort or annoyance, it is sometimes difficult to determine whether the invasion is significant. The standard for the determination of significant character is the standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant.<sup>7</sup>

Defendants argue that “[b]ecause there is no evidence that air, soil, groundwater, or surface water at Plaintiffs’ farms has ever exceeded applicable health and safety standards for fluoride, Plaintiffs cannot demonstrate that they have suffered ‘significant harm’ necessary to support a nuisance claim.”<sup>8</sup> This argument assumes that a violation of health and safety standards is necessary for a nuisance claim to succeed. However, such a violation is not a requirement for a nuisance claim.<sup>9</sup> Moreover, Defendants rely entirely on the EPA Report’s conclusion that fluoride concentrations at Plaintiffs’ farms were at acceptable levels and simply ignore Plaintiffs’ evidence that Defendants violated environmental standards and that fluoride from the Boyertown Facility caused Plaintiffs’ cow problems. Accordingly, a genuine issue of material fact exists, and summary judgment is not appropriate for this claim.

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<sup>7</sup> Karpiak, 676 A.2d at 272-73; see also Kembel, 478 A.2d at 14-15.

<sup>8</sup> Defs.’ Mot. For Summ. J. at 57.

<sup>9</sup> See, e.g., Harford Penn-Cann Serv., Inc. v. Zymblosky, 549 A.2d 208 (Pa. Super. Ct. 1988) (affirming lower court’s holding that dust blowing from defendant’s property onto plaintiff’s property was a nuisance as a matter of law); Noerr v. Lewistown Smelting & Refining, Inc., 60 Pa. D. & C.2d 406 (1973) (finding lead poisoning of plaintiff’s cows caused by defendant’s operation of brass smelters near plaintiff’s land to be sufficient for nuisance claim).

**B. Count IV – Negligence Per Se<sup>10</sup>**

Plaintiffs base their negligence per se claims on (1) Defendants' violation of the Pennsylvania Air Pollution Control Act ("PAPCA"), 35 Pa. Stat. Ann. § 4001 et seq., and (2) on Defendants' violation of the requirements of its Nuclear Regulatory Commission License (the "NRC license"). "Negligence per se has been defined as conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances."<sup>11</sup> To prove a claim of negligence per se, a plaintiff must prove four elements:

- (1) The purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally;
- (2) The statute or regulation must clearly apply to the conduct of the defendant;
- (3) The defendant must violate the statute or regulation;
- (4) The violation of the statute or regulation must be the proximate cause of the plaintiff's injuries.<sup>12</sup>

With respect to Plaintiffs' claim under PAPCA, Defendants argue that summary judgment should be granted because Plaintiffs cannot establish either the first or fourth elements. With respect to Plaintiffs' claim under the NRC license, Defendants argue that Plaintiffs cannot establish the third element. Both claims are discussed below.

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<sup>10</sup> Defendant did not move for summary judgment on Counts II (Trespass) and III (Negligence) other than on the statute of limitations, which the Court granted by separate opinion. 2004 U.S. Dist LEXIS 7497.

<sup>11</sup> Wagner v. Anzon, Inc., 684 A.2d 570,574 (Pa. Super. Ct. 1996).

<sup>12</sup> Id.; see also Cecile Indus., Inc. v. United States, 493 F.2d 97, 100 (3d Cir. 1984) ("[T]his court has held in interpreting Pennsylvania law that not every breach of a statutory duty imposes damage liability.")

## 1. PAPCA

Defendants argue that the purpose of PAPCA is to protect the public generally, as opposed to a particular group of individuals to which Plaintiffs belong. As such, assert Defendants, PAPCA does not satisfy the first element of negligence per se.<sup>13</sup> The “Declaration of Policy” set forth at the beginning of PAPCA states:

It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; (iv) development, attraction and expansion of industry, commerce and agriculture; and (v) implementation of the provisions of the Clean Air Act in the Commonwealth.<sup>14</sup>

This declaration makes clear that the purpose of this statute is to protect the air in Pennsylvania for the benefit of the public generally, not for the benefit of a particular group of individuals. Plaintiffs contend that the reference to “prevention of injury to plant and animal life and to property” and “agriculture” demonstrate that PAPCA was intended to protect farmers. This argument lacks merit. As the Commonwealth Court of Pennsylvania has stated: “[t]here can be no doubt from a reading of [PAPCA] that the legislative intent is to clean the air insofar as is reasonably possible under the police powers granted to the Commonwealth in both the State and Federal Constitutions.”<sup>15</sup>

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<sup>13</sup> Wagner, 684 A.2d at 574 (“[A] court will not use a statute or regulation as the basis of negligence per se where the purpose of the statute is to ‘secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public.’”) (quoting Centolanza v. Lehigh Valley Dairies, Inc., 635 A.2d 143, 150 (Pa. Super. Ct. 1993), aff’d, 658 A.2d 336 (Pa. 1995); see also Cecile Indus., Inc., 493 F.2d at 99-100 (“[T]he Pennsylvania Supreme Court stated the additional requirement that before violation of a statute will be deemed to constitute negligence, the court must find that the intent of the statute was, at least in part, to protect the interest of the plaintiff individually, as opposed to the public.”).

<sup>14</sup> 35 Pa. Stat. Ann. § 4002(a).

<sup>15</sup> Bortz Coal Co. v. Air Pollution Comm’n, 279 A.2d 388, 392 (Pa. Commw. Ct. 1971).

Plaintiffs' claim is almost identical to that of the plaintiffs in Wagner, who asserted a negligence per se claim under the Philadelphia Air Management Code of 1969. The Wagner court affirmed the trial court's grant of a directed verdict in favor of the defendants, concluding:

It is clear from these findings that the purpose of the Code was to protect the "atmosphere over the City" of Philadelphia, with a concomitant benefits to its "inhabitants." There is no indication in these findings that the Code was meant to protect a particular class of individuals; rather it was enacted in "furtherance of the health and welfare of [the] City's inhabitants, to the conduct of the normal pursuits of life, recreation, commerce and individual activity, and to sustaining life in an urban area."<sup>16</sup>

The court further noted that "a statute governing air quality, by its nature, is directed to the population in general."<sup>17</sup> As with the Philadelphia Air Management Code, PAPCA was enacted to clean the air for the benefit of the public in general.

Plaintiffs also argue that because PAPCA creates a private right of action, it provides a sufficient basis to support a claim in negligence per se.<sup>18</sup> Plaintiffs are partially correct: "[t]he issue of whether a plaintiff can assert a cause of action based on negligence per se is closely related to the question of whether a private cause of action exists under a statute."<sup>19</sup> Courts have held,

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<sup>16</sup> Wagner, 684 A.2d at 574-75.

<sup>17</sup> Id. at 575 n.4.

<sup>18</sup> In Goldsborough v. Columbia Borough, 48 Pa. D. & C.3d 193 (1988), the only case to have addressed this specific issue, the court held that PAPCA could serve as the basis for a negligence per se claim. However, in light of the fact that (1) the court gave no explanation for its conclusion, (2) the decision has never been cited by any court, and (3) the decision is inconsistent with more recent cases such as Wagner, the Court does not give this decision any weight.

<sup>19</sup> Lutz v. Chromatex, Inc., 718 F. Supp. 413, 428 (M.D. Pa. 1989); see also Frederick L. v. Thomas, 578 F.2d 513, 517 n.8 (3d Cir. 1978) ("Most formulations of the standards for implying a private cause of action center on the presence or absence of a legislative intent to impose civil liability. In theory, at least, application of the negligence per se doctrine represents a judicial policy judgment independent of legislative intent with respect to the imposition of civil liability. Both, however, address the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damage liability."); Wagner, 684 A.2d at 575 (same).

however, that when a statute only provides a private right of action to compel enforcement of that statute and not for damages, this standard does not necessarily apply.<sup>20</sup>

PAPCA provides for a private right of action “to compel compliance with this act or any rule, regulation, order or plan approval or permit issued pursuant to this act . . . .”<sup>21</sup> It also allows individuals to request civil penalties to be paid into a Clean Air Fund established by the Act or to be used to prevent air pollution in the county where the violation occurred. PAPCA does not, however, create a private right of action for monetary damages. For this reason, and because the purpose of the Act is to protect the public generally, PAPCA cannot serve as the basis of a negligence per se claim. Accordingly, summary judgment is appropriate on Plaintiffs’ negligence per se claim based on PAPCA.<sup>22</sup>

## **2. NRC License**

Plaintiffs also allege that Defendants violated the requirements of its NRC License and that this violation is a sufficient basis for a negligence per se claim. This argument fails because Plaintiffs misconstrue the NRC License to require that Defendants not cause vegetation near the Boyertown Facility to contain more than 40 parts per million (ppm) of fluoride. However, the NRC

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<sup>20</sup> See, e.g., Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp. 2d 391, 412 (M.D. Pa. 1998) (“Our conclusion that the [Pennsylvania Clean Streams Law] does not allow a private cause of action for monetary damages undermines as well, [plaintiff’s] right to recover on a theory of negligence per se.”) (emphasis added); Lutz, 718 F. Supp. 413 (dismissing negligence per se cause of action based on violations of the Clean Streams Law and Solid Waste Management Act).

<sup>21</sup> 35 Pa. Stat. Ann. § 4013.6.

<sup>22</sup> Because the Court grants summary judgment on this ground, it is unnecessary to discuss Defendants’ claim that Plaintiffs cannot prove the fourth element of negligence per se. Further, the Court’s decision to grant summary judgment on Plaintiffs’ negligence per se cause of action based on PAPCA does not necessarily preclude Plaintiffs from presenting evidence of Defendants’ alleged violations of PAPCA to support their remaining common law negligence cause of action.

License contains no such a requirement. Rather, its only requirement relating to fluoride states:

[Defendants] shall monitor for fluoride in forage crops at least twice during harvest time from acreage adjacent to the Boyertown site on the east side of County Line Road. If the average fluoride concentration exceeds 40 ppm, the incident shall be reported in writing to the Pennsylvania Department of Environmental Resources, Norristown Regional Air Pollution Control Engineer, and to the Uranium Fuel Licensing Branch.<sup>23</sup>

Defendants only violate this provision if they do not report when fluoride concentrations exceed 40 ppm. Plaintiffs cite to no evidence of such a violation and even cite to Defendants' letters reporting when fluoride concentrations exceeded 40 ppm in compliance with the NRC License. Accordingly, summary judgment is appropriate for this negligence per se claim as well.

**D. Count V – Negligent Interference with Business**

There is no cause of action for negligent interference with business under Pennsylvania law. In their Response in Opposition, Plaintiffs attempt to transform this claim into one for intentional interference with business relations. This attempt fails because: 1) Plaintiffs did not properly plead a cause of action for intentional interference with business relations despite having amended their complaint twice;<sup>24</sup> and 2) even if Plaintiffs had properly pled this cause of action, they have presented no evidence sufficient to establish any of the elements of such a cause

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<sup>23</sup> U.S. Nuclear Regulatory Commission Materials License SMB-920 at ¶ 21.

<sup>24</sup> Plaintiffs' most glaring omission is their failure to allege the existence of a contractual relationship between them and a third party. See Pawlowski v. Smorto, 588 A.2d 36, 39-40 (Pa. Super. Ct. 1991) ("To set forth a legally sufficient cause of action for intentional interference with contractual or prospective contractual relations, four elements must be pled: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.")

of action.<sup>25</sup> Accordingly, summary judgment is appropriate for this claim.

### **E. Count VI - Outrageous Conduct**

Plaintiffs purport to assert a cause of action for “outrageous conduct” that is independent from a cause of action for infliction of emotional distress. They argue that this cause of action is sufficient to sustain a demand for punitive damages. Plaintiffs are mistaken: Pennsylvania law does not recognize a separate cause of action for punitive damages.<sup>26</sup> Accordingly, summary judgment is granted as to this cause of action.

Plaintiffs also incorrectly argue that even though they have not asserted a cause of action for intentional infliction of emotional distress, they can still recover damages for emotional distress under their other tort claims without any heightened pleading or proof requirements.<sup>27</sup> “Except in general limited situations not applicable here, Pennsylvania law does not permit the recovery of damages for emotional distress ‘in the absence of physical manifestation of the emotional distress allegedly suffered.’”<sup>28</sup> The facts in Mateer, a case relied upon by Defendants, are quite similar to the case before the Court. In Mateer, the plaintiffs asserted causes of action for negligence, trespass, nuisance and strict liability, alleging that toxic materials deposited at a

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<sup>25</sup> In their Response in Opposition, Plaintiffs essentially argue that it is implied from the record that Plaintiffs have contracts for the sale of milk. Notably, however, Plaintiffs do not cite to any evidence of specific contracts.

<sup>26</sup> Peer v. Minnesota Mut. Fire & Cas. Co., No. Civ.A.93-2338, 1993 U.S. Dist. LEXIS 18008, at \*16-17 (E.D. Pa. Dec. 21, 1993) (“Punitive damages are an element of damages that must be tied to a specific cause of action.”); see also Beaver v. Kemper Nat’l Ins. Cos., No. Civ.A.93-3663, 1994 U.S. Dist. LEXIS 2793, at \*5 (E.D. Pa. Mar. 10, 1994) (adopting Peer court’s conclusion that “Pennsylvania does not recognize an independent cause of action for punitive damages denominated as a tort claim for ‘outrage’”).

<sup>27</sup> Pls’ Resp. in Opp. at 74.

<sup>28</sup> Mateer v. U.S. Aluminum, No. Civ.A.88-2147, 1989 U.S. Dist. LEXIS 6323, at \*25 (E.D. Pa. June 6, 1989) (quoting Houston v. Texaco, Inc., 538 A.2d 502, 504 (Pa. Super. Ct. 1988)).

neighboring quarry contaminated their groundwater. The court granted the defendants' motion for summary judgment on the plaintiffs' claims for emotional distress, stating, "as the plaintiffs have not demonstrated either actual or potential personal injury related to the contamination of their well, they are not entitled to damages for emotional distress."<sup>29</sup> As in Mateer, Plaintiffs here do not present any evidence of actual or potential personal injury related to the injuries suffered by their cows.

The cases Plaintiffs cite in support of their position are inapposite. In Little v. York, 481 A.2d 1194 (Pa. Super. Ct. 1984), the court allowed the recovery of emotional distress damages for humiliation where the plaintiff had been falsely imprisoned, but not physically harmed, due to the negligent misrepresentation of the defendant. The court restricted its holding to the facts of the case and did not hold, as Plaintiffs erroneously contend, that emotional distress damages are recoverable in any situation and for any tort.<sup>30</sup>

The holding in Tran v. General Motors Acceptance Corp., Civ. A.No.88-1836, 1989 U.S. Dist. LEXIS 6616, \*6-7 (E.D. Pa. June 12, 1989), is similarly distinguishable because it is tied to the facts. In Tran, the defendant's agents pounded on the door to the plaintiffs' home at 3:30 a.m. The agents allegedly "were loud and abusive and acted in a threatening manner," and when the

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<sup>29</sup> Mateer, 1989 U.S. Dist. LEXIS 6323, at \*25.

<sup>30</sup> The Little court specifically held as follows:

Thus, we hold that where a negligent act of an entity which holds itself out as responsible for the collection of taxes and which works closely with taxing bodies which have the authority to prosecute individuals for noncompliance, erroneously advises an individual as to the manner in which she should file a certain return, which fact ultimately results in that individual's unjustified imprisonment, that entity may be found liable for the emotional distress suffered by the individual in reliance upon the negligent misrepresentation.

481 A.2d at 1202.

plaintiffs failed to hand over the keys to the plaintiffs' car, the agents broke the lock to the plaintiffs' back gate and broke into the car.<sup>31</sup> The court found that the plaintiffs might be able to recover for the emotional distress that resulted from defendants' alleged trespass. As Defendants cogently point out, in both Tran and Little, "the conduct for which [the] plaintiffs sought to recover damages for emotional distress involved physical impact or the threat of physical impact, and the primary injury suffered would naturally give rise to significant emotional distress. By contrast, this case . . . involves nothing more than a claim for traditional property damage. In such a case, it cannot be said that emotional distress is a natural and inevitable consequence of the alleged misconduct."<sup>32</sup>

While Plaintiffs allege that for up to thirty years they experienced, inter alia, worry, headaches, chest pains, arm numbness and lack of sleep, they have presented no evidence in the form of expert opinions or testimony demonstrating that these alleged injuries are the result of their emotional distress. Further, it is not foreseeable or inevitable that severe emotional distress to Plaintiffs would result from injuries to their dairy cows. Accordingly, summary judgment is granted on Plaintiffs' claims for emotional distress damages.

**F. Counts VII and VIII – Fraud and Fraudulent Misrepresentation or Nondisclosure**

With these counts, Plaintiffs simply assert separate causes of action for the same alleged misrepresentation and concealment that they argue tolled the statute of limitations as to their other causes of actions. In the Court's April 29, 2004 Order, the Court found these arguments wanting because, inter alia, Plaintiffs' reliance on any of Defendants' statements was not

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<sup>31</sup> Tran, 1989 U.S. Dist. LEXIS 6616, at \*2-3.

<sup>32</sup> Defs.' Reply Mem. at 27-28.

reasonable.<sup>33</sup> For the same reasons, summary judgment is granted as to these causes of action.

**G. Plaintiffs' Motion for Partial Summary Judgment**

Mystifyingly, Plaintiffs have also filed a motion for partial summary judgment, asking the Court to find in favor of Plaintiffs on liability as to several of their causes of action and leaving only the amount of damages for trial. Plaintiffs first argue that they could not have discovered the cause of their cows' injuries prior to 1999 because every specialist who had investigated their herds and farms up to that point had concluded that their cows were not suffering from fluorosis, and then argue that there are no genuine issues of material fact relating to Defendants' liability for Plaintiffs' cows' fluorosis. Needless to say, simply because Plaintiffs were finally able to retain an expert who would support their claims does not render irrelevant the results of the earlier investigations, including their own. Accordingly, Plaintiffs are not entitled to summary judgment.

An appropriate Order follows.

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<sup>33</sup> 2004 U.S. Dist LEXIS 7497, at \*33-36.

**IN THE UNITED STATES DISTRICT COURT  
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**MERRILL MEST, et al.,**  
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v.

**CABOT CORPORATION, et al.,**  
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**CIVIL ACTION  
NO. 01-4943**

**ORDER**

**AND NOW**, this 14th day of May, 2004, after a hearing, and upon consideration of each of the numerous pleadings and exhibits relating to Plaintiffs Merrill Mest, Betty Mest, Suzanne Hallowell (individually and as Trustee), Wayne Hallowell (individually and as Trustee), Sean Hallowell, Amber Hallowell (a minor, by her next friend and parent, Wayne Hallowell), The Hallowell Farms Partnership, and The Wayne Z. Hallowell Family Revocable Trust's Motion for Partial Summary Judgment and Defendants Cabot Corporation and Cabot Performance Materials' Motion for Summary Judgment,<sup>34</sup> and for the reasons set forth in the attached memorandum opinion, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**, and Plaintiffs' Motion of Partial Summary Judgment is **DENIED**. It is further **ORDERED** that:

1. Defendants' Motion for Leave to File a Sur-Reply Memorandum [Doc. #95] is **DENIED**. The Court did not consider the Sur-Reply Memorandum attached to said

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<sup>34</sup> Specifically, the Court considered the following: Plaintiffs' Motion for Partial Summary Judgment [Doc. #81], Defendants' Response thereto [Doc. #88], and Plaintiffs' Reply [Doc. #93]; Defendants' Motion for Leave to File a Sur-Reply Memorandum [Doc. #95] and Plaintiffs' Reply thereto; Defendants' Motion for Summary Judgment [Doc. #82], Plaintiffs' Response thereto and accompanying exhibits [Docs. ##84-87, 89-90], Defendants' Reply Memorandum [Doc. #92], Defendants' Supplemental Brief [Doc. #102], Plaintiffs' Supplemental Brief in Opposition [Doc. #104], Defendants' Supplemental Reply Brief [Doc. #106], Plaintiffs' Response in Opposition [Doc. #107], Defendants' Post-Argument Brief [Doc. #125], and Plaintiffs' Supplemental Memoranda [Docs. ##122, 123].

Motion when issuing the instant Order.

2. **JUDGMENT IS ENTERED** in favor of Defendants and against Plaintiffs on Count IV (Negligence Per Se), Count V (Negligent Interference with Business), Count VI (Outrageous Conduct), Count VII (Fraud), and Count VIII (Fraudulent Misrepresentation or Non-Disclosure) of the Second Amended Complaint.
3. Plaintiffs are precluded from recovering damages for emotional distress.
4. Defendants' arguments regarding Plaintiffs' damages (other than emotional distress damages) are premature, and the Court did not consider them. The Court reserves ruling on such arguments until trial.
5. Defendants' Motion for Summary Judgment is **DENIED** as to Count I (Nuisance), Count II (Trespass), and Count III (Negligence), with respect to Defendants' conduct after November 10, 1998.<sup>35</sup>

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**

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<sup>35</sup> Pursuant to the Court's April 29, 2004 Order, judgment has previously been entered in favor of Defendants' on these counts with respect to Defendants' conduct prior to November 10, 1998.