EFiled: Nov 29 2022 10:48AM EST
Filing ID 68452407
Case Number 279,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,	)	No. 279, 2022
Plaintiff Below, Appellant,	)	Appeal from the Superior Court of the State of Delaware, C.A. No. N21C-09-179 MMJ CCLD
v.	)	
MONSANTO COMPANY, SOLUTIA, INC., and PHARMACIA LLC,	)	
Defendants Below, Appellees.	)	

THIRD CORRECTED BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE SUPERIOR COURT DECISION

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IDENTITY AND INTEREST OF AMICI

Amici are professors of tort, environmental, and related areas of law at institutions in Delaware and across the United States. They have extensive experience studying and teaching the nuisance and trespass doctrines implicated by this appeal. As scholars and educators, moreover, *Amici* share strong interests in the proper application and development of those hallowed doctrines. To assist the Court, this brief applies settled principles of tort law to untangle and resolve questions of exceptional importance, chief among them: whether manufacturers may be held liable in nuisance or trespass for environmental contamination caused by their tortious production, promotion, and sale of hazardous consumer products.

Pursuant to Rule 28, *Amici* submit this brief solely on their own behalf, not as representatives of their universities. The names of *Amici* are listed in Attachment A of their motion for leave to file an amicus brief.

SUMMARY OF ARGUMENT

1. The State of Delaware seeks to hold chemical manufacturers ("Monsanto") liable for widespread environmental contamination caused by one of their products: polychlorinated biphenyls ("PCBs"). As alleged in the Complaint, Monsanto produced virtually all PCBs ever sold in the United States. A010 ¶ 5; A022 ¶ 42. And for more than four decades, it aggressively marketed and promoted these chemicals—despite knowing that PCBs were toxic to humans and wildlife, and despite knowing that the ordinary use and disposal of PCB-containing products would inevitably lead to pervasive contamination of the environment. A031 ¶ 62–A043 ¶ 83. Taken as true, these allegations of tortious commercial conduct amply establish Monsanto's liability under Delaware common law for participating in the creation of a public nuisance and for trespassing on State-owned land.

2. The Superior Court erred in concluding otherwise.[1] Rather than applying the standard test for nuisance liability, the Superior Court categorically prohibited "product-based claims for public nuisance"—*i.e.*, claims seeking to hold manufacturers liable for public nuisances created by their tortious production, promotion, and sale of commercial products. Op. 6. But that blanket exemption conflicts with longstanding Delaware law, which provides that *anyone* who

[1] *Amici* offer no view on whether the Superior Court also erred in dismissing the State's claim for unjust enrichment.

participates in creating a public nuisance may be held liable for the resulting injuries. This Court has never recognized an exception from liability for nuisances created by a defendant's tortious production, promotion, and sale of harmful products. Nor has it ever required proof that a defendant "exercise[d] control over the instrumentality that caused the nuisance at the time of the nuisance." Op. 7. Instead, Delaware courts have overwhelmingly adhered to the *Restatement (Second) of Torts* ("*Restatement*"), which merely requires a causal connection between a defendant's conduct and the creation of a public nuisance.

3. As for trespass, the Superior Court misapplied the well-worn elements of possession and causation. Because the State has the right to exclude others from its waters and submerged lands, it satisfies the possession requirement of trespass liability. And just like nuisance, trespass merely requires a causal connection between a defendant's conduct and the alleged trespass. It does not—as the Superior Court held—impose an additional requirement of control over the trespassing instrumentality.

4. For these reasons, the Court should allow the State's nuisance and trespass claims to proceed to discovery, just as courts across the country have done in analogous suits against manufacturers for injuries caused by the production, promotion, and sale of commercial products.

ARGUMENT

I. The Superior Court Erred in Categorically Prohibiting "Product-Based Claims for Public Nuisance."

Following the *Restatement*, Delaware courts have "broadly held that '*[a]ll those who participate* in the creation or maintenance of a nuisance are generally liable to third persons for injuries suffered therefrom.'" *Trs. of Vill. of Arden v. Unity Constr. Co.*, No. C.A. 15025, 2000 WL 130627, at *3 (Del. Ch. Jan. 26, 2000) (emphasis in original); *see also Restatement* § 834 (expansively defining those "subject to liability for a nuisance").[2] The State easily satisfies that test here. There is no question that the Complaint pleads the existence of a cognizable public nuisance, namely: widespread PCB contamination that severely degrades the State's waters, land, and other natural resources, and that endangers the health of humans and wildlife alike. *See, e.g.*, *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467 (D. Md. 2019) ("Widespread water pollution is indeed a quintessential public nuisance"); *Restatement* § 821B cmt. g (interference with a community's "right to fish" is a public nuisance). Nor is there any doubt that the State adequately pleads Monsanto's substantial participation in the creation of the alleged public nuisance,

[2] *Accord Lechliter v. Del. Dep't of Nat. Res. & Envtl Control*, No. CV 7939-VCG, 2015 WL 9591587, at *16 (Del. Ch. Dec. 31, 2015), *aff'd*, 146 A.3d 358 (Del. 2016); *Leitstein v. Hirt*, No. CIV.A. 1469-N, 2006 WL 2986999, at *2 (Del. Ch. Oct. 12, 2006); *Hazlett v. Fletcher*, No. CIV.A.769, 1985 WL 149636, at *2 (Del. Ch. Mar. 1, 1985); *Keeley v. Manor Park Apts., Sec. 1, Inc.*, 99 A.2d 248, 250 (Del. Ch. 1953).

namely: through its domination of PCB production, its vigorous promotion of PCBs for uses that Monsanto knew would result in pervasive environmental contamination, and its failure to warn consumers and the public of PCB's known dangers. *See* A010 ¶ 5 – A011 ¶ 7.

Rather than applying the standard test for public nuisance, however, the Superior Court created a new blanket exception to nuisance liability, holding that Delaware nuisance law could not reach public nuisances created by a manufacturer's production, promotion, and sale of dangerous products—no matter how tortious its behavior. That exception cannot be reconciled with the history, principles, and purpose of nuisance law. Nor is it justified by any of the cases or policy concerns cited by the Superior Court.

A. Nuisance Law Encompasses Product-Based Claims.

Contrary to the Superior Court's misapprehension, public nuisance law has never limited itself to "situations involving land use." Op. 7–8. Instead, it has long encompassed a "large, miscellaneous[,] and diversified group" of nuisance-causing conduct, including "the shooting of fireworks in the public streets" and "indecent exhibitions." *Restatement* § 821B cmt. b. By the end of the nineteenth century, moreover, it was settled that a defendant could create an actionable public nuisance by selling harmful products, such as "meat, food, or drink" that was "injurious to health"; "obscene pictures, prints, books[,] or devices"; and "horse[s] affected with

glanders." H. G. Wood, *The Law of Nuisances* 72–73, 147 (1875) (Ex. A) (collecting cases).[3] Indeed, the prevailing wisdom of that early era was that "*any* 'act not warranted by law, or omission to discharge a legal duty[']" could give rise to public nuisance liability, so long as it sufficiently interfered with recognized public rights. *Restatement* § 821B cmt. a (emphasis added).

Delaware incorporated that wisdom more than a century ago. Far from restricting nuisance liability to a defendant's use of land, the State's highest court declared that an actionable public nuisance could arise from "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of a right common to all." *City of Wilmington v. Vandegrift*, 29 A. 1047, 1048 (Del. 1893). Early Delaware nuisance statutes reinforced this broad understanding of nuisance-causing conduct, confirming that nuisance liability extended beyond the use or misuse of real property. *See, e.g.*, *Lofland v. State*, 83 A. 1033, 1034 (Del. Super. Ct. 1912) (statute prohibited "[c]ertain acts generally recognized as nuisances," including the use of "profane language" in a "public

[3] Wood was the leading authority on nuisance in the late nineteenth century. *See City of Mansfield v. Brister*, 76 Ohio St. 270, 279 (1907) (Wood was a "learned author"); *Griffin v. Fairmount Coal Co.*, 53 S.E. 24, 60 (W. Va. 1905) (*Wood on Nuisances* was "a work by a celebrated and able author"); *Cluney v. Lee Wai*, 10 Haw. 319, 322 (1896) (Wood was a "learned author"); *Breeding v. Koch Carbon, Inc.*, 726 F. Supp. 645, 647 (W.D. Va. 1989) (Wood was "[a] noted authority" on nuisance).

place"); *see also Restatement* § 821B cmt. b (identifying criminal nuisance statutes as relevant to determining the "traditional basis for . . . a public nuisance").

That understanding has carried into the modern era. *See Town of Georgetown v. Vanaman*, No. CIV.A. 1225, 1988 WL 7388, at *4 (Del. Ch. Jan. 28, 1988) (definition of public nuisance "under Delaware common law" has not changed "[s]ince 1893"). As noted above, most Delaware courts recognize that nuisance liability may attach to any activity that creates a nuisance.[4] Several have rebuffed attempts to exempt classes of nuisance-creating defendants from nuisance liability. *See, e.g.*, *Hazlett*, 1985 WL 149636, at *2 (rejecting the argument that defendants could not be held liable because they were "non-property owner[s]"); *Trs. of Vill. of Arden*, 2000 WL 130627, at *3 (same). And at least one has expressly recognized that nuisance liability can arise from the sale of commercial products. *Craven v. Fifth Ward Republican Club, Inc.*, 146 A.2d 400, 402–03 (Del. Ch. 1958) (granting preliminary injunction against a private club that created a public nuisance by selling alcohol).

Unsurprisingly, this majority view accords with the *Restatement (Second) of Torts*, which Delaware courts routinely consult for guidance on nuisance and other

[4] *See also Artesian Water Co. v. Gov't of New Castle Cnty.*, No. CIV 5106, 1983 WL 17986, at *14 (Del. Ch. Aug. 4, 1983) ("[C]ourts refer to an individual creating or maintaining a nuisance, meaning that he is engaging in an activity or creating a condition that is harmful"); *City of Wilmington*, 29 A. at 1048 ("act[s] or omission[s] [that] endanger[]" public rights).

torts. *See Field v. Mans*, 516 U.S. 59, 70 (1995) (calling the *Restatement* "the most widely accepted distillation of the common law of torts").[5] Consistent with the history and evolution of nuisance law, the *Restatement* defines nuisance-causing conduct to include "*all* acts that are a cause of the harm." *Restatement* § 834 & cmt. b (emphasis added). Indeed, it goes further still and declares that a defendant may be held liable for merely "participat[ing]" in "an activity" that causes "a nuisance." *Id.*; *see id.* § 822 cmt. a ("These interests may be invaded by any one of the types of conduct that serve in general as bases for all tort liability."). The renowned torts scholar William Prosser reached a similar conclusion, explaining that "nuisance is a field of tort liability rather than a type of tortious conduct." Prosser, *Handbook of Law of Torts* 573 (4th ed. 1971) (Ex. B).[6] As such, the scope of nuisance liability is

[5] *See also Lechliter*, 2015 WL 9591587, at *16 n.121, *17 nn.130–131 (repeatedly relying on the *Restatement* in the nuisance context); *Hazlett*, 1985 WL 149636, at *2 (similar); *Artesian Water Co.*, 1983 WL 17986, at *16 (making sure its nuisance-related holdings were "in accord with . . . The Second Restatement of Torts"); *Patton v. Simone*, Nos. Civ. A. 90C-JA-29, 90C-JL-219, 1993 WL 54462, at *12 n.8, *13 n.9 (Del. Super. Ct. Jan. 28, 1993) (similar); *Ptomey v. Rago*, No. CIV.A. 83C-DE-114, 1989 WL 5226, at *1 (Del. Super. Ct. Jan. 11, 1989) (similar), *aff'd*, 567 A.2d 423 (Del. 1989).

[6] Delaware courts frequently consult Professor Prosser on questions of tort law. *See, e.g.*, *Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968, 971 (Del. 1980) (citing Prosser for "the doctrine of strict tort liability in the products liability area"); *Hazlett*, 1985 WL 149636, at *3 (citing Prosser for nuisance remedies); *Artesian Water Co.*, 1983 WL 17986, at *16 (making sure its nuisance-related holdings were "in accord with Prosser's treatise").

defined by "reference to the interests invaded" (*i.e.*, public rights), "not to any particular kind of act or omission which has led to the invasion." *Id.*

Consistent with this modern consensus, courts around the country have overwhelmingly approved of nuisance claims against manufacturers for injuries caused by their production, promotion, and sale of dangerous products—including PCBs, lead paint, gasoline additives, asbestos, opioids, and cigarettes.[7] These courts

[7] *Oregon v. Monsanto Co.*, No. 18CV00540, 2019 WL 11815008, at *7 (Or. Cir. Ct. Jan. 9, 2019) (PCBs); *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 652 (Pa. Commw. Ct. 2021) (PCBs); *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164, at *7–9 (E.D. Wash. 2016) (PCBs); *Mayor & City Council of Balt. v. Monsanto Co.*, No. RDB-19-0483, 2020 WL 1529014, at *8–10 (D. Md. 2020) (PCBs); *Port of Portland v. Monsanto Co.*, No. 3:17-CV-00015, 2017 WL 4236561, at *9 (D. Or. 2017) (PCBs); *Northridge Co. v. W.R. Grace & Co.*, 205 Wis. 2d 267, 282, 556 N.W.2d 345, 351–52 (App. 1996) (asbestos); *Johnson v. 3M*, 563 F. Supp. 3d 1253, 1342–43 (N.D. Ga. 2021) (PFAS chemicals); *Evans v. Lorillard Tobacco Co.*, No. CIV. A. 04-2840A, 2007 WL 796175, at *1, 18–19 (Mass. Super. 2007) (cigarettes); *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 645–51 (N.D. Cal. 2020) (e-cigarettes); *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 121–23 (2d Cir. 2013) (gasoline additives); *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467–69 (D. Md. 2019) (gasoline additives); *Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d 129, 142–43 (D.R.I. 2018) (gasoline additives); *City of Bos. v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *13–14 (Mass. Super. 2000) (guns); *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 418–21 (2002) (guns); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1209–15 (9th Cir. 2003) (guns); *Cnty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 324–30 (Cal. Ct. App. 2006) (lead paint); *State v. Fermenta ASC Corp.*, 160 Misc. 2d 187, 194–96, 608 N.Y.S.2d 980 (N.Y. Sup. Ct. 1994) (pesticides); *State v. Purdue Pharma L.P.*, No. 3AN-17-09966CI, 2018 WL 4468439, at *4 (Alaska Super. 2018) (opioids); *State v. Purdue Pharma L.P.*, No. CV2018002018, 2019 WL 1590064, at *3–4 (Ark. Cir. 2019) (opioids); *Commonwealth v. Endo Health Sols. Inc.*, No. 17-CI-1147, 2018 WL 3635765, at *6 (Ky. Cir. 2018) (opioids); *Commonwealth v. Purdue Pharma, L.P.*, No.

have rightly repudiated attempts to restrict public-nuisance liability to the misuse of land. And they have correctly rejected special nuisance protections for manufacturers. Instead, these courts have applied age-old nuisance principles to the facts before them, asking whether the defendant manufacturer participated in the creation of a public nuisance by tortiously producing, promoting, and selling a dangerous product. This Court should do the same.

B. The Superior Court's Reasons for Creating a Product-Based Exception Are Unpersuasive.

The Superior Court offered four misguided justifications for prohibiting product-based claims for public nuisance.

First, the Superior Court mistakenly believed that recognizing the State's "product-based claims" would "expand the scope of the public nuisance actions." Op. 7–8. As discussed above, there *is* precedent in Delaware and elsewhere for holding sellers liable for nuisances that they created through their promotion and sale of commercial products. *See Craven*, 146 A.2d at 402–03. In any event, even if it were true that "all [Delaware] cases to date" had involved the misuse of land, that

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1884CV01808BLS2, 2019 WL 5495866, at *4–5 (Mass. Super. 2019) (opioids); *In re Opioid Litig.*, No. 400000/2017, 2018 WL 3115102, at *21–22 (N.Y. Sup. Ct. 2018) (opioids); *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 WL 3991963, at *7–11 (R.I. Super. 2019) (opioids); *State v. Purdue Pharma L.P.*, No. 1-173-18, 2019 WL 2331282, at *5–6 (Tenn. Cir. 2019) (opioids); *State v. Purdue Pharma Inc.*, No. 217-2017-CV-00402, 2018 WL 4566129, at *13–14 (N.H. Super. Sep. 18, 2018) (opioids).

would simply be "due to the happenstance of how the particular public nuisance actions arose and not to any principle of law." *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1232 (Ind. 2003). A court does not "expand[] the law" when it simply "appl[ies] settled Delaware law to a new set of facts." *Banks v. E.I. du Pont de Nemours & Co.*, No. CV 19-1672-MN-JLH, 2022 WL 3139087, at *6 (D. Del. Aug. 4, 2022). Rather, it continues the "orderly" evolution of the common law. *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021). That is all that the State's claims do here.

Second, the Superior Court stated that "a defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance." Op. 7. But control is simply a factor that courts may consider when evaluating a defendant's participation in the creation of a nuisance. *See Patton*, 1993 WL 54462, at *13 (concluding that the defendant "did not carry on the activity which created the nuisance nor assist in carrying it out" because, *inter alia*, "it had no control over the premises"). It is not a standalone requirement. *See Hazlett*, 1985 WL 149636, at *2 (whether the defendants had "controlled [certain] property" was irrelevant so long as they "participated to a substantial degree in the creation of a nuisance").

Instead, Delaware courts have long described the requisite relationship between defendant and nuisance as a matter of ordinary legal causation.[8] That view accords with the *Restatement*, which explains that a defendant who creates a nuisance will remain liable even after the defendant "ceases" its tortious "activity" and even if the defendant "is no longer in a position to abate the [nuisance]." *Restatement* § 834 cmt. e. Indeed, it has been settled for more than a century that a defendant need not "commit the particular act that creates the nuisance; it is enough if he contributes thereto either by his act or neglect, directly or remotely." Wood, *supra*, at 39. On the basis of that ancient principle of nuisance law, numerous courts have correctly concluded that a manufacturer can be liable for nuisances created by their deceptive promotion, failure to instruct, or other conduct pertaining to a dangerous product—even if the alleged injuries occurred after the harmful product left the manufacturer's hands. *See Cnty. of Santa Clara*, 40 Cal. Rptr. 3d at 325 ("[T]he critical question is whether the defendant *created or assisted in the creation of the nuisance*" (emphasis in original)). [9] This Court should reach the same conclusion.

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[8] *Lechliter*, 2015 WL 9591587, at *17 (applying ordinary causation principles); *Patton*, 1993 WL 54462, at *13 & n.9 (liability attaches if "nuisance [was] caused by [a defendant's] activity"); *Artesian Water Co.*, 1983 WL 17986, at *20–21 (similar); *State ex rel. Buckson v. Sposato*, 235 A.2d 841, 846 (Del. Ch. 1967) (defendant liable when their "conduct … produce[s] material annoyance, inconvenience, or discomfort").

[9] *See supra* 9 n.7.

Even if there were a "control" element, moreover, the Complaint would satisfy it. Here, as in other product-based nuisance cases, the nuisance-causing instrumentality is Monsanto's "conduct in carrying out [its] business activities," *see In re: Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 WL 3737023, at *10 (N.D. Ohio 2019)—*i.e.*, its "ongoing conduct of marketing, distributing, and selling" PCBs, *Cincinnati*, 768 N.E.2d at 1143. The element of control—if it exists—does not require defendant manufacturers to be "the final link in the causal chain." *Johnson*, 563 F. Supp. 3d at 1338. Nor does it demand that they control "the actual use" of their products. *Cincinnati*, 768 N.E.2d at 1143. Instead, courts have found sufficient control where, as here, a defendant manufacturer inflated the market for a dangerous product by "misrepresent[ing]" the product's risks, supplying "excessive amounts" of the product, and "falsely promot[ing] and distribut[ing the product] generally." *Purdue Pharma*, 2019 WL 3991963, at *10. At a bare minimum, Monsanto's alleged control over the market for PCBs raises thorny questions of fact that are "inappropriate for resolution on a motion to dismiss." *JUUL Labs*, 497 F. Supp. 3d at 649 (cleaned up); *see also, e.g., State v. Tippetts-Abbett-McCarthy-Stratton*, 527 A.2d 688, 693 (Conn. 1987) ("[T]he question of whether a defendant maintains control over property sufficient [for] nuisance liability normally is a jury question.").

Third, the Superior Court cited concerns about transforming nuisance law into "a monster that would devour in one gulp the entire law of tort." Op. 9. Those concerns are misplaced, however. As numerous courts have rightly recognized, a "public nuisance action is not a disguised products liability action." *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 594 (Cal. Ct. App. 2017). Where, as here, nuisance "liability is premised on [a defendant's] *promotion of* [*a hazardous product*] *for* [*a*] *use* with knowledge of the hazard that such use would create," the nuisance-creating conduct "is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product." *Cnty. of Santa Clara*, 40 Cal. Rptr. 3d at 328. Moreover, even a cursory review of the case law confirms that public-nuisance cases represent a tiny share of lawsuits brought against manufacturers for product-related injuries. This is unsurprising: "the manufacture and distribution of products [will] rarely cause a violation of a public right" because widespread individual consumer injuries will rarely rise to the level of a communal or public injury. *State ex. rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 721 (Okla. 2021).

Finally, the Superior Court believed that "the great weight of authority in other jurisdictions support[s] the conclusion that product claims are not encompassed within the public nuisance doctrine." Op. 11. In reality, though, far more courts have recognized product-based nuisance claims than rejected them.

Compare Op. 6–9 & n.15 (collecting cases that dismissed product-based nuisance claims), *with supra* 9 n.7 (collecting cases that approved of product-based nuisance claims). To be sure, the scope of Delaware common law should not be determined by a popularity contest. But if it were, the State would prevail.

II. The Superior Court Misunderstood the Possession and Causation Elements of Trespass.

The Superior Court also erred in dismissing the State's trespass claim. Consistent with the *Restatement*, Delaware courts generally recognize trespass liability when three conditions are met: (1) a defendant intentionally causes a thing to enter (2) land that is lawfully possessed by a plaintiff, (3) without obtaining the plaintiff's consent. *See, e.g.*, *Amer v. NVF Co.*, No. Civ. A. 11812, 1994 WL 279981, at *3 (Del. Ch. June 15, 1994); *Cochran v. City of Wilmington*, 77 A. 963, 963–64 (Del. Super. Ct. 1909).[10] Here, the Complaint handily meets those requirements by alleging that Monsanto intentionally caused the unauthorized entry of PCBs onto State-owned lands. A061 ¶¶ 133–34. In concluding otherwise, the Superior Court misapplied the trespass elements of possession and causation.

A. The State Alleges the Requisite Possessory Interest.

The Superior Court reasoned that a trespass plaintiff must demonstrate "exclusive possession" of its property, and that the State's possession of Delaware rivers are non-exclusive because the State holds those waters open for use by the public. Op. 15. As the State explains in its opening brief, that analysis misconstrues the State's trespass claim, which instead "seeks to recover for harms to its *lands*."

[10] Delaware courts disagree over whether trespass also requires proof of damages. *See Kane v. NVR, Inc.*, No. 2019-0569-PWG, 2020 WL 3027239, at *7 (Del. Ch. June 5, 2020). But the Court need not resolve this question here because it is uncontested that PCB contamination injures the State's land.

AOB 34 n.4 (emphasis added). In any event, the State has adequately pleaded possession of both land and waters for purposes of trespass.

In the context of trespass, possession simply refers to the right to exclude others from real property. *See Kane v. NVR, Inc.*, No. 2019-0569-PWG, 2020 WL 3027239, at *6 (Del. Ch. June 5, 2020) ("The wrong [of trespass] . . . consists of an interference with the possessor's interest in excluding others from the land" (quoting *Restatement* § 163)); *see* Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691, 1704 (2012) ("Causes of action like trespass implement a right to exclude . . . ."). Courts have sometimes described that right as "[t]he right to exclusive possession of land." Dan B. Dobbs et al., *Dobbs' Law of Torts* § 52 (2d ed. July 2022 update).[11] But contrary to the Superior Court's suggestions, there is no

[11] *Accord Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993) ("The chief and one of the most valuable characteristics of the bundle of rights commonly called 'property' is 'the right to sole and exclusive possession—the right to *exclude* . . . .'" (emphasis in original)); *Kysar v. BP Am. Prod. Co.*, No. CIV 00-958 LFG/KBM, 2004 WL 7337784, at *6 (D.N.M. Nov. 18, 2004) (referring to the "right to exclusive possession, sometimes called the right to exclude others"); *Borough of Upper Saddle River v. Rockland Cnty. Sewer Dist. #1*, 16 F. Supp. 3d 294, 338 (S.D.N.Y. 2014) ("As a claim for trespass centers on the right of property owners to exclude others from their domain, New Jersey law plainly requires proof of exclusive possession as an element of trespass" (collecting cases)); *Holmquist v. King Cnty.*, 368 P.3d 234, 239 (Wash. Ct. App. 2016) ("Respecting the paramount right to exclude others, Washington courts compensate the loss of exclusive possession . . . ."); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1206 (9th Cir. 2018) (Bea, J., concurring) ("exclusive possession of the land" means "the right to exclude anyone from entry"); *cf. Tumulty v. Schreppler*, 132 A.3d 4, 26 (Del. Ch. 2015) (observing in the adverse possession context that "[a]n ordinary

requirement that a plaintiff be the exclusive or sole user of the property in question. *See In re MTBE Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 313 (S.D.N.Y. 2006) (recognizing a plaintiff's "exclusive possession" of groundwater even though the plaintiff's proprietary rights were "limited to reasonable beneficial use" of the water). Instead, standing in trespass cases turns on whether a plaintiff has the right to exclude others, not whether the plaintiff has actually exercised that right.

Here, the State undoubtedly possesses the right to exclude others from its rivers and submerged lands. Indeed, the State's highest court squarely held so more than a century ago, explaining:

> [T]he State has the *unrestricted right of a proprietor over its waters*; and may obstruct or *close the same*, if the public interest or convenience requires it to do so. As a public highway, it is free to all citizens for navigation or fishery; but when the legislature deems it more beneficial to the public to *close this highway* by a permanent bridge, or to exclude the fish from its waters by a dam, it is a question only of public expediency, and furnishes no just ground of complaint from individuals who have heretofore enjoyed benefits and advantages which may be abridged, or cut off, by the improvement.

Bailey v. Phila., Wilmington & Balt. R.R. Co., 4 Del. (4 Harr.) 389, 395–96 (1846) (emphasis). As *Bailey* makes clear, the State does not lose its right to exclude simply because it holds its navigable waters open for public use. *Cf. State v. Oliver*, 727 A.2d 491, 496 (N.J. Super. Ct. App. Div. 1999) (state government may "close

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landowner may experience trespasses on her land; promptly excluding such individuals upon discovery reinforces a claim of exclusive ownership").

beaches and preclude use of property, even that falling within the Public Trust Doctrine, when the public safety and welfare is threatened"). Instead, it may restrict access to those public-trust resources "if the public interest or convenience requires it to do so." *Bailey*, 4 Del. (4 Harr.) at 395–96; *see also State ex rel. Buckson v. Pa. R.R. Co.*, 228 A.2d 587, 604 (Del. Super. Ct. 1967) ("[A] state . . . may regulate and control navigable waters for any purpose within the scope of its sovereign, governmental, and police powers.").

B. Control Is Not an Element of Trespass.

The Superior Court also incorrectly rejected the State's trespass claim for failing to plead "control by Defendants of the [trespassing] instrumentality." Op. 15. Before the Superior Court's ruling in this case, no Delaware court had recognized a control-over-the-instrumentality requirement for trespass. Instead, courts in this State have simply required a defendant's conduct to be a "proximate cause" of the alleged trespass. *Newark Square, LLC v. Ladutko*, No. N15C-08-227 MMJ, 2017 WL 544606, at *3 (Del. Super. Ct. Feb. 10, 2017); *see Gordon v. Nat'l R.R. Passenger Corp.*, No. CIV. A. 10753, 1997 WL 298320, at *15 (Del. Ch. Apr. 18, 1997) (applying the same ordinary causation principles to trespass and public nuisance claims).

This causation standard coheres with the *Restatement*, which explains that trespass liability attaches when a defendant "causes a thing or a third person" to enter

a plaintiff's land. *Restatement* § 158(a); *see also id.* § 162 (scope of trespasser's liability extends to "physical harm . . . caused by any act done, activity carried on, or condition created by the trespasser"). Indeed, the *Restatement* expressly holds that "[a] trespass may be committed by the continued presence on the land of a . . . thing which the actor has tortiously placed there, *whether or not the actor has the ability to remove it*." *Id.* § 161(1) (emphasis added).

In any event, the Complaint adequately pleads Monsanto's control of the instrumentality of PCB contamination, for the reasons discussed above. Accordingly, even if this Court were to add a new control element to trespass claims, the State would meet it.

CONCLUSION

This Court should reverse the Superior Court's dismissal of the State's claims for public nuisance and trespass, and remand the case for further proceedings.

Respectfully submitted,

Legal Scholars Amici

Dated: November 29, 2022

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CERTIFICATE OF COMPLIANCE UNDER RULE 13(d)(ii)

Counsel for *Amici* Legal Scholars hereby certifies:

1. This brief complies with the typeface requirement of Rule 13(a)(1) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 365.

2. This brief complies with the type-volume limitations of Rule 14(d)(1) and Rule 28(d) because it contains 4,950 words, which were counted in Microsoft Word 365.

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CERTIFICATE OF SERVICE

I, Kenneth T. Kristl, hereby certify that on November 29, 2022, the foregoing document was served via FileAndServeXpress upon the all counsel of record.

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