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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 RANDY BUCHANAN and DONNA  
8 BUCHANAN, individuals,

9 Plaintiffs,

10 v.

11 SIMPLOT FEEDERS, LLC, an Idaho  
12 limited liability company; and  
13 TYSON FRESH MEATS, INC., a  
14 Delaware corporation,

15 Defendants.

NO. 4:19-CV-5209-TOR

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

14 BEFORE THE COURT are Defendant Tyson Fresh Meat, Inc.'s ("Tyson")  
15 Motion for Partial Summary Judgment (ECF No. 82), Motion to Exclude  
16 Plaintiffs' Expert Dr. Heather R. Jordan (ECF No. 90), and Motion to Exclude  
17 Plaintiffs' Expert Dr. Jeffrey K. Tomberlin (ECF No. 92). These matters were  
18 submitted for consideration without oral argument. The Court has reviewed the  
19 record and files herein and is fully informed. For the reasons discussed below,  
20 Tyson's Motion for Partial Summary Judgment (ECF No. 82) is **granted**, Motion

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT ~ 1

1 to Exclude Plaintiffs’ Expert Dr. Heather R. Jordan (ECF No. 90) is **denied as**  
2 **moot**, and Motion to Exclude Plaintiffs’ Expert Dr. Jeffrey K. Tomberlin (ECF  
3 No. 92) is **denied as moot**.

#### 4 **BACKGROUND**

5 This case concerns a concentrated animal farm’s alleged effect on  
6 neighboring land. Plaintiffs’ Complaint raises the following causes of action: (1)  
7 common law and per se negligence, (2) common law and per se nuisance, (3) and  
8 trespass. ECF No. 1 at 14–16, ¶¶ 56–66. On September 19, 2022, Tyson filed the  
9 present Motion for Partial Summary Judgment. ECF No. 82. Plaintiffs’ response  
10 was due on October 10, 2022. LCivR 7(c)(2)(B). Plaintiffs did not file a response,  
11 timely or otherwise. As a result, the Court considers the following facts  
12 undisputed. Fed. R. Civ. P. 56(e)(2).

13 Since 1961, the Buchanans have owned and resided on over 300 acres of  
14 land in Washington, where they also operate a commercial farm. ECF No. 83 at 2,  
15 ¶ 1. The Buchanans’ utilize tractors, trucks, helicopters, drones, propane cannons,  
16 shotguns, wind machines, and combines in connection with their commercial farm,  
17 all of which create noise. *Id.* at 10, ¶¶ 35–36. The Buchanans’ property also hosts  
18 decaying organic material, where flies can breed. *Id.*, ¶ 37. The Buchanans’  
19 property is bordered by U.S. Route 12 to the west and by a Union Pacific railroad  
20 to the east, both of which produce noise. *Id.* at 4, 11 ¶¶ 11–12, 41–42.

1 Tyson owns and operates a beef processing and packing facility located one  
2 mile away from the Buchanans' residence, which has been in operation for over 50  
3 years. *Id.* at 2–3, ¶¶ 2, 6. Tyson's facility is on land zoned for Industrial  
4 Agricultural Mixed and is within the Attalia Industrial Urban Growth Area  
5 bordering the Buchanans' property to the south and east. *Id.* at 3–4, ¶¶ 7, 8, 10.

6 From August 14, 2016 to present, Tyson obtained and complied with all  
7 permits relating to noise and flies for its operations. *Id.* at 5, ¶¶ 15–16. In this  
8 time, there have been no enforcement actions against Tyson relating to noise or  
9 flies nor any regulatory findings related to excessive, unreasonable, or  
10 objectionable noise or flies. *Id.*, ¶ 17.

11 Tyson has implemented industry best practices to minimize any noise  
12 arounds its operations. *Id.* at 6, ¶ 18. First, to minimize noise emissions, Tyson's  
13 facility houses noise-generating equipment indoors. *Id.*, ¶ 19. Second, Tyson  
14 maintains a regular maintenance schedule for all operating equipment to confirm  
15 facility equipment was continuously functioning properly and not generating  
16 excess noise. *Id.* Third, Tyson regularly monitors noise levels in compliance with  
17 OSHA and other applicable noise-related regulatory requirements. *Id.* Fourth,  
18 while all noise has been kept to a reasonable minimum, any noise is within Walla  
19 Walla County's applicable sound level limits. *Id.*, ¶¶ 20–21.

1 Tyson has also implemented industry best practices to minimize flies around  
2 its operations. *Id.* at 6–7, ¶¶ 22, 26. First, as part of its integrated pest  
3 management program, Tyson contracts with a company who services about 68 fly  
4 traps per week at the facility. *Id.*, ¶ 23. Second, Tyson ensures animal holding  
5 pens are cleaned each day and any waste material is removed at least three times a  
6 week. *Id.* at 7, ¶ 24. Third, Tyson complies with USDA requirements and  
7 inspections relating to pests, including flies. *Id.*, ¶ 25.

8 Tyson’s beef processing and packing facility supplies millions of pounds of  
9 meat each week to people throughout the West Coast, Alaska, and Canada. *Id.* at  
10 8, ¶ 27. Tyson is the second largest employer in Walla Walla County, employing  
11 between 1,350 and 1,515 people with an average annual payroll exceeding \$50  
12 million and paying \$490,000 in annual property taxes and millions of additional  
13 dollars in sales taxes and utility payments each year. *Id.*, ¶¶ 28–29. Other  
14 businesses in Walla Walla County depend on Tyson’s facility. *Id.*, ¶ 30. In the last  
15 three years, Tyson has donated over \$800,000 pounds of meat to food banks  
16 throughout the State of Washington, provided over \$100,000 in corporate grants,  
17 sponsored several scholarships for students, and supported and participated in  
18 numerous community services events. *Id.*, ¶ 31.

19 As to the noise, there are other industrial and commercial operations in the  
20 area, such as other commercial farms, a pulp and paper mill and compost facility, a

1 truck washing operation, a train services operation, a wine distribution facility, a  
2 cold storage facility, and a convenience store and gas station. *Id.* at 4–5, ¶ 14.  
3 These commercial farms and industrial businesses generate noise and/or flies. *Id.*  
4 at 11, ¶ 42–44. The noise from Tyson’s facility is difficult to distinguish from the  
5 noise emitted from a third-party cold storage facility. *Id.* at 12, ¶ 46.

6 As to the flies, the Buchanans admitted they have no evidence any fly  
7 originating on Tyson’s property entered their property. *Id.* at 12, ¶ 47. The  
8 Buchanans’ entomologist stated material on their property could serve as “mass  
9 production sites” for flies, that some level of flies is expected, and that there is “no  
10 evidence” that Tyson’s facility is “the source of the flies.” *Id.* at 10, 12, ¶¶ 38, 40,  
11 49. Tyson’s entomologist expert reported that Tyson’s facility is not a source of  
12 any significant fly population on the Buchanans’ property. *Id.* at 12, ¶¶ 48.

## 13 DISCUSSION

### 14 I. Summary Judgment Standard

15 The Court may grant summary judgment in favor of a moving party who  
16 demonstrates “that there is no genuine dispute as to any material fact and that the  
17 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling  
18 on a motion for summary judgment, the court must only consider admissible  
19 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The  
20 party moving for summary judgment bears the initial burden of showing the

1 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
2 317, 323 (1986). The burden then shifts to the non-moving party to identify  
3 specific facts showing there is a genuine issue of material fact. *See Anderson v.*  
4 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla  
5 of evidence in support of the plaintiff’s position will be insufficient; there must be  
6 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

7 For purposes of summary judgment, a fact is “material” if it might affect the  
8 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is  
9 “genuine” only where the evidence is such that a reasonable jury could find in  
10 favor of the non-moving party. *Id.* The Court views the facts, and all rational  
11 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*  
12 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted  
13 “against a party who fails to make a showing sufficient to establish the existence of  
14 an element essential to that party’s case, and on which that party will bear the  
15 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

## 16 **II. Negligence Claims**

17 Tyson moves for summary on Plaintiffs’ negligence claims. ECF No. 82 at  
18 11. The Court previously dismissed Plaintiffs’ negligence per se claim. ECF No.  
19 21 at 5. Therefore, the Court will address the remaining negligence claim.

1 To establish a negligence claim, a plaintiff must demonstrate a duty, breach  
2 of that duty, causation, and damages. *Hurley v. Port Blakely Tree Farms L.P.*, 182  
3 Wash. App. 753, 773 (2014). While duty is a question of law, breach and  
4 causation are generally questions of fact. *Walter Farm. Grain Growers, Inc. v.*  
5 *Foremost Pump & Well Servs., LLC*, 21 Wash. App. 2d 451, 459 (2022).

6 “Duty is the duty to exercise ordinary care, or, alternatively phrased, the  
7 duty to exercise such care as a reasonable person would exercise under the same or  
8 similar circumstances.” *Mathis v. Ammons*, 84 Wash. App. 411, 416 (1996).

9 “Breach is the failure to exercise ordinary care, or, alternatively phrased, the failure  
10 to exercise such care as a reasonable person would exercise under the same or  
11 similar circumstances.” *Id.*

12 Plaintiffs failed to identify any evidence establishing duty or the applicable  
13 standard of care, let alone breach, causation, or damages. ECF Nos. 1, 82 at 12.  
14 The Court previously recognized that while the Complaint did not provide “a  
15 detailed delineation of the statutes or regulations at issue”, Plaintiff sufficiently  
16 pled the standard of care may be set by the Department of Ecology, WAC 173-  
17 400-040 which sets maximum emissions standards. ECF No. 21 at 6 (citing ECF  
18 No. 1 at 6, ¶ 23). However, there are no facts here regarding Tyson’s emissions  
19 before the Court. Moreover, Plaintiffs have identified no law or industry standards  
20 that sets a standard of care regarding excessive flies or noise.

1 To the contrary, Tyson asserts it has obtained and complied with all permits  
2 relating to the production of noise and flies. *Id.* at 5, ¶¶ 15–16. Tyson  
3 implemented industry best practices to minimize any noise arounds its operations.  
4 *Id.* at 6, ¶ 18. Tyson’s noise-generating equipment is indoors, Tyson maintains a  
5 regular maintenance schedule ensuring there is no excess noise, Tyson regularly  
6 monitors noise levels in compliance with OSHA and other regulatory  
7 requirements, and any noise is within Walla Walla County’s applicable sound  
8 limits. *Id.*, ¶¶ 19–21. Tyson also implemented industry best practices to minimize  
9 flies around its operations. *Id.* at 6–7, ¶¶ 22, 26. Tyson has a pest management  
10 program that services approximately 68 fly traps per week, Tyson cleans animal  
11 holding pens each week and removes waste material at least three times a week,  
12 and Tyson complies with USDA requirements and inspection relating to pests,  
13 including flies. *Id.* at 6, ¶¶ 23–25.

14 There are also no facts establishing causation for either noise or flies. The  
15 noise from Tyson’s facility, if any, is difficult to distinguish from the noise emitted  
16 from a third-party cold storage facility. *Id.* at 12, ¶ 46. The Buchanans also  
17 admitted they have no evidence any fly originating on Tyson’s property entered  
18 their property. *Id.* at 12, ¶ 47. Indeed, the Buchanans’ own entomologist stated  
19 that there is “no evidence” that Tyson’s facility is “the source of the flies.” *Id.*, ¶  
20 49.



1           There is no evidence Tyson breached any standard of care and no evidence  
2 that Tyson’s conduct caused damage under these undisputed facts. Therefore,  
3 summary judgment on Plaintiffs’ negligence claims asserted against Tyson is  
4 appropriate.

5           **III. Nuisance Claims**

6           Tyson moves for summary judgment on Plaintiffs’ nuisance claims. ECF  
7 No. 82 at 18.

8           In Washington, nuisance includes “whatever is injurious to health or  
9 indecent or offensive to the senses, or an obstruction to the free use of property, so  
10 as to essentially interfere with the comfortable enjoyment of the life and property.”  
11 RCW 7.48.010. More specifically, nuisance is “unlawfully doing an act, or  
12 omitting to perform a duty, which act or omission either annoys, injures, or  
13 endangers the comfort, repose health or safety of others, offends decency, or  
14 unlawfully interferes with, obstructs or tends to obstruct, ... or in any way renders  
15 other persons insecure in life, or in the use of property.” RCW 7.48.120.

16 Interference with a person’s property occurs where an act or omission “causes a  
17 reasonable fear of using property.” *Lakey v. Puget Sound Energy, Inc.*, 176 Wash.  
18 2d 909, 923 (2013). In turn, reasonableness is considered in light of the social  
19 utility of the activity, including “the character of the neighborhood where the  
20

1 activity occurs and the degree of community dependence on the particular  
2 activity.” *Id.* at 923–24 (internal citations and quotation marks omitted).

3 Additionally, a plaintiff can establish a nuisance per se claim by showing a  
4 violation of law or by showing “an act, thing, omission, or use of property which  
5 of itself is a nuisance, and hence is not permissible or excusable under any  
6 circumstance.” *Moore v. Steve’s Outboard Serv.*, 182 Wash. 2d 151, 155 (2014)  
7 (internal citations omitted).

8 Plaintiffs failed to identify any violation of law as the basis for the nuisance  
9 claims. Moreover, there are no facts to suggest Tyson’s operations unreasonably  
10 interfere with Plaintiffs’ use and enjoyment of their property or that any incidental  
11 noise or flies are not permissible under any circumstance. As stated *supra*, it is  
12 undisputed Tyson follows all regulations concerning noise and pests. Even if  
13 Plaintiffs are affected by noise or flies, Tyson asserts the conditions already exist  
14 due to Plaintiffs’ own commercial activities and/or surrounding traffic and  
15 commercial enterprises. *See* ECF No. 1 at 10–12, ¶¶ 35–37, 42–45. In any event,  
16 Tyson asserts that any interference is reasonable where Tyson’s facility is an  
17 integral part of the community and neighborhood which is zoned for Tyson’s  
18 operations. *See id.* at 8, ¶¶ 27–31.

1           Tyson’s activities do not unreasonably interfere with Plaintiffs’ use and  
2 enjoyment of their property under these undisputed facts. Therefore, summary  
3 judgment on Plaintiffs’ nuisance claims asserted against Tyson is appropriate.

4           **IV. Trespass**

5           Tyson moves for summary judgment on Plaintiffs’ trespass claim. ECF No.  
6 82 at 23.

7           In Washington, to establish a claim for trespass in this context, the “plaintiff  
8 must show 1) an invasion affecting an interest in the exclusive possession of his  
9 property; 2) an intentional doing of the act which results in the invasion; 3)  
10 reasonable foreseeability that the act done could result in an invasion of plaintiff’s  
11 possessory interest; and 4) substantial damages to the res.” *Bradley v. Am.*  
12 *Smelting & Ref. Co.*, 104 Wash. 2d 677, 690-91 (1985) (internal citation omitted).  
13 *Bradley* clarified that transitory invasions are “are properly denominated as  
14 nuisances.” *Id.* at 691.

15           Plaintiffs failed to assert any facts demonstrating an invasion of noise or  
16 flies attributable to Tyson nor any facts demonstrating substantial damage to the  
17 property. In any event, the nature of the claimed invasions is properly  
18 characterized as nuisance rather than trespass. *Wallace v. Lewis Cnty.*, 134 Wash.  
19 App. 1, 16 (2006), *as corrected* (Aug. 15, 2006) (rodents); *Mock v. Potlatch Corp.*,

1 786 F. Supp. 1545, 1550 (D. Idaho 1992) (noise). Therefore, summary judgment  
2 on Plaintiffs' trespass claims asserted against Tyson is appropriate.

3 **ACCORDINGLY, IT IS SO ORDERED.**

4 1. Defendant Tyson Fresh Meat, Inc.'s Motion for Partial Summary  
5 Judgment (ECF No. 82) is **GRANTED**.

6 2. All claims against Defendant Tyson Fresh Meat, Inc. are **DISMISSED**  
7 **with prejudice**.

8 3. Defendant Tyson Fresh Meat, Inc.'s Motion to Exclude Plaintiffs' Expert  
9 Dr. Heather R. Jordan (ECF No. 90) is **DENIED as moot**.

10 4. Defendant Tyson Fresh Meat, Inc.'s Motion to Exclude Plaintiffs' Expert  
11 Dr. Jeffrey K. Tomberlin (ECF No. 92) is **DENIED as moot**.

12 The District Court Executive is directed to enter this Order and furnish  
13 copies to counsel.

14 DATED November 9, 2022.



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*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge