Expanding Right to Farm Statutes

By Tiffany Dowell[i]

All fifty states have right to farm laws on the books.[ii] Generally, these statutes provide an affirmative defense for agricultural operations that face nuisance lawsuits brought by nearby landowners.[iii] Legal scholars have questioned whether trespass suits would prove to be fatal to right to farm protection.[iv] Most right to farm statutes protect against nuisance actions, leaving some plaintiffs to file trespass suits and argue that this claim is not subject to the Right to Farm defense. Some states have laws that expressly protect agricultural operations from lawsuits for both nuisance and trespass.[v] Some states have held that trespass suits are not protected.[vi] Other states statutes do not expressly prohibit allegations of trespass, and this issue remains unresolved.[vii]

A March 2010, Texas Court of Appeals decision[viii] has resolved this issue with regard to the Texas Right to Farm statute. The court held in *Ehler v. LVDVD, L.C.* that the Texas Right to Farm statute provides protection to agricultural operations from both nuisance and trespass allegations. This decision in could well provide persuasive authority for agriculturists in other states facing trespass suits.

The ruling seems to be in line with the spirit and purpose of right to farm laws. By allowing a plaintiff to circumvent the intended protecting for agriculturists, simply by pleading trespass, rather than pleading nuisance, the entire purpose behind these statutes would be frustrated. The Texas Court of Appeals recognized this, and refused to let a dispute over technicality and semantics destroy the purpose of Right to Farm laws.

Texas Court of Appeals Decision

The Texas Right to Farm statute, Tex. Agric. Code Ann. § 251.004(a) (Vernon 1981), provides protection for agricultural operations from "nuisance actions" being brought against them. The *Ehler* plaintiffs claimed nuisance and trespass against the defendants, owners of an adjacent dairy. Plaintiffs argued that the Right to Farm statute only offered protection to nuisance actions, and that trespass claims were excluded. The trial court rejected this argument and granted summary judgment to the defendants.[ix] The Texas Court of Appeals affirmed, expressly holding that the statute provided a defense for agriculturists against both nuisance and trespass actions.

The facts underlying the case were simple and apparently undisputed. The plaintiffs owned land adjacent to defendants' dairy in El Paso County, Texas. In 2002 and 2003, rain water washed manure from the dairy onto plaintiffs' property. It was this runoff that caused plaintiffs to file suit against the dairy for nuisance and trespass.

Defendants moved for summary judgment based on the Texas Right to Farm statute, which operates as an affirmative defense.[x] Under the Right to farm law, "no nuisance action may be brought against an agricultural operation" if two conditions exist: (1) the agricultural operation was in business lawfully for more than year before the nuisance action was filed; and (2) the conditions and circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.[xi] Defendants raised the statute as an affirmative defense to both plaintiffs' nuisance and trespass claims.

In response, plaintiffs argued that the right to farm act could not apply to their trespass action. Specifically, plaintiffs relied on the language of Section 251.001(a), providing that "*no nuisance action"* may be brought against an agricultural operation, arguing that the affirmative defense was limited only to nuisance claims. Defendants argued that the plaintiffs should not be allowed to avoid the application of the Right to Farm statute through artful pleading of trespass, as allowing for this would be contrary to the purpose of the Right to Farm law.

The term "nuisance action" is not defined in the Right to Farm act. Thus, the court looked to both the ordinary meaning of the word, to precedent cases, and to the purpose of the statute in order to determine what the legislature intended by the phrase. Because plaintiffs relied on the same event and alleged the same damages for both their nuisance and trespass claims, the court found that a trespass action is included in those actions prohibited under the Right to Farm statute.

The court also reasoned that this decision comports with the policy of the Right to Farm statute. Specifically, the right to farm act was based on a Texas policy to "conserve, protect, and encourage the development and improvement of its agricultural land" and the purpose of the Right to Farm Act was to reduce loss of agricultural resources by limiting the circumstances in which an operation may be liable as a nuisance.[xii] The court held that agreeing with plaintiffs and limiting the application and protection of the Right to Farm statute to only nuisance claims would "eviscerate the statute" and would deny agricultural operators the protection intended by the Texas Legislature in passing the law.

Conclusion

As urban sprawl continues to grow, Right to Farm laws will become more frequently relied upon by agriculturists seeking to protect their operations and way of life.[xiii] The *Ehler* decision is a step in the right direction for agriculture in the judicial interpretation of this type of statute. By recognizing that the purpose of the statute was to protect agricultural operations, the *Ehler* court's willingness to allow the Right to Farm defense in both nuisance and trespass cases is a victory for agriculture.

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[ii] *See* Lisa N. Thomas, Comment, *Forgiving Nuisance and Trespass: Is Oregon's Right-to-Farm Law Constitutional?*, 16 J. Envtl. L. & Litig. 445 (2001).

[iii] *See* Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 Wis. L. Rev. 95, 118 (1983).

[iv] *See* Mark B. Lapping & Nels R. Leutwiler, *Agriculture in Conflict: Right-to-Farm Laws and the Peri-Urban Milieu for Farming* In *Sustaining Agriculture Near Cities*, 214-15 (W. Lockeretz ed. 1987) (recognizing that trespass suits could prove the Achilles heel for right to farm laws; "Because right-to-farm laws generally limit their protection of farmers to a partial shield against *nuisance* actions, the farmers in many jurisdictions will remain vulnerable to lawsuits brought under a *trespass* theory.").

[v] *See, e.g.* Or. Rev. Stat. Ann. §§ 30.930 – 30.947 (1981) ; Ky. Rev. Stat. Ann. § 413.072(2) ("No agricultural or silvicultural operation or any of its appurtenances shall bec or become a nuisance or trespass…"); *Rancho Viejo LLC v. Tres Amigos Viejos LLC*, 100 Cal. App. 4th 550, 561 (Cal. Ct. App.2002) (holding that California's Right to Farm statute applies as a defense to both nuisance and trespass claims).

[vi] *See, e.g. Buchanan v. Simplot Feeders* LTD, 952 P.2d 610, 618 (Wash. 1998) ("If…the agricultural activity interferes with the neighbors' actual possession of their property, and if the activity physically damages the property, then the action qualifies as a trespass and damages may be recovered."); *City of Benton City v. Adrian*, 748 P.2d 679, 682 (Wash. Ct. App. 1988); Timothy D. Bates, *The Right to Farm Act: When Can Barring Nuisance Actions or Zoning Enforcement Constitute an Unconstitutional Taking? Or Something's Rotten in the State of Iowa* 6 (1981), http://law.du.edu/images/uploads/rmlui/conferencematerials/2007/Friday/DogsHogsandBullfrogsRuralandAgriculturalLandUselaw/TheRighttoFarmActOutline-4406(v1).pdf (recognizing that some statutes permit trespass or negligence claims to be brought).

[vii] *See, e.g.* NMSA 1978, § 47-9-3 (1981).

[viii] *Ehler v. LVDVD, L.C.*, No. 08-07-00254-CV (Tex. Ct. App. Mar. 17, 2010).

[ix] Plaintiffs' claims of nuisance and violation of the Texas Water Code were likewise disposed of on summary judgment in the trial court and affirmed by the Court of Appeals.

[x] *See Aguilar v. Trujillo*, 162 S.W.3d 839, 853-54 (Tex. Ct. App. 2005) (stating that the Texas Right to Farm act is a statute of repose); *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (explaining that a statute of repose acts as an affirmative defense).

[xi] *See* Tex. Agric. Code Ann. § 251.004(a); *Holubec v. Brandenberger*, 111 S.W.3d 32, 38 (Tex. 2003).

[xii] *See* Tex. Agric. Code Ann. § 251.001.

[xiii] *See* Tiffany Dowell, Comment, *Daddy Won't Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers*, 18 San Joaquin Agric. L. Rev. 127, 128-29 (2009).