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Livestock Odor & (and) Nuisance Actions vs. Right-to-Farm Laws: Report by Defendant Farmer's Attorney

Patrick J. Wheeler

LIVESTOCK ODOR & NUISANCE ACTIONS VS. "RIGHT-TO-FARM" LAWS: REPORT BY DEFENDANT FARMER'S ATTORNEY

J. PATRICK WHEELER*

I. INTRODUCTION

As a farm boy, the breeding, rearing and marketing of livestock, including hogs, cattle, sheep, chickens and turkeys, produced memorable odors which probably were unpleasant, but since they were necessary for the purpose of producing income, they are now pleasant memories. Since then much time has passed, and with more livestock, more people, more odors, and shortages of friendliness and neighborliness, these odors today pose a threat to livestock producers.

Nuisance laws have been used to prevent unreasonable emissions of odor from livestock since 1610.[1] The problems associated with nuisance actions and the uncertainty resulting to the producer pressured the legislatures of the United States to provide alternative relief. The "right-to-farm" legislation is now available to the producer in at least forty-nine states.[2] Still, there are some producers unable to avail themselves of the "right-to-farm" legislation who may become a defendant in a common law nuisance action, with results leading to financial ruin or, at the very least, financial distress.

This paper will discuss a private nuisance action involving a confined sow-pig and finishing hog operation in Missouri defended against neighbors' claims that the operation substantially interfered with the use and enjoyment of their property. The neighbors demanded a permanent injunction and damages for a reduction in value of their property by use of the defendant's land,[3] a neighbor versus neighbor case.

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* Private practitioner, 314 North 11th Street, Canton, Missouri; J.D., St. Louis University, 1951.

The author gratefully acknowledges the assistance of Professor Neil D. Hamilton, Drake University, Des Moines, Iowa, 50311, for his nation-wide research on right-to-farm actions.

1. Aldred's Case, 77 Eng. Reports 816 (1610).

2. *See* Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99-136 (1988).

3. Hellebusch v. Glosemeyer, 1990, Circuit Court Warren County, Missouri upon jury verdict for producer, July 1990, no appeal taken.

II. COMMON LAW NUISANCE DOCTRINE

Common law nuisance doctrine emanates from the efforts of our courts to reconcile the use of property with the personal comfort of others in close proximity to that property. The weighing of equities involved requires a "feel" for the conditions, the people involved, the area concerned, the respective financial conditions, and the attitude of the trier of fact. Section 821F of the Second Restatement of Torts sets forth the rule that there is liability for nuisance only to those who are *significantly* harmed, a kind of harm that would result to a *normal* person in the community.[4]

The rights of owners to use their land is geared to the community. While raising hogs in London may be possible, it may not be practical. Raising hogs in a community of farmers who raise cattle might not be wise, but raising hogs in a community where hogs are customarily raised will allow a substantial number of "normal persons" to be present in the community. These "normal people" will make up the juries, elect the judges, create public opinion and generally reduce the "significant harm" that might result from the release of occasional odors by the producer.

A nuisance may be of a public nature. Acts affecting a substantial number of the general public are generally classified as public nuisances, distinguished from private nuisances, which generally affect only a few.[5] The nuisance may be *per se*, temporary, permanent, partial or complete.[6] Livestock odors are generally not considered to be *permanent* nuisance, even though the odors may be from a permanent structure, because such odors may be abated by, among other things, conduct, activities, or termination. There may be an abatement by injunctive relief, recovery of damages, or both, for significant harm resulting from the nuisance. Money damages may be both actual and punitive.

A private nuisance action involving the production of hogs, where negligence or improper activity is alleged, is a difficult case to defend for the reason that there are no definite emission controls or standards in most states. The Missouri Division of Natural Resources attempted enforcement of odor control regulations, but discontinued efforts primarily because of costs and inability to establish clear and definitive rules and regulations. Generally, health codes are not involved, since unpleasant odors from hog

4. RESTATEMENT (SECOND) OF TORTS § 821F (1979).
5. *Id.* § 821B.
6. *Id.* § 827.

production are not health-threatening. Zoning laws in most areas allow for agricultural activity, including the raising of hogs, but provide no definitive regulations. Accordingly, a livestock producer is left to the whims of a community, the juries, the courts, and the uncertain results of nuisance litigation.

The theory of nuisance is based in tort, yet negligence is only one type of conduct that can produce a nuisance. A person may be strictly liable for certain conduct without negligence. The issue is one of "reasonableness" of conduct. Each may use their property in such a way as to cause some annoyance, but the conduct must be reasonable under the circumstances.

Interference with the use of a person's land by another is a civil wrong which may be remedied by the person harmed. Damage to property may be recovered based on the loss of rental value during the nuisance, loss of income on crops,[7] or the permanent diminution in value of the property.

Temporary damages are the ordinary measure for odor nuisances (*i.e.*, actual damages to date of trial).[8] Punitive or exemplary damages can only be awarded when substantial actual damages exist.[9]

The measure of damages for injury to real estate by nuisance has generally been stated as follows:

> Where the injury to real estate resulting from a nuisance is permanent, the measure of damages is the depreciation in the value of the property . . . [and], all damages, both past and prospective, may be recovered.
>
> Where the injury is temporary or remediable, the measure of damages is not the depreciation of the value of the property, but the depreciation of the rental or usable value during the continuance of the injury . . . and damages as for a permanent injury cannot be allowed where the injury is temporary or the nuisance removable.[10]

A court of equity may temporarily enjoin, partially enjoin or direct alternative methods or solutions to avoid a complete and

7. Weber v. I.M.T. Ins., 462 N.W.2d 283 (Iowa 1990). In *Weber*, the plaintiff was allowed to recover for the loss of his sweet corn crop caused by the odor of manure which the defendant-producer allowed to fall upon the roadway.

8. Ready v. Missouri Pac. Ry. Co., 72 S.W. 142, 143 (Mo. Ct. App. 1903).

9. Thompson v. Hodge, 348 S.W.2d 11, 15 (Mo. Ct. App. 1961).

10. 66 C.J.S. *Nuisance* § 175 (1950).

permanent injunction. This, of course, requires proof that there is no adequate or complete relief at law.

There are defenses to nuisance actions. The defense of contributory negligence or assumption of risk may be used when negligent conduct of the defendant is claimed.[11] The contribution of others to the nuisance may not extinguish defendant's liability for his own contribution.[12] While the "coming to the nuisance" doctrine is not an absolute defense, it may be considered in determining whether the nuisance is actionable.[13] The "right-to-farm" laws may be a defense to a livestock odor case.

The "coming to the nuisance" doctrine is generally based on the theory that there was an assumption of the risk. A person building a residence in an area used for the raising of hogs may be prohibited from later claiming that the hogs are causing odors that should be abated. The doctrine is sharply disputed and has been much debated.[14] A discussion of the defense of coming to the nuisance which reviews both sides of the debate is found in a thorough discussion of the right-to-farm by Margaret R. Grossman and Thomas G. Fisher.[15]

An action tried to a jury is, in effect, the trying of an action to a zoning board, but usually injunctive relief is tried to a court. The joining of a claim for damages with a claim for injunctive relief may still leave the trial to a judge rather than a jury. Whether a claim for injunctive relief and damages may be split and tried to the court and jury simultaneously is debatable.[16] The courts have held that the injunction issues may be determined by a court of equity.[17] These courts of equity may continue to retain jurisdiction of the case in order to grant damages where equity requires such relief under circumstances to be determined without the benefit of a jury.[18] This result is contradictory to the general rule and constitutional provisions of most states guaranteeing a right to trial by jury in common law actions. The better rule would seem to be that where a court is confronted with claims for both equitable relief and damages, the court would panel a jury who would hear the evidence, decide the issue of damages, and leave to the

11. RESTATEMENT (SECOND) OF TORTS § 496A (1986).
12. RESTATEMENT (SECOND) OF TORTS § 840E (1979).
13. RESTATEMENT (SECOND) OF TORTS § 840D (1979).
14. GREGORY, KALVERE & EPSTEIN, CASES AND MATERIALS ON TORTS 616 (1977).
15. Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95-165.
16. *See* State *ex rel.* Willman v. Sloan, 574 S.W.2d 421 (Mo. 1978).
17. *Id* at 422.
18. *Id.*

court at the conclusion of the case the decision whether to grant injunctive relief.

III. RIGHT-TO-FARM LAWS

A thorough review of the status of right-to-farm laws of each state is found in *Nuisance Law and Livestock Production in the United States: A Fifty State Analysis* by Professor Neil D. Hamilton and David Bolte.[19] The majority of the statutes are patterned after section 106-700 of the North Carolina General Statutes.[20] The right-to-farm doctrine is the result of pressure on the legislatures to codify protection from nuisance actions involving livestock producers. Frequently the statutes produce more questions than answers.

The Missouri right-to-farm law is found at section 537.295 of the Missouri Annotated Statutes[21] and was recently amended by the legislature to extend protection to assignees of the land.[22] The new amendments of the Missouri Act also attempt to provide for a reasonable expansion of agricultural operation after the protection from the right-to-farm law has been obtained.

The plaintiffs in the *Glosemeyer*[23] case consisted of persons who "came to the nuisance" and persons who were present before the commencement of the hog operation. The trial court determined that the right-to-farm law was inapplicable under those circumstances, even though the hog operation had been in operation for more than one year before the commencement of litigation. Arguments in the *Glosemeyer* trial that the right-to-farm act of Missouri was a special statute of limitations prohibiting an action after one year were unsuccessful.

An Indiana court determined that the right-to-farm act was applicable retroactively.[24] In fact, the Indiana statute gives specific reference to the reason for the passage of the act.[25] The statute states that the express purpose of the act is to prevent further reduction and loss to the state of its agricultural resources by limiting litigation under the nuisance doctrine.[26]

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19. *See* Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99-136 (1988).
20. *See, e.g.*, N.C. GEN. STAT. § 106-700 (1988 & Supp. 1991).
21. MO. ANN. STAT. § 537.295 (Vernon 1988 & Supp 1992).
22. *See id.* § 537.295(1) (Supp. 1992).
23. Hellebusch v. Glosemeyer, 1990, Circuit Court Warren County, Missouri upon jury verdict for producer, July 1990, no appeal taken.
24. Shatto v. McNulty, 509 N.E.2d 897, 900 (Ind. Ct. App. 1987).
25. *See* IND. CODE ANN. § 34-1-52-4 (Burns 1986).
26. *Id.*

In situations where a state right-to-farm law provides that no agricultural operation may be deemed a nuisance after it has been in operation for more than one year, counsel for defendant should argue that a nuisance action cannot be maintained unless negligence of the operator is alleged. If a producer is freed from a private nuisance theory by a right-to-farm law and liability is predicated on a theory of negligence, the outcome of litigation may be more easily predicted. Standards of care can be more clearly defined and established by the evidence. When right-to-farm acts are interpreted as precluding the application of the nuisance doctrine to the raising of livestock, a producer has a greater opportunity to defend claims against unreasonable odors.

The right-to-farm law, although enacted in almost all states, has not had the desired or intended effect in preventing nuisance actions in livestock odor cases. In fact, case law indicates that there have been few solutions to the burdensome doctrine of nuisance. The Iowa Legislature has attempted an additional form of relief by the establishment of "agricultural areas."[27] The result of the legislation has been a removal of litigation from the courts to administrative law units, which may or may not protect to a producer.

IV. THE ANATOMY OF A NUISANCE ACTION INVOLVING LIVESTOCK ODORS

The most important decision to be made by the plaintiff prior to litigation is a determination of the nature and extent of relief to be sought. This decision will depend on all of the facts and the location.

The *Glosemeyer* case review began in a small rural community which for 150 years had been a tranquil farming area involved in the production of livestock and grain on well-tended farmsteads established by settlers of German ancestry. The county was within commuting distance of a large urban area and was becoming a bedroom community for people working in the city. Still, the area around the producer was used predominantly for farming.

Discord developed in the community following the construction of confinement facilities for the finishing of hogs, using water lagoons for the collection of livestock waste with the use of sprinkler irrigation systems to distribute the waste from the lagoons onto pastures. The plaintiffs were led by a retired livestock pro-

27. IOWA CODE ANN. § 176B.1-13 (1990).

ducer in the community who had raised livestock for over fifty years. He was joined by four other nearby homeowners. Several livestock operations were closer, but many of those operations were nonconfinement operations. Negotiations to avoid litigation failed when the consulting engineer employed by the plaintiffs demanded an aeration system for the lagoon comparable to municipal waste disposal system lagoons. Studies by other experts employed by the producer did not substantiate the claims of the consulting engineer of the plaintiff. The lawsuit sought to abate the alleged nuisance by terminating the operation in its entirety. Claims for both punitive and actual damages were made.

The petition was filed in two counts; Count I for damages and Count II for permanent injunction restraining further conduct of the hog feeding operation. The plaintiffs' claim was based on odors depreciating the value of their property and depriving them the enjoyment of their home. General forms for the pleading of a nuisance action are found in the legal encyclopedias.[28]

A general denial was filed on behalf of defendants, with affirmative defenses including statute of limitations, the right-to-farm act, and wrongful interference with the business of the defendants. The defendants' counterclaims alleged a willful intention to destroy the defendants' business by various attempts to solicit sales, businesses and others to boycott the business.

The principal pre-trial problem revolved around the issue of whether the defendants were entitled to a jury trial on the issue of damages and how the case would proceed on the injunctive relief issues if the defendants were entitled to a jury trial. The trial court ultimately resolved the issue in favor of the defendants, allowing a jury to be panelled and hear the evidence as presented to the court in all issues, with the court reserving the right to decide the issues on the claim for injunction and submitting the issue of damages to the jury if the claim for injunction was denied. If the claim on the injunction were to be granted, the court would retain the case for a determination of any damages.

After ten days of trial and testimony from a consulting engineer, real estate agents, other producers in the vicinity, and witnesses as to the odor emanating from the premises of the defendant, the trial judge found for the defendants on the claim for injunction and the jury found for the defendants on the claim for damages. No appeal was taken.

28. *See* 18A AM. JUR. PLEADING AND PRACTICE FORMS *Nuisance* (1986).

The following experts were used in support of the defendants: Chief of the Missouri DNR and an environmental specialist of the DNR who had monitored the operation of the defendants at their request; a University of Missouri chemist who had taken various tests by the use of a device for measuring odor levels at various points surrounding the defendants' operation; an agricultural engineer concerning the design of the various hog raising facilities and, in particular, the waste disposal facilities; doctors of veterinary medicine who had treated the animals, as well as a University of Missouri animal pathologist concerning tissue examination of animals and relationship to cleanliness and proper care of the animals; an extension economist; two certified real estate appraisers; the executive director of the Missouri Pork Producers Association; defendants' accountant; and swine consultants who were involved in the feeding of the animals.

Perhaps the most convincing evidence in the case came from twenty other producers who operated within a twenty-mile radius of the defendants, with six of them in close proximity to the plaintiffs' property. The most important factor in the decision of both the court and the jury was the defendants' ability to prove by expert witnesses as well as by lay witnesses that the defendants' operation was in compliance with all rules and regulations and was operated in a careful manner with state of the art equipment and designed facilities.

The litigation mght have been avoided had there been better communication between the neighbors, but it was successfully concluded in favor of the producer because of the proof of careful management in using the best available means to reduce odors from reaching into the atmosphere and interfering with the use of plaintiffs' property.