Expanding the Texas Right to Farm

By Tiffany Dowell[i]

A March 2010, Texas Court of Appeals decision[ii] is a victory for Texas agricultural operators. The court in held *Ehler v. LVDVD, L.C.* that the Texas Right to Farm statute[iii] provides protection to agricultural operations from both nuisance and trespass allegations. This decision is important for Texas agriculturists, as it prevents plaintiffs from using artful pleading to circumvent the protections intended by the Right to Farm statute.

The ruling is well within the spirit and purpose of the Texas Right to Farm statute. 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 the Right to Farm act.

Texas Right to Farm Act

The Texas Right to Farm act was passed by the legislature in 1981, with a primary purpose of protecting and encouraging agriculture in the state.[iv] Specifically, the statute provides that no nuisance action may be brought against any agricultural operation if it has been in existence for at least one year prior to the action being filed and if the conditions complained of remain substantially changed since the established date of operation.[v] If a plaintiff brings suit against an agricultural operation protected by the statute, the plaintiff is liable to the agricultural operation for all costs and fees incurred in defending the action, including attorney's fees, costs, and travel.[vi]

Like Texas, Every other state has right to farm laws on the books.[vii] Generally, these statutes provide an affirmative defense for agricultural operations that face nuisance lawsuits brought by nearby landowners.[viii] Legal scholars have questioned whether trespass suits would prove to be fatal to right to farm protection.[ix]

Texas Court of Appeals Decision

The Texas Right to Farm statute provides protection for agricultural operations from "nuisance actions" being brought against them.[x] 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.[xi] 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.[xii] 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.[xiii] 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.[xiv] 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, the Texas Right to Farm law will become more frequently relied upon by agriculturists seeking to protect their operations and way of life.[xv] The *Ehler* decision is a step in the right direction for Texas agriculture in the judicial interpretation of this 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.

[i] Tiffany Dowell is an associate at Peifer, Hanson & Mullins, P.A. in Albuquerque, New Mexico.
[ii] *Ehler v. LVDVD, L.C.*, No. 08-07-00254-CV (Tex. Ct. App. Mar. 17, 2010).
[iii] Tex. Agric. Code Ann. §§ 251.001 – 251.006 (Vernon 1981).
[iv] *See* Tex. Agric. Code Ann. § 251.001.
[v] *See* Tex. Agric. Code Ann. § 251.004(a) .
[vi] *See* Tex. Agric. Code Ann. § 251.004(b).
[vii] *See* Lisa N. Thomas, Comment, *Forgiving Nuisance and Trespass: Is Oregon's Right-to-Farm Law Constitutional?*, 16 J. Envtl. L. & Litig. 445 (2001).
[viii] *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).
[ix] *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.").
[x] Tex. Agric. Code Ann. § 251.004(a).
[xi] 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.
[xii] *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).
[xiii] *See* Tex. Agric. Code Ann. § 251.004(a); *Holubec v. Brandenberger*, 111 S.W.3d 32, 38 (Tex. 2003).
[xiv] *See* Tex. Agric. Code Ann. § 251.001.
[xv] *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).