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Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- Liability of a landowner to habitual trepassers

Almond marketing order advertising assessments do not violate First Amendment

In September of 1999 the United States Court of Appeal for the Ninth Circuit issued the most recent of its decisions involving mandatory advertising assessments and marketing orders. *Cal-Almond v. United States Department of Agriculture,* 99 D.A.R. 9923 (Sept. 22, 1999).

The issue in the case was whether the credit-back provisions of the Almond Marketing Order advertising assessments constituted compelled speech and thus violated Cal-Almond's First Amendment rights. See generally 7 C.F.R. 981.441.

Pursuant to provisions of the Almond Order, almond handlers are charged a tonnage-based assessment to be used for the purpose of generically advertising and promoting the sale of almonds. At the handlers' option, they may receive a credit against the assessment for qualified promotional activities designed to increase the use of almonds. *Cal Almond* at 99 D.A.R. 9923, 7 C.F.R. §§ 981.441(a), 981.441(e)(4), and 981.441(e)(2). The credit was reduced from a 100 percent credit to a two-thirds credit beginning with the 1993-94 crop year. *Id.*

Cal-Almond petitioned the United States Department of Agriculture (USDA) for review on the basis that the credit-back program constituted compelled speech in violation of its First Amendment rights. Relying on earlier authority, the Administrative Law Judge ruled in favor of Cal-Almond. See *Cal-Almond v. USDA*, 14 F.3d 429 (9th Cir, 1993)(*Cal-Almond I*). The subsequent appeal to the USDA's Judicial Officer was stayed pending the United States Supreme Court's decision in *Glickman v. Wielman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). ("*Glickman*"). In the *Glickman* case, the Supreme Court determined that mandatory assessments for tree fruits were valid economic regulations. Subsequent to *Glickman,* the Ninth Circuit in *Cal-Almond III* (remand of *Cal-Almond I* on certiorari from United States Supreme Court) remanded to the district court with instructions to dismiss the First Amendment challenges to the advertising assessments. *Cal-Almond, Inc. v. Dept. Of Agric.*, no.94-17160 (9th Cir. 1997)(*Cal-Almond III*); *USDA v. Cal-Almond, Inc.*, 521 U.S.1113 (1997)(*Cal-Almond II*). *Cal-Almond* at 99 D.A.R. 9923.

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Condemnation of Agricultural Security Area farmland

Interstate Route 81 is a major trucking thoroughfare running through Pennsylvania's prime farmland. With the exception of Thanksgiving and Christmas, eighteen wheelers constantly roll across the area carrying tons of freight in every direction. In late 1988, PennDOT proposed constructing a new Exit 7 interchange along Interstate 81 in the Chambersburg area of Franklin County. This $5.8 million improvement would provide additional access to Chambersburg and relieve traffic congestion on the nearby I-81 interchange and Route 30, which sits about a mile south of the intended location.[1]

Lamar and Lois White own a 26-acre farm contiguous to Interstate 81 in Greene and Guilford townships. The farm is in an Agricultural Security Area (ASA)[2]. An Agricultural Security Area is designated by a statewide program designed to conserve and protect and to encourage the development and improvement of Pennsylvania's agricultural lands for the production of food and other agricultural products. To encourage participation in this program, numerous incentives are offered. Landowners receive incentives in exchange for relinquishment of the right

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Cal-Almond primarily contended that the *Glickman* analysis did not apply because the credit restrained its ability to communicate its message, and constituted compelled speech. *Id*. at 9923. Cal-Almond's assertion was that the "credit-back" provisions compelled speech because the Almond Board could determine which advertising was entitled to a credit and could therefore "dictate" the conduct of the handlers' advertising. The restraint argument focused on a reduction in Cal-Almond's advertising budget. *Cal Almond* 99 D.A.R. at 9924-9925.

The court reviewed the arguments of Cal-Almond to determine if under the three-part test of *Glickman*, Cal-Almond's First Amendment rights were abridged or whether the assessment was a permissible part of a "regulatory scheme" or economic regulation. *Cal-Almond* at 9924. The three part test required that the Court consider "whether the advertising programs impose a restraint on Cal-Almond's freedom to communicate any message to any audience; whether the advertising programs compel Cal-Almond to engage in any actual or symbolic speech; and whether the advertising programs compel Cal-Almond to endorse or finance any political or ideological views that are not germane to the purposes for which the compelled association is justified." *Cal-Almond* at 9924 citing *Gallo Cattle Co.v. California Milk Advisory Board*, ____F3d___ (9th Cir.July 1999).

In applying *Glickman* and the three-part test, the court noted that Cal-Almond did not dispute that it was part of an activity as an almond handler that was already subject to a "regulatory scheme" that substantially constrained the marketing of almonds. *Cal-Almond* at 9924, citing *Glickman* at 521 U.S. 469 and 7 U.S.C. Section 602(1). Cal-Almond was also noted as effectively conceding that if the assessments were "purely mandatory," they would be constitutional. Id. at 9924.

The court in applying the first prong of the three-part test found that Cal-Almond's "freedom to communicate" was not restrained by a reduction in its advertising budget. Cal-Almond had argued that the assessments reduced the amount of money available for advertising. The Ninth Circuit noted that it had expressly rejected this argument in the *Gallo* case, which followed the Supreme Court's "plain statement" that a reduction in an advertising budget did not by itself equal a speech restriction. 99 D.A.R. at 9924 citing *Gallo supra* and *Glickman* at 521 U.S. at 470.

In applying the second prong of the test, the Ninth Circuit found unpersuasive the argument that the Almond Board could "dictate" how the advertising to receive the credit was conducted. The court noted the handlers had the options of simply paying assessments; directly advertising and attempting to receive credit; or advertising regardless of whether they received credit. *Cal-Almond* at 9924. Cal-Almond also argued that the requirement that the promotional seal be carried to receive the full benefit of the advertising constituted "compelled" speech. However the court rejected this argument noting that they were free to choose not to carry the seal. *Id.* at 9924, citing; *Gallo supra* at __ F3d.___.

With respect the third prong of the test, Cal-Almond argued that it "ideologically" objected to the assessments because the assessments supported advertising for "snack almonds" and it did not produce snack almonds. *Cal-Almond* at 9925. The court rejected this argument finding that the standard was whether the message was "germane" to the purpose of the Almond order; i.e. promoting marketing, consumption and distribution of almonds. *Cal-Almond* at 9925, citing *Glickman* at 521 U.S. 476, 7 C.F.R. § 608c, *Gallo* __F.3d__. Here Cal-Almond's objections did not engender any crisis of conscience; rather they amounted to a question of the wisdom or effectiveness of the program and were thus not questions of constitutional import. *Cal-Almond* at 9925 citing *Glickman* at 521 U.S. 472.

The assessments were therefore constitutional.

—*Thomas P. Guarino, Merced, CA*

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to develop the farmland. Compensation is provided by the taxpayers.[3]

In June 1994, the Whites received a notice from PennDOT informing them that PennDOT might need to enter their property to conduct surveys and tests for the construction of a new Exit 7 interchange. To build the proposed exit PennDOT would need to condemn all or a large portion of the White farm.[4] Sometime after receiving the notification of possible entry, the Whites refused entry to PennDOT employees, and PennDOT made no further attempt to access the Whites' property.

In March 1999, PennDOT received approval from the Federal Highway Administration (FHA) to move forward with plans to construct a new Exit 7 interchange. The FHA approval meant that designers could draft final plans, acquire the right-of-way property and construct the interchange as early as Spring 2000.[5] In response to the FHA announcement, the Whites filed a lawsuit against PennDOT in the Commonwealth Court, alleging that PennDOT violated the Agricultural Security Area Law by illegally conducting tests on their land prior to obtaining Agricultural Lands Condemnation Approval Board (ALCAB) permission. PennDOT responded by claiming that they did not need the approval of the ALCAB because they were simply installing a new exit and the ALCAB statute exempted the approval.

The first of two issues that the lawsuit presented was: must the Pennsylvania Department of Transportation have Agricultural Lands Condemnation Approval Board approval before it files a declaration of taking and seizes Agricultural Security Area farmland?

The court began its decision by stating that Pennsylvania Statutes clearly empower PennDOT to condemn land for all transportation purposes.[6] But before condemning agricultural lands that are being used for productive agricultural purposes, PennDOT must request the ALCAB to determine if there is a reasonable and prudent alternative to building the highway on productive farmland.[7]

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AALA Editor..........................Linda Grim McCormick
Rt. 2, Box 292A, 2816 C.R. 163
Alvin, TX 77511
Phone: (281) 388-0155
FAX: (281) 388-0155
E-mail: lgmccormick@teacher.esc4.com

Contributing Editors: Drew Kershen, The University of Oklahoma; Thomas Guarino, Merced, CA; Roger McEowen, Kansas State University; Jeff Feirick, Penn State University.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

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— Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Trespassing livestock and murder convictions: could a deficient fence lead to a prison term for a livestock owner?

By Roger A. McEowen

A concern of livestock owners is their potential liability when livestock escape an enclosure and injure another person or their property. Typically, the focus is on the livestock owner's civil liability for damages caused by the escaped livestock, with the rules of liability varying depending upon the jurisdiction where the animals are located.[1]

In most states, an injured party must establish that the livestock owner negligently failed to keep the animals enclosed.[2] In other jurisdictions, primarily the western range states, landowners are required to construct fences around their property before damages can be collected from the owner of trespassing livestock.[3] But, even in some of these western jurisdictions, there is a blend of "open range" and "fence in" rules.[4]

Under the North Dakota statute, for example, if livestock injure a motorist in a grazing area, the livestock owner is not liable.[5] If a motorist is injured outside a grazing area, the livestock owner must be shown to have been negligent.[6]

In still other states, the fact that an animal has escaped its enclosure creates a rebuttable presumption that the livestock owner was negligent.[7] In a highly questionable opinion, the Nebraska Supreme Court applied the doctrine of res ipsa loquitur in a livestock trespass case.[8] The decision has been roundly criticized.[9]

A recent Kansas Supreme Court decision[11] raises the concern that a livestock owner could not only be held liable civilly for damages escaped livestock cause, but could be prosecuted criminally for involuntary manslaughter or unintentional second degree murder if the escaped livestock cause another person's death.

In *State v. Davidson,*[12] the Kansas Supreme Court upheld a county district court jury's conviction of unintentional second-degree murder against an owner of Rottweiler dogs. The dogs killed an eleven-year-old boy in April of 1997. Evidence introduced at trial demonstrated that the dogs were enclosed behind an inadequate fence in the defendant's yard, and that the defendant had been warned repeatedly that the dogs were out of control, escaping frequently and frightening people in the neighborhood.

Roger A. McEowen is Associate Professor of Agricultural Law at Kansas State University, Manhattan, KS and is a member of the Kansas and Nebraska Bars.

The defendant argued that her conduct constituted merely a negligent omission to confine the dogs and that, therefore, she should have been charged with involuntary manslaughter rather than second-degree murder. Under Kansas law, involuntary manslaughter, a lesser-included offense of second-degree murder, is defined as the "unintentional killing of a human being committed recklessly."[13] Second-degree murder is defined as the "killing of a human being committed unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."[14]

In an earlier case,[15] the Kansas Supreme Court determined that the second-degree murder provision[16] was distinguishable from involuntary manslaughter,[17] and upheld the statute against a constitutional void-for-vagueness challenge. In particular, the court determined that second-degree murder requires a conscious disregard of the risk, sufficient under the circumstances, to manifest extreme indifference to the value of human life. Conviction of second-degree murder requires proof that the defendant acted recklessly under circumstances manifesting extreme indifference to the value of human life. Less extreme recklessness is punishable as manslaughter. Therefore, the court concluded that the language of the second degree murder statute[18] described a kind of culpability different in degree but not in kind from the ordinary recklessness required for manslaughter.

The defendant in *Davidson*[19] argued that her conduct, as a matter of law, did not rise to the level of recklessness necessary to support a conviction for second-degree murder. The jury disagreed, determining instead that the defendant's conduct involved an extreme degree of recklessness.

The Kansas Supreme Court, in *Davidson*[20] discussed at length the defendant's conduct with respect to the dogs from the time the defendant acquired ownership of the dogs. The court noted that the dogs had escaped their enclosure in the defendant's yard on numerous occasions and that the defendant was aware of the escapes. The court also noted the dogs' history of aggressive behavior—chasing children on bicycles, fighting with other dogs, and scaring residents in the neighborhood. Likewise, the court noted that the defendant had failed to properly care for the dogs on certain occasions and had investigated techniques designed to train the dogs to attack individuals upon command.

On the morning of the boy's death, neighbors had noticed the defendant's dogs running loose in the neighborhood. However, the dogs later returned to their fenced enclosure.

Later that morning, the decedent's mother dropped the decedent and his younger brother off at a school bus stop near the defendant's residence. While waiting for the bus, the younger brother noticed that the defendant's dogs were digging at the fence. When the dogs eventually escaped their enclosure, they ran toward the boys, who climbed up into a tree in a neighbor's yard to safety. The defendant's three dogs surrounded the tree and barked at the boys for several minutes before leaving. The decedent, in spite of the protests of his younger brother, got down out of the tree and followed in the direction that the dogs had gone to see what the dogs were doing. When the school bus arrived a few moments later, the younger brother got out of the tree, ran to the bus stop, gathered up the bags and instruments that the boys were carrying, and got on the bus. The boy told the bus driver that his brother had gone after the dogs. Shortly thereafter, the decedent was found dead, having been mauled by the defendant's dogs.

The defendant later told police that she let the dogs out into their enclosure approximately an hour before the decedent's death, then took a sleeping pill and went to sleep on the living room couch. When the defendant was told that her dogs had attacked a boy, the defendant revealed that she was aware that the decedent and his brother would later be at the bus stop and that the boys teased her dogs whenever they came around her property so that the dogs barked and got aggressive when the boys were in the area.

The defendant told police that she and her husband had discussed putting a chain on the gate to the fenced enclosure because the dogs repeatedly escaped. At the time of the decedent's death, there was no chain on the gate. The fence was a six-foot tall chain-link fence with posts sunk in concrete. However, over the course of time, the posts had widened because of pressure being put on the gate while the latch was in the closed position. The resulting gap was sufficient to allow the dogs to escape.

On appeal, the only issue before the Supreme Court was whether the state's evidence was sufficient to support the jury's determination that the defendant's degree of recklessness supported the conviction of second-degree murder. Thus, the court, in focusing exclusively on the defendant's conduct that the court believed contributed to the decedent's death, determined that the defendant could have reasonably foreseen that the dogs could attack or injure someone as a result of what she did or failed to do with respect to the dogs.[21] Consequently, the court affirmed the district court's conviction of second-degree murder, determining that the evidence was sufficient to support the jury's verdict that the defendant killed the boy unintentionally but recklessly under circumstances showing extreme indifference to the value of human life.[22]

The prosecution admitted that there was no precedent in Kansas for convicting a person of homicide for a killing committed by the person's dogs, and could not cite a single case in any jurisdiction where a dog owner had been convicted of second-degree murder for killings committed by their dogs.

The court referenced a Florida case[23] where the defendant's manslaughter conviction was upheld for the killing of another person by the defendant's dogs. The applicable Florida statute, however, conditioned the crime of manslaughter, in part, on the person killed by the defendant's animal "taking all the precautions which the circumstances may permit to avoid such animal."[24]

The court also cited a North Carolina case where the defendant's two Rottweilers had killed a jogger and the defendant's conviction was affirmed on appeal.[25] Again, however, the defendant's conduct was determined to be the *proximate cause* of the victim's death.

This raises a troubling aspect of *Davidson.*[26] Neither the trial court nor the Supreme Court addressed the issue of what *actually* constituted the direct cause of the boy's death. Clearly, the evidence was sufficient to support a conviction of a child endangerment.[27] However, a serious question arises as to whether the second-degree murder conviction was appropriate under the facts of the case.

Unlawful or reckless conduct is only one ingredient of the crimes of involuntary manslaughter or unintentional second-degree murder.[28] Another essential and distinctly separate element of the crime is that the unlawful or reckless conduct charged to the defendant be the *direct* cause of the death in issue. Both the trial court and the Supreme Court conveniently ignored the troubling fact that the decedent along with his younger brother were safely in a tree away from the dogs and that the dogs had retreated out of sight from the boys before the decedent climbed down out of the tree to search for the dogs.[29]

Given the younger brother's plea that the decedent remain in the tree, the decedent was clearly aware of the danger posed in searching for the dogs. However, despite such knowledge, the decedent recklessly chose to leave the safety of the tree and search for the dogs. It was this act of the decedent that ultimately and directly resulted in his death. Consequently, the defendant's admittedly reckless conduct was not a sufficiently direct cause of the decedent's death to hold the defendant criminally liable therefore.

Reckless conduct is only one element of the crimes of involuntary manslaughter and unintentional second-degree murder. In each case, *the defendant's reckless conduct must be a direct cause of the killing.* When a defendant acts recklessly, to whatever degree required under the applicable statute, most courts tend to carefully scrutinize the circumstances of the death before concluding that the circumstances are to be attributed to the defendant.[30] Unfortunately, that did not happen in this case.

The implications of *Davidson*[31] for farmers and ranchers could be profound. Arguably, a charge of unintentional second-degree murder could apply to a livestock owner whose livestock escape an enclosure and cause another person's death.

It would seem that the potential for criminal liability should be limited to situations where a livestock owner has become aware of an animal's vicious propensities and has failed to take further action to restrain such animal or the animals have repeatedly escaped from their enclosure and wandered onto a public roadway.

Criminal liability should not apply where the decedent's actions are the direct cause of the decedent's death (such as where the decedent exits the automobile to photograph the livestock that had already moved off of the road and is subsequently killed by the animals). But, apparently that would not be the case in Kansas.

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[1] See generally McEowen and Harl, *Principles of Agricultural Law,* § 11.11[1] (1999).

[2] See, e.g., 29 A.L.R. 4th 431 (1997).

[3] Id.

[4] Some states, such as North Dakota, have statutorily designated grazing areas (N.D. Cent. Code § 36-11-07 (1997)).

[5] Id.

[6] See, e.g., *Hassan v. Brooks*, 566 N.W.2d 822 (N.D. 1997) (strict liability rule inapplicable in situations involving injury to motorists not occurring within a grazing area).

[7] See, e.g., 29 A.L.R. 4th 431 (1997).

[8] *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995).

[9] See, e.g., McEowen and Harl, *Principles of Agricultural Law,* §§ 11.11[1] (1999); Harl, "Res Ipsa Loquitur For Animals on the Highway?", 8 Agricultural Law Digest No. 19, Oct. 3, 1997, pp. 145-146.

[10] *State v. Davidson,* No. 81,243, 1999 Kan. LEXIS 395 (Kan. Sup. Ct. Jul. 9, 1999).

[12] No. 81,243, 1999 Kan. LEXIS 395 (Kan. Sup. Ct. Jul. 9,1999).

[13] Kan. Stat. Ann. § 21-3404(a) (1997).

[14] Kan. Stat. Ann. § 21-3402(b) (1997).

[15] *State v. Robinson,* 261 Kan. 865, 934 P.2d 38 (1997).

[16] Kan. Stat. Ann. § 21-3402(b) (1997).

[17] Kan. Stat. Ann. § 21-3404(a) (1997).

[18] Kan. Stat. § 21-3402(b).

[19] No. 81,243, 1999 Kan. LEXIS 395 (Kan. Sup. Ct. Jul. 9,1999).

[20] No. 81,243, 1999 Kan. LEXIS 395 (Kan. Sup. Ct. Jul. 9,1999).

[21] The defendant's primary argument on appeal was that the state failed to prove foreseeability.

[22] See Kan. Stat. Ann. § 21-3402(b) (1997).

[23] *Munn v. State,* 158 Fla. 892, 30 So. 2d 501 (1947).

[24] Fla. Stat. Ann. § 782.12 (1941).

[25] *State v. Powell,* 109 N.C. App. 1, 426 S.E.2d 91 (1993).

[26] No. 81,243, 1999 Kan. LEXIS 395 (Kan. Sup. Ct. Jul. 9,1999).

[27] The jury did, indeed, convict the defendant of endangering a child. That determination was not appealed.

[28] Involuntary manslaughter, under Kansas law, is a lesser included offense of unintentional second-degree murder.

[29] Admittedly, the issue was not before the Supreme Court on review.

[30] See, e.g., *Commonwealth v. Root,* 403 Pa. 571, 170 A.2d 310 (1961) (defendant's conviction of involuntary manslaughter for death of opponent in highway auto race reversed; opponent's reckless act of passing in dangerous manner superceding cause of death).

[31] No. 81,243, 1999 Kan. LEXIS 395 (Kan. Sup. Ct. Jul. 9,1999).

ASA farmland/*Cont. from page 2*

The Agricultural Lands Condemnation Approval Board was created to protect productive agricultural land from condemnation. The board is comprised of six members consisting of the Director of the Office of Policy and Planning, the Secretaries of Agriculture, Environmental Protection, Transportation and two active farmers appointed by the Governor with the advice and consent of a majority of the Senate. The Secretary of Agriculture is the chairman. The board has jurisdiction over land condemned for highway and waste disposal purposes. Once faced with a dispute, the board has sixty days in which to determine whether there is a feasible and prudent alternative to the proposed condemnation.[8]

Pennsylvania Department of Transportation argued to the court that the ALCAB has no jurisdiction over PennDOT's power to condemn farmland because the Exit 7 project was simply a widening of an existing road. In section 106(d)(1) of the ALCAB, the statute provides that board jurisdiction does not apply to widening roadways of existing highways, and the elimination of curves or reconstruction on existing highways.[9] According to PennDOT, the Exit 7 project was a simple widening of an existing highway. The court disagreed. It found that the work proposed on Exit 7 was clearly outside the scope of the exception because it involved the addition of an interchange with new ramps and connector roads. The court held that PennDOT must seek ALCAB approval before it can file a declaration of taking.

The second issue addressed was: can the Pennsylvania Department of Transportation conduct tests on Agricultural Security Area farmland proposed for condemnation before getting approval from the Agricultural Lands Condemnation Approval Board (ALCAB)?[10]

The court in deciding this issue looked to section 1-409 of the Eminent Domain Code (EDC).[11] Section 1-409 provides that prior to the filing of the declaration of taking, a condemnor is authorized to enter onto property for the purposes of conducting public planning studies.[12] However, one restriction implemented in the EDC contains a ten-day notification period. Therefore, PennDOT must wait ten days after notifying the Whites before entering the land and conducting the tests.

Entry onto land to conduct a survey may cause damage to the land. The Eminent Domain Code acknowledges this and provides a landowner compensation for any damages incurred from the land study. The court found that PennDOT was entitled to enter the Whites' property without ALCAB approval for testing and planning purposes pursuant to the Eminent Domain Code, but PennDOT must pay the Whites for any damage caused by the testing. The Eminent Domain Code is clear and ALCAB approval is not a prerequisite to PennDOT's right to enter the farmland for the purposes of public planning studies.

In conclusion, Pennsylvania recognizes that once farmland is lost, it is gone forever. To slow the conversion of farmland into housing or industrial developments, Pennsylvania enacted the ALCAB. The court held that the ALCAB must be provided the opportunity to look for a way to save productive ASA farmland proposed for condemnation. Pennsylvania also recognizes that changes not even contemplated twenty years ago can and do become a reality. These changes require looking at all possible options, including the condemnation of ASA farmland. Each survey conducted protects taxpayers from wasting the limited resources available to state and local government. The court's ruling provides PennDOT the ability to conduct tests allowing for change in the future, but PennDOT's authority is not unfettered and is tempered by ALCAB approval.

Jeff Feirick, Graduate Research Assistant, The Agricultural Law Research and Education Center, Penn State University, Dickinson School of Law

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[1] *Plans Approved for New I-81 Exit 7 Interchange*, Carlisle Pa. Sentinel, Mar. 27, 1999, at B-1.

[2] 3 Pa. Cons. Stat. Ann. §§ 901 et. seq. (West 1988).

[3] 3 Pa. Cons. Stat. Ann. § 902 (West 1988).

[4] *Farm Bureau Files Amicus Curiae In Exit 7 Lawsuit*, Pennsylvania Farm Bureau Country Focus, Sep. 1999, at 16.

[5] *Plans Approved for New I-81 Exit 7 Interchange*, Carlisle Pa. Sentinel, Mar. 27, 1999, at B-1.

[6] 71 Pa. Cons. Stat. Ann. §§ 513(e)(1) (West 1990).

[7] 71 Pa. Cons. Stat. Ann. §§ 106(b) (West 1990).

[8] 71 Pa. Cons. Stat. Ann. §§ 106 (a), 106 (b) (West 1990).

[9] 71 Pa. Cons. Stat. Ann. §§ 106(d)(1) (West 1990).

[10] 71 Pa. Cons. Stat. Ann. § 106 (West 1995)

[11] 26 Pa. Cons. Stat. Ann. § 1-409 (West 1997)

[12] 26 Pa. Cons. Stat. Ann. § 1-409 (West 1997)

Prevented plantings in crop insurance

In *Snell v. Glickman*, No. 98-2190, 1999 U.S. App. LEXIS 6034 (10th Cir. Apr. 2, 1999), the plaintiff was a dryland wheat farmer in New Mexico in a region that had been affected by drought conditions for the previous three to four years. The plaintiff did not plant a wheat crop after determining that the moisture level in the soil was too low and would likely cause a wheat crop to not mature and the land to suffer wind erosion. The plaintiff's neighbors did plant wheat and their crops failed to mature resulting in severe wind erosion to their land. The plaintiff applied to recover crop insurance benefits on the basis that the drought prevented him from planting his wheat crop. Coverage under the policy was provided for "prevented plantings," defined in part as the inability "to plant the insured crop due to an insured cause of loss that is general in the area (*i.e., most producers in the surrounding area are unable to plant due to similar insurable causes*)."

The local Farm Service Agency denied the plaintiff's claim, and the plaintiff appealed to the USDA's National Appeals Division (NAD). The NAD hearing officer denied the claim, noting that the plaintiff's concern for conservation was secondary with respect to the terms of the crop insurance policy. Because the plaintiff's neighbors were able to and did plant wheat, the plaintiff did not meet the insurance criteria for "prevented plantings." The hearing officer's decision was upheld in a subsequent administrative appeal.

On appeal to the Tenth Circuit, the plaintiff claimed that the "prevented planting" provision in the policy was unreasonable because it required the plaintiff to violate sound conservation practices to be eligible to recover under the policy. The court upheld the administrative findings on the basis that the plaintiff had not demonstrated that the insurance program's general reliance on what other farmers do as a measure for determining whether planting is "prevented" was unreasonable or not in accordance with law.

—Roger A. McEowen, Kansas State University

Clarifying the Washington State Right to Farm Act

In 1979, Washington state enacted its on Right-to-Farm Act. Wash. Rev. Code Ann. §§ 7.48.300- .310 & .905 (West 1992). The act provides that agricultural activities conducted on farmland and forest practices, if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and nonforestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety. In 1992, the Washington Legislature added: "Nothing in this section shall affect or impair any right to sue for damages."

In *Buchanan v. Simplot Feeders Limited Partnership (Simplot) and IBP, Inc. (IBP)*, 952 P.2d 610 (Wash. 1998), the Buchanans, farmers, sued their neighbors, Simplot and IBP, conducting farming activities, in federal court alleging nuisance, trespass and negligence. The United States District Court for the Eastern District of Washington certified a question for the Washington Supreme Court because there are no relevant Washington authorities that deal with the issue. The question is whether the 1992 amendment to the Washington Right-to-Farm Act limits application of the balance of the section to actions seeking extraordinary relief?

The Buchanans own and operate a 320-acre farm near Pasco, Washington. They have farmed and lived on the land since 1961. In 1969, a small cattle-feeding operation opened on the land to the southeast of the Buchanan farm. Simplot purchased the feedlot in the fall of 1992. In 1970 a small meat processing plant began operation on the property to the southeast of the Buchanan farm. IBP purchased the facility in 1976.

The Buchanans allege Simplot's operation now holds over 40,000 cows and since 1992 has resulted in a significant increase of flies and bad odors. They also allege that IBP has significantly expanded its meat processing and rendering plant since 1993 resulting in a significant increase in foul and obnoxious odors crossing onto the Buchanans' farm and residence. Under the trespass action, the Buchanans complained of flies and manure dust which were damaging the Buchanans' crops. Under the nuisance claim, they complained of the foul and obnoxious odors.

As to the nuisance claim, Simplot and IBP argued to the federal court that their operations were exempt from nuisance suits under the Washington Right-to-Farm Act because the Act declares that agricultural activities, which create odors, do not constitute a nuisance. The Buchanans disputed the Defendants' reliance on the Act, arguing to the federal court that the statute could not apply since the Buchanan farm allegedly was in operation before Defendants' activities. The Buchanans then argued that, even if the Defendants could rely on the Act, the Buchanans could still seek damages in their nuisance action pursuant to a 1992 amendment to the statute.

The federal court issued an order partially granting Defendants' motion for summary judgment. The court dismissed some of the Buchanans' negligence and trespass claims, but withheld ruling on the nuisance claim, finding that there was a question of interpretation of Washington's Right to Farm Act.

Before the Washington Supreme Court addressed the certified question, it commented on the distinct, yet related, question of whether Defendants may properly rely on the Right-to-Farm Act in defense of this nuisance action. An agricultural activity is presumed to be reasonable and shall not constitute a nuisance when: (1) the activity does not have a substantial adverse effect on public health and safety; (2) the activity is consistent with good agricultural practices, laws, and rules; and (3) the activity was established prior to the surrounding nonagricultural activities.

The court had to decide if the third condition applied because both parties were agricultural activities. The court examined the language of the statute and the Legislature's finding and purpose.

First, the court determined that in the first sentence of the statute the Legislature clearly states what the Act is designed to protect: "the legislature finds that agricultural activities conducted on farmland and forest practices in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses and timber production." Wash. Rev. Code Ann. § 7.48.300 The Legislature was concerned that farmlands in urbanizing areas are prematurely being closed to agricultural use because of nuisance lawsuits in those urbanizing areas. The Act is designed to protect farms from nuisance lawsuits brought by new residents.

The second sentence of the statute is, "it is therefore the purpose of Wash. Rev. Code Ann. §§ 7.48.300-7.48.310 and 7.48.905 to provide that agricultural activities conducted on farmland and forest practices be protected from nuisance lawsuits." *Id.* The Defendants focused on, the second sentence alone, claiming that it broadly offered nuisance protection from all agricultural activities. The court refused to accept this argument because the court felt the Defendants had read this sentence out of context with the rest of the statute. When analyzing the ambiguous language in the statute along with the Legislature's finding and purpose, it becomes clear the nuisance immunity should be allowed only in those cases where the nuisance suit arises because of urban encroachment into an established agricultural area.

The court bolstered its reliance on the narrow position by explaining that public policy considerations also require a narrow application of the Act. They found that the protection afforded by the nuisance exemption is similar to a prescriptive easement. A farmer who participates in farming activities that potentially interfere with the use and enjoyment of adjoining land, gives notice to an urban developer who subsequently locates next to the farm. The Right-to-Farm Act provides a quasi easement against urban developments to continue those nuisance activities. This quasi easement is obtained more easily under the Act than if the farm were required to meet the strict requirements for a prescriptive easement.

If an agricultural activity interferes with the use and enjoyment of an adjoining property, it is properly characterized as a nuisance and the activity may be protected under the Right-to-Farm Act. If, on the other hand, 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.

The Washington Supreme Court held that the language of the certified question merely refers to a plaintiff's ability to seek damages in other causes of action, such as trespass. Assuming Defendants can rely on the Right-to-Farm Act as a defense, the 1992 amendment does not allow the Buchanans to seek nuisance damages for the foul odors allegedly emanating from Defendants' property.

In the dissent, Justice Alexander points out that the federal court did not ask the Washington Supreme Court to answer more than one federal question. Alexander felt the court should avoid giving answers that were not asked for. The majority disagreed with Justice Alexander. In *Rettkowski v. Department of Ecology,* 910 P.2d 462, 466 (Wash. 1996), the Court decided that when a statute is clear and unambiguous on its face, there is no need to resort to methods of statutory construction. The majority felt there was sufficient need to clarify the ambiguous section of the statute.

—Jeff Feirick, The Agricultural Law Research and Education Center, Penn State University, Dickinson School of Law