North Carolina's "Right to Farm" Response to the *Murphy-Brown (Smithfield)* Swine Nuisance Verdicts

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> *"Whereas, frivolous nuisance lawsuits threaten the very existence of farming in North Carolina; … and, [w]hereas, regrettably, the General Assembly is again forced to make plain its intent that existing farms and forestry operations in North Carolina that are operating in good faith be shielded from nuisance lawsuits filed long after the operations become established; Now, therefore …"*[1]

Such is the preamble to the 2018 amendments to North Carolina's right to farm law[2] passed in an omnibus package referred to as the Farm Act of 2018[3], on June 15, 2018. This law passed within 30 days of its filing and following a gubernatorial veto override[4] became law in the wake of several multi-million dollar nuisance verdicts against North Carolina's top pork producer Murphy-Brown, LLC, a subsidiary of Smithfield Foods, Inc. The amendments illustrate the North Carolina legislature's continuing efforts to insulate farms, particularly those integrated into the economically important swine and poultry industries, from common law liability for real or perceived environmental externalities.

One might read the preamble to the most recent amendments as a "we cannot make this any more clear!" admonishment to North Carolina state and federal judges as they consider rulings in nuisance cases involving farm operations. With North Carolina second in the nation in hog

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[1] An Act to Make Various Changes to the Agricultural Laws (aka "Farm Act of 2018") (N.C. SESS. LAWS 2018-113, Senate Bill 711)

[2] N.C. GEN. STAT §106-700 *et seq*. (2015)

[3] Farm Act of 2018, *id*. This statute contained a grab bag of changes related to various agricultural laws, such as removing "cow share" arrangements from regulation as sales of raw milk, as well as requiring that the state enforce federal restrictions on using the word "milk" to describe plant-based liquids.

[4] The legislation was filed on May 16, 2019, ratified on June 15, and vetoed by Governor Roy Cooper on June 25 accompanied by the following statement: "Our laws must balance the needs of businesses versus property rights. Giving one industry special treatment at the expense of its neighbors is unfair." (see https://governor.nc.gov/news/governor-cooper-vetoes-bills-and-signs-bills-law). The veto was overridden on June 27. See https://www.ncleg.gov/BillLookup/2017/S711

production,[5] other states have taken note, with some acting to protect farm operations in their jurisdictions.[6]

To date, 26 nuisance cases have been filed against Murphy-Brown in the Federal District Court for the Eastern District of North Carolina under diversity jurisdiction.[7] Of that number, five resulted in compensatory and punitive damage verdicts[8] from largely urban jury panels living far from the community challenges of managing the waste generated by North Carolina's pork product output.[9] These five cases are now on consolidated appeal before the Fourth Circuit, with the remaining cases under stay pending the legal ruling from that court.[10] A key issue on appeal is the trial judges' failure to grant defendant Murphy Brown's pleading to dismiss the cases based on the Farm Act of 2018 amendments to North Carolina's right to farm law.

Given the economic importance of North Carolina's integrated pork and poultry production sectors, the state's General Assembly has historically responded to common law nuisance case filings, trial verdicts and appellate opinions by updating the right to farm law to address a vulnerability in the law exposed by such litigation. With North Carolina having one of the first right to farm laws in the nation dating back to 1979, similar laws have been passed in all 50 states[11] to achieve the public policy of farmland preservation by inoculating farm operations from common law nuisance verdicts that might otherwise remove farmland from agricultural use.[12] In North Carolina, all published opinions of common law nuisance cases testing the state's right to farm law concern swine concentrated animal feeding operations (CAFOs).[13]

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[5] After Iowa, North Carolina is the largest producer of hogs in the United States, accounting for $2,873,988,000 in sales on a swine population of 8,901,434 hogs, for nearly a quarter of North Carolina's total agricultural output. (U.S. Department of Agriculture, *National Agricultural Statistics Service*, 2018).

[6] Other states which have recently moved in most recent session to enhance right to farm protections in the wake of the *Smithfield* verdicts include Utah (SB93), Nebraska (LB 227) and West Virginia (SB393).

[7] All of the approximately 500 plaintiffs are North Carolina residents, whereas Smithfield, Inc. is headquartered in Virginia and Murphy-Brown, LLC in Delaware. The farm operators were not named as defendants and do not own the pigs at issue in the litigation; the named defendants had no North Carolina subsidiary which owned the pigs at issue. The farm operators were not made parties to the litigation by either plaintiffs or defendant.

[8] 1) McKiver v. Murphy-Brown, LLC , E.D.N.C., No. 14-CV-180-BR (Verdict: $51 million [reduced to $3 million] for 10 plaintiffs); 2) Williams vs. Murphy-Brown, LLC, E.D.N.C., 7:14-CV-180-BR (Verdict: $25 million [reduced to $630,000]; 3) Artis v. Murphy-Brown, LLC, No. 7:14-CV-237-BR (Verdict: $473.5 million [reduced by statute to $94 million]; 4) Gillis v. Murphy-Brown, LLC, E.D.N.C., No. 14-cv-185-BR (Verdict: compensatory damages from $100-$75,000 per plaintiff); 5) McGowan v. Murphy-Brown, LLC, No. 7:14-CV-182-BR (Verdict: damages totaling $420,000).

[9] A key motion and controversial order by Judge Britt dismissed defendant's request that jurors be allowed to travel to the farm operation to witness firsthand the claimed effects of swine waste management systems.

[10] As of publication, argument in the cases has not been calendared (Author email confirmation with lead appellate counsel, June 11, 2019).

[11] See Harrison M. Pittman, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 AMERICAN LAW REPORTS 465 (6th ed. 2005).

[12] See Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to*

The Farm Act of 2018 marks the fourth time the General Assembly has updated the right to farm law following unfavorable court rulings or anticipating new nuisance filings. Indeed, the Farm Act's preamble quoted above notes the General Assembly's continuing efforts in 1992, 2013 and 2017[14] to express a public policy that farm operations be protected when the area surrounding the farm changes from an agricultural area to something else, presumably a residential area. The codification of this "coming to the nuisance" theory – with its responsive adjustments – is designed to result in dismissal of nuisance cases.

The first amendment in 1992 extended the coming to the nuisance defense to forestry operations,[15] and in 1995 the right to farm law added a requirement of pre-litigation mediation.[16] The next amendments in 2013[17] were made following the filing of the first *Smithfield* actions in state court in an effort to ensure that an operation established prior to plaintiffs' nearby residency would be protected. The amendments provided that a farm may raise an affirmative defense to a nuisance claim when the farm was established before "changed conditions in or about the locality outside of the operation" occurred or if the farm has undergone a "fundamental change."[18] The 2013 amendments defined fundamental change to exclude changes in ownership, size, or type of product produced, or employment of new technology.[19]

Farm: Statutory Limits on Nuisance Actions Against the Farmer, 1983 WIS. L. REV. 95 (1983).

[13] While North Carolina's - and indeed all state right to farm laws - do not specifically target integrated CAFOs, all reported farm common law nuisance cases in North Carolina concern such operations. See Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699 (N.C. App., 2002) (related to pre-litigation mediation requirement, see note 17 below); Mayes v. Tabor, 334 S.E.2d 489, 77 N.C.App. 197 (N.C. App., 1985) (supporting the proposition that a farm need not be operated negligently to constitute a nuisance, and supporting the proposition that living adjacent to a hog operation prior to its establishment is not "changed circumstances in or about the locality" (334 S.E.2d 489 at 491); and Parker v. Barefoot, 502 S.E.2d 42, 130 N.C.App. 18 (N.C. App., 1998) (supporting the proposition that use of latest technology does not preclude nuisance finding).

[14] Farm Act of 2018, Id.

[15] Act of July 8, 1992, ch. 892, sec. 1, § 106-700, 1991 N.C. Sess. Laws 441, 441–43 (codified as amended at N.C. GEN. STAT. § 106-700 (2018)).

[16] Act of July 27, 1995, ch. 500, sec. 1, § 7A-38.3, 1995 N.C. Sess. Laws 1489, 1492–94 (codified as amended at N.C. GEN. STAT. § 7A-38.3 (2015)) See Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699 (N.C. App., 2002), holding that pre-litigation requirement has been met regardless whether additional plaintiffs join the case.

[17] Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 858–59 (codified as amended at N.C. GEN. STAT. § 106-701 (2015))

[18] The danger of a statutorily undefined "fundamental change" was illustrated by the case of Durham v. Britt, 117 N.C.App. 250, 451 S.E.2d 1 (1994), which exposed limiting phrase to broad fact inquiry that survives the right to farm dismissal on summary judgement. *Durham v. Britt* concerned the change in operation from a confined turkey production facility to a confined swine production facility. In reversing the trial court's dismissal of the case under the right to farm law, the North Carolina Court of Appeals noted that "[a] fundamental change could consist of a significant change in the type of agricultural operation, or a significant change in the hours of the agricultural operation." Id 451 S.E.2d at 3.

The Farm Act of 2018 amendments are the most sweeping to date, and may close the opening through which such nuisance actions have survived as well as admissible evidence to prove a nuisance. Presumably due to the trial court's finding that a sufficient number of the plaintiffs had resided in the vicinity prior to the establishment of the operations at issue, the "changed conditions" exception through which the defense has fallen in previous cases, as well as the *Smithfield* trials, was struck from the right to farm statute.[20] In addition, the qualifications for standing were tightened as follows:

> *(a) No nuisance action may be filed against an agricultural or forestry operation unless all of the following apply:*
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> *(1) The plaintiff is a legal possessor of the real property affected by the conditions alleged to be a nuisance.*
>
> *(2) The real property affected by the conditions alleged to be a nuisance is located within one half-mile of the source of the activity or structure alleged to be a nuisance.*
>
> *(3) The action is filed within one year of the establishment of the agricultural or forestry operation or within one year of the operation undergoing a fundamental change."*[21]

Of course, as noted above, while fundamental change is still open to factual interpretation, the statutory definition limitations provide a broad catchall that has not yet been tested in the courts.[22] Also stripped away is any language leaving open an exception where the "fundamental change" language is inapplicable due to negligence or "improper operation."[23]

Additional changes relate to the larger portion of the verdicts comprised of punitive damages as follows:

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[19] The 2013 amendments defined fundamental change by what it is not. The amendments codified that the following were not to be considered a fundamental change starting the clock on filing a nuisance action:

1. A change in ownership or size.
2. Temporary cessation or interruption of farming.
3. Enrollment in government programs.
4. Adoption of new technology.
5. A change in the type of farm product being produced.

H.B. 614, N.C. Sess. Laws 2013-314. The language of these five elements is drawn from a model right to farm law written by the American Legislative Exchange Council; see http://www.alec.org/modelpolicy/right-to-farm-act/

[20] Farm Act of 2018, N.C. SESS. LAWS 2018-113, Senate Bill 711

[21] N.C. GEN. STAT. § 106-701 (2018).

[22] Legal research reveals no North Carolina appellate opinion addressing a fact pattern providing context or color to the wording of the limitations.

[23] Id at n.21. In addition, §106-701(d), which voids any local ordinance that may designate certain types of farm operations a nuisance, was stripped of its negligence exception.

> *A plaintiff may not recover punitive damages for a private nuisance action where the alleged nuisance emanated from an agricultural or forestry operation that has not been subject to a criminal conviction or a civil enforcement action taken by a State or federal environmental regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance within the three years prior to the first act on which the nuisance action is based.*[24]

Though the punitive damage portion of the verdicts was reduced on motion by defendants under a cap mandated by existing state law,[25] new language appears to close the door to any claim of punitive damages absent such objective regulatory enforcement standard cited above, and indeed inserts a requirement of regulatory violation due process and adds a proximate cause requirement. Though not defined, the requirement of "criminal conviction" or "civil enforcement action," when combined with the removal of the negligence exception to the fundamental change bar, may work together to bar any evidence short of a public record on a regulatory violation.

As a companion to the right to farm law amendments, the Farm Act of 2018 also inserted a significant change to another farm preservation statute[26] authorizing counties to voluntarily establish Voluntary Agricultural District (VAD) ordinances[27] that among other benefits alert title searchers of a parcel's proximity to an operating farm. The proximity notice provision thus provides warning to non-farming residential purchasers – including residential developers – of the sights, smells and sounds of adjacent operating farms. Theoretically such foreknowledge deflates a nuisance damage calculation based on valuation expectations when a potential nuisance has been disclosed prior to purchase.[28] Whereas before the Farm Act of 2018 counties with *digitized* (e.g. online) land records systems had the option to add a proximity warning reasonably calculated to alert the proximity of a searched parcel to a farm, the new law makes such warning mandatory. Specifically, the Farm Act requires that *[a]ll counties shall require that land records include some form of notice reasonably calculated to alert a person researching the title of a particular tract that such tract is located within one-half mile of a*

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[24] Id.

[25] N.C. GEN. STAT. § 1D-25 (1995). Punitive damages are limited to three times compensatory damages, which for this purpose are capped at $250,000. This law has been upheld by the North Carolina Supreme Court; see Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (N.C., 2004).

[26] N.C. GEN. STAT. §106-735 *et seq*. As of this writing, ninety of North Carolina's one hundred counties have adopted a VAD ordinance. (see http://www.ncagr.gov/Farmlandpreservation/VAD/)

[27] In addition to North Carolina, Voluntary Agricultural District programs have been authorized by law in thirteen states: CA, DE, IL, IA, KY, MA, MN, OH, PA, TN, UT, VA, and WI (American Farmland Trust, *Agricultural District Programs,* 2016)

[28] The VAD statute states, "[t]he purpose of such agricultural districts shall be to increase identity and pride in the agricultural community and its way of life *and to increase protection from nuisance suits* and other negative impacts on properly managed farms." [emphasis added] N.C. GEN. STAT. §106-738(b).

poultry, swine, or dairy qualifying farm.[29] All 100 North Carolina's county register of deeds have searchable online databases of land title records, as well as geographic information systems (GIS).[30] Unlike the right to farm law which applies to agriculture in all its forms, "poultry, swine, or dairy" farms are singled out for greater proximity buffer notice protection in the VAD statute.[31]

As noted earlier, with the first five verdicts on appeal, North Carolina farmers, farm advocates, environmentalists, rural community health advocates, and other interested parties await the Fourth Circuit Court's opinion which will determine the outcome of the remaining cases. Indeed, briefs filed by defendant (now appellant) Murphy-Brown, LLC, and supported by various amici briefs filed by organizations including American Farm Bureau Federation and the North Carolina Pork Council, argue for a retro-active application of the Farm Act's changes to the current *Smithfield* cases.[32] Whatever the result, history tells us that North Carolina's right to farm law may yet undergo further changes prompted by future fact patterns.[33]

[29] N.C. GEN. STAT. § 106-741(a). Note the term "qualifying farm" qualification is a de facto requirement that such proximity notice be required only in counties that have adopted a VAD ordinance, as the term "qualifying farmland" indicates that the landowner has agreed in writing not to remove the subject parcel from farm use for ten years, such agreement being recordable in the chain of title for that parcel. See N.C. GEN. STAT. §106-737(4).

[30] The author notes that although the statute has no enforcer or penalty for county non-compliance, counties have taken the mandate seriously. Many counties have added a VAD GIS layer to demonstrate the required buffer, though arguably a GIS search is not technically relevant in a chain of title search. For example, see Harnett County GIS representation of VADs at https://gis.harnett.org/portfolio-items/voluntary-ag-districts/.

[31] N.C. GEN. STAT. §106-741(a).

[32] See e.g. Brief of the American Farm Bureau Federation, et al. as Amici Curiae Supporting Appellant and Reversal, McKiver v. Murphy-Brown, LLC, No. 19-1019 (4th Cir.).

[33] The author notes that a lawsuit styled as Rural Empowerment Association for Community Help et al v. State of North Carolina, et al (19 CVS 8198) was filed on June 19, 2019 (as this article was being completed) in Wake County Superior Court in Raleigh, NC, challenging the constitutionality of the Farm Act of 2018.