

# **“Sic Utere Tuo”: Common Law Nuisance and the Murphy-Brown Litigation (and a few other topics)**

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## ***This Lawyer's Background***

- Member of the Virginia State Bar (1992) and North Carolina State Bar (2003)
- Non-profit work in agriculture
  - American Farmland Trust
  - NC Farm Transition Network
- Private (Farm) Law Practice (2010 - 2018)
- NCSU Agricultural and Resource Economics (2018)
  - 70% Extension appointment
  - 30% Teaching (Environmental and Agriculture Law)

## First, the news...

Oral arguments in *McKiver I*,  
*McGowan I* & *Artis I* 4<sup>th</sup> Circuit  
appeal scheduled for January 28-  
31(ish) in Richmond

# Fundamental Challenge re Nuisance Litigation

- Public understanding of where **bacon** comes from?
  - There is no system to replace this system
  - Hard to imagine ecological damage from sufficient “pasture pork” to meet current demand
  - Does this feature into nuisance liability “balance” theory?
- Right to Farm laws are increasingly being challenged on constitutional “property rights” deprivation
  - Does the NC RTF (as amended) statute strike enough balance?
  - Iowa RTF statute held unconstitutional “as applied” (*Gacke v. Pork Xtra, L.L.C.*)

# ***Rural Empowerment Association for Community Help et al v. State of North Carolina, et al (19 CVS 8198)***

- On June 19, 2019, three non-profit groups filed a state constitutional challenge (in Wake County) to the 2017 & 2018 right to farm amendments
- Claims include:
  - (1) Illegal “special law”
  - (2) Deprived plaintiffs members of property rights
  - (3) Violates right to jury trial to judge nuisance elements
- Status?

# Farm Nuisance Litigation Generally

- Nuisance litigation tends to reflect the types of agriculture prevalent in the state.
  - WI cranberry bogs (water quality, flooding)
  - LA sugar cane fields (burning)
  - NC swine operations
  - New England wedding barns (noise, traffic)
- **Animal ag nuisance** tends to get the headlines because of the potential impact
- Very difficult to measure the impact of the RTF statutes from across the country
- In early American trespass and nuisance cases, farmers were often the *plaintiffs* (against municipal water treatment)

# General RTF Protection Triggers

- 3 Basic types of triggers
  - Farm existed first (i.e. “Coming to the Nuisance”)
    - **Feature of NC law**
  - Some states have designated agriculture zones and only operations in the zone receive protection
    - **Not a feature of NC law**
    - However statutory ban on local swine zoning (*Craig v. Chatham Co.*)
  - Many states say that if a farm has been in continuous operation substantially unchanged, then it receives protection (statute of repose)
    - **Feature of NC law**

## Common Law Nuisance, Generally

- In general, nuisance is “that activity which arises from **unreasonable**, unwarranted or unlawful use by a person of his own property, working obstruction or **injury to the right of another**, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage”, Black’s Law Dictionary (7th ed.)



# Common Law Nuisance in History

England 1611:

- **“Sic Utere Tuo ut alienum non laedas”**  
 (“Use your own property in such a way that you do not injure other people's use of their property”)
- *William Alred’s Case* (The First “Environmental” Nuisance Case)
- **a swine nuisance lawsuit**



England 1865:

**Balancing of the Equities** (dicta in *St. Helen’s Smelting Co.*)

- Industrial Revolution

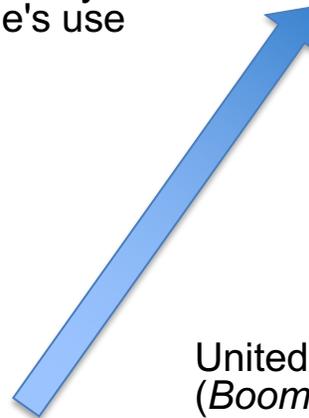
- United States 1890: Still No Balancing of the Equities (*Susquehanna Fertilizer Co.*)



United States 1970: **Balancing Equities** rule (*Boomer Cement*)



Restatement (2) of Torts (Nuisance)



# Common Law Nuisance: The Modern Rule

## General Rule, from Rest. (2<sup>nd</sup>) of Torts, § 822:

“One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- intentional and **unreasonable**, or
- unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”

- § 826. **Unreasonableness** of Intentional Invasion
- § 827. **Gravity** of Harm-- Factors Involved
- § 828. **Utility** of Conduct-- Factors Involved
- § 829. **Gravity** vs. **Utility**-- Conduct Malicious Or Indecent
- § 831. **Gravity** vs. **Utility**-- Conduct Unsited to Locality

# Nuisance Modern Rule (Restatement (Second) of Torts, § 822-831)

- § 822 Liable for private nuisance if conduct is:
  - intentional and **unreasonable**, or
  - unintentional and otherwise actionable under the rules controlling liability for
    - negligent or reckless conduct, or for abnormally dangerous conditions or activities.
- § 826 Is conduct **unreasonable**?
  - the **gravity of the harm** outweighs the **utility of the actor's conduct**, or
  - the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would *not make the continuation of the conduct not feasible*.

## “Gravity of Harm”

- § 827. What is the **gravity** of the harm? Factors:
  - the extent of the harm involved;
  - the character of the harm involved;
  - the social value that the law attaches to the type of use or enjoyment invaded;
    - Private property rights
  - the suitability of the particular use or enjoyment invaded to the character of the locality; and
    - Is “rural” rural enough?
  - the burden on the person harmed of avoiding the harm

## “Utility of Conduct”

- § 828 **Utility of Conduct**
  - the social value that the law attaches to the primary purpose of the conduct;
    - E.g. production of bacon and pork products
  - the suitability of the conduct to the **character of the locality**; and
    - Does this invite evidence of water impact?
    - Is “rural” rural enough?
  - the impracticability of preventing or avoiding the invasion.
    - Is there any other way to meet pork demand?
    - Impracticability = economic impracticality
    - Loss of profit? What are the margins?
      - Cost of “better” odor management techniques?

## “Conduct Unsited to Locality”

- § 831. **Gravity** vs. **Utility** - **Conduct Unsited to Locality**
  1. An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant, **and**
  2. the particular use or enjoyment interfered with is well suited to the character of the locality; **and**
  3. the actor's conduct is unsited to the **character of that locality**.
    - Rests on the assumption that current waste management techniques are appropriate in rural areas

# Coming to the Nuisance: NC's Right to Farm Law

- “No agricultural or forestry operation...shall be or become a nuisance...after the operation has been in operation for more than one year, **when such operation was not a nuisance at the time the operation began.**” NCGS § 106-701
  - Codifies “coming to the nuisance” defense
  - 1979: one of the earliest in the U.S.
  - *The early test: **Durham v. Britt***
    - Is poultry to swine a “fundamental change”?
- NCGS § 106-701 amended after ***Durham v. Britt*** to say a fundamental change to the operation does not include:
  - A change in ownership or size;
  - An interruption of farming for a period of no more than three years;
  - Participation in a government-sponsored agricultural program;
  - Employment of new technology; or
  - A change in the type of agricultural or forestry product produced

# History of Litigation Against NC CAFOs

- *Mayes v. Tabor (1985)*
  - Neighbor pre-dated farm, barring come-to-the-  
nuisance defense
  - ***Misapplied by EDNC?***
- *Parker v. Barefoot (1998)*
  - Prospect that use of latest technology not a  
defense against nuisance
- *Powell v. Bulluck (2002)*
  - Affirmation (and limitation) of pre-litigation  
mediation (late plaintiffs not bound to mediate)

## 2018 NC Legislative Responses

- Farm Act of 2018
  - *“Whereas, 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*  
”  
...
- Changes to NCGS § 106-700
  - Occupation requirement
  - Half-mile proximity
  - 1-year statute of limitations
- Response to punitive damages awarded in Smithfield cases
  - **§ 106-702.** Limitations on private nuisance actions against agricultural and forestry operations.
    - Measured by property value
    - Require civil or criminal **enforcement** action on record
- Voluntary Agricultural District (VAD) chain of title proximity notice
  - Farm qualifications
  - Proximity Notice Requirement

## ***New Right to Farm ( § 106–701)*** **(all must apply)**

- (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***.

## “Fundamental Change” is not:

- A change in ownership or size
- An interruption of farming for a period of no more than three years
- Participation in a government-sponsored agricultural program
- Employment of new technology
- A change in the type of agricultural or forestry product produced
  - Q: Grazing cattle to poultry house?
  - Q: Forestry harvest cleared for poultry house?

## Nuisance Damages ( § 106-702)

- measured by the **reduction in the fair market value** of the plaintiff's property caused by the nuisance, but not to exceed the fair market value of the property
- **(new)** “A plaintiff may not recover **punitive damages** ... 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.**”

\*more than a warning?

## Attorneys Fees

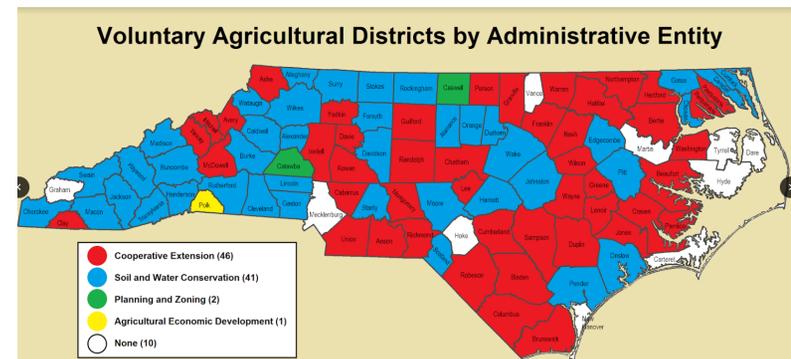
(f) In a nuisance action against an agricultural or forestry operation, the court shall award costs and expenses, including reasonable attorneys' fees, to:

(1) The agricultural or forestry operation when the court finds the operation was not a nuisance and the nuisance action was ***frivolous or malicious***; or

(2) The plaintiff when the court finds the agricultural or forestry operation was a nuisance and the operation asserted an affirmative defense in the nuisance action that was frivolous and malicious.

# Voluntary Agricultural District update

- Voluntary program, non-binding, get signage
- Counties must provide a land records warning (in chain of title, GIS, etc.) to warn of proximity to farms enrolled in the program
  - 1000 feet poultry, swine or dairy
  - 600 feet of qualifying farm
  - ½ mile from VAD



## 4<sup>th</sup> Circuit Appeal

- Oral arguments scheduled for January 28-31(ish)
- Argument for retroactive application of 2018 changes to Right to Farm law
  - Some precedent for “clarifying” laws
- Other issues:
  - Whether damages are appropriate remedy
  - Judges ruling on evidentiary issues
    - Odor expert testimony
    - Denial of juror farm visit
- Decision will likely not serve as precedent for North Carolina state law on Right to Farm

## Following North Carolina's Lead

- Updated RTF laws in Nebraska, Oklahoma, Utah, West Virginia and Washington
- Updated bills introduced in Louisiana, Oregon and Vermont **update**
- **Recovery caps** in Kansas, Missouri, North Carolina and Virginia

# NC Agricultural Mediation Program – Farm Bill expansion

- Created under Agricultural Credit Act of 1987 (born of 80's farm crisis)
- Mediation: dispute resolution by 3d party neutral
  - Collaborative agreement, not focused on winning
- Program reauthorized under Farm Bill, provides grant funding for ag mediation as free service
  - Run in NC by NC Agricultural Mediation Program (housed at Western Carolina University)
- Existing: adverse letter rulings, wetlands determinations, conservation program compliance
- 2018 Farm Bill expanded list of "issues" a farm mediation program may mediate, now includes
  - Landowner/farmer disputes (leases)
  - Equipment leases
  - "farm transition" (including partition)
  - Organic certification loss
  - Right to Farm (neighbor disputes)
  - "Other" as state agriculture department determines
    - Examples: Easements, water rights, environmental compliance, etc.

# Agricultural and Natural Resource Law

- Meet Our Staff
- Events
- Agribusiness Law
- Farm Transition and Succession
- Land Use and Zoning
- Environmental and Natural Resource Regulation
- Energy
- Public Lands and Wildlife Management
- Department of Agricultural and Resource Economics
- Publications & Factsheets



Now on Twitter

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Tweets from NC Cooperative Extension and colleagues, nationwide.



## News and Updates

### Farm and Value-Added Processing Labor: Branan Presents With Farmer Panel at Annual Carolina Meat Conference

Andrew Branan, ARE Extension Assistant Professor, was invited to participate in a discussion on employment law issues faced by ...

FEATURED

### Hemp License Application and the "Bona Fide Farmer": Is There a Minimum Farm Income Requirement?

A not uncommon question persists regarding the use of the term "Bona Fide Farmer" in the hemp license application: ...

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### Farm Tenancy: Letter Template Available to Timely Terminate Verbal Farm Rental Arrangements

Though empirical data is lacking, it is believed that a majority of farmland acres in North Carolina are rented ...

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### Atlantic Coast Pipeline: Fourth Circuit Pipeline: Continued Shortcomings in Required Endangered Species Act Review

### Wills: NC Court of Appeals Interprets Per Stirpes Testamentary Intent

The North Carolina Court of Appeals demonstrated in September that use of the common law term per stirpes – ...

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### Endangered Species: New Landowner Extension Publication on Endangered Species Management

North Carolina Cooperative Extension has released a new landowner orientation guide regarding endangered or threatened species under Federal and ...

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### Gate Disputes: North Carolina Court Affirms Law on Gates and Access

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# THANKS FOR INVITING ME!

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