

Extension Conference 2019

Farm Liability Topics

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Anyone can get sued...

- Insurance defends injury claims (assuming they are covered)
 - Without insurance, must defend from your own pocket
- Goal is to follow system that will result in dismissal
 - Limits on personal liability
 - Compliance with statutory exemptions
 - Document document document
- Most “threats to sue” do not materialize in a filed complaint
 - (but notify insurer if claim of property damage or injury)
- Anything can happen in a courtroom, particularly with a jury
- Most applicable NC law is “court-made”
 - Opinions published by Appellate and Supreme Courts (Superior Court verdicts do not carry weight of law)
 - Settled case law is sparse

Mosaic Law

"If an ox gore a man or a woman that they die; then the ox shall be surely stoned and his flesh shall not be eaten, but the owner of the ox shall be quit. **But if the ox were wont to push with his horn in time past**, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death. If there be laid on him a sum of money, then he shall give for the ransom of his life whatsoever is laid upon him." (Exodus 21:28-30)

- ***Banks v. Maxwell*, 205 N.C. 233, 171 S.E. 70 (N.C., 1933)**

Fact Pattern (actual farmer call)

- Calf escapes through unbroken hot 4 strand poly fence once
 - Neighbors call animal control who investigate fence and issue warning
- Calf escapes through same unbroken fence again
 - Animal control, repeat
- Calf escapes through same unbroken fence *again*
 - Animal control, repeat
- Farm qualifies for zoning as Bona Fide Farm
- Farm is a qualified farm in an Voluntary Agricultural District

Boundary Fencing Requirement Implied

- NCGS § 68-15 et seq. Livestock Law
 - Livestock defined: Include but not limited to equine animals, bovine animals, sheep, goats, llamas, and swine (NCGS § 68-15)
 - “If any person shall allow his livestock to run at large, he shall be guilty of a Class 3 misdemeanor.” (NCGS § 68-16)
- Loose Poultry: “If any person shall permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large on the lands of any other person while such lands are under cultivation in any kind of grain or feedstuff or while being used for gardens or ornamental purposes, after having received **actual or constructive notice** of such running at large, the person is guilty of a Class 3 misdemeanor.” (NCGS § 68-25)

Fence Construction

- Can build fence inside but not on property line
 - Becomes an encroachment
 - Neighbor has remedy of ouster
 - Can only repair fence from your side without trespass
 - If neighbor **connects** to your fence, then trespass
- Survey recommended (not cheap)
 - May have benefit of neighbor survey (research for recorded plat)
- Shared Fence with Neighbor by Agreement
 - Joint construction and maintenance agreement
 - Not enforceable against future owner **unless recorded with County Register of Deeds**

Note on Gates

- Many tracts of land have access to a public right of way via an easement
- Generally, the owner (A) of the “servient estate” (the land over which the easement runs) may erect a gate so long as it does not unreasonably interfere with the owner (B) of the “dominant” estate’s use of the easement
 - i.e. erect a gate and give party a code or key
- However, if instrument creating the easement (deed or other document) requires that the easement remain “open”, A may not install a gate.
- Holding of *Taylor v. Adkins* (June 2019)

Fence Removal Liability

- NCGS § 14-144
 - Your land or land in dispute?
 - “[unlawful to] willfully burn, destroy, pull down, injure or remove any fence, wall or other enclosure, or any part thereof, surrounding or about any yard, garden, **cultivated field or pasture**”
 - Damage < \$5000 = Class 2 Misdemeanor
 - Damage > \$5000 = Class 1 Felony
- Storm Damage Generally (Tree or limb fall)
 - “Reasonably foreseeable” standard on owner of tree
 - Can remove branches up to property line

Fencing and Zoning

- Fence Types may be restricted by zoning
 - E.g. no barbed wire or electrical fencing (does not contain an exception)
 - Extends from municipal or town zoning into county via ETJ
 - Generally one mile for small towns, three miles for cities
- Likely an allowed structure under Bona Fide Farm zoning exemption
 - No permit required

Escaped Livestock Liability - Civil

- Not Strict Liability
- Liability is based on **Negligence** standard (“reasonable and prudent”)
 - A fact-based inquiry by court
- Cases:
 - If an animal is repeatedly found running at large, the consent and knowledge of the owner may be inferred. *Kelly v. Willis*, 238 N.C. 637, 78 S.E.2d 711 (1953)
 - “It is the legal duty of a person having charge of animals to exercise ordinary care and the foresight of a prudent person in keeping them in restraint.” *Gardner v. Black*, 217 N.C. 573, 9 S.E.2d 10 (1940)
 - Evidence showed that the defendant property **owner had removed barbed wire from his fencing** with the intention of later replacing it with electrified wire, but never did the installation... issues of fact remained as to whether he “exercised ordinary care and the foresight of a prudent person in keeping the horse in restraint” because the horses were, in fact, able to push over the fence (no prior escapes therefore irrelevant) *Bynum v. Whitley*, 656 S.E.2d 16 (N.C. App. 2008)

Negligence Standard – Escaped Livestock

- Liability “rests upon the question whether the keeper is guilty (sic) of negligence in permitting them to escape.”
- Legal duty standard is “ordinary care and the foresight of a prudent person in keeping them in restraint.”
- “[P]laintiff must present evidence sufficient to indicate that defendant's animals ‘were at large with his knowledge and consent, or at his will, or that their escape was due to any negligence on his part.’”
 - *Wilmoth v. Hemric*, 768 S.E.2d 570 (N.C. App., 2014)
- Evidence examples
 - failure to maintain an adequate fence
 - Repeated citations
 - leaving a gate open
 - counting the cows too infrequently
 - Other?

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Impoundment and Abandonment

- Any person may impound stray cattle
 - Due reasonable costs of impoundment
 - Owner known: must contact
 - Owner unknown: inform Sheriff of details
- Animal deemed abandoned when:
 - it is placed in the custody of any other person for treatment, boarding, or care; **and**
 - the owner of the livestock does not retake custody of the animal within two months after the last day the owner paid a fee to the custodian for the treatment, boarding, or care of the livestock; **and**
 - the custodian has made reasonable attempts to collect any past-due fees during the two-month period.
- May sell or dispose after 2 months

Injury by Animals On-farm

- Standards of Duty
 - Trespasser = no duty (exceptions)
 - Invitee = negligence standard
- Liability “Immunity” by Statute (NCGS 99E-7)
 - Warns of “inherent risk”
 - must plead the affirmative defense of assumption of the risk of the farm animal activity
 - Agritourism, rodeos, training, boarding, veterinarians
 - Must post signage (language in statute)
 - Does not cover products liability

“Inherent Risk” Defined (§ 99E-6[9])

- The possibility of a farm animal behaving in ways that may result in injury, harm, or death to persons on or around them.
- The unpredictability of a farm animal's reaction to such things as sounds, sudden movement, unfamiliar objects, persons, or other animals.
- The risk of contracting an illness due to coming into physical contact with animals, animal feed, animal waste, or surfaces that have been in contact with animal waste.
- Inherent risks of farm animal activities *does not* include a collision or accident involving a **motor vehicle**.

Exceptions to § 99E Liability Limitation

- (1) Provides the equipment or tack, and knew or *should have known* that the equipment or tack was faulty, and such faulty equipment or tack proximately caused the injury, damage, or death. **or**
- (2) Provides the equine **[or farm animal]** and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or to safely manage the particular equine. **or**
- (3) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission proximately caused the injury, damage, or death.

Signage Required

- The signs ... shall be placed in a clearly visible location on or near stables, corrals, arenas, or other farm animal facilities where the farm animal professional or the farm animal activity sponsor conducts animal activities.

"WARNING Under North Carolina law, a farm animal activity sponsor or farm animal professional is not liable for an injury to or the death of a participant in farm animal activities resulting exclusively from the inherent risks of farm animal activities. Chapter 99E of the North Carolina General Statutes."

Trespass

- **§ 38B-2. General rule.** A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of care to a trespasser and is not subject to liability for any injury to a trespasser.
- **§ 38B-3. Exceptions**
 - Intentional harm = “willful or wanton”
 - Example: thin wire across field entrance (to repel ATV)
 - May use reasonable force to repel a crime
 - Harm to Children (<14) (attractive nuisance doctrine)
 - reason to know that children were likely to trespass **and**
 - owner knew of unreasonable risk of serious bodily injury or death **and**
 - child did not appreciate the risk **and**
 - utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk discover the condition or realize the risk involved **and**
 - possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the injured child.

Livestock Injury to Trespasser

- "The animal inflicting the injury must be dangerous, vicious, mischievous or ferocious, or one termed in the law as possessing a vicious propensity." **and**
- "The owner must have actual or constructive knowledge of the vicious propensity, character and habits of the animal."
 - **Rector v. Southern Coal Co, 192 N.C. 804, 136 S.E. 113 (N.C., 1926)**
- "The propensity is vicious if it tends to harm, whether manifested in play or in anger, or in some outbreak of untrained nature"
 - **Hill v. Moseley Et Ux, 220 N.C. 485, 17 S.E.2d 676 (N.C., 1941)**

Liability Standards and Evidence (On Farm Injury)

- Owner or keeper of **vicious** animal has **strict liability**
 - *Swain v. Tillett*, 269 N.C. 46, 152 S.E.2d 297 (1967)
- Landlord for tenant owner of vicious animal *may* be found **negligent**
 - *Holcomb v. Colonial Associates, LLC*, 597 S.E.2d 710, 358 N.C. 501 (N.C., 2004)
 - Lease clause requiring removal infers landlord control
- “The **prior behavior** of an animal is admissible to show both the animal's vicious propensities and the owner's actual or constructive knowledge of such propensities, **even though the behavior falls short of *actual injury***.”
- “[T]he animal's **reputation**, while inadmissible to show directly the animal's vicious propensities, **is admissible to show the owner's *knowledge*** of the alleged propensity and to corroborate the testimony of those who have sworn to the animal's viciousness.”
 - *Williams v. Tysinger*, 388 S.E.2d 616, 97 N.C.App. 438 (N.C. App., 1990)

Nuisance

- Scenario: Plan to take a loan to build a chicken house, neighbor objects, threatens to sue
- Must unreasonably interfere with neighbor's use and quiet enjoyment
- Right to Farm Law
 - 2018 updated standing and damages
 - Not applicable to negligence, trespass, personal injury, strict liability, other torts
- Mandatory Mediation (NCGS § 7A-38.3)
 - Pre-litigation requirement unless waived
- Voluntary Agriculture District (2018 update)
 - 1000 feet poultry, swine or dairy
 - 600 feet of qualifying farm
 - ½ mile from VAD

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.
 - Grazing cattle to poultry house?
 - 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.***”

Bona Fide Farm Status - Zoning

- Exemption from County zoning restrictions
- Not an exemption from NC Building Code requirements
 - New statute all but requires issuing permit for all farm buildings
- Safe Harbors NCGS **§ 153A-340**
 - A farm sales tax exemption certificate issued by the Department of Revenue.
 - A copy of the property tax listing showing that the property is eligible for participation in the present use value program pursuant to G.S. 105-277.3.
 - A copy of the farm owner's or operator's Schedule F from the owner's or operator's most recent federal income tax return.
 - A forest management plan
- FSA Farm Numbers no longer qualify

Bona Fide Farm - Agritourism

- A building or structure that is used for agritourism is a bona fide farm purpose if the building or structure is located on a property that (i) is owned by a person who holds a qualifying farmer sales tax exemption certificate from the Department of Revenue pursuant to G.S. 105-164.13E(a) **or** (ii) is enrolled in the present-use value program pursuant to G.S. 105-277.3. Failure to maintain the requirements of this subsection for a period of three years after the date the building or structure was originally classified as a bona fide purpose pursuant to this subdivision shall subject the building or structure to applicable zoning and development regulation ordinances adopted by a county pursuant to subsection (a) of this section in effect on the date the property no longer meets the requirements of this subsection.
- For purposes of this section, "agritourism" means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. A building or structure used for agritourism includes any building or structure used for public or private events, including, but not limited to, weddings, receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of **its farm or rural setting**.

Drone Law

- Any person who is the subject of unwarranted surveillance, or whose photograph is taken in violation of the provisions of this section, shall have a civil cause of action
 - If you hear a drone you think is trying to take evidence on your property, go outside and make sure it is taking a picture of you!
- In lieu of actual damages, the person whose photograph is taken may elect to recover five thousand dollars (\$5,000) for each photograph or video that is published or otherwise disseminated, as well as reasonable costs and attorneys' fees and injunctive or other relief as determined by the court.

Drone Law (§ 15A-300.1)

- Surveillance of real property prohibited without consent of owner or lessee (§ 15A-300.1[b][1][b])
- May not photograph an individual, without the individual's consent, for the purpose of publishing or otherwise publicly disseminating the photograph.
 - Does not apply to ***newsgathering***, newsworthy events, or events or places to which the general public is invited
- Maximum height: 400 feet
- Permit for commercial operation
- *18 U.S.C. 32 prohibits destruction of aircraft*
- Cannot use to hunt or fish or interfere with taking of wildlife

2019 NC “Farm Act” Provisions

- Hemp
 - Smokeable hemp banned (“I fought the law...”) (June 1, 2020)
 - Applicants must be Qualifying Farmer (have Farm Tax Certificate [or Conditional])*
- PUV disqualification notice requirement
- Abandoned utility right of ways (separate statute) § 62-193. Disposition of certain unused **utility easements**.
 - Landowner may extinguish if no construction within 20 years of grant, pays utility **fair market value** of the easement
 - File complaint with NC Utilities Commission
 - If landowner and utility cannot agree to value, then Clerk of Court appoints commissioners (as in taking valuation)
- Confidentiality of Soil and Water gathered info from farms (on conservation applications)
- No Clean Water Management TF money if have EQIP money
- No Updates to Right to Farm law

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NC Farm Act Bona Fide Farm Expansion

- Bona Fide Farm zoning exemption changes
 - Response to Harnett County [case](#) (*Jeffries v. Harnett Co.*)
 - Hunting, fishing, shooting sports, equestrian now considered **agritourism**
 - Shooting range requires NC WRC site evaluation
 - Agritourism = bona fide farm
 - Structures exempt on shooting farms in counties < 110,000 population
- Catering from BFF exempt from county **or municipal** permitting (still must comply with health code)
- Roadside signage
 - BFF may erect signage within normal 660 foot buffer from edge of interstate or primary highway RW
 - Sign not bigger than 3 feet long on any side
 - Located on owned or leased BFF

Murphy-Brown Cases and Right to Farm

- 26 cases (540 plaintiffs)
 - 5 verdicts
 - Remainder stayed pending appeal
- 4th Circuit Appeal
 - Briefs filed (including Farm Bureau amicus)
 - No oral argument on calendar yet!
- Issues on Appeal:
 - Punitive damages: did the trial judge err as a matter of law in allowing award of punitive damages?
 - Right to Farm: does it apply retroactively?
 - Exclusion of defense expert witness on odors and other evidentiary rulings

Nuisance Scenario

- Scenario: Plan to take a loan to build a chicken house, neighbor objects, threatens to sue
- Must unreasonably interfere with neighbor's use and quiet enjoyment
- New Right to Farm standing requirements:
 - Is neighbor legal possessor of property? (owner or signed tenant)
 - Will neighbor have been there when the poultry houses are built?
 - Does the neighbor live within one-half mile of the new poultry houses? (as opposed to ½ mile from boundary)
- Is building a chicken house a fundamental change in the land use?

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

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ANIMAL ACTIVISM – “Ag Gag” law

- Creates a civil right of action for private employers
- North Carolina Property Protection Act, N.C.G.S. 99E-2(b)
 - Employee enters non-public space of employment to remove or capture “data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer”
 - “records images or sound occurring within an employer's premises”
 - “placing on the employer's premises an unattended camera or electronic surveillance device”
 - Commits “An act that substantially interferes with the ownership or possession of real property”
- Under challenge in *PETA v. Stein* (before federal Middle District NC, 1:16-cv-00025-TDS-JEP)
 - 4th Circuit has granted standing to PETA et al in “pre-enforcement challenge” to First Amendment rights

NC Agricultural Mediation Program – Farm Bill expansion

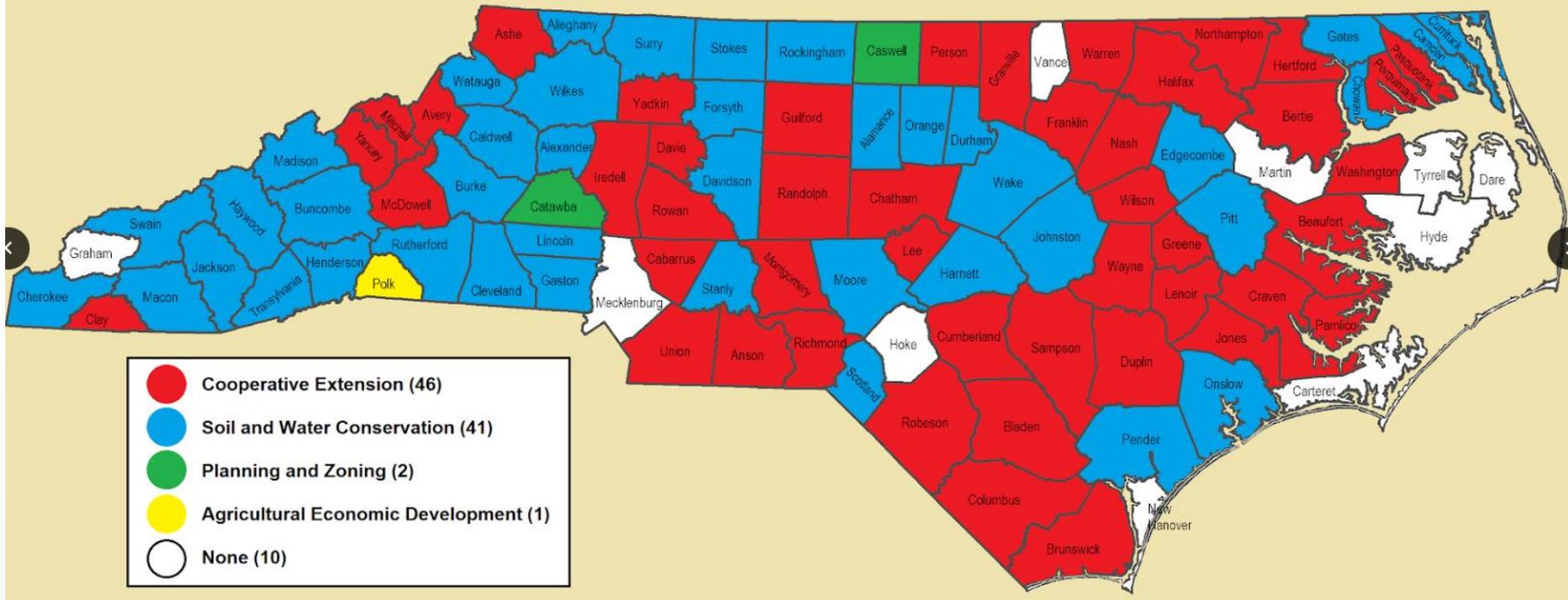
- Created under Agricultural Credit Act of 1987 (born of 80's farm crisis)
- Mediation: dispute resolution by 3d party neutral
 - Collaborative agreement, not focused on winning
- Program reauthorized under Farm Bill, provides grant funding for ag mediation as free service
 - Run in NC by NC Agricultural 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.

Voluntary Agricultural District Workgroup

- Update

- Halifax County situation: DOT taking triggered public hearing, DOT sued, county attorney opined that districts were not legally authorized by Board of Commissioners
- Challenges:
 - loss of landowner interest, benefits unclear
 - Advisory Board authority to designate VADs (enroll land without Commissioner permission)
 - Geographic definition of Ag District hard to establish in light of buffer notification requirement
 - 2018 requirement that VADs be identified in “land records system” (response to *Murphy-Brown* nuisance law suits)
- Branan Templates under review
 - Basic (no optional features)
 - Advanced (includes parliamentary suggestion for Boards)
 - Bylaws (for Boards without ordinance parliamentary guidance)
- Revisions to VAD statute being considered
 - Clarify parcels as districts
 - Reduce VAD Board size (reduce district representation requirements)
 - Other?
- Spring outreach schedule planned

Voluntary Agricultural Districts by Administrative Entity



THANKS FOR INVITING ME!

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