

Kansas Court of Appeals Decides Major Hog Nuisance Case

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Overview

A recent opinion by the Kansas Court of Appeals provides a thorough explanation of property rights with respect to road ditch rights-of-way, as well as the common law of trespass and nuisance in addition to the Kansas Right-to-Farm law. The case involved what is perhaps the most egregious ag nuisance case that has ever gone to an appellate-level court in Kansas. The case is *Ross et al. v. Nelson, et al.*, No. 125,274, 2023 Kan. App. LEXIS 32 (Kan. Ct. App. Aug. 25, 2023).

Of trespass, nuisance and right-to-farm laws – it's the topic of today's post.

Background Facts

The defendant (Nelson) owns multiple farming operations and installed about 2 miles of pipeline in the road ditch right-of-way next to a public road to transport liquified hog waste to spread on his crop fields. He installed the three underground pipes (two to carry water to his hog operation and one to carry the effluent) without the consent of the adjacent landowners (the plaintiffs). He also did not follow the applicable county permitting process. The defendant's daughter-in-law later filled-out a permit application and paid the fee for installing the pipes but neither the county clerk nor Road and Bridge Supervisor ever signed the permit application. The defendant also created an impression with the County Commissioners that he had the permission of the landowners adjacent to the roadway where he was wanting to install pipes. The County Attorney advised the Commissioners that the adjacent landowners had to consent before the application could be approved. But the fact remained that the Commission never granted approval to install the pipes and the County Attorney called the Sheriff who temporarily stopped the installation process. However, the defendant later completed the installation. The Sheriff also contacted the Kansas Department of Health and Environment (KDHE), but the KDHE explained that it does not oversee piping installation between hog operations and disposal sites. The KDHE regulates the disposal of hog waste.

Note: The defendant consistently maintained that he didn't need permission to install the pipes in the road ditch right-of-way. He also lobbied the county commissioners and the state legislature for express authority to lay the pipelines. His lobbying efforts were not successful.

Once installed, the pipes ran for a mile along each of the plaintiffs' road frontages. The liquified hog manure was sprayed from a pivot irrigation system (and end gun) near a home of one of the plaintiffs. The plaintiffs, also farmers, sued for trespass and nuisance.



The spray from the pivot came within 200 feet of one of the plaintiffs' homes. As noted, neither of the plaintiffs gave permission to the defendant to lay pipes in the road right-of-way, and the defendant choose not to dispose of the hog waste on other land that he owned where no one lived nearby.

In the Spring of 2019, the waste was pumped through the pipelines and effluent was sprayed on the field. The plaintiffs filed a report with the Sheriff concerning the odor. The report noted that hog waste mist would drift onto the plaintiffs' property and sprayed one of the plaintiffs personally as well as their home which then became covered in flies. The wife of one of the plaintiff couples moved to their Nebraska home. One of the plaintiffs had planned to sell their farmland to one of their tenants, but the sale fell through because of the odor.

Trial Court

The plaintiffs sued for trespass and nuisance. The trial court ruled for the plaintiffs on both issues. On the trespass issue, the trial court noted that the defendant did not have a public purpose for installing pipes in the road right-of-way and he didn't have permission – either from the landowners, the county or the legislature.

The trial court also ruled for the plaintiffs on the nuisance issue. The Kansas Right-to-Farm law didn't apply to authorize the defendant's conduct because the nuisance was the result of the defendant's trespass.

The trial court also added a claim for punitive damages.

The jury returned a verdict of \$126,720 in property damages for the plaintiffs, plus \$2,000 in nuisance damages plus \$50,000 of punitive damages.

The defendant appealed.

Appellate Court

The appellate court affirmed and in doing so made some important points relevant to all farming operations.

Use of road ditch right-of-way. The appellate court pointed out that a road ditch right-of-way cannot be used for private purposes without first securing the adjacent landowners' permission or otherwise receiving local or legislative authority. The right-of-way is owned by the adjacent property owners. The public has an easement to use the roadway for travel, that's it. *Shawnee County Commissioners v. Beckwith, 10 Kan. 603 (1873)*. The ownership of the land and "everything connected with the land over which the road is laid out" does not pass to the public but remains with the owner of the underlying (and adjacent) land. *Id.* While the defendant lobbied the legislature for a change in the law on this point, the bill died in committee. Thus, the defendant's laying of the pipes in the road ditch right-of-way was a trespass.

The appellate court specifically noted that "fee owners of real property containing a public roadway have a possessory right to use, control, and exclude others from the land, as long as they do not interfere with the public's use of the road. In contrast, the public has an easement over the property to



use the road for transportation purposes...but not other rights beyond those purposes. Any further use by member of the public may be authorized through state action, provided the landowner is compensated for the diminished property rights, or through the landowner's consent." The scope of the public's easement in a road ditch right-of-way, the court noted, must be for a public purpose. Any private use must be merely incidental to the public purpose. *Stauber v. City of Elwood*, 3 Kan. App. 2d 341, 594 P.2d 1115, rev. den. 226 Kan. 793 (1979).

Because the defendant was using the road ditch right-of-way solely for his private purposes, he had no right to lay the pipelines without permission or official government authority. He had neither. The appellate court pointed out that it was immaterial that the pipelines didn't interfere with public travel. The appellate court also rejected as absurd and with no support in Kansas law the defendant's argument that supplying pork for ultimate public consumption constituted a public purpose. Consequently, the appellate court upheld the trial court's determination that the defendant had committed a trespass.

Nuisance and right-to-farm. The appellate court also upheld the trial court's consideration of the nuisance claim and the resulting jury award for the plaintiffs on the nuisance claim. The general legal principle underlying the doctrine of nuisance is that property must be used in such a manner that it does not injure that of others. See, e.g., *Wilburn v. Boeing Airplane Co.*, 188 Kan. 722, 366 P.2d 246 (1961). However, there is a limitation placed on nuisance laws. Many states, including Kansas, have adopted what are known as a "right-to-farm" law. Such a law limits the extent to which a farm operation may be considered to be a nuisance. Under the Kansas right-to-farm law, if a farming operation is conducted according to good agricultural practices and was established before surrounding nonfarming activities, the courts must presume that there is no nuisance. *Kan. Stat. Ann. §2-3202(a)*. An activity is a good agricultural practice if it "is undertaken in conformity with federal, state, and local laws and rules and regulations." *Kan. Stat. Ann. §2-3202(b)*.

The defendant claimed that the Kansas right-to-farm law protected his fertilization practices from nuisance claims and that there was no evidence submitted at trial to support the jury's finding that spraying the effluent as fertilizer was a nuisance.

The appellate court noted that neither party raised on appeal whether the defendant's activity predated the plaintiffs' residing nearby. Thus, the appellate court presumed that the right-to-farm law could apply to protect the defendant's activity. The appellate court also did not address the fact that the plaintiffs were also farmers. It has been held in a district court case in Kansas that the Kansas right-to-farm provisions do not apply to disputes between farmers, since the law is designed to protect farmers only from nuisance claims brought by nonfarmers.

The defendant's basic argument was that his manure spreading activity was protected by the right-to-farm law because he was in compliance with all federal and state and local laws rules and regulations. This was in spite of him already found to have committed a trespass which allowed him to engage in the activity that gave rise to the nuisance claim. The defendant (and amici) tried to finesse this hurdle by asserting that the common law of trespass was not part of state law. The appellate court concluded that this was another of the defendant's absurd arguments and rejected it. The appellate



court determined that the nuisance was the result of a trespass (a violation of state law) and was not protected.

Punitive damages. The appellate court also upheld the trial court's assessment of punitive damages against the defendant. While an award of punitive damages is a relatively rare occurrence, it will be assessed where the court determines that the evidence warrants it based on the defendant's particularly bad conduct. Here, the appellate court determined that witness testimony was persuasive – the wife of one of the plaintiff couples hadn't stayed at the home for a year; the plaintiffs couldn't host guests at their home because of the hog odor; a plaintiff's house was covered with the effluent mist and coated with flies; there was a lingering stench both outside and inside a plaintiff's home; spray drifted onto one of the plaintiffs; and after the lawsuit was filed, the defendant sprayed twice as much fertilizer as he had the prior year. The defendant also piled truckloads of manure across from one of the plaintiffs' homes for several days straight. The appellate court concluded that this was clearly "willful" and "reprehensible" conduct that warranted imposing punitive damages.

The defendant claimed that the punitive damage award should be set aside due to "instructional error." He claimed that the jury verdict form was unclear as to whether the punitive damages were for trespass or for nuisance. But his attorney failed to object to the verdict form and the appellate court determined that the form was not clearly erroneous.

Conclusion

The appellate court's opinion is thorough and well thought-out. It is a "win" for property rights in upholding an adjacent owner's rights in road ditch rights-of-way and noting that the protections of the right-to-farm law is limited to situations where the farming operation accused of committing a nuisance is in compliance with state law – all of it, including state common law.

The appellate court began its opinion by stating that the case arose "at the intersection of property rights, public roadways and the Kansas Right to Farm Act." Unfortunately, the path that led to that intersection was lined with arrogance, greed and a lust for power.

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