HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1601 Farming Operations
SPONSOR(S): Judiciary Committee and Civil Justice & Property Rights Subcommittee, Williamson and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/CS/SB 88

FINAL HOUSE FLOOR ACTION: 110 **Y's** 7 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 1601 passed the House on April 22, 2021, as CS/CS/CS/SB 88.

In the 1970s, states began to identify the potential for conflict between farmers and developers as urban sprawl crept into rural, agricultural areas. One of the initial concerns was that the relocation of city dwellers into the agricultural areas would result in the filing of nuisance lawsuits once the new neighbors experienced the sensory nature of farm life, complete with an inescapable array of odors, loud noises, dust, and other stimuli.

To protect farms and agricultural operations from the encroaching sprawl, all fifty states passed anti-nuisance "Right to Farm" laws, which protect agricultural production against specified nuisance lawsuits. Such laws do not grant absolute immunity from suit but generally provide civil liability protections for pre-existing agricultural operations when changes are made to the use of nearby parcels.

The Florida Right to Farm Act, enacted in 1979, protects farm operations from nuisance lawsuits if the operations comply with generally accepted agricultural and management practices. However, the Act specifies several unsanitary conditions that constitute evidence of a nuisance in such lawsuit.

The bill amends the Florida Right to Farm Act to:

- Expand the definition of "farm operation" to include agritourism activity and particle emissions.
- Provide a definition of "nuisance" as it relates to farm operations.
- Specify that, for an agritourism activity, the "established date of operation" means the date the specific agritourism activity commenced.
- Require a plaintiff to prove by clear and convincing evidence that his or her claim arises from conduct that did not comply with state or federal environmental laws, regulations, or best management practices in a civil nuisance action against a farm.
- Prohibit a nuisance action from being filed against a farm operation unless the real property affected by the alleged nuisance condition is located within one-half mile of the source of the activity or structure which is alleged to be a nuisance.
- Clarify and limit how compensatory and punitive damages may be awarded in certain claims against a farm.
- Provide for an award of attorney fees, costs, and expenses against a plaintiff in certain situations.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on April 29, 2021, ch. 2021-7, L.O.F., and will become effective on July 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

History of Right to Farm Laws

In the 1970s, states began to identify the potential for conflict between farmers and developers as urban sprawl crept into rural, agricultural areas. One of the initial concerns was that the relocation of city dwellers into agricultural areas would result in the filing of nuisance lawsuits once the new neighbors experienced the sensory nature of farm life, complete with an inescapable array of odors, loud noises, dust, and other stimuli.[1]

To protect farms and agricultural operations from the encroaching sprawl, all fifty states passed anti-nuisance laws that are referred to as "Right to Farm" laws. These laws, which protect agricultural production against certain nuisance lawsuits, do not grant absolute immunity but generally provide protections for defendants based upon a "coming to the nuisance" defense theory. Specifically, these laws provide a liability shield for pre-existing agricultural operations when changes are made to the use of nearby parcels, such that the plaintiffs are described as "coming to the nuisance."[2] The Florida Right to Farm Act was enacted in 1979.[3]

Florida Right to Farm Act

The Florida Right to Farm Act[4] protects farm operations from nuisance lawsuits if the operations comply with generally accepted agricultural and management practices. The Act contains a section of legislative findings and purposes that establish why reasonable agricultural activities conducted on farmland should be protected from nuisance lawsuits that can force the premature removal of farmland from agricultural use.[5] The language notes, in part, that:

- Agricultural production makes major contributions to the state economy;
- Agricultural lands cannot be replaced;
- Agricultural activities increase tourism; and
- Agriculture furthers the economic self-sufficiency of the people of the state and should be protected.

The Florida Right to Farm Act states that a farm operation cannot be classified as a public or private nuisance if the farm:

- Has been in operation for 1 year or more since its established date of operation;
- Was not a nuisance when it was established; and
- Conforms to generally accepted agricultural and management practices.[6]

However, the following four unsanitary conditions constitute evidence of a nuisance:

- The presence of untreated or improperly treated human waste, garbage, offal, dead animals, dangerous waste materials, or gases which are harmful to human or animal life.
- The presence of improperly built or improperly maintained septic tanks, water closets, or privies.
- The keeping of diseased animals which are dangerous to human health, unless the animals are kept in accordance with a current state or federal disease control program.

[1] Alexia B. Borden and Thomas R. Head, III, *The "Right To Farm" In The Southeast – Does it Go Too Far?* 11 No. 1 ABA Agric. Mgmt. Committee Newsl. 8 (April, 2007).
[2] *Id*.
[3] Chapter 79-61, ss. 1-2, Laws of Fla.
[4] S. 823.14, F.S.
[5] S. 823.14(2), F.S.
[6] S. 823.14(4)(a), F.S.

- The presence of unsanitary places where animals are slaughtered, which may give rise to diseases which are harmful to human or animal life.[7]

Additionally, a farm operation cannot be classified as a public or private nuisance due to a change:

- In ownership;
- In the type of farm product that is produced;
- In conditions in or around the locality of the farm; or
- Made in compliance with best management practices adopted by local, state, or federal agencies.[8]

The Florida Right to Farm Act, however, does not allow an existing farm operation to increase to a more excessive farm operation with regard to noise, odor, dust, or fumes where the existing operation is adjacent to an established homestead or business on March 15, 1982.[9,10]

Civil Procedure

Nuisance Actions

A nuisance is an activity, condition, or situation that significantly interferes with another person's use or enjoyment of his or her property. A private nuisance affects a person's private right that is not common to the public, while a public nuisance is an interference that affects the general public, such as a condition that is dangerous to health or community standards.[11]

Standard of Proof

A standard of proof is the level or degree of proof necessary to meet the burden of proof for a particular issue.[12] In criminal actions, the standard of proof necessary for a conviction[13] is beyond a reasonable doubt, meaning that the factfinder must be virtually certain of the defendant's guilt in order to render a guilty verdict. In most civil actions, the standard of proof is by the preponderance of the evidence, meaning the burden of proof is met when the party with the burden convinces the factfinder that there is a greater than fifty percent chance that the claim is true.[14] However, certain civil actions[15] are subject to a heightened standard of proof, requiring the plaintiff to prove the allegations by clear and convincing evidence. This standard requires the evidence to be highly and substantially more likely to be true than untrue.[16] The clear and convincing evidence standard is an intermediate-level standard. It is more rigorous than the "preponderance" standard but less rigorous than the "beyond a reasonable doubt" standard.

Access to Courts

The Florida Constitution broadly protects the right to access the courts, which "shall be open to every person for redress of any injury . . . ."[17] However, this constitutional right is not unlimited.

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[7] *Id*.
[8] S. 823.14(4)(b), F.S.
[9] S. 823.14(5), F.S.
[10] In an effort to eliminate duplication of regulatory authority over farm operations, local governments may not adopt an ordinance or similar policy to prohibit or limit an activity of a bona fide farm operation on land that is classified as agricultural land in accordance with statute, where the activity is regulated through implemented best management practices or certain interim measures. *See* s. 823.14(6), F.S.
[11] BLACK'S LAW DICTIONARY (11th ed. 2019).
[12] *Id.*
[13] The standard of proof for proving affirmative defenses raised in a criminal trial may vary.
[14] 5 *Florida Practice Series* s. 16:1.
[15] These actions typically include actions to impose a civil penalty, civil actions based on conduct amounting to a criminal law violation, and actions in which the effect of a civil ruling might be to deprive a party of a protected interest. 5 *Florida Practice Series* s. 16:1.
[16] 5 *Florida Practice Series* s. 16:1; *see Colorado v. New Mexico*, 467 U.S. 310 (1984).
[17] Art. I, s. 21, Fla. Const.

In *Kluger v. White*,[18] the Florida Supreme Court evaluated to what extent the Legislature may alter a civil cause of action. The Court stated that it would not completely prohibit the Legislature from altering a cause of action, but neither would it allow the Legislature "to destroy a traditional and long-standing cause of action upon mere legislative whim . . . ." The takeaway from *Kluger* and other relevant case law is that the Legislature may:

- Reduce the right to bring a cause of action as long as the right is not entirely abolished.[19]
- Abolish a cause of action that is not "traditional and long-standing"—that is, a cause of action that did not exist at common law, and that did not exist in statute before the adoption of the Florida Constitution's Declaration of Rights.[20]
- Abolish a cause of action if the Legislature either:
    - Provides a reasonable commensurate benefit in exchange;[21] or
    - Shows an "overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."[22]

Agriculture in Florida

According to the University of Florida Institute of Food and Agricultural Sciences, Florida had 47,590 farm operations covering 9.7 million acres of farmland in 2018, the most recent year for which this information is available. Agricultural land, which consists of cropland and ranchland, combined with forest land, comprises nearly two-thirds of the state's entire land.[23]

Data provided by the U.S. Department of Agriculture notes that in 2019, Florida's cash receipts from the sale of agricultural commodities was $7.67 billion, ranking 18th in the nation for total commodity sales. Florida leads the U.S. in the production of oranges, sugarcane, and watermelons. The state ranks second in the nation for the production of bell peppers, cucumbers, grapefruit, peanuts, strawberries, and tomatoes.[24]

Agritourism Activity

"Agritourism activity," which is defined under "Agricultural Development" in chapter 570, F.S.,[25] includes any agricultural related activity that is consistent with a bona fide farm, livestock operation, or ranch or in a working forest which allows the general public to view or enjoy its activities for recreational, entertainment, or educational purposes. These activities include farming, ranching, historical, cultural, civic, ceremonial, training and exhibition, or harvest-your-own activities and attractions. An agritourism activity does not include the building of new or additional structures or facilities that are intended

[18] *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).
[19] *See Achord v. Osceola Farms Co.*, 52 So. 3d 699 (Fla. 2010).
[20] *See Anderson v. Gannett Comp.*, 994 So. 2d 1048 (Fla. 2008) (false light was not actionable under the common law); *McPhail v. Jenkins*, 382 So. 2d 1329 (Fla. 1980) (wrongful death was not actionable under the common law); *see also Kluger*, 281 So. 2d at 4 ("We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative . . . unless the Legislature can show an overpowering public necessity . . .").
[21] *Kluger*, 281 So. 2d at 4; *see Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (upholding statutory cap on medical malpractice damages because the Legislature provided arbitration, which is a "commensurate benefit" for a claimant); *accord Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974); *but see Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1992) (striking down noneconomic cap on damages, which, although not wholly abolishing a cause of action, did not provide a commensurate benefit).
[22] *Kluger*, 281 So. 2d at 4-5 (noting that in 1945, the Legislature abolished the right to sue for several causes of action, but successfully demonstrated "the public necessity required for the total abolition of a right to sue") (citing *Rotwein v. Gersten*, 36 So. 2d 419 (Fla. 1948); *see Echarte*, 618 So. 2d at 195 ("Even if the medical malpractice arbitration statutes at issue did not provide a commensurate benefit, we would find that the statutes satisfy the second prong of *Kluger* which requires a legislative finding that an 'overpowering public necessity' exists, and further that 'no alternative method of meeting such public necessity can be shown'").
[23] University of Florida – IFAS, *Florida Agriculture & Natural Resource Facts* (July 2018), published by the UF/IFAS Economic Impact Analysis Program in 2019 and 2020.
[24] U.S. Department of Agriculture, National Agricultural Statistics Service, *Florida Agricultural Facts* (Sept. 2020), https://www.nass.usda.gov/Statistics_by_State/Florida/Publications/More_Features/FL2019.pdf (last visited Apr. 23, 2021).
[25] This chapter relates to the Department of Agriculture and Consumer Services.

primarily to house, shelter, transport, or otherwise accommodate the general public. An activity may be deemed an agritourism activity even if a participant does not pay to participate in the activity.[26]

Established Date of Operation

"Established date of operation" under the Florida Right to Farm Act means the date the farm operation commenced. The definition provides that:

- If the farm operation is subsequently expanded within the original boundaries of the farm land, the established date of operation of the expansion is the same date the original farm operation commenced.
- If the land boundaries of the farm are subsequently expanded, the established date of operation for each expansion is deemed to be a separate and independent established date of operation. However, the expanded operation does not divest the farm operation of a previous established date of operation.[27]

Recent Litigation

A federal class action lawsuit[28] was recently filed against sugarcane farmers in south Florida alleging that the pre-harvest burning of sugarcane has caused damages to nearby individuals and property. The defendants farm sugarcane on approximately 400,000 acres in areas south and southeast of Lake Okeechobee. The farmers burn the outer leaves of the sugarcane during a pre-harvest burn that takes place during a 6-month period from October through May each year. The plaintiffs allege that the burning has diminished their property values, caused long-term health issues, and prevented the area from growing economically.

Although the litigation is ongoing, the court has determined that pre-harvest burning of sugarcane is an acceptable agricultural practice protected by the Florida Right to Farm Act. However, the court has also determined that the Right to Farm Act does not bar all of the plaintiffs' claims, including claims that pre-harvest burning has released harmful pollutants.

Effect of the Bill

Legislative Findings and Definitions

The bill adds the concept of agritourism into the Right to Farm Act's legislative findings and purpose to recognize that preservation of agricultural activities contributes to the increase of tourism and agritourism. Additionally, the bill amends the purpose of the act to protect reasonable agricultural and complementary agritourism activities conducted on farmland from nuisance suits. The bill specifies that the established date of operation for an agritourism activity is the date the specific agritourism activity commenced.

The bill also expands the definition of "farm operation" within the Right to Farm Act to include:

- "Agritourism activities," thereby giving agritourism activities the nuisance protections that compliant farm operations receive under the terms of the Act. Under the bill, agritourism includes the marketing of farm products at roadside stands or farm markets.
- Particle emissions.

[26] S. 570.86(1), F.S.
[27] S. 823.14(3)(d), F.S.
[28] *Coffie v. Florida Crystals Corporation*, 460 F. Supp. 3d 1297 (S.D. Fla. 2020).

Lawsuit Procedures

Under the bill, a plaintiff must prove by clear and convincing evidence that a defendant did not comply with state or federal environmental laws, regulations, or best management practices in a civil nuisance action against a farm. The bill defines "nuisance" as any interference with reasonable use and enjoyment of land, including, but not limited to, noise, smoke, odors, dust, fumes, particle emissions, or vibration. The bill provides that a nuisance under the Right to Farm Act also includes all claims that meet the requirements of this definition of nuisance, regardless of whether the claim is designated as a claim brought in nuisance, negligence, trespass, personal injury, strict liability, or other tort.

One-half Mile Distance Restrictions for Nuisance Claims

Under the bill, a nuisance action may not be filed against a farm operation unless the real property affected by the alleged nuisance condition is located within one-half mile of the source of the activity or structure which is alleged to be a nuisance.

Compensatory Damages[29] in a Nuisance Claim

The bill limits the amount of compensatory damages awardable to a plaintiff in a private nuisance action relating to a farm operation. Specifically, the compensatory damages are limited to the reduction in the fair market value of the plaintiff's property caused by the nuisance, and such damages may not exceed the property's fair market value.

Punitive Damages[30] in a Nuisance Claim

Under the bill, a plaintiff may not recover punitive damages in a nuisance action against a farm unless:

- The alleged nuisance is based on substantially the same conduct that was subject to a civil enforcement judgment or criminal conviction; and
- The conviction or judgment happened within 3 years of the first act forming the basis of the current nuisance action.

Costs and Expenses Awarded Against a Plaintiff

The bill requires a court to award attorney fees and costs against a plaintiff under the Right to Farm Act in certain situations. Specifically, the bill provides that if a plaintiff does not prevail in a nuisance claim against a farm operation that was in existence for a year or more before the claim was filed, and the farm operation conforms to generally accepted agricultural and management practices or state and federal environmental laws, the plaintiff is responsible for all costs, fees, and expenses incurred to defend the action.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[29] Compensatory damages are awarded to repay actual losses. BLACK'S LAW DICTIONARY (11th ed. 2019).
[30] Punitive damages are awarded in addition to actual damages to punish a defendant who acted in a reckless manner or with malice or deceit. BLACK'S LAW DICTIONARY (11th ed. 2019).

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may reduce nuisance lawsuit litigation costs for farms. On the other hand, a person adversely affected by a farm operation may have more difficulty in obtaining judicial redress.

D. FISCAL COMMENTS:

None.