THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Number 2009-0749

The State of New Hampshire

V.

Julie Ostopchuk

Appeal From the Trial Court Decisions

Exeter District Court

Case numbers 09CR1636 and 09CR2247

Brief of Appellant Julie Ostopchuk

Julie M Ostopchuk, Pro Se

19 Rowell Road

East Kingston, NH 03827

5. Defense Photographic Exhibits
6. Defense Photographic Exhibits

**Note that T-1 shall refer to transcript 1 from case 09CR1636
**Note that T-2 shall refer to transcript 2 from case 09CR2247
** Example T-1-32,2 will reference Transcript 1, page 32, line 2

CONSTITUTIONAL REVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED

NH RSA 466:31 Dogs a Menace, a Nuisance or Vicious. –
(b) If it barks for sustained periods of more than 1/2 hour, or during the night hours so as to disturb the peace and quiet of a neighborhood or area, not including a dog which is guarding, working, or herding livestock, as defined in RSA 21:34-a, II(a)(4);

NH RSA 21:34-a Farm, Agriculture, Farming. –
I. The word ""farm'' means any land, buildings, or structures on or in which agriculture and farming activities are carried out or conducted and shall include the residence or residences of owners, occupants, or employees located on such land. Structures shall include all farm outbuildings used in the care of livestock, and in the production and storage of fruit, vegetables, or nursery stock; in the production of maple syrup; greenhouses for the production of annual or perennial plants; and any other structures used in operations named in paragraph II of this section.

II. The words ""agriculture'' and ""farming'' mean all operations of a farm, including:
(a) (1) The cultivation, conservation, and tillage of the soil.
(2) The storage, use of, and spreading of commercial fertilizer, lime, wood ash, sawdust, compost, animal manure,

septage, and, where permitted by municipal and state rules and regulations, other lawful soil amendments.

(3) The use of and application of agricultural chemicals.

(4) The raising and sale of livestock, which shall include, but not be limited to, dairy cows and the production of milk, beef animals, swine, sheep, goats….

(b) Any practice on the farm incident to, or in conjunction with such farming operations, including, but not necessarily restricted to:

(7) The use of dogs for herding, working, or guarding livestock, as defined in RSA 21:34-a, II(a)(4).

NH RSA 432:33 Immunity from Suit. – No agricultural operation shall be found a public or private nuisance as a result of changed conditions in or around the locality of the agricultural operation, if such agricultural operation has been in operation for one year or more and if it was not a nuisance at the time it began operation. This section shall not apply when any aspect of the agricultural operation is determined to be injurious to public health or safety under RSA 147:1 or RSA 147:2.

NH RSA 466:31-a Penalties.

I. Any person who violates any provision of RSA 466:31 shall be guilty of a violation; provided that if such person chooses to pay the civil forfeiture specified in paragraph II, the person shall be deemed to have waived the right to have the case heard in district or municipal court and shall not be prosecuted or found guilty of a violation of RSA 466:31. Any person who does not pay the civil forfeiture specified in paragraph II shall have the case disposed of in district or municipal court.

II. Any person who violates any of the provisions of RSA 466:31 shall be liable for a civil forfeiture, which shall be paid to the clerk of the town or city wherein such dog is owned or kept within 96 hours of the date and time notice is given by any law enforcement officer or other person authorized by the town to the owner or keeper of a dog in violation of RSA 466:31. If the forfeiture is paid,

said payment shall be in full satisfaction of the assessed penalty. The forfeiture shall be in the amount as specified for the following violations:

(a) $25 for the first nuisance offense under RSA 466:31, II(a), (b), (c) or (d); $100 for the second or subsequent nuisance offense committed within 12 months of the first nuisance offense under RSA 466:31, II(a), (b), (c) or (d).

(b) $50 for the first menace offense under RSA 466:31, II(e) or (f); $200 for the second or subsequent menace offense committed within 12 months of the first menace offense under RSA 466:31, II(e) or (f).

Article I – East Kingston NH –Zoning Ordinance—Purpose

This Ordinance is established in pursuance of authority conferred by Chapter 31 of the Revised Statutes Annotated of the State of New Hampshire, or any amendments thereto, in order to preserve and improve the attractiveness of the Town of East Kingston as a rural, residential and farming community and to continue its desirability as a place in which to lie and do business and promote the health, welfare, morals, convenience and safety of its citizens

Article III – East Kingston NH – Districting

For the purpose of regulating the use of land and the location and construction of buildings, the Town of East Kingston shall be considered as one district of residential, agricultural or forestry use only. Business, commercial and industrial uses are prohibited except as herein provided.

NH State Constitution [Art.] 2. [Natural Rights.] All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and *protecting, property*; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or

abridged by this state on account of race, creed, color, sex or national origin.

NH State Constitution [Art.] 16. [Former Jeopardy; Jury Trial in Capital Cases.] No subject shall be liable to be tried, after an acquittal, for the same crime or offense. Nor shall the legislature make any law that shall subject any person to a capital.…

STATEMENT OF THE CASE

On June 6, 2009, a summons, citing violation of RSA 466:31 for a noise complaint lodged by Mr. Frank Eaton regarding a barking dog was served to Ms Julie Ostopchuk of 19 Rowell Road, East Kingston, NH.

On August 21, a trial was held at Exeter District Court. Ms Ostopchuk, Pro Se, pled not guilty citing the dog was excluded from the noise ordinance (RSA 466:31) as a working livestock guarding dog as the Defendant owns livestock, namely sheep. Ms Ostopchuk also contended that the dog does not bark incessantly so as to violate the statute. Ms. Ostopchuk was found not guilty. At Prosecution's objection to the initial ruling, an additional trial was granted.

Ms Ostopchuk filed a Motion for Acquittal stating the case had already been tried in its completion. [Appendix 1] Motion was denied. An additional trial was scheduled and held on September 18, 2009.

An additional summons was received for another complaint by the same neighbor, from Frank Eaton at 10:30 in the morning of August 25, 2009. Ms Ostopchuk pled not guilty to the additional complaint and it was agreed at the first appearance on September 4, 2009 by Prosecution and Ms Ostopchuk to have both complaints tried at the scheduled trial on September 15, 2009. At second trial, Ms. Ostopchuk was found guilty and fined $1,000.00 in total.

STATEMENT OF THE FACTS

Ms. Ostopchuk purchased the property at 19 Rowell Road in East Kingston, NH in February of 2009. The property is in an agriculturally zoned area, where she owns livestock, specifically, sheep. She also owns a licensed Great Pyrenees dog, which she uses to protect the sheep from predators. Only one neighbor has complained of noise from Ms. Ostopchuk's dog. The relationship between that neighbor, Frank Eaton and the Defendant, Ms Ostopchuk has been noted as strained beginning with a visit Mr. Eaton paid to Ms Ostopchuk sometime in March 2009, at 10:00 in the evening. (T-2-17,18)

Sometime in April, Ms. Ostopchuk took the initiative to meet with East Kingston Police chief Reid Simpson to discuss the matter of strained relations with Mr. Eaton, stressing no wish for ill relations with any neighbor.

The next incident, on May 12, 2009, Ms Ostopchuk informed Mr. Eaton, which he has testified to, that she would have him arrested if he were to attempt such behavior again.(T-2-16,14) Both parties called police with officer Chad Larson responding, who spoke with both Mr. Eaton and Ms Ostopchuk. Ms Ostopchuk noted to Officer Larson that Mr. Eaton was verbally abusive to her in front of your young child by yelling and swearing at her. (T-2-25,13) Her daughter who was in the room while Officer Larson was speaking of the matter confirmed this to the officer.

Ms Ostopchuk had a discussion with Sergeant Raymond Marquis, of East Kingston PD regarding the complainant neighbor, Frank Eaton. Sergeant Marquis had never been to Ms Ostopchuk's residence and the two had never met prior. Ms. Ostopchuk informed Sergeant Marquis of her concern over Mr. Eaton's behavior and informed Sergeant Marquis of her ownership of livestock and that her dog was used as a livestock guarding dog to ward off predators, and that as a prior animal control officer herself, she held an understanding of the exclusion of working dogs as it applied to farming in New Hampshire. Sergeant Marquis noted he did not realize that Ms Ostopchuk owned livestock, but that he did not believe a dog should be allowed to bark and would be pursing the matter in court. (T-2-42,3) Ms Ostopchuk expressed concern to Sergeant Marquis over his willful blindness to the provisions in the statute (*RSA 466:31*)

> That same day, in written letter, Ms. Ostopchuk notified both East Kingston PD as well as the East Kingston Selectmen of her protected rights under NH law (RSA 466:31) to use customary and recommended agricultural practice of using a livestock guarding dog for her sheep on her land zoned for such use, yet be respectful to the neighbors. She additionally noted that she purchased the property specifically because it was a working farm prior to her purchase, with all pasture, fencing, and barn in place. Ms. Ostopchuk also noted in that letter that she had been in the farming tradition for many years, and was starting over again on this small farm as a now single parent. [* letter not saved] Acknowledgement of this letter being received by both entities on June 17, 2009 was in a letter from the selectmen. [Appendix 3]

Days later a violation notice citing violation of RSA 466:31 for a barking dog was given to Ms. Ostopchuk, back-dated to a complaint by Frank Eaton on June 6, 2009, and signed by Sergeant Marquis.

First appearance was scheduled and heard on July 17, 2009. Defendant requested dismissal from the Prosecutor as well as the Court citing the exclusion of a working livestock guardian dog under RSA 466:31. Request was denied. Trial was scheduled and heard on August 21, 2009.

At trial, Ms. Ostopchuk, representing Pro Se for her defense, cited RSA 466:31 and its specific reference of RSA 21:34-a; established

by the legislative body to give certain rights and protections to those carrying out agricultural activities and using accepted agricultural practice. (T1-21- 22,8). Judge Cullen objected to citing the RSA, stating it was getting away from the issue. (T-1-22,12)

Defense also noted that the use of the property for agricultural purposes has not changed since the transfer of ownership. Per abutter Thomas Brandolini's testimony, the property had been continuously used to raise livestock for over 20 years. (T-1-20,22) (*NH RSA 432:33 Immunity from Suit)* The Court stated whether or not the property had been continuously operated as a farm for over 20 years is not an issue in this case.

NH RSA 466:31 outlines an exception to the noise nuisance statute for dogs that guard livestock. RSA 466:31 also specifically references RSA 21:34 which are the State of NH definitions of acceptable farming practices, which includes the use of dogs guarding livestock such as sheep as an acceptable farming practice.

Defense entered photographic exhibits of sheep, barn, pasture, and Great Pyrenees dog. (T-1-16,11) [Appendix 5]

Defense called witness; neighbor Thomas Brandolini of 17 Rowell Road, who testified to Defendant's ownership of sheep and observations of Great Pyrenees dog kept in the pasture with the sheep. (T-1-23,6)

Later during arguments, the Defense reiterated the Statute as written by the legislators that she was accused of violating, as the

Prosecution was arguing that Ms. Ostopchuk is not entitled to the protections included in RSA 466:31, stating; “Owning two sheep does not mean raising livestock, does not mean operating as a farm.″ (T-1-28,2) “I don't think there's been any evidence to point the fact that this is a working dog that's working on a clearly operational farm as fits the statute, Judge. And I believe that her dog, therefore, does fit the statute. The State has met its burden.” (T-1-28,12) . Once the defense was raised, the Prosecution had the burden of disproving it. The Prosecution provided no evidence that the defendant was not using her dog in a generally accepted, reasonable, and prudent manner. The Prosecution did not adduce any evidence that the dog was not in fact reacting to a predator at the time of the complaints, or that the barking could not, somehow, meet the definition of a farming practice. If a burden of proof for the Defense was necessary, the uncontested fact of ownership of livestock such as sheep, and a Great Pyrenees dog that is kept with the sheep; the traditional and recommended breed specifically for use as a livestock guarding dog should have sufficed.

The Court refused to acknowledge the State of New Hampshire’s definition of acceptable farming activities as cited within the statute Ms Ostopchuk was accused of violating. (T-1-29-23) Judge Cullen is quoted stating: “The definition of agriculture does not come into the issues in this case. That's not what comes into the issues in this case.” The Court failed to apply the provisions of NH

RSA 21:34 to the facts of this case and there was no evidence to the contrary.

Prosecution presented their case with witness and closing arguments.

Judgment was found for the defense, Judge Cullen stating “At this point, I'm entering a finding of not guilty because from my notes, the -- and my recollection, there's no evidence that the dog continued barking for more than a half-hour.” (T-1-30-19) Prosecution objected to the finding of not guilty, citing the argument ruled on did not consider the argument of exclusion of RSA 466:31 and whether the defense was protected under the statute.

Judge Cullen granted the prosecution a whole new trial on the matter scheduled for September 18, 2009.

Defense filed a Motion for Acquittal, requesting the matter not be tried twice, citing Prosecution did not meet their burden of proof at the scheduled trial and should not be granted an additional trial after the matter was tried with witness testimony, closing arguments and initial judgment for the Defense. [Appendix 1] Motion for Acquittal was denied. *[Art.] 16. [Former Jeopardy; Jury Trial in Capital Cases.]*

On August 25, 2009, and additional citation was received by Ms. Ostopchuk again citing violation of RSA 466:31 for a barking dog at 10:30 A.M., during which time Mr. Eaton was having

construction done on his home a matter of feet from the dog as he testified himself. (T-2-19,4) (T-2-52,7) Also important to note two days later, Mr. Brandolini was on the property at 19 Rowell Rd observing the dog's behavior as Mr. Eaton was mowing the lawn in very close proximity to where the dog and sheep were, yet separated by a see-through wire fence. The dog barked a couple of times, and laid down quiet again. (T-2-52,16)

First appearance on the matter from August 25, 2009 was scheduled and heard on September 4, 2009. Ms Ostopchuk again pled not guilty. It was agreed by Prosecution and Defense to hear both matters together at additional trial that had been previously scheduled for September 18, 2009.

On September 18, 2009, second trial was held and arguments presented on both sides. Ms Ostopchuk, representing Pro Se inquired as to a ruling on Defenses filing of a Motion for Acquittal (T-2-3,19) [Appendix 1] Motion was deni Defense further stated to Judge Cullen "Your Honor, we are arguing whether the dog is exempt from the RSA, not whether the dog barks. It was admitted at the first trial that the dog barks." (T-2-13,10)
Judge Cullen responded: "No, ma'am. No, ma'am. That's the first issue. If the dog didn't bark, there probably wouldn't be a case." (T-2-13,13)
Prosecutor Newell contradicts her objection to the ruling at the first trial on August 21, 2009 by stating: "Judge, we've been going back and forth with her on this. And the last time we were here, that was her issue. She first stipulated the dog was barking; then,

at the end of the trial, she changed her mind and said she didn't want to stipulate." (T-2-13,16) Contradiction noted here. (T-1-30,23) The Defense had always maintained the dog is a working livestock guarding dog and that the dog does not bark incessantly as was confirmed and testified to by other property abutter Thomas Brandolini (T-2-51,15-52,1)

Officer Chad Larson Of East Kingston PD notes Ms Ostopchuk's allegations about abutter Frank Eaton's abusive behavior when he knocked on Ms Ostopchuk's door at 10:00 at night (T-2-25,8)

Prosecution's witness Frank Eaton, the complainant abutter of Ms Ostopchuk in CROSS-EXAMINATION BY MS. OSTOPCHUK:

Q. Mr. Eaton, you said that you attempted a resolve with myself over this situation. At what hour did you attempt a resolve?

A. 9:30 at night.

Q. And how did you attempt that resolve, Mr. Eaton?

A. I knocked on your door.

Q. Okay. And were you swearing and yelling at that time --

A. No, I wasn't swearing.

Q. -- in front of my child?

A. I never had a chance to say anything. I never stepped into your house. You came out, said you'd have me arrested for trespassing.

Q. Now, why do you think I would have said that I'd have you arrested?

Q. Okay. Well, prior to that incident, why didn't you stop by during decent daylight hours and talk about it?

A. I did the first time at ten o'clock at night.

Q. Okay.

Note; Mr. Eaton does not deny the allegation that he was yelling at Ms Ostopchuk in front of her young child. This per Mr. Eaton was the second time he had attempted 'resolve' with Ms Ostopchuk by knocking on her door past 9:30pm then yelling.

Defense objected to East Kingston police officer Chad Larson defining what constituted a farm rather than using the State of New Hampshire's definition as outlined in RSA 466:31. (T-2-23,13) Defense stated "The officer does not -- is not qualified to say what is a farm by the State's definitions." Objection was not ruled on.

Expert witness Susan Smith, President of Northeast Great Pyrenees Rescue, an expert in the Great Pyrenees breed testified to her observances of the dog in question Ms Smith was requested by Ms Ostopchuk to visit and to observe the Great Pyrenees the Defense owns. Ms. Smith's expertise as she testified came from working with and placing over 200 Great Pyrenees as working livestock guarding dogs for a number of years. (T-2-46,19) Susan Smith testified that the dogs observed behavior was typical of a livestock guardian (T-2-47,21) Ms Smith further noted that the environment was in her opinion definitely a farm situation (T-2-48,1) It should be noted that the East Kingston police officers can only view a small portion of the land at 19 Rowell Rd from the road and have never physically been near the barn or pasture. Ms. Smith and Mr. Brandolini are the only witnesses that testified who had been physically in the area of the barn and pasture. Ms Smith testified about how the Great Pyrenees used as a livestock

guarding dog typically acts stating “As soon as I walked into your yard, he barked at me, and then proceeded over to where the sheep were. So he was clearly, you know, protecting his charges.” (T-2-49,3)
Ms Smith also testified that Ms Ostopchuk’s farm is not the smallest farm she has been on. (T-2-49,8) Witness Tom Brandolini testified that when he approaches the sheep in the pasture that the dog becomes protective. (T-2-53,11)

Judge Cullen stated it was the Defense’s obligation to provide an affirmative defense in this case (T-2-63,1) It is held that agricultural operations do not have an affirmative defense against nuisance claims based on their compliance with "generally accepted agricultural practices" as provided under New Hampshire law. Compliance with generally accepted agricultural practices provides an agricultural operation with an affirmative defense to a nuisance claim." *NH RSA* 21:34(b), provides for the use of dogs for guarding livestock that "[a]n agricultural operation is operating according to generally accepted agricultural practices if it is located in an agriculturally zoned area and complies with the provisions of all applicable federal and state statutes and rules or any issued permits for the operation."

ARGUMENTS

1 The Court erred by holding a second trial on the matter and by failing to accept the Defense’s filed Motion for

Acquittal, and trying this case twice, which is a violation of the Defendants Constitutional Rights under the Double Jeopardy clause. The Defendant presented her case as did the prosecution in completion through closing argument by the Prosecution, and a judgment was found for the Defendant. The facts being argued were set forth at the beginning of trial and agreed upon by Defense, Prosecution, and Judge. [*State V. Gregory Courtemarche No. 96-184, (1998)] Under the Federal Constitution, jeopardy attaches when a trial commences. Id . This moment occurs in a jury trial "when a jury is sworn or empanelled or, in a bench trial, when the judge begins to hear evidence."*

At first trial, the Prosecution provided no evidence that the Defendant was not using her dog in a generally accepted, reasonable, and prudent manner. The Prosecution did not adduce any evidence that the dog was not in fact reacting to a predator at the time of the complaints, or that the barking could not, somehow, meet the definition of a farming practice.

2 At first and second trial, the Court erred by failing to apply the provisions of NH RSA 21:34 to the facts of this case and there was no evidence to the contrary. Once the defense was raised, the Prosecution had the burden of disproving it. The Court also erred in not accepting the defense raised as was outlined at the beginning of the first trial as well as the reason for the Prosecution's objection to the initial ruling. The Prosecution provided no evidence that the defendant was not using her dog in a

generally accepted, reasonable, and prudent manner. The Prosecution did not adduce any evidence that the dog was not in fact reacting to a predator at the time of the complaints, or that the barking could not, somehow, meet the definition of a farming practice. The trial court substituted its own opinion that the dog barking could not be a recognized farming practice.

The Prosecution, as was seen in the transcript, insisted at the second trial that the argument was something other than the dog being excluded from the noise statute. The Prosecution objected to the Court's ruling at the first trial, stating it had not ruled on whether the dog was excluded from the noise statute. Although the Defense tried to remind the court, the Prosecution seriously muddied the waters and the Court negated and failed to recognize the issue; which was the dog being excluded from RSA 466:31 as a working dog guarding livestock.

3 The Court erred in assessing excessive fines totaling $1,000.00. (T-2-64,6-14) The *[NH RSA 466:31*] lists penalties for first offense at $25.00, and $100 for second offense. (I) *[Art.] 33.[Excessive Bail, Fines, and Punishments Prohibited]* addresses imposing such excessive fines in the NH Constitution.

CONCLUSION

From the first trial held, and continuing through the second trial, it has been demonstrated that this Court erred by failing to hear or consider the definitions of acceptable farming practices and the

States definition of a farm as set by the Legislative Branch as was set forth into law in RSA 21:34 as if specifically included and referenced in RSA 466:31, the statute Ms Ostopchuk was accused of violating.
To suggest that small agricultural operations such as Ms. Ostopchuk has are not afforded the protections under NH law as equally as larger operations would set a terrible precedent and discourage future farmers who are just starting out, as well as small family farms raising livestock for their own consumption. 96% of New Hampshire farms are considered "small farms" by the USDA, yet deserve the full protections under New Hampshire's law's set aside, and intended to preserve our State's rich heritage of farming.

For the foregoing reasons the Appellant, Julie Ostopchuk, Pro Se requests this Honorable Court to reverse the decision made by the lower Court on September 18, 2009.

CASE LAW

Oregon Judicial Department Appellate Court Opinions

Filed: April 28, 2004

Hood River County V. Francis N Mazzara

010058DG; A118596

IN THE COURT OF APPEALS OF THE STATE OF OREGON

HOOD RIVER COUNTY,

Respondent,

v.

FRANCIS N. MAZZARA,

Appellant.

010058DG; A118596

Appeal from Circuit Court, Hood River County.

Bernard L. Smith, Judge.

Argued and submitted January 9, 2004.

Bart A. Brush argued the cause and filed the brief for appellant.

No appearance for respondent.

Before Edmonds, Presiding Judge, and Armstrong and Schuman, Judges.

SCHUMAN, J.

Reversed.

SCHUMAN, J.

Defendant appeals a conviction for violating Hood River County Ordinances (HRCO) under which the owner of a dog may not allow it "to become a public nuisance * * *" by "[d]isturb[ing] any person by frequent or prolonged noises[.]" HRCO 6.16.010; HRCO 6.08.140(E). Defendant argues that the ordinances are invalid as applied to her because ORS 30.935 immunizes farm practices from the application of local government ordinances. We reverse.

ORS 30.935 provides:

"Any local government * * * ordinance or regulation * * * that makes a farm practice a nuisance or trespass or provides for its abatement as a nuisance or trespass is invalid with respect to that farm practice for which no action or claim is allowed under ORS 30.936 * * *."

As relevant here, ORS 30.936 provides, "(1) No farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass." A farming practice is defined as:

"[A] mode of operation on a farm that:

"(a) Is or may be used on a farm of a similar nature;

"(b) Is a generally accepted, reasonable and prudent method for the operation of the farm to obtain a profit in money;

"(c) Is or may become a generally accepted, reasonable and prudent method in conjunction with farm use;

"(d) Complies with applicable laws; and

"(e) Is done in a reasonable and prudent manner."

ORS 30.930(2).

Defendant operates a farm with a herd of 60 cashmere and angora goats on land that borders a national forest. Several witnesses testified that predators inhabit the area, including coyote, cougar, bear, and bobcat. Defendant's dogs are of a breed, Kuvasz, that traditionally has been used to guard livestock. The dogs are introduced to the herd as puppies so

that they will "bond" with it and become protective of it by, among other methods, barking at predators. The dogs can sense a predator when humans might not be aware of it. Usually, the dogs will continue to bark until either the threat goes away or a person comes to investigate.

On the date that defendant was cited, she and her husband were away from the farm for the day due to a medical appointment. Defendant's neighbor called 9-1-1 to report that a dog had been barking for six hours. A deputy arrived to investigate, and he also heard the dog barking. He drove up defendant's driveway and saw the dog in a pen or pasture. He could not recall if there were goats in the same pasture. The dog's tempo of barking increased when the deputy approached it. The deputy left and later cited defendant for the violation that is at issue here.

Defendant had a trial to the court and was fined $250 for the violation. She assigns error to the trial court's failure "to apply the provisions of ORS 30.935 to the facts of this case" and the trial court's failure "to enter judgment in favor of defendant[] when defendant[] established each of the elements necessary to prove that her use of livestock guardian dogs and their barking was a 'farm practice' within the meaning of the statute and there was no evidence to the contrary." The two assignments of error essentially reduce to the question whether the trial court properly applied ORS 30.935 in light of the evidence. [(1)]

From the outset, the trial court expressed skepticism about the applicability of the statute:

"THE COURT: Anything that you can classify as farm practice would be acceptable, and the neighbor has to live with it; that would be correct?

"[DEFENSE COUNSEL]: That's the public policy separate [*sic*] stated from the statutes of the State of Oregon, yes, Your Honor.

"THE COURT: You're going to have to prove that to me. I'm going to be--I'm a little reluctant to believe that that's accurate in that specific, in that degree. There may be degrees of that, the farm practices, but you can cite me to the law specifically in the cases that find that that's the case, okay?"

Defendant presented evidence that her use of the dogs was a farm practice as defined in ORS 30.930(2). This was sufficient to raise the defense provided by ORS 30.935. Once the defense was raised, the county had the burden of disproving it. ORS 161.055 (state has burden of disproving defense other than affirmative defense raised at trial); ORS

153.030 (criminal procedure laws applicable to crimes also apply to violations).

Defendant testified that she used the dogs in her goat farming operation to guard livestock and that barking that otherwise would have constituted a nuisance was an essential part of that use. One of her witnesses, James Johnson, the Land Use and Water Planning Coordinator for the Department of Natural Resources Division of the Oregon Department of Agriculture, testified that such use is not only a legitimate farming practice but a recommended one. He had visited defendant's farm, and he agreed that her use of the dogs was reasonable and prudent; he testified that he "saw nothing different [from] what I've observed in other operations." Defendant, then, introduced uncontradicted evidence establishing all of the elements of a "farming practice" as defined by ORS 30.930(2).

The county, for its part, introduced *no* evidence that use of livestock guardian dogs was not a farming practice or that defendant was not using her dogs in a generally accepted, reasonable, and prudent manner. The county focused on the fact that the dog barked for six hours, but it did not adduce any evidence that the dog was not in fact reacting to a predator or that barking of that duration could not, somehow, meet the definition of a farming practice. Certainly six hours of barking would be disturbing to a neighbor. However, ORS 30.935 provides that farming practices that would *otherwise be a nuisance* under county and local ordinances cannot be made illegal. ORS 30.933 provides the relevant legislative findings and policy:

"(1) The Legislative Assembly finds that:

"(a) Farming and forest practices are critical to the economic welfare of this state.

"(b) The expansion of residential and urban uses on and near lands zoned or used for agriculture or production of forest products may give rise to conflicts between resource and nonresource activities.

"(c) In the interest of the continued welfare of the state, farming and forest practices must be protected from legal actions that may be intended to limit, or have the effect of limiting, farming and forest practices.

"(2) The Legislative Assembly declares that it is the policy of this state that:

"(a) Farming practices on lands zoned for farm use must be protected.

"* * * * *

"(c) Persons who locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting.

"(d) Certain private rights of action and the authority of local governments and special districts to declare farming and forest practices to be nuisances or trespass must be limited because such claims for relief and local government ordinances are inconsistent with land use policies, including policies set forth in ORS 215.243, and have adverse effects on the continuation of farming and forest practices and the full use of the resource base of this state."

ORS 30.935 promotes a policy of maintaining exclusive use farm land for farming, even at the expense of the neighbors' enjoyment of their property.

After the defense rested, the following colloquy occurred between defense counsel and the trial court:

"[DEFENSE COUNSEL]: If [the complaining neighbor is] unable to verify whether there was or was not a predator around, Mr. Tomson--or Mr. Johnson, from the Oregon Department of Agriculture testified these dogs sense a lot more than humans do. They'll sense by hearing better than humans, smell better than humans, they may know something's there when humans don't, and that's a completely appropriate response for that dog to bark to keep that predator away, and if it takes six hours, it takes six hours.

"THE COURT: Well, I think that's patently ridiculous, and I would never accept that. I'm not venting on you; I'm just venting on the idea that it would be appropriate for some dog out to just bark, bark, bark its life away out there, and that it is not reasonable for an owner of a dog, if it really wants that dog to protect their animals, to not be there to respond to it, to just expect this dog to be out there in an area where there's people that are going to be disturbed. I just don't accept that within the Agricultural Practice Act, and I'm not going to.

"So, if we're arguing about it's okay for six hours of barking, eight hours of barking, two hours of barking, I have the facts of this case and the

facts here are that it looks like it's in excess of six hours of barking by this dog, for no apparent purpose that I have. We don't have any testimony other than supposition, and I'm not going to make my decision on supposition, that there may have been a predator somewhere in the world there. That's not going to fly.

"So, I guess on that issue, frankly, you haven't convinced me that the Agricultural Practice Act exception applies to that."

Once defendant raised the defense, the county had the burden of disproving it. ORS 161.055. The county did not do so. The trial court disregarded uncontested facts that established defendant's immunity, and in doing so it erred. Put another way, the court substituted its own opinion that six hours of dog barking could not be a recognized farming practice when the uncontested testimony established that it can be and, in this case, it was. We therefore reverse.

Reversed.

THE SUPREME COURT OF NEW HAMPSHIRE

Nashua District Court

No. 96-184

THE STATE OF NEW HAMPSHIRE

v.

GREGORY COURTEMARCHE

May 14, 1998

Philip T. McLaughlin , attorney general (Cynthia L. White , senior assistant attorney general, on the brief and orally), for the State.

Donald E. Bisson , assistant appellate defender, of Concord, by brief and orally, for the defendant.

BRODERICK, J. The State appeals the dismissal by the Nashua District Court (Howorth , J.) of its second complaint charging the defendant, Gregory Courtemarche, with driving while intoxicated (DWI), second offense, see RSA 265:82 (1993 & Supp. 1997) (amended 1995, 1996); RSA 265:82-b, I(b) (1993) (amended 1995, 1996, 1997). We reverse.

In June 1994, the Nashua District Court issued "Court Administrative Objectives." The objectives note that they "are not to be considered policies, local rules or standards of performance." They also specifically provide that "once a case is on the list and the case is called, jeopardy will ordinarily be considered to have attached."

In February 1995, the defendant was arrested for, inter alia , driving while intoxicated, second offense. In April, the Nashua District Court called the defendant's case for trial. Before the district court heard any evidence, however, the State nol prossed the complaint. In response, the district court noted that because the defendant was present and the case had been called for trial, jeopardy had attached.

The State later returned to the district court and filed another complaint for the same offense. After a hearing, the district court dismissed the second complaint on double jeopardy grounds, noting its earlier observation at the time the original complaint was nol prossed . In so ruling, the district court relied on its interpretation of federal double jeopardy principles and its "need to resolve the potential vagaries of district court practice." The defendant has since conceded that because jeopardy does not attach in bench trials until the judge begins to hear evidence, see , e.g. , United States v. Bonilla Romero , 836 F.2d 39, 42 (1st Cir. 1987), cert . denied , 488 U.S. 817 (1988), the district court erred in its analysis. We agree.

Under the Federal Constitution, jeopardy attaches when a trial commences. Id . This moment occurs in a jury trial "when a jury is sworn or empanelled or, in a bench trial, when the judge begins to hear evidence." Id . Accordingly, the Nashua District Court erred by relying on federal double jeopardy principles to conclude that jeopardy attached before the trial began.

STATE OF NEW HAMPSHIRE

EXETER DISTRICT COURT **JUDICIAL BRANCH**

In the matter of:

Appendix 1

State V. Julie Ostopchuk

Case Number: 435-2009-CR-01636

MOTION FOR ACQUITTAL

NOW COMES Julie Ostopchuk, Petitioner in the above referenced matter, by and through herself representing Pro Se in the case above, objects to an additional trial on the above referenced matter, scheduled for September 18, 2009. and moves this Honorable Court to acquit on the charges as were brought and tried on August 21, 2009. As for grounds for said Motion, she states as follows:

1. Prosecution agreed to trial within the time allotted and presented their case, witness and closing argument.
2. Prosecution did not meet their burden of proof at the scheduled trial. The evidence presented to the Court was insufficient and therefore, should not receive a second trial. Prosecution had ample time to request additional time if so needed to prove its case prior to the original trial date.
3. Defense came prepared for the trial as scheduled with witnesses and evidence. Defense presented witness and evidence of her livestock ownership and Great Pyrenees livestock guardian dog. Defense witness was an abutting neighbor who testified the Defendant raises sheep and a Great Pyrenees dog who he has witnessed guards the livestock.
4. RSA 433:61 excludes livestock guardian dogs who are working as defined in RSA 21:34-a II (a) (4).

WHEREFORE Julie Ostopchuk, by and through herself representing Pro Se prays:

A. That this court enter judgment of acquittal.
B. For such other and further relief as justice may require.

Dated this 5th day of September, 2009.