

A10-1596 and A10-2135

STATE OF MINNESOTA
IN COURT OF APPEALS

Oluf Johnson and Debra Johnson,

Appellants

v.

Paynesville Farmers Union Cooperative
Oil Company,

Respondent

APPELLANTS' REPLY BRIEF

ARLO H. VANDE VEGTE, P.A.

Arlo H. Vande Vegte (#0112045)
12800 Industrial Park Blvd., Suite 210
Plymouth, MN 55441-3929
952/475-2219

ATTORNEY FOR APPELLANTS

RAJKOWSKI HANSMEIER, LTD.

Kevin Gray (#0185516)
Matthew Mochrle (#034767X)
11 Seventh Avenue North
P.O. Box 1433
St. Cloud, MN 56302
320/521-1055

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

A.. Public Policy Considerations 1

B. Respondent’s Arguments 2

TABLE OF AUTHORITIES

STATUTES

Minn. Stat. § 18B.07 subd. 1 1

OTHER AUTHORITIES

7 CFR § 205.2 6, 8

7 CFR § 205.202(b) 3, 6

7 CFR 205.400(f) 6

7 CFR § 205.406(b) 4

7 CFR § 205.406(c) 4

7 CFR § 205.671 3

7 U.S.C. §§ 136 to 136y 1

Minnesota Rules of Evidence 803(6) 5

Minnesota Rules of Evidence 803(8) 5

Minnesota Rules of Evidence 803(15) 5

A. **Public Policy Considerations.** In Respondent's Brief it took pains to make the point that there is no interpretive case law, anywhere, respecting the NOP issues framed in this litigation. Each side has strong reason to advocate for its interpretation of the regulations. In that respect, Appellants have advanced their arguments demonstrating the misinterpretation/misapplication of the so-called "5% Rule" and will further discuss that issue below. Appellants here note that the Respondent is in the business of purveying and applying chemicals which are highly regulated both under FIFRA and the Minnesota Pesticide Control Act. They are capable of great harm. Minn. Stat. § 18B.07 subd. 1 states:

Pesticides must be applied in accordance with the product label or labeling and in a manner that will not cause unreasonable adverse effects on the environment within the limits prescribed by this chapter and FIFRA¹

Respondent's tendency throughout this litigation has been to minimize its own misconduct and its effects upon Appellants. That is a matter of dispute. However, what is not disputable is the fact that the law compels Respondent to use pesticides **exactly** as the manufacturer says they must be used. It has, repeatedly, failed to do so. There is a strong public policy reason behind that simple statutory directive. That directive directly impacts upon the NOP - which seeks to create, to the extent possible, a world that is totally divorced from the use of pesticides. Appellants have chosen to live in that world - a world that is anathematic in every way to Respondent's world.

¹7 U.S.C. §§ 136 to 136y

As this Court considers the regulatory issues in this matter, then, Appellants respectfully request the Court to keep in mind the question of which of the two worlds here is most likely to cause harm and which is most likely to need the protection of the law. Clearly it is the pesticide applicator that is most likely to cause harm and the organic farmer that is most likely to suffer at the applicator's hand. The degree of harm suffered may be an issue of fact, but the question of the existence of any harm at all should not rise and fall on a "5% Rule" the implementation of which the organic farmer has no control and no discretion.

It is the commercial applicator who should, then, bear the risk of loss when it fails to comply with the federal and state regulatory pesticide schemes. It should not be permitted to successfully raise technical, hairsplitting arguments which bend and warp the NOP regulations to their own liking. Nor should they be allowed to apply them where they do not belong. That is precisely what Respondent is hoping for. Public policy, however, falls squarely in Appellants' favor.

B. Respondent's Arguments.

Respondent's arguments are nothing more than wishful aspirations as to the intent and application of the NOP regulations. Without directly addressing the discretionary nature of the testing procedures underlying its "5% Rule" arguments, it assumes that any "certifying agent" confronted with a "drift" event affecting an organic farmer is required to test to see if the organic crops can meet the 5% threshold before it is allowed to decertify the farmer's

field. There is absolutely no support in the NOP for that claim.

The so-called “5% Rule” from 7 C.F.R. § 205.671 applies only to currently grown crops, not to the fields involved with the spray drift event at issue. The rule only makes it possible, “when” the certifying agent has decided [in its discretion] to test for prohibited chemicals in currently grown crops to determine whether the sale of those crops as organic products may occur notwithstanding the spray event. It does not address the question of annual field certification in any manner. It does not provide the organic farmer a direct means to test his/her own crops. Thus, Respondent has missed the critical distinction between the crops involved in a drift event and the field on which they were grown. The field, itself, must pass muster under 7 C.F.R. § 205.202(b). There is no prescribed test procedure for that. This means that whether a spray-affected organic field has had any prohibited substances “applied” to it for three years becomes a matter of the certifying agent’s determination.²

The OCIA has the discretion, under the NOP regulations not only to decide whether it will test drifted crops for the 5% tolerance under 7 C.F.R. § 205.671, but also to decide whether it will require a field affected by spray drift to go into three years of “transition” regardless of testing issues under § 205.671. In that regard the OCIA here acted by decertifying Appellants’ fields.

²The farthest possible reach of the “5% Rule” would be to the crop grown in the season of the drift event if and only if the certifying agent decided, at its own expense, to test that crop.

Respondent attempts to defend this point by arguing that the OCIA is just wrong. Thus, it considers itself to be more expert than the OCIA on the subject. It goes so far as to claim that Appellants and the OCIA are guilty of “mismanagement” of Appellants’ organic farming operation. [Respondent’s Brief pages 26-27]. This is baseless.

Respondent insists that the NOP comments as to the “5% Rule” strongly support its argument. They do not. They only make it clear that an organic farmer may not use pesticides by design and then try to use the 5% testing threshold to qualify the crops as “organic”.

The comments do not address the question at issue here presented - where a pesticide applicator causes an illegal drift onto an organic operation should the affected fields [not crops] be decertified? That question is addressed by specific NOP regulations [not just comments] which give that question to the certifying agent’s discretion. *See*, 7 C.F.R. § 205.406(b) and (c).

Respondent forgets that in all recent cases, but one [2007], the MDA took enforcement action against Respondent for the various pesticide misuses about which Appellants complained and Respondent admitted to those violations [2002, 2005, and 2008 times two]. As to 2007, the MDA found that an unlawful drift event had occurred but did not take direct enforcement action. Thus, there was substantial independent regulatory evidence of Respondent’s violations of the pesticide application laws in each and every case where Appellants’ fields were decertified by the OCIA. In addition, the OCIA visited the farm,

viewed the affected fields and interviewed Appellants before issuing decertification instructions.

However, Respondent contends that there is no admissible proof of decertification. Oluf Johnson testified by way of affidavit and deposition to the decertifications. He testified to his MDA complaints and the reporting of the drift events to the OCIA. He testified to his reporting at the annual certification site visits made by the OCIA to his farm; his participation in those visits; the OCIA's receipt of the MDA investigatory data; and his later receipt of letters from the OCIA directing him as to which of his fields are and are not certified for the next year. [*See*, SA 150]. All of that testimony was based upon his own personal knowledge as a direct participant in the events he recounted. His own recollections of his participation is not inadmissible hearsay as Respondent seems to suggest. Nor is his testimony that he complied with the OCIA's transition directives to him.

The OCIA letters decertifying the drift affected fields, it appears, are what Respondent claims to be inadmissible hearsay. But those letters [SA-239 to 251] are admissible. They are admissible as Appellants' own business records under Minn. R. Evidence 803(6). They are admissible as the OCIA's business records under the same rule. They are admissible as documents containing statements affecting an interest in property under Minn. R. Evidence 803(15). To the extent the OCIA is considered a public agency because of the authority given it under NOP regulations to enforce the same, the letters may also be public records and reports under Minn. R. Evidence 803(8).

But, Respondent claims that the “three year rule” from 7 C.F.R. § 205.202(b) only applies where the organic farmer intentionally applies prohibited chemicals to a field. Otherwise, it claims, an organic field would have to be kept under a bubble to keep all contaminants, such as those carried by wildlife, out.

The regulations do not address contamination by wildlife, etc. The NOP addresses the use of prohibited chemicals by humans. As noted in Appellants’ Brief [page 25] organic farmers are compelled by that regulation to notify the certifying agent concerning any “application, including drift, of a prohibited substance to any field.” 7 C.F.R. § 205.400(f). They are not compelled to report a fox or a goose traversing their land. If anything would be absurd that would be.

It is clear from the regulatory language of § 205.400(f) that “drift” is a form of “application” of prohibited chemicals. Again, “drift” is defined by the NOP as any “physical movement” of a prohibited substance onto organic land from an “intended target site”. 7 C.F.R. § 205.2. Thus, Respondent’s argument that the word “applied” as it pertains to § 205.202(b)’s three year prohibition unambiguously means only an intentional application of prohibited substances by the organic farmer [or anyone for that matter] to the affected land is belied by § 205.400(f) and the NOP’s definition of “drift”. These regulatory definitions and provisions gave the OCIA the legal right to decertify Appellants’ fields notwithstanding Respondent’s incredulities and wishful thinking.

But, then Respondent complains that Appellants did not appeal the OCIA's decertifications. They make this argument in the context of Appellants' claims for inconvenience damages associated with either the nuisance or trespass theories they seek to reinstate. The argument, as it goes, appears to be that Appellants' inconveniences are self-imposed because they did not appeal these decertifications.

Appellants' first comment regarding this argument is that even if they had appealed Respondent has produced no evidence that all of the inconveniences caused by the pesticide misuses would have been cured by successful appeals. Appellants would have to respect the decertifications pending appeal and would still have had to plan their crop rotations, etc., around the possibility of losing the appeals

For that matter Respondent has no evidence that any of the appeals would have succeeded. Moreover, having to incur the time and effort to make the appeals is, itself, a form of inconvenience for having to deal with Respondent's violations. Thus, there would be inconvenience damages either way. The most that can be said for Respondent's argument, then, is that it might go to mitigation of damages - not to the fact of some form of inconvenience damages themselves.

Respondent also tries to obfuscate the evidence regarding the 2007 event by calling the Court's attention to the difference between "drift" and "volatilization" according to its expert witness. Thus, it claims, there is no proof that a wrongful use of pesticides in 2007 caused Appellants to be required to plow down a 10 acre strip of affected land by MDA directive. For purposes of the NOP, there is no difference between drift and volatilization because its definition of "drift" is "[t]he

physical movement of prohibited substances from the intended target site onto an organic operation or portion thereof” 7 C.F.R. § 205.2 [at SA-260]. Volatilization is necessarily included in this definition. Volatilization, however, occurs both during the actual spray activity and later. [SA-233]. The “Advisory Notice” that the MDA gave to Respondent after the 2007 drift event noted the illegal application of the pesticide. [SA-252]. And, there is no source of the dicamba product which caused the plow down other than Respondent’s 2007 spray activities - to which it readily admits it engaged. Respondent did not contest the MDA’s “Advisory Notice” that it had illegally sprayed in 2007. Accordingly, a triable fact issue continues respecting the 2007 pesticide misuse.

In addition Appellant plowed under crops in 2008 when there were two admitted violations because of ragweed incursions Appellant attributes to chemical applications of less than the prescribed amount.

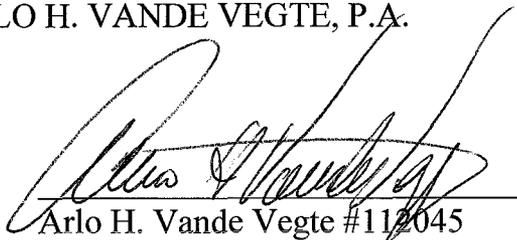
With regard to the 2008 violations, Respondent continues to contest the right to amend the complaint to include them. For all the reasons stated on this appeal that amendment should be permitted. To the extent that it is not permitted on appeal, but the Court believes that Appellants’ 2008 claims are not entirely “futile”, Appellants would ask that the decision here should not be in prejudice of their ability to bring a separate claim for 2008 violations.

Finally, Respondent argues that the trial court was correct in dissolving the injunction because it now knows that the “5% Rule” prevails. Respondent ignores the repetitive nature of its pesticide misuses and the substantial negative impacts they have had upon Appellant’s lives and their organic farming operations. Respondent’s callous disregard of the law is what

drew the trial court's attention to its conduct in the first place. By Appellant's account, this appeal demonstrates the that the dismissal, premised entirely upon the inapposite "5%" rule as it was, must be reversed. If this Court agrees the injunctive claim, if not the injunction, should be reinstated.

ARLO H. VANDE VEGTE, P.A.

By:



Arlo H. Vande Vegte #112045

Attorney for Appellants

12800 Industrial Park Blvd. Ste 210

Plymouth, MN 55441-3929

952-475-2219