

Case Nos. A10-1596 & A10-2135

State of Minnesota
In Court of Appeals

Oluf Johnson and Debra Johnson,

Appellants,

vs.

Paynesville Farmers Union Cooperative Oil Company,

Respondent.

**RESPONDENT PAYNESVILLE FARMERS UNION
COOPERATIVE OIL COMPANY'S RESPONSIVE BRIEF**

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STATEMENT OF LEGAL ISSUES

I. Did Appellants fail to produce the requisite evidence of damages to support their negligence per se and nuisance claims and survive dismissal as a matter of law?

The trial court answered this question in the affirmative upon Respondent's Motion for Summary Judgment and dismissed the negligence per se and nuisance claims as a matter of law. App-40.

Gradjelick v. Hance, 646 N.W.2d 225 (Minn. 2002)

Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273 (Minn. 2000)

Minn. Stat. § 561.01

7 C.F.R. §§ 205.202, 205.671

65 Fed. Reg. 80,548, 80,556 (Dec. 21, 2000)

II. Is Appellants' claim for trespass by particulate matter a recognized claim in Minnesota?

The trial court answered this question in the negative upon Respondent's Motion for Summary Judgment and dismissed the trespass claim as a matter of law. App-40.

Wendinger v. Forst Farms, Inc., 662 N.W.2d 546 (Minn. Ct. App. 2003)

Fagerlie v. City of Willmar, 435 N.W.2d 641 (Minn. Ct. App. 1989)

III. Did the trial court act in clear error when dismissing Appellants' claim for permanent injunctive relief?

The trial court dismissed Appellants' claim for permanent injunctive relief as a matter of law in conjunction with Respondent's Motion for Costs and Disbursements. App-62.

Highview North Apartments v. Ramsey County, 323 N.W.2d 65 (Minn. 1982)

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IV. Did the trial court act in clear error when revoking the previously-enacted temporary injunction against Respondent?

The trial court revoked the temporary injunction which had previously been in place in this lawsuit in conjunction with Respondent's Motion for Costs and Disbursements and. App-62.

Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka County, 121 N.W.2d 183 (Minn. 1963)

V. Did the trial court abuse its discretion by denying Appellants leave to amend their Complaint to add new claims?

The trial court denied Appellants' request for leave to amend their Complaint to add claims relating to allegations of damage in 2008 because such claims were "futile" pursuant to the controlling National Organic Program regulations. Appellants' request was made in conjunction with their opposition to Respondent's Motion for Summary Judgment. App-41.

State v. Baxter, 686 N.W.2d 846 (Minn. Ct. App. 2004)

Doe v. F.P., 667 N.W.2d 493 (Minn. Ct. App. 2003), *review denied* (Minn. Oct. 21, 2003)

STATEMENT OF THE CASE

A. Parties' Backgrounds

Respondent Paynesville Farmer's Union Cooperative Oil Company ("Paynesville Co-op") is a farm product and services provider to dozens of farmers in the general vicinity of Appellants Oluf and Debra Johnsons' ("the Johnsons") farm fields in Stearns, Meeker and Kandiyohi Counties. Paynesville Co-op annually sprays pesticides on between 35,000 and 45,000 acres of farmland in its region; including fields adjacent to the Johnsons' organic fields. RA-1. Between mid-April and mid-September each year, Paynesville Co-op's six full-time, certified applicators typically spray customers' fields five to seven days per week. RA-1. Paynesville Co-op's spray services are vital to the health of its customers' crops and the profitability of dozens of family farms in the area.

B. Appellants' Claims and Theories of Recovery

The Johnsons purport to be organic farmers whose crops were damaged as a result of spray drift of pesticides caused by Paynesville Co-op. App-2-7. Yet, despite their stated intention to produce, market and sell organic crops on a regular basis, the Johnsons in this lawsuit have made a profound effort to interpret the National Organic Program ("NOP") regulations¹ in a way which is most detrimental to their interests as organic farmers. This is in addition to the fact that their interpretation of the NOP regulations is simply incorrect. As noted by Paynesville Co-op's counsel during oral arguments on summary judgment, it would be in the Johnsons' best interest to argue that the NOP

¹ It is undisputed in this case that the NOP regulations, codified at 7 C.F.R. § 205 et seq., govern the practices and procedures required of the Johnsons to raise and market organic crops.

regulations be interpreted in a manner consistent with Paynesville Co-op's arguments on the issue. Transcript, pp. 23-24. If the Johnsons were to concede that Paynesville Co-op's interpretation of the NOP regulations is correct, most – if not all – of the inconveniences and business interruptions claimed by the Johnsons in this case would be nonexistent and they would be able to raise their organic crops free from outside distraction.

Relative to this appeal, the Complaint alleges that the Johnsons suffered damages as a result of drift of pesticides which were applied to crops adjacent to theirs by Paynesville Co-op on June 15, 2007. App-4. The Johnsons allege damage to their fields and crops based on claims of common law trespass, common law private nuisance, private nuisance under Minn. Stat. § 561.01 and negligence *per se* for violation of Minn. Stat. § 18B.07. App-4-5. The Johnsons' Complaint also includes claims of personal injury – as a result of a private nuisance – and temporary and permanent injunctive relief. App-5-6.

The Johnsons' original Complaint also included claims which have been dismissed and are not being appealed. Specifically, the Johnsons claimed damages from an incident in 2005 in which Paynesville Co-op was alleged to have caused pesticides to drift from a neighboring farm field. App-3. The trial court dismissed the claim on summary judgment for violation of the applicable two-year statute of limitations. App-40. Paynesville Co-op had also argued that the Johnsons had already released it from liability for the 2005 allegations as part of a settlement made between the Johnsons and the

adjoining landowner's insurance company; an issue which the trial court said would require a determination of fact by the jury. App-52.

Another claim of the Johnsons' which was dismissed on summary judgment and is not being appealed is one for personal injury as a result of battery. App-41. The Johnsons had alleged that Appellant Oluf Johnson suffered certain minor and temporary symptoms on two occasions when he claimed he was in the vicinity of Paynesville Co-op's pesticide spray equipment as it was being used to apply chemicals to neighboring lands. This claim was dismissed for lack of any evidence of intent. App-60. As a consequence of its finding of lack of intent, the trial court did not address Paynesville Co-op's argument that the Johnsons also failed to present evidence of personal injury, as Mr. Johnson had not sought treatment for his alleged problems and did not retain a medical expert to testify to the element of causation. App-60.

Oluf Johnson confirmed during his deposition the theory on which his claims for damage to property are based: that is, he believes *any* amount of pesticide drift onto a field certified as "organic" results in the entire field being disqualified from organic classification for three years. SA-158. He acknowledged that this position is based on his interpretation of the NOP regulations, which are federal law.² SA-158. In other words, Appellant Oluf Johnson takes the position that if only one square foot of a 130-acre field was damaged by pesticide drift, the whole field would have to be decertified

² As discussed, *infra*, the NOP regulations actually allow a tolerance for certain amounts of chemicals on crops sold as "100% organic" so long as the grower did not apply the chemicals as part of his/her farming operations. Thus, Mr. Johnson's interpretation of the NOP regulations is incorrect.

and any crops taken off the field would have to be sold as conventional crops as opposed to organic for a period of three years after the alleged exposure. RA-6.

The trial court disagreed with the Johnsons' position on the matter of damages and instead interpreted the NOP regulations consistent with the commentary provided by their drafters and the arguments presented by Paynesville Co-op. App-57-58. By following Paynesville Co-op's interpretation of the NOP regulations, the trial court determined that a three-year decertification period for organic fields is only required in the instance when an organic farmer him- or herself is found to have intentionally applied a pesticide to the organic crops. App-57-58. In other words, the trial court determined that the NOP regulations do not require three-year decertification periods in the instance of accidental pesticide drift. App-57-58. The trial court also interpreted the NOP regulations to provide acceptable tolerance levels for prohibited chemicals in crops allowed to be sold as "organic." App-58. Because the Johnsons have provided no evidence that any pesticide drift caused by Paynesville Co-op on June 15, 2007 resulted in a violation of the acceptable tolerance levels in the Johnsons' organic crops, the trial court determined that Paynesville Co-op's activities on June 15, 2007 had no impact on the Johnsons' ability to produce organic crops. App-58.

Finally, the Johnsons' appeal requests reversal of the trial court's denial of their motion to amend the Complaint to add damage claims due to alleged pesticide drift on two occasions in the summer of 2008; both of which allegedly impacted the same field of Appellants'. App-60-61. The trial court was correct to deny the attempt to amend the pleadings on the grounds of futility. The 2008 claims' similarity to the claims relating to

the 2007 incident render them baseless as well; or, as the trial court stated, “futile.” Furthermore, because no claims in the original Complaint would survive summary judgment, as discussed *infra*, it would be illogical to add new claims to a lawsuit which has otherwise been disposed of entirely.

STATEMENT OF THE FACTS

A. Incident at Issue

The Johnsons allege that on June 15, 2007, Paynesville Co-op applied the herbicide Status® to a field adjacent to their soybeans growing in a field they refer to as “Field 1.” App-4. Status® has two active ingredients; dicamba and diflufenzopyr. RA-7. The Johnsons allege that the herbicide drifted during application and contaminated their soybeans. The Johnsons themselves did not test samples of the crops that were allegedly drifted on as a result of Paynesville Co-op’s application of Status®. SA-160. According to Paynesville Co-op’s agronomy expert witness, Brent Peterson, in the absence of residue testing, it may not be possible to establish whether alleged crop damage is due to pesticide drift or other non-herbicide factors. RA-17. These opinions were un rebutted

At the Johnsons’ request, the Minnesota Department of Agriculture (“MDA”) investigated the incident and tested four vegetation samples taken from the Johnsons’ soybeans in Field 1³ for both of the active ingredients in Status®, diflufenzopyr and

³ In 2007, the southern portion of Field 1 was planted with soybeans and the northern half was planted with corn. SA-180-181.

dicamba.⁴ SA-59-63. Of these four tests, *none* detected diflufenzopyr. SA-59-62. Only two of the four samples contained any trace of dicamba; and both of those tests revealed that the chemical was “[p]resent but below detection limit.” SA-59, SA-61.

According to the MDA’s findings on the June 15, 2007 incident, “it can not be proven if the detections [of dicamba] were from drift or volatilization following the application.” SA-55. The MDA reached this conclusion based on the fact that only one of the two active ingredients of Status® (dicamba) was at all present in the samples taken from the Johnsons’ soybean field. SA-55. Volatilization is a process far different from drift. RA-17. Simply put, volatilization describes the process by which a chemical which has been applied to – and sits as a residue on – the intended crops vaporizes and gets carried through the air; not as a spray or liquid particles, but instead simply as a gaseous substance that has evaporated into the air. RA-17. In other words, if the Status® product applied by Paynesville Co-op to fields adjacent to the Johnsons’ soybeans had drifted in the wind before coming to rest on the soybeans, both chemicals would have been found in the MDA’s soybean samples because both chemicals would have still been present in the liquid particles which drifted. RA-17. To the contrary, volatilization of just one chemical among several is possible and would explain how dicamba could have evaporated off of the lands neighboring the Johnsons’ and traveled through the air while diflufenzopyr did not. RA-17.

⁴ Although Paynesville Co-op does not concede that the documents created by the MDA would be admissible at trial, the bulk of Paynesville Co-op’s summary judgment argument considered the test results and conclusions of the MDA and argued that such information – even if deemed admissible at trial – fails to set forth *prima facie* evidence of the Johnsons’ claims.

The Johnsons allege that they were damaged, in part, because they were ordered by the MDA to plow down a “small area” of their field which bordered the field on which Paynesville Co-op applied the herbicide. SA-57. But the plowed area of soybeans only constituted a strip 175-feet wide running along the adjacent field which had been sprayed with Status®. SA-57-58. The plowed area is indicated on a map created by the MDA.⁵ SA-58. The Johnsons harvested the remainder of the crops in Field 1 in 2007 which were located outside the small strip of land which was plowed under. SA-180.

Nevertheless, the Johnsons in this lawsuit claim that the entire soybean crop in the southern half of Field 1 was affected by the incident of June 15, 2007. Additionally, they claim that the corn in the northern half of Field 1 was affected on June 15, 2007 – despite the fact that the MDA refused to take any vegetation samples from the corn in Field 1 upon the Johnsons’ request that it be tested also. SA-181. Using their improper interpretation of the NOP regulations, the Johnsons claim that Field 1 needed to be taken out of organic production for three years following June 15, 2007. Appellants’ Brief, p.

⁵ Although the map does not provide dimensions of the length of the plowed strip, the scale shown on the map allows an estimate that the strip is 2,500 feet long by the indicated width of 175 feet. Because a 25-foot buffer zone is required to encircle all organic crops, the plowed strip would include an area of about 2,500 feet by 150 feet which constituted organic crops and the buffer zone of about 2,500 feet by 25 feet which constituted traditional, non-organic crops. Based on these dimensions, the size of the soybean patch which was ordered plowed under can be estimated at about ten (10) acres. The entirety of the Johnsons’ field at issue, Field 1, consists of 93 total acres. SA-3. Thus, the fact that just 10 of the 93 acres of Field 1 were even potentially affected by the June 15, 2007 incident disproves the Johnsons’ allegation in their Brief that the plowed strip of soybeans covered “most” of the width of the soybean field as a whole. Appellants’ Brief, p. 11. This footnote is provided simply to provide the Court with perspective regarding the extent of potential alleged damages, and is not provided to argue that the exact dimensions of the plowed strip of soybeans have been established by the trial court.

14. They further allege that their certifying agent, OCIA, required such a response. *Id.* The Johnsons chose not to appeal the OCIA's determination that the entirety of Field 1 would be taken out of organic production following the June 15, 2007 incident. SA-181. In making this decision, they chose to forego a remedy provided in the NOP regulations which would have allowed them to challenge the determination of OCIA; a determination which, as discussed *infra*, is contrary to the NOP regulations and placed more severe burdens on the Johnsons than were required by law.

B. Alleged Physical Symptoms of Pesticide Exposure

Much of Appellant's Brief is dedicated to an attempt to persuade this Court that evidence of nuisance damages exist which would defeat the trial court's summary judgment order on that claim. *See, e.g.*, Appellants' Brief, pp. 30-32. One of the Johnsons' arguments is that their enjoyment of their property has been negatively affected because Appellant Oluf Johnson feels detrimental physical effects when exposed to Paynesville Co-op's pesticides. Appellant's Brief, p. 31. A careful review of the record in this case regarding physical symptoms of pesticide exposure reveals that *no* evidence exists of such complaints by Oluf Johnson with respect to the one incident relating to the claim of nuisance now on appeal; the alleged spray drift on June 15, 2007.

The only evidence in the trial court record relating to Appellant Oluf Johnson's alleged physical symptoms relates to just two alleged incidents; one in June, 2006 and another in July, 2008. Regarding the June, 2006 allegations, Mr. Johnson claimed to have suffered "an instant headache and cotton mouth" as a result of Paynesville Co-op "spraying actually a fair distance away." SA-176. Regarding the July, 2008 allegations,

Mr. Johnson testified as follows: “I was out in the field and smelling chemical, and then, also, I guess the effects of cotton mouth, enlarging of the throat, and an instant headache. And I don't want to be in that environment; so, you know, I have to leave.” SA-187.

Recall that the Johnsons provided no medical evidence of such symptoms or proof of any medical condition related to pesticide exposure – by means of medical records or testimony of a medical expert or otherwise. Nevertheless, the Johnsons have provided no evidence of any harmful physical effects as a result of the alleged June 15, 2007 pesticide drift.

C. Other Incidents Discussed in Appellants’ Brief

Despite the fact that the only claim for damages which has been plead and which is now on appeal is the June 15, 2007 incident, Appellants’ Brief includes allegations of several other incidents in which the Johnsons claim to have suffered monetary or other damage at the hands of Paynesville Co-op. *See, e.g.*, Appellants’ Brief, pp. 7-12.

Paynesville Co-op will discuss these events briefly, but only as they relate to Appellants’ claim that the trial court erred in (1) revoking the temporary injunction which had been in place and (2) dismissing the claim for permanent injunctive relief. Paynesville Co-op takes the position that this Court cannot consider the allegations beyond the June 15, 2007 incident when making its determination of whether to uphold the dismissal of the claims for damages relating to that incident.

Even if proven true, the Johnsons exaggerate the impact of the other alleged incidents on their farming practices. The Johnsons also fail to provide any evidence to support their allegations that the other incidents caused a disruption to their organic

farming practices. The Johnsons' exaggeration of the impact of the incidents on their ability to raise organic crops is a result of their improper interpretation of the NOP regulations, which govern the production of their organic crops.⁶ This issue will be discussed at length in the Argument section of this Brief. The Johnsons failure to present evidence of the alleged severe business interruptions is due to the fact that they have no proof that any act by Paynesville Co-op required their organic fields to be taken out of organic production pursuant to the NOP regulations.

1. June 23, 2005

The Johnsons lack evidence about any alleged harm caused by Paynesville Co-op in 2005. On June 23, 2005, Paynesville Co-op was hired by Ed Kalkbrenner to spray one strip of his field which was adjacent to one of the Johnsons' fields. RA-20-22. Ed Kalkbrenner's son had sprayed the rest of the field the same day and omitted the missed strip by mistake. *Id.* The Johnsons never undertook an investigation as to whether the alleged drift damages were caused by Paynesville Co-op's spraying of the one strip or the Kalkbrenners' spraying of the remainder of the field. SA-170. Oluf Johnson in his

⁶ According to Appellants' Brief, the Johnsons place much reliance on their certifying agent, OCIA, to determine the impact of spray drift on organic crops and the need to de-certify certain fields following alleged spray drift incidents. But because the OCIA's alleged instructions to the Johnsons to de-certify entire fields for three years following each incident were contrary to the requirements of the federal NOP regulations, and because the instructions from OCIA placed much more severe hardship on the Johnsons than what was required, the Johnsons' true controversy regarding these matters should be with the OCIA; not Paynesville Co-op. But the Johnsons' chose not to appeal any OCIA decisions, despite the fact that such a process is outlined in the NOP regulations at 7 C.F.R. § 205.681. SA-181, SA-320.

deposition admitted that it would be impossible at this point in time to determine which party was responsible for the alleged damage. SA-170.

2. July 3, 2008 and August 1, 2008

The Johnsons exaggerate the effects of the alleged spray drift incidents on July 3, 2008 and August 1, 2008. The MDA's investigation of each noted *no* visual damage to the Johnsons' crops and stated that any pesticide drift was "minimal and was limited to a small part of the alfalfa field and not the entire field." SA-71, SA-73. Furthermore, the active ingredient in the pesticide related to the July 3, 2008 allegations was only detected in one of the four samples taken by the MDA. SA-70-71. The active ingredient in the pesticide related to the August 1, 2008 allegations was only detected in two of the five samples taken; and at levels below the minimum detection limit. SA-72-73. As discussed, *infra*, when analyzed pursuant to the NOP regulations, any alleged effects caused by Paynesville Co-op on the Johnsons' ability to grow and market organic farm products are non-existent. The Johnsons instead raise exaggerated claims and arguments which are contrary to the interests of an organic farmer in an attempt to earn an income via litigation against Paynesville Co-op as opposed to producing and selling organic crops.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing the dismissal of claims pursuant to Minn. R. Civ. P. 56, this Court reviews de novo "whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson*,

L.L.P., 644 N.W.2d 72, 77 (Minn. 2002). “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

“[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). “[T]he party resisting summary judgment must do more than rest on mere averments.” *Id.* No genuine issue for trial exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *Id.* at 69 (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). “[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *Id.* at 71. The non-moving party “may not rely on the possibility that he will be able to develop evidence at trial, but must present specific admissible facts showing a material fact issue.” *O’Neil v. Kelly*, 239 N.W.2d 231, 232 (Minn. 1976); *see also North States Power Co. v. Minnesota Metro Council*, 684 N.W.2d 485, 491 (Minn. 2004).

II. THE DISMISSAL OF THE JOHNSONS' NUISANCE AND NEGLIGENCE PER SE CLAIMS SHOULD BE AFFIRMED

The Johnsons' nuisance and negligence per se claims fail as a matter of law because no evidence exists of damage or other harm to them or their property relating to the 2007 incident. Nuisance is defined by statute as “[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” Minn. Stat. § 561.01. An action in nuisance “may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance.” *Id.*

“Negligence per se is a form of ordinary negligence that results from violation of a statute.” *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981). “Summary judgment is proper if there is a ‘complete lack of proof on any of the essential elements’ of a negligence per se claim.” *Anderson v. State, Dept. of Natural Resources*, 693 N.W.2d 181, 189 (Minn. 2005); *citing Gradjelic v. Hance*, 646 N.W.2d 225, 234 (Minn. 2002). The elements of a claim for negligence are: “(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty being the proximate cause of the injury.” *Gradjelic*, 646 N.W.2d at 234 (citation omitted). “A per se negligence rule substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute . . . is conclusive evidence of duty and breach.” *Id.* at 231 n.3.

Both the nuisance and negligence per se claims by the Johnsons in the instant matter contain the requirement that they prove that some type of damages or harm

occurred as a result of actions by Paynesville Co-op. No such evidence has been presented in this case.

A. The Johnsons have presented No Evidence that Paynesville Co-op's Actions in 2007 caused the Johnsons to lose Organic Certification for their Crops

The question of whether Paynesville Co-op caused any interruption to the Johnsons' organic farming practices requires interpretation of the NOP regulations which govern those practices. "Statutory construction is . . . a legal issue reviewed de novo." *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007).

The Minnesota Supreme Court has stated, "When construing a statute, our goal is to ascertain and effectuate the intention of the legislature." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). When a statute is free of ambiguity, courts are to look only at its plain language. *Tuma v. Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986). "If the meaning of statutory language is not plain, courts resolve ambiguity by looking to legislative intent, agency interpretation, and principles of continuity which include consistency with laws on the same or similar subjects." *Occhino v. Grover*, 640 N.W.2d 357, 360 (Minn. Ct. App. 2002)(citation omitted). When reviewing a statute, courts are to assume that the legislature does not intend absurd or unreasonable results. *Schroedl*, 616 N.W.2d at 278.

"A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Id.* at 277 (quotation and citation omitted). When the language of the statute is ambiguous, the intent of the legislature controls. Minn. Stat. § 645.16. "A statute should be interpreted, whenever possible, to give effect to all of its

provisions; ‘no word, phrase, or sentence should be deemed superfluous, void, or insignificant.’” *Schroedl*, 616 N.W.2d at 277 (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)).

1. The Johnsons’ Interpretation of the National Organic Program Regulations is Incorrect.

The parties here do not dispute that the NOP regulations, codified at 7 C.F.R. § 205 et seq., govern the Johnsons’ abilities to sell organic crops and obtain/retain organic certification on their fields. The primary dispute between the parties in this case relates to the statutory interpretation of the relevant NOP regulations. The interpretation presented by the Johnsons in their arguments – as well as the similar personal beliefs to which Appellant Oluf Johnson testified – is simply wrong. As will be discussed below, both the plain language of the NOP regulations and – if such regulations are found to be ambiguous – the comments to the NOP rules favor the statutory interpretation presented by Paynesville Co-op.

The two most relevant NOP regulations to this lawsuit are as follows. Section 205.671 of the NOP regulations defines the chemical tolerance levels for crops which are allowed to be sold as organically produced and states, “When residue testing detects prohibited substances at levels that are greater than 5 percent of the Environmental Protection Agency’s tolerance for the specific residue detected or unavoidable residual environmental contamination, the agricultural product must not be sold, labeled, or represented as organically produced.” 7 C.F.R. § 205.671 (the “5% Rule”). Section 205.202 governs “application” of prohibited substances to organic fields and states, “Any

field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as ‘organic,’ must: . . . (b) Have had no prohibited substances, as listed in § 205.105, applied to it for a period of 3 years immediately preceding harvest of the crop . . .” 7 C.F.R. § 205.202. No case law exists in the United States which either analyzes or further defines the language of 7 C.F.R. § 205.202(b) or 7 C.F.R. § 205.671.⁷

2. 7 C.F.R. § 205.202(b) is Unambiguous and does not Require Decertification of Organic Fields due to Unintended Pesticide Drift from Neighboring Fields.

According to the Minnesota Supreme Court, “In statutory construction, we interpret statutory provisions in light of each other in order to avoid conflicting interpretations.” *Clark v. Pawlenty*, 755 N.W.2d 293, 305 (Minn. 2008). In this case, the only way to read NOP sections 205.202(b) and 205.671 consistently is to interpret section 205.202(b) as only referring to chemical applications by the organic farmer him- or herself. In other words, where section 205.202(b) requires an organic field to have had no prohibited substances “applied to it” in the three years before harvest of a crop, the phrase “applied to it” only refers to the actions by the organic farmer of making an intentional application of prohibited substances to the field. Had the NOP framers meant for unintended drift of pesticides to be a de-certifying factor, the phrase “applied to it” would have been replaced with words such as “come in contact with it.”

⁷ A Westlaw search of all state and federal cases in the United States containing a citation to 7 C.F.R. § 205.202 renders just one result; the unpublished case of *Hickerson v. New Jersey*, 2009 WL 3296529 (D.N.J. 2009) (unpublished decision at RA-23) (raising a question of whether the plaintiff’s requisite buffer zones were adequate under Section 205.202(c)). A Westlaw search for cases which cite to Section 205.671 returns no results.

The Johnsons' mistaken interpretation of the NOP rules would require them to decertify a field from organic production in the event that even trace amounts of prohibited substances unintentionally came into contact with the field by means of accidental spray drift or any other means. Neither the NOP regulations (nor the comments thereto, discussed *infra*) support this contention. Such an interpretation of the regulations would be absurd. Short of encasing an organic field in a bubble, an organic farmer could not possibly prevent trace amounts of prohibited substances from entering his/her fields. Birds and animals continually travel above and through different farm fields with no regard to whether they contain organic or conventional crops. The example given by Paynesville Co-op's counsel at the summary judgment hearing is that a goose or other bird which eats vegetation in a conventional farm field containing pesticides cannot be prevented from traveling to an organic farm field and depositing the chemicals by defecating. But, under the Johnsons' interpretation of the NOP regulations, such an instance would require the organic farmer to de-certify that entire field for three years; clearly an absurd result.⁸ Instead, by including the 5% Rule, the NOP framers

⁸ It is notable that Paynesville Co-op's interpretation of the NOP is more aligned with the discussion of pesticide drift in the excerpt presented in Appellants' Brief from the University of Minnesota's Applicator's Training Manual. SA-235. According to the Johnsons, that manual states that "Pesticide drift *can* result in loss" of organic certification. *Id.* (emphasis added). The manual is correct in one sense; that if a pesticide accidentally drifts onto an organic crop and tests reveal a violation of the NOP's 5% Rule, the contaminated portion of that crop is decertified from organic production until it is harvested. However, for the manual to be consistent with the Johnsons' arguments, it would need to state that 'pesticide drift *always* results in loss of certification.'

It must also be noted that this training manual is inadmissible hearsay. Despite the Johnsons' contention that it qualifies for the business record exception to the hearsay

clearly had the foresight to realize that no organic field can remain 100% free of contaminants. Instead, they created the strict tolerance level of just 5% of allowable chemicals in conventional crops to ensure that organic farmers would not be unduly burdened by chemical deposition on their lands which were out of their control. It is consistent then to say that a field's loss of certification as organic for a three-year transition period can only come as a result of the organic farmer's own intentional application of prohibited substances to the field.

Paynesville Co-op's interpretation of section 205.202(b) is the only way to avoid conflicting interpretations within the NOP regulations. If accidental contamination of any amount was found to be a de-certifying factor for organic fields under section 205.202(b), then the tolerance provisions for pesticides in section 205.671 would be meaningless. To the contrary, as stated above, section 205.671 is clearly meant to cover those sometimes unavoidable situations in which small amounts of prohibited substances accidentally come into contact with crops intended to be sold as organic. This interpretation of the statute is the only way in which sections 205.202(b) and 205.671 can be read together in an unambiguous manner.

To summarize, section 205.202(b) only requires decertification of an organic field for three years where the organic farmer him- or herself applies prohibited substances to

rule, the manual is not relevant to the case in any way. It is not a document prepared by the state in connection with the facts of this case; the scenario anticipated by the business record exception at Minn. R. Evid. 803(8). But, furthermore, the document is a training manual for *private applicators* of pesticides. It has no bearing on this case due to Paynesville Co-op's status as a *commercial applicator*.

the organic field in question. Section 205.671 provides tolerance levels for prohibited substances in organic crops when a party other than the organic farmer causes such substances to come into contact with crops intended to be sold as organic. But, even if this Court determines that the language of Section 202.205(b) is ambiguous, the published comments to the final NOP rule establish that Paynesville Co-op's interpretation of the relevant NOP regulations is correct.

3. If the NOP Regulations are Ambiguous, the Comments thereto Establish that the NOP Tolerance Levels are the only Prohibition on Selling Organic Goods where the Organic Farmer has not Intentionally Applied Prohibited Substances to his/her Fields or Crops.

The Johnsons argue in their Brief that Paynesville Co-op's interpretation of the NOP regulations is incorrect because it misinterprets the phrase "applied to it" in 7 C.F.R. § 205.202(b). Paynesville Co-op maintains that the Johnsons' interpretation cannot be adopted because it renders the 5% Rule meaningless. But, because Paynesville Co-op's interpretation of the NOP regulations as discussed in the previous section is reasonable, the Johnsons' position at best merely highlights an ambiguity in the statute regarding the definition of the word "applied." The question is whether the term refers to application by any means, including accidental drift, or if it refers only to intentional application by the organic farmer.

Recall that if a statute is ambiguous, Minnesota law requires an investigation into the intention of the drafters of a statute to ensure that it is applied consistent with the drafters' objectives. The final NOP rules and prefatory comments are published at 65 Fed. Reg. 80,548 (December 21, 2000). Multiple excerpts from those comments support

Paynesville Co-op's interpretation of the applicable NOP regulations in this case. The relevant comments to the NOP rules and Paynesville Co-op's discussion of those comments follow.

The trial court relied most on the following comment to the NOP regulations, which specifically discusses the fact that the presence of detectable pesticide residue alone does not necessarily constitute a violation of the NOP regulations:

Drift has been a difficult issue for organic producers from the beginning. Organic operations have always had to worry about the potential for drift from neighboring operations, particularly drift of synthetic chemical pesticides. As the number of organic farms increases, so does the potential for conflict between organic and nonorganic operations.

It has always been the responsibility of organic operations to manage potential contact of organic products with other substances not approved for use in organic production systems, whether from the nonorganic portion of a split operation or from neighboring farms. The organic system plan must outline steps that an organic operation will take to avoid this kind of unintentional contact.

When we are considering drift issues, it is particularly important to remember that organic standards are process based. Certifying agents attest to the ability of organic operations to follow a set of production standards and practices that meet the requirements of the Act and the regulations. This regulation prohibits the use of excluded methods in organic operations. **The presence of a detectable residue of a product of excluded methods alone does not necessarily constitute a violation of this regulation. As long as an organic operation has not used excluded methods and takes reasonable steps to avoid contact with the products of excluded methods as detailed in their approved organic system plan, the unintentional presence of the products of excluded methods should not affect the status of an organic product or operation.**

National Organic Program, 65 Fed. Reg. 80,548, 80,556 (Dec. 21, 2000) (codified at 7 C.F.R. 205) (emphasis added).⁹ As stated by the commentators, the standards for organic farming are “process based” and the role of the certifying agent is to determine whether the practices of the organic farmer meet the requirements of the act. The NOP regulations prohibit the use of excluded methods by the organic farmer while recognizing that even when those practices are followed, unintentional contact with excluded products can occur. This comment clearly negates the Johnsons’ arguments that any amount of detectable residue on one of their organic fields constitutes a violation of the NOP regulations and requires the entire field to be placed into transition for three years. As stated in the above comment, “the unintentional presence of the products of excluded methods should **not** affect the status of an organic product or operation.”

The following comment relates to the interpretation of the NOP’s “5% rule” and discusses the loss of certification of an organic farm in the case of “intentional” application of prohibited substances:

In the case of residue testing and the detection of prohibited substances in or on agricultural products to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with . . .” products with detectable residues of prohibited substances that exceed 5 percent of the EPA tolerance for the specific residue or UREC cannot be sold or labeled as organically produced. **When such an agricultural crop is in violation of these requirements, the certification of that crop will be suspended for the period**

⁹ The allegation in Appellants’ Brief that this comment does not relate to drift of pesticides is completely unfounded. While it is true that the initial discussion in this comment section refers to “genetic drift,” the discussion at the point of the language quoted herein had clearly broadened its scope to include drift of all prohibited substances, such as pesticides. The comment itself even specifically refers to “synthetic chemical pesticides” in the second sentence of the language quoted above.

that the crop is in production. Certifying agents must follow the requirements specified in sections 205.662 and 205.663 of subpart G, Compliance.

The “5 percent of EPA tolerance” standard is considered a level above which an agricultural product cannot be sold as organic, regardless of how the product may have come into contact with a potential prohibited substance. This standard has been established to: (1) satisfy consumer expectations that organic agricultural products will contain minimal chemical residues and (2) respond to the organic industry's request to implement a standard comparable to current industry practices. However, the “5 percent of EPA tolerance” standard cannot be used to automatically qualify agricultural products as organically produced, even if the level of chemical residues detected on an agricultural product is below 5 percent of the EPA tolerance for the respective prohibited substance. This final rule is a comprehensive set of standards and regulations that determines whether a product can or cannot be considered to carry the specified organic labeling terms in subpart D, Labeling. Therefore, in addition to this section of subpart G, Administrative, all other requirements of this part must be met by certified organic operations to have an agricultural product considered “organically produced.”

When residue testing detects the presence of any prohibited substance, whether above or below 5 percent of the EPA tolerance for the specific pesticide or UREC, the SOP's governing State official or certifying agent may conduct an investigation of the certified organic operation to determine the cause of the prohibited substance or product in or on the agricultural product to be sold or labeled as organically produced. The same shall occur if testing detects a product produced using excluded methods. **If the investigation reveals that the presence of the prohibited substance or product produced using excluded methods in or on an agricultural product intended to be sold as organically produced is the result of an intentional application of a prohibited substance or use of excluded methods, the certified organic operation shall be subject to suspension or revocation of its organic certification.** In addition, any person who knowingly sells, labels, or represents an agricultural product as organically produced in violation of the Act or these regulations shall be subject to a civil penalty of not more than \$10,000 per violation.

National Organic Program, 65 Fed. Reg. 80,548, 80,629-80,630 (Dec. 21, 2000) (codified at 7 C.F.R. 205) (emphasis added). The above comment thus clarifies three key intentions of the NOP. First, organic crops which are simply found to be in violation of the 5% rule are only to be taken out of organic production for “the period that the crop is in production.” This means that once the suspect crop is harvested, the organic production may resume immediately on the same field. This interpretation by the NOP commenters is – once again – in stark contrast to the Johnsons’ position that such a violation would de-certify a field for three years. Second, the 5% rule applies to *all* situations in which prohibited substances are detected on organic crops. This comment supports Paynesville Co-op’s interpretation that the 5% rule applies to incidents of accidental spray drift. Third and finally, the above comment clarifies that when prohibited substances are detected on organic crops an investigation is prudent to determine the cause of the existence of such substances on the crop; but the penalty of “suspension or revocation” of an organic farmer’s certification is one which can result only where “*intentional* application of a prohibited substance or use of excluded methods” is found. This comment therefore is entirely consistent with Paynesville Co-op’s interpretation of the NOP; i.e. that the three-year decertification process only applies where the organic farmer (e.g. Appellant Oluf Johnson) is found to have performed “intentional application” of the detected pesticides.

The following comment further discusses the interrelationship between intentional application of pesticides by an organic farmer and the three-year decertification period.

(3) Exclusion from Organic Sale. Commenters expressed that section 205.671(a) could be easily misinterpreted. They said that section 205.671(a) did not make clear that residue testing may not be used to qualify crops to be sold as organic if a direct application of prohibited materials occurred. Commenters suggested that section 205.671(a) include: “Any crop or product to which prohibited materials have been directly applied shall not be sold, labeled, or represented as organically produced.”

We do not believe this additional language is necessary. **Residue testing cannot be used to qualify any agricultural crop or product to which a prohibited material has been purposefully/directly applied.** The presence of any prohibited substance on an agricultural product to be sold as organic warrants an investigation as to why the detected prohibited substance is present on the agricultural product. It does not matter if the product has come into contact with a prohibited substance through means of drift or intentional application. **If the outcome of the investigation reveals that the presence of the detected prohibited substance is the result of an intentional application, the certified operation will be subject to suspension or revocation of its organic certification** and/or a civil penalty of not more than \$10,000 if he/she knowingly sells the product as organic. The use of prohibited substances is not allowed in the Act or this final rule. Residue testing is not a means of qualifying a crop or product as organic if a prohibited substance has been intentionally/directly applied. It is a tool for monitoring compliance with the regulations set forth in the Act and in this part.

Id. at 80,634 (emphasis added). This comment provides the intended framework for conducting residue testing for prohibited substances. The comment clarifies three key principles of the NOP regulations. First, if a residue test detects a prohibited substance, no matter the cause, an investigation is warranted. Second, the 5% rule in section 205.671 cannot be used to certify crops as organic where the organic farmer has intentionally made a direct application of a prohibited substance. This principle is consistent with Paynesville Co-op’s argument that the only way an organic farmer can

lose certification of a field without needing to test for the 5% tolerance level is if he/she makes a direct and intentional application of prohibited substances to an organic field. Third, the above comment proves that the certified organic operation is only subject to revocation or suspension of its certification if the investigation reveals that “the detected prohibited substance is the result of an *intentional application*.” Again, this comment is consistent with Paynesville Co-op’s interpretation that the three-year decertification penalty is applicable only where the organic farmer is the one who made a direct and intentional application of prohibited substance to an organic field. In the case of intentional application by the organic grower of a pesticide, the grower cannot regain certification even if he/she conducts residue testing and shows that the 5% rule has not been violated.

No admissible evidence exists in this case that supports the Johnsons’ claims that Paynesville Co-op caused them to lose organic certification on their fields. If the Johnsons were informed of such a consequence by their certifying agent, OCIA, then the OCIA’s determination is also directly contrary to the NOP regulations. There is neither evidence nor a contention by the Johnsons in this case that they intentionally applied pesticides to their own organic fields. Such would be the only situation in which decertification of fields could occur for more than one production period or without testing for compliance with the 5% rule. Despite the Johnsons’ contention otherwise, any determination by the OCIA to decertify fields in relation to the alleged spray drift caused by Paynesville Co-op is not a determination that can be imposed by law on Paynesville Co-op in this lawsuit. Despite the fact that all OCIA documentation is inadmissible

hearsay, the OCIA determination did not involve findings of fault or damages required under Minnesota law and did not include representatives of Paynesville Co-op in any way. Furthermore, although they are granted the right to do so under the NOP regulations, the Johnsons did not appeal the OCIA's determinations.¹⁰

The Johnsons' failure to enforce their rights of appeal under the NOP is the cause of any business interruption damages resulting from the decertification of organic fields. There is no legal basis for the Johnsons to essentially argue that the failures by them and the OCIA to properly manage their organic farm according to the NOP regulations should require Paynesville Co-op to pay for the alleged losses. Thus, there also exists no legal basis to find that Paynesville Co-op caused any of the "inconvenience" damages which the Johnsons claim a right to pursuant to their nuisance claims. Such inconveniences (i.e. changing crop rotation schedules, disruption of marketing, etc.) were not a consequence

¹⁰ The Johnsons rely on a distinguishable case to argue that the OCIA's determination to de-certify organic fields is the law of the case in this lawsuit. Appellants' Brief, p. 30 (citing *Vicker v. Starkey*, 122 N.W.2d 169, 173 (Minn. 1963) ("Although a reviewing court might reach a contrary conclusion to that arrived at by an *administrative body*, the court cannot substitute its judgment for that of the administrative body when the finding is *properly supported by evidence*.")) (emphasis added). But the *Vicker* court also recognized the "well-established rule" that a court *can* disturb an administrative agency's determination if the agency "proceeded upon an erroneous theory of law." *Vicker*, 122 N.W.2d at 173.

Contrary to this case, *Vicker* dealt with a state administrative agency, the Department of Economic Security, which denied the petitioner unemployment benefits. *Vicker*, 122 N.W.2d at 170. The OCIA is not such an administrative agency whose decisions are binding upon courts. Even if the OCIA is administrative body, the determination can be overruled if based upon an erroneous theory of law or if not properly supported by the evidence. Here, the OCIA's determination to place the Johnsons' organic fields into three-year transition periods is (1) not "properly supported by evidence" and (2) is a decision based "upon an erroneous theory of law." The OCIA's decision, thus, cannot be considered the law of this case.

of Paynesville Co-op's actions; instead, they were the result of either the Johnsons' or OCIA's mismanagement of the farm.

B. Samples taken from Crops in 2007 do not violate the NOP's 5% Rule

In addition to having no cognizable claim for unintentional pesticide drift onto fields which results in a three-year loss of organic certification, the Johnsons also have no claim for damage to the crops on which the drifted pesticides are alleged to have fallen in 2007. Those crops could have been sold as "100% organic" in full compliance with the NOP regulations. This is because all chemical residue tests by the MDA in 2007 revealed levels within the NOP's 5% tolerance limits. For example, recall that in 2007 Paynesville Co-op is alleged to have caused drift of Status® (active ingredients dicamba and diflufenzopyr) onto the Johnsons' organic soybeans. Diflufenzopyr was not detected whatsoever in the Johnsons' crop. Dicamba was detected – but below detection limits – in just one of the four soybean samples. Under the NOP, dicamba can be present in organic soybeans sold as "100% organic" up to a concentration of 0.5 parts per million in seed and 1.5 parts per million in hulls so long as the organic farmer did not intentionally apply the chemical to the soybeans. 7 C.F.R. § 205.671; *cf.* 40 C.F.R. § 180.227.

Because there is no evidence whatsoever that the concentration of dicamba in the Johnsons' soybeans exceeded the NOP tolerance levels, they could have sold the soybeans as "100% organic." Thus, they have no cause of action for damages against Paynesville Co-op for the 2007 incident. If the Johnsons decided to destroy the soybean crops at issue and/or not market them as organic following the alleged drift in 2007 it was not because they were precluded by law from doing so under the NOP; instead, it was a

choice of theirs based on an incorrect interpretation of the NOP.¹¹ As stated previously, Paynesville Co-op cannot be responsible for the Johnsons' mismanagement of their crops or their (or the OCIA's) mistaken interpretation of the NOP regulations. The Johnsons' claims for damages in 2007 should be dismissed as a matter of law.

III. THE DISTRICT COURT'S DISMISSAL OF THE JOHNSONS' TRESPASS CLAIM SHOULD BE AFFIRMED

Minnesota courts do not recognize a claim for trespass based on the spread of particulate matter onto the claimant's property. As this Court stated in 2003, a claim for trespass can only be made upon an invasion of possessory rights to land:

Minnesota, however, has not recognized trespass by particulate matter. Current Minnesota law was summarized in a 1989 case involving allegations of nuisance and trespass caused by noxious fumes from a waste-water treatment plant: "[a]lthough some of the traditional distinctions between nuisance and trespass have become blurred and uncertain, **the distinction now accepted is that trespass is an invasion of the plaintiff's right to exercise exclusive possession of the land and nuisance is an interference with the plaintiff's use and enjoyment of the land.**"

¹¹ With respect to the 175-foot-wide strip of Field 1 which was plowed under at the MDA's request in 2007, Paynesville Co-op maintains that its actions did not cause such damages either. Recall that the MDA's tests (the only tests conducted) could not establish that the damage to crops was caused by pesticide drift. Because volatilization of the dicamba chemical in Status® was a more likely scenario due to the complete absence of diflufenzopyr in the MDA's samples, and because the Johnsons have presented neither allegations nor expert testimony that the transmission of dicamba via volatilization is the result of any wrongdoing by Paynesville Co-op, the dismissal of the damages claims was proper. However, if this Court reinstates any of the Johnsons' claims for damages relating to the 2007 incident, Paynesville Co-op requests that the trial court be instructed that the damages at trial must be limited solely to the impact of the MDA's order to plow under the roughly ten-acre strip of soybeans in 2007.

Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 550 (Minn. Ct. App. 2003) (emphasis added) (quoting *Fagerlie v. City of Willmar*, 435 N.W.2d 641, 644 n.2 (Minn. Ct. App. 1989)).

The Johnsons' arguments on the issue of trespass rely on a line of cases based on principles irrelevant to the instant matter. The cases relating to trespass by foreign objects are not controlling on cases such as the instant one which deals solely with the alleged transmission of particulate matter. Instead, the cases cited by the Johnsons refer only to inanimate objects which come to rest and remain on the complaining party's land. For instance, the Minnesota Supreme Court in the case of *Victor v. Sell* held that trespass is not limited to human entry and can include "throwing or placing an **object** upon the property of another." *Victor v. Sell*, 222 N.W.2d 337, 340 (Minn. 1974) (citations omitted; emphasis added). This principle was relied upon in another of the cases cited in the Johnsons' brief. See *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 805 (Minn. Ct. App. 2001) (citing the rule as stated in *Victor* and finding that the entry of bullets onto land without permission of the owner constitutes trespass).

The Johnsons' trespass claims were properly dismissed by the trial court. In this case, the Johnsons do not allege trespass by any person or inanimate object. Instead, they allege trespass based on drift of chemicals and particulate matter. As outlined in the *Wendinger* opinion, Minnesota courts do not recognize a claim for trespass by particulate matter. Conversely, the rule as stated in *Victor*, by its reference to "objects," does not apply to cases involving particulate matter.

The Johnsons' arguments on this topic have also been dismissed by the discussion in *Wendinger*. Recall that *Wendinger* identified nuisance as the proper claim when the plaintiff alleges "an interference with the plaintiff's use and enjoyment of the land." Even though the Johnsons profess in their Brief to argue that their right of "possession" was impacted by Paynesville Co-op's actions, the facts they allege in support of this argument relate only to alleged interference with their *use* of the land. For instance, the Johnsons argue that pesticide drift "leads to negative consequences and *loss of the intended use* of the land." Appellant's Brief, p. 35 (emphasis added). The Johnsons further argue that "the chemicals came upon the land by respondent's hand and did injury to the land by *making it unsuitable for organic farming. . .*" *Id.* (emphasis added). These allegations relate only to claims of interference with the Johnsons' use of the land as a result of drift of particulate matter. The allegations have no relation to any alleged interference with the right of "possession" of the Johnsons' land.

Because the Johnsons' trespass claim is one for trespass by particulate matter, dismissal of the trespass cause of action should be affirmed. The proper claim to be brought based on the Johnsons' allegations is instead one for private nuisance. However, as discussed, *infra*, the nuisance claim fails as a matter of law for different reasons.

IV. THE TRIAL COURT'S DISMISSAL OF APPELLANTS' CLAIMS FOR INUNCTIVE RELIEF SHOULD BE AFFIRMED

A. Standard of Review

“A district court’s findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous.” *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. Ct. App. 2003), review denied (Minn. Nov. 25, 2003).

B. Appellants’ Claims for Permanent Injunctive Relief were Properly Dismissed

“Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist *before* injunctive relief may be granted.” *Smith v. Spitzenberger*, 363 N.W.2d 470, 472 (Minn. Ct. App. 1985) (quotation omitted) (emphasis in original). “A permanent injunction will issue only after a right to such relief has been established at a trial.” *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. Ct. App. 1987) (quotation omitted). Before permanent injunctive relief may be awarded, the merits of a dispute must be determined. *Id.*

The Johnsons’ claim for permanent injunctive relief is based in part on the private nuisance statute codified at Minn. Stat. § 561.01. Relying on the written opinion in *Highview North Apartments v. Ramsey County*, 323 N.W.2d 65 (Minn. 1982), the Johnsons argue that a claim for permanent injunctive relief under the private nuisance statute can be sustained in the absence of a viable claim for monetary damages. However, further analysis of the *Highview North* case reveals that the Minnesota Supreme Court’s interpretation of the private nuisance statute precludes the Johnsons’ claim for permanent injunctive relief in this case.

After reciting the language of Minn. Stat. § 561.01 (which has remained unchanged since *Highview North* was decided), the Minnesota Supreme Court in *Highview North* stated:

The statute defines a nuisance in terms of the resultant harm rather than in terms of the kind of conduct by a defendant which causes the harm. This is in accord with the historical evolution of nuisance since, as Prosser puts it, “Nuisances are types of damage” Prosser, *The Law of Torts* 577 (4th ed. 1971). **Yet there must be some kind of conduct causing the nuisance harm which is “wrongful.”** See *Randall v. Village of Excelsior*, 258 Minn. 81, 85, 103 N.W.2d 131, 134 (1960). **This wrongful conduct varies, and may at times be characterized as intentional conduct, negligence, ultrahazardous activity, violation of a statute or some other tortious activity.** See *Randall, supra*; *H. Christiansen & Sons, Inc. v. City of Duluth*, 225 Minn. 475, 31 N.W.2d 270 (1948); *Mokovich v. Independent School District No. 22*, 177 Minn. 446, 225 N.W. 292 (1929).

Highview North, 323 N.W.2d at 70 (emphasis added).

In the instant matter, by dismissing the Johnsons’ extensive and numerous claims for damages on summary judgment, the trial court determined as a matter of law that Paynesville Co-op’s conduct was not “wrongful.” Because the trial court’s dismissal of the Johnsons’ damages claims should be affirmed for the reasons stated *supra*, there can be no finding of wrongful conduct by Paynesville Co-op in this case. In other words, the requisite showing of wrongful conduct under *Highview North* cannot be made by the Johnsons. Thus, the Johnsons’ claims for injunctive relief under Minn. Stat. § 561.01 must also fail as a matter of law. Any trial or hearing on claims for such relief would merely re-litigate the damage claims which fail as a matter of law.

C. The Trial Court’s Revocation of the Temporary Injunction should be Affirmed

The purpose of a temporary injunction is to “maintain the status quo until a case can be decided on the merits.” *Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka County*, 121 N.W.2d 183, 187 (Minn. 1963). “[A]n order granting or refusing such relief

neither establishes the law of the case nor constitutes an adjudication of the issues on the merits.” *Id.* “Only a trial on the merits has such effect.” *Id.*

Because the instant case was decided on its merits on summary judgment, and because the trial court’s dismissal of the Johnsons’ claims should be affirmed for the reasons discussed *supra*, no legal basis exists for a temporary injunction at this time. On these grounds, the trial court’s revocation of the temporary injunction was not clear error. Instead, it was required pursuant to the principles stated in *Village of Blaine v. Independent School District No. 12*.

Alternatively, even if this Court reinstates the claims for nuisance or other damages relating to the June 15, 2007 incident, it cannot be said that the trial court acted in clear error when revoking the temporary injunction. The temporary injunction was put in place early in the litigation process in this case – before either party conducted a thorough review of the comments to the controlling NOP regulations. At the time Judge Davick-Halfen issued the temporary injunction, she had not yet been presented with a full analysis of the potential impact of Paynesville Co-op’s pesticide spray activities on the Johnsons’ ability to comply with the NOP regulations. The Johnsons’ motion for temporary injunction presented arguments to the Court based on their mistaken belief that miniscule amounts of pesticide drift onto small portions of their fields could decertify entire fields from organic production for three years.

Based on the discussions of NOP regulations raised to the trial court on summary judgment, it is now known that the potential impact of any accidental spray drift caused by Paynesville Co-op is minor. The alleged spray drift incidents in the past resulted in no

violation of NOP regulations and would not require decertification of any fields. This, in turn, would not require the Johnsons to alter their crop rotations as they allege.

Furthermore, only small portions of the Johnsons' fields have been implicated in the MDA studies as being potentially affected. In most cases investigated by the MDA at the Johnsons' request, the MDA did not visually observe any damage to the Johnsons' crops despite the alleged pesticide drift. Nothing in the record supports the argument that a temporary injunction is warranted which places significant burden on Paynesville Co-op to provide information of their business activities to the Johnsons on a continuous basis. It was not clear error for the trial court to revoke the temporary injunction.

In response to Paynesville Co-op's position on this issue, the Johnsons are expected to argue that the temporary injunction should be reinstated along with other claims in this matter because the trial court had already made its decision in August, 2009 that the temporary injunction was warranted. But the *Village of Blaine v. Independent School District No. 12* case, cited above, provides that a decision on a motion for temporary injunction does not determine the law of the case. This Court should consider all information available to determine whether the revocation of the temporary injunction was proper. Its scope of review should not be limited to the information presented prior to issuance of the temporary injunction.

V. THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT SHOULD BE AFFIRMED

"The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion."

State v. Baxter, 686 N.W.2d 846, 850 (Minn. Ct. App. 2004) (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). “Whether the district court has abused its discretion in ruling on a motion to amend may turn on whether it was correct in an underlying legal ruling.” *Doe v. F.P.*, 667 N.W.2d 493, 500-01 (Minn. Ct. App. 2003), *review denied* (Minn. Oct. 21, 2003).

Here, there is no error in the legal ruling underlying the trial court’s determination that amendment of the Complaint in this case would be futile. The ruling was based on the trial court’s correct interpretation of the NOP regulations and the fact that the Johnsons failed to provide evidence of damages. Paynesville Co-op has demonstrated in this Brief that the dismissal of all causes of action which have been plead in this case should be affirmed. If this Court affirms the trial court’s dismissal of all claims, no lawsuit would exist to which new claims could be added. It would be futile to add claims to a lawsuit which has already been disposed of. Instead, in such a situation, the more proper course of action would be to uphold the denial of the Johnsons’ motion to amend and require them to seek recourse for their 2008 claims in a separately-initiated lawsuit.

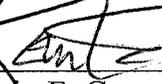
CONCLUSION

For the reasons presented herein, Respondent Paynesville Co-op respectfully requests that this Court affirm all decisions by the trial court which have been raised on appeal. The decisions which should be affirmed are: (1) dismissal of Appellants’ negligence per se and nuisance claims regarding the 2007 events, (2) dismissal of Appellants’ trespass claims regarding the 2007 events, (3) dismissal of all claims for permanent injunction, (4) revocation of the temporary injunction which was previously

entered in this case, and (5) denial of Appellants' request for leave to amend their Complaint.

Dated this 2nd day of February, 2011.

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State of Minnesota
In Court of Appeals

Oluf Johnson and Debra Johnson,

Appellants,

vs.

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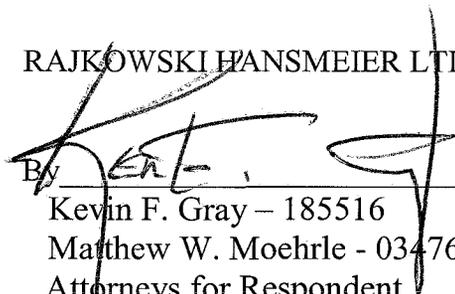
Respondent.

CERTIFICATE AS TO BRIEF LENGTH

I hereby certify that this reply brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a 13 point Times New Roman font. The length of this brief is 9,822 words. This brief was prepared using Microsoft Word 2002.

Dated this 2nd day of February, 2011.

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