

CASE NOS. A10-1596 & A10-2135

State of Minnesota
In Supreme Court

Oluf Johnson and Debra Johnson

Respondents,

vs.

Paynesville Farmers Union Cooperative Oil Company,

Appellant.

**BRIEF AND ADDENDUM OF *AMICI CURIAE* MINNESOTA GRAIN
AND FEED ASSOCIATION, COOPERATIVE NETWORK AND
MINNESOTA STATEWIDE COOPERATIVE MANAGERS ASSOCIATION**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION

Amici Curiae Minnesota Grain and Feed Association, Cooperative Network and Minnesota Statewide Cooperative Managers Association (collectively, “Amici”)¹ are Minnesota non-profit, agricultural organizations. Their members consist of Minnesota grain farmers, grain elevators and cooperative associations and managers involved in growing and merchandising grain. Amici’s members will be adversely affected if the decision of the Minnesota Court of Appeals in this case is allowed to stand. Amici support Appellant Paynesville Farmers Union Cooperative Oil Company (“Paynesville Co-op”) and respectfully request that the Court of Appeals’ decision be reversed and that the summary judgment entered by the Stearns County District Court be affirmed by the Court in all respects.

Pesticide drift is inevitable. In recognition of that reality, Congress and the United States Department of Agriculture (“USDA”) created a comprehensive regulatory scheme that allows conventional and organic farmers to peacefully coexist next to each other. The regulatory scheme permits conventional farmers to continue using pesticides in their farming operations and organic farmers to continue selling their crops as “organic” as long as they follow certain approved organic-farming practices, even when pesticides drift onto their farms. The Court of Appeals’ decision unwinds this careful compromise. The Court of Appeals’ decision significantly increases the risk of conflict and lawsuits

¹ This Brief was authored solely by counsel for Amici. The only entity other than Amici who made a monetary contribution to the preparation and submission of this Brief is Land O’Lakes, Inc. Land O’Lakes, Inc. is a Minnesota cooperative engaged in various agricultural-related businesses including dairy foods, animal nutrition and crop protection.

between conventional and organic farmers. It also increases the risk that organic farmers will be unable to sell their crops as organic despite following approved organic-farming practices.

The Court of Appeals' decision also disregards established precedent by creating a new cause of action in Minnesota, trespass by particulate matter. Harm resulting from the transfer of particulate matter from one property to another is adequately addressed by existing nuisance and negligence law. There is no need to complicate trespass law with a new and largely undefined legal theory that will only serve to further pit organic farmers against conventional farmers.

ARGUMENT²

I. THE COURT OF APPEALS MISCONSTRUED THE NATIONAL ORGANIC PROGRAM REGULATIONS.

Congress passed the Organic Foods Production Act ("OFPA") in 1990. Pub. L. No. 101-624, 104 Stat. 3935 (1990) (codified at 7 U.S.C. §§ 6501-6523). OFPA required the United States Secretary of Agriculture to "establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods[.]" 7 U.S.C. § 6503(a). To that end, on December 21, 2000, the USDA issued a Final Rule establishing the National Organic Program ("NOP"). 65 Fed. Reg. 80,548 (Dec. 21, 2000)(codified at 7 C.F.R. § 205). The NOP regulations established "national standards for the production and handling of organically produced products, including a National List of substances approved for and prohibited from use in organic production

² Amici rely on the Statement of Facts set forth in the Brief filed by Paynesville Co-op.

and handling.” *Id.*; see also G. Kuepper, *Organic Farm Certification & The National Organic Program*, *Appropriate Tech. Transfer for Rural Areas*, pp. 3-4 (Oct. 2002) (Amici’s Addendum at Add-3-4) (setting forth the steps required for organic certification).

It took more than ten years for the USDA to satisfy the congressional mandate to create a national program for regulating the production of organic food. A significant amount of thought, revision and compromise went in to creating the NOP regulations. See M. Friedland, *You Call That Organic? The USDA’s Misleading Food Regulations*, 13 *N.Y.U. Env’tl. L.J.*: 379, 383 (2005) (Amici’s Addendum at Add-10) (observing that the initial proposed rule sparked more public comments than any other USDA regulation in history).

One of the key issues addressed during the NOP rulemaking process was pesticide drift. Exposure to pesticides through over spray, wind, dust, fog and other means (collectively, “drift”), is inevitable:

Organic foods grown and processed properly, however, are not necessarily free from pesticides and other synthetic chemicals of conventional farming. Indeed, such produce can be contaminated due to cultivation on previously contaminated soil, percolation of chemicals through soil, especially on sloping fields, unauthorized use of pesticides, cross-contamination with wind drift, spray drift from neighboring conventional farms, contaminated groundwater or irrigation water, or even during transport, processing and storage.

F. Magkos, F. Arvaniti & A. Zampelas, *Organic Food: Buying More Safety or Just Peace of Mind? A Critical Review of the Literature*, *Critical Reviews in Food Sci. & Nutrition*

46:23-56, p. 26 (2006) (Amici's Addendum at Add-53); *see also* C. Benbrook, *Minimizing Pesticide Dietary Exposure Through the Consumption of Organic Food: An Organic Center State of Science Review*, The Organic Ctr. for Educ. & Promotion, pp. 20-21 (May 2004) (Amici's Addendum at Add-104-105); Friedland, *supra*, p. 399 (Amici's Addendum at Add-15) (according to the Administrator of the Agricultural Marketing Service, a division of the USDA, such drift "occurs constantly"). Despite the use of sophisticated technology and best efforts to contain pesticides, it is not possible to completely eliminate pesticide drift. S. Cordell & P. Baker, *Pesticide Drift*, Cooperative Extension, Univ. of Ariz., College of Agric., p. 2 (Amici's Addendum at Add-149) (examining a recent study on drift and concluding "there may always be some level of drift with current application methods"); Benbrook, *supra*, p. 30 (Amici's Addendum at Add-114) ("As much as three-quarters of the pesticides applied by air onto crops drift elsewhere; regardless of how a pesticide is applied, drift losses less than 10 percent are uncommon").

The USDA recognized that organic crops would always be subject to some level of pesticide exposure through drift. Accordingly, the principal focus during the NOP rulemaking process was placed on the *process* used by farmers to raise organic crops:

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.*”

65 Fed. Reg. 80,548, 80556 (Dec. 21, 2000) (emphasis added).

The USDA realized, however, that there had to be a level of pesticide exposure at which a product should not be sold as “organic,” even if the organic farmer used approved organic-farming practices. As a compromise, the USDA established the “5% Rule,” a specific, objective standard used to determine whether an agricultural product produced using organic-farming practices can be sold as “organic.” The 5% Rule 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 Organic Center for Education and Promotion has recognized that the NOP adopted

the 5% Rule “to prevent organic farmers from loss of certification over incidental environmental contamination with pesticides not actually applied on their farms.” Benbrook, *supra*, p. 21 (Amici’s Addendum at Add-105).

The 5% Rule applies to crops. Another NOP regulation, 7 C.F.R. § 205.202, governs land on which organic crops may be grown. Section 205.202 provides, in part: “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 (emphasis added).

A critical dispute in this case concerns the proper interpretation of the phrase “applied to” in Section 205.202. The Court of Appeals interpreted this phrase to include “unintentional pesticide drift,” and concluded that certifying agents have discretion to decertify a field if contamination of less than five percent is present on the crops. *Johnson v. Paynesville Farmers Union Co-op Oil Co.*, 802 N.W.2d 383, 390-91 (Minn. Ct. App. 2011), *rev. granted* (Minn. Oct. 18, 2011). The Stearns County District Court, on the other hand, interpreted this phrase to refer to pesticide applications by organic farmers themselves and held that the 5% Rule does not prevent crops from being sold as organic, even if they have been exposed to inadvertent pesticide drift, unless the synthetic pesticide is present on the crops at a level greater than 5% of the EPA’s specified tolerance level. (Order and Memorandum pp. 16-18 (Appellant’s Addendum at Add-16-18)). Amici respectfully urge the Court to adopt the District Court’s interpretation of Section 205.202 for four reasons.

First, the Court of Appeals' interpretation of Section 205.202 would lead to absurd results. As previously stated, agricultural land will always be exposed to some level of pesticides through drift. If the phrase "applied to" included pesticides resulting from drift, no agricultural land would ever be able to become or remain certified for organic production.

Second, the Court of Appeals' interpretation of Section 205.202 is inconsistent with the 5% Rule. The 5% Rule recognizes the inevitable presence of pesticides on crops, but requires the residue to be less than 5% of the EPA's specified tolerance levels for the crops to qualify as "organic." It would be difficult, if not impossible, for crops to contain pesticide residue without that residue also being present on the land on which the crops were grown. The only logical, consistent way to interpret Section 205.202 with the 5% Rule is to construe the phrase "applied to" to mean applications of pesticides by organic farmers themselves. As the District Court held, there would be no need for the 5% Rule if any application, including an inadvertent "application" through drift, resulted in decertification of land. (Order and Memorandum p. 18 (Appellant's Addendum at Add-18)).

Third, the District Court's interpretation is firmly supported by the comments to the NOP regulations. As detailed in Paynesville Co-op's Brief, the comments to the NOP regulations make it perfectly clear that the phrase "applied to" in Section 205.202 means an "intentional" application of pesticides by an organic farmer. (Appellant's Brief pp. 19-27).

Finally, the Court of Appeals' interpretation of Section 205.202 would be detrimental to both conventional and organic farmers. Conventional farmers would be subject to substantial liability for pesticide drift onto organic fields even where the level of pesticide residue does not prevent the affected crops from being marketed and sold as "organic." Organic farmers would be unable to certify fields and would be subject to having fields decertified for a period of three years based upon even trace levels of pesticides. The end result would be more discord and litigation between conventional and organic farmers, less organic crop production and higher prices for both conventional and organic crops.

II. THE COURT SHOULD DECLINE TO RECOGNIZE A NEW CAUSE OF ACTION FOR TRESPASS BY PARTICULATE MATTER.

In *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003), the Court of Appeals held that a property owner's claim based on invasive odors from a neighboring hog farm could give rise to a claim for nuisance, but not trespass. 662 N.W.2d at 550-51. The court examined the trend in other jurisdictions of abandoning the historical distinction between nuisance and trespass claims, but acknowledged that "Minnesota . . . has not recognized trespass by particulate matter." *Id.* at 550. The Court of Appeals in *Wendinger* reaffirmed the distinction accepted in Minnesota between nuisance and trespass 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.*" *Id.* (emphasis added).

The Court of Appeals' decision in this case represents a dramatic departure from its holding in *Wendinger* and a troublesome blurring of the distinction between trespass and nuisance law. Traditionally, a claim for trespass required entry onto land by a person or a physical, tangible object. *Darney v. Dragon Prods. Co.*, 771 F.Supp.2d 91, 106 (D. Me. 2011); *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219 (Mich. Ct. App. 1999); Restatement (Second) of Torts § 158 p. 277 (“One is subject to liability to another for trespass . . . if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so . . .”). Under the traditional view, “intrusions of dust and vibrations—just like other ‘invisible’ irritants such as smoke, gas and noise—are not actionable as a trespass but only as a private nuisance.” *Darney*, 771 F.Supp.2d at 106. Further, under traditional concepts of trespass, a landowner could recover at least nominal damages even in the absence of proof of any actual injury, while recovery for nuisance required proof of actual and substantial injury. *Adams*, 602 N.W.2d at 219; Restatement (Second) of Torts § 158 p. 277 (allowing liability for trespass “irrespective of whether [the trespasser] causes harm to any legally protected interest of the other”). By contrast, under the so-called “modern theory” of trespass, a person can be held liable for causing intangible matter to enter onto another person’s property. *See Darney*, 771 F.Supp.2d at 106.

Although some jurisdictions have chosen to recognize a claim of trespass by particulate matter, *see, e.g., Bradley v. Am. Smelting & Refining Co.*, 709 P.2d 782 (Wash. 1985) and *Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979), legal scholars have pointed out that these cases are really just “examples of either the tort of

private nuisance or liability for harm resulting from negligence.” W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* pp. 71-72 (5th ed. 1984). Other jurisdictions have “decline[d] [the] invitation to strip the tort of trespass to land of its distinctive accouterments and commingle its identity with other causes of action.” *Adams*, 602 N.W.2d at 220. In refusing to adopt the modern theory of trespass law, the *Adams* court recognized that it merely replicated traditional nuisance doctrine and “conflated nuisance with trespass to the point of rendering it difficult to delineate the difference between the two theories of recovery.” *Id.* at 221. This Court, too, should decline to adopt the so-called “modern theory” of trespass, as merely duplicative of other legal claims. Property owners with claims for damage based on particulate matter are adequately protected by nuisance and negligence law—no additional liability theory under the guise of trespass is needed.

This Court should also decline to recognize a claim for trespass by particulate matter because the standard set forth by the Court of Appeals is amorphous and incapable of clear definition. In recognizing a claim for trespass by pesticide drift, the Court of Appeals implicitly signaled the potential future difficulty in determining when such a claim might lie by holding that the chemical pesticide must be deposited in “discernable and consequential amounts.” *Johnson*, 802 N.W.2d at 389. Not surprisingly, the Court gave no guidance as to what the phrase “discernable and consequential amounts” means. This is particularly troubling given that chemical pesticides can be invisible to the naked eye. Cordell, *supra*, p. 1 (Amici’s Addendum at Add-148) (“Pesticide drift can be difficult to manage because the full range of drift cannot be detected visually”).

Moreover, as stated above, landowners could recover at least nominal damages under traditional trespass theory even in the absence of proof of any other injury. The Court of Appeals did not indicate whether “consequential amounts” is tied to some measure of damages and, if so, what comprises that measure of damages. If the Court of Appeals’ decision is allowed to stand, there will inevitably be an influx of lawsuits to determine what the phrase “discernable and consequential amounts” means.

If the Court elects to adopt the “modern theory” of trespass and recognize a claim for trespass by particulate matter, Amici respectfully request the Court to at least require plaintiffs to prove actual and substantial damages. As the *Bradley* court recognized, failure to include a requirement of proof of actual and substantial damages as part of a claim for trespass by particulate matter could result in a multiplicity of specious lawsuits: “No useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant. Manufacturers would be harassed and the litigious few would cause the escalation of costs to the detriment of the many.” *Bradley*, 709 P.2d at 791; *see also John Larkin, Inc. v. Marceau*, 959 A.2d 551, 555 (Vt. 2008) (“Because the ambient environment always contains particulate matter from many sources, such a technical reading of trespass [without an actual and substantial damages requirement] would subject countless persons and entities to automatic liability for trespass absent any demonstrated injury”). The Court of Appeals stated no specific requirement that plaintiff prove “actual and substantial damages” and failed to make clear whether its requirement that chemical pesticides be deposited in “discernable and consequential amounts” is tied to any showing of damages. If a new legal theory in

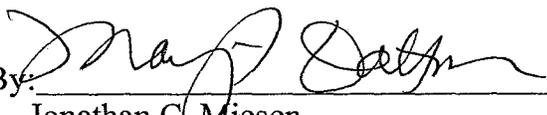
trespass as articulated by the Court of Appeals is recognized, without any requirement that a property owner prove actual and substantial damages, conflict between conventional and organic farmers will increase, the number of lawsuits and litigation costs will go up and conventional farmers will be faced with the constant risk of being liable to organic farmers and other landowners for unintended and inevitable drift every time they use synthetic pesticides.

CONCLUSION

For all of the foregoing reasons, Amici respectfully request that the Court reverse the Court of Appeals' decision and affirm the Stearns County District Court's summary judgment in all respects.

Respectfully submitted,

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