

A10-1596 and A10-2135

STATE OF MINNESOTA
SUPREME COURT

Oluf Johnson and Debra Johnson,

Respondents

v.

Paynesville Farmers Union Cooperative
Oil Company,

Appellant

RESPONDENTS' BRIEF, APPENDIX AND ADDENDUM

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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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STATEMENT OF THE ISSUES

I. HAVE RESPONDENTS MADE A PRIMA FACIE CASE FOR DAMAGES EITHER WITH OR WITHOUT THE 5% RULE?

- A. The trial court held in the negative. The Court of Appeals reversed and held in the affirmative.
- B. Cases:
1. Anderson v. State of Minnesota, 693 N.W.2d 181 (Minn. 2005) [as to right to bring action for negligence per se damages claim for violating pesticide use laws]
 2. In re: Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation, 621 F.3d 781 (8th Cir. 2010)[as to preemption of state regulation of certifying agent's authority to decide matters involving certification of organic producers].
 3. Vicker v. Starkey, 265 Minn. 464, 122 N.W.2d 169 (1963)[as to deference courts must give to an administrative body's judgment].
- C. Statutes and Regulations:
1. 7 U.S.C. § 136, *et seq.* [Federal Insecticide, Fungicide and Rodenticide Act or "FIFRA"]
 2. Minn. Stat. § 18B.07
 3. 7 U.S.C. § 6501, *et seq.* [Organic Foods Production Act or "OFPA"]
 4. 7 CFR § 205.202
 5. 7 CFR § 205.670
 6. Minn. Stat. §§ 31.92 and 925 [adopting federal organic food production laws and regulations]

II. DO RESPONDENTS HAVE A VIABLE TRESPASS CLAIM?

- A. The trial court held in the negative. The Court of Appeals reversed and held in the affirmative.
- B. Cases
 - 1. Whittaker v. Stangvick, 100 Minn. 386, 111 N.W. 295 (1907) [as to airborne material falling on land and doing some damage sufficient to show trespass]
 - 2. Citizens for a Safe Grant v. Lone Oak Sportsmens Club, Inc., 624 N.W.2d 796, 805 (Minn.App. 2001) [as to bullets and pellets from neighboring gun club falling onto property constituted damage and a trespass].

III. DID THE TRIAL COURT ABUSE ITS DISCRETION BY REFUSING RESPONDENTS LEAVE TO AMEND THEIR COMPLAINT TO INCLUDE DAMAGE CLAIMS FROM 2008 DRIFT INCIDENTS?

- A. The trial court held in the negative. The Court of Appeals reversed and held in the affirmative.
- B. Cases:
 - 1. Doe v. F.P., 667 N.W.2d 493 (Minn.App. 2003).
- C. Statutes:
 - 1. Minn. Stat. § 561.01
 - 2. 7 CFR § 205.202
 - 3. 7 CFR § 205.670

IV. DID THE TRIAL COURT ERR IN DISMISSING THE INJUNCTIVE CLAIM?

- A. The trial court held in the negative. The Court of Appeals reversed and held in the affirmative.

B. Cases:

1. Doe v. F.P., 667 N.W.2d 493 (Minn.App. 2003).

C. Statutes:

1. Minn. Stat. § 18B.07
2. 7 CFR § 205.202
3. 7 CFR § 205.670

STATEMENT OF THE CASE

HYPOTHETICAL - A commercial pesticide applicator lumbers along the length of a corn field exhausting a misty cloud of water and pesticide from its boom. As it nears the boundary of an adjacent bean field its protective “organic field” warning sign and buffer zone come into the operator’s view. He knows he is approaching an organic soy bean field. He knows that the wind is blowing steadily and directly at the organic field. He knows the wind-speed is 12 miles per hour. He also knows that application of this pesticide under such conditions is prohibited by the product label. He knows he is breaking the federal and state pesticide control laws.

As the applicator nears the edge of the corn field the operator sees the mist of water droplets/ dissolved pesticide blowing across the boundary/ buffer zone and into the adjoining organic bean field. It makes no difference to the operator that this is happening. His boss tells him they have to get their work done on schedule. If there is a fine, it will be paid. He knows his boss’ attitude is “[w]ho cares if a little pesticide drifts over there?

Anyone who thinks that they can keep their supposedly organic fields completely free of pesticides is crazy anyway. Pesticides rule and organic farmers are just a pain.”

Respondents respectfully ask the Court to keep this hypothetical in mind as it sifts through the issues in this case. While hypothetical, it is representative of the problems posed by appellant's and *amicis*' arguments, and, yet, in many respects resembles the facts of this case

Since 2002 respondents have been victimized by documented, illegal pesticide drifts delivered at the hand of the appellant no less than five times. Each time their organic fields have been de-certified. Other adverse consequences to the land or crop have also occurred.

Appellant knows that its conduct is illegal. But, it just pays the fine and goes about its regular business.

It seems to respondents that, notwithstanding appellant's admitted, multiple violations of the pesticide laws, what it and *amici* seek here are rulings that would clip the wings of the organic certifying agents' law-given discretion to administer and enforce the organic food production regulations. They contend that the Court of Appeals' ruling has given certifying agents too much power and that, as a practical matter, at least some pesticide contamination is inevitable no matter what. They attempt to add weight to their arguments by claiming that their interpretation is the only way that conventional and organic food producers can co-exist in close proximity without constant litigation.

Appellant and *amici* further claim the NOP should be interpreted such that when

there is a pesticide drift event which the organic farmer has not caused (such as the above hypothetical), the certifying agent may neither de-certify the affected field nor the organic operation. As a by-product of such an interpretation, only if preharvest or postharvest chemical testing of the drifted crop shows pesticide levels in excess of 5% of the EPA's tolerance does the crop lose "organic" status. Thus, without proof of such chemical testing there is no proof of damages to an organic farmer even from a scenario such as the hypothetical stated above. Appellant and *amici* further urge this Court to hold that pesticide drift encroaching upon another's property cannot constitute a trespass.

It is the aim of this brief to demonstrate that holding in appellant's favor on any of those issues would not only constitute bad law, but bad policy. Indeed, there are two significant pieces of federal legislation that must be considered. Those are FIFRA ["Federal Insecticide, Fungicide, and Rodenticide Act", 7 U.S.C. § 136, *et seq.*] and OFPA ["Organic Foods Production Act", 7 U.S.C § 6501, *et seq.*]. Each has an extensive set of implementing regulations. *See*, 40 C.F.R. §§ 152 to 180 for FIFRA and 7 C.F.R. §§ 205.1 to 205.690 for OFPA. The latter set of CFR's is known as the "National Organic Program" or "NOP". The very fabric of the enforcement structure of the NOP is at issue here.

In addition to the federal laws/regulations are the parallel state statutes. The Minnesota Pesticide Control Act, Minn. Stat. § 18B.01, *et seq.*, provides pesticide regulations that exceed FIFRA. By contrast, there is Minn. Stat. §§ 31.92 and 925 which merely incorporate the OFPA and its "associated regulation in Code of Federal Regulations, title 7, section 205"

as “...the organic food production law and rules in this state.” There is no state supplementation to organic regulation whatsoever. The existing contents of the NOP, including the discretion and decision-making authority it has vested in the certifying agents, is already the law of Minnesota. So, too, is the preemption of state regulation of certification matters caused by § 6507 of the OFPA.

At the end of the analysis of these laws, and their application to the relevant events of this case, appellant’s and *amicis*’ arguments simply are not persuasive. They are asking this Court to act as a “super-legislature”. Their arguments, if adopted, will lead us down an ill-advised path of encroachment into federally preempted regulation; lawlessness on both sides; balkanized regulation among the states within the realm of organic food production laws/regulations [the exact opposite of the intent behind OFPA and the NOP]; and discriminatory treatment of the organic community in the right to bring a claim for pesticide misuse. All of this, of course, is merely to suit the convenience of those who apply “restricted use” pesticides¹ and to insulate them a torrent of non-existent litigation.

The trial court adopted appellant’s arguments that no damages may be shown absent test results that exceed 5% of the EPA’s tolerance. It also adopted the appellant’s argument that pesticide drift, as a “particulate matter”, may not be the instrument of a trespass.

¹ “Restricted use” pesticides are those which require an applicator to be a “certified applicator” as defined by 7 U.S.C. § 136(e)[Add - 26] *See also*, 7 U.S.C. § 136i(a)[Add - 11] for certification procedures pertaining to commercial applicators but not private applicators. This means not only the co-op, but its individual applicator/employees, must be certified to apply “restricted use” pesticides.

Because of these adoptions, the trial court refused to permit amendment of the complaint on futility grounds and it dissolved the temporary injunction. The Court of Appeals found itself in sharp disagreement with the trial court. The Court of Appeals should be affirmed.

STATEMENT OF THE FACTS²

A. HISTORY OF THE PESTICIDE MISUSES.

1. Organic Farming Operation and the Regulations. Respondents were first certified as organic producers in 1998. [SA-1 to 2]. They posted organic farming warning signs and kept the required “buffer zones” between adjoining land and the organic crop fields. [Id.]. They also sent the co-op a certified letter on April 23, 1998, requesting that precautions be taken when conducting spraying operations near their fields. [Id.].

A material part of effective organic grain farming is crop rotation. By rotating crops in the fields from year to year the organic grain farmer saves the soil from depletion and enhances the natural suppression of pests and weeds. Organic grain products are sold at premium prices in the marketplace - far more than conventional crops. This is especially true of organic seed products which sell for much higher prices. [SA-2].

² Respondents rely upon the same set of documents they produced at the Court of Appeals as supplementation of the record to permit easier access by the Court. Thus, they have re-packaged “Appellants’ Supplemental Appendix” at the Court of Appeals to now become “Respondents’ Supplemental Appendix” here. Citations to “Respondents’ Supplemental Appendix” appear as “SA- (page number)”. Any additional supplementation appears in the Appendix and Addendum attached to this Brief. Citations to materials in the Appendix appear as “App - (page number)”. Addendum citations appear as “Add -(page number)”.

An organic grain farmer, then, makes a rotation plan that spans years so that the principles of effective organic farming are followed. When a field is contaminated with chemical pesticides, federal regulation prohibits its use for organic farming for a period of three years. This is provided in 7 CFR § 205.202 which reads:

Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as “organic”, must:

- (a) Have been managed in accordance with the provisions of §§ 205.203 through 205.206;
- (b) Have had no prohibited substances, as listed in § 205.105, applied to it for a period of three years immediately preceding harvest of the crop;³ and
- (c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.

[SA-269].

Pesticide contamination disrupts the rotation and damages the farmer’s ability to earn profits from organic grain sales. That is exactly what has happened to respondents as a result of appellant’s repeated unlawful activities. [SA-3].

2. The 1998 Incident. In 1998 the co-op caused an over-spray. Respondents

³ Section 205.202(b) has been and will be referred to as the so-called “3 Year Rule”.

complained to the co-op of their losses. They were told that it would be “made right.” This did not occur. Respondents submitted an invoice in 2001 claiming their losses but appellant ignored it. Respondents opted to let the matter rest and did not pursue legal action. [SA- 3 to 4].

3. **The June 20, 2002, Incident.** On July 11, 2002, respondents complained to the MDA of what appeared to be spray drift damage to their organic soy bean field. The MDA investigated and determined that on June 20, 2002, appellant sprayed an adjoining wildlife area with “Salvo”, a herbicide containing 24-D. The MDA concluded that the “Salvo” was applied in violation of the product label and, hence, the law. It was applied when prevailing wind conditions were too strong. Although [and due to the late timing of the discovery of the damage] the 24-D had dissipated from the crop samples taken by the MDA, visual inspection of the crops, together with the data involving appellant’s unlawful application caused the MDA to issue a Notice of Intent-Enforcement Action to defendant. [SA-4; SA-16 to 25].

This violation took the soy bean field out of organic production for three years and caused appellants to lose a lucrative contract to sell the otherwise organically grown beans. [SA-4].

Respondents sued appellant over this violation and that case was settled in late 2005. Included as part of the settlement was appellant’s signed agreement to give respondents 24 hours’ notice of pesticide applications on land adjoining respondents’ fields provided that

respondents provided them maps of their fields each spring. Appellant agreed that failure to do so would be grounds for claiming injunctive relief. [SA-5; SA-27 to 28].

Although respondents delivered the maps to the co-op on March 14, 2006, and March 15, 2007, appellant never once gave 24 hours notice of intent to apply pesticides to any land adjoining the depicted fields. Appellant did, however, subsequently spray adjoining lands. [SA-5; SA-29 to 31].

4. **The June 23, 2005, Incident.** On June 23, 2005, respondents complained of herbicide drift onto their organic alfalfa field. The MDA investigated and determined that the co-op had applied the herbicide, Option® [active ingredient foramsulfuron], to adjoining land, again, in violation of the product label [application during high wind conditions] and that the resulting drift had damaged respondents' alfalfa crop. Another Notice of Intent-Enforcement Action was served upon the co-op and a \$400 fine was imposed. Appellant paid that fine and, again, admitted to the violation. [SA-6; SA-41 to 46; SA-140].

5. **The June 15, 2007, Incident.** On June 15, 2007, appellant applied the herbicide Status® [active ingredient diflufenzopyr and dicamba] and Roundup® [active ingredient glyphosate] to a field immediately adjoining one of respondents' soybean fields. No notice of the application was given to respondents even though the maps were provided on March 15, 2007. The MDA verified that these chemicals were applied in wind conditions that were too high and blowing in the direction of respondents' organic soy bean field. The MDA's tests of bean plants were positive for Dicamba. The MDA also learned that appellant

had not kept a complete record of the pesticide application. In October of 2007 the MDA issued an Advisory Notice to the co-op advising of these issues and asking for annual training “to insure that drift and label violations do not occur, especially near sensitive crops and organic crops”. [SA-252 to 253; SA-6 to 7; SA-64 to 73; SA-146 to 147].

Appellant admits that it did not contest the wind violations cited by the MDA in its Advisory Notice. Nor did it conduct any training about spraying in windy conditions in follow up to the Advisory Notice’s request. [SA Evans dep 62-63].

The MDA also advised respondents that there is no tolerance at all for diflufenzopyr in soybeans [organic or non-organic] and that they were required to “plow down” a strip running most of the width of the organic soy bean field. [SA-57].

6. **The July 3, 2008, Incident.** On July 3, 2008, respondents reported chemical drift onto their organic alfalfa field from appellant’s spraying activities to the MDA. The MDA’s “preliminary information” indicated that “**Roundup Power Max and Select Max (active ingredients = glyphosate and clethodim)** herbicides were applied to adjacent cropland”. [SA-7; SA-64]. The MDA issued a “civil penalty enforcement action” which respondent’s admitted and paid. [Id.; SA-65 to 76; SA-141 to 145].

7. **The August 1, 2008, Incident.** On August 1, 2008, respondent, Oluf Johnson, was in his organic alfalfa field recording the wind speed as appellant was spraying adjacent property. Respondent complained to the MDA of drift onto his crops. He had his own wind meter which measured the wind speed at 7 mph. Due to this application and the July

application the entire 176 acre organic alfalfa field had to be taken out of organic production.

[SA-8; SA-77 to 94].

The MDA combined this incident investigation with the July 3, 2008 incident and penalty. [SA-141 to 145]. Thus, appellant admitted and paid both violations in 2008.

8. Fields Out of Organic Production. As of the time respondents moved for a preliminary injunction in the spring of 2009, on the above-recited factual record, they had three fields out of organic production due to appellant's illegal pesticide spraying activities. Field 1A and Field 1B combined are 94 acres. Field 2 is 180 acres. The total acreage out of organic crop production was 270.4 acres at that time. [SA-109 to 117].

9. The Certifying Agent - OCIA and Its Process. Pursuant to the NOP, specifically 7 CFR § 205.400:

A person seeking to...maintain organic certification....must:

* * * * *

(b) Establish, implement, and update annually an organic production... system plan that is submitted to an accredited certifying agent ...

* * * * *

(f) Immediately notify the certifying agent concerning any:

(1) Application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of an operation...

[SA-286 to 287].

At the summary judgment hearing of April 29, 2010, counsel for respondent made the following specious and utterly unfounded claim:

But, letters from some agency in Omaha or Lincoln, Nebraska, are not sufficient to defeat a summary judgment motion, Your Honor. And, in any event, if you go back and look at the record in this case, what the OCIA really is doing is just affirming what Mr. Johnson tells them. They don't do any independent testing. They don't do any investigation. Mr. Johnson calls them up and says, I'm going to take this field out of organic production for three years because got some chemicals applied to it. And the OCIA says, oh, it got chemicals applied to it? Then, yes, take it out of organic production for three years.

[T.43, L. 1 - 14].

There is no evidence in this record to support the claim that the OCIA merely rubber stamps what respondents ask them to do regarding de-certification of fields. Nor is there any evidence that respondents asked to have their fields placed into transition.

The OCIA is the "certifying agent" for respondents' organic farming operation. [SA-151; (P. 16 L. 8 - 24)]. Each growing season the OCIA sends an inspector to their farm who inspects the operation. At that time any chemical drift issues that may have occurred are discussed. The OCIA then collects the relevant drift-related MDA documents. After reviewing such the inspector writes a report which goes to an OCIA review board at its home office in Omaha. The review board makes the determination as to whether the chemically affected field should not be certified for organic production. There is an appeal process, but appellants have not appealed any of the de-certifications of their fields because

they know of the damage done by the chemicals. [SA-159; (P. 46 L. 17 to P. 50 L. 1)].

Oluf Johnson testified that pursuant to the “3 Year Rule” the OCIA put his fields put into “transition”⁴ or extended an already existing period of “transition” following appellant’s pesticide misuse events in **2005** [SA-172 to 173 (P. 100 L. 2 to P. 102 L. 25)]; in **2007** [SA-180 to 181 (P. 129 L. 16 to P. 134 L. 6)]; and in **2008** [181 to 183 (P. 135 L. 14 to P. 144 L. 141)].

OCIA certification letters issued to respondents made the following statements:

- “Fields 1A and 1B shall be put in transition for 36 months” [SA-239 (OCIA letter of 9/13/05)]
- “The inspection report indicates that chemical drift may have occurred on 51 transitional acres in Field 1B and that a chemical analysis is being done. If the analysis indicates contamination, you must take this land back to the beginning of 36-month transition.” [SA-244 (OCIA letter of 8/27/07)]⁵
- “The Certification Decision Team (CDT) has granted

⁴A field is in “transition” as it waits out the three year period. [SA-151 (P. 15 L. 14 to P. 16 L. 7)]. “Transitional” crops must be sold as conventional crops. [SA-2 to 3]. A “field” is defined in the NOP as “[a]n area of land identified as a discrete unit within a production operation”. [7 C.F.R. § 205.1; SA 261]. Respondents so identified their fields with a numbering system as is referenced in the OCIA letters herein cited.

⁵Chemical analysis by the MDA on October 5, 2007, did indicate the presence of drift contamination. [SA-146 to 147; SA-55; SA-59 to 62; SA-252 to 253]. Accordingly, respondents were obligated to extend the period of transition of the affected field 1B per the OCIA mandate. In addition, due to the mere presence of prohibited chemical for **any** soy bean product, organic or conventional, respondents were required by the MDA to “plow down” a strip of soy beans affected by this pesticide misuse event. [SA-57 to 58].

(NOP) certification for 964.3 acres...”⁶ “The inspection report indicates there is a continued drift on fields 1A, 1B, 2 and recently on field 9.” [SA-249-251 (OCIA letter 1/30/09)].

“According to the inspection report and field histories submitted for review the following fields are in transition: 9. 2. 1A and 1B” [SA-249-251 (OCIA letter 1/30/09)].

B. A TEMPORARY INJUNCTION ISSUED AND WAS DISSOLVED.

Respondents sought and received a temporary injunction which, eventually, issued on August 6, 2009. [Respondents’ Appendix pages 14 - 17]. The injunction required appellant to give respondents prior notice of their intent to spray properties adjacent to respondents’ land and if there was no ability to give advance notice, the co-op would have to give notice as soon as practicable after spraying. It was also required to provide written details of the spraying activity, including the chemicals to be used. [Id.].

This injunction was dissolved by the trial court’s order of November 4, 2010, because of its adoption of the no damages/no harm argument. [Appellant’s Addendum, pages 23-27].

C. DAMAGES CAUSED BY RESPONDENT’S PESTICIDE MISUSES.

1. **Transitional Fields Mean Conventional Prices.** At the time respondents were seeking the temporary injunction in June of 2009, they had 1364.4 acres potentially available for organic production. However, as of April 27, 2009, the OCIA

⁶This is 270.4 acres short of what should be certifiable but for appellant’s misuses. [SA-109 to 113].

permitted organic certification as to only 964 acres. This meant that 270 acres were in “transition” and out of organic production. The reason, and only reason for this, was appellant’s pesticide misuses. [SA-109 to 117].

Organic crops bring markedly higher prices than conventional crops. [SA-2]. For each year a field is in “transition”, then, the organic farmer must continue to practice organic farming techniques with respect to it but, must sell the crops at conventional prices. [SA-2 to 3]. This has caused appellants serious financial losses. [SA-3].

2. **Respondents Have Been Unable to Start a Lucrative Organic Seed Business Due to Appellant’s Repeated Pesticide Misuses.** Organic seed prices are even higher than that of organic crops grown for consumption. Respondents have an organic seed corn that they want to market. However, because of the contaminations they have not been able to advertise it due to the inability to predict from year to year that a clean supply can be grown. [SA-228 to 229]. Respondents submitted proof that they have had approximately \$33,000 seed sales from 2004 - 2009. [SA-157 (P. 37 L. 13 to P. 42 L. 1)].

3. **Appellant’s Pesticide Misuses Have Caused Appellants Substantial Inconveniences.** Organic farmers must keep close records of their operation and have them available for the certifying agent’s inspection at any time in order to demonstrate that they have met all applicable NOP requirements. 7 CFR § 205.103 [SA-267]. Among other things, the NOP provides that there are certain allowed and disallowed substances which may or may not be used in an organic farming operation. 7 CFR § 205.105. [SA-267 to 268]. Whenever

there is a “drift”⁷ event affecting an organic farmer’s land with a “prohibited substance” he/she/it is legally bound to report it to the certifying agent immediately. 7 CFR § 205.400(f) [SA-286].

A key component to organic farming is crop rotation. 7 CFR § 205.205 [SA-271] mandates crop rotation. In order to maximize the soil’s potential for continuing organic production the organic farmer is required to annually provide updated system plans to the certifying agent, which demonstrate changes in the original plan submitted in accordance with 7 CFR §§ 205.200 and 201 [SA-268 to 269].

Accordingly, each time appellant has caused a “drift” event to respondents’ land, it significantly increases their reporting and record-keeping burden. They report to and work with the Minnesota Department of Agriculture which then investigates the matter, including a site inspection. [*see, for example*, SA-18 to 19; SA-23; SA-43 to 44; SA-55 to 63; SA-65 to 74; SA-83 to 94]. The MDA may, depending on the circumstances, issue a “food/commodity advisory” telling them that there may be added consequences and, if appropriate, will order respondents to destroy crops because of zero tolerances for certain chemicals in

⁷The word “drift” is specifically defined in the NOP regulations. It is defined as “[t]he physical movement of prohibited substances from the target site onto an organic operation or portion thereof”. 7 CFR § 205.2 [SA-260]. Although this definition is simple and direct in its meaning, appellant attempts to create a differentiation between the movement of pesticide particles suspended in water droplets onto organic land and the mere evaporation of volatile pesticide substances which then moves to the nearby organic land. It calls the former “drift” and the latter “volatilization”. [*Infra*]. The NOP makes no distinction between the two.

certain products. [*See, for example*, SA-57 to 58].

Respondents must provide its certifying agent all the necessary drift event records and then adjust their organic production system plan to provide for the methods by which they will ameliorate the effects of the “drift” event and otherwise prevent commingling of organically grown crops from non-organic substances and crops affected by prohibited substances. (*See, for example*, 7 CFR § 204.201(a)(5) [SA-268 to 269] which requires an “organic production system plan” to include a description of the “management practices and physical barriers established to prevent commingling of organic and non-organic products”; *see also*, 7 C.F.R. § 205.406 [SA-290 to 291] which sets forth the reporting requirements for continuation of certification).

The adjustment of a crop rotation plan is problematic. The crop rotation schedule is something that respondents plan years in advance. [SA-2]. There is a four year rotation plan for each field. Chemical contamination disrupts that four year rotation. [SA-155 (P. 32 L. 24 to P. 37 L. 16)].

Respondents must also avoid “parallel” farming and other factors in their extra rotational planning. “Parallel” farming is growing the same crop in a non-organic field next to a field that is organically certified. It is prohibited to stop commingling. [SA-228 to 229]. This must be accounted for in the amending of the crop rotation plan.

Still another problem associated with appellant’s “drift” events is weed pressure on drift-affected fields. Application of less than the recommended dose may actually enhance

weed growth. [SA-228; SA-247]. In 2008 respondents disked under a soy bean crop due to weed pressure on their Fields 1A and 1B because giant ragweed had taken over a contaminated area. [Id.].

4. Appellant's Pesticide Misuses in 2007 and 2008 Have Forced Appellants to Destroy Valuable Crops. Directly as a result of appellant's drift event in 2007, respondents were ordered by the MDA to "plow down" a strip of soybeans [the area damaged by the drift plus a buffer area 175 feet by 25 feet in size] in the affected field because there was no tolerance in soybeans for the pesticide respondent had misused. [SA-57 to 58]. Appellants complied. [SA-180 (P 131 L. 2 to P. 132 L. 23)].

D. **Respondent's "End Run" All Damages and Obtain Summary Judgment on a No Damages Proved Theory.** Appellant relied upon 7 CFR § 205.671 to fashion an argument that because respondents had not tested their crops to see if the prohibited substances in their crops from appellant's drift events exceeded 5% of the allowed EPA limit for that substance, respondents could not show that their fields were either de-certified or that they had any damages whatsoever.

The trial court completely bought into this argument holding as follows:

The Court is persuaded by defendant's argument regarding the proper interpretation of the NOP regulations. If any application, including drift from a neighboring field, was to cause decertification and exclusion from sale as organic, then there would be no need for 7 C.F.R. 205.671. The Court presumes that a superfluous regulation would not be enacted.

* * * * *

Therefore, as there is no evidence that chemical residue tests performed on the plants, allegedly affected by the chemical drift, exceeded the 5% tolerance limits established in 7 C.F.R. 205.671, produce from these plants could have been sold as “organic”. As such, Plaintiffs have not put forth prima facie evidence of damages on their nuisance and negligence claims.

[Appellant’s Addendum pages 18-19].

The Court of Appeals reversed holding that test results coming in at less the 5% limit of 7 C.F.R. § 205.671 did not, by reverse implication, automatically qualify drifted crops to carry the “organic” label even if they tested under the 5%. It agreed with respondents that the certifying agent has the discretion to de-certify a drifted field. [App. 60-61]. It is that discretion that appellant and the *amici curiae* want to attack.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS HAD MADE A PRIMA FACIE CASE FOR DAMAGES EITHER WITH OR WITHOUT THE 5% RULE.

A. STANDARD OF REVIEW.

On appeal from summary judgment, this Court considers two questions: [1] Are there genuine issues of material fact?; and [2] Did the trial court misapply the law? State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

In this case the trial court misapplied the law to hold that there are no damages. It has also ignored damages facts which are independent of the “5% Rule”. It also misapplied the law of trespass and the same standard of review applies there.

B. REGULATION OF PESTICIDES AND THE COMMON LAW.

1. FIFRA. Respondents begin with FIFRA [7 U.S.C. §§ 136; 136a to 136y].

Congress began to regulate the use of pesticides as early as 1910 when it enacted the Insecticide Act of 1910 to protect farmers from adulterated or misbranded pesticide products. It first enacted FIFRA in 1947 and so required the USDA to register all pesticides before their introduction into interstate commerce. In 1970 agency jurisdiction was transferred to the Environmental Protection Agency.

This was the initiation of a shift in the focus of federal policy from the control of pesticides for reasonably safe use in agricultural production to control of pesticides for reduction of unreasonable risks to man and the environment.

This trend toward risk reduction from toxicity and environmental degradation was continued through Congress' enactment of the Environmental Pesticide Control Act of 1972, which amended FIFRA by focusing more heavily on standards and methods of control. *See*, the United States Environmental Protection Agency website, <http://www.epa.gov/compliance/civil/fifra/fifraenfstatereq.html> (last updated 2011-09-15) entitled "FIFRA Statute, Regulations & Enforcement" [Add - 1].

Among other things, FIFRA now requires commercial applicators, such as appellant, to become certified to apply "restricted use" pesticides. [7 U.S.C. § 136i], and to keep accurate records of pesticide use. [7 U.S.C. § 136i-1; *see also* 7 C.F.R. 110.3 (Add - 11 to 12; 15 to 16; and 8 to 9, respectively)] . FIFRA declares it unlawful to use a pesticide in a manner "inconsistent with its labeling" [7 U.S.C. § 136j(2)(G)] and to violate any applicable

regulation. [7 U.S.C. § 136j(2)(S)][Add - 19; Add- 20].

FIFRA, however, has not totally preempted state regulation of pesticides.⁸ It specifically states that “[a] state may regulate the sale or use of any federally registered pesticide or device in the state, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.” [7 U.S.C. § 136v(a); Add-24]. Thus, the states are permitted to be more, but not less, restrictive than FIFRA.

2. Minnesota Pesticide Control Act. In 1987 the Minnesota legislature enacted the Pesticide Control Act, Minn. Stat. §§ 18B.01, *et seq.* The State of Minnesota, then, has created, in its own right, a set of laws in supplementation of FIFRA. For our purposes here, the most relevant portion of Chapter 18B is Minn. Stat. § 18B.07 subd. 2. It provides in relevant part as follows:

Subd. 2. Prohibited pesticide use.

(a) A person may not use...a pesticide...in a manner:

- (1) that is inconsistent with a label or labeling as defined by FIFRA;
- (2) that endangers humans, damages agricultural products

* * * * *

⁸The recognized areas of federally preempted action are negligence claims based upon breach of warranty, failure to warn and “other causes of action impinging on the EPA’s power to enforce labeling requirements.” Anderson v. State, Department of Natural Resources, 693 N.W.2d 181, 188 (Minn. 2005)

- (b) A person may not direct a pesticide onto property beyond the boundaries of the target site. A person may not apply a pesticide resulting in damage to adjacent property.

[SA-339].

This statute not only moves forward with FIFRA's already advancing theme that protection of people and the environment is a vital objective, it adds, specifically, the protection of "agricultural products" to the category of things to be protected.

3. The arrival of negligence *per se* based upon violation of pesticide statutes.

In Anderson v. State, Department of Natural Resources, 693 N.W.2d 181, (Minn. 2005), this Court recognized the existence of a common law negligence claim for bee-keepers whose foraging [and, perhaps, trespassing] bees sickened and died as a result of the DNR's use of a pesticide allegedly in violation of its product label. This Court also approved a claim for negligence *per se* due to an allegation of product label violation. It did these things noting that a claim of this nature does not encroach into the areas of federal preemption under FIFRA. [Anderson, 693 N.W.2d at 188].

The statute relied upon in Anderson was and is the same statute respondents have employed to allege a negligence *per se* claim here - Minn. Stat. § 18B.07 subd. 2.

It takes no great stretch of imagination to read Minn. Stat. § 18B.07 and understand that it is very severe in its application. This is particularly exemplified by Subd. 2(b). In essence, it creates violation if there is an application "resulting in damage to adjacent property." Respondents have alleged violation under either Subd. 2(a) or Subd. 2(b) in their

negligence *per se* count. [See, Complaint, ¶ 22 at Appellant's Appendix, page 4].

Appellant complains that the 2007 incident was probably just post-application volatilization of the chemical and not an over-spray. But, a fair reading of the statute demonstrates that a person simply "...may not apply a pesticide resulting in damage to adjacent property." Thus, whether the contamination was by direct over-spray or volatilization makes no difference.⁹ A violation has occurred in either case.

A recent illustration of the imposition of liability for volatilization comes from California. See, Jacobs Farm/Del Cabo, Inc. v. Western Farm Services, Inc., 190 Cal. App. 4th 1502, 119 Cal. Rptr. 3d 529 (Cal.App. 6th Dist. 2010). There the California Court of Appeals upheld a verdict against a pesticide applicator who had applied a product correctly, but then it volatilized and drifted onto the adjoining organic farm. The local pesticide commissioner took the position that no statutory violation had occurred.

Nevertheless, the volatilized contamination of the organic crop was sufficient to uphold the jury's determination that the applicator had trespassed, was negligent and had created a nuisance. The holding included an affirmation of the trial court's jury instruction on

⁹ It is noteworthy, in this context, to point out that the NOP defines the word "drift" in a manner that is consistent with the "zero tolerance" standard of Minn. Stat. § 18B.07 Subd. 2(b). It defines "drift" as follows:

Drift. The physical movement of prohibited substances from the intended target site onto an organic operation or portion thereof.

7 C.F.R. § 205.2 [SA 260].

negligence *per se*. [190 Cal.App.4th at 1514-16; 1526-27]. Basically, the applicable California statute burdened the applicator with the responsibility to know and foresee the circumstances where volatilization might occur in order to avoid it when a reasonable possibility of chemical movement off the target site existed.

While Minn. Stat. § 18B.07 Subd. 2(b) does not contain the same recitation of underlying duties [watch the weather and otherwise determine the reasonable possibility of damage], it contains clear language prohibiting the applicator from pesticide use “resulting” in damage to adjacent property. Respondent would argue that the appellant’s duty to avoid volatilization is even more strict under Minnesota law because the statute sets up, in effect, a “zero tolerance” for harm to adjoining property.

The pesticide regulatory scheme in Minnesota [and elsewhere] plainly recognizes the potential for harm presented by pesticides and they demand strict compliance. Over-spray and/or damage from volatilization are illegal. Enveloped in this policy, appellant, an admitted multiple violator of those laws, stands before this Court protesting that the “sky is falling” because of what the Court of Appeals did. Indeed, knowing that the injunction claim is still very much at issue, appellant even goes so far as to winnow what it wants to be the relevant factual inquiry down to the events of 2007 and, only grudgingly, 2008. [Appellant’s Brief, pages 6 and 10].

Respondent, on the other hand, has included the entirety of appellant’s transgressions in an effort to show its demonstrated propensity to violate the pesticide laws. It appears that

appellant [and *amici*] want to see a rule of law where they are free to cause pesticide drift without consequence, at least with respect to the organic farming community.

The MDA's enforcement actions here center upon label violations and causing harm to adjoining property. [k*See*, SA 16-17;42-46;55;63; 66-77]. While the MDA has taken repeated enforcement action against appellant, the MDA's typically nominal fine is paid and appellant continues to go about its business as if nothing has happened. More enforcement through civil liability is required.

The negligence/negligence *per se* cause[s] of action established by Anderson v. State, DNR, supra, extends protection to respondents, as does Minn. Stat. § 18B.07 Subd. 2. The equitable remedy of injunctive relief also extends protection. Given appellant's history, these things are necessary adjuncts to the administrative enforcement efforts of the Minnesota Department of Agriculture. To create a rule that organic farmers may only prove damages where testing exceeds 5% of EPA tolerance can only exacerbate appellant's unlawful conduct and encourage others to do the same.

C. ORGANIC FOOD PRODUCTION REGULATION LAWS.

Congress enacted the OFPA in 1990. Its purpose was to create a standardized, nationally applicable set of laws/regulations for the production of food to be marketed as "organic". What had existed theretofore was a patchwork of state regulations such that the public could not rely upon any set standards for what it was intending to purchase when the "organic" representation appeared in conjunction with such products. The nationalization of the

regulatory process that leads to the ability to legitimately sell agricultural products as “organic” is critical to this case.

7 U.S.C. § 6501 [the first section of the OFPA] states as follows:

It is the purpose of this title [7 U.S.C. §§ 6501 *et seq*] - -

- (1) to establish national standards governing the marketing of certain agricultural products as organically produced products;
- (2) to assure consumers that organically produced products meet a consistent standard; and
- (3) to facilitate interstate commerce in fresh and processed food that is organically produced. [Add - 21].

Those statutory purposes must continue to guide this Court as ppellant’s arguments clearly seek to erode them.

It took the USDA over ten years to promulgate a set of CFR’s that would establish the “National Organic Program”. [See, 13 N.Y.U. Envtl. L.J. 379, 383 (2005) appearing at page Add - 10 of the *amicis*’ addendum]. The net result was a set of regulations that has been described as “process” based, i.e., they focus upon the organic food producer’s production processes. [Id., 388-91 appearing at pages 11-12 of *amicis*’ addendum]. The oversight of this process was vested in the “certifying agent”. That concept is central here. Appellant and *amici* have no right to re-write the NOP or to ask this Court to do so.

One of frustrations expressed by the author of the N.Y.U. law review note is the lack of mandatory chemical testing of organic products. The author complains that certifying agents are given discretion to decide if preharvest or postharvest testing of product should

be done. She notes that the applicable regulation makes the certifying agent do such testing at its own expense and concludes that product testing "...is very unlikely to occur...". She further supports this argument by noting that certifying agents, being hired by the producers themselves, are likely to be susceptible to competitive forces among other certifying agents to be lenient in order to keep their producers as clients. [Id., 393 appearing at page 13 of *amicis'* addendum].

Of course, this discussion and criticism focuses upon 7 C.F.R. § 205.670 and 671, which, respondents argue, collectively make up the so-called "5% Rule" upon which appellant so heavily relies. It is noteworthy that the law note author's analysis of the NOP's intent behind the "5% Rule" tracks closely with respondents' arguments that the organic producer has no testing procedure to use, but must rely upon the certifying agent's discretion on whether to test or not test. [*infra*].

Finally, other than to merely adopt the OFPA and the NOP as law of Minnesota ["The federal law specified in section 31.92, subdivision 2b, is adopted as the organic food production law and rules in this state" - Minn. Stat. 31.925(2011); Add -], the State of Minnesota has stayed out of organic regulation-writing entirely. Thus, despite whatever shortcomings legal writers and others may have of them, the OFPA and the NOP are the law of this state.

D. PRINCIPLES OF STATE/FEDERAL COMITY - IF NOT CONFLICT PREEMPTION - PROHIBIT STATE RESTRAINTS UPON CERTIFICATION DECISIONS. ¹⁰

In the recent case In re: Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation, 621 F.3d 781 (8th Cir. 2010), the Eighth Circuit Court of Appeals had a great deal to say about the structure of the NOP vis-a-vis the certifying agent. Apparently, the certifying agent [QAI] in Aurora had permitted one of its certified organic milk producers [Aurora] to run rough-shod over the processes required to meet organic standards. Among other things, the class plaintiffs alleged that Aurora should have been decertified as an organic milk producer and was not. [This is the reverse side of appellant's argument here]. First, the Eighth Circuit analyzed the defense's "express preemption" argument based upon the language of 7 U.S.C. § 6507. ¹¹ The Eighth Circuit agreed that because § 6507 deals

¹⁰ To the extent that appellant argues in its reply brief that this general subject matter is being raised for the first time on appeal, respondents note that they have consistently argued that the certifying agent has the exclusive discretion to make certification decisions and testing decisions. In this appeal appellant and *amici* have focused upon policy arguments that are, themselves, extensions of earlier made argument. The comity or preemption argument is merely an extension of the argument of exclusive discretion in the certifying agent earlier made by respondents. Moreover, there are exceptions to the "first time on appeal" rule. For instance, lack of subject matter jurisdiction has been recognized as an exception. Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429, 432 (Minn.App. 1995, *review denied* (Minn. May 31, 1995)). In addition there are times when the Court, on its own motion, should consider the issue being raised for public policy reasons. *See, Ezekial v. Homewood Hospital, Inc.*, 223 Minn. 440, 445, 27 N.W.2d 409, 412 (1947).

¹¹ 7 U.S.C. § 6507(a) says that states may "...submit a plan for the establishment of a State organic certification program to the Secretary for approval. A State organic certification program must meet the requirements of this title to be approved by the Secretary." [Add -]

specifically with the subject of certification and because any state wishing to adopt its own organic certification regulations must first have the USDA's approval, this statute was a relevant consideration on the subject of "implied" federal preemption. [621 F.3d at 792-93].

It rejected "field preemption" due to the narrowness of OFPA's preemption clause. [Id., at 793]. However, it was persuaded that principles of "conflict preemption" necessitated the dismissal of the class plaintiffs' claims against the certifying agent, QAI, as a means of protecting against a "patchwork" of state regulation on certification issues. [Id., 794-97]. It, thus, upheld the complete dismissal of all claims against the certifying agent, QAI, because they "stand in conflict with the OFPA". [Id, at 796].

The focus of the present discussion goes to appellant's contention that a certifying agent should be not be permitted to de-certify an organic producer and/or an organically certified "field" when the producer is the victim of unintentional pesticide application not caused by the organic producer itself. ¹² Appellant's argument goes to both the "5% Rule" and the "3 Year Rule". What appellant suggests is clearly an interpretation that is consistent with its goal of having respondents' damages, or the bulk of them, legally evaporate.

But, appellant is asking the Court to tread where the Eighth Circuit has said it should not go - into the arena of regulating certification decisions. The Aurora case makes

¹² In its Statement of the Case appellant describes this discretion as a "surplus of power" in denegation of an "acceptable tolerance level" of chemicals in organic crops that allows conventional and organic farmers to co-exist in close proximity. [Appellant's Brief, page 3].

that much clear:

Even a cursory review of the OFPA reveals the nationalization of the decision to certify businesses in order to carry out the statute's purposes. The method the OFPA uses to achieve its purpose is to allow some producers of agricultural products (those that comply with all the requirements set forth in the OFPA and NOP) to sell and label their goods as organic and to prohibit others from doing so. The OFPA achieves this objective by certifying agricultural operations to use the OFPA Terms to sell or label their products. The certifying agents decide whether to certify a particular business - whether they may or may not sell or label products as organic.

The district court dismissed the class plaintiffs' claims against the QAI because the claims "directly contradict the OFPA and NOP". After reviewing the claims against QAI, the district court reasoned "[e]ssentially, Plaintiffs are asserting that...QAI should have revoked ...Aurora's qualifications." A review of each of the counts reveals all the claims against QAI challenge conduct the OFPA and NOP contemplated QAI would undertake in executing its responsibilities pursuant to the statute. As the district court analyzed in detail, it would be impossible, on the one hand, for QAI to comply with the OFPA and its regulations, which detail the process for revoking certifications, and, on the other hand, to comply with any additional state law duty and process to revoke certifications. (emphasis added)

[Aurora, 621 F.3d at 795].

The Court of Appeals' decision here in no way interferes with the OCIA's certification decisions. In fact it acknowledged that respondents' fields were de-certified by their certifying agent and accepted this use of discretion. ["Becasue the regulations and commentary fail to expressly state what happens if drift causes less-than-five-percent contamination, we assume that the certifying agent has the disretion to certify or not certify the field" (citing to 7C.F.R. § 205.662(a) and (e))] [Appellant's App. 61].

Since it was the conflict between the OFPA and state tort claims that caused those claims against the certifying agent to be preempted in Aurora, the same kind of “conflict preemption” principle extends to the instant case. Respondents’ state tort claims are based upon appellant’s violation of the pesticide laws. But, appellant’s defense to those tort claims is based on the NOP. A defense to a tort claim is nothing more than the inverse of the claim itself. What appellant and *amici* suggest stands in conflict with the OFPA as well as the NOP because they want a state common law restraint put upon certification decisions.

Also noteworthy is the fact that the Minnesota legislature did not lose sight of the nationalization of the organic standards when it adopted both the OFPA and the NOP via Minn. Stat. §§ 31.92 and 31.925. All of the law and lore of those federal statutes and rules were incorporated and adopted into our state law but no more.¹³ Thus, it is already the policy of Minnesota’s state statutory scheme to follow, utterly and completely, the guidelines of the OFPA and the NOP - for good or for ill. Appellants simply may not invade the certifying agent’s discretion no matter what their justifications.

Respondents respectfully urge this Court to exercise restraint similar to the state legislature’s restraint on the subject of organic regulation. Should appellant prevail, the bulwark of nationalization so carefully ingrained into the NOP could easily disintegrate.

¹³ This stands in contrast to its enactment of Chapter 18B where the legislature engaged in extensive supplementation of FIFRA and added significant scope to the nature of what conduct will constitute illegal behavior when using a “restricted use” pesticide. [Minn. Stat. § 18B.07, *supra*].

Courts of other states may choose to disagree or may create some other kind of variation/restraint upon the certifying agent's discretion using this Court's ruling as an invitation to do so. As it stands, the certifying agent makes all calls on the question of certification and all calls on the question of whether there is to be any chemical testing done. It must remain so or a return to the "patchwork" of individual state organic regulation looms.

E. THE COURT OF APPEALS PROPERLY PUT THE "5% RULE" BACK INTO ITS PROPER ROLE.

The trial court's adoption of appellant's argument under the so-called "5% Rule" was improvident. 7 C.F.R. § 205.671 was taken totally out of context. The Court of Appeals recognized that it must be construed with all of the other NOP regulations with which respondents must comply. [Appellant's App 58-59]. Respondents' fields, notwithstanding appellant's interpretation of the "5% Rule", were de-certified by their certifying agent and were thus subject to the "3 Year Rule" of 7 CFR § 205.202. The Court of Appeals properly recognized that as well. [Appellant's App. 59].

1. Invocation of "5% Rule" testing applies to the certifying agent only.

By reading 7 CFR § 205.671 one sees that the first few words are: "[w]hen residue testing detects prohibited substances at levels greater than 5%...". Nothing in that rule, standing alone, suggests that organic land is to be tested - it refers to "agricultural products". Nothing in the rule, standing alone, suggests **who** is to perform such residue testing or under what circumstances the testing is to be done. Indeed, there is nothing in the entirety of the NOP that permits testing of any kind by the organic producer or that recognizes any tests done at

the producer's behest to have any validity for any purpose.

This, then, brings the discussion to 7 CFR § 205.671 and its true context. Respondents first point to the rule immediately preceding it - 7 CFR § 205.670 [SA-319]. It provides a methodology by which a certifying agent "may" use residue testing when it decides it is proper to do so.

The testing regulation first says that organic products are required to be made "...accessible for examination by...the certifying agent." 7 CFR § 205.670(a) [Id.].

The rule next provides that where the certifying agent "has reason to believe that the agricultural input or product has come into contact with a prohibited substance" then the certifying agent, again, "may require preharvest or postharvest testing of any agricultural...product..." (emphasis added). Furthermore, such testing must be conducted at the "certifying agent's own expense". 7 CFR § 205.670(b) [Id.].

7 CFR § 205.670(c) then mandates that such testing be performed by "...an inspector representing...the certifying agent" and it lays out specific testing standards. [Id.].

Section 205.670, then, provides no outlet for the organic producer to do or to demand testing in order to qualify crops as organic under the "5% Rule". Instead, all discretion is vested in the certifying agent.

The Court of Appeals pointed to specific language within the comment to 7 C.F.R. § 205.671 [at 65 Fed. Reg. 80,548, 80,629] to hold that no 5% safe harbor was created by its language in any event. The language of the comment cited by the Court of Appeals was the

following:

However, the “5% 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.

[See, Appellant’s App. 60].

This language recognizes the authority of the certifying agent to enforce the NOP within its discretion. It also says that even testing results below the 5% standard do not “automatically qualify” the products. Appellant has not responded to this citation.

The comment to 7 C.F.R. § 205.670. does further violence to the spin appellant so ardently places upon the wording of the comment to § 205.671. It does so with a few simple words:

Certifying agents do not have to conduct residue tests if they do not have reason to believe testing is necessary. Certifying agents must ensure, however, that certified organic operations are operating in accordance with the Act and the regulations set forth in this part.

[65 FR 804628-629; SA-330].

The above citation makes it clear that only the certifying agent has the discretion to do or not do testing and must otherwise ensure full compliance with the NOP. This is entirely consistent with the initializing “Summary” of the comments to the NOP effective February 20, 2001:

Under the program, certifying agents will certify production...
in compliance with the requirements of this regulation and
will initiate compliance actions to enforce program requirements.

[65 Fed. Reg. 80548; SA-322]

Nowhere does NOP provide any right of co-regulation to the organic producer to decide when or if testing or any enforcement action will occur. The certifying agent has sole authority.

Respondents are, then, required to abide by all of the NOP regulations, including those that apply to their land. 7 C.F.R.. § 205.202(b) [the so-called “3 Year Rule] states that their land must not have had any “... prohibited substances, as listed in § 205.105, **applied to it** for a period of three years immediately preceding harvest of the crop” (emphasis added) before they can legally sell their crops as organic crops.

The Court of Appeals agreed with respondents that by reviewing the NOP as an integrated whole the word “applied” appearing in the three year prohibition of “prohibited substances” includes pesticide drift. [Appellant’s App. 59]. Indeed, the word “applied” appearing in 7 C.F.R.. § 205.202(b) appears in its variant form - “application” - in other parts of the NOP regulations. These uses of the word “application” appear in specific conjunction with the drifting of pesticides. (Id.; *see also*, 7 C.F.R. § 205.202(c) [SA 269] and 7 C.F.R. § 400(f)(1) [SA 286]).

Nevertheless, appellant here asserts that the only reasonable interpretation of this language is that the proscription of applying prohibited substances for three years can only

relate to the organic producer, himself, and does not implicate drift from adjoining property and third parties. This claim, along with the chemical-contamination-of-some-kind-is-inevitable argument, lies at the center of appellant's [and *amici curiae*'s] claims that it is in the best interests of conventional farmers and organic farmers, alike, to construe the regulation according to their interpretation.

There are at least five major flaws to these arguments. First, appellants and *amici* forget that the purpose of the NOP is to protect the consuming public, not the farmers.¹⁴ Adoption of their interpretation would greatly dis-serve the public interest in buying "organic" products because it would greatly enhance the risk of indiscriminate contamination. On the one hand, violation prone applicators, such as appellant, would have even less reason to follow the product label and/or take steps to ensure that their applications do not result in damage to adjoining land.

On the other hand, organic producers, overwhelmed with multiple drift events caused by indifferent applicators, would be encouraged to hide the incidents and adopt a "don't ask, don't tell" posture for fear that they would lose the opportunity of the "organic" price premium. If the N.Y.U. law note is correct, certifying agents, oblivious to the drift event, will not be inclined to test to see if the affected crops exceed the 5% EPA tolerance. The net result would be lawlessness and an ever increasing concentration of prohibited substances in organic

¹⁴ See, 7 U.S.C. § 6502(2) ["to assure consumers that organically produced products meet a consistent standard"].

food.

The second flaw in appellant's argument is that the courts are not the place to cure the evils of which they complain. As above-discussed, what they are asking the Supreme Court of this State to do is to ignore the ten-plus year legislative and regulatory effort which forged the NOP and blue pencil out the authority and discretion given the certifying agent to enforce its provisions. If they really want to effect that kind of change they must do so legislatively. To ask this Court to ignore the current structure of the NOP in favor of their convenience is both short-sighted and selfish.

Third, the inevitability of some contamination because of ambient pesticide residues is hardly an excuse for creating more contamination through unlawful conduct. Some contamination from sources not in violation of FIFRA or the Minnesota Pesticide Control Act may be inevitable. But those who are subject to those controls must, for the reasons stated above, be held to strict compliance.

Fourth, peaceful co-existence between the organic and conventional farming communities can be achieved by compliance with product labels and the pesticide laws.. It is appellant's duty to comply every time it does a pesticide application.

Fifth, interpretation of the NOP according to appellant and *amici* (and as per the trial court) would result in an otherwise inexplicable discrimination against the organic farming community in its ability to seek fair compensation for negligent and unlawful pesticide applications. The logical extension of the defense's argument is that before any organic

farmer could make out a *prima facie* case of damages for pesticide drift, he/she would first have to prove that crop residues exceed the relevant 5% EPA tolerance. A conventional farmer, on the other hand, is not bound by the NOP and no such precondition to a *prima facie* damages showing would exist in the event his/her crop was damaged by pesticide drift. There is no basis for such a discriminatory rule of damages.

Appellant also claims, and the trial court agreed, that the de-certification under the “3 Year Rule” meant that the “5% Rule” has no purpose. That simply is not the case. It remains a hardship-based rule available only to those organic producers who have **not** played the system by furtively using pesticides and then using test procedures to sell organically. Although an innocently affected organic producer might ask for the testing, there is nothing in the rule that requires testing. Hardship may or may not assist the affected organic producer because of this, but at least some mechanism exists for use at the certifying agent’s discretion.

Appellant and *amici* also emphasize a comment to the NOP rules that says inadvertent drift should not adversely affect the organic operation. 65 Fed. Reg. 80556. [SA 325]. But, this comment is specific to the issue of “genetic drift” of pollen from genetically engineered agricultural products [“GMO” grains]. This case is not about genetic drift. It is about pesticide drift.

The key language of the comment upon which reliance is placed is:

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 effect the

status of an organic product or operation

. (Emphasis added) [SA-325].

The term “excluded methods” is defined by the NOP to mean genetically engineered products. 7 CFR § 205.2. [SA-258]. The comment, then, cannot be extended beyond genetically engineered products and their pollen drift. Indeed, pesticide drift and pollen drift are entirely separate subjects carrying entirely different issues. A major distinguishing factor is that “restricted use” pesticides are controlled by FIFRA and the Minnesota Pesticide Control Act. GMO grains are not. Pesticide drift comes from mechanically induced means under human control, *albeit*, it is preventable. Pollen drift is a naturally occurring event over which there is little, if any, means of control.

The wording of the NOP regulations follow set definitions and it needs to be interpreted as a whole. (*See*, Comment at 65 Fed Reg. 80549). [SA-323]. The NOP regulations provide a specific definition of the word “drift” to be any “physical movement” of a prohibited substance onto organic land from an “intended target site”. 7 CFR § 205.2. When “drift” occurs, the organic farmer is compelled to “[i]mmediately notify the certifying agent concerning **any... application, including drift**, of a prohibited substance to any field...”. 7 C.F.R. § 205.400(f). (emphasis added). Thus, the word “application” there is used in the same sense as the word “applied” is used in 7 CFR § 205.202(b) - and it includes “drift”. The Court of Appeals recognized this and properly accepted respondents’ argument that the “3 Year Rule” of 7 C.F.R. § 205.202 applies to drift events caused by someone other

than the organic producer.

The NOP regulations also require the certifying agent to conduct annual document reviews and site inspections for purposes of continuing, or not continuing the certification. It is specifically stated that the certifying agent “**may allow continuation** of certification and issue an updated certificate of organic operation...” (emphasis added). 7 CFR § 205.406(b). If, during the inspection and review of required documentation, the certifying agent “has reason to believe...that a certified operation is not complying with the requirements of the Act and the regulations in this part...”, then the certifying agent is to give written notice of noncompliance. 7 C.F.R. § 205.406(c). Continuation of the certification is, then, up to the certifying agent’s discretion.

In the instant case respondents met their reporting obligations and the OCIA met its review/inspection obligations each year in which appellant’s drift events occurred. The OCIA chose to de-certify the affected fields - which it had discretion to do based upon the records from the MDA, the records from respondents and its inspection of the site. It ordered respondents to put the affected fields into transition for 36 months or to extend an existing period of transition. Appellant has no evidence to show otherwise.

The only conclusion that may be reached, then, is that by looking at the NOP regulations as a whole, it is clear that the certifying agent makes the call on continuing certification regarding land on which drift has occurred. It may or may not use residue testing as a means of assisting itself in making the call and, in the case of chemical drift, it might

decide to spend the money to have testing done to alleviate hardship on an innocent organic operation. On the other hand, it may not and, based upon the records reviewed and site inspections, merely advise the drift affected organic producer that the field involved must be placed into transition for three years.

The latter circumstance is exactly what happened here. Respondents have submitted testimony and the notification letters from the OCIA notifying them of the transitioning of the fields on which appellant has caused drift. These transition periods are for three years consistent with the three year ban on having prohibited substances “applied” under 7 CFR § 205.202(b). Thus, by reading the regulations as a whole, and by looking at the record, it is clear that respondents’ claims for damages for loss of organic pricing is not moribund. There is no basis on which to apply the “5% Rule” here because the OCIA did no testing.

And, when the NOP regulations are examined in full, there simply are no provisions anywhere which permit an organic farmer to conduct his own testing in order to meet the 5% standard or any other standard.

Appellant also warns that the ruling of the Court of Appeals is likely to foment litigation between the conventional and the organic farming communities. We are now more than twenty years post-OFPA and ten years post-NOP. Yet, this case is a case of first impression - here and everywhere. It is highly doubtful that the situation will change much if the Court of Appeals is upheld.

2. Regardless of the “5% Rule”, the OCIA placed appellants fields into

transition because of respondent's pesticide misuses. Both the appellant and the trial court used the "5% Rule" as a "silver bullet" to defeat respondents' damages claims. However, both ignore the fact that the OCIA directed respondents' fields into transition, as it has discretion to do.

Neither appellant nor the trial court are free to merely disregard the OCIA's determinations. As a certifying agent the OCIA is accredited to "certify a domestic... production...operation as a certified operation". 7 CFR § 205.500(a). The de-certifications of appellants' fields were based upon the MDA reports, respondents' reports and site inspections. There is no basis in fact or in law to call their determinations into question. "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." Vicker v. Starkey, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

3. Respondents' have recognized legal bases for their damages.

Respondents are entitled to claim damages, including damages for loss of the organic premium in the marketplace. And, in any event they are entitled to present their claims for damages that are independent of any organic versus non-organic price differential. Respondents will discuss those below.

a. Nuisance Damages. In Highview North Apartments v. County of Ramsey, 323 N.W.2d 65 (Minn. 1982), the Minnesota Supreme Court upheld an award of

damages on a theory of private nuisance. It noted that the private nuisance statute, Minn. Stat. § 561.01 [on which appellants here rely] authorizes a “choice or combination” of relief as between damages and injunctive relief. 323 N.W.2d at 73. The Highview trial court awarded over \$73,000 in damages “...to real and personal property and for disruption and inconvenience caused by the nuisance”. [Id.] Included in the damages for inconvenience were damages to the owner of the apartments affected by the water intrusion for having to deal with the problems caused by the nuisance.

The Highview Court cited to Holmberg v. Bergin, 172 N.W.2d 739 (Minn. 1969), another nuisance case. There this Court held that it would not disturb the trial court’s refusal to award damages because it had awarded injunctive relief. However, the Court recognized the right to pursue damages for “...property damage and physical suffering, discomfort, and inconvenience resulting from the nuisance.”

There is also precedent for the proposition that damage to business and good will are compensable nuisance damages. *See, Aldrich v. Westmore*, 52 Minn. 164, 172, 53 N.W. 1072, 1074 (1893) [damage to business caused by nuisance is damage to property].

Minn. Stat. § 561.01 defines a “nuisance” as follows:

Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction of free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance.

Here there is evidence that Oluf Johnson was required to plow under crops. He needed to comply with an MDA directive to plow crops under in 2007. He needed to control weeds

by plowing crops in spray drift areas and this was done with OCIA approval in 2008. There is evidence that Oluf Johnson is physically affected by pesticides. During appellant's spray activities he has suffered cotton mouth, swollen throat and headaches. [SA-176 (P. 113 L. 17 to P. 114 L. 8); SA-187 (P. 157 L. 23 to P. 160 L. 24)].

Respondents want to farm their land organically. They want to, but have not been able to, start a regular organic seed business. That is their choice. Appellant's pesticide misuses have forced them to make reports, make adjustments to the farming operation and to do other things to compensate for these violations - all in derogation of their right to "free use" of their property and the right to its "comfortable enjoyment". These are items of inconvenience and disruption which the law deems to be compensable. Even the physical discomfort is compensable. And, the loss of "business" in the form of a lucrative organic seed business is damage to their property.

Thus, nuisance damage claims for property loss, inconvenience, disruption and physical discomfort all exist.

b. Negligence Per Se Damages. Respondents alleged negligence *per se* for violation of Minn. Stat. § 18B.07 subd. 2(a) or (b). This Court has said that violation of Minn. Stat. § 18B.07 may give rise to a claim for damages on a theory of negligence *per se*. Anderson v. State of Minnesota, 693 N.W.2d 181, 189-91 (Minn. 2005).

It is axiomatic that a plaintiff in a negligence case may be awarded damages for property loss. Where property is totally destroyed the plaintiff may seek the value of the

property at the time of its destruction. *Restatement, Second, Torts* § 927 (1979). There can be damages for loss of use as well. [Id., comments n and o].

At a very minimum, when the MDA ordered respondents to plow under the drift affected area of their soy beans together with a buffer strip, the crops that were plowed under were totally destroyed. This is an item of damage which respondents are entitled to present and which is independent of any organic versus non-organic pricing issues.

The trial court's failure to recognize respondent's right to move forward with damages claims that were independent of the "5% Rule" argument was clear error.

II. A VIABLE CLAIM FOR TRESPASS EXISTS NOTWITHSTANDING THE FACT THAT RESPONDENT CAUSED "DRIFT" OF PESTICIDES.

Respondents assert that as long as there is damage to the land resulting from deposition of "particulate matter" a viable claim for trespass exists. They further assert that intermittent odors and fumes that do not damage the land are, indeed, merely a nuisance. But when the intrusion is on the land and it creates any kind of negative impact to the land, a trespass is implicated. The "3 Year Rule", alone, satisfies this, but more is involved. Pesticides kill things. It is up to the landowner, not a trespasser, to decide what, if anything, should be killed, on his/her/its land.

There are two elements to trespass. The first is the plaintiff's right of possession of the land. The second is an unlawful entry by the defendant. Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 550 (Minn.App. 2003). The invasion of substances, as opposed to persons, has been held to be a trespass in Minnesota. *See, Victor v. Sell*, 301 Minn. 309, 313, 222 N.W.2d

337, 340 (1974) [though found not to be by jury, a radiator placed onto property could have been a trespass]; Bridgeman-Russell Company v. City of Duluth, 158 Minn. 509, 511-12 197 N.W. 971, 972-73 (1924) [large volume of water escaped from reservoir was trespass]; Bohrer v. Village of Inver Grove, 166 Minn. 336, 338, 207 N.W. 721 (1926) [deposition of dirt/sand via run-off through a ravine was both trespass and nuisance]; Whittaker v. Stangvick, 100 Minn. 386, 392, 111 N.W. 295, 297 (1907)[duck hunting buckshot and birds falling onto plaintiff's land held an enjoined trespass] and Citizens for a Safe Grant v. Lone Oak Sportsmens Club, Inc., 624 N.W.2d 796, 805 (Minn.App. 2001) [bullets and pellets from neighboring gun club falling onto property constituted a trespass].

Likewise, the deposition of chemical substances upon respondents' land amounts to an invasion of the right to exclusive possession because it introduces an unwanted foreign substance to the land, itself, which kills vegetation growing on the land.

The Court of Appeals, then, properly held that pesticide drift can be a form of trespass. The entire issue litigated below revolved around the phrase "particulate matter". The District Court held that Wendinger v. Forst Farms, Inc., *supra*, was persuasive authority that "particulate matter" cannot be the instrumentality of a trespass under Minnesota law.

The Court of Appeals disagreed looking to foreign case law to help justify this holding. It cited to Borland v. Saunders Lead Co., Inc., 369 So.2d, 523 (Ala. 1979)[deposition of lead particulates was a trespass] and Bradley v. American Smelting and Refining Co., 709 P.2d

782 (Wa. 1985) [airborne heavy metal particulates from copper smelter held trespass].

In Borland the Alabama Court reasoned that if an indirect invasion of substances causes damage to the land, then it falls into the category of trespass because the exclusive right of possession has been besmirched. In Bradley the Washington Court said that if the invading particulates create a harmful condition on the plaintiff's land, it is a trespass until the intruding substance is removed. This is the majority view.¹⁵

Respondents' land was damaged by the appellant's repeated over-sprays. Not only were their affected fields put into "transition" for three years at a time, they had to plow down crops. This is not just use and enjoyment of the land. It is an interference with the right to have one's land kept free of invading substances, i.e., the right to exclusive possession.

Accordingly, respondents urge the Court of affirm the Court of Appeals on the question of trespass

III. THE TRIAL COURT ERRED IN REFUSING TO PERMIT AMENDMENT OF THE COMPLAINT TO INCLUDE DAMAGES CLAIMS FOR THE TWO 2008 DRIFT EVENTS ON GROUNDS OF "FUTILITY".

A. STANDARD OF REVIEW.

Typically, this issue an abuse of discretion standard. However, in the case of the denial

¹⁵ See, Larkin v. Marceau, 959 A.2d 551, 555-56 (Vt. 2008)[over-spray of residential pesticide could be a trespass only if there was a demonstrated physical impact on the land]; Wilson v. Interlake Steel Company, 649 P.2d 922 (Cal. 1982)[vibration and noise, if accompanied by damage to land, can be trespass (as well as deposition of particulates)]; Dickens v. Oxy Vinyls, LP, 631 F.Supp.2d 859, 865 (D.Ct. Ky. 2009)[the existence of harmful particulate matter a precondition to trespass]. *But see*, Adams v. Cleveland-Cliffs Iron Company, 602 N.W.2d 215 (Mich. Ct.App. 1999) [particulate matter is only a nuisance].

of a motion to amend a pleading, whether the district court has abused its discretion can turn upon the issue of whether the trial court was correct in “an underlying legal ruling”. Doe v. F.P., 667 N.W.2d 493, 500-01 (Minn.App. 2003). The trial court’s underlying legal rulings as to no damages and/or no trespass are incorrect.

B. THE TRIAL COURT’S “FUTILITY” RULING WAS LEGALLY INFIRM SO THE REFUSAL TO PERMIT THE AMENDMENT IS INCORRECT.

The Court of Appeals reversed the district court’s “futility” holding respecting respondents’ motion to amend their complaint to include the 2008 events. This was a proper ruling because there clearly are damages of some sort regardless of the “5% Rule” issue.

The parties had litigated the 2008 drift events and claims by consent since early in the litigation. They were part of the record in the injunctive proceedings. The trial court cited to 2008 events as evidence of damage in its June 26, 2009 order granting injunctive relief. [App-29; SA-82 to 83]. Appellant then took substantial discovery including interrogatories, document requests and deposition testimony specific to the events and claims arising out of those events that happened in 2008. Respondents took discovery of the same. [SA-131 to 134; SA-196 to 224].

Appellant opposed the motion to amend but had no real prejudice to offer the court and the focus was placed upon “futility”. Of course, nearly the entire basis of the futility defense was the “5% Rule”. The one and only ground on which the motion to amend was denied was “futility”. [App-61].

The “5% Rule” justifying the holding that there are zero damages ignores the true purpose and effect of that rule and appellants’ inability to utilize it themselves. The “5% Rule”, in any event, does not erase damages for inconvenience, loss of property, etc., that are not associated with organic versus non-organic pricing. The certifying agent, OCIA, de-certified appellants’ fields and there is no legal basis to claim that their decision should not be recognized by the courts.

IV. THE TRIAL COURT ERRED IN DISSOLVING THE TEMPORARY INJUNCTION AND DISMISSING THE INJUNCTIVE CLAIM.

A. STANDARD OF REVIEW.

A decision on whether to grant injunctive relief is discretionary and is reviewed on an abuse of discretion standard. Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 209 (Minn. 1993).

This case involves the dissolution of an injunction already granted and, thus, the trial court already made findings on the “Dahlberg factors”¹⁶ that were favorable to appellants. The change in circumstance brought on by the summary judgment caused the court to vacate the injunction. However, if the court’s underlying legal basis for the summary judgment is here found to be wrong, presumably the injunction should be reinstated. *See, Doe v. F.P., supra*. At least, the claim for injunctive relief should be reinstated.

¹⁶The five “Dahlberg factors” are: (1) history of the parties and their relationship; (2) comparison of relative harms to the parties if relief is granted or denied; (3) movant’s likelihood of success on the merits; (4) public policy considerations; and (5) administrative burden in judicial enforcement and supervision. Dahlberg Brothers, Inc. v. Ford Motor Company, 137 N.W.2d 314, 321-22 (Minn. 1965).

It has also been held that an abuse of discretion occurs when there is a “clearly erroneous conclusion that is against both logic and the facts in the record.” Cisek v. Cisek, 409 N.W.2d 233, 235 (Minn.App. 1987). Respondents put it that, the trial court’s misapplication of the “5% Rule” together with its misapplication of basic law of nuisance and negligence to hold that there are no damages was an abuse of discretion. The law has recognized the right to nuisance damages for inconvenience and discomfort for a long time. These damages were cast aside for no apparent reason.

B. THE TRIAL COURT’S TREATMENT OF THE INJUNCTION ISSUE HAS BEEN INCONSISTENT AND THE INJUNCTIVE CLAIM WAS PROPERLY REINSTATED.

Without commenting on the merits of the claim for injunctive relief, the Court of Appeals reinstated the claim. This was only proper given the record in this case.

In its November 4, 2010, order [Appellant’s Addendum pages 23-27] the trial court vacated the temporary injunction on grounds that since there is no longer any claim for damages, there is no claim for injunctive relief under the nuisance statute. This is an incorrect view of the law.

Minn. Stat. § 561.01 has been clearly recognized as permitting an “either or both situation” as to damages and/or injunctive remedies for nuisance. “The choice or combination of these forms of relief is within the trial court’s discretion, and, on appeal, we are limited to consideration of whether this discretion has been abused.” Highview North Apartments v. County of Ramsey, 323 N.W.2d at 73.

Because the trial court first granted an injunction, and specifically, said that there is evidence of damages in support of the “likelihood of success on the merits” factor, its position now is wholly inconsistent. This is what the trial court said in its Order of June 26, 2009 , holding that appellants were entitled to injunctive relief): “Some evidence exists that Plaintiffs were damaged (Ex 13 to Aff. Oluf Johnson in Supp. of Mot. for Temp. Inj.)”. [Respondents’ Appendix page 9].

The exhibit referenced by the trial court in the above citation is a letter from the MDA to Oluf Johnson dated August 5, 2008. It is one of the MDA’s food/commodity advisories. It states that “[t]he MDA’s preliminary information indicates **Roundup Power Max and Lorsban Advance (active ingredients = glyphosate and chlorpyrifos)** herbicides were applied to adjacent cropland.”. Then it advised respondents that “...you cannot plant or harvest any crop until we get back to you...” in an area “...300 feet east of the adjacent soybean field.” [SA-82 to 83]. If nothing else this is inconvenience associated with a nuisance.

Respondents were ordered to plant or harvest **nothing** pending further notice in the August 5, 2008, food/commodity advisory. Another such example of such damage and inconvenience is the 2007 plow down order from the MDA. [SA-57 to 58].

These exhibits exemplify just a couple items of damage that respondents have suffered that have nothing to do with the “5% Rule”. They are among **many** inconveniences and intrusions into appellants’ organic farming operation caused by appellants’ disregard of the

pesticide use laws.

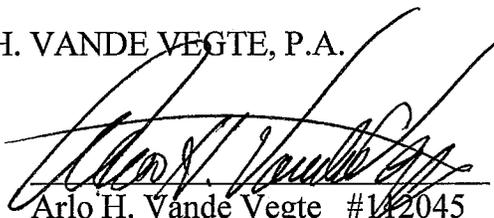
Repeated trespass is enjoined. Whittaker v. Stangvik, *supra*. Nuisance is enjoined. Minn. Stat. § 561.01. It seems that the trial court lost sight of these things in order to reach a desired result - dismissal of the entire case. But, it was not free to leave appropriate remedies behind. That is precisely what it did and for that reason it abused its discretion in dissolving this injunction and dismissing the injunctive case. The “5% Rule” is not a “silver bullet” as to any of the claims for remedies in this case, be they injunction or damages.

CONCLUSION

The Court of Appeals should be affirmed in every respect. This case should be remanded to the trial court for trial on all claims, including the 2008 claims and the claim for injunctive relief.

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