

NO. A11-693

State of Minnesota
 In Court of Appeals

Farm Bureau Mutual Insurance Company,

Appellant,

vs.

Earthsoils, Inc., Lavern Ptacek and Jeffrey Ptacek,

Respondents.

RESPONDENTS LAVERN AND JEFFREY PTACEK'S
 BRIEF AND APPENDIX

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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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES iv

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

 I. The Ptaceks’ Underlying Lawsuit 2

 II. Farm Bureau’s Lawsuit..... 3

 III. The Trial Court’s Decision 4

ARGUMENT 4

 I. Standard of Review 4

 II. Farm Bureau’s CGL Policy Imposes a Duty to Defend..... 5

 A. The Ptaceks Suffered Lost Profits because of Property Damage 7

 1. The Damage to the Ptaceks’ Corn Crop Constitutes “Property
 Damage” 7

 2. Farm Bureau’s Case Law Supports a Finding of “Property
 Damage” 9

 B. Farm Bureau’s Policy Exclusion m. Does Not Apply 12

 III. Farm Bureau’s CGL Policy Imposes a Duty to Indemnify 12

CONCLUSION 14

APPENDIX

TABLE OF AUTHORITIES

CASES	PAGE
<i>Atl. Mut. Ins. Co. v. Judd Co.</i> , 380 N.W.2d 122, 126 (Minn. 1986).....	7
<i>Auto Owners Insurance Company v. Harrell's Fertilizer, Inc.</i> , No. 4:05-cv-39, 2006 U.S. Dist. LEXIS 3021 (E.D. Tenn. Jan. 20, 2006).....	11
<i>Crum v. Anchor Cas. Co.</i> , 119 N.W.2d 703, 709 (Minn. 1963).....	6, 8
<i>Del Hayes & Sons, Inc. v. Mitchell</i> , 230 N.W.2d 588, 591-92 (1975).....	5
<i>Franklin v. W. Nat'l Mut. Ins. Co.</i> , 558 N.W.2d 277, 280 (Minn. Ct. App. 1997).....	6
<i>Garvis v. Emp'rs Mut. Cas. Co.</i> , 497 N.W.2d 254, 258 (Minn. 1993)...	6, 7, 8
<i>Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh, Pa.</i> , 643 N.W.2d 307, 318-19 (Minn. Ct. App. 2002).....	6
<i>Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.</i> , 736 N.W.2d 313, 317 (Minn. 2007)	5
<i>Johnson v. Aid Ins. Co. of Des Moines, Iowa</i> , 287 N.W.2d 663, 665 (Minn. 1980)	6, 8
<i>Madison Farmers Mill & Elevator Co. v. Mut. Serv. Cas. Ins. Co.</i> , No. C9-88-1620, 1989 Minn. App. LEXIS 106 (Minn. Ct. App. Feb. 7, 1989).....	10, 11, 13
<i>Reinsurance Ass'n of Minn. v. Timmer</i> , 641 N.W.2d 302 (Minn. Ct. App. 2002).....	12
<i>SCSC Corp. v. Allied Mut. Ins. Co.</i> , 536 N.W.2d 305 (Minn. 1995).....	12, 13, 14
<i>St. Paul Fire & Marine v. Nat'l Computer</i> , 490 N.W.2d 626, 631 (Minn. Ct. App. 1992).....	7-8
<i>St. Paul Fire & Marine v. Nat'l Ins.</i> , 496 N.W.2d 411, 415 (Minn. Ct. App. 1993).....	5
<i>Western Heritage Insurance Co. v. Green</i> , 54 P.3d 948 (Idaho 2002).....	9, 10

Wooddale Builders, Inc. v. Maryland Cas. Co., 772 N.W.2d 283, 302
(Minn. 2006) 5

STATEMENT OF THE ISSUES

1. **Does Appellant's general liability coverage impose a duty to defend when its insured's fertilizer caused damage to the corn crop of the insured's customer?**

The Trial Court held in the affirmative.

Apposite Cases

Crum v. Anchor Cas. Co., 119 N.W.2d 703, 709 (Minn. 1963)

W. Heritage Ins. Co. v. Green, 54 P.3d 948 (Idaho 2002)

Madison Farmers Mill & Elevator Co. v. Mut. Serv. Cas. Ins. Co., No. C9-88-1620, 1989 Minn. App. LEXIS 106 (Minn. Ct. App. Feb. 7, 1989)

2. **Does Appellant's general liability coverage impose a duty to indemnify when its insured's fertilizer caused damage to the corn crop of the insured's customer?**

The Trial Court held in the affirmative.

Apposite Cases

SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305 (Minn. 1995)

Reinsurance Ass'n of Minn. v. Timmer, 641 N.W.2d 302 (Minn. Ct. App. 2002)

Madison Farmers Mill & Elevator Co. v. Mut. Serv. Cas. Ins. Co., No. C9-88-1620, 1989 Minn. App. LEXIS 106 (Minn. Ct. App. Feb. 7, 1989)

STATEMENT OF THE CASE

Hog and grain farmers Lavern and Jeffrey Ptacek brought suit against Earthsoils, Inc. (“Earthsoils”), a provider of agronomy consulting services, for recommending and providing fertilizer it knew or should have known contained grossly insufficient quantities of nitrogen for sustaining healthy corn crops. The lack of sufficient nitrogen in the fertilizer damaged the Ptaceks’ corn crop, causing large swaths of dry brown and yellowing foliage and stunting the corn’s productive capacity, leading to decreased crop yields and a large financial loss for the Ptaceks. Earthsoils tendered the defense of the lawsuit to Farm Bureau Mutual Insurance Co. (“Farm Bureau”), which insured Earthsoils under a Commercial General Liability (“CGL”) policy.

Farm Bureau brought this action for declaratory relief and moved for summary judgment, arguing that the Ptaceks had not suffered “property damage” as defined by the policy. Farm Bureau argued the Ptaceks had alleged only an economic loss that was not covered by the CGL policy, and that Farm Bureau had no duty to defend or indemnify Earthsoils for the Ptaceks’ loss. The trial court disagreed, finding that the Ptaceks’ alleged losses necessarily flowed from “property damage” to their corn crops. The trial court therefore held that Farm Bureau owed Earthsoils both a duty to defend and a duty to indemnify as a matter of law. The trial court then granted summary judgment *sua sponte* in favor of Earthsoils and the Ptaceks. This appeal followed.

STATEMENT OF FACTS

I. The Ptaceks' Underlying Lawsuit.

The Ptaceks operate a hog and grain farm near Owatonna, Minnesota. (A. App. 16, ¶ 1.)¹ Earthsoils provides agronomy consulting services to farmers in connection with its sale of fertilizer. (A. App. 16-17, ¶ 3.) Earthsoils recommended and provided the Ptaceks with fertilizer it knew or should have known contained grossly insufficient quantities of nitrogen for sustaining healthy corn crops. (A. App. 17 ¶¶ 4-7.) In reliance on Earthsoils' representations, the Ptaceks applied Earthsoils' fertilizer to their land in the amounts Earthsoils recommended and provided. (*Id.* ¶ 9.)

The Ptaceks' corn crop suffered from nitrogen deficiency, causing the crop to look distressed with large swaths of dry brown and yellowing foliage such that Earthsoils' owner Michael McCornack ("McCornack") expressed surprise there were any ears of corn in the field at all. (A. App. 40-43, Lavern Ptacek Dep. 156:7-8, 176:24-177:5; A. App. 45, McCornack Dep. 39:4-13; R. App. 1, McCornack Dep. 73:2-15; R. App. 2, Jeffrey Ptacek Dep. 45:4-46:2.) According to McCornack, the crops appeared to be "starving to death." (A. App. 45, McCornack Dep. 39:9-10.)

A laboratory analysis of tissue samples collected by a consulting agronomist, Jon Koster, confirmed the Ptaceks' corn crop contained less than half the normal content of nitrogen. (R. App. 3-5.)² The nitrogen deficiency stunted the corn's productive capacity,

¹ Appellant's Appendix will be cited as "A. App.".

² Respondent's Appendix will be cited as "R. App.".

reducing the Ptaceks' crop yield by more than half, versus what it would have been had it received sufficient nitrogen, ultimately resulting in a large financial loss for the Ptaceks. (A. App. 17-18 ¶¶ 10, 12.)

The Ptaceks filed suit against Earthsoils and McCornack on March 5, 2008. (A. App. 16-23.) During all relevant times, Earthsoils was covered by a CGL insurance policy issued by Farm Bureau. (A. App. 1-15.) Earthsoils tendered defense of the underlying lawsuit to Farm Bureau, which has since been defending under a reservation of rights. (A. App. 24.)

II. Farm Bureau's Lawsuit.

Farm Bureau filed this declaratory action against Earthsoils and the Ptaceks seeking a determination that it had no contractual duty to defend Earthsoils in its underlying dispute with the Ptaceks. (A. App. 25-31.) Farm Bureau subsequently brought a motion for summary judgment, arguing in relevant part that there was no coverage for the Ptaceks' loss because the Ptaceks had not alleged any "property damage" as defined by the CGL policy. (A. App. 46-56.) Earthsoils and the Ptaceks filed memoranda in opposition to Farm Bureau's motion. (A. App. 57-88.)

The CGL form's insuring agreement states in relevant part:

Section I – Coverages

Coverage A Bodily Injury And Property Damage Liability

1. Insuring Agreement

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to

which this insurance applies. We will have the right and duty to defend the insured against any “suit.”

(A. App. 2.) The policy defines “property damage” in relevant part as:

- a. Physical injury to tangible property, including all resulting loss of use of that property.

(A. App. 14.)

III. The Trial Court’s Decision.

The trial court denied Farm Bureau’s motion for summary judgment. (A. Add. 1.)³ The trial court held that corn crops are tangible property, that the Ptaceks’ corn crop suffered “physical injury,” and that the Ptaceks’ alleged loss therefore constituted “property damage” as defined by the CGL policy. (A. Add. 5-7.) The trial court further held that all of the Ptaceks’ claims in the underlying lawsuit required the Ptaceks to show that their monetary damages flowed from that “property damage” to their corn crop. (A. Add. 7-8). Because Farm Bureau had pointed to no applicable policy exclusions, the trial court concluded that Farm Bureau has both a duty to defend and a duty to indemnify as a matter of law, and issued summary judgment *sua sponte* in favor of Earthsoils and the Ptaceks. (A. Add. 1, 7-8.)

ARGUMENT

I. Standard Of Review.

On a motion for summary judgment, judgment must be rendered when there is no genuine issue of material fact and either party is entitled to judgment as a matter of law.

³ Appellant’s Addendum will be cited as “A. Add.”.

Minn. R. Civ. P. 56.03. Trial courts have the inherent power to *sua sponte* summarily dispose of cases in which no issue of material fact exists. *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588, 591-92 (1975). On appeal from a district court's grant of summary judgment, the reviewing court asks "(1) whether there are any genuine issues of material fact for trial; and (2) whether the trial court erred in its application of the law." *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 317 (Minn. 2007) (citation omitted). Here, there are no genuine issues of material fact. The only issue is whether the trial court erred as a matter of law.

II. Farm Bureau's CGL Policy Imposes A Duty To Defend.

The trial court did not err in holding that Farm Bureau has a duty to defend Earthsoils in the underlying case. A liability insurer assumes two contractual duties to its insured: the duty to defend and the duty to indemnify. *St. Paul Fire & Marine v. Nat'l Ins.*, 496 N.W.2d 411, 415 (Minn. Ct. App. 1993). The insurer's duty to defend is broader than the duty to indemnify in three ways: (1) the duty to defend extends to every claim that "arguably" falls within the scope of coverage; (2) the duty to defend one claim creates a duty to defend all claims; and (3) the duty to defend exists regardless of the merits of the underlying claims. *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 772 N.W.2d 283, 302 (Minn. 2006). The duty to defend arises when a claim alleges facts which, if established, would support a recovery under the policy. *St. Paul Fire & Marine Ins. Co. v. Nat'l Chiropractic Mut. Ins. Co.*, 496 N.W.2d 411, 415 (Minn. Ct. App. 1993).

Where, as here, the insurer agrees to defend under a reservation of rights, the insurer's duty to defend continues until it is clear that no element of the claim is within the scope of the policy. *Franklin v. W. Nat'l Mut. Ins. Co.*, 558 N.W.2d 277, 280 (Minn. Ct. App. 1997). In determining whether an insurer has a duty to defend, Minnesota courts read the policy in a light favorable to finding coverage. See *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh, Pa.*, 643 N.W.2d 307, 318-19 (Minn. Ct. App. 2002). Evidence extrinsic to the complaint may be used by both the insured and the insurer to clarify whether there is a duty to defend.⁴ *Garvis v. Emp'rs Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993); *Crum v. Anchor Cas. Co.*, 119 N.W.2d 703, 708-12 (Minn. 1963); *Home Ins. Co.*, 643 N.W.2d at 319. In *Crum v. Anchor Casualty Co.*, the Minnesota Supreme Court wrote:

If, then, the insurer may refuse to defend when the complaint states a cause of action covered by the insurance because it has knowledge [outside] the complaint that would exclude liability, we see no good reason why it should not be obligated to defend where it has knowledge [outside] the complaint that the true facts, if established, will bring the cause of action within the insurance coverage.

119 N.W.2d at 709.

⁴ As it did below, Farm Bureau continues to imply that it is not required to look beyond the four corners of the Ptaceks' Complaint in determining whether it has a duty to defend. (See, e.g., App. Brief 15, 23-24.) This is not the law. A liability insurer may look to the third party's complaint to make an initial determination of coverage, but must take into account all reasonable inferences as well as extrinsic facts known to it. *Johnson v. Aid Ins. Co. of Des Moines, Iowa*, 287 N.W.2d 663, 665 (Minn. 1980); *Garvis*, 497 N.W.2d at 258.

“The insurer bears the burden of demonstrating that no duty to defend exists by showing that all parts of the cause of action fall clearly outside the coverage afforded by the policy.” *Atl. Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 126 (Minn. 1986). As shown below, Farm Bureau cannot demonstrate that all parts of the Ptaceks’ causes of action fall clearly outside Farm Bureau’s CGL policy. The trial court’s ruling should therefore be affirmed.

A. The Ptaceks Suffered Lost Profits Because of Property Damage.

Farm Bureau’s entire argument is premised on the theory that the only damage alleged by the Ptaceks’ Complaint is “less-than-anticipated crop yield,” and that “less-than-anticipated crop yield” involves no physical injury to tangible property or loss of use. Farm Bureau’s premise is invalid because it ignores reasonable inferences from the Ptaceks’ Complaint as well as facts developed in discovery in the underlying case.

1. The Damage to the Ptaceks’ Corn Crop Constitutes “Property Damage.”

The CGL policy covers damages for which Farm Bureau’s insured becomes liable because of “bodily injury” or “property damage.” (A. App. 2.) The CGL policy’s definition of “property damage” is “[p]hysical injury to tangible property, including all resulting loss of use of that property.” (A. App. 14.) It is undisputed that the Ptaceks’ corn crop was tangible property.⁵ *See St. Paul Fire & Marine v. Nat’l Computer*, 490 N.W.2d 626, 631 (Minn. Ct. App. 1992) (defining “tangible” as “discernible by the

⁵ Counsel for Farm Bureau conceded that corn crops are tangible property at the summary judgment hearing held on January 13, 2011. (R. App. 6-8.)

touch”). In the underlying Complaint, the Ptaceks allege Earthsoils’ nitrogen-deficient fertilizer caused their corn crop to be less than half as productive as it would have been had the fertilizer contained sufficient nitrogen. (A. App. 17-18 ¶ 10.) A reasonable inference from this allegation is that the fertilizer *physically injured* the corn crop causing the crop to grow half as well as it would have had it received sufficient nitrogen.

Evidence developed in the underlying case confirms the corn crop suffered “physical injury.” McCornack and Earthsoils do not dispute the crop was physically injured. The crops looked so distressed, with large swaths of dry brown and yellowing foliage, that Earthsoils’ owner McCornack was surprised there were any ears of corn in the field at all. (A. App. 40-43, Lavern Ptacek Dep. 156:7-8, 176:24-177:5; A. App. 45, McCornack Dep. 39:4-13; R. App. 1, McCornack Dep. 73:2-15; R. App. 2, Jeffrey Ptacek Dep. 45:4-46:2; R. App. 3-5.) According to McCornack, the crops appeared to be “starving to death.” (A. App. 45, McCornack Dep. 39:9-10.)

As the trial court found, “[t]he physical injury [to the corn crop] was manifested in visibly poor plant developing (yellowing) and resulted in decreased yields.” (A. Add. 7.) A laboratory analysis of tissue samples collected by consulting agronomist Jon Koster reflected that the Ptaceks’ corn plants contained less than half the normal content of nitrogen. (R. App. 3-5.) Farm Bureau cannot ignore evidence simply because it was not expressly set forth in the Ptaceks’ Complaint. *Crum*, 119 N.W.2d at 708-12; *Johnson*, 287 N.W.2d at 665; *Garvis*, 497 N.W.2d at 258.

The Ptaceks alleged in their Complaint that the lack of nitrogen stunted the corn's reproductive capacity, causing it to produce half as much corn as it would have produced if it had not suffered from nitrogen deficiency. (A. App. 17-18 ¶¶ 10-12.) The Ptaceks therefore have alleged that their financial losses from decreased crop yield flowed directly from physical injury to their corn crop, i.e., "property damage." The trial court therefore did not err in finding that Farm Bureau has a duty to defend as a matter of law.

2. Farm Bureau's Case Law Supports a Finding of "Property Damage."

Farm Bureau cites a number of cases supporting the conclusion that the Ptaceks' loss is because of "property damage" as defined by the CGL policy. For example, in *Western Heritage Insurance Co. v. Green*, 54 P.3d 948 (Idaho 2002), potato farmers contracted with the insured for the purchase and application of fertilizer and weed control to their farmland. *Id.* at 949-50. The insured improperly applied the product, skipping some areas of the field and spraying insufficient quantities on others. *Id.* at 950. As the potatoes grew, so did strips of weeds. *Id.* The weeds grew large, causing the potato foliage to yellow and die. *Id.* When the affected potato plants were pulled, it discovered they had poor root systems. *Id.* As a result, fewer potatoes were harvested, and many were damaged and unmarketable. *Id.* The Idaho Supreme Court found that the misapplication of fertilizer and weed control caused physical injury to tangible property, resulting in economic loss in the form of decreased yield and unmarketable potatoes. *Id.* at 836.

The facts in the Ptaceks' underlying lawsuit are very similar. The Ptaceks allege that Earthsoils recommended application of insufficient quantities of nitrogen-poor fertilizer to their cornfield. (A. App. 16-17, ¶¶ 3-7.) As the corn crop grew, its foliage turned dry brown and yellow, appearing as though it was "staving to death." (A. App. 40-43, Lavern Ptacek Dep. 156:7-8, 176:24-177:5; A. App. 45, McCornack Dep. 39:4-13; R. App. 1, McCornack Dep. 73:2-15; R. App. 2, Jeffrey Ptacek Dep. 45:4-46:2.) When the affected crops were tested, they were found to contain less than half the normal content of nitrogen. (R. App. 3-5.) The Ptaceks allege that the nitrogen deficiency stunted the productive capacity of the corn, resulting in economic loss in the form of decreased crop yield. (A. App. 17-18 ¶¶ 10, 12.) Just as the misapplication of product in *Western Heritage* resulted in physical injury (yellow and dying foliage, poor root system) to tangible property (potato plants), the application of Earthsoils' nitrogen-deficient fertilizer resulted in physical injury ("half dead" dry brown and yellow foliage, nitrogen deficiency) to tangible property (corn crop). The Ptaceks have therefore alleged "property damage" to their corn crop.

In *Madison Farmers Mill & Elevator Co. v. Mutual Service Casualty Insurance Co.*, No. C9-88-1620, 1989 Minn. App. LEXIS 106 (Minn. Ct. App. Feb. 7, 1989),⁶ also cited by Farm Bureau, Madison changed the composition of its pheasant feed, allegedly causing pheasants to produce fewer eggs. *Id.* at *1. Madison was then sued for damages

⁶ This unpublished opinion of the Minnesota Court of Appeals is contained in Appellant's Appendix at A. App. 118-119.

relating to the decreased egg production. *Id.* at *1-2. The complaint did not directly allege any physical injury to the pheasants, but an expert testified that the decreased egg production could have been the result of damage to the bird's reproductive system. *Id.* at *3. The court found that this physical damage to the bird's reproductive system would constitute "property damage." *Id.* at *4. As in *Madison Farmers*, the Ptaceks' Complaint did not directly allege any physical injury to their corn crops, but facts developed during discovery show that the Ptaceks' corn crop suffered physical injury in that it was unhealthy due to nitrogen deficiency, stunting its productive capacity. Just as in *Madison Farmers*, the physical injury to the Ptaceks' corn crop constitutes "property damage."

Finally, in *Auto Owners Insurance Company v. Harrell's Fertilizer, Inc.*, No. 4:05-cv-39, 2006 U.S. Dist. LEXIS 3021 (E.D. Tenn. Jan. 20, 2006),⁷ the insured sold a nursery some fertilizer that allegedly damaged, stunted the growth of, or destroyed the nursery's plants. *Id.* at *3. The court held, "Upon a review of the allegations of the complaint in the underlying lawsuit, it is clear that they raise claims of property damage to the plants." *Id.* at *10. As in *Harrell's Fertilizer*, the Ptaceks claim in their underlying suit that Earthsoils recommended and sold them fertilizer that damaged and stunted the productive capacity of their corn crop. It is equally clear that the Ptaceks raise claims of

⁷ This unpublished case is contained in Appellant's Appendix at A. App. 123-126.

“property damage” to their crop. The trial court therefore did not err in holding that the Ptaceks have alleged “property damage.”⁸

B. Farm Bureau’s Policy Exclusion m. Does Not Apply.

Farm Bureau argues in its brief at pp. 29-32 that its policy “exclusion m.” may apply. Exclusion m. only applies to two categories: (1) “property damage” to “impaired property;” and (2) property that has not been physically injured. (A. App. 5.) Farm Bureau does not dispute that the damage here was not “impaired property.” (App. Br. 27.)⁹ Farm Bureau’s argument is instead premised on the assumption that the Ptaceks’ property was not physically injured. (*Id.*) As explained above, the Ptaceks’ corn crop was physically injured. Exclusion m. therefore does not apply.

III. Farm Bureau’s CGL Policy Imposes A Duty To Indemnify.

The trial court did not err in finding as a matter of law that Farm Bureau has a duty to indemnify Earthsoils in the event the Ptaceks prevail in their underlying lawsuit. The insured bears the initial burden of proving an insurer’s duty to indemnify. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995) (insured suing insurer for indemnity must initially demonstrate prima facie case of coverage). “[T]o establish a duty to indemnify, the insured must prove that all claims alleged in the complaint fall within the policy coverage.” *Reinsurance Ass’n of Minn. v. Timmer*, 641 N.W.2d 302, 308 (Minn. Ct. App. 2002). “[I]f any one of the claims alleged in the complaint falls

⁸ Because the Ptaceks’ claims involve physical damage to tangible property, the Ptaceks will not address Farm Bureau’s arguments in connection with “loss of use.”

⁹ Appellant’s brief will be cited as “App. Br.”.

outside of the policy coverage, the question of the duty to indemnify is not ripe and the district court's judgment must be deferred until the decision in the underlying action is final.” *Id.* If the insured is successful in showing a prima facie case of coverage, the burden shifts to the insurer to prove the applicability of a policy exclusion. *SCSC Corp.*, 536 N.W.2d at 313.

Earthsoils can prove a prima facie case of coverage as to each of the Ptaceks’ claims. In *Madison Farmers*, the pheasant feed case discussed above, the trial court held that the insurer had a duty to indemnify its insured if the pheasant farmer prevailed on his claims. 1989 Minn. App. LEXIS 106 at *4. This court agreed, finding that to show causation and damages on his claims, the pheasant farmer would have to show physical damage to the pheasants, and that if physical damage was shown, no policy exclusion applied. *Id.* Similarly, the Ptaceks must show physical damage to their corn in order to prove causation and damages for their claims. All of the Ptaceks’ claims are premised on the allegation that Earthsoils recommended and provided nitrogen-poor fertilizer which damaged the Ptaceks’ corn crop, ultimately resulting in substantial lost profits. If the Ptaceks prove damages for any one of their claims, it will be, in part, because they showed that their lost profits were caused by “property damage,” as defined by Farm Bureau’s policy. As a result, whatever sums Earthsoils becomes liable to pay are because of “property damage.” Earthsoils therefore has a prima facie case of coverage for each of the Ptaceks’ claims.

Because Earthsoils has a prima facie case of coverage, Farm Bureau must prove the applicability of a policy exclusion. *SCSC Corp.*, 536 N.W.2d at 313. Farm Bureau argues that all of the Ptaceks' claims against Earthsoils are "arguably not indemnifiable," but has failed to identify a single applicable exclusion to any one of the Ptaceks' claims. (App. Br. 34.) The only policy exclusion Farm Bureau has pointed to, either to the trial court or in this appeal, is exclusion m. (App. Br. 26-32; A. App. 55-56.) As shown above, policy exclusion m. does not apply. Farm Bureau therefore has not satisfied its burden of proving the applicability of a policy exclusion. The trial court did not err by ruling that Farm Bureau has a duty to indemnify Earthsoils in the event the Ptaceks prevail on their claims.

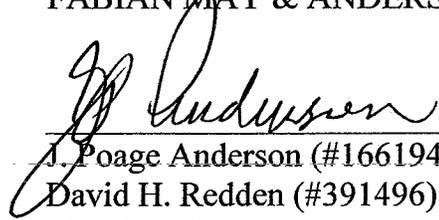
CONCLUSION

The trial court did not err in its application of insurance law. All of the Ptaceks' claimed damages flow from alleged "property damage" covered by Farm Bureau's policy. Farm Bureau cannot identify a single policy exclusion applicable to the Ptaceks' claims. Farm Bureau therefore has a duty to defend Earthsoils in the underlying case, and has a duty to indemnify Earthsoils should the Ptaceks prevail on their claims. Respondents Lavern and Jeffrey Ptacek respectfully request the Court affirm the trial court's decision.

Respectfully submitted,

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Dated: 10/25/11



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