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Case Nos. A10-1596 & A10-2135

State of Minnesota
Supreme Court

Oluf Johnson and Debra Johnson,

Respondents,

vs.

Paynesville Farmers Union Cooperative Oil Company,

Appellant.

APPELLANT'S BRIEF 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 LEGAL ISSUES

I. Did Respondents Oluf and Debra Johnson fail to establish a *prima facie* case for damages under their negligence per se and nuisance claims?

The trial court answered this question in the affirmative upon Petitioner's Motion for Summary Judgment and dismissed the negligence per se and nuisance claims as a matter of law. Add-1. The Court of Appeals reversed. App-49.

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

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

Minn. Stat. § 561.01

7 C.F.R. §§ 205.202, 205.671

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

II. Is the Johnsons' claim for trespass by particulate chemical pesticide matter an actionable claim?

The trial court answered this question in the negative upon Petitioner's Motion for Summary Judgment and dismissed the trespass claim as a matter of law. Add-1. The Court of Appeals reversed. App-49.

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

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

Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215 (Mich. Ct. App. 1999)

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

The trial court dismissed the Johnsons' claim for permanent injunctive relief as a matter of law in conjunction with Petitioner's Application for Costs and Disbursements. Add-23. The Court of Appeals reversed. App-49.

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

Randall v. Village of Excelsior, 103 N.W.2d 131 (Minn. 1960)

Bio-Line, Inc. v. Burman, 404 N.W.2d 318 (Minn. Ct. App. 1987)

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

The trial court denied the Johnsons' request for leave to amend their Complaint to add claims relating to allegations of damage in 2008 because such claims were "futile". The Johnsons' request was made in conjunction with their opposition to Respondent's Motion for Summary Judgment. Add-2. The Court of Appeals reversed. App-49.

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

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

STATEMENT OF THE CASE

The claims on appeal involve allegations by Respondents Oluf and Debra Johnson (hereafter the “Johnsons”) that Petitioner Paynesville Farmers Union Cooperative Oil Company (hereafter “Petitioner” or “Paynesville Co-op”) caused chemical pesticides to drift onto fields which the Johnsons were using, or intended to use, in the production of organic crops in the growing season of 2007. Paynesville Co-op seeks the following action by this Court:

- Reversal of the Court of Appeals’ decision that the Johnsons’ have set forth enough evidence of damages for their private nuisance and negligence per se claims to survive summary judgment, or, in the alternative, reversing that part of the Court of Appeals’ decision which recognized that the Johnsons suffered losses under the National Organic Program (“NOP”) regulations and affirming only the determination that damages may be recovered for crops lost in 2007 in the small portion of the Johnsons’ field which was ordered by the Minnesota Department of Agriculture to be plowed under¹;
- Reversal of the Court of Appeals’ decision that the drift of pesticides in particulate form may constitute an actionable trespass claim, or, in the alternative, a finding that the Johnsons have not presented sufficient evidence

¹ As discussed, *infra*, a question of material fact may exist as to whether a single harvest from a small portion of the Johnsons’ soybean field at issue was damaged when it was ordered to be destroyed by state authorities. Paynesville Co-op’s position remains that claims for damages beyond the loss of this minimal amount of crops have no evidentiary support – especially those claims which are based on de-certification of organic fields pursuant to the NOP regulations.

to establish a *prima facie* case of substantial damage under a claim of trespass by particulate matter;

- Reversal of the Court of Appeals' decision allowing the Johnsons to amend their complaint to add claims for damages relating to events other than those alleged in the original Complaint; and
- Reversal of the Court of Appeals' decision allowing the Johnsons to move forward with their claim for permanent injunctive relief.

The Stearns County District Court, Honorable Kris Davick-Halfen presiding, dismissed the entirety of the Johnsons' claims for damages on summary judgment², and also dismissed their claims for injunctive relief and denied their request to amend the Complaint to add allegations relating to events in the 2008 growing season. The determination which served as the primary basis for the district court's dismissal of the claims for damages was the court's finding that, even if the allegations were true, the Johnsons provided no evidence that the crops on their organic fields were subjected to a concentration of pesticides which would have disqualified those crops from being sold as "organic" under the applicable federal regulations. The district court also dismissed the trespass cause of action based on case law declaring that Minnesota does not recognize claims for trespass by particulate matter.

² The district court Order also dismissed as a matter of law: (1) Oluf Johnson's claims for personal injury from alleged exposure to pesticides sprayed by Paynesville Co-op for lack of any medical evidence of injury and (2) the Johnsons' claim for spray drift damages on one instance in 2005 for violation of the applicable statute of limitations. Neither of these decisions was appealed by the Johnsons at the Court of Appeals level.

As the logical subsequent step to dismissing the claims for damages, the district court then properly dismissed the Johnsons' claims for permanent injunctive relief and vacated a temporary injunction which had been ordered at the outset of litigation. Finally, the district court determined that because the purported evidence of new claims relating to events in 2008 was similar to what had been used in the Johnsons' attempt to prove the 2007 claims, it would be futile to allow the Johnsons to amend their Complaint by adding claims for damages relating to the 2008 events.

The Court of Appeals erred when it reversed each of the above determinations by the district court. The Court of Appeals inexplicably switched the primary focus of this matter to the question of whether Minnesota should allow a claim of trespass by the drift of pesticides in particulate form. In answering this question in the affirmative, the Court of Appeals retreated from the principles set out in *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003), *review denied* (Minn. Aug. 5, 2003) and created a division in this State's common law as to whether claims for trespass by particulate matter are recognized.

The Court of Appeals then reversed the district court's finding that no proof of damages existed, and in doing so rendered ineffectual a vital part of the federal regulations which outline an acceptable tolerance level for certain chemicals in organic crops and allow organic and traditional farms to co-exist in close proximity. The Court of Appeals' decision instead placed a surplus of power in the discretion of private organic certifying agents who are charged with oversight of organic farming operations, and rendered disputes between organic and traditional farmers much more likely.

As a by-product of its allowance of the claims for damages to survive the summary judgment stage, the Court of Appeals reversed the trial court's denial of the Johnsons' request to amend their Complaint to add new claims. The Court of Appeals also held that the district court erred in denying the claim for permanent injunctive relief, but notably did not proclaim that the vacation of the temporary injunction should be reversed. This appeal follows.

STATEMENT OF FACTS

A. Paynesville Co-op's Background

Petitioner Paynesville Co-op is a member owned farm product and services provider to dozens of farmers operating in the general vicinity of the Johnsons' farm fields in Stearns, Meeker and Kandiyohi Counties. Paynesville Co-op annually sprays pesticides on 35,000 to 45,000 acres of farmland in its region; including fields adjacent to the Johnsons' organic fields. SR-1. Between mid-April and mid-September each year, Paynesville Co-op's six full-time, certified applicators typically spray customers' fields five to seven days per week. SR-1. Paynesville Co-op's spray services are vital to the health of its customers' crops and the profitability of dozens of family farms in the area.

B. Paynesville Co-op's Pesticide Spraying Practices

When spraying pesticides near organic or other sensitive crops – including the Johnsons' crops – Paynesville Co-op takes extra precautions to avoid drift of its chemicals. The following facts are taken from unrebutted testimony of Paynesville Co-op employees and were presented to the trial court in Paynesville Co-op's Memorandum of Law in Opposition to Plaintiffs' Motion to Amend Complaint. Paynesville Co-op's

Memorandum of Law in Opposition to Plaintiffs' Motion to Amend Complaint, pp. 13-15. Paynesville Co-op has used custom Case IH® spray applicators since about 2003 and 2004. SR-6. The Case applicators are outfitted with after-market AIM Command® systems which give Paynesville Co-op's applicators the ability to control the size of the droplets of pesticides and ensure they are large enough to avoid drift. SR-7. SR-13. A computer on the applicator controls the pressure and rate of application of the pesticides. SR-7. A Paynesville Co-op applicator, Christopher Platow, testified he routinely sprays larger droplets on borders of fields or near susceptible crops. SR-7. Because the larger droplets are less likely to drift, this practice is meant to prevent spray drift. SR-7. Mr. Platow also listens to a weather radio channel while operating the applicators. SR-8. He stops the application if the weather changes to unfavorable conditions. SR-8.

Another Paynesville Co-op applicator, Shawn Hoppe, testified that all applicators are outfitted with handheld wind meters to measure the wind speed and direction at specific application sites. SR-15. Mr. Hoppe testified that Paynesville Co-op uses multiple products as additives to the pesticides which serve as drift retardants. SR-15. Like Mr. Platow, Mr. Hoppe also uses larger droplet sizes in an effort to avoid pesticide drift. SR-15.

More specific to this case, Paynesville Co-op's employees take extra precautions to avoid spray drift when applying product near the Johnsons' organic fields. SR-16. Paynesville Co-op's agronomist, John Vander Beek, notifies his employees of the proximity to the Johnsons' fields when giving spray instructions to them. SR-16. Each spring, Paynesville Co-op's manager, Paul Evans, presents and discusses with his

applicators the maps provided by the Johnsons showing the location of their organic fields. SR-9. When applying near the Johnsons' fields, both Mr. Hoppe and Mr. Platow lower their spray booms further than normal to decrease the chance of pesticide drift. SR-10. SR-16.

As a result of the efforts to reduce or eliminate the possibility of spray drift, Paynesville Co-op has received no complaints of spray drift from any area organic farmers except the Johnsons. SR-12, 19. Further, despite the fact that Paynesville Co-op services approximately 200 active farmers in the Paynesville area each year, it has received just *one* complaint of spray drift from area conventional farmers in the past decade or more. SR-12.

C. Incident at Issue

The Johnsons allege that on June 15, 2007, Paynesville Co-op applied the herbicide Status® to a field adjacent to their soybeans growing in a field referred to as "Field 1." App-4. Status® has two active ingredients; dicamba and diflufenzopyr. SR-20. The Johnsons allege that the herbicide drifted during application and contaminated their soybeans. The Johnsons themselves did not test samples of the crops onto which the drifted pesticide allegedly came to rest. SR-30.

Mr. Hoppe was the Paynesville Co-op applicator who made the pesticide application which is the basis of the claims for damage on June 15, 2007. SR-17. Mr. Hoppe used two products when applying pesticides that day which serve as drift retardants; Weather Gard and Compadre. SR-16-17. Mr. Hoppe also lowered the boom height on his applicator on the date in question. SR-16.

At the Johnsons' request, the Minnesota Department of Agriculture ("MDA") investigated the incident and tested four vegetation samples from the Johnsons' soybeans in Field 1³ for both of the active ingredients in Status®, diflufenzopyr and dicamba.⁴ SR-38-42. Of these four tests, *none* detected diflufenzopyr. SR-38-41. Only two of the four samples contained any trace of dicamba; and both of those tests revealed that the chemical was "[p]resent but below detection limit."⁵ SR-38, SR-40.

The MDA's findings with respect to the June 15, 2007 incident provided, "it can not be proven if the detections [of dicamba] were from drift or volatilization following the application." SR-43. The MDA reached its conclusion based on the fact that only one of the two active ingredients of Status® (dicamba) was present in the samples taken from the Johnsons' field. SR-43. Volatilization is a process far different from drift. SR-45. Simply put, volatilization describes the process by which a chemical which has been applied to – and sits as a residue on – the targeted crops vaporizes and gets carried through the air; not as a spray or liquid particles, but instead simply as a gaseous

³ In 2007, the southern portion of Field 1 was planted with soybeans and the northern half was planted with corn. SR-32-33.

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

⁵ The definition of this term was provided by a research scientist with the MDA and is in the record in this case: "The detection level is a value that we have set because we have to estimate the minimum amount of a specific chemical we expect the instrumentation to detect for the various kinds of crops that are being tested. The detection level is not an absolute. Thus, as in this case, Dicamba is found to be present but below the laboratory estimated detection level for this chemical using the confirmation criteria. This means that the confirmation criteria meets or exceeds the acceptable protocol for regulatory samples." SR-35.

substance that has evaporated into the air. SR-45. In other words, if the Status® product applied by Paynesville Co-op to fields adjacent to the Johnsons' soybeans had drifted in the wind before coming to rest on the soybeans, both chemicals would have been found in the MDA's soybean samples because both chemicals would have still been present in the liquid particles which drifted. SR-45. To the contrary, volatilization of just one chemical among several is possible and would explain how dicamba could have evaporated off of the lands neighboring the Johnsons' and traveled through the air while diflufenzopyr did not. SR-45.

In his deposition, Oluf Johnson admitted he did not observe the alleged overspray incident in 2007. SR-32. Mr. Johnson first alleged awareness of a possible issue on June 25, 2007; ten days after the alleged spray drift occurred. SR-31-32. On that date, while cultivating the soybeans, Mr. Johnson alleges to have noticed that "part of the field was puckered and cupped." SR-31. The residue testing described above was conducted on June 27, 2007. SR-38-42. Mr. Johnson agreed that the Minnesota Department of Agriculture confirmed to him in a letter the extent to which he was to remedy the alleged damage; that is, Mr. Johnson was to plow under a 175-foot-wide strip of soybeans, including the damaged beans and a 25-foot buffer zone "to make sure that all soybeans that were physically damaged would not be harvested." SR-32, SR-47-48. The Johnsons' damage allegations here include the loss of the harvest from this "small area" of their field. SR-47. The area to be plowed is drawn on a map created by the MDA.⁶

⁶ Although the map does not provide dimensions of the length of the plowed strip, the scale shown on the map allows an estimate that the strip is 2,500 feet long by the

SR-48. The Johnsons harvested the remainder of the crops in Field 1 in 2007 which were located outside the small strip which was plowed under. SR-32.

Despite the allegation of visual damage to the Johnsons' soybeans, according to Paynesville Co-op's agronomy expert witness, in the absence of residue testing it may not be possible to establish whether alleged crop damage is due to pesticide drift or other non-herbicide factors. SR-45. This expert opinion was un rebutted, as the Johnsons did not present any expert opinions on causation at the trial court level.

In addition to the loss of crops in the "small part" of Field 1 alleged to have been visually damaged, the Johnsons in this lawsuit claim that the entirety of Field 1 was affected by the incident of June 15, 2007. For instance, they claim that the corn in the northern half of Field 1 was affected on June 15, 2007 – despite the fact that the MDA refused to take any vegetation samples from the corn in Field 1 upon the Johnsons' request that it be tested. SR-33. Utilizing a flawed interpretation of NOP regulations, the Johnsons claim that Field 1 needed to be taken out of organic production for three years following June 15, 2007. Appellants' Brief in Court of Appeals, p. 14. They

indicated width of 175 feet. Because a 25-foot buffer zone is required to encircle all organic crops, pursuant to NOP regulations, the plowed strip would include an area of about 2,500 feet by 150 feet which constituted organic crops and the buffer zone of about 2,500 feet by 25 feet which constituted traditional, non-organic crops. Based on these dimensions, the size of the soybean patch which was ordered plowed under can be estimated at about ten (10) acres. The entirety of the Johnsons' field at issue, Field 1, consists of 93 total acres. SR-51. The fact that just 10 of the 93 acres of Field 1 were even potentially affected by the June 15, 2007 incident disproves the Johnsons' earlier assertions that the plowed strip of soybeans covered "most" of the width of the soybean field as a whole. Appellants' Brief in Court of Appeals, p. 11. This footnote is provided simply to provide the Court with perspective regarding the extent of potential alleged damages, and is not provided to argue that the exact dimensions of the plowed strip of soybeans have or should have been established by the trial court.

further allege that their private certifying agent, OCIA, required such a response. Appellants' Brief in Court of Appeals, p. 14. The Johnsons chose not to appeal the OCIA's determination that the entirety of Field 1 be taken out of organic production following the June 15, 2007 incident. SR-33. The Johnsons chose to forego a remedy provided in the NOP regulations which would have allowed them to challenge the determination of OCIA; a determination which, as discussed *infra*, is contrary to the NOP regulations and placed more severe burdens on the Johnsons than required by law.

D. Non-Monetary Damage Allegations

At the Court of Appeals level, the Johnsons attempted an argument that non-monetary losses exist which may support their private nuisance claim. Appellants' Brief in Court of Appeals, pp. 30-32. The Johnsons contend that their enjoyment of the property has been negatively affected because Oluf Johnson feels detrimental physical effects when exposed to Paynesville Co-op's pesticides. Appellants' Brief in Court of Appeals, p. 31. A careful review of the record in this case regarding physical symptoms of pesticide exposure reveals that *no* evidence exists of such complaints by Oluf Johnson with respect to the one incident relating to the claim of nuisance now on appeal; the alleged spray drift on June 15, 2007. There is no evidence in the form of medical records, testimony of a medical expert or otherwise to support such an allegation.

E. 2008 Damage Allegations

Because they relate to the Johnsons' request to amend their Complaint, the alleged spray drift incidents on July 3, 2008 and August 1, 2008 must be summarized. As with the 2007 events, the Johnsons requested the investigation by the MDA into the 2008

allegations. This was requested despite the MDA's eventual finding that *no* visual damage was seen as part of its investigation into the 2008 events. SR-62. As with the 2007 events, the investigation revealed very minor consequences. In addition to the note by the MDA of *no* visual damage to the Johnsons' crops, the MDA also stated that any pesticide drift was "minimal and was limited to a small part of the alfalfa field and not the entire field." SR-62, 64. Furthermore, the active ingredient in the pesticide related to the July 3, 2008 allegations was only detected in *one* of the four samples taken by the MDA. SR-61, 62. The active ingredient in the pesticide related to the August 1, 2008 allegations was only detected in *two* of the five samples taken; and at levels below the minimum detection limit. SR-63, 64.

F. The Johnsons' Organic Certifying Agent

Throughout this litigation, the Johnsons allege that they place much reliance on their certifying agent, OCIA, to determine the impact of spray drift on organic crops and the need to de-certify certain fields following alleged spray drift incidents. Because the OCIA's alleged instructions to the Johnsons to de-certify entire fields for three years following each incident were contrary to the requirements of the federal NOP regulations, and because the instructions from OCIA placed much more severe hardship on the Johnsons than what was required by law, the Johnsons' true controversy regarding these matters should be with the OCIA; not Paynesville Co-op. The Johnsons have chosen not to appeal any OCIA decisions, despite the fact that such a process is outlined in the NOP regulations at 7 C.F.R. § 205.681. SR-33.

ARGUMENT

I. THE JOHNSONS DID NOT ESTABLISH A PRIMA FACIE CASE FOR DAMAGES.

A. This Court Reviews *De Novo* the Trial Court's Summary Judgment Order.

The trial court in this matter entered judgment on the issue of damages pursuant to Minn. R. Civ. P. 56.⁷ When reviewing the dismissal of claims pursuant to Minn. R. Civ. P. 56, this Court reviews *de novo* “whether a genuine issue of material fact exists” and “whether the district court erred in its application of the law.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

“[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). “[T]he party resisting summary judgment must do more than rest on mere averments.” *Id.* No genuine issue for trial exists “[w]here the

⁷ The trespass issue was also decided on summary judgment, requiring *de novo* review. This discussion of the review standard also applies to the forthcoming trespass argument.

record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *Id.* at 69 (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). “[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *Id.* at 71. The nonmoving party “may not rely on the possibility that he will be able to develop evidence at trial, but must present specific admissible facts showing a material fact issue.” *O’Neil v. Kelly*, 239 N.W.2d 231, 232 (Minn. 1976); *see also North States Power Co. v. Minnesota Metro Council*, 684 N.W.2d 485, 491 (Minn. 2004).

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

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

“Negligence per se is a form of ordinary negligence that results from violation of a statute.” *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981). The elements of a claim for negligence are: “(1) the existence of a duty of care, (2) a breach of that duty, (3)

an injury, and (4) the breach of the duty being the proximate cause of the injury.”

Gradjelic, 646 N.W.2d at 234 (citation omitted). “A per se negligence rule substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute . . . is conclusive evidence of duty and breach.” *Id.* at 231 n.3.

Both the nuisance and negligence per se claims require proof that some type of damages or harm occurred as a result of actions by Paynesville Co-op. “Summary judgment is proper if there is a ‘complete lack of proof on any of the essential elements’ of a negligence per se claim.” *Anderson v. State, Dept. of Natural Resources*, 693 N.W.2d 181, 189 (Minn. 2005) (citing *Gradjelic v. Hance*, 646 N.W.2d 225, 234 (Minn. 2002)). No such evidence of harm has been presented in this case, making summary judgment appropriate.

The question of whether Paynesville Co-op caused any interruption to the Johnsons’ organic farming practices requires interpretation of the NOP regulations which govern those practices. *See* Minn. Stat. § 31.925 (2010) (adopting the federal Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501–6523, and the associated federal regulations in NOP, 7 C.F.R. § 205, as the “organic food production law” of Minnesota). “Statutory construction is . . . a legal issue reviewed de novo.” *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007).

This Court has stated, “When construing a statute, our goal is to ascertain and effectuate the intention of the legislature.” *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). When a statute is free of ambiguity, courts are to look only at its plain language. *Tuma v. Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706

(Minn. 1986). “If the meaning of statutory language is not plain, courts resolve ambiguity by looking to legislative intent, agency interpretation, and principles of continuity which include consistency with laws on the same or similar subjects.”

Occhino v. Grover, 640 N.W.2d 357, 360 (Minn. Ct. App. 2002)(citation omitted). When reviewing a statute, courts are to assume that the legislature does not intend absurd or unreasonable results. *Schroedl*, 616 N.W.2d at 278.

“A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Id.* at 277 (quotation and citation omitted). When the language of the statute is ambiguous, the intent of the legislature controls. Minn. Stat. § 645.16. “A statute should be interpreted, whenever possible, to give effect to all of its provisions; ‘no word, phrase, or sentence should be deemed superfluous, void, or insignificant.’” *Schroedl*, 616 N.W.2d at 277 (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)).

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

The parties here do not dispute that the NOP regulations, codified at 7 C.F.R. § 205, govern the Johnsons’ abilities to sell organic crops and obtain/retain organic certification on their fields. The primary dispute between the parties in this case relates to the statutory interpretation of the relevant NOP regulations. As will be discussed *infra*, both the plain language of the NOP regulations and – if such regulations are found to be ambiguous – the comments to the NOP rules favor the statutory interpretation presented by Paynesville Co-op and adopted by the District Court .

The two most relevant NOP regulations to this lawsuit are:

- 7 C.F.R. § 205.671 (defining the acceptable tolerance levels for prohibited substances in crops which are marketed as organic); and
- 7 C.F.R. § 205.202 (setting forth the general requirements for obtaining organic certification, including the prohibition on an organic farmer's use of certain substances).

Section 205.671 states, in its entirety, "When residue testing detects prohibited substances at levels that are greater than 5 percent of the Environmental Protection Agency's tolerance for the specific residue detected or unavoidable residual environmental contamination, the agricultural product must not be sold, labeled, or represented as organically produced." 7 C.F.R. § 205.671 (attached at Add-28)(the "5% Rule").

Section 205.202 states, in its entirety,

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 3 years immediately preceding harvest of the crop; 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.

7 C.F.R. § 205.202 (attached at Add-29). No case law exists in the United States which either analyzes or further defines the language of 7 C.F.R. § 205.202 or 7 C.F.R. § 205.671.⁸ As discussed in greater detail, below, the Court of Appeals’ analysis of the NOP regulations left section 205.671 with no purpose, and is thus an erroneous interpretation of the law.

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

In 2008, this Court stated, “In statutory construction, we interpret statutory provisions in light of each other in order to avoid conflicting interpretations.” *Clark v. Pawlenty*, 755 N.W.2d 293, 305 (Minn. 2008). In this case, the only way to read NOP sections 205.202(b) and 205.671 consistently is to interpret section 205.202(b) as only referring to applications of a prohibited substance by the organic farmer him- or herself. In other words, where section 205.202(b) requires an organic field to have had no prohibited substances “applied to it” in the three years before harvest of a crop, the phrase “applied to it” only refers to the actions by the organic farmer of making an intentional application of prohibited substances to the field.

The Court of Appeals’ – and the Johnsons’ – erroneous interpretation of the NOP regulations would require a farmer to decertify a field from organic production in the

⁸ A Westlaw search of all state and federal cases in the United States containing a citation to 7 C.F.R. § 205.202 renders just one result; the unpublished case of *Hickerson v. New Jersey*, 2009 WL 3296529 (D.N.J. 2009) (unpublished decision at SR-66) (raising a question of whether the plaintiff’s requisite buffer zones were adequate under Section 205.202(c)). A Westlaw search for cases which cite to Section 205.671 returns no results.

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

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

Paynesville Co-op's interpretation of section 205.202(b) is the only way to avoid conflicting interpretations within the NOP regulations. If accidental contamination of

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

To summarize, section 205.202(b) only requires decertification of an organic field for three years where the organic farmer him- or herself applies prohibited substances to the organic field in question. Section 205.671 provides tolerance levels for prohibited substances in organic crops when a party other than the organic farmer causes such substances to come into contact with crops intended to be sold as organic. However, even if this Court determines that the language of Section 205.202(b) is ambiguous, the published comments to the final NOP rule establish that Paynesville Co-op's interpretation of the relevant NOP regulations is correct.

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

The Johnsons have previously argued that Paynesville Co-op's interpretation of the NOP regulations is incorrect because it misinterprets the phrase "applied to it" in 7 C.F.R. § 205.202(b). Paynesville Co-op maintains that the Johnsons' interpretation

cannot be adopted because it renders the 5% Rule meaningless. But, because Paynesville Co-op's interpretation of the NOP regulations as discussed in the previous section is reasonable, the Johnsons' position at best merely highlights an ambiguity in the statute regarding the definition of the word "applied." The question is whether the term refers to application by any means, including accidental drift, or if it refers only to intentional application by the organic farmer.

Recall that if a statute is ambiguous, Minnesota law requires an investigation into the intention of the drafters of a statute to ensure that it is applied consistent with the drafters' objectives. The final NOP rules and prefatory comments are published at 65 Fed. Reg. 80,548 (December 21, 2000). Multiple excerpts from those comments support Paynesville Co-op's interpretation of the applicable NOP regulations in this case. The relevant comments to the NOP rules and Paynesville Co-op's discussion of those comments follow.

The trial court relied most on the following comment to the NOP regulations, which specifically discusses the fact that the presence of detectable pesticide residue alone does not necessarily constitute a violation of the NOP regulations. The Court of Appeals also recognized that this comment supports Paynesville Co-op's arguments. *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 802 N.W.2d 383, 390 (Minn. Ct. App. 2011), review granted (Oct. 18, 2011).

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

increases, so does the potential for conflict between organic and nonorganic operations.

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

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

National Organic Program, 65 Fed. Reg. 80,548, 80,556 (Dec. 21, 2000) (emphasis added)(attached at Add-31-32). The statements in the above commentary most relevant to the instant matter are:

- that the standards for organic farming are process based;
- that it has always been the organic farmers' responsibility to manage potential contact with excluded substances, including those emanating from neighboring farms;
- the recognition by the NOP drafters that even when the prescribed practices are followed, unintentional contact with excluded products can occur; and

- the stated intent of the NOP drafters that the **unintentional presence** of excluded substances should not affect a grower's organic certification.

This comment clearly negates the position taken by the Johnsons that "any" amount of detectable residue on one of their organic fields constitutes a violation of the NOP regulations and requires the entire field to be placed into transition for three years, thus causing business interruption losses far beyond the immediate growing season. Instead, according to the NOP drafters, the accidental presence in the Johnsons' field in 2007 of the chemical dicamba at levels "present but below" detection levels "should **not** affect the status" of the Johnsons' organic operations.

The following excerpt is an expansion of the comment identified by the Court of Appeals in this matter as "more specific commentary" which it contends negates Paynesville Co-op's position. But Paynesville Co-op suggests that the Court of Appeals took the following commentary out of context. The comment at issue relates to the interpretation of the NOP's "5% Rule" and discusses the loss of certification of an organic farm in the case of "intentional" application of prohibited substances, and states:

Detection of Prohibited Substances or Products Derived from Excluded Methods

In the case of residue testing and the detection of prohibited substances in or on agricultural products to be sold, labeled, or represented as "100 percent organic," "organic," or "made with . . ." products with detectable residues of prohibited substances that exceed 5 percent of the EPA tolerance for the specific residue or UREC cannot be sold or labeled as organically produced. When such an agricultural crop is in violation of these requirements, the certification of that crop will be suspended for the period that the crop is **in production**. Certifying agents must follow the requirements specified in sections 205.662 and 205.663 of subpart G, Compliance.

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

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

National Organic Program, 65 Fed. Reg. 80,548, 80,629-80,630 (Dec. 21, 2000)

(emphasis added; emphasized heading in original) (attached at Add-33-34). The Court of

Appeals in its opinion highlighted the same language italicized above. *Johnson*, 802 N.W.2d at 391. The Court of Appeals then used this language to dismiss Paynesville Co-op's arguments, stating that the Co-op was attempting to use the 5% Rule as an automatic qualifier for organic crops. *Id.* at 385 (holding that the 5% Rule "does not, by reverse implication, automatically authorize the sale of organically labeled produce that does not fail that five-percent test."). Such a holding is contrary to Paynesville Co-op's position. Paynesville Co-op only asserts that in the case of accidental or "unintentional" pesticide drift, where the organic farmer has otherwise fully complied with the NOP regulations, there is nothing preventing crops from being sold as fully organic if residue testing does not violate the 5% Rule.

The holding by the Court of Appeals also mischaracterizes the NOP commentary as a whole. The italicized language, above, is only referring to the situation where an organic farmer has not followed all requirements of the NOP regulations (i.e. the three-year certification period, the cessation of use of prohibited substances, etc.). The part of the above comment relied upon by the Court of Appeals is not addressing or guiding a situation involving accidental or unintentional pesticide drift. Paynesville Co-op agrees that residue testing revealing compliance with the 5% Rule is not an automatic qualifier of organic crops. In addition to complying with this tolerance level, the organic producer must also comply with all the other "process based" requirements stated in the NOP.

The balance of the above comment further clarifies three key intentions of the NOP which support Paynesville Co-op's arguments on damages in the instant matter:

- First, organic crops which are simply found to be in violation of the 5% Rule are only to be taken out of organic production for “the period that the crop is in production.” This means that once the suspect crop is harvested, the organic production may resume immediately on the same field. This interpretation by the NOP commenters is – once again – in stark contrast to the Johnsons’ position that such a violation would de-certify a field from organic production for three years.
- Second, the 5% Rule applies to *all* situations in which prohibited substances are detected on organic crops, which means that it is to be applied to incidents of accidental spray drift to determine whether the crops may still be sold as “organic”.
- Third, the above comment clarifies that when prohibited substances are detected on organic crops an investigation is prudent to determine the cause of the existence of such substances on the crop; but the penalty of suspension or revocation of an organic farmer’s certification is one which can result only where “*intentional* application of a prohibited substance or use of excluded methods” is found.

This comment therefore is entirely consistent with Paynesville Co-op’s interpretation of the NOP; i.e. that the three-year decertification process only applies where the organic farmer (e.g. the Johnsons) is found to have performed “intentional application” of the detected pesticides. There is no evidence of such action in this case.

The following comment further discusses the interrelationship between intentional application of pesticides by an organic farmer and the three-year decertification period. This comment was provided to the Court of Appeals in Paynesville Co-op's brief, but was not addressed in the appellate court's opinion. It provides further support for the notion that the Court of Appeals misconstrued the meaning of the comment cited previously:

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

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

National Organic Program, 65 Fed. Reg. 80,548, 80,634 (Dec. 21, 2000) (emphasis added) (attached at Add-36-37). This comment provides the intended framework for

conducting residue testing for prohibited substances. The comment clarifies more key principles of the NOP regulations.

- First, if a residue test detects a prohibited substance, no matter the cause, an investigation is warranted.
- Second, as discussed above, the 5% Rule in section 205.671 cannot be used to certify crops as organic where the organic farmer has intentionally made a direct application of a prohibited substance.
- Third, the above comment proves that the certified organic operation is only subject to revocation or suspension of its certification if the investigation reveals that “the detected prohibited substance is the result of an *intentional application.*”

This comment is consistent with Paynesville Co-op’s interpretation that the three-year decertification penalty is applicable only where the organic farmer is the one who made a direct and intentional application of prohibited substance to an organic field. In the case of intentional application by the organic grower of a pesticide, the grower cannot regain certification even if he/she conducts residue testing and shows that the 5% Rule has not been violated.

4. The Johnsons have not Presented any Evidence in Support of their Claim that the Actions of Paynesville Co-op Caused them to Violate the NOP Regulations and Lose Organic Certification for any Period of Time.

No admissible evidence exists in this case that supports the Johnsons’ claims that Paynesville Co-op caused them to lose organic certification on their fields. If the

Johnsons were informed of such a consequence by their certifying agent⁹, OCIA, then the OCIA's determination is also directly contrary to the NOP regulations. There is neither evidence nor a contention by the Johnsons in this case that they intentionally applied pesticides to their own organic fields. Such would be the only situation in which de-certification of fields could occur for more than one production period or without testing for compliance with the 5% Rule. Any determination by OCIA to decertify fields in relation to the alleged spray drift caused by Paynesville Co-op is not a determination that can be imposed by law on Paynesville Co-op in this lawsuit. Despite the fact that all OCIA documentation is inadmissible hearsay, and that no OCIA representative has offered testimony in this case, the OCIA determination did not involve findings of fault or damages required under Minnesota law and did not include representatives of Paynesville Co-op in any way. Furthermore, although they are granted the right to do so under the NOP regulations, the Johnsons did not appeal the OCIA's determinations.¹⁰

⁹ It should be noted that the Court of Appeals mistakenly characterized the Johnsons' certifying agent as a representative of the State of Minnesota. *See Johnson*, 802 N.W.2d at 386 ("He was also told by the **state's** organic certifying agent that if any pesticide residue was detected, he must take the field out of organic production for three years. The MDA detected pesticide residue, and so Johnson took the field out of organic production."). Actually, the Johnsons' certifying agent in this matter, OCIA, is a private corporation based in Lincoln, Nebraska which is authorized by the NOP regulations to manage organic operations pursuant to those regulations.

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

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

5. The Johnsons also have not Presented any Evidence in Support of their Claim that the Actions of Paynesville Co-op Caused Damage to the Crops Growing in their Field on the Date of the Alleged Incident.

In addition to having no cognizable claim for unintentional pesticide drift onto fields and resulting claim of a three-year loss of organic certification, the Johnsons also have no claim for damage to the actual soybean crops which were growing at the time of the alleged incident in 2007.¹¹ Simply stated, the soybeans in Field 1 could have been

a court *can* disturb an administrative agency's determination if the agency "proceeded upon an erroneous theory of law." *Vicker*, 122 N.W.2d at 173.

¹¹ With respect to the 175-foot-wide strip of Field 1 which was plowed under at the MDA's request, Paynesville Co-op maintains that its actions did not cause such damages either. Recall that the MDA's tests (the only tests conducted) could not establish that the damage to crops was caused by pesticide drift. Because (1) volatilization of the dicamba chemical in Status® was a more likely scenario due to the complete absence of diflufenzopyr in the MDA's samples, and (2) the Johnsons have presented neither allegations nor expert testimony that the transmission of dicamba via volatilization is the result of any wrongdoing by Paynesville Co-op, the dismissal of the entirety of the

sold as “100% organic” in full compliance with the NOP regulations. This is because (1) all chemical residue tests by the MDA in 2007 revealed levels within the NOP’s 5% tolerance limits and (2) there is no evidence that the Johnsons’ farming practices were in violation of the NOP regulations. Regarding the presence of chemical residue, the allegation here is that Paynesville Co-op caused drift of Status® (active ingredients dicamba and diflufenzopyr) onto the Johnsons’ organic soybeans. Recall that diflufenzopyr was **not** detected in the Johnsons’ field. Dicamba was detected – but below detection limits – in just two of the four soybean samples. Under the NOP, dicamba can be present in organic soybeans sold as “100% organic” up to a concentration of 0.5 parts per million in seed and 1.5 parts per million in hulls so long as the organic farmer did not intentionally apply the chemical to the soybeans. 7 C.F.R. § 205.671; *cf.* 40 C.F.R. § 180.227. Because there is no evidence that the concentration of dicamba in the Johnsons’ soybeans exceeded the NOP tolerance levels, they could have sold the soybeans as “100% organic.” Thus, no cause of action exists for damages against Paynesville Co-op for the 2007 incident.

If the Johnsons decided to do anything with the soybean crops at issue other than market them as organic following the alleged drift in 2007 it was not because they were precluded by law from doing so under the NOP; instead, it was a choice of theirs based on an incorrect interpretation of the NOP. As stated previously, Paynesville Co-op

damages claims was proper. However, if this Court allows any of the Johnsons’ claims for damages relating to the 2007 incident to survive, Paynesville Co-op requests the trial court be instructed that the damages at trial be limited to the monetary value of the crops growing within the plowed 175-foot-wide strip at the time of the alleged incident.

cannot be responsible for the Johnsons' mismanagement of their crops or their (or OCIA's) mistaken interpretation of NOP regulations. The Johnsons' claims for damages in 2007 should be dismissed as a matter of law.

II. THE JOHNSONS' TRESPASS CLAIM SHOULD BE DISMISSED.

A. Minnesota Does Not Recognize a Claim for Trespass by Particulate Matter.

Because the trespass issue was also decided by the trial court pursuant to Minn. R. Civ. P. 56, a *de novo* review should be conducted by this Court pursuant to the standards set forth, *supra*. Until the decision by the Court of Appeals in this matter, Minnesota courts did not recognize a claim for trespass based on the spread of particulate matter onto a claimant's property. The Court of Appeals properly recognized that particulate matter is defined as "[m]aterial suspended in the air in the form of minute solid particles or *liquid droplets*, especially when considered an atmospheric pollutant." *Johnson*, 802 N.W.2d at 388 (quoting *The American Heritage Dictionary of the English Language* 1282 (4th ed. 2000)) (emphasis added). Before its opinion in this case, the Minnesota Court of Appeals stated the following about claims for trespass by particulate matter:

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

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

The claimants in *Wendinger* alleged that invasive odors from a nearby confined animal feeding facility constituted trespass onto their lands. *Wendinger*, 662 N.W.2d at 549. The Wendingers argued that the odors from the feeding operation physically invaded their land because the odors “migrated onto the property in the form of airborne particulate matter.” *Id.* at 550. After setting forth the above distinction between trespass and private nuisance causes of action, the *Wendinger* court affirmed the dismissal in the trial court of the trespass claim. *Id.*

The arguments by the Johnsons – as they have framed them – are consistent with only a private nuisance action according to the discussion in *Wendinger*. For instance, the Johnsons’ brief to the Court of Appeals argued that their right of *possession* was impacted by Paynesville Co-op’s actions; but the facts alleged in support of this argument related only to alleged interference with the Johnsons’ *use* of their land. For instance, the Johnsons argued that pesticide drift “leads to negative consequences and *loss of the intended use* of the land.” Appellant’s Brief in Court of Appeals, p. 35 (emphasis added). The Johnsons further argued that “the chemicals came upon the land by respondent’s hand and did injury to the land by *making it unsuitable for organic farming. . .*” *Id.* (emphasis added). These allegations relate only to claims of interference with the Johnsons’ use of the land to grow organic crops. The allegations have no relation to any alleged interference with the right of possession of the Johnsons’ land.

B. The Minnesota Cases Relied Upon by the Court of Appeals are of no Value because they are Factually Distinguishable or Address Legal Theories Not Relevant to the Instant Matter.

In its decision, the Court of Appeals relied on four prior Minnesota cases which considered facts distinguishable from the instant matter. *Johnson*, 802 N.W.2d at 388.

The cases cited by the Court of Appeals were:

- *Victor v. Sell*, 222 N.W.2d 337, 338 (Minn. 1974) (involving allegations that a landowner was injured when he fell off ladder onto his own property landing on a radiator which had been discarded onto his land by a neighbor);
- *Anderson v. State, Dept. of Natural Res.*, 693 N.W.2d 181, 185 (Minn. 2005) (involving allegations that honey bees were injured on land controlled by the defendants as a result of the bees' exposure to pesticides on that land);
- *Red River Spray Serv., Inc. v. Nelson*, 404 N.W.2d 332, 334 (Minn. Ct. App. 1987) (involving findings of negligence – not trespass – at trial for overspray of pesticides); and
- *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 805 (Minn. Ct. App. 2001) (involving allegations that errant bullets fired from neighboring firearms range repeatedly fly over and come to rest on the plaintiffs' land).

None of these Minnesota cases provide a basis for the Court of Appeals' decision in this matter, for the following reasons:

- *Victor v. Sell*, 222 N.W.2d 337 (Minn. 1974): The facts alone distinguish *Victor* from the instant matter. In that case, the defendant, Sell, was alleged to have

discarded indoor heat radiators onto the plaintiff's neighboring land after the equipment had frozen up and was removed from Sell's house. *Victor*, 222 N.W.2d at 310. As the work on the plumbing in the Sell home was ongoing, the plaintiff, Victor, climbed a ladder on his own property to remove ice and snow from his roof. *Id.* He slipped and fell, landing on the ground on his back, and alleged that his left leg was injured when it hit a piece of Sell's radiator which was on Victor's land and buried beneath the snow. *Id.* at 310-311. Based on these facts alone, the *Victor* case is inapplicable to the instant matter because it deals with the placement of an inanimate object onto the property of another; an act which clearly constitutes trespass under traditional legal principles. The *Victor* case would only be relevant to the instant matter if this case involved allegations that Paynesville Co-op drove its sprayer onto the Johnsons' fields or that the Co-op discarded some of its spray equipment onto the Johnsons' fields. Instead, the only allegations in this case by the Johnsons are that Paynesville Co-op properly stayed on its customer's land while spraying pesticides, but that the pesticide particles drifted onto the Johnsons' land.

- *Anderson v. State, Dept. of Natural Res.*, 693 N.W.2d 181 (Minn. 2005): The *Anderson* case did not involve a discussion of whether pesticides which injured a hive of bees constituted trespass, and for good reason; the bees in that case were allegedly exposed to the pesticides when they flew onto the defendants' lands. Because of this distinction, the discussion in *Anderson* which was referenced by the Court of Appeals in the instant case dealt only with a landowner's general duty

of care towards neighbors, and did not involve trespass of any kind by the defendants. On this topic, this Court stated, “Landowners owe a duty to use their property so as not to injure that of others.” *Anderson* 693 N.W.2d at 186 (citations omitted). The only discussion of trespass in *Anderson* was this Court’s recognition that liability for harm to bees is usually non-existent when the *bees* trespass onto other land which has been treated with pesticides and are injured as a result. *Id.* Because *Anderson* did not involve facts or legal theories comparative to those at issue here, it is of no value in determining whether drift of pesticide particles from a targeted parcel to a neighboring parcel can constitute trespass.

- *Red River Spray Serv., Inc. v. Nelson*, 404 N.W.2d 332 (Minn. Ct. App. 1987): Like *Anderson*, the *Red River* case did not discuss whether drift of pesticides or any other particulate matter could constitute trespass. Instead, the *Red River* case dealt solely with the question of whether a herbicide sprayer was negligent in causing the alleged overspray. *Red River*, 404 N.W.2d at 334. It is acknowledged here that negligence can be the basis for an award of damages in a pesticide drift case. This is not a novel theory, as negligence per se can be proven if a violation of Minn. Stat. § 18B.07 subd. 2(b) (prohibiting the application of pesticides to other than the target field) is proven. Because *Red River* only acknowledges a cause of action which is admittedly a potential basis for liability in the case of pesticide drift, it provides no value to the analysis of whether trespass by drift of pesticide particles is an actionable claim.

- *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796 (Minn. Ct. App. 2001): The court in *Citizens* held that “[t]he entry of bullets over and onto adjacent private property resulting from the operation of the rifle ranges at the Gun Club without the permission of the property owners constitutes a trespass.” *Citizens*, 624 N.W.2d at 805. *Citizens*, like *Victor*, is distinguishable on the facts because it deals with trespass by tangible things. Furthermore, as discussed, *infra*, the facts of *Citizens* provide a compelling example as to why the Court of Appeals’ decision in the instant matter would endanger traditional property rights by diminishing a landowner’s ability to make claims such as those brought in *Citizens*.

C. This Court Should Not Adopt the Principles of the Cases Relied Upon by the Court of Appeals from Outside Jurisdictions as they Relate to Claims for Trespass by Particulate Matter.

Case law from outside jurisdictions cited by the Court of Appeals to support its recognition of trespass by particulate matter should not be adopted in Minnesota for multiple reasons: (1) the case law provides unworkable and blurred distinctions between actionable and benign instances of encroachment of particulate matter onto a claimant’s property, (2) it blurs – or even erases – the line between causes of action for trespass and those based on private nuisance and (3) it diminishes traditional property rights of a potential claimant under trespass law.

The primary cases from outside Minnesota relied on by the Court of Appeals are discussed herein:

- *Borland v. Sanders Lead Co., Inc.*, 369 So. 2d 523, 529 (Ala. 1979) (recognizing that lead particulates and sulfoxide emitted from a smelting operation can constitute trespass); and
- *Bradley v. American Smelting and Refining Co.*, 709 P.2d 782, 786-90 (Wash. 1985) (holding that arsenic and cadmium particles emitted from a smelting plant and landing on the plaintiffs' land could constitute a trespass).

The opinion of the Alabama Supreme Court¹² in the *Borland* case is particularly troublesome and provides an example of the unnecessary complexities in allowing claims for trespass by particulate matter when a claim for private nuisance would suffice. The following excerpt from *Borland* highlights the difficulty courts will face in drawing a line between insignificant chemical drift and drift which would be actionable under trespass law:

It might appear, at first blush, from our holding today that every property owner in this State would have a cause of action against any neighboring industry which emitted particulate matter into the atmosphere, or even a passing motorist, whose exhaust emissions come to rest upon another's property. But we hasten to point out that there is a point where the entry is so lacking in substance that the law will refuse to recognize it, applying the maxim *De minimis non curat lex* the law does not concern itself with trifles. In the present case, however, we are not faced with a trifling complaint. The Plaintiffs in this case have suffered, if the evidence is believed, a real and substantial invasion of a protected interest.

Borland, 369 So. 2d at 529. The *Borland* court went on to define the requirements of proof in a claim for trespass by particulate matter:

¹² Not the Alaska Supreme Court, as stated in the Court of Appeals' decision in this matter.

[A] plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the Res.

Id. The requirement of “substantial damages” in *Borland* is akin to the requirement created by the Court of Appeals here. The Court of Appeals here said, “We hold that a trespass action can arise from a chemical pesticide being deposited in discernable and *consequential amounts* onto one agricultural property as the result of errant overspray during application directed at another.” *Johnson*, 802 N.W.2d at 389 (emphasis added).

At least one court has rejected the holding and direction of *Borland*. In 1999, the Michigan Court of Appeals recognized the dangers of such a legal framework and stated:

We do not welcome this redirection of trespass law toward nuisance law. The requirement that real and substantial damages be proved, and balanced against the usefulness of the offending activity, is appropriate where the issue is interference with one's use or enjoyment of one's land; applying it where a landowner has had to endure an unauthorized physical occupation of the landowner's land, however, offends traditional principles of ownership. **The law should not require a property owner to justify exercising the right to exclude. To countenance the erosion of presumed damages in cases of trespass is to endanger the right of exclusion itself.**

Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215, 221 (Mich. Ct. App. 1999)

(emphasis added). The *Adams* court instead professed its agreement “with the characterization of cases of this sort found in Prosser & Keeton as being ‘in reality, examples of the tort of private nuisance or liability for harm resulting from negligence,’ not proper trespass cases.” *Id.* at 220 (quoting Prosser & Keeton, Torts (5th ed.), § 13, pp. 71-72 (concerning “decisions finding a trespass constituted by the entry of invisible gases

and microscopic particles, but only if harm results”). In the end, the *Adams* court declined the plaintiffs’ “invitation to strip the tort of trespass to land of its distinctive accouterments and commingle its identity with other causes of action.” *Id.*

The fears of the Michigan Court of Appeals in *Adams* will play out in Minnesota if the Court of Appeals’ decision on trespass is upheld. By affirming the Court of Appeals’ decision, this Court would be opening the door to the defense in trespass cases involving intrusion onto land by tangible objects that the intrusion, if proven, did not cause substantial damages and is excusable. With specific reference to the Court of Appeals’ decision here, a trespass defendant could potentially argue that its actions did not result in a “consequential” invasion of the claimant’s possessory rights.¹³ Affirming case law that allows such an argument to be made would erode the protection of land granted in the law of trespass as it stood in Minnesota before the Court of Appeals’ decision in this matter. This Court should instead follow the rationale presented in *Adams* and reverse the Court of Appeals’ recognition of a claim for trespass by particulate matter.

D. In the Alternative, if this Court Adopts the Cause of Action for Trespass by Particulate Matter, the Johnsons’ Trespass Claim Should be Dismissed for Failure to Present Evidence of Requisite Substantial Damage.

The Johnsons in this case have not established a *prima facie* case for damages which would suffice under the requirements of a claim for trespass by particulate matter,

¹³ For example, such an argument would be plausible in a case with similar facts to those at issue in *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796 (Minn. Ct. App. 2001) (finding that errant bullets landing on the claimant’s land constituted trespass). Because errant bullets are inconsequential in size and their physical presence on the land likely poses little hardship to a landowner, a landowners’ right to exclude such potentially dangerous objects from entering or coming to rest on the land would wrongly be in jeopardy if such a defense were possible.

regardless of whether the analysis is done pursuant to the requirements set forth in the Court of Appeals' opinion in this matter or the legal framework presented in the *Borland* case.

1. The Johnsons have not Presented Proof of “Discernable and Consequential Amounts” of Spray Drift to Satisfy the Court of Appeals’ Framework in the Instant Case.

Recall that in this case, the Court of Appeals held that a trespass action can arise from pesticides being deposited “in discernable and consequential amounts” onto one farm field as the result of errant overspray during the application to another field. *Johnson*, 802 N.W.2d at 389.

The Court of Appeals' error in finding that the Johnsons could survive summary judgment under this newly-created standard is demonstrated in the sentence which immediately precedes its holding which provides: “We address only the allegations here, which go beyond inconsequential overspray or odor-related intrusion.” *Id.* This statement establishes that the Court of Appeals was applying the incorrect standard to this summary judgment motion. By addressing only the Johnsons' “allegations” of spray drift, the Court of Appeals was mistakenly applying the standard of proof required to overcome a motion to dismiss on the pleadings pursuant to Minn. R. Civ. P. 12.02. Instead, on a motion such as that brought by Paynesville Co-op, governed by Rule 56, the Johnsons' claim for trespass can only go to trial if the Johnsons have provided evidence which establishes all essential elements of the claim. If, according to the Court of Appeals, an essential element of a claim for trespass by particulate matter is that the

chemical be deposited in “discernable or consequential amounts,” the Johnsons have failed to prove this element.

First, the herbicide Status® was not deposited in discernable amounts. Recall that one of the ingredients, diflufenzopyr, was not detected in *any* of the chemical residue tests performed on the Johnsons’ field, and the other active ingredient, dicamba, was found in only two of the four samples and was below the detection limit of the testing methods used by the MDA. Because the tests done by the MDA could not even put a number on the concentration in the Johnsons’ crops of any ingredient of Status®, and because one of the main ingredients in that herbicide was completely absent from the test results, it cannot be said that the herbicide’s presence on the Johnsons’ field was in a “discernable” amount.

Second, because there is no proof that the presence of Status® was discernable in the Johnsons’ field, it follows logically that there is no evidence the presence of the substance was in “consequential” amounts. Not only does this analysis reveal that the Johnsons have failed to meet their burden of proof on these essential elements of their claim, it also reveals the vague and disconnected nature of the language used by the Court of Appeals in defining the burden of proof for claims of this type.

The use of the term “consequential” seems to be superfluous because there would never be an instance where the presence of a pesticide which has drifted would be in a “consequential amount,” but would not be “discernable.” Second, no guidance is given as to what measures should be used to determine whether a pesticide has been deposited in an amount which is consequential. Certainly, two possibilities exist relevant to this

matter as to how to define this term: (1) whether the pesticide ingredients were found in a measurable quantity, or (2) whether the pesticide ingredients were found in a quantity which would disqualify crops from being used as intended. Using either of these measures must result in a decision that the Johnsons have not met their burden of proof. Under option (1), it has already been discussed that the MDA was not able to quantify the amount of dicamba in the two samples which detected the chemical, thus rendering the amount inconsequential. And, under option (2), as discussed in Section I, *supra*, there is no evidence that dicamba was deposited onto the Johnsons' soybeans in an amount which would disqualify them for sale as "100% organic" pursuant to the NOP regulations.

If, instead, this Court were to adopt the requirements for a trespass by particulate matter claim as set forth in *Borland*, the Johnsons' claim under such a theory would also fail as a matter of law on summary judgment. Recall that the *Borland* case stated the following elements of this claim:

. . . 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the Res.

Borland, 369 So. 2d at 529.

In this case, the Johnsons have presented no evidence which would support a finding in their favor on either the third or fourth in the *Borland* framework. Element three, which relates to the foreseeability of the invasion of the possessory interest has no support. In fact, the evidence greatly weighs in favor of Paynesville Co-op. Multiple pesticide applicators who work for Paynesville Co-op, including the applicator at the

time of the incident at issue – have testified to the measures which are regularly taken by the Co-op in order to avoid drift near sensitive crops, including the Johnsons’ organic crops. Such measures include the use of sophisticated spray equipment, lowered spray booms, increased droplet size and multiple anti-drift additives to the pesticides. These measures which are regularly taken by the Co-op render it unforeseeable that the possessory interest of an organic crop which is located near or adjacent to the targeted field would be invaded.

The drift of Status® in the instant matter was also not foreseeable as a result of the most likely method of transmission onto the Johnsons’ field. Because only one of the ingredients in the pesticide was detected whatsoever on the field, it is more likely that volatilization of the dicamba occurred, as opposed to drift of the pesticide droplets. The absence of the other ingredient, diflufenzopyr, indicates that the pesticide droplets were deposited on *only* the target field, and not the Johnsons’ field. It was not until a later time that the dicamba molecules volatilized, became airborne and spread. This method of transmission also supports the conclusion that Paynesville Co-op could not have foreseen the alleged invasion of the Johnsons’ possessory rights, as the applicator, Mr. Hoppe, would have witnessed the pesticide droplets being applied as intended on the targeted field exclusively.

Additionally, no evidence exists to satisfy element four of the *Borland* framework. For the same reasons that there is no evidence of “discernable or consequential amounts” of pesticide on the Johnsons’ field, there also is no evidence that “substantial damage” was done to that field. Because the Johnsons have not met their burden of proof under

either of the potentially-applicable standards for proving trespass by particulate matter, the district court's dismissal of the trespass cause of action should be affirmed and the Court of Appeals' decision on the issue should be reversed.

III. THE COURT OF APPEALS ERRED BY REVERSING THE TRIAL COURT'S DISMISSAL OF THE JOHNSONS' CLAIM FOR PERMANENT INJUNCTIVE RELIEF.

"A district court's findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous." *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. Ct. App. 2003), review denied (Minn. Nov. 25, 2003). "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist *before* injunctive relief may be granted." *Smith v. Spitzenberger*, 363 N.W.2d 470, 472 (Minn. Ct. App. 1985) (quotation omitted) (emphasis in original). "A permanent injunction will issue only after a right to such relief has been established at a trial." *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. Ct. App. 1987) (quotation omitted). Before permanent injunctive relief may be awarded, the merits of a dispute must be determined. *Id.*

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

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

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

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

None of the alleged conduct by Paynesville Co-op can be considered “wrongful” in the instant matter. This was essentially the determination reached by the trial court when it dismissed the Johnsons’ extensive and numerous claims for damages on summary judgment. The entirety of the evidence shows that Paynesville Co-op did nothing to cause the Johnsons’ crops to be in violation of the NOP regulations. Furthermore, even if focus is placed on the small portion of the Johnsons’ Field 1 which was ordered plowed under by the MDA in the summer of 2007, the Johnsons have not provided competent evidence that the presence of any chemical pesticide was the result of errant overspray of pesticide droplets. Instead, as introduced in the MDA report, the presence of just dicamba – and not the other active ingredient in Status® – makes it more likely that dicamba volatilized and spread only after it had properly been applied to the

field owned by Paynesville Co-op's customer. Because the trial court's dismissal of the Johnsons' damages claims should be affirmed by this Court for the reasons stated, *supra*, there can be no finding of wrongful conduct by Paynesville Co-op in this case. Thus, the Johnsons' claims for injunctive relief under Minn. Stat. § 561.01 should be dismissed as a matter of law. Any trial or hearing on claims for such relief would merely re-litigate the damage claims which fail as a matter of law.

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

“The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion.” *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. Ct. App. 2004) (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). “Whether the district court has abused its discretion in ruling on a motion to amend may turn on whether it was correct in an underlying legal ruling.” *Doe v. F.P.*, 667 N.W.2d 493, 500-01 (Minn. Ct. App. 2003), *review denied* (Minn. Oct. 21, 2003).

Here, there is no error in the legal ruling underlying the trial court's determination that amendment of the Complaint in this case would be futile. The ruling was based on the trial court's correct interpretation of the NOP regulations and the fact that the Johnsons failed to provide evidence of damages in the existing matter – and would likewise fail to prove damages in any similar matter relating to the 2008 events. Paynesville Co-op has demonstrated in this Brief that the dismissal of all causes of action which have been pleaded in this case should be affirmed. If this Court affirms the trial

court's dismissal of all claims, no lawsuit would exist to which new claims could be added. Because it would be futile to add claims to a lawsuit which has already been disposed of, the proper course of action would be to uphold the denial of the Johnsons' motion to amend and require them to seek recourse for their 2008 claims in a separately-initiated lawsuit if they choose to pursue the matter further.

CONCLUSION

Paynesville Co-op respectfully requests that the judgments and orders of the trial court which are now on appeal be affirmed. The facts in this case provide a striking example of the situation contemplated by the NOP regulations – as well as the drafters of those regulations – in which the unintentional transmission of trace amounts of pesticide onto an organic farm should have no ill effects on the organic farmer's ability to sell or continue to grow organic crops. The damages claimed in this case are due solely to the fact that the Johnsons and their organic certifying agent did not follow the proper analytical framework provided in the NOP regulations in the case of unintentional transmission of a pesticide, which is to determine whether the organic grower played any part in causing the alleged contamination and, if not, then to verify that the crops satisfy the applicable tolerance level allowing them to still be sold as "organic". Because the tolerance level was not exceeded in this case, the trial court's determination that no evidence of damages exists is correct.

The claim for trespass by particulate matter should also not be recognized by this Court as it would add confusion to the requirements of an actionable trespass claim and would erode the exclusionary rights of landowners under traditional trespass law.

Regardless of whether such a cause of action is recognized in Minnesota, though, the Johnsons have failed to offer evidence which would prove the essential elements of trespass.

Because all causes of action for monetary damages should be dismissed as a matter of law, there remains no basis for the Johnsons' claims for injunctive relief. And, finally, because the theories of recovery for 2008 events mirror those at issue on appeal, the trial court was correct to identify the Johnsons' request for leave to amend their Complaint as "futile."

Dated this 17th day of November, 2011.

Respectfully submitted,

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