

A10-1596 and A10-2135

STATE OF MINNESOTA
IN COURT OF APPEALS

Oluf Johnson and Debra Johnson,

Appellants

v.

Paynesville Farmers Union Cooperative
Oil Company,

Respondent

APPELLANTS' BRIEF, APPENDIX and ADDENDUM

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STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO THE DAMAGES CLAIMS FOR NUISANCE, TRESPASS AND NEGLIGENCE *PER SE*?

A. The trial court held in the negative.

B. Cases:

1. Highview North Apartments v. County of Ramsey, 323 N.W.2d 65 (Minn. 1982) [as to nuisance damages going to inconvenience and disruption]
2. Anderson v. State of Minnesota, 693 N.W.2d 181 (Minn. 2005) [as to right to bring action for negligence per se damages claim for violating pesticide use laws]
3. Whittaker v. Stangvick, 100 Minn. 386, 111 N.W. 295 (1907) [as to airborne material falling on land and doing some damage sufficient to show trespass]

C. Statutes:

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

II. DID THE TRIAL COURT ERR IN REFUSING APPELLANTS LEAVE TO AMEND THEIR COMPLAINT TO INCLUDE DAMAGE CLAIMS FROM 2008 DRIFT INCIDENTS?

A. The trial court held in the negative.

B. Cases:

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

C. Statutes:

1. Minn. Stat. § 561.01
2. 7 CFR § 205.202

3. 7 CFR § 205.670

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

A. The trial court held in the negative.

B. Cases:

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

C. Statutes:

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

STATEMENT OF THE CASE

Appellants are organic grain farmers. In order to legally sell their crops as “organic” products they must meet all applicable National Organic Program [“NOP”] regulations. Each field organically farmed must meet NOP regulations separately and be certified as an organic field. NOP certifications are administered through what are called “certifying agents”. Based upon applicable NOP regulations, these “certifying agents” have the power to tell organic farmers whether their fields will be or will remain certified (7 CFR § 205.406(c) and (d); 7 CFR § 500(a); SA-291].

An important regulation that must be met for obtaining and keeping certification for any organic field is to avoid having pesticides applied to it for three years. The certifying agent audits each organic operation annually. Organic farmers are required to report

incidents which may affect certification.

Appellants have spent their careers as organic farmers doing their best to comply with the organic production laws and regulations. Respondent, a local coop that is in the business of selling and applying pesticides, has repeatedly violated the pesticide application laws by causing drift of pesticides onto appellant's land. This has happened in 1998, 2002, 2005, 2007 and twice in 2008. When charged by the Minnesota Department of Agriculture with pesticide abuse respondent pays the fine and does it again and again. [SA-108 to 135]. This history includes 2002, 2005 and 2008. It also happened in 2007, but the MDA did not fine respondent for that incident.

Appellants brought this action alleging trespass, nuisance, negligence *per se*, battery and injunctive relief. The original complaint alleged damages claims from 2005 and 2007. No claim was ever made for the 1998 incident. The 2002 violation had been previously litigated and resolved. However, it and the 1998 incident were alleged in the current complaint due to the continuing nature of the violations and the need for injunctive relief. The MDA investigation of the 2008 violations was not completed when this action began so it was not alleged when the action began.

On June 23, 2009, the district court heard a motion for temporary injunction. It found that the requisite factors had been satisfied (including damages to appellants that were independent of the grounds on which it later said there are no damages), and on August 6, 2009, issued a temporary injunction compelling defendant to meet certain notice

requirements prior to or immediately after applying pesticides to land adjoining appellants' land. [App-20 to 33; App-34 to 39].

The litigation of the injunction and later discovery all included the two pesticide violations from 2008 as the MDA had since concluded its investigation, determined that violations had occurred and fined respondent for pesticide abuse.

Plaintiff moved to amend the complaint to include the 2008 violations at the same time that respondent moved for summary judgment. Respondent's basis for summary judgment 7 CFR § 205.671 (the so-called "5% Rule") [SA-319] provided that in cases of pesticide drift an organic farmer could still sell the grain as organic if it tested below a set percentage of banned chemical. Since appellants had not tested their grain, they argued, appellants could not prove respondent's drift events had caused any damages.¹

Respondents succeeded in obtaining summary judgment across the board. [Add-1 to 22]. By its order of July 16, 2010, the trial court dismissed plaintiff's complaint in its entirety with the exception of the count for injunctive relief. The dismissal included the trespass claim because, the court said, deposition of particulate matter on neighboring land is not recognized as a trespass in Minnesota. The nuisance and negligence *per se* claims were dismissed because the court said the "5% Rule" means there were no damages - at all. The trial court denied appellants' motion to amend to include 2008 on futility grounds for the

¹Respondent also sought and received summary judgment on the 2005 event on statute of limitations grounds and succeeded in dismissing the battery claim. Appellants do not appeal those determinations.

same reason.²

The temporary injunction was not part of the summary judgment proceedings. On August 26, 2010, the trial court heard oral argument on the question of whether the temporary injunction should be dissolved and whether respondent is entitled to costs and disbursements as the prevailing party. By its judgment of November 4, 2010, the trial court dissolved the injunction, dismissed the injunctive case and awarded costs/disbursements to respondent. It said that if plaintiff had no claim for damages, it had no claim for injunctive relief under the private nuisance statute. [Add-23 to 26].

On September 10, 2010, appellants filed their appeal of the July 16, 2010, partial judgment by mail. On December 2, 2010, appellants did the same respecting the November 4, 2010, final judgment. On December 6, 2010, appellants filed a motion to consolidate the appeals. [App-71]. On December 9, 2010, consolidation of these appeals was ordered. [App-72 to 73].

Thus, appellants here appeal arguing that the trial court erred in granting summary judgement as to the trespass, nuisance, negligence per se and injunctive claims. Appellants also appeal the trial court's refusal to permit amendment of the complaint to include damages claims for the 2008 pesticide abuse events. Finally, the appeal the dissolution of the temporary injunction and dismissal of the claim for injunctive relief.

²The trial court also included the "no just reason for delay" language from MRCP 54.02 in the order for judgment, thus making the partial judgment appealable under MRCAP 103.03(a).

STATEMENT OF THE FACTS

A. HISTORY OF THE PESTICIDE MISUSES.

1. **Organic Farming Operation and the Regulations.** Appellants began their organic farming operation on the subject land in 1998 when they first became certified to produce organic crops. [SA-1 to 2]. As part of the operation they posted organic farming warning signs around the perimeter of the subject property and kept the required “buffer zones” between adjoining land and the organic crop fields. [Id.]. They also sent the coop a certified letter on April 23, 1998, advising it of their change-over to organic farming and requesting that precautions be taken when conducting spraying operations near their fields. [Id.].

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

An organic grain farmer, then, makes a rotation plan that spans years so that the principles of effective organic farming are followed. When a field is infected with chemical pesticides, federal regulation prohibits its use for organic farming for a period of three years.

This is provided in 7 CFR § 205.202 which reads:

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

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

[SA-269].

Because of this problem, the rotational plan is disrupted and the farmer's ability to earn profits from organic grain sales is prejudiced. That is exactly what has happened to appellants as a result of respondent's repeated unlawful activities. [SA-3]. While appellants should be well into an established, profitable organic farming operation after ten years, they have suffered set-back after set-back due to defendant's chemical spray activities. They are in debt. [SA-3].

2. The 1998 Incident. On April 23, 1998, appellants gave respondent written notice of their organic farming operation. [SA-3 to 4]. In 1998 the co-op caused an over-spray. Appellants complained to the co-op of their losses. They were told that it would be "made right." This did not occur. Appellants submitted an invoice in 2001 claiming their losses but respondent ignored it. Appellants opted to let the matter rest and did not pursue legal action. [Id.].

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

This violation took the soy bean field out of organic production for three years and caused appellants to lose a lucrative contract to sell the otherwise organically grown beans. The agreement called for payment of \$16.50 per bushel, a price over three times the price of conventional soy beans. [SA-4].

Appellants sued respondent over this violation and this case was settled in late 2005. Included as part of the settlement was respondent’s signed agreement as to the following:

1. No later than March 15th of each year plaintiffs will provide defendant, Paynesville Farmers Union Cooperative Oil Company with accurate maps showing the locations of any and all fields which plaintiffs intend to put into organic production for the ensuing growing season.

2. Upon receipt of such maps Paynesville Farmers Union Cooperative Oil Company will give plaintiffs written notice of its intent to spray pesticides of any kind on land adjoining any of the fields depicted in the maps. Such notice may be given by delivering a writing within 24 hours of the expected spraying event.
3. In the event plaintiffs fail to provide the maps described in paragraph number 1, above, Paynesville Farmers Union Cooperative Oil Company shall have no responsibility to deliver the notice described in paragraph number 2, above.
4. In the event proper maps are delivered but no notice is given, plaintiffs may apply to the district court for injunctive relief.

[SA-5; SA-27 to 28].

Although appellants delivered the maps to the coop, which deliveries were acknowledged in writing by the coop, on March 14, 2006, and March 15, 2007, respondent never once gave 24 hours notice of intent to apply pesticides to any land adjoining the depicted fields. Respondent did, however, subsequently spray adjoining lands. [SA-5; SA-29 to 31].

4. **The July 6, 2004, Incident.** In early July of 2004 [July 2nd and 5th] appellants noticed additional chemical drift onto their soybean fields. They complained to the MDA. The MDA began another investigation. During the investigation the MDA determined that defendant had provided a “mini-bulk” to one Doug Larson. This equipment was contaminated with a pesticide that is incompatible with soybeans. A large area was sprayed and Mr. Larson’s own bean crop was severely damaged. Investigation at the coop showed

that the contaminated “mini-bulk” had been provided by the coop but had since been washed.

Investigation further showed multiple violations of the law by the coop including: [a] multiple sales of regulated pesticides to certified applicators that were not recorded on the required sales record; [2] three cases of failure to properly record EPA Registration Numbers; [3] two cases of incorrect certification numbers for applicators qualified to purchase regulated pesticides; [4] sale of regulated pesticides to an uncertified person. [SA-5 to 6; SA-33 to 40].

The MDA issued another Notice of Intent-Enforcement Action to the coop alleging statutory violations for the above listed conduct and it imposed a civil penalty of \$3,250.00. [Id.]. The coop paid this fine without contest. [SA-108 to 112; SA-137].

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

6. The June 15, 2007, Incident. On June 15, 2007, defendant applied the herbicide Status® [active ingredient diflufenzopyr and dicamba] and Roundup® [active ingredient glyphosate] to a field immediately adjoining one of plaintiff’s soybean fields. No

notice of the application was given to plaintiffs even though the maps were provided on March 15, 2007. The MDA verified that these chemicals were applied by defendant in wind conditions that were too high and blowing in the direction of plaintiff's organic soy bean field. The MDA's tests of bean plants were positive for Dicamba. The MDA also learned that defendant had not kept a complete record of the pesticide application. In October of 2007 defendant issued an Advisory Notice to the coop advising of these issues and told defendant to conduct annual training "to insure that drift and label violations do not occur, especially near sensitive crops and organic crops". [SA-252 to 253; SA-6 to 7; SA-64 to 73; SA-146 to 147].

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

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

8. **The August 1, 2008, Incident.** On August 1, 2008, appellant, Oluf Johnson, was in his organic alfalfa field recording the wind speed as respondent was spraying adjacent

property. He complained to the MDA of drift onto his crops. He had his own wind meter which measured the wind speed at 7 mph. Due to this application and the July application the entire 176 acre organic alfalfa field had to be taken out of organic production. [SA-8; SA-77 to 94].

The MDA combined this incident investigation with the July 3, 2008 incident and penalty. [SA-141 to 145].

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

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

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

* * * * *

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

* * * * *

(f) Immediately notify the certifying agent concerning any:

(1) Application, including drift, of a prohibited substance to any field, production unit, site,

facility, livestock, or product that is part of an operation...

[SA-286 to 287].

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

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

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

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

The OCIA is the "certifying agent" for their organic farming operation. [SA-151; (P. 16 L. 8 - 24)]. Each growing season the OCIA sends an inspector to appellants' farm who inspects the operation. At that time any chemical over-spray issues that may have occurred are discussed. The OCIA collects the relevant MDA documents and then the inspector writes a report which goes to an OCIA review board from its home office which makes the determination as to whether the chemically affected field should not be certified for organic

production. There is an appeal process, but appellants have not appealed any of the de-certifications of their fields because they know of the damage done by the chemicals. [SA-159; (P. 46 L. 17 to P. 50 L. 1)].

There is a three year period of “transition” for a field to weather out chemicals. 7

CFR § 202, *inter alia*, provides:

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

* * * * *

- (b) Have had **no prohibited substances**, as listed in § 205.105, applied to it for a period of 3 years immediately preceding harvest of the crop; 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. (Emphasis added).

[SA-269].

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

³A field is in “transition” as it waits out the three year period. [SA-151 (P. 15 L. 14 to P. 16 L. 7)]. “Transitional” crops must be sold as conventional crops. [SA-2 to 3].

OCIA certification letters issued to appellants made the following statements:

- “Fields 1A and 1B shall be put in transition for 36 months” [SA-239 (OCIA letter of 9/13/05)]
- “The inspection report indicates that chemical drift may have occurred on 51 transitional acres in Field 1B and that a chemical analysis is being done. If the analysis indicates contamination, you must take this land back to the beginning of 36-month transition.” [SA-244 (OCIA letter of 8/27/07)]⁴
- “The Certification Decision Team (CDT) has granted (NOP) certification for 964.3 acres....”⁵ “The inspection report indicates there is a continued drift on fields 1A, 1B, 2 and recently on field 9.” [SA-249-251 (OCIA letter 1/30/09)].

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

The loss of certification to appellant’s fields is not something that only happens to appellants. There is a manual entitled “Private Pesticide Applicator’s Training Manual” published by the University of Minnesota Extension Service and the MDA. [SA-231 to 237]. Respondent contends that this manual is inadmissible as a “learned treatise” and has no

⁴Chemical analysis by the MDA on October 5, 2007, did indicate the presence of drift contamination. [SA-146 to 147; SA-55; SA-59 to 62; SA-252 to 253]. Accordingly, appellants were obligated to extend the period of transition of the affected field 1B per the OCIA mandate. In addition, due to the mere presence of prohibited chemical for **any** product, organic or conventional, appellants were required by the MDA to “plow down” a strip of soy beans affect by this pesticide misuse event. [SA-57 to 58].

⁵This is 270.4 acres short of what should be certifiable but for respondent’s misuses. [SA-109 to 113].

application to it because it is a commercial applicator, not a private applicator.

Appellants, however, contend that it is not a “learned treatise” because it is a statutorily mandated publication. Minn. Stat. § 18B.305 subd. 2 [SA-342]. Because of this public mandate the document is a “public record” under Minnesota Rule of Evidence 803(3).

Moreover, the fact that the manual is published for private applicators does not alter the laws of physics or the characteristics and behavior of chemical drift. Nor does it alter the laws and regulations that apply to pesticide application and organic farmers. Respondent’s distinction is one without a difference.

On the subject of chemical drift and loss of organic certification, the manual states the following:

To receive “organic certification” a farmer must keep his fields pesticide - free for at least three (3) years. A relatively new and increasing concern surrounds the off-target movement of pesticides into organic acreage. Pesticide drift can result in loss of such certification, often at great financial cost to the farmer...

[SA-235].

That is precisely the situation in which appellants have repeatedly found themselves because of respondent’s illegal pesticide misuses.

B. A TEMPORARY INJUNCTION ISSUED AND WAS DISSOLVED.

Appellants sought and received a temporary injunction which, eventually, issued on August 6, 2009. [App-34 to 38]. The injunction required respondent to give appellants prior notice of their intent to spray properties adjacent to appellant’s land and if there was no

ability to give advance notice, they coop would have to give notice as soon as practicable after spraying. It was also required to provide written details of the spraying activity, including the chemicals to be used. [Id.].

This injunction was dissolved by the trial court's order of November 4, 2010, which precipitated the second appeal. [App-62 to 66].

C. DAMAGES CAUSED BY RESPONDENT'S PESTICIDE MISUSES.

1. Transitional Fields Mean Conventional Prices. At the time appellant's were seeking the temporary injunction in June of 2009, they had 1364.4 acres potentially available for organic production. However, as of April 27, 2009, the OCIA permitted organic certification as to only 964 acres. This meant that 270 acres was in "transition" and out of organic production. The reason, and only reason for this, was respondent's pesticide misuses that affected appellants' fields. [SA-109 to 117].

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

2. Appellants Have Been Unable to Start a Lucrative Organic Seed Business Due to Respondent's Repeated Pesticide Misuses. Organic seed prices are even higher than that of organic crops grown for consumption. Appellants have an organic seed corn that they want to market. However, because of the contaminations they have not been able to advertise

it due to the inability to predict from year to year that a clean supply can be grown. [SA-228 to 229].

Appellants did submit proof that they have had approximately \$33,000 seed sales from 2004 - 2009. [SA-157 (P. 37 L. 13 to P. 42 L. 1)].

3. Respondent's Pesticide Misuses Have Caused Appellants Substantial Inconveniences. Organic farmers must keep close records of their operation and have them available for the certifying agent's inspection at any time in order to demonstrate that they have met all applicable NOP requirements. 7 CFR § 205.103 [SA-267]. Among other things, the NOP provides that there are certain allowed and disallowed substances which may or may not be used in an organic farming operation. 7 CFR § 205.105. [SA-267 to 268]. Whenever there is a "drift"⁶ event affecting an organic farmer's land with a "prohibited substance" he/she/it is legally bound to report it to the certifying agent immediately. 7 CFR § 205.400(f) [SA-286].

A key component to organic farming is crop rotation. 7 CFR § 205.205 [SA-271] mandates crop rotation. In order to maximize the soil's potential for continuing organic

⁶The word "drift" is specifically defined in the NOP regulations. It is defined as "[t]he physical movement of prohibited substances from the target site onto an organic operation or portion thereof". 7 CFR § 205.2 [SA-260]. Although this definition is simple and direct in its meaning, respondent attempts to create a differentiation between the movement of pesticide particles suspended in water droplets onto organic land and the mere evaporation of volatile pesticide substances which then moves to the nearby organic land. It calls the former "drift" and the latter "volatilization". [*Infra*]. The NOP clearly makes no distinction between the two.

production the organic farmer is required to annually provide updated system plans to the certifying agent, which demonstrate changes in the original organic production system plan submitted in accordance with 7 CFR §§ 205.200 and 201 [SA-268 to 269].

Accordingly, each time respondent has caused a “drift” event to appellants’ land, it significantly increases their reporting and record-keeping burden. They report to and work with the Minnesota Department of Agriculture which then investigates the matter, including a site inspection. [*see, for example*, SA-18 to 19; SA-23; SA-43 to 44; SA-55 to 63; SA-65 to 74; SA-83 to 94]. The MDA may, depending on the circumstances, issue a “food/commodity advisory” telling them that there may be added consequences and, if appropriate, will order appellants to destroy crops because of zero tolerances for certain chemicals in certain products. [*See, for example*, SA-57 to 58].

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

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

Appellants must be cognizant of “parallel” farming and other factors in their extra rotational planning due to respondent’s pesticide misuses. Parallel farming is growing the same crop in a field that is not certified as organic next to a field that is organically certified so there is no commingling. [SA-228 to 229]. This must be accounted for in the amending of the crop rotation plan.

Still another problem associated with respondent’s “drift” events is weed pressure on appellant’s affected fields. Application of less than the recommended dose may actually enhance weed growth. [SA-228; SA-247]. In 2008 appellants disked under a soy bean crop due to weed pressure on their Fields 1A and 1B because giant ragweed had taken over a contaminated area. [Id.].

4. Respondent’s Pesticide Misuses Have Caused Appellants Substantial Annoyance. Appellants believed that they would be highly successful at organic farming. However, they find themselves in debt to the bank. [SA-3]. They are worried about economic survival. [Id.].

5. Respondent’s Pesticide Misuses in 2007 and 2008 Have Forced Appellants to Destroy Valuable Crops. Directly as a result of respondent’s drift event in

2007, appellants were ordered by the MDA to “plow down” a strip of soybeans [the area damaged by the drift plus a buffer area 175 feet by 25 feet in size] in the affected field because there was no tolerance in soybeans for the pesticide respondent had misused. [SA-57 to 58]. Appellants complied. [SA-180 (P 131 L. 2 to P. 132 L. 23)].

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

The NOP statutes provide a list of non-synthetic substances which may not be applied by the organic farmer in order to retain certification. *See* 7 C.F.R. 205.602. However, it is notable that the above list of NOP requirements for organic farmers is void of any limits placed on neighboring farmers’ use of these chemical pesticides. Presumably, anticipating inadvertent drift of prohibited substances onto organic fields, limitations on pesticide residue in organic crops is found in the NOP statute entitled, “Exclusion for organic sale,” which provides

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. The Administrator, the applicable State organic program’s governing State official or the certifying agent may conduct an investigation of the certified operation to determine the cause of the prohibited substance.

7 C.F.R. § 205.671 (emphasis added). In other words, prohibited substances which are present in organic crops at a level of 5% or less of the Environmental Protection Agency's ("EPA") tolerance level for conventional crops still qualify to be sold as organically produced.

[SA-254].

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

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

* * * * *

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

[App-57 to 58].

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLAIMS FOR DAMAGES UNDER NUISANCE, TRESPASS AND NEGLIGENCE *PER SE*.

A. STANDARD OF REVIEW.

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

In this case the trial court has misapplied the law to hold that there are no damages to support claims for nuisance and negligence *per se*. It has also ignored damages facts which are independent of the legal theory which it misapplied which are clearly compensable even if appellants are wrong about the trial court's misapplication of the "5% Rule". It also misapplied the law of trespass.

B. THE NOP'S 5% RULE HAS BEEN MISAPPLIED.

The trial court's adoption of respondent's argument under the so-called "5% Rule" is incorrect. 7 C.F.R. § 205.671 has been taken totally out of context and must be construed with all of the other NOP regulations with which appellants must comply. When read in full context it becomes irrelevant to appellant's situation. And, in practical circumstance, it is irrelevant anyway. Appellants' fields, notwithstanding the "5% Rule", were de-certified by appellants' certifying agent and were thus subject to the "3 year rule" of 7 CFR § 205.202.

1. Invocation of the "5% Rule" procedure applies to the OCIA only and has been erroneously applied to appellants. By reading 7 CFR § 205.671 one sees that the first few words are: "[w]hen residue testing detects prohibited substances at levels greater than 5%...". Nothing in that rule, standing alone, suggests that organic land is to be tested - it refers to "agricultural products". Nothing in the rule, standing alone, suggests **who** is to perform such residue testing or under what circumstances the testing is to be done. Indeed, there is nothing in that rule which suggests that residue testing is mandatory or permissive. It merely refers to circumstances "when" such testing is performed.

The fact is, appellants are required to abide by all of the NOP regulations, including those that apply to their land.⁷ 7 C.F.R.. § 205.202(b) states that their land must not have had any “... prohibited substances, as listed in § 205.105, **applied to it** for a period of three years immediately preceding harvest of the crop” (emphasis added) before they can legally sell their crops as organic crops. As cited above, the trial court did not consider this regulation as persuasive because it otherwise saw no purpose to the so-called “5% Rule” and it cited a comment to the NOP rules that implies that inadvertent drift should not adversely affect the operation.⁸ But, there clearly is a reason for the “5% Rule” that extends beyond the trial

⁷The applicable comments found at 65 Fed. Reg. 80559 (Feb. 20, 2001) specifically state:

Crop Production

Any field or farm parcel used to produce an organic crop must have been managed in accordance with the requirements in sections 205.203 through 205.206 and have had no prohibited substances applied to it for at least 3 years prior to harvest of the crop. Such fields and farm parcels must also have distinct, defined boundaries and buffer zones to prevent contact with the land or crop by prohibited substances applied to adjoining land. [SA-327 to 328]

⁸The trial court cited a portion of the NOP comments that helped persuade it that respondent’s claims under the “5% Rule” were correct. It cited from 65 Fed. Reg. 80556. [App-58]. However, that part of the comments has to do with “Genetic” drift, i.e., pollen from GMO grains. Although there is some discussion of pesticide drift (for exemplification purposes) in this portion of the comments, it does not address the same subject-matter.

The key language of the comment is: “As long as an organic operation has not used excluded methods and takes reasonable steps to avoid contact with the products of excluded methods as detailed in their approved organic system plan, the unintentional presence of the products of excluded methods should not effect the status of an organic product or operation”. (Emphasis added) [SA-325]. The term “excluded methods” is

court's perception.

The wording of the NOP regulations follow set definitions and need to be interpreted as a whole. (*See*, Comment at 65 Fed Reg. 80549). [SA-323]. The NOP regulations provide a specific definition of the word "drift" to be any "physical movement" of a prohibited substance onto organic land from an "intended target site". 7 CFR § 205.2. When "drift" occurs, the organic farmer is compelled to "[i]mmediately notify the certifying agent concerning **any... application, including drift**, of a prohibited substance to any field...". 7 C.F.R. § 205.400(f). (emphasis added). Thus, the word "application" there is used in the same sense as the word "applied" is used in 7 CFR § 205.202(b) - and it includes "drift".

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

defined by the NOP to mean genetically engineered products. 7 CFR § 205.2. [SA-258]. The comment, then, cannot be extended beyond genetically engineered products and their pollen drift.

In the instant case appellants met their reporting obligations and the OCIA met its review/inspection obligations each year in which respondent's drift events occurred. The OCIA chose to de-certify the affected fields - which it had discretion to do based upon the records from the MDA, the records from appellants and its inspection of the site. It ordered appellants to put the affected fields into transition for 36 months or to extend an existing period of transition.

Respondent has no evidence to show otherwise. Instead, it has engaged in unfair and baseless claim that collusive de-certifications, have been happening between appellants and the OCIA. [T. 43 L. 1-14].

This, then, brings the discussion to 7 CFR § 205.671 and its true context.⁹ Appellants first point to the rule immediately preceding it - 7 CFR § 205.670. It provides methodology by which a certifying agent "may" use residue testing when "drift" has occurred. It is entitled "Inspection and testing of agricultural product to be sold or labeled". It differentiates among products to be sold as "100 percent organic" versus "organic" versus "made with organic (specified ingredients or food groups)". It applies to "agricultural products that are to be sold" as one of those three classes.

⁹Respondent argued that because the comments to this rule make it clear that the 5% testing standard was not intended to be a safe harbor for an organic producer who intentionally uses a pesticide and then demonstrates through testing that he is at or below the 5%, this must be support for its claim that an organic farmer who innocently has been drifted upon can test and still market his products as organic if the test results are favorable. However, respondent has not suggested any particular methodology or NOP regulation that would permit the organic farmers to do this. There is none.

First, the products are required to be made “...accessible for examination by...the certifying agent.” 7 CFR § 205.670(a).

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

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

Finally, 7 CFR § 205.670(e) states that if testing results “...indicate a specific agricultural product contains pesticide residues...that exceed...the Environmental Protection Agency’s regulatory tolerances...” the certifying agent must report the same to the EPA.

Obviously, this regulation creates a specific set of preharvest and/or postharvest chemical residue testing procedures and requirements that are to be done by the certifying agent if, and only if, the certifying agent deems it advisable. Moreover, the testing protocol does NOT include any provision for the organic farmer to do any testing himself/herself/itself or to even demand that the certifying agent perform such testing. It is entirely up to the certifying agent’s discretion.

Respondent’s reliance upon the very next regulation, 7 CFR § 205.671, is entirely misplaced. That rule clearly pertains to testing conducted under the regulation immediately

preceding it. If it did not it would contain its own protocol for who, how and what may be done in terms of testing by the organic farmer or anyone (other than the certifying agent) wanting to test.

Construing the NOP respondent's way detracts from the certifying agent's sole authority to enforce the NOP by giving the organic producer a means to co-regulate its certification decisions. This is NOT what was intended.¹⁰

The only conclusion that may be reached, then, is that by looking at the NOP regulations as a whole, it is clear that the certifying agent makes the call on continuing certification regarding land on which drift has occurred. It may or may not use residue testing as a means of assisting itself in making the call and, in the case of chemical drift, it might decide to spend the money to have testing done to alleviate hardship on an innocent organic operation. On the other hand, it may not and, based upon the records reviewed and site inspections, merely advise the drift affected organic producer that the field involved must be placed into transition for three years.

The latter circumstance is exactly what happened here. Appellants have submitted testimony and the notification letters from the OCIA notifying them of the transitioning of the fields on which respondent has caused drift. These transition periods are for three years

¹⁰The initializing "Summary" of the comments and NOP regulations effect 2/20/01 specifically states: "Under the program, certifying agents will certify production...in compliance with the requirements of this regulation and will initiate compliance actions to enforce program requirements." [SA-322]. No where is the organic producer provided any right of co-regulation.

consistent with the three year ban on having prohibited substances “applied” under 7 CFR § 205.202(b). Thus, by reading the regulations as a whole, and by looking at the record, it is clear that appellants’ claims for damages for loss of organic pricing is not moribund. There is no basis on which to apply the “5% Rule” to appellants because the OCIA did no testing and the only way to get the benefit of a “5% Rule” exemption would have been for the OCIA to proceed under 7 CFR § 205.670; do the testing; and step aside if the testing results were at or below the 5% threshold.

And, when the NOP regulations are examined in full, there simply are NO provisions anywhere which permit an organic farmer to conduct his own testing in order to meet the 5% standard or any other standard. Accordingly, respondent’s entire argument that appellant’s proof of damages fails because they failed to test for 5% compliance evaporates. Likewise, the trial court’s whole basis for dismissing the claims on grounds that there are no damages fails with it. The “5% Rule” is irrelevant here.

2. Regardless of the “5% Rule”, the OCIA placed appellants fields into transition because of respondent’s pesticide misuses. Both the respondent and the trial court used the “5% Rule” as a “silver bullet” to defeat appellants’ damages claims under the nuisance and negligence *per se* claims. However, both ignore the fact that the OCIA directed appellants’ fields into transition, as it has discretion to do.

Neither respondent nor the trial court are free to merely disregard the OCIA’s determinations. As a certifying agent the OCIA is accredited to “certify a domestic...

production...operation as a certified operation”. 7 CFR § 205.500(a). The de-certifications of appellants’ fields were based upon the MDA reports, appellants’ reports and site inspections. Respondent has no basis in fact or in law to call their determinations into question. “Although a reviewing court might reach a contrary conclusion to that arrived at by an administrative body, the court cannot substitute its judgment for that of the administrative body when the finding is properly supported by evidence.” Vicker v. Starkey, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

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

a. Nuisance Damages. In Highview North Apartments v. County of Ramsey, 323 N.W.2d 65 (Minn. 1982), the Minnesota Supreme Court upheld an award of damages on a theory of private nuisance. It noted that the private nuisance statute, Minn. Stat. § 561.01 [on which appellants here rely] authorizes a “choice or combination” of relief as between damages and injunctive relief. 323 N.W.2d at 73. The Highview trial court awarded over \$73,000 in damages “...to real and personal property and for disruption and inconvenience caused by the nuisance”. [Id.] Included in the damages for inconvenience were damages to the owner of the apartments affected by the water intrusion for having to deal with the problems caused by the nuisance.

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

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

Minn. Stat. § 561.01 defines a "nuisance" as follows:

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

Here there is evidence that Oluf Johnson was required to plow under crops. He needed to comply with an MDA directive to plow crops under in 2007. He needed to control weeds by plowing crops in spray drift areas and this was done with OCIA approval in 2008. There is evidence that Oluf Johnson is physically affected by pesticides. During respondent's spray activities he has suffered cotton mouth, swollen throat and headaches. [SA-176 (P. 113 L. 17 to P. 114 L. 8); SA-187 (P. 157 L. 23 to P. 160 L. 24)].

Appellants want to farm their land organically. They want to, but have not been able to, start a regular organic seed business. That is their choice. Respondent's pesticide misuses have forced them to make reports, make adjustments to the farming operation and to doother

things to compensate for these violations - all in derogation of their right to “free use” of their property and the right to its “comfortable enjoyment”. These are items of inconvenience and disruption which the law deems to be compensable. Even the physical discomfort is compensable. And, the loss of “business” in the form of a lucrative organic seed business is damage to their property.

Thus, nuisance damage claims for property loss, inconvenience, disruption and physical discomfort all exist and have nothing to do with organic versus non-organic crop prices.

b. Negligence Per Se Damages. Appellants alleged negligence *per se* for violation of Minn. Stat. § 18B.07 subd. 2(a) or (b) which reads, in relevant part, as follows:

Subd. 2. Prohibited pesticide use.

- (a) A person may not use...a pesticide...in a manner:
 - (1) that is inconsistent with a label or labeling as defined by FIFRA;
 - (2) that endangers humans, damages agricultural products

* * * * *

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

[SA-339].

The Minnesota Supreme Court has said that violation of Minn. Stat. § 18B.07 may give rise to a claim for damages on a theory of negligence *per se*. Anderson v. State of Minnesota, 693 N.W.2d 181, 189-91 (Minn. 2005).

It is axiomatic that a plaintiff in a negligence case may be awarded damages for property loss. Where property is totally destroyed the plaintiff may seek the value of the property at the time of its destruction. *Restatement, Second, Torts* § 927 (1979). There can be damages for loss of use as well. [Id., comments n and o].

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

The trial court's failure to recognize appellant's right to move forward with nuisance and negligence *per se* damages that were independent of the "5% Rule" argument was clear error.

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

The trial court agreed with the respondent's contention that Wendinger v. Forst Farms, 662 N.W.2d 546 (Minn.App. 2003) demonstrates that there is no cause of action for trespass in this case.

In Wendinger a claim was made for trespass on the basis of intermittent foul odors emanating from the defendant's hog farming operation. This Court upheld the trial court's dismissal of the trespass claim noting that although some jurisdictions recognize trespass by particulate matter, Minnesota has not. This Court analogized Wendinger to Fagerlie v. City of Willmar, 435 N.W.2d 641, 644 Fn. 2 (Minn.App. 1989) where noxious fumes emanating from a treatment plant were perceived as a nuisance, rather than a trespass. *See*, Wendinger, 662 N.W.2d at 550-51.

The trial court here noted that appellants argued that there is a difference between odors and pesticides that are delivered via water droplets from sprayers. [App-52 to 53]. In fact appellants argued that the most significant difference is the fact that pesticides are considered by NOP regulation to continue on the land for 36 months following the invasion. The court held, nevertheless, that since pesticide droplets are "particulate matter" they could not be an instrumentality of trespass. [Id].

There are two elements to trespass. The first is plaintiff's right of possession of the land. The second is an unlawful entry by the defendant. Wendinger, 662 N.W.2d at 550. The invasion of substances, as opposed to persons, has been held to be a trespass in Minnesota. *See*, Victor v. Sell, 301 Minn. 309, 313, 222 N.W.2d 337, 340 (1974) [though found not to be by jury, a radiator placed onto property could have been a trespass]; Bridgeman-Russell Company v. City of Duluth, 158 Minn. 509, 511-12 197 N.W. 971, 972-73 (1924) [large volume of water escaped from reservoir was trespass]; Bohrer v. Village of

Inver Grove, 166 Minn. 336, 338, 207 N.W. 721 (1926) [deposition of dirt/sand via run-off through a ravine was both trespass and nuisance]; Whittaker v. Stangvick, 100 Minn. 386, 392, 111 N.W. 295, 297 (1907)[duck hunting buckshot and birds falling onto plaintiff's land held an enjoined trespass] and Citizens for a Safe Grant v. Lone Oak Sportsmens Club, Inc., 624 N.W.2d 796, 805 (Minn.App. 2001) [bullets and pellets from neighboring gun club falling onto property constituted a trespass].

Likewise, the deposition of chemical substances upon appellant's land amounts to an invasion of their right to exclusive possession because it introduces a foreign substance to the land itself which then leads to negative consequences and loss of the intended use of the land.

It does not matter that the chemicals did not flood onto the property as in Bridgeman-Russell. Nor does it matter that they were not washed onto appellants' land by run-off as in Bohrer. Nor does it matter that defendant broadcast the chemicals into the air suspended in water droplets which followed the wind to appellants' land. The method of transport to the trespassed land is not the issue. Whether the right of exclusive possession has been besmirched is the issue. What matters, then, is that the chemicals came upon the land by respondent's hand and did injury to the land by making it unsuitable for organic farming for the next 36 months. In Whittaker v. Stangvick, *supra*, the Court recognized that the falling buckshot and birds did "substantial damage to the premises."

However, even if the damage was “insignificant” (as the duck hunters argued), such was considered irrelevant by the Court. There was still an invasion of the right of exclusive control.

Correspondingly, respondent’s use of pesticides invaded appellant’s right to exclusive possession - a right of possession that included freedom from contamination by NOP “prohibited substances”. That invasion caused damage to the land and sets it apart from the odors and fumes held to be nuisances and not trespasses in Wendinger and Fagerlie.

Appellants would suggest, then, that trial court’s premise that “particulate matter” has not been recognized in Minnesota as actionable trespass is inapplicable here. Rather, the particulate matter rule pertains to odors and fumes which are offensive to the senses as in Wendinger and Fagerlie. While respondent’s conduct also created a nuisance, the same conduct can be both a nuisance and a trespass. Bohrer v. Village of Inver Grove, supra; Citizens for a Safe Grant v. Lone Oak Sportsmens Club, Inc., supra.

II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANTS TO AMEND THE COMPLAINT TO INCLUDE DAMAGES CLAIMS FOR THE TWO 2008 DRIFT EVENTS ON GROUNDS OF “FUTILITY”.

A. STANDARD OF REVIEW.

Typically, this issue an abuse of discretion standard. However, in the case of the denial of a motion to amend a pleading, whether the district court has abused its discretion can turn upon the issue of whether the trial court was correct in “an underlying legal ruling”. Doe v. F.P., 667 N.W.2d 493, 500-01 (Minn.App. 2003). The trial court’s underlying legal

rulings as to no damages and/or no trespass are incorrect.

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

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

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

Almost this entire brief has been devoted to a demonstration as to why, factually and legally, the dismissal of the damages claims for nuisance, trespass and negligence *per se* was improvident. The “5% Rule” justifying the holding that there are zero damages ignores the true purpose and effect of that rule and appellants’ inability to utilize it themselves. The “5% Rule”, in any event, does not erase damages for inconvenience, loss of property, etc., that are not associated with organic versus non-organic pricing. The certifying agent, OCIA, de-

certified appellants' fields and there is no legal basis to claim that their decision should not be recognized by the courts.

Trespass does and should apply to these facts for the reasons above-discussed.

To the extent that this Court agrees with appellants and restores any or some of those claims for the 2007 incident, the futility of making the same claim[s] for 2008 completely disappears. Thus, appellants respectfully request a reversal and remand with instructions to permit amendment of the complaint to include cause[s] of action for damages attributable to 2008 for any remanded claims.

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

A. STANDARD OF REVIEW.

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

This case involves the dissolution of an injunction already granted and, thus, the trial court already made findings on the "Dahlberg factors"¹¹ that were favorable to appellants. The change in circumstance brought on by the summary judgment caused the court to vacate

¹¹The five "Dahlberg factors" are: (1) history of the parties and their relationship; (2) comparison of relative harms to the parties if relief is granted or denied; (3) movant's likelihood of success on the merits; (4) public policy considerations; and (5) administrative burden in judicial enforcement and supervision. Dahlberg Brothers, Inc. v. Ford Motor Company, 137 N.W.2d 314, 321-22 (Minn. 1965).

the injunction. However, if the court's underlying legal basis for the summary judgment is here found to be wrong, presumably the injunction should be reinstated. *See, Doe v. F.P., supra.* At least, the claim for injunctive relief should be reinstated.

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

B. THE TRIAL COURT'S TREATMENT OF THE INJUNCTION ISSUE HAS BEEN INCONSISTENT AND THE INJUNCTION/INJUNCTIVE CLAIM SHOULD BE ORDERED REINSTATED.

In its November 4, 2010, order [App-62 to 66] the trial court vacated the temporary injunction on grounds that since there is no longer any claim for damages, there is no claim for injunctive relief under the nuisance statute. This is an incorrect view of the law.

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

Because the trial court first granted an injunction, and specifically, said that there is evidence of damages in support of the “likelihood of success on the merits” factor, its position now is wholly inconsistent. This is what the trial court said in its Order of June 26, 2009 (holding that appellants were entitled to injunctive relief): “Some evidence exists that Plaintiffs were damaged (Ex 13 to Aff. Oluf Johnson in Supp. of Mot. for Temp. Inj.)”. [App-29].

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

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

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

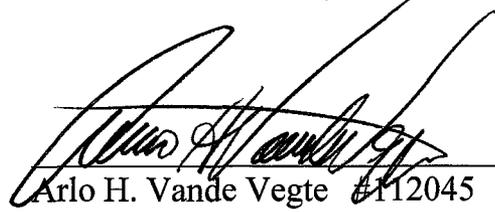
Repeated trespass is enjoinable. Whittaker v. Stangvik, *supra*. Nuisance is enjoinable. Minn. Stat. § 561.01. It seems that the trial court lost sight of these things in order to reach a desired result - dismissal of the entire case. But, it is not free to leave appropriate remedies behind when there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

CONCLUSION

In essence, the trial court’s dismissals and respondent’s arguments in support of the dismissals are a “house of cards” premised upon an inapposite “5% Rule”. Even if it does apply, they have turned a blind eye to the legitimate damage and injunctive claims that exist notwithstanding. The trespass claim is viable as well. Claims for damages under the nuisance, trespass and negligence *per se* should be remanded to the trial court for trial and the injunctive claim remanded with an order to reinstate the temporary injunction pending the final outcome on the merits. The award of costs/disbursements against appellants should be reversed as well. Appellants respectfully request this relief on appeal.

ARLO H. VANDE VEGTE, P.A.

By:

A handwritten signature in black ink, appearing to read "Arlo H. Vande Vegte", is written over a horizontal line.

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