

NO. A11-693

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State of Minnesota  
**In Court of Appeals**

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Farm Bureau Mutual Insurance Company,

*Appellant,*

vs.

Earthsoils, Inc., Lavern Ptacek and Jeffrey Ptacek,

*Respondents.*

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**APPELLANT'S REPLY BRIEF AND APPENDIX**

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Curtis D. Ruwe (#0313257)  
Beth A. Jenson Prouty (#0389275)  
ARTHUR, CHAPMAN, KETTERING,  
SMETAK & PIKALA, P.A.  
500 Young Quinlan Building  
81 South Ninth Street  
Minneapolis, MN 55402  
(612) 339-3500

*Attorneys for Appellant  
Farm Bureau Mutual Insurance Company*

Paul Sortland (#103573)  
SORTLAND LAW OFFICE  
431 South Seventh Street  
Suite 2440  
Minneapolis, MN 55415  
(612) 375-0400

*Attorney for Respondent  
Earthsoils Inc.*

J. Poage Anderson (#166194)  
David H. Redden (#391496)  
FABIAN MAY & ANDERSON, PLLP  
1285 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 353-3440

*Attorney for Respondents  
Lavern and Jeffrey Ptacek*

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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## REPLY ARGUMENT

### **I. THE PTACEKS' UNDERLYING LAWSUIT ALLEGES ONLY BUSINESS RISKS NOT COVERED BY FARM BUREAU'S COMMERCIAL GENERAL LIABILITY POLICY.**

Earthsoils argument for coverage is that application of Earthsoils' fertilizer damaged the Ptaceks' corn crop because the crop did not produce the anticipated yield. (Earthsoils Br. at 11, 13.) As support, Earthsoils cites *Ferrell v. West Bend Mut. Ins. Co.*, 393 F.3d 786, 789 (8th Cir. 2005), where a plastic film laid over tomato plants to prevent dirt from splashing onto them prematurely deteriorated. (See Earthsoils Br. at 14.) Because the film deteriorated, it was difficult to properly water the plants and dirt splashed onto the tomatoes, causing blight. *Ferrell*, 393 F.3d at 789. "These problems resulted in stunted plants that produced less fruit, and the tomatoes that did grow were smaller than normal and suffered from sunburn, rain damage, and cracked stems." *Id.* One of the tomato growers "testified that the quality of the crop with the defective film was worse than if no film had been used at all." *Id.* (emphasis added).

Here, in contrast to *Ferrell*, the only evidence is that fertilizer caused the decreased yield. There is no allegation or evidence that the fertilizer: (1) damaged the corn seeds, causing them produce less yield than would have been produced if no fertilizer had been applied; or (2) damaged the actual corn crop yield, making it unmarketable or reducing its sale value because the kernels produced were smaller or blemished in some way. There is no evidence or allegation that the quality or quantity of the actual crop was worse than if no

fertilizer had been used at all. To the contrary, the only evidence is that – while the fertilizer did enhance the corn seed’s growth capacity – the insufficient quality and quantity of fertilizer caused the less-than-anticipated yield because it failed to enhance the corn seeds’ full growth capacity. In its brief, Earthsoils itself describes the Ptaceks’ claim as being for “damages to their corn crop, which was deficient as a result of the fertilizer provided by Earthsoils.” (Earthsoils Br. at 21-22.)

Second, Earthsoils cites *Stark Liquidation Co. v. Florists’ Mut. Ins. Co.*, 243 S.W.3d 385 (Mo. App. 2007), and argues the Minnesota Court of Appeals should adopt *Stark’s* reasoning to hold that a CGL policy covers injury caused by the negligence of an insured. (Earthsoils Br. at 14.) Under Minnesota precedent, a CGL policy can cover an insured’s negligence that results “in damage to property other than to the product or completed work itself.” (See Appellants Br. (“App. Br.”) at 13 (quoting *Bor-Son Bldg. Corp. v. Employers Comm’l Union Ins. Co.*, 323 N.W.2d 58, 63 (Minn. 1982) (emphasis added)). But CGL policies do not cover economic loss caused “because the product . . . is not that for which the damaged person bargained.” *Id.* Further, *Stark* has no persuasive value here because, in *Stark*, the underlying plaintiff, Duffin, was seeking damages for “the loss of use of property . . . which has not been physically injured.” 243 S.W.2d at 393. Although the apricot trees Duffin purchased from Stark contained bacterial canker that decreased the trees anticipated yield, Duffin did not seek to recover for this loss, but only for the lost use of his land. *Id.* Here, the Ptaceks deny making

any loss-of-use claims, and Earthsoils argues such analysis should not apply because the Ptaceks allege physical injury. (Ptaceks' Br. at 12 & n.8; see Earthsoils Br. at 5.)

Finally, Earthsoils attempts to distinguish *North Branch Mut. Ins. Co. v. Bloom Lake Farms, Inc.*, No. C9-95-762, 1995 Minn. App. LEXIS 1206 (Minn. App. Sept. 19, 1995) (attached as Appellant's Appendix ("A. App.") at 114-17), alleging the damage in that case was to the herd sold, not to any other property of the buyer. (Earthsoils Br. at 14). Earthsoils, in making this argument, explains why the Ptaceks' claim is not covered. In *Bloom Lake Farms*, there was no evidence that the milk that was actually produced was unmarketable or that the calves that were actually born were physically injured. But the Radels claimed that less milk and fewer calves were produced. Similarly, here, neither Earthsoils nor the Ptaceks have produced any evidence that the fertilizer damaged the Ptaceks' corn seeds or that the actual crop was actually damaged. Their claims are that the fertilizer was of insufficient quality and quantity to produce the promised yield. As stated in *Bloom Lake Farms*, a CGL policy is not designed to cover this risk.

Public policy, as exemplified in the business risk doctrine, does not support extending liability coverage to an insured for the repair or replacement of the insureds work. *Bor-Son Bldg. Corp.*, 323 N.W.2d at 61-62. Instead, the business risk doctrine is designed to prevent, "the opportunity or incentive for the insured . . . to be less than optimally diligent in . . . the performance of his contractual

obligations to complete a project in a good workmanlike manner.” *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 326 (Minn. 2004).

As the Court observed in *Bor-Son*:

The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverage in question are designed to protect against. 323 N.W.2d at 63.

The business risk doctrine applies here. No matter how the Ptaceks may couch their allegations, the underlying lawsuit exists because the Ptaceks allege that Earthsoils promised its fertilizer would enhance the growth of the Ptaceks’ corn seeds so that the seeds would produce 180-200 bushels of corn per acre. (A. App. 17, Ptacek Compl. at ¶ 8.) Because Earthsoils allegedly provided the wrong fertilizer recommendations, the fertilizer only enhanced the seeds to produce half that amount. The Ptaceks brought a claim against Earthsoils seeking to recover the difference between the profit they were promised and the profit they actually realized. As outlined above, Minnesota courts have consistently held that the CGL policy is not intended to make up the difference when the insured falls short of its contractual obligations. But that is precisely what Earthsoils and the Ptaceks are requesting. To grant coverage in this case would contravene the public policy concern behind the business risk doctrine because the insured would retain the profit from work it allegedly failed to properly perform. Moreover, to grant coverage in this case would potentially make Farm Bureau the guarantor of any

amount of yield that Earthsoils warrants to its customers – a risk far beyond that which Farm Bureau underwrote for this policy.

**II. LESS-THAN-ANTICIPATED CROP YIELD IS NOT “PROPERTY DAMAGE” – DEFINED BY FARM BUREAU’S POLICY AS “PHYSICAL INJURY” TO “TANGIBLE PROPERTY.”**

**A. Less-than-anticipated crop yield is not “tangible property.”**

To argue anticipated crop yield is “tangible property,” Earthsoils cites to *St. Paul Fire & Marine v. Nat’l Computer*, 490 N.W.2d 626, 631 (Minn. App. 1992), which defines “tangible” as “discernable by the touch; capable of being touched; palpable.” (Earthsoils Br. at 16, 19-22.) In *Nat’l Computer*, a former Boeing employee took a set of three-ring binders containing Boeing proprietary technical and pricing information and provided it to a competitor. 490 N.W.2d at 629. Even though the binders were “tangible property,” the court of appeals reversed the district court’s finding of coverage because the real injury was not the binders, but rather the loss of the confidential nature of the information. *Id.* at 631. Therefore, the complaint did not allege damage to “tangible property.” *Id.* Here, Earthsoils fails to explain how loss-of-anticipated yield – essentially corn that did not grow – is a tangible substance that is capable of being touched. Just as in *Nat’l Computer* the value of keeping information confidential was intangible, here, loss-of-anticipated yield is intangible.

Earthsoils also cites *Safeco Ins. Co. v. D.E. Munroe*, 527 P.2d 64 (Mont. 1974) and *Gen. Ins. Co. of Am. v. Gauger*, 538 P.2d 563 (Wash. App. 1975). (Earthsoils Br. at 20-22.) In *Munroe*, Munroe Ranch delivered the wrong kind of

seed wheat, and the seeds did not come up when planted. 527 P.2d at 66. To determine coverage, the Court analyzed whether there was any injury to “tangible property.” *Id.* at 69. The Court adopted the district court’s finding verbatim, reiterating that:

[I]f the claimants against Munroe as aforescribed suffered any loss by virtue of having received and planted the wrong type of seed wheat, it follows, as a matter of common knowledge, that the land in which the seed wheat was planted would have been damaged in that said land would have lost a portion of its retained moisture, would have lost a portion of its retained fertilizer, weeds would have grown thereon where no crop had grown, erosion would have occurred, said land would have to have been recultivated in order to render it suitable for the planting of another crop of the same or similar nature, and that if little or no crop grew, the claimants would have received little or no compensation by virtue of having lost a crop, and would have suffered loss of use of their lands. *Id.* at 68 (emphasis added)

The Montana Supreme Court then concluded that “a Montana wheat field and the crop therein, is tangible property.” *Id.* “The district court clearly found injury to the wheat fields and thus injury to tangible property.” *Id.* (emphasis added). The *Gauger* court quoted the holding of *Munroe*. 538 P.2d at 565.

*Munroe* and *Gauger* do not support Earthsoils’ argument that a crop that does not grow is “tangible property.” While *Munroe* states that a crop in a wheat field is tangible property – it does not say that a crop that does not grow in a wheat field is tangible property. In both *Munroe* and *Gauger*, the courts found injury to “tangible property” because there was a “loss of use” of wheat fields. The Ptaceks and Earthsoils are not making any loss-of-use claims.

Even if *Munroe* and *Gauger* would support Earthsoils' argument – that a crop that does not grow a wheat field is “tangible property” – such reasoning should be rejected. It is contrary to Minnesota precedent which holds that loss-of-anticipated yield is not “tangible property.” (See App. Br. at 16-19.)

Further, both *Munroe* and *Gauger* found “property damage” under a definition that included “consequential damages” and did not require “physical injury.” *Munroe*, 527 P.2d at 68; *Gauger*, 538 P.2d at 564-66; see also App. Br. at 19-20. The policy analyzed in *Munroe* provided coverage for:

damages for loss of use of property resulting from injury to or destruction of tangible property. 527 P.2d at 68 (emphasis added).

Similarly, the policy in *Gauger* covered damages for:

loss of use of property resulting from property damage. . . . ‘property damage’ means injury to or destruction of *tangible* property.” 538 P.2d at 565 (underline emphasis added).

Here, Earthsoils and the Ptaceks are claiming coverage under the Farm Bureau policy's first definition of “property damage”, defined as:

- a. Physical injury to tangible property. (A. App. 14) (emphasis added).

The policy language in *Munroe* and *Gauger* does not parallel this definition of “property damage.” Rather, the *Munroe* and *Gauger* definitions more closely parallel Farm Bureau's second definition of “property damage,” defined as:

- b. Loss of use of tangible property that is not physically injured. (A. App. 14) (emphasis added).

Here, the Ptaceks deny making any loss-of-use claims under this definition. (Ptaceks' Br. at 12 & n.8.) Earthsoils similarly denies that any such claim exists. (See Earthsoils Br. at 5.) Therefore, *Munroe* and *Gauger* are not precedent for finding "physical injury" to "tangible property," and the Court should reject such arguments. Alternatively, if the Court finds "[l]oss of use of tangible property that is not physically injured," it should then conclude such "property damage" falls within Exclusion m. (See App. Br. at 24-32.)

**B. Less-than-anticipated crop yield is not "physical injury."**

*i. Neither the Ptaceks nor Earthsoils have produced any evidence of "physical injury."*

Both the Ptaceks and Earthsoils argue that "Earthsoils' nitrogen-deficient fertilizer caused [the Ptaceks'] corn crop to be less than half as productive as it would have been had the fertilizer contained sufficient nitrogen." (Earthsoils Br. at 20; Ptaceks' Br. at 8.) Therefore, they argue, "a reasonable inference from this allegation is that the fertilizer physically injured the corn crop causing the crop to grow half as well as it would have had it received sufficient nitrogen." (*Id.*) The Ptaceks cite to laboratory analysis of tissue samples showing that the corn crop contained less than half the necessary content of nitrogen. (Ptaceks Br. at 2.) They allege this nitrogen deficiency stunted the corn's productive capacity, reducing their crop yield by more than half of what they had been told the fertilizer would produce. (*Id.* at 2-3.)

Earthsoils further argues that “decreased crop production is physical damage.” (Earthsoils Br. at 18.) “[T]he damage to the corn crop resulted from the injury to the tangible property itself.” (*Id.* at 24.) “[T]he corn and soil<sup>1</sup> damaged by the fertilizer supplied by Earthsoil was discernable by touch and thus tangible property that was physically injured.” (*Id.*)

While all reasonable inferences favor the nonmoving party in summary judgment, surmise, speculation and general allegations do not create an issue of material fact. *Erickson v. Gen. Un. Life. Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977) (general assertions); *Fownes v. Hubbard Broad., Inc.*, 302 Minn. 471, 474, 225 N.W.2d 534, 537 (1975) (surmise and speculation). Neither does mere argument, conclusory statements, or reliance on the “naked allegation of [the] pleadings.” *Williamson v. Prasciunas*, 661 N.W.2d 645, 653 (Minn. App. 2003) (mere argument); *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004) (conclusory statements); *Morgan v. McLaughlin*, 290 Minn. 389, 393, 188 N.W.2d 829, 832 (1971) (naked allegations).

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<sup>1</sup> While not identifying what the damage to soil is, Earthsoils’ brief – citing the district court’s opinion – makes several references to it. (Earthsoils Br. at 7, 21, 24.) As the Ptaceks are not alleging loss-of-use of soil, Earthsoils is presumably alleging damage because the soil did not contain the amount of nitrogen it would have if Earthsoils had supplied a sufficient quality and quantity of fertilizer. But again, there is no evidence that the fertilizer depleted the soil of nitrogen, so that the soil contained less nitrogen than it would have if no fertilizer had been applied. There is no evidence that the nitrogen the fertilizer did supply to the soil decreased the crop yield so that it was less than if no fertilizer had been applied at all.

Earthsoils and the Ptaceks have not identified any evidence of any actual damage to the actual corn seeds or to the actual corn crop that could have resulted in the decreased corn yield. They have never alleged or produced any evidence from which to infer that the fertilizer:

- caused the Ptaceks' corns seeds not to germinate;
- damaged the corn seeds, causing them to yield less corn crop than would have been produced if no fertilizer had been applied; or
- damaged the actual 2007 corn crop yield or rendered it unmarketable.

In contrast to *Ferrell*, 393 F.3d at 789, where one of the tomato growers “testified that the quality of the crop with the defective film was worse than if no film had been used at all,” here, there is no allegation or evidence that the corn yield was less than if no fertilizer had been used at all. Therefore, because less-than-anticipated crop yield is not “physical injury,” there is no evidence of any “physical injury” to “tangible property.”

***ii. “Physical injury” requires actual injury.***

Earthsoils attempts to distinguish *Bloom Lake Farms*, 1995 Minn. App. LEXIS 1206, by arguing the Radels only sought to recover the difference between the diminished value of the herd actually purchased and the herd they had anticipated purchasing. (Earthsoils Br. at 24-25.) But in *Bloom Lake Farms*, the Radels were not seeking to recover for the diminished value of the herd, but rather for less-than-anticipated milk and calf production that occurred after the herd was in their possession. (See App. Br. at 13-14.) They were seeking to recover for profits they had anticipated had the herd produced the yield it had been

represented to produce. Similarly, here, the Ptaceks are seeking to recover for profits they had anticipated realizing had the fertilizer enhanced the corn seeds' yield as it had been represented that it would. The analysis of *Bloom Lake Farms* does apply.

Earthsoils argues its claim is similar to the covered damage for cattle born after the sale that were infected with the herds' disease in *Triple U Enter., Inc. v. New Hampshire Ins. Co.*, 527 F. Supp 798, 806-07 (D.S.D. 1983). (Earthsoils Br. at 24-25.) Earthsoils argues that like *Triple U*, it is seeking coverage for property damage to "the corn that grew after Earthsoils sold [i]ts fertilizer which the Ptaceks applied to their soil." (*Id.* at 25.) It alleges it is seeking coverage for "corn grown after Earthsoils provided fertilizer." (*Id.*)

But Earthsoils is not seeking to recover for "corn that grew"; it is seeking to recover for corn that did not grow. Further, while the diseased newborn calves in *Triple U* were born after the sale, the herd that infected the calves was diseased before and at the time of sale. The Heppers' claim was covered – not because the calves were born after the sale – but because there was actual physical injury to tangible property. In contrast, the Heppers' claim for loss-of-anticipated calves that were not born after the sale was not covered because there was no actual physical injury to tangible property. Similarly, here, the question is not whether the Ptaceks were damaged before or after the recommendation and application of fertilizer. The question is whether the fertilizer caused any "physical injury" to "tangible property." Unlike the actual disease spread to newborn calves in *Triple*

U, here, Earthsoils and the Ptaceks have not alleged any actual injury to the corn seeds or corn crop that resulted in lost yields.

Earthsoils also argues that *Madison Farmers Mill & Elevator Co. v. Mut. Serv. Cas. Ins. Co.*, No. C9-88-1620, 1989 Minn. App. LEXIS 106 (Minn. App. Feb. 7, 1989) (A. App. 118-19), is not relevant to whether there is “property damage” under a definition of “property damage” that requires “physical injury to tangible property.” (Earthsoils Br. at 22.) But in *Madison Farmers*, the court applied a definition of “property damage” that required “physical injury.” (See App. Br. at 20-21.) Therefore, the case is relevant.

The Ptaceks argue *Western Heritage Ins. Co. v. Green*, 54 P.3d 948 (Idaho 2002),<sup>2</sup> supports finding coverage because the potato foliage in *Green* was brown and yellowing just as the Ptaceks’ corn foliage was brown and yellowing. (Ptaceks’ Br. at 9-10.) Similarly, in *Auto Owners Ins. Co. v. Harrell’s Fertilizer, Inc.*, No. 4:05-cv-39, 2006 U.S. Dist. LEXIS 3021 (E.D. Tenn. Jan. 20, 2006) (A. App. 127-126), fertilizer applied to a nursery’s plants damaged, stunted the growth of, or destroyed the plants, making them unmarketable or unsalvageable. But in *Green* and *Harrell’s* there was actual physical injury to the actual crop: because

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<sup>2</sup> Earthsoils alleges that Farm Bureau mischaracterizes *Green* because the Idaho Supreme Court found coverage was excluded under the policy’s care, custody, and control exclusion, and did not consider Exclusion (m). (Earthsoils Br. At 23.) But in *Green*, the Idaho Supreme Court concluded the district court erred in finding physical injury and not continuing on to consider whether there was any loss of use of property. 54 P.3d at 954. The Court concluded that because “the misapplication [of fertilizer] caused a ‘loss of use of tangible property’ that includes loss of the use of the soil, Exclusion (m) excludes coverage.” *Id.*

of the fertilizer, many of potatoes actually harvested and the greenhouse plants actually grown were unmarketable. (See App. Br. 21-22.) Here, it has not been alleged that the fertilizer caused any actual injury to the actual corn seeds or to the actual corn crop. There is no evidence or allegation that the actual corn crop produced was unmarketable.

The Ptaceks also argue this case is like *Madison Farmers*, 1989 Minn. App. LEXIS 106, where the Minnesota Court of Appeals found a duty to defend when evidence was produced that feed caused physical damage to pheasants' reproductive system, resulting in decreased egg production. (Ptaceks' Br. at 10-11.) They argue that their "corn crop suffered physical injury in that it was unhealthy due to nitrogen deficiency, stunting its productive capacity." (*Id.* at 11.) But in *Madison Farmers*, there was only a duty to defend because it was alleged that the feed physically damaged the pheasants reproductive system – and that the physical damage resulted in decreased egg production. 1989 Minn. App. LEXIS at \*3. There would not have been a duty to defend if the feed – and not the physical damage to the pheasant's reproductive system – was the cause of the decreased production. *Id.* at \*2. (See App. Br. at 20-21.)

Here, there has been no allegation or evidence that the fertilizer caused any actual physical damage to the corn seeds or corn crop which then resulted in decreased yield. It has not been alleged that the fertilizer caused the corn seeds to yield less crop than would have been produced if no fertilizer had not been applied. It has not been alleged that the fertilizer depleted the soil, corn seeds, or

corn plants of nitrogen so that there was less nitrogen than if the fertilizer had been applied at all. The only allegation is that the fertilizer caused the decreased yield because it did not enhance the corn seeds to produce the yield the proper quality and quantity of fertilizer would have produced. There is no evidence of “physical injury” to “tangible property.”

### **C. Measure of damages**

Earthsoils argues throughout its brief that less-than-anticipated crop yield is a way to measure the result of “physical injury” to “tangible property.” (*See e.g.*, Earthsoils Br. at 15, 17, 19, 20, 23-25.) Farm Bureau agrees. (*See* App. Br. at 23-24.) But Earthsoils’ also argues that less-than-anticipated yield is “physical injury” and “tangible property.” Based on Minnesota precedent, it is not. (*See* App. Br. at 19-23.)

It is also important to note that the Ptaceks have not claimed any damage resulting from the brown and yellowing corn stalk foliage. They have not made any claim for loss-of-anticipated use of foliage or loss-of-anticipated revenue by alleging the foliage was rendered unmarketable. Further, neither Earthsoils nor the Ptaceks have argued there is a causal link between the less-than-anticipated yield and the corn stalks’ brown and yellowing foliage. They have not argued or produced evidence that less-than-anticipated yield is the measure of damages for brown and yellowing foliage.

As exemplified by the arguments in this case, even if the corn stalks were not brown and yellowing, the Ptaceks would have brought the underlying case if

the fertilizer had not enhanced the corn seeds to produce the anticipated yield. Conversely, even if the corn stalks were brown and yellowing, the Ptaceks would not have brought the underlying case if the fertilizer had enhanced the corn seeds to produce the anticipated yield. The Ptaceks are seeking to recover only for the alleged “property damage” of less-than-anticipated corn crop yield. As analyzed above, less-than-anticipated yield is not “property damage.”

#### **D. Table of cases**

To determine if there is “property damage,” courts have distinguished between (1) an insureds’ product that causes “physical injury” to “tangible property” that results in “less-than-anticipated yield” – and (2) an insureds’ product that causes “less-than-anticipated yield.” The former is “property damage;” the latter is not. As shown below, the Ptaceks’ claim parallels the latter. Farm Bureau provides the table of cases to give the court a more visual and succinct depiction of how this precedent has been applied.

Case	Insured's product	Alleged "tangible property"	Alleged "physical injury"	Measure of damages	Is there "property damage?"
<i>Madison Farms</i> , (Minn. App. 1989)	Feed	Pheasants	Reproductive system	Loss-of-anticipated profit	Yes
<i>Triple U</i> (8th Cir. 1983)	Herd	Newborn calves	Contacted herd's disease	Depreciation in value of calves born diseased	Yes
<i>Ferrell</i> (8th Cir. 2005)	Plastic film	Tomato crop	Tomatoes actually grown were smaller, sunburned, rain damage, cracked stems: worse than if no film used	Loss-of-anticipated profit	Yes
<i>Green</i> (Idaho 2002)	Fertilizer	Potato crop	Many potatoes actually grown were unmarketable because blemished etc.	Loss-of-anticipated profit	Yes
<i>Harrell's Fertilizer</i> (E.D. Tenn. 2006)	Fertilizer	Nursery plants	Nursery plants actually grown were unmarketable because damaged, stunted, or destroyed	Loss-of-anticipated profit	Yes
<i>Madison Farms</i> , (Minn. App. 1989)	Feed	Reduced egg production	Loss-of-anticipated profit	Loss-of-anticipated profit	No
<i>Bloom Lake Farms</i> (Minn. App. 1995)	Herd	Reduced milk and calf production	Loss-of-anticipated profit	Loss-of-anticipated profit	No
<i>Triple U</i> (8 <sup>th</sup> Cir. 1983)	Herd	Reduced calf production	Loss-of-anticipated profit	Loss-of-anticipated profit	No
<i>Ptaceks' claim</i>	Fertilizer	Reduced corn crop	Loss-of-anticipated profit	Loss-of-anticipated profit	No

**III. EVEN IF A DUTY TO DEFEND EXISTS, FARM BUREAU IS NOT REQUIRED TO INDEMNIFY EARTHSOILS FOR ALL DAMAGES AWARDED AGAINST EARTHSOILS IN THE UNDERLYING ACTION BECAUSE THE PTACEKS' COMPLAINT ALLEGES CAUSES OF ACTION NOT COVERED BY FARM BUREAU'S CGL POLICY.**

To argue the district court properly held Farm Bureau has a duty to indemnify Earthsoils for any liability imposed against it, the Ptaceks cite *Madison Farmers*, 1989 Minn. App. LEXIS at \*5. (Ptaceks Br. at 24.) But in *Madison*

*Farmers* – only one claim – breach of warranty – was alleged. 1989 Minn. App. LEXIS at \*5. Here, six claims – breach of contract, consumer misrepresentation, negligence, breach of expressed warranty, breach of warranty and merchantability, and breach of warranty of fitness – are alleged. Further, in *Madison Farmers*, the court only held the insurer would have a duty if the jury found damage to the pheasant’s reproductive system and that such damage resulted in decreased yield. No such duty would exist if the jury found the insured’s feed caused the decreased egg production. 1989 Minn. App. LEXIS at \*5. Here, the district court held that Farm Bureau had a duty to indemnify for any liability imposed on Earthsoils without requiring that such liability be imposed as a result of “physical injury” to “tangible property.” The court’s holding would only be correct if the Ptaceks’ claims against Earthsoils were limited to a finding of “property damage” as defined by Farm Bureau’s policy.

But the Ptaceks’ claims are not limited to “physical injury” to “tangible property,” as defined by Farm Bureau’s policy. Under the Ptaceks’ multiple theories of liability, a jury could find that some of these claims are premised on “property damage,” while others are not. Further, the Ptaceks do not allege that if a jury fails to find “property damage” – as defined by Farm Bureau’s policy – then the Ptaceks have no basis to seek recovery from Earthsoils. To the contrary, the Ptaceks state that if they “prove damages for any one of their claims, it will be, **in part**, because they showed that their lost profits were caused by ‘property damage,’ as defined by Farm Bureau’s policy.” (Ptaceks’ Br. at 13 (emphasis

added); *see also* Earthsoils Br. at 28.) Because the Ptaceks claims against Farm Bureau are not limited to finding “property damage” as defined by Farm Bureau’s policy, the district court should have withheld a ruling on Farm Bureau’s duty to indemnify until the underlying claims had been determined.

The Ptaceks also argue that all of their claims against Earthsoils are covered because Farm Bureau has only alleged one exclusion – Exclusion m – which the Ptaceks allege do not apply. (Ptaceks’ Br. at 14.) But before an insurer has the burden to prove a policy exclusion, the insured – here Earthsoils – has the burden to establish a prima facie case of coverage. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995); *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). To prove a duty to indemnify, an insured must do more than reference allegations in a complaint. *Nelson v. Am. Home Assur. Co.*, No. 11-1161 (RHK/FLN), 2011 U.S. Dist. LEXIS 115371, at \*11-25 (D. Minn. Oct. 5, 2011) (attached as A. App. 127-33). Here, neither Earthsoils nor the Ptaceks have alleged – or established – that all of the Ptaceks’ claims against Earthsoils are dependent on finding “property damage,” as defined in Farm Bureau’s policy.

Earthsoils alleges Farm Bureau should be estopped from denying coverage under the doctrine of laches because it waited for two years after Earthsoils tendered its defense to bring a declaratory judgment action on coverage. (Earthsoils’ Br. at 28.) But it is undisputed that, at the time Earthsoils tendered its defense to Farm Bureau, a Non-waiver Agreement was executed, reserving all of Farm Bureau’s rights under the policy. (A. App. 24.) This included the right to

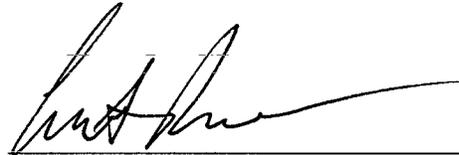
contest coverage. Even if Earthsoils would have a legal basis to argue Farm Bureau is estopped from denying coverage, it cannot raise this issue for the first time on appeal. Generally, a reviewing court considers “ ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’ ” *Thiele v. Stich* , 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. Am. Financial Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)). In opposing Farm Bureau’s motion for summary judgment before the district court, Earthsoils did not argue that Farm Bureau was estopped from denying coverage. Therefore, the Court should not consider this argument for the first time on appeal.

### CONCLUSION

Commercial general liability insurance exists to protect against casualty-type losses, not to warrant the insured’s work. Here, neither Earthsoils nor the Ptaceks allege that Earthsoils’ fertilizer caused any actual physical injury to the Ptaceks actual corn seeds or corn crop. Instead, they allege that Earthsoils’ fertilizer was of insufficient quality and quantity to enhance the corn seeds’ yield capacity. The failure of Earthsoils’ fertilizer to produce the yields it was represented to produce is not a claim designed to be covered by Farm Bureau’s CGL policy. Therefore, Farm Bureau respectfully asks this Court to reverse the district court and to grant Farm Bureau’s motion for summary judgment.

ARTHUR, CHAPMAN, KETTERING,  
SMETAK & PIKALA, P.A.

Dated: 11-10-11



Curtis D. Ruwe (#0313257)  
Beth A. Jenson Prouty (#0389275)  
500 Young Quinlan Building  
81 South Ninth Street  
Minneapolis, MN 55402-3214  
(612) 339-3500

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel of record, pursuant to Rule 132.01, subd. 3(a) of the Rules of Civil Appellate procedure hereby certifies that the attached brief has been prepared using Microsoft Word, Times New Roman, with a font size of 13 pt. and a word count of 5,511.

ARTHUR, CHAPMAN, KETTERING,  
SMETAK & PIKALA, P.A.

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Curtis D. Ruwe (#0313257)  
Beth A. Jenson Prouty (#0389275)  
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