

Court cuts back on remedies for errant pesticide overspray

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In *Johnson v. Paynesville Farmers Union Cooperative Oil Co.* (No. A10-1596), the Minnesota Supreme Court held that the errant overspray of pesticide does not give rise to an organic farmer's claim of trespass, but remanded for reconsideration of some limited aspects of the organic farmer's nuisance and negligence claims. This decision reverses a Court of Appeals' decision recognizing an extension of the scope of trespass claims in Minnesota, making it difficult for organic farmers to obtain relief if their crops are damaged or contaminated by pesticides and herbicides from nearby conventional farms.



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In the 1990s, Stearns County farmers Oluf and Debra Johnson began the process of converting their conventional family farm into a certified organic farm. The Johnsons took many steps to comply with federal organic farming law, including the National Organic Program ("NOP"), which the Minnesota Legislature adopted as state law. Among other things, the NOP regulates the extent to which herbicides and pesticides can come into contact with organic produce. Despite the Johnsons' efforts to comply with the NOP, the Paynesville Farmers Union Cooperative ("Cooperative") oversprayed pesticides and herbicides onto the Johnsons' fields five times between 1998 and 2008. As a result of the oversprays, the Johnsons were on a number of occasions required by a Minnesota Department of Agriculture organic certifying agent to either sell their crops at lower nonorganic prices or destroy their crops and restart the three-year NOP conversion process.

Stearns County District Court decision

In 2009, the Johnsons filed a complaint against the Cooperative in Stearns County District Court alleging trespass, nuisance, and negligence. The District Court granted the Cooperative's motion for summary judgment on the basis that Minnesota did not recognize trespass by particulate matter. The District Court also held that the Johnsons failed to state a claim for damages under their nuisance and negligence theories because they did not show that the pesticide residue on the crops exceeded the NOP's five-percent tolerance limit.



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Court of Appeals decision

The Johnsons appealed, and the Minnesota Court of Appeals reversed the District Court's decision. The Court of Appeals held that unwanted pesticide drift constituted a trespass because it was an "unlawful entry" of a substance that "affects the composition of the land" and results in deposits in "discernible and consequential amounts." The Court of Appeals also held that the Johnsons had suffered damages sufficient to overcome dismissal of their nuisance and negligence claims because the Cooperative's overspray had caused a banned substance to be "applied to" the Johnsons' organic fields in violation of NOP rules. The Court of Appeals concluded that because the government's organic certifying agent had discretion to decertify a field as organic and restart the three-year conversion process, the Johnsons could seek damages resulting from such decertification.

Supreme Court decision

The Cooperative appealed. Subsequently, the Minnesota Supreme Court ("Court") reversed in part and remanded the case based on two key holdings.

First, the Court overturned the Court of Appeals' decision permitting the Johnsons' trespass claims for errant overspray. The Court held that Minnesota does not recognize a claim of trespass by "particulate matter," such as pesticides and herbicides. The Court reasoned that in order to constitute a trespass, an unlawful entry must be done "by means of some physical, tangible agency" (i.e., a physical object) and that "disruption to the landowner's exclusive possessory interest is not the same when the invasion is committed by an intangible agency, such as the particulate matter at issue here." The Court declined

to adopt the approach taken by a number of other state courts, followed by the Court of Appeals, that permits claims for trespass by particulate matter with a showing of some harm. The Court argued that requiring a plaintiff to show harm for a claim of trespass "is inconsistent with our precedent that provides a remedy to a property owner for any trivial trespass." Ultimately, the Court concluded that this type of claim could be more readily accommodated as a nuisance or negligence claim.

Second, the Court rejected the Johnsons' most economically significant damages for their nuisance and negligence claims — damages based on a federal regulation requiring pesticide-contaminated fields out of organic production for three years. The Johnsons suffered these damages as a result of an order by the Minnesota Department of Agriculture's organic certifying agent requiring the Johnsons to remove certain fields from organic production because pesticides were "applied to" those fields (through errant overspray by the Cooperative) in violation of 7 C.F.R. sec. 205.202(b). The Johnsons argued that the phrase "applied to" referred to any application of pesticides, regardless of the source. The Court disagreed and held instead that the phrase was intended to govern only the organic producer's intentional application of prohibited substances, not application by a third party such as the Cooperative. The Court explained that the certifying organic agent was the cause of the Johnsons' loss because the agent erroneously interpreted the statute when he directed the Johnsons to take their fields out of organic production. The Court indicated that the Johnsons' only remedy in this case was an administrative appeal of the agent's decision.

The only bright spot of the opinion for the Johnsons was that the Court concluded the Johnsons could seek damages for an overspray that exceeded a 5 percent tolerance for pesticide residue or caused visible damages to crops, as well as for damages to the Johnsons' physical health, excessive weed growth, and other inconveniences. The Court remanded the case for a determination of whether the Cooperative could be liable under nuisance and negligence theories for these damages and whether a permanent injunction could be issued based on those claims prohibiting aerial pesticide application near the Johnsons' fields.

Implications of the Johnson decision

Most importantly, the Court's decision clearly limits the ability of an organic farmer, or any property owner, to bring a trespass claim for harm caused by any particulate matter (i.e., any non-visible particles). Because a claim of trespass requires a lower burden of proof than nuisance or negligence claims, this decision may make it more difficult for organic farmers trying to comply with the strict regulations for organic produce to obtain relief if their crops are damaged or contaminated by errant overspray of pesticides and herbicides.

The Court's decision also rejects a growing consensus among state courts, recognized by the Court of Appeals, that harm caused by particulate matter may constitute trespass in some circumstances. Instead, the Court chose to adhere to the centuries-old common law distinction between trespass and nuisance: whether a substance is visually "tangible" or not. However, this distinction between tangible and intangible substances no longer reflects our understanding of the science of particulate matter, in no small part because it is factually incorrect to label particulate matter "intangible" — modern science makes particles of almost any size physically tangible. Indeed, our extensive knowledge of particulate matter in modern times demonstrates that the smallest matter can sometimes cause the greatest amount of harm to health and the environment. Notably, the Court's decision never defines a cut-off point where an object is no longer "tangible," but instead makes the conclusory statement that something is not tangible if it is not physical.

Furthermore, although the Court remanded other aspects of the Johnsons' nuisance and negligence claims, the Court's interpretation of 7 C.F.R. sec. 205.202(b) indicates that organic farmers may not be able to recover damages for the overspray of pesticides if they are told by an organic certifying agent to take fields out of production. The Court's decision substantially limits the discretion of a certifying agent to implement stricter standards than the maximum residue levels provided by the regulations. It is unclear whether this decision will have implications for future cases in which a state agency's interpretation of a statute is in dispute outside of the context of the NOP. Further, it is not clear what remedies are available to organic farmers who exhaust their administrative appeals against the agency, but do not overturn the agent's decision — indeed, such farmers would be caught in a Catch-22 where they are required by the agency to withdraw a field from organic production for three years, but have no remedy for the economic loss they suffer as a result.

In addition to limiting the remedies available to organic farmers for pesticide overspray, the Court's decision prohibits trespass claims for "all particulate matter." Under the Johnson decision, individuals are unable to use trespass as a basis for recovery if the silica dust invades their land and homes. Instead, they will have to obtain relief for damages through other claims, such as negligence, nuisance, or applicable environmental statutes.

The Court's decision also has implications for the National Organic Program as a whole. Because Minnesota no longer recognizes pesticide drift from third parties onto organic fields, "organic" means something different in Minnesota than other states, as Minnesota now permits organic produce to be sold up to the NOP's five-percent threshold when pesticide drift is caused by third parties.

Ultimately, this case highlights the need for action by the Legislature. The Legislature could specifically designate certain particulate matter, such as pesticides and herbicides, as substances that can give rise to a claim of trespass. Further, the Legislature might also consider clarifying the meaning of the NOP's "applied to" requirement under Minnesota law. Such solutions might help to ensure the successful coexistence of organic and conventional farming.

Author's note: Full citations for all cases or quotations referenced in this article are included in the Court of Appeals or Supreme Court decisions.

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