

Never Mind, Pesticide Drift Doesn't Constitute a Trespass After All

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Overview

In July 2011, the Minnesota Court of Appeals, in ruling on an issue of first impression, held that particulate matter from chemical pesticide drift could constitute a trespass under Minnesota law. [<http://www.calt.iastate.edu/pesticidedrift.html>] Upon further review, however, the Minnesota Supreme Court spent little time quelling the Court of Appeals' forging of new legal ground and swiftly reversed the decision.

The case stems from plaintiff's complaints of pesticide drift onto his fields over a period of several years. The defendant, a local co-op, sprayed chemical pesticides for conventional farmers on field's adjoining plaintiff's property. Some of the plaintiff's fields were growing organic crops and other fields were going through the three-year transitional process for organic certification eligibility.

The plaintiff reported the pesticide as required by the regulations governing organic certification. The plaintiff was told by an organic certifying agent to destroy 10 acres of soybeans, and the plaintiff alleged he was required to start over on the three year process for transferring land into the organic program due to the drift. *There was no evidence presented regarding whether the drift reached the EPA threshold of 5% before any of these actions were taken.* The plaintiff sued the co-op, and the trial court granted summary judgment to the co-op. The court held that pesticide drift is a

not recognized as a trespass in the state. The court also held that the plaintiff failed to prove his damages, so his negligence and nuisance claims failed as well. The court dismissed all of the plaintiff's claims. The plaintiff appealed. The Court of Appeals reversed finding pesticide drift could constitute a trespass and that the trial court erred in dismissing the claims. The co-op appealed and the Supreme Court granted review of the entire matter.

In Minnesota, a trespass is an intentional act that occurs when there is a wrongful or unlawful entry by a person affecting another's right of possession to their land. Actual damages are not required in order to prove the claim. The focus, instead, is on whether there has been an intentional direct, physical, and tangible entry upon the land that another person possesses.

Minnesota Supreme Court Opinion¹

In reviewing the claim, the court found significant that the elements for a trespass require a physical and tangible entry. The court adopted the trial court's definition of particulate matter as "material suspended in the air in the form of minute solid particles or liquid droplets." Because, by definition, particulate matter does not create a direct, physical, or tangible entry upon the land, the court held that pesticide drift does not constitute a trespass under Minnesota law.

The Court explained that other more fitting remedies already existed, such as nuisance and negligence that could address any wrongs caused by an offending particulate matter. Because the plaintiff failed to allege any tangible object invaded his land, his claim for trespass failed as a matter of law and the trial court's judgment on this issue was affirmed.

The Court then reviewed the plaintiff's nuisance and negligence per se claims. A nuisance in Minnesota can be anything injurious to health, indecent or offensive to the senses, or an obstruction that interferes with the comfortable enjoyment of life or property. On a negligence per se claim, Minnesota law requires that the plaintiff show that the defendant violated a statutory duty that proximately caused the plaintiff's damages.

The plaintiff alleged that his damages were caused by the defendant causing the plaintiff to breach 7 C.F.R. § 205.202(b). That regulation concerns organic producers' prohibited pesticide use. The key question for the court as to whether the defendant violated this regulation turned on the meaning of "applied to it" as used in the regulation and whether this phrase referred to intentional use by the organic producer only or also included incidental or unintended drift caused by a third party.

After reviewing the cited and related regulations, the court determined the term "applied to it" unambiguously referred only to the organic producer's application of the prohibited substance. Additional provisions within the statute included requirements of the organic producer to limit unintended application through buffer zones and boundaries and a requirement to notify certifying agents about any drift that occurs. The court determined that if it were to interpret the phrase as including all possible applications--intentional or not, several sections of the regulation would be superfluous and irrelevant. The court noted that it would not adopt an interpretation of a statute if the interpretation renders other parts irrelevant. Thus, the only possible outcome was that the regulation at issue did not apply to the defendant's conduct.

The court also determined that the plaintiff had failed to prove the pesticide drift was actually the cause of his damages. In reviewing the statute, the court was familiar with the process for testing and actions to be taken when pesticide drift is reported. The Court concluded that the plaintiff's damages, including taking a field out of organic production for three years was an erroneous interpretation of the statute by the certifying agent, so any damages for this were actually caused by the agent rather than the defendant. In other words, the damages were not caused by the drift, but by a certifying agent's wrongful interpretation of the statute directing the plaintiff to take the actions causing his damages. For this reason, the court affirmed the district court's grant of summary judgment on these claims based on the organic statute.

The court, however, remanded the case to the trial court for consideration of a few of the plaintiff's other claims that the trial court did not address in its grant of summary judgment to the defendant. The court directed on remand that the trial court determine whether any genuine issues of fact remained regarding the plaintiff's allegation that he was required to destroy 10 acres of soybeans because of the presence of pesticide. The court also remanded for consideration of the plaintiff's additional damage claims based on general nuisance and negligence theories, including extra weed control requirements, additional record-keeping, and physical maladies.

A dissent filed in this case argued that with the ability to measure particulate matter and the variety of sizes and lasting effects of different matter, the plaintiff's trespass claim should have been recognized.

Conclusion

This decision gives something to both conventional and organic producers. Conventional farmers (and service providers) will not be held liable for trespass for non-physical invasions onto their neighbor's property. Organic producers [and others] are reminded that the remedies of nuisance and negligence are adequate claims for damages

caused by their neighbor's pesticide applications. But, the court also makes clear that organic producers claiming damages will have to prove the actions taken in response to the pesticide drift were actually required. Also, with the lack of trespass as a claim, all damages alleged by an organic producer will have to be proven for recovery.

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¹ Johnson v. Paynesville Farmers Union Cooperative Oil Co., No. A10-1596, 2012 Minn. LEXIS 380 (Minn. Sup. Ct. Aug. 1, 2012).