

Organic farmer may assert claim for trespass

by Brian D. Clark

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In *Johnson v. Paynesville Farmers Union Cooperative Oil Co.*, (No. A10-1596) the Minnesota Court of Appeals held that the errant overspray of pesticide gives rise to a claim of trespass by an organic farmer. The July 25 decision extends the boundaries of trespass claims in Minnesota and highlights the sometimes incompatible nature of conventional and organic farming.

In the 1990s, Oluf and Debra Johnson undertook a mandatory three-year process to convert their conventional family farm into a certified organic farm. The Johnsons took numerous steps to ensure pesticides and herbicides would not come into contact with their organic produce as required by the National Organic Program ("NOP"), which Minnesota adopted as state law (see Minn. Stat. sec. 31.925). The Johnsons posted notices around their fields, maintained a buffer zone between neighboring nonorganic fields, and asked the local cooperative (the Paynesville Farmers Union) to avoid overspray onto the Johnsons' fields during aerial pesticide and herbicide application on neighboring fields.

Despite the Johnsons' precautions, the cooperative oversprayed pesticide and herbicide onto the Johnsons' fields five times between 1998 and 2008. As a result of the oversprays, the Johnsons were forced to either sell their crop 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 in Stearns County District Court against the cooperative alleging claims of trespass, nuisance and negligence as a result of oversprays in 2005 and 2007. The District Court subsequently granted the cooperative's motion for summary judgment based on two key holdings. The District Court also denied a motion to amend the complaint to add claims related to a 2008 overspray, dismissed the Johnsons' battery claim stemming from headaches caused by an overspray, and dismissed claims for the 2005 overspray as barred by the two year statute of limitations for pesticide-related claims.

First, the District Court dismissed the Johnsons' trespass claim based on the 2007 overspray. The court relied on the holding in *Wendinger v. Forst Farms Inc.*, which rejected a trespass claim based on odors from a hog confinement because Minnesota "has not recognized trespass by particulate matter." Second, the District Court found damages lacking for any claim because it interpreted a NOP provision prohibiting pesticide residues on organic produce in excess of a 5 percent tolerance limit to permit the sale of any organic produce that falls below that threshold.

Court of Appeals' decision

The Johnsons appealed the District Court's decision. The Court of Appeals ruled in the Johnsons' favor in a decision published July 25. The decision makes two key holdings.

First, the Court of Appeals held that Minnesota permits a claim of trespass for unwanted pesticide drift brought by an organic farming operation. The Court of Appeals' analysis focused on whether the unwanted pesticide drift satisfied the "unlawful entry" requirement for a trespass claim. The other element of a trespass claim, plaintiff's rightful possession, was not in question. Establishing a new test, the Court of Appeals held that unlawful entry occurs when a substance "affects the composition of the land" and results in deposits in "discernable and consequential amounts." The Johnson court distinguished the *Wendinger* decision because the invasive odors in that case were transient, while the purpose and design of pesticides and herbicides is to "descend[] and cling[] to soil or plants, killing organisms." Interestingly, *Wendinger* expressly distinguished two cases (*Bradley v. Am. Smelting & Refining Co.* and *Borland v. Sanders*) from other jurisdictions that relied upon the same reasoning as *Johnson*, but the *Johnson* decision concludes that *Wendinger's* discussion of those cases was "unnecessary to that holding" and "our assessment of them was a bit adrift."

Second, the Court of Appeals held that the Johnsons had suffered damages sufficient to survive dismissal of their nuisance and negligence claims. Concluding that the errant overspray caused a banned substance to be "applied to" the Johnsons' organic produce in violation of the NOP rules, the

Court of Appeals held that the Johnsons' damages could be measured by the difference between organic and nonorganic prices. The Court of Appeals also found that the District Court erroneously read the NOP's 5 percent pesticide residue tolerance. While the District Court interpreted the NOP provision as permitting the sale of any organic produce with less than 5 percent pesticide residue, the Court of Appeals rejected this conclusion based, in part, on the discretion granted by the NOP to the government's organic certifying agent to decertify produce with only trace amounts of pesticide residue. The Court of Appeals also noted that "substantial inconveniences," such as alterations to the Johnsons' crop rotation schedule, provide additional bases for damages.

Implications of Johnson decision

In some ways, the Johnson decision is nothing new. Many other jurisdictions permit similar types of trespass claims. Further, previous Minnesota decisions had already permitted recovery of damages for negligent pesticide overspray, so Johnson merely provides another legal basis upon which an injured party may recover in Minnesota. The result in Johnson is in line with previous Minnesota cases finding liability based on negligence in application of pesticide that killed bees on the landowner's property (*Anderson v. State Dep't of Natural Res.*) and negligence in application of pesticide that drifted onto a neighbor's adjacent soybean field (*Red River Spray Serv. Inc. v. Nelson*), as well as trespass based on errant bullets that landed on another's property (*Citizens for a Safe Grant v. Lone Oak Sportsmen's Club Inc.*).

One uncertain aspect of the Johnson decision is whether it adds a proof-of-damages requirement for errant overspray trespass cases. Traditionally, nuisance and trespass claims were distinguished by the fact nuisance claims require proof of damages as an element of the claim and trespass claims do not require such proof (see Minn. Stat. sec. 561.01). In Johnson, the Court of Appeals required a "discernable and consequential amount" of pesticide or herbicide to prevail on an errant overspray trespass claim, which was easily accomplished by the Johnsons because of their lost revenue from selling their otherwise organic produce at nonorganic prices. It remains to be seen whether the "discernable and consequential" requirement will in practice mean that courts considering errant overspray trespass claims will require a showing of damages similar to that for a negligence or nuisance claim.

Johnson has implications beyond rural Minnesota. For instance, herbicides routinely applied to lawns can cause damage to a neighbor's property through errant subterranean movement (i.e., via root systems), surface runoff or aerial drifting. A good example is provided by recent allegations that DuPont's new Imprelis lawn-care herbicide has killed thousands of trees, apparently through the transmission of the herbicide to the tree through extensive root systems. Logically, Imprelis would seem to "affect the composition of the land" if it physically enters into a tree, and if it kills or damages the tree, presumably it does so in "discernable and consequential amounts." Thus, if Imprelis is applied to a target lawn and is transmitted across a property line via a tree's root system, Johnson may provide the basis for a trespass claim.

Johnson also suggests that land uses by conventional and organic farmers can be incompatible. From an organic farmer's perspective, it is already expensive and time-consuming to meet organic certification standards without having their operations significantly interrupted by errant oversprays. Even if Johnson now provides the basis to recover damages through a trespass claim, it offers little comfort. For conventional farmers, Johnson highlights the serious financial consequences that can result from aerial spraying applications of commonly used pesticides and herbicides when a neighbor converts to organic farming methods. Conventional farmers grow crops that are designed to work with herbicides and pesticides, so the threat of costly lawsuits from neighboring organic farms is one they face for doing something required to get their crops to market.

The sometimes incompatible nature of land uses by conventional and organic farmers suggests turning to a century-old solution — zoning regulation. Today, most local governments' zoning systems designate the majority of rural land as "agricultural." There may be merit in limited circumstances to dividing the agricultural zoning category into agricultural-conventional and agricultural-organic. Not only would such a distinction lessen the chance of oversprays by grouping organic farmers into one geographic area, but it would also provide local governments with a new marketing tool to highlight a specific region's organic produce. A new zoning category would also help organic farmers avoid the high costs of dealing with unwanted pesticide exposure and allow conventional farmers to apply pesticides and herbicides without fear of costly litigation.

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Editor's note: All cases discussed in this article are cited in the Johnson decision.

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