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IN THE SUPREME COURT OF IOWA
No. 21-0652

GORDON GARRISON,

Plaintiff- Appellant,

v.

NEW FASHION PORK, LLP, and BWT HOLDINGS, LLLP,

Defendants- Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR

EMMET COUNTY

HON. CHARLES BORTH

BRIEF OF AMICUS CURIAE

IOWA PORK PRODUCERS ASSOCIATION AND

IOWA FARM BUREAU FEDERATION

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court by using the Iowa Judicial Branch electronic filing system, which will send notice of electronic filing to all parties and attorneys of record.

/s/ Eldon McAfee
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STATEMENT OF THE CASE

As was noted in the Brief filed by Appellees New Fashion Pork, LLP and BWT Holdings, LLLP, the underlying case in this matter involves a confined animal feeding operation in Emmet County, Iowa. The Appellant, Gordon Garrison ("Garrison") owns property and lives to the north of the animal feeding operation. The underlying case started in Federal Court, where it was dismissed on summary judgment. *See Garrison v. New Fashion Pork, LLP,* 449 F. Supp. 3d 863 (N.D. Iowa 2020). Garrison then refiled in the Iowa District Court for Emmet County. The state District Court also entered summary judgment in favor of the Defendants and the Plaintiff now appeals.

AMICI CURIAE IDENTIFICATION

The Iowa Pork Producers Association ("IPPA") is a grassroots commodity organization representing Iowa's pork producers. The members of IPPA include both members who own pigs and producer members who own the barns and feed and care for pigs across the state of Iowa. The members of IPPA are similarly situated to the Defendants in this matter and the Court's ruling will impact the statutory protections afforded to livestock producers in the state. The threat of recurring and abundant lawsuits against pork producers who are following the letter of the law threaten the financial

stability and the very existence of pork producers in rural communities throughout the state of Iowa. IPPA possesses a unique perspective and a wealth of information regarding pork production in the state of Iowa that will assist the court in assessing the ramifications of any decision rendered in this case. IPPA seeks the proper construction and interpretation of Iowa Code Section 657.11 and Iowa Code 657.11A as intended by the Iowa legislature in enacting those laws.

The Iowa Farm Bureau Federation is an independent, non-governmental, voluntary organization of farm families. With over 155,000 members, the Iowa Farm Bureau Federation is dedicated to helping farm families prosper and improve their quality of life. Our members include farmers who grow food, feed, fiber, and fuel and whose farms are or will be threatened by nuisance lawsuits. Our members also own or lease farms throughout the state that rely on important tile drainage systems, both within and outside of drainage districts, for improved productivity and the ability to make a living from the land. Over thirty million acres within our state's borders are utilized for farming and twenty percent of our residents are employed by agriculture or an ag related industry. *See* 2019 Iowa Agricultural Economic Contribution Study, https://www.supportfarmers.com/resources/iowaagintel/ (last visited

7/28/2021). Forty-five percent of Emmet County residents are employed in agriculture or an ag related industry with twenty-four percent of residents employed in livestock production specifically. *Id.* The county includes 229,814 acres of farmland. Iowa has the largest percentage of land area that is utilized for agriculture among the fifty states. Iowa is also the nation's leader in producing corn, soybeans, pork and eggs. Our members have significant investments in their crop and livestock farms which could be affected by the outcome of this case.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND IOWA CODE SECTION 657.11 CONSTITUTIONAL AS APPLIED TO THE PLAINTIFF

This Court in *Gacke v. Pork Xtra*, found that Iowa Code §657.11 was unconstitutional as applied to the Gackes, but specifically expressed no opinion regarding whether the statute could be constitutionally applied under other or different circumstances. 684 N.W.2d 168, 179 (Iowa 2004). In *Honomichl v. Valley View Swine, LLC,* this Court further clarified the as applied constitutional application of §657.11 finding that an evidentiary hearing and specific findings of fact were necessary to determine whether §657.11 can constitutionally be applied to a particular plaintiff or set of

facts. 914 N.W.2d 223, 238 (Iowa 2018). The factors to be considered by the district court in completing this as applied analysis include the following:

1) Plaintiff must show that he received no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general,
2) Sustained a significant hardship, AND
3) Resided on their property long before any animal operation was commenced on the neighboring land and had spent considerable sums of money in improvements to their property prior to construction of the defendant's facilities.

Id. at 235 (citing *Gacke v. Pork Xtra,* 684 N.W.2d 168, 178 (Iowa 2004)).

If a Plaintiff is unable to show any one of those three, then §657.11 is constitutional as applied to that Plaintiff. The only factor at issue in this action is whether the Plaintiff received a particular benefit from the nuisance protections granted in §657.11. The Defendants' brief focuses on the Plaintiff's sheep operation, his application of manure on a farm he owns in Kossuth County, and the benefit that the Plaintiff received from §657.11, while Plaintiff contends he received no benefit. §657.11 also requires that owners of an animal feeding operation comply with all federal and state statutes and regulations as well as use existing prudent generally accepted

management practices reasonable for the operation in order to enjoy the protections set forth in the statute. §657.11(2)(a) and (b).

Encompassed in §657.11 compliance with all federal and state statutes and regulations, there are other applicable statutes that an owner of an animal feeding operation must comply with that benefit a neighboring landowner. For example, a distance of 1,875 feet is required between the Plaintiff's residence and the Defendant's confinement building, unless the owner of the residence signs a waiver. Iowa Code §459.202(4); §459.205. The legislature in describing the separation distance specifically stated, "if the titleholder of the land benefiting from the separation requirement…" §459.205(2)(emphasis added). Another example involves the protection of the adjoining landowner's drainage systems in Iowa Code §459.303. The construction of the confinement barn cannot impede the adjoining landowner's drainage tile and repairs must be made to reestablish their drainage if it is damaged. Iowa Code §459.303(5)(b)(2). In using this language, the legislature recognized that the neighboring landowner receives the benefit from the statute regulating the construction of an animal feeding operation.

Because §657.11 requires compliance with federal and state statutes and regulations and because those statutes benefit the neighboring

landowner, the Plaintiff in this action does benefit from §657.11 and therefore the statute is constitutional as applied to the Plaintiff.

II. GACKE IS OUTDATED AND WRONGFULLY DECIDED AND SHOULD BE OVERRULED

Before this case, the issue of the constitutionality of Iowa's nuisance defense statutes (Iowa Code §§172D, 352.11, 657.11, and now §657.11A) has been before the Iowa appellate courts no less than four times since the first of these statutes was enacted in 1976. *See Bormann v. Board of Supervisors of Kossuth County*, 584 N.W.2d 309 (Iowa 1998); *Gacke v. Pork Xtra, LLP,* 684 N.W.2d 168 (Iowa 2004); *McIlrath v. Prestage Farms of Iowa,* 889 N.W.2d 700 (table) 2016 WL 6902328 (Iowa Ct. App. 2016); and *Honomichl et. al. v. Valley View Swine, LLC and JBS Live Pork, LLC,* 914 N.W.2d 223 (Iowa 2018). As will be discussed, the time has come to put an end to this litigation and fully recognize the intent of the Iowa legislature by overturning *Gacke v. Pork Xtra, LLP*.

The four cases began with the ruling in *Bormann v. Board of Supervisors of Kossuth County* in 1998 striking down §352.11 as a taking of private property without just compensation because the legislature exceeded its authority in enacting the nuisance protections in §352.11 by the "commandeering of valuable property rights without compensating the

owners, and sacrificing those rights for the economic advantage of a few." 584 N.W.2d at 322.

The next case was *Gacke v. Pork Xtra, LLP* in 2004. The Court first noted that for purposes of constitutional analysis, §657.11 is not distinguishable from the §352.11 nuisance defense. 684 N.W.2d at 172-173. Although the Court stated it was not retreating from its decision in *Bormann*, it did rule that §657.11 is a taking only as to any reduction in property value of a neighbor's residence and that the nuisance defense could apply to all other non-property value type damages (loss of personal use and enjoyment, mental distress, punitive damages, etc.). *Id.* 174-175. The Court then ruled that §657.11 was unconstitutional in this case because it violated Article I, Section 1 of the Iowa Constitution, the Inalienable Rights Clause. *Id.* at 175-179. The Court ruled that this constitutional provision is not absolute and is subject to "reasonable regulation by the state." *Id.* While the Court noted the public purpose of §657.11 in protecting livestock producers from defending nuisance lawsuits, it ruled that in this case §657.11 was unduly oppressive and outweighed the public purpose of the law. *Id.* at 178-179. The Court noted: "Unlike a property owner who comes to a nuisance, these landowners lived on and invested in their property long before Pork Xtra constructed its confinement facilities." *Id.* at 179. The Court also ruled that

the law did not provide any benefit to the Gackes other than the public benefit. *Id.* at 178-179. The Court ruled that the nuisance defense could not be relied on in this case but expressed no opinion "as to whether the statute might be constitutionally applied under other circumstances." *Id.* at 179.

The third case is *McIlrath v. Prestage Farms of Iowa*. The Iowa Court of Appeals affirmed the district court's ruling finding §657.11 unconstitutional under the holding of *Gacke v. Pork Xtra*. The Court of Appeals agreed with the district court that the facts were substantially similar to the facts of *Gacke v. Pork Xtra.* 889 N.W.2d 700. Accordingly, §657.11(2) was unconstitutional under the Inalienable Rights Clause under the three factors in *Gacke* in that McIlrath received no benefit from §657.11 and she lived on and made substantial improvements to her property long before Prestage Farms constructed the hog confinement. *Id*.

Finally, the Iowa Supreme Court delved into the details of §657.11 in *Honomichl et. al. v. Valley View Swine, LLC and JBS Live Pork, LLC*. The Court ruled that the district court erred in finding §657.11(2) violated article I, section 1 without making specific findings of fact relative to any of the plaintiffs. 914 N.W.2d at 227. Rather, each plaintiff must prove the nuisance defense is unconstitutional by proving the three factors established in *Gacke. Id.* at 235. The Court recognized that Iowa law governing

confinement feeding operations had become more extensive and restrictive since *Gacke,* but found that the "the analytical framework set forth by the *Gacke* factors, even with its limitations, are still compatible with present conditions." *Id.* at 237.

The special concurrence agreed that the trial judge failed to properly apply the three-factor constitutionality test to each plaintiff, but also believed that the G*acke* three factor test should be eliminated and emphasized four main points.

- The deferential rational-basis test must be used in challenges under the inalienable rights clause. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015). The concurrence noted that "[i]n the last century, Gacke is the only Iowa case sustaining a constitutional challenge under the inalienable rights clause" and therefore "Jacobsma restores the proper deference to the policy choices of the elected branches." *Id.* at 239.
- The more extensive and restrictive statutory and regulatory framework in Iowa law for confinement feeding operations, which the majority recognized but dismissed, carried the day in overturning Gacke. *Id.* at 239. Subsequent to *Honomichl,* an Iowa Department of Natural Resources rule has been adopted tightening the rules on the definition

of common ownership of confinement feeding operations which in turn tightens the rules for siting confinement feeding operations. Iowa Admin. Code r. 567-65.1(1); 42 Iowa Admin. Bull. 1871 (Jan. 15, 2020); ARC 4871C.

- The Court stated: "*Gacke* was wrongly decided. CAFOs may be controversial, but it is not our court's role to second-guess policy choices of the elected branches of government." *Id.* at 239. See discussion below of *Farmegg v. Humboldt County* for an analogous scenario.
- The concurrence tied the knot so-to-speak in the history of the Court's rulings starting with *Bormann* and leading to *Gacke*:

  "All other states have passed such right-to-farm laws, and no other state supreme court has held them even partially unconstitutional. To the contrary, other courts have uniformly rejected constitutional challenges to these statutes. ***Gacke* stands alone**." (emphasis added) *Id.* at 239.

This Court should follow the lead of the concurrence in *Honomichl* and end Iowa's isolation by overruling *Gacke.*

A situation similar to this case, and in an equally controversial area of Iowa agricultural law, occurred with the Iowa Supreme Court's

interpretation of the agricultural exemption to county zoning, Iowa Code §335.2. This provision, originally adopted in 1946, exempts land and structures used for agricultural purposes from county zoning ordinances. A surprising and strained 1971 ruling limited application of this exemption despite what appeared to be clear statutory language. *See Farmegg v. Humboldt County*, 190 N.W.2d 454 (Iowa 1971)(a confinement chicken operation on a 4-acre parcel without crop production was not part of an "agricultural function" and therefore did not qualify for the agricultural exemption to county zoning). This decision was questioned but nonetheless carried forward by the Iowa Supreme Court for years. *See Helmke v. Board of Adjustment*, 418 N.W.2d 346 (Iowa 1988)(a farmer owned cooperative grain storage facility qualified for the *Farmegg* "agricultural purpose" exemption to a zoning ordinance), *Thompson v. Hancock County*, 539 N.W.2d 181 (Iowa 1995)(a proposed hog confinement operation was part of the *Farmegg* "agricultural function" and therefore exempt from a county zoning ordinance, where, among other factors, the farmers raised crops some of which were feed for the hogs). Finally, in *Kuehl v. Cass County*, the Iowa Supreme Court ruled that a proposed swine finishing confinement operation on a 5-acre parcel was agricultural, even with no crop production on site, and therefore exempt from county zoning. 555 N.W.2d 686, 689 (Iowa

1996). The Court ruled: "To the extent that the *Farmegg Products* engrafted a requirement on exempt agricultural uses not contained in the statute creating the exemption that decision must now be disapproved." *Id.*

Like the interpretation of the §335.2 agricultural exemption to county zoning, the Iowa Supreme Court has struggled with the constitutionality of Iowa Code §§352.11 and 657.11. Like the ruling in *Kuehl* for the agricultural exemption to county zoning, this Court should put an end to the string of litigation and overrule *Gacke.*

While the Plaintiffs argue that §657.11 is unconstitutional under *Gacke* and *Honomichl*, their arguments, and the very fact that this case is in front of this Court to interpret the district court's application of and ruling on the *Gacke* factors, illustrate that *Gacke* should be overturned. With this case – the fifth case in the last 23 years on the constitutionality of nuisance defense laws in Iowa and the second in three years – the time has come for this Court to put aside arguments over application of the three factors in *Gacke* and fully recognize the nuisance protections afforded in §657.11 as enacted by the legislature.

III. THE DISTRICT COURT'S RULING GRANTING SUMMARY JUDGMENT ON THE PLAINTIFF'S DRAINAGE LAW AND TRESPASS CLAIMS SHOULD BE AFFIRMED.

As a matter of law, Plaintiff failed to establish a violation of Iowa's drainage law or trespass law. Both claims involve water flow through a natural watercourse which begins on the Defendant's field and flows downgradient through the Plaintiff's property. App. Vol. 2, pp. 163, 168. No allegations were made that excess or polluted water entered the Plaintiff's property through any other location. *Id.* at 166, 168; App. Vol. 1, pp. 90-92; Appellant's Br. at 40. The District Court's grant of summary judgment for failure to establish a violation of the drainage and trespass laws should be upheld.

A. Iowa Drainage Law

Individual drainage law between neighboring property owners has been the subject of litigation for better than a century. Like drainage districts, individual landowners are immune from liability for draining their property, but with two limited exceptions. Iowa Code chapter 468 addresses water quantity by permitting landowners to facilitate the drainage of excess water from their properties by installing "open or covered drains" which outlet to "natural watercourses" without liability to downstream landowners "unless it increases the quantity of water or changes the manner of discharge

on the land of another." Iowa Code §468.621 (2021). Current statutory law reflects long-held common law. "It has always been the rule in this state that the dominant landowner has the right to conduct the water falling upon his land by means of underground tile drains into the channel provided by nature for the drainage of his land, and through such channel to case it upon the lower or servient estate, provided only that the water so thrown upon the servient estate is not materially and unduly increased to the damage of the owner thereof." *Sheker v. Machovec*, 110 N.W. 1055, 1056 (Iowa 1907). "…if the volume of water is substantially increased or if the manner or method of drainage is substantially changed and actual damage results, the servient owner is entitled to relief." *O'Tool v. Hathaway*, 461 N.W.2d 161, 163 (Iowa 1990)(citing *Rosendahl Levy v. Iowa St. Hwy. Comm.,* 171 N.W.2d 530, 536 (Iowa 1969)).

In the present case, it is undisputed that Defendants own the dominant estate, called the Sanderson farm, and Plaintiff Garrison owns the servient estate. App. Vol. 1, p. 32; App. Vol. 2, pp. 165-166. "In determining which of adjacent tracts is dominant, relative elevation and not general movement of floodwaters is controlling." *Moody v. Van Wechel,* 402 N.W.2d 752, 757 (Iowa 1987); *C & D Mount Farms Corp. v. R & S Farms, Inc.,* Case No. 16-1586, 2017 WL 4570434 at *2 (Iowa Ct. App., Oct. 11, 2017); *Newlin v.*

Callender, No. 10-1014, 2011 WL 5460279 at *3 (Iowa Ct. App. Nov. 9, 2011). Water naturally flows downhill from the dominant estate to the servient estate throughout the state of Iowa.

In recognizing this long held common law and statutory right, Iowa courts have characterized it as an easement in favor of the upper landowner. "The owner of the upper or dominant estate, here the defendants, have a legal and natural easement in the lower or servient, here the plaintiffs, estate for the drainage of surface waters." *Thome v. Retterath,* 433 N.W.2d 51, 53 (Iowa 1988); *See, Ditch v. Hess,* 212 N.W.2d 441, 448 (Iowa 1973); *C & D Mount Farms Corp.* at *2.; *Rosendahl* 171 N.W.2d at 536; *Maben v. Olson,* 175 N.W. 512, 513 (Iowa 1919); *Mason City & Fr. D.R. Co. v . Bd. of Supervisor of Wright Cty,* 121 N.W. 39, 40 (Iowa 1909). Under Iowa law, Defendants, owner of the dominant estate, have an easement to drain water through the watercourse traversing the Garrison property.

Most of the Plaintiff's arguments related to water are not relevant to proving a violation of Iowa drainage law. By design, drainage law addresses water quantity, not quality. As this Court recently noted, tort claims challenging environmental pollution have coexisted with drainage district immunity without the legislature or the courts abrogating the drainage immunity. *Bd. of Water Works Tr. of City of Des Moines v. Sac Cty. Bd. of*

Supervisors, 890 N.W.2d 50, 63-64 (Iowa 2017). Individual drainage law has worked much the same way for over a hundred years. For his drainage law claim, Plaintiff argues that the drainage tile on the Defendant's property caused increased water flow through the creek traversing his property. App. Vol. 1, pp. 34, 90-91; Appellant's Br. pp. 41-42. The alleged water quality, water tests and manure application rates relate to his trespass claim and are not relevant to this drainage law question.

The Plaintiff's complaint is more appropriately characterized as a challenge to the volume of water rather than the method and manner of water flow. The Plaintiff admits "The drainage goes from the tile outlets to a stream on the BWT property that flows across the property boundary to my property." App. Vol. 1, p. 90. Plaintiff's expert report does not conclude that there was a substantial change in how or where the water flowed onto Plaintiff's property. App. Vol. 2, p. 176. The new tile outlets are very close to the old tile outlets from the Sanderson farm which also flowed into the creek. App. Vol. 1, pp. 91-92. Because the drainage flowed from the Sanderson farm to the Plaintiff's property through the creek both before and after the installation of drainage tile, the method and manner of the water discharge did not change.

Even if Plaintiff had demonstrated additional water flowing through his property caused by the tile, the existence of increased water draining to lower lands is anticipated by Iowa law and does not, by itself, demonstrate a violation. "A landowner may divert water by surface drainage constructed upon his or her own land even though some different or additional water may thereby enter the servient estate." *Moody*, 402 N.W.2d at 752. "The owner of the dominant estate may cast an additional quantity of surface water upon the servient estate, if in so doing, he does not thereby do substantial damage the servient estate." *Thome*, 433 N.W.2d at 53 (citations omitted). "… the upper proprietor may drain his land through natural watercourses in a way to increase the water that is to flow over the servient land, providing the increase is not too great or in such unnatural quantities as to be the cause of substantial injury." *Rosendahl*, 171 N.W.2d at 536; *Cundiff v. Kopseiker,* 61 N.W.2d 443, 445 (Iowa 1953). The Plaintiff's argument of increased water flow is not supported by evidence and thus the case also falls short of establishing "substantially increased" water flow as required to find a violation of either statutory or common law.

Overcoming the individual drainage immunity requires proof of actual damages. "Recovery under this theory also requires proof of actual damages." *Newlin*, 2011 WL 5460279 at *7; *O'Tool*, 461 N.W.2d at 163.

Because increased water is allowed to be drained to lower properties, the emphasis for determining whether the amount of water is substantial is on whether the damage is substantial. *Rosendahl*, 171 N.W.2d at 535. There is no evidence in the record of increased water flow through Plaintiff's property causing substantial or any damage to the Plaintiff's land. The most that can be concluded from the presented evidence is that the drainage tile outlets some amount of water to the creek on the Sanderson farm which then flows through Plaintiff's land. Because Defendants have a common law and statutory right to drain their property, the Plaintiff can only recover if he can prove actual damage to his property that was proximately caused by a substantial increase in volume or a substantial change in the manner the water flows onto his property. Therefore, even when viewing the evidence in the light most favorable to the Plaintiff, he has failed to prove the elements of a drainage law cause of action.

B. Trespass

Plaintiff's common law trespass action focuses on his allegation of the Defendants "overapplying manure from their CAFO to the crop field" and allowing "excess manure" to enter an unnamed stream which then flows through his property. Appellant's Br. at 40; App. Vol. 2, p. 176. Plaintiff does not provide any evidence of a trespass of the land itself or the

groundwater under his land. *Id.;* App. Vol. 1, p. 90. Plaintiff alleges that his water samples were taken from the creek. App. Vol. 1, p. 90. "Trespass ordinarily requires a showing of actual interference with a party's exclusive possession of land including some observable or physical invasion." *Freeman v. Grain Processing Corp.,* 848 N.W.2d 58, 67 (Iowa 2014) (citations omitted); *Ryan v. City of Emmetsburg,* 4 N.W.2d 435, 438 (Iowa 1942); *Bormann v. Bd. of Sups. in and for Kossuth County,* 584 N.W.2d 309, 315 (Iowa 1998); *C & D Mount Farms Corp*, at *4; Restatement (Second) of Torts § 158 (1964).

The evidentiary problems with Plaintiff's trespass claim, such as the isolated water test sheets and the lack of expert witnesses, have been identified by the Emmet County District Court, the federal District Court for the Northern District of Iowa and the Defendants' brief; therefore, we will not duplicate the discussion. App. Vol. 2, pp. 421-422; *Garrison v. New Fashion Pork, LLP*, 449 F.Supp.3d 863, 873-874 (N.D. Iowa 2020); Appellees' Br. at 37-47. In addition to a lack of evidence, Plaintiff's claim fails because he lacks the requisite exclusive possessory interest in the water flowing across his property, and because Iowa law contains the required manure land application rate calculations rather than a model constructed for inorganic commercial fertilizer.

1. Plaintiff lacks a possessory interest in the water traversing his property and therefore his allegations do not qualify as a trespass.

As a matter of law, Plaintiff does not own or have exclusive possession of the surface water that Defendants allegedly polluted. The surface water contained in the creek is a "water of the state" belonging to the public and is not owned by the Plaintiff. Iowa Code §455B.171(31) (2021)("*Water of the state"* means any stream…natural or artificial, public or private, which are contained within, flow through or border upon the state or any portion thereof."). "Water occurring in a basin or watercourse or other body of water of the state, is public water and public wealth of the people of the state…" Iowa Code §455B.262(3) (2021); *See also Bd. of Water Works Tr. of City of Des Moines,* 890 N.W.2d at 69 (citations omitted). The creek flows from Defendant's property through Plaintiffs and then to the next downstream property. App. Vol. 2, p. 168. Therefore, because the water is owned by the public, Plaintiff doesn't have exclusive possession of the water.

Further, upper or dominant estate landowners have the right to drain their land through the natural watercourse traversing the lower or servient property. Iowa Code §468.621 (2021). As discussed under drainage law above, Iowa case law describes this right as an easement over the servient or

downstream property. *Thome,* 433 N.W.2d at 53. In its declaration of public ownership of the water, the legislature preserved the right of any person to drain land using tile, open ditches, or surface drainage. Iowa Code §455B.270 (2021). By draining excess water from their land through the natural watercourse, thousands of upstream landowners, like the Defendants, are not trespassing.

When discussing the differences between Clean Air Act statutory violations and common law torts such as nuisance and trespass, this Court noted that "Common law controls are based on property rights, are location specific, and provide remedies to rightholders for real harms." *Freeman,* 848 N.W.2d at 69 (citations omitted). A similar analysis applies to the comparison between Clean Water Act violations and common law torts. Here, Plaintiff brings a common law trespass claim, not a citizen suit action on behalf of the state under the state's water pollution laws. Iowa Code §455B.111 (2021). The general commentary from Plaintiff's witnesses regarding general water quality and generalities about "some" farmers are not relevant to the trespass claim as those opinions are not specific to the properties or parties in this case. *See, e.g.,* App. Vol. 2, pp. 178-182. Even if the Plaintiff's "water tests" did demonstrate water pollution in the creek proximately caused by the Defendant's manure application, the Iowa

Department of Natural Resources (DNR) is the appropriate authority to enforce the violation on behalf of the public. With his trespass claim, Plaintiff did not provide evidence of any invasion of property other than the alleged "water tests" of the surface water in the creek. Lacking exclusive possession of the surface water, Plaintiff's claim does not meet the most basic element of a trespass claim.

2. The required land application rate for manure is defined by Iowa law, not by an online calculator meant as guidance for inorganic commercial nitrogen.

"Nitrogen is an essential element for plant growth and reproduction, and management is critical for optimal yield in Iowa corn production systems." John E. Sawyer & John Lundvall, *Nitrogen Use in Iowa Corn Production*, March 2018, p. 1, https://store.extension.iastate.edu/product/14281-pdf. (last visited 7/23/2021). Every farm larger than a small animal feeding operation, which houses animals entirely inside barns, including the Defendants, is required to submit and follow a manure management plan, subject to approval and inspection by the DNR. Iowa Code §459.312(1)(a) (2021). Among other things, a manure management plan must include restrictions on the application of manure based on "nitrogen use levels in order to obtain optimum crop yields" in accordance with DNR rules. Iowa Code

§459.312(10) (2021). DNR's regulations very specifically describe how the land application rates are to be calculated. Iowa Admin. Code r. 567-65.3 and 65.17 (11/9/2016). The livestock farm cannot apply manure in excess of the prescribed rates. *Id.* Plaintiff offered no evidence that the rate restrictions in the state-approved manure management plan were exceeded. If the Plaintiff does not agree with the required calculations, his audience should be the Iowa legislature and the DNR rather than the courts.

Instead, Plaintiff offers an alternate methodology for calculating the application rate. Appellant's Br. at 39. He proposes an economic model to calculate the most profitable rate of inorganic commercial fertilizer for corn, called the maximum return to nitrogen (MRTN). *Id.;* App. Vol. 2, pp. 185-186. This rate is determined using the online tool called the Corn Nitrogen Rate Calculator. *See* Iowa State Univ., *Corn Nitrogen Rate Calculator,* http://cnrc.agron.iastate.edu (last visited 7/27/2021). The model also calculates a profitable nitrogen rate range. *Id.* As explained by Professor Sawyer at Iowa State University, the Corn Nitrogen Rate Calculator is designed to use the price of nitrogen and the price of corn to calculate the best rate of nitrogen to apply for the highest economic net return. Sawyer at 5. The outputs from the model are highly variable depending on the chosen

inputs, such as the price of inorganic nitrogen and the price of corn. *See Corn Nitrogen Rate Calculator*.

The economic model was not built or intended for manure being used, as evidenced by manure being excluded as an option for a nitrogen source in the calculator. *Id.* Mr. Kassel does not explain why the research behind the Corn Nitrogen Rate Calculator would be applicable to manure application rates or corn's utilization of manure instead of commercial fertilizer. App. Vol. 2, pp. 185-186. He also does not describe why or how the input numbers were chosen for his example, how he determined the per pound price of nitrogen in manure, or what form of inorganic nitrogen he substituted for manure when using the calculator. *Id.* The USDA Agricultural Marketing Service regularly reports the price of the various forms of commercial fertilizer sold in Iowa, but it does not report manure sale prices. *See* USDA ERS, *Iowa Production Cost Report,* Reports | Mars Document (usda.gov) (last visited 7/23/2021). Mr. Streit offers no further analysis or explanation other than to say he agrees with Mr. Kassel. App. Vol. 2, p. 184.

The Corn Nitrogen Rate Calculator is easy to use once the inputs to the calculator are decided upon. *See Corn Nitrogen Rate Calculator.* For example, using the average price of anhydrous ammonia prepaid at the end

of last year ($400/ton) and the current corn futures for this December when this corn crop will be harvested ($5.60), the Corn Nitrogen Rate Calculator suggests a MRTN application rate of 211 lb/acre and a profitable nitrogen rate range of 201-232 lb/acre for Northern Iowa. *Id.* It is common for farmers to manage risk by pre-paying for their crop inputs and forward contracting the sale of their crop, so this example updates the calculation to more current prices. Because the model is based on calculating the best nitrogen rate for profit, changing the nitrogen and corn prices in the calculator can significantly change recommended nitrogen application rates. Using the Corn Nitrogen Rate Calculator to come up with a recommended profitable commercial nitrogen rate does not demonstrate the Defendants overapplied manure.

The economic model utilized by Plaintiff for calculating nitrogen application rates can be highly variable depending on the price of commercial nitrogen and corn. The Corn Nitrogen Rate Calculator is not appropriate for determining manure application rates. Iowa law establishes the required calculations for determining the optimum manure application rate. Further, according to the federal district court who heard similar claims between the parties, the alleged water test results have no correlation with manure application on the Sanderson farm and the nitrate levels even decline

over time. *Garrison*, 449 F.Supp.3d at 873-74. A recommended profitable rate resulting from the Corn Nitrogen Rate Calculator does not demonstrate that overapplication or a trespass from manure application occurred.

As a matter of law, Plaintiff has failed to prove a violation of Iowa drainage law or that a trespass occurred. The Defendants have immunity from liability for draining excess water from their property onto the lower land as Plaintiff has not demonstrated that the volume of water is substantially increased, or that the manner or method of drainage is substantially changed. He has provided no evidence of actual damage to his property which is a prerequisite to holding the upper landowner liable. With the trespass claim, the creek where the alleged trespass of nitrates occurred from manure application is a water of the state and not exclusively possessed by Plaintiff. Even if everything the Plaintiff alleged was true, the appropriate remedy would be a citizen suit under Iowa Code §455B.111, not a common law trespass as alleged here. Plaintiff has not established a violation of Iowa drainage law or a common law trespass.

IV. THE DISTRICT COURT CORRECTLY FOUND IOWA CODE SECTION 657.11A CONSTITUTIONAL ON ITS FACE

Plaintiff has argued that Iowa Code §657.11A is unconstitutional because it violates Article 1, Section 1 of Iowa's Constitution, a plaintiff's right to a trial by jury, and Iowa's equal protection and due process clauses. All of the Plaintiff's constitutional challenges to Iowa Code §657.11A fail and the District Court's decision finding the statute constitutional should be affirmed.

Plaintiff has gone to great lengths in his brief discussing other state's constitutions and statutes involving damage caps and the fact that those other states have found the damage caps to be unconstitutional. In reality, the Plaintiffs cites only five out of fifty state constitutions that reference a prohibition on damage caps and of those five, Plaintiff fail to acknowledge that three of those states' constitutional prohibitions on damage caps do not even extend to property damage, specifically Arizona, Arkansas and Wyoming. Additionally, all but one case referenced by the Plaintiff involves a specific dollar amount damages cap. Iowa Code §657.11A does not cap damages at an arbitrary dollar amount, but instead ties the non-economic damages in a livestock nuisance action to the diminution in property value. Interestingly enough, Plaintiff has failed to mention a Missouri statute that is nearly identical to Iowa Code §657.11A which survived similar constitutional challenges to those raised by the Plaintiff in this action. Mo.

Rev. St. §537.296; see also *Labrayere v. Bohr Farms, LLC,* 458 S.W.3d 319 (Mo. 2015). The Missouri statute is much stricter than Iowa Code §657.11A and still survived constitutional challenges. The Missouri statute limits damages in a permanent nuisance case to the reduction in fair market value of the claimant's property, but not more than the fair market value of the property plus damages arising from a medical condition that is shown by objective and documented evidence to be caused by the nuisance. Mo. Rev. St. §537.296(2)(1) and (3). Missouri eliminates any recovery of special or non-economic damages while §657.11A provides for special or non-economic damages in an amount not to exceed one and a half times the diminution in property value and damages due to adverse health conditions. Iowa Code §657.11A(3). The Missouri statute applies to an alleged nuisance on all property primarily used for crop or animal production purposes. Mo. Rev. St. §537.296(2).

Missouri provides a cause of action for both temporary and permanent nuisance claims; however, in Iowa a nuisance based on odor from a livestock operation where there is no evidence the operator of the facility intends to close it in the foreseeable future has been held to be a permanent nuisance. *See generally Weinhold v. Wolff*, 555 N.W.2d 454, 463 (Iowa 1996) (quoting 58 Am. Jur. 2d *Nuisance* §§ 273-75 (1989)). *See also Gacke*

v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004) (holding that if the trial court concludes that the livestock facilities will be operated indefinitely as a nuisance, the nuisance is deemed permanent in nature). No Iowa nuisance case involving odor from a livestock operation has been deemed a temporary nuisance and therefore only the relevant portions of the Missouri statute for a permanent nuisance are set forth herein.

The Plaintiffs in *Labrayere v. Bohr Farms, LLC,* challenged the constitutionality of the Missouri statute claiming that it was 1) an unconstitutional taking, 2) denies equal protection, 3) violates due process and 4) violates Missouri's open courts clause. 458 S.W.3d 319 (Mo. 2015). Plaintiff in this action, has not challenged §657.11A as an unconstitutional taking and this Court has already determined that as long as a Plaintiff is compensated for the diminution in property value, there is no unconstitutional taking of property. *See Gacke v. Pork Xtra, LLC,* 684 N.W.2d 168, 175 (2004). Because §657.11A still provides for a plaintiff to recover diminution in property value, for reasons stated in *Gacke*, §657.11A is not an unconstitutional taking.

In finding that the statute did not deny equal protection, the Missouri Supreme Court found the statute was not subject to strict scrutiny because rural landowners and residents were not a suspect class for purposes of a

strict scrutiny analysis. *Labrayere v. Bohr Farms, LLC,* 458 S.W.3d 319, 331 (Mo. 2015). Therefore, when the Court applied the rational basis test, it found that the statute did rationally advance the legitimate state interest in "promoting the agricultural economy by reducing the litigation risk faced by Missouri farmers while permitting nearby landowners to recover the diminution in property value caused by agricultural operations." *Id.* at 333. Similarly, the state interest advanced by Iowa Code §657.11A is to "preserve and encourage the expansion of responsible animal agricultural production in this state which provides employment opportunities in and economic growth for rural Iowa, contributes tax revenues to the state and to local communities and protects our valuable natural resources." Iowa Code §657.11A(1)(a).

Plaintiff in this action argues that in order for §657.11A to survive the rational basis test, it is necessary to determine the purpose of the statute and whether the alleged purpose has a basis in fact. Appellant's Br. at 54. Plaintiff then states that there is no basis in fact for the purpose advanced by §657.11A because animal feeding operations were growing and expanding in Iowa at the time §657.11A was passed. *Id*. Further, Plaintiff cites statements made by Senator Zumbach, the floor manager of the bill, that the purpose was to enable young farmers to go to the bank and get a loan to

construct a confined animal feeding operation. *Id.* at 55. Plaintiff discounts this statement, but it is well known and documented that outside risks, including the risk for litigation, are a factor in determining if an applicant gets approved for agricultural financing. The Comptroller's Handbook published by the Office of the Comptroller of the Currency's (OCC) lists associated risks that should be considered in agricultural lending. One of those risks is operational risk, defined as the "risk to a current or projected financial condition and resilience arising from inadequate or failed internal processes or systems, human errors or misconduct, or adverse external events." *Office of the Comptroller of the Currency, Agricultural Lending,* March 30, 2020. Lawsuits would certainly be an adverse external event that would impact the evaluation of operational risk and the ability to obtain financing.

Similarly in a study completed to determine factors ag lenders consider when deciding whether to approve a loan, one of the main factors identified was productive standing of the applicant. *Allen M. Featherstone, et.al., Factors Affecting the Agricultural Loan Decision-Making Process* 110, 116 (Oct. 3-4, 2005). Productive standing of an applicant is a qualitative factor that examines a borrower's ability to manage risk which is used in determining the loan amount and the interest rate. *Id.* at 120-21.

The protections in §657.11A would reduce risks and thereby increase the productive standing of the loan applicant. Because there is a factual basis for the purpose and legitimate state interest advanced by §657.11A, the statute passes the rational basis test and is therefore not in violation of Iowa's equal protection clause.

The Missouri Supreme Court in *Labrayere* also found that the statute did not violate due process because the court found that the statute did not deprive Plaintiffs of a fundamental right which was unrelated to a legitimate state interest. Plaintiff in this case has asserted that the fundamental right at issue is the right to a jury. However, as set forth in Appellee's Brief, §657.11A does not deprive the Plaintiff of his right to a jury trial because in applying §657.11A, a jury would serve as the factfinder and determine if a nuisance exists and §657.11A is only determinative of the remedy. Appellees' Br. at 54-55.

The Missouri statute was further challenged on the basis that it violated Article 1, Section 14 of the Missouri Constitution which states that "courts of justice will be open to every person, and certain remedy afforded for every injury to person, property or character and that right and justice shall be administered without sale, denial or delay." While not the same verbiage used in the Iowa Constitution for a right to trial by jury, the

Missouri constitutional language involves a citizen's access to the courts and remedies afforded by the court system. The Iowa Supreme Court has found that, in determining if there is a violation of Iowa's Constitutional provision to a right to trial by jury, that the Court must first examine the interpretations of the seventh amendment of the United States Constitution. *Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724, 726 (Iowa 1981). Defendants' have fully briefed the seventh amendment to the U.S. Constitution and set forth the case law interpreting that right. The overwhelming case law interpreting the seventh amendment to the U.S. Constitution supports the district court's finding on §657.11A because the statute merely impacts the remedy obtained by a plaintiff at trial.

CONCLUSION

The District Court correctly found that Iowa Code §657.11 is constitutional as applied to the Plaintiff and that Plaintiff's claims for trespass and drainage failed as a matter of law. The District Court decision should be affirmed and for the reasons stated herein Iowa Code §657.11A should be found constitutional, *Gacke* should be overruled and Iowa Code §657.11 should be found constitutional.

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