IN THE IOWA SUPREME COURT
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

APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because (1) it involves fundamental and urgent issues of broad public importance regarding the validity and application of the test set forth in *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168 (Iowa 2004); (2) it presents substantial questions of enunciating or changing legal principles regarding the validity and application of the *Gacke* test; and (3) it involves substantial issues of first impression regarding the constitutionality of Iowa Code section 657.11A. Iowa R. App. P. 6.1101(2)(c), (d), (f).

STATEMENT OF THE CASE

This appeal is the latest step in a case that centers on Defendants' confined animal feeding operation ("CAFO") in Emmet County, Iowa. Plaintiff owns property and lives to the North of Defendants' CAFO. The 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). Plaintiff then refiled in the Iowa District Court for Emmet County. The state District Court also entered summary judgment in Defendants' favor. Plaintiffs now appeal.

I. Federal Court Litigation

Glaringly absent from Plaintiff's Brief is a discussion of the year and a half these parties spent litigating in the United States District Court for the Northern District of Iowa before Judge Williams. *Garrison*, 449 F. Supp. 3d 863. The federal case involved claims under the Clean Water Act and the Resource Conservation Recovery Act, along with the state claims at issue here, all arising out of Defendants' CAFO in Emmet County, Iowa. *Id.* at 867-68. In the federal case, Judge Williams granted summary judgment in Defendants' favor and dismissed Plaintiff's federal claims with prejudice. *Id.* at 876. Specifically, Judge Williams found the alleged violations of the CWA and RCRA were wholly past violations, and therefore Plaintiff could

not prevail on those claims. *Id.* at 874. Of importance here, the federal court found Plaintiff's water test results did not show any ongoing violation of the CWA or RCRA, but instead showed perhaps a slight decrease in nitrates in the water over time since Defendants began their operation. *Id.* at 873. The federal court declined to exercise jurisdiction over Plaintiff's state law claims. *Id.* at 875.

Following entry of summary judgment, Defendants filed a Bill of Costs. App. Vol. 3, pp. 3-4 (Defendants' Bill of Costs). In resisting the Bill of Costs, Plaintiff argued that he was the prevailing party because he "effectively accomplished [his] primary purpose" by the court "finding that any resumed spreading of manure on the property . . . could create an imminent and ongoing threat going forward under either the CWA or RCRA." App. Vol. 3, p. 5 (Plaintiff's Resistance to Defendants' Bill of Costs, p. 1, ¶ 2). The federal court rejected this argument entirely, finding Plaintiff mischaracterized the Court's summary judgment order. App. Vol. 1, pp. 308-311. (Federal Court Order Granting Bill of Costs). More specifically, the federal court noted it "did not say resumed spreading *would* create an imminent and ongoing threat. Nor did the Court find that defendants were prohibited from spreading manure on land adjacent to plaintiff's property in the future." App. Vol. 1, p. 309 (Federal Court Order

on Defendants' Bill of Costs, p. 2) (emphasis in original). The Court further found Plaintiff did not prevail on any of his claims, and Defendants were the prevailing party. App. Vol. 1, p. 310 (Federal Court Order on Defendants' Bill of Costs, p. 3).

Plaintiff did not appeal any of the rulings from the federal case.

II. State Court Litigation

On June 1, 2020, Plaintiff filed the Petition in this case, alleging claims of nuisance, trespass, and violations of "Iowa drainage law" arising out of Defendants' CAFO operation. App. Vol. 1, pp. 32-37 (Plaintiff's Petition at Law and Jury Demand). On January 21, 2021, Plaintiff filed his motion to strike Defendants' affirmative defenses. App. Vol. 1, pp. 95-96 (Plaintiff's Motion to Strike Affirmative Defenses). On January 25, 2021, Plaintiff filed his motion to find the damage caps contained in Iowa Code section 657.11A(3) unconstitutional. App. Vol. 1, pp. 121-122 (Plaintiff's Motion to Find Damage Caps Unconstitutional). The District Court held a hearing on both motions. App. Vol. 1, pp. 377-385 (Order dated April 6, 2021, p. 1). With regard to the motion to strike affirmative defenses, the Court found an evidentiary hearing should be set pursuant to *Gacke* and *Honomichl*. (*Id.*). The District Court denied Plaintiff's facial challenge to Iowa Code section 657.11A by order dated April 6, 2021. (*Id.*).

On March 8, 2021, Defendants filed their motion for summary judgment, which Plaintiff resisted. App. Vol. 1, pp. 239-141 (Defendants' Motion for Summary Judgment). On April 9, 2021, the District Court held an evidentiary hearing on Plaintiff's motion to strike affirmative defenses, and also heard oral argument on Defendants' motion for summary judgment. App. Vol. 2, pp. 9-79 (Transcript of April 9, 2021 Hearing). On May 4, 2021, the District Court entered an order denying Plaintiff's motion to strike affirmative defenses, finding Plaintiff benefitted from the nuisance immunity and therefore Iowa Code section 657.11 was constitutional as applied to Plaintiff. App. Vol. 2, pp. 404-409 (Order Denying Plaintiff's Motion to Strike Affirmative Defenses). On May 5, 2021, Plaintiff filed a motion to reconsider the District Court's ruling on the motion to strike affirmative defenses. App. Vol. 2, pp. 410-414 (Plaintiff's Motion to Reconsider).

On May 10, 2021, the District Court entered an order granting Defendants' motion for summary judgment and dismissing Plaintiff's Petition, in its entirety, with prejudice. App. Vol. 2, pp. 415-423 (Ruling on Motion for Summary Judgment). The District Court found: (1) with regard to the nuisance claim, Defendants were entitled to the protections of Iowa Code section 657.11; (2) with regard to the trespass and Iowa drainage law claims, Plaintiff had no expert testimony tying Defendants' alleged

overapplication to any increased nitrate levels in the stream adjoining Plaintiff's property; and (3) Plaintiff had no evidence that Defendants violated any DNR regulation or standard under Iowa law in their applications of manure. (*Id.*). On May 11, 2021, Plaintiff filed a Notice of Appeal. App. Vol. 2, p. 426 (Notice of Appeal). Also on May 11, 2021, and 48 minutes after Plaintiff filed the Notice of Appeal, the District Court entered an order denying Plaintiff's motion to reconsider. App. Vol. 2, pp. 424-425 (Order Denying Plaintiff's Motion to Reconsider).

STATEMENT OF FACTS

I. Facts Relevant to Summary Judgment

The following facts are undisputed.[1] Defendants own and operate a confined animal feeding operation ("CAFO") adjacent to Plaintiff's property in Emmet County, Iowa. App. Vol. 1, p. 32 (Petition, ¶¶ 1-2). The property is known as the Sanderson property. Plaintiff claims Defendants have over-applied the manure from the Sanderson CAFO onto the Sanderson property. App. Vol. 1, p. 34 (Petition, ¶ 14); App. Vol. 1, pp. 75, 76 (G. Garrison Depo., pp. 111:21-24, 115:5-11). Plaintiff supports his claim that Defendants have over-applied manure solely with water testing. App. Vol. 1, pp. 75-76, 77, 83-84 (G. Garrison Depo., pp. 111:21 – 112:2, 117:3-9, 143:19 – 144:8). Plaintiff believes that NFP has over-applied manure because he finds nitrates in the water at the creek adjoining his property. App. Vol. 1, p. 86 (G. Garrison Depo., pp. 189:18-190:3). Plaintiff has been performing water testing of the creek adjoining his property since approximately 2001. App. Vol. 1, pp. 76, 77 (G. Garrison Depo., pp. 112:6-

[1] Plaintiff did not file any response to Defendants' Statement of Undisputed Material Facts. *See Toney v. Parker*, 958 N.W.2d 202, 209 n.2 (Iowa 2021) (encouraging parties to follow federal practice "to help the district court more easily determine whether any genuine issue of material fact precludes summary judgment"). On the other hand, Defendants filed a detailed response to Plaintiff's Disputed Facts, which shows the facts Plaintiff raised were either undisputed, immaterial, provably false, or not supported by any evidence.

9, 119:4-7). Garrison contends that the water transported onto his property is a trespass. App. Vol. 1, p. 82 (G. Garrison Depo., p. 138:10-14).

The federal court previously found in litigation between these same parties that the only pattern that can be discerned from Plaintiff's water test results is a slight decrease in the nitrate levels in the water since Defendants began their operation. *Garrison*, 449 F. Supp. 3d at 873. Plaintiff has no expert to set a baseline for the acceptable or appropriate nitrate levels in surface waters. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Designations). Plaintiff has no expert to interpret or apply the water test results. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Designations).

With regard to the nuisance claim, Plaintiff's claim is limited solely to the odor emanating from Defendants' facility. (Plaintiff's Brief, p. 33). Plaintiff has no witnesses to testify as to the prudence or general acceptance of any farm management practices. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Designations). Plaintiff has no witnesses to set a standard as to existing prudent generally accepted farm management practices. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Designations). Plaintiff has failed to identify any alternative technologies and approaches that would be considered "existing prudent generally accepted management practices." App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Designations).

Plaintiff admits that Defendants' manure management plan is fully compliant with Iowa law, according to the Iowa DNR. App. Vol. 1, p. 79 (G. Garrison Depo., p. 125:18-23).

With regard to damages, Plaintiff does not allege any personal injury or mental anguish arising out of Defendants' CAFO. App. Vol. 2, pp. 303-305 (Plaintiff's Answer to Interrogatory No. 15). Plaintiff has no evidence of diminution in value of his property. App. Vol. 2, pp. 306-397 (Expert Report of W. Brent Taylor); App. Vol. 1, p. 85 (G. Garrison Depo. pp. 169-170).

II. Facts Relevant to *Gacke* Only

The following facts are taken from the record of the District Court's evidentiary hearing held on April 9, 2021. Plaintiff raised approximately 500 ewes on his property for about forty years beginning in the 1970s through 2018, and enjoyed every benefit of the statute. App. Vol. 2, pp. 38, 41 (April 9 Hearing Transcript, pp. 76:16–23, 79:9-11). When the ewes would get pregnant and give birth to lambs, Plaintiff would have upwards of over a thousand total ewes and lambs on his property. App. Vol. 2, p. 40 (April 9 Hearing Transcript, p. 78:6-13). Plaintiff kept the ewes and lambs in a fenced-in lot, confining them for 45 days or more. App. Vol. 3, p. 21;

App. Vol. 2, p. 42 (Hearing Transcript, 4/9/21, pp. 66:3-10, 80:9-15). Plaintiff had a barn where the ewes and lambs stayed during weather events and during the winter. App. Vol. 2, p. 40 (Hearing Transcript, 4/9/21, p. 78:14-18). Plaintiff has also maintained a manure pile that stands about six feet tall on his property from his sheep farm for the past forty years. App. Vol. 2, p. 42 (Hearing Transcript, 4/9/21, p. 80:16-23).

Additionally, Plaintiff owns a one-half interest in approximately 260 acres of land in Kossuth County. App. Vol. 2, p. 47 (Hearing Transcript, 4/9/21, p. 85:19-23). Plaintiff cash rents this land to Charles Laubenthal. App. Vol. 3, p. 22 (Hearing Transcript, 4/9/21, p. 67:11-20). Mr. Laubenthal operates a CAFO near the property. App. Vol. 2, p. 48 (Hearing Transcript, 4/9/21, p. 86:4-7). With Plaintiff's permission, Mr. Laubenthal has applied manure from the CAFO to Plaintiff's land. App. Vol. 2, pp. 48-51 (Hearing Transcript, 4/9/21, pp. 86:4 – 89:5).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND IOWA CODE SECTION 657.11 IS CONSTITUTIONAL AS APPLIED TO PLAINTIFF BECAUSE PLAINTIFF BENEFITTED FROM THE NUISANCE IMMUNITY

A. Preservation of Error

Plaintiff failed to preserve error on the issue of whether the application of Iowa Code section 657.11 constitutes a "taking" with regard to his alleged diminution in property damages. (Plaintiff's Brief, pp. 20-21). Plaintiff raised this issue for the first time in his Rule 1.904 motion filed after the Court entered summary judgment in Defendants' favor. App. Vol. 2, pp. 410-414 (Plaintiff's Motion to Reconsider). A party cannot raise an argument for the first time in a motion to reconsider. *Winger Contracting Co. v. Cargill, Inc.*, 926 N.W.2d 526, 542-43 (Iowa 2019). Moreover, Plaintiff filed his Notice of Appeal before the Court ruled on the motion to reconsider, and therefore waived the argument. App. Vol. 2, p. 426 (Plaintiff's Notice of Appeal; District Court's Ruling on Motion to Reconsider); *Freer v. DAC, Inc.*, 929 N.W.2d 685, 687-88 (Iowa 2019) ("A moving party is deemed to have waived and abandoned a posttrial motion when that party files a notice of appeal"). The District Court lost jurisdiction upon Plaintiff's filing of the Notice of Appeal at 10:42 a.m. on May 11, 2021. App. Vol. 2, p. 426 (Plaintiff's Notice of Appeal); *Freer*,

929 N.W.2d at 687–88. Thus, the District Court's denial of the motion to reconsider filed on May 11, 2021 at 11:30 a.m., after the Notice of Appeal was perfected, is void and of no effect. App. Vol. 2, pp. 424-425 (District Court's Ruling on Motion to Reconsider); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000) ("once the appeal is perfected, the district court loses jurisdiction to rule on the motion, and any such ruling has no legal effect"); *Wolf v. City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992) ("An appeal is taken and perfected by filing a notice of appeal with the clerk of the court where the order, judgment or decree was entered"). To the extent Plaintiff argues the Court impliedly decided this issue, the Court should reject that argument as well. *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 713 (Iowa 2005). The Court should find Plaintiff failed to preserve error on his Takings Clause argument, and decline to consider this issue.

Defendants agree that Plaintiff preserved error on the District Court's ruling that Plaintiff cannot satisfy the *Gacke* factors.

B. Standard of Review

The Court reviews constitutional challenges to statutes de novo. *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 230 (Iowa 2018). The Court "presume[s] statutes are constitutional, and the party challenging

the statute must prove the unconstitutionality beyond a reasonable doubt." *Id.* (internal quotations omitted). "This requires the challenger to refute every reasonable basis upon which the statute could be found to be constitutional." *Id.* (internal quotations omitted). "If the statute is susceptible to multiple constructions, only one of which is constitutional, [the Court is] obliged to adopt the constitutional construction of the statute." *Id.*

C. Plaintiff Had an Animal Feeding Operation on His Property for Nearly Forty Years and Thus Benefitted from the Nuisance Immunity in Iowa Code Section 657.11

Plaintiff cannot satisfy his burden to show section 657.11 is unconstitutional as applied. In order to find section 657.11 unconstitutional as applied to the facts of this case, Plaintiff must meet all of the three prongs contained in the test espoused in *Gacke*:

> For courts to determine whether section 657.11(2) is unconstitutional as applied to plaintiffs, plaintiffs must show they (1) "receive[d] no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general[,]" (2) "sustain[ed] significant hardship[,]" and (3) "resided on their property long before any animal operation was commenced" on neighboring land and "had spent considerable sums of money in improvements to their property prior to construction of the defendant's facilities." *Gacke*, 684 N.W.2d at 178. In applying the second step in *Gacke*, we concluded the means employed by the legislature to accomplish its objective under section 657.11(2) were "unduly oppressive and, therefore, not a reasonable exercise of the state's police power" as applied to the plaintiffs in violation of the inalienable

> rights clause of the Iowa Constitution. We reached this decision based on the specific circumstances of the case as developed at trial. Under Iowa law, the constitutionality of a statute is a question of law for resolution by the Court.

Honomichl at 235-36. "[T]he *Gacke* factors require a fact-based analysis that generally requires a trial on the merits, or at least an evidentiary pretrial hearing." *Id.* at 238.

Following an evidentiary hearing, the District Court correctly found that Plaintiff cannot satisfy the *Gacke* test. App. Vol. 2, pp. 404-409 (Order Denying Plaintiff's Motion to Strike Affirmative Defenses). By raising livestock on his property, Plaintiff has received the benefit of the immunity provided by section 657.11. App. Vol. 2, pp. 38-41 (Hearing Transcript, 4/9/21, pp. 76:16-79:19). The protections provided by the statute apply to injuries and claims caused by animal feeding operations on or after May 21, 1998. Iowa Code § 657.11(6). Plaintiff raised approximately 500 ewes on his property for about forty years beginning in the 1970s through 2018, and enjoyed every benefit of the statute. App. Vol. 2, pp. 38-41 (Hearing Transcript, 4/9/21, pp. 76:16-79:19). When the ewes would get pregnant and give birth to lambs, Plaintiff would have upwards of over a thousand total ewes and lambs on his property. App. Vol. 2, p. 40 (Hearing Transcript, 4/9/21, p. 78:6-13). Plaintiff kept the ewes and lambs in a fenced-in lot, confining them for 45 days or more. App. Vol. 3, p. 22

(Hearing Transcript, 4/9/21, pp. 66:3-10); App. Vol. 2, p. 42 (Hearing Transcript, 4/9/21, p. 80:9-15). Plaintiff had a barn where the ewes and lambs stayed during weather events and during the winter. App. Vol. 2, p. 40 (Hearing Transcript, 4/9/21, p. 78:14-18). Plaintiff has also maintained a manure pile that stands six feet high on his property from his sheep farm for the past forty years. App. Vol. 2, p. 42 (Hearing Transcript, 4/9/21, p. 80:16-23); App. Vol. 2, p. 402 (Hearing Exhibit U).

There is no dispute that Plaintiff's sheep farm constitutes an animal feeding operation, as defined in Iowa Code section 459.102(4). As such, Plaintiff fully enjoyed the benefits of nuisance immunity related to his animal feeding operation. This is a real benefit that Plaintiff actually enjoyed. It is not some remote, hypothetical benefit, as Plaintiff posits. If any neighboring landowner had raised a nuisance claim against Plaintiff from May 1998 forward related to his sheep farm, section 657.11 would have given him an absolute defense, provided Plaintiff did not violate any applicable rules and used reasonable management practices. Plaintiff argues that for a plaintiff to benefit from the statute under *Gacke*, the plaintiff has to face an actual or threatened nuisance claim. However, this ignores the fact that section 657.11 was enacted so that animal feeding operations can avoid such claims altogether. Iowa Code § 657.11(1) ("The purpose of this section

is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits . . .”). The plaintiffs in *Gacke* and *Honomichl* did not engage in animal feeding operations, and could easily meet this prong. Plaintiff cannot make the same argument here given he raised sheep on his farm up until about 2018. The District Court correctly found that Plaintiff did receive the benefits of section 657.11, and therefore section 657.11 is constitutional as applied to Plaintiff.

Plaintiff claims the “benefit” prong of *Gacke* should be narrowly defined, but fails to cite any authority for this argument. As such, Plaintiff has waived this argument. Iowa R. App. P. 6.903(2)(g)(3).[2] In any event, there is no authority that supports such an argument. No Iowa court has ever found that the benefit prong of *Gacke* should be narrowly defined. The District Court recognized this, finding “neither the *Gacke* test nor any other authority requires a quantitative comparison of potential benefits of the

[2] Plaintiff makes only sporadic citations to the record throughout his Brief. The Court can and should ignore arguments or contentions where Plaintiff fails to cite to the record, and find such arguments waived. *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 174 (Iowa 1990) (“Courts should not be required to search the record to verify the facts and actions taken and are warranted in ignoring uncited contentions, especially in cases where the record is voluminous”); *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) (same); *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 866 (Iowa 2001) (same).

immunity statute. It only requires that a plaintiff received *no* particular benefit from the nuisance immunity granted to defendants other than that inuring to the public in general." App. Vol. 1, pp. 377-385 (Order Denying Plaintiff's Motion to Strike Affirmative Defenses, p. 4) (emphasis in original).

D. Plaintiff Allowed a CAFO Operator to Apply Manure from His CAFO to Plaintiff's Land in Kossuth County and thus Plaintiff Benefitted Further from the Nuisance Immunity

The District Court also correctly found Plaintiff has benefitted from the nuisance immunity related to Plaintiff's property in Kossuth County. App. Vol. 1, pp. 380-381 (Order Denying Plaintiff's Motion to Strike Affirmative Defenses, pp. 4-5). Specifically, Plaintiff owns a one-half interest in approximately 260 acres of land in Kossuth County. App. Vol. 2, p. 47 (April 9 Hearing Transcript, p. 85:19-23). Plaintiff cash rents this land to Charles Laubenthal. App. Vol. 3, p. 22; App. Vol 2, p. 30 (April 9 Hearing Transcript, pp. 67:11 – 68:9). Mr. Laubenthal operates a CAFO near the property. App. Vol 2, p. 30 (*Id.*). With Plaintiff's permission, Mr. Laubenthal has applied manure from the CAFO to Plaintiff's land. App. Vol. 2, pp. 48-51 (April 9 Hearing Transcript, pp. 86:4 – 89:5).

Plaintiff argues that only a CAFO owner or operator could "benefit" from the application of section 657.11. However, both the statute and the

facts of this case show otherwise. First, Iowa Code section 657.11(4) specifically provides that the nuisance immunity applies to "the transportation and application of animal manure." Thus, it is directly applicable to the situation here, where Mr. Laubenthal transported and applied manure from an animal feeding operation on Plaintiff's land. App. Vol. 2, pp. 48-51 (April 9 Hearing Transcript, pp. 86:4 – 89:5). Second, in this very case, Plaintiff sued the owner of land on which manure is applied, BWT Holdings, LLLP, seeking to hold BWT Holdings liable for nuisance. App. Vol. 1, p. 32 (Petition, ¶ 3). BWT Holdings is not an owner or operator of the animal feeding operation. App. Vol. 1, p. 32 (Petition, ¶ 3). This wholly contradicts Plaintiff's argument that only "the owner or operator of an animal feeding operation" can be sued for nuisance and thus benefit from Iowa Code section 657.11. Plaintiff's use of the Kossuth County land that he owns provides an additional reason to find Plaintiff benefitted from the nuisance immunity in Iowa Code section 657.11, and therefore cannot satisfy the *Gacke* test.

E. Alternatively, the Court Should Overrule *Gacke*, Apply a Rational Basis Test, and Find the Statute Constitutional

As Defendants argued before the District Court, *Gacke* was wrongly decided, is outdated, is limited to its facts, and should be overruled. App. Vol. 3, pp. 13-14 (Defendants' Memorandum of Authorities in Support of

Resistance to Motion to Strike Affirmative Defenses, pp. 7-8). As Justice Waterman and Justice Mansfield recognized in *Honomichl*, the *Gacke* test is out of line with Iowa Supreme Court precedent and the Court's usual deference to the Iowa legislature. *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 239 (Iowa 2018) (Waterman, J., concurring specially). The Court should apply a rational basis review, which section 657.11 clearly satisfies. *Honomichl*, 914 N.W.2d at 238. While the District Court did not rule on this issue, this Court may still decide whether *Gacke* should be overruled. "A successful party in district court is not required to request the district court to rule on alternative grounds raised, but not relied upon by the district court in making its ruling, in order to assert those grounds in support of affirming the ruling of the district court when appealed by the opposing party." *State v. Cromer*, 765 N.W.2d 1, 7 n.4 (Iowa 2009). The Court should overrule *Gacke* and uphold section 657.11 under a rational basis review. This serves as an alternative basis to affirm the District Court's denial of Plaintiff's Motion to Strike Affirmative Defenses.

II. DEFENDANTS ARE ENTITLED TO THE PROTECTIONS OF IOWA CODE SECTION 657.11 AS A MATTER OF LAW

A. Preservation of Error

Defendants agree that Plaintiff preserved error on this issue.

B. Standard of Review

This Court reviews a district court's grant of summary judgment for correction of errors at law. *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). Summary judgment is "'the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.'" *Nelson v. Lindaman*, 867 N.W.2d 1, 11 (Iowa 2015) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Robinson v. Allied Prop. & Cas. Ins. Co.*, 816 N.W.2d 398, 401 (Iowa 2012); Iowa R. Civ. P. 1.981(3). An issue of fact is "material" only when the dispute involves facts that might affect the outcome of the suit. *Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008). An issue of material fact is "genuine" only when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* Although the evidence is viewed in the light most favorable to the nonmoving party, the nonmoving party must set forth specific facts showing the existence of a genuine issue for trial, and mere speculation is insufficient. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005). "[W]hen the facts are undisputed and the only issue is what legal consequences flow from those facts, entry of summary judgment is

proper." *Emmet Cty. State Bank v. Reutter*, 439 N.W.2d 651, 653 (Iowa 1989). "It is well established that a party opposing a motion for summary judgment is not entitled to rely on the hope of a subsequent magical appearance at trial of genuine issues of material fact." *Prior v. Rathjen*, 199 N.W.2d 327, 331 (Iowa 1972).

C. Plaintiff Has No Evidence of Defendants' Failure to Use Prudent Generally Accepted Management Practices Reasonable for the Operation

Defendants are entitled to nuisance immunity under the statute unless Plaintiff can prove an exception applies. Section 657.11(2) provides in pertinent part:

> However, this section shall not apply if the person bringing the action proves that an injury to the person or damage to the person's property is proximately caused by either of the following:
>
> a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.
>
> b. Both of the following:
>
> (1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property.
>
> (2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.

Plaintiff does not claim the exception in section 657.11(2)(a) applies.[3] Instead, Plaintiff relies solely on section 657.11(2)(b).

As the District Court correctly found, Plaintiff has no evidence to support his argument that Defendants failed to use existing prudent generally accepted management practices reasonable for their operation. The record is absolutely silent on this issue, and Plaintiff has identified no facts to support his argument. Without citing to any authority, Plaintiff repeats the same nonsensical argument that he made before the District Court – specifically, that because the statute does not define the term "prudent generally accepted management practices reasonable for the operation," this somehow creates a fact issue. (Plaintiff's Brief, p. 34).

Contrary to Plaintiff's argument, that reasoning fully supports summary judgment in Defendants' favor. Plaintiff has the burden to prove Defendants failed to use existing prudent generally accepted management practices reasonable for the operation, but utterly failed to produce any evidence to make such a showing. *See* Iowa Code § 657.11(2) (burden is on the plaintiff to prove an exception applies). Plaintiff has no witnesses

[3] The District Court correctly found Plaintiff could not prove the exception in section 657.11(2)(a), because Plaintiff has no evidence to tie any violation of any statute or regulation to any damage. App. Vol. 2, pp. 418-419 (Ruling on Motion for Summary Judgment, pp. 4-5).

(expert or otherwise) to testify as to the prudence or general acceptance of any farm management practices. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Disclosures); App. Vol. 1, p. 266 (Def. SUF in Support of Motion for Summary Judgment, ¶¶ 11-13). Plaintiff has no witnesses (expert or otherwise) to testify as to the prudence or general acceptance of the electrostatic fence. (*Id.*). Plaintiff has no witnesses (expert or otherwise) to set a standard as to existing prudent generally accepted management practices. (*Id.*). In addition, Plaintiff has failed to identify any alternative technologies and approaches that would be considered "existing prudent generally accepted management practices." (*Id.*). The District Court correctly found Plaintiff failed to produce any evidence to create a genuine issue of material fact. App. Vol. 1, p. 420 (Ruling on Motion for Summary Judgment, p. 6).

Plaintiff's discussion of the electrostatic fence reveals further weaknesses in his position. Defendants installed the electrostatic fence in 2016 to address Plaintiff's concerns about odor coming from the facility. App. Vol. 1, p. 59 (Jay Moore Depo. p. 66:11 – 67:3); App. Vol. 1, pp. 369-370 (G. Garrison Affidavit dated March 18, 2021, ¶ 10). The electrostatic fence that Defendants installed was a first of its kind application of the technology. App. Vol. 1, pp. 66-67 (John Baumgartner Depo. pp. 11:13 –

12:8). Thus, it was new, innovative, and advanced, not outdated or below any minimum standard. Defendants installed the fence on the North side of the building, which faces Plaintiff's property. (*Id.*). On the one hand, Plaintiff claims without evidentiary support that the electrostatic fence is not a reasonably prudent generally accepted practice. (Plaintiff's Brief, p. 35). On the other hand, Plaintiff argues without evidence that Defendants are at fault for only installing the fence on one side of the facility. (*Id.*). Plaintiff cannot have it both ways, or either way for that matter. Plaintiff has no witnesses (expert or otherwise) to opine as to the prudence or general acceptance of the electrostatic fence. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Disclosures). The Court should reject Plaintiff's arguments as to Defendants' use of existing prudent generally accepted management practices reasonable for the operation.

III. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF'S TRESPASS AND IOWA DRAINAGE LAW CLAIMS

A. Preservation of Error

Defendants agree that Plaintiff preserved error on these issues.

B. Standard of Review

Defendants incorporate by reference the Standard of Review paragraph set forth in Argument Section II of this Brief, above.

C. Plaintiffs Water Test Results Do Not Support His Claims

Plaintiff's attempts to relitigate factual arguments lost in the previous federal court litigation must fail. Because Plaintiff admits that his trespass and "Iowa drainage law" claims rely on the same evidence (Plaintiff's Brief, p. 32), Defendants will address these claims together. Plaintiff's trespass and drainage law claims arise primarily out of allegations that Defendants have overapplied manure to their property resulting in runoff to Plaintiff's property. As he did in the federal litigation, Plaintiff attempts to support these claims by offering a number of water tests taken at various points of the property. App. Vol. 2, pp. 80-161 (Water Test Results); App. Vol. 1, pp. 317-321 (Water Test Results Spreadsheet). However, the federal court already ruled that these same water tests do not demonstrate overapplication. *Garrison*, 449 F. Supp. 3d at 873.

Plaintiff's attempts to rely on these water tests again fails for two reasons: (1) this issue is barred by issue preclusion; and (2) even if this Court were to disregard the federal court's prior ruling on this issue, the water tests themselves show no increase in nitrate levels to evidence overapplication.

1. The Federal Court Already Determined that Water Test Results Submitted by Plaintiff do not Show Increased Nitrate Levels and Plaintiff is Barred from Seeking a Different Factual Finding Here

Issue preclusion "prevent[s] the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same question." *Lemartec Eng'g & Constr. v. Advance Conveying Techs., LLC*, 940 N.W.2d 775, 779 (Iowa 2020) (internal citations omitted). "[W]here a particular issue or fact is litigated and decided, the judgment estops both parties from later litigating the same issue." *Id.* (quoting *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 174 (Iowa 2006)).

Under Iowa law, issue preclusion applies to both factual and legal issues raised and resolved in a previous action. *Id;* see also *Barker v. Iowa Dep't of Pub. Safety*, 922 N.W.2d 581, 587 (Iowa 2019). Here, the federal court has already adjudicated the factual issue of whether the water tests could support Plaintiff's argument that those tests constituted evidence of the overapplication of manure. *Garrison*, 449 F. Supp. 3d at 873. Thus, Plaintiff is prohibited from seeking a different factual determination here.

A party asserting issue preclusion must establish the following:

> (1) the issue concluded must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior action, and (4) the determination ... in the prior action must have been necessary and essential to the resulting judgment.

Chamberlain, L.L.C. v. City of Ames, 757 N.W.2d 644, 648 (Iowa 2008). Here, all four factors necessary to invoke issue preclusion are satisfied.

First, the issue presented is the factual issue of whether the water test results could support Plaintiff's argument that there were increased nitrate levels due to Defendants' alleged manure applications. There is no disputing the factual issue presented is identical to that presented in the federal litigation. Stated differently, the water test results only support Plaintiff's claims if the Court (or jury) were to contradict the federal court's factual finding that the water test results do not show an increase in nitrate levels caused by Defendants. *See Garrison*, 449 F. Supp. 3d at 873. Plaintiff himself stated that he intends to rely on these same tests to support claims of overapplication. In his Answers to Interrogatories, Plaintiff stated "with respect to Mr. Garrison's trespass and drainage law claims, the water tests submitted in the federal case show the increase in pollutants discharged to Mr. Garrison's property." App. Vol. 1, pp. 282-284 (Plaintiff's Answer to Interrogatory No. 24). Thus, the first factor is satisfied.

Second, these factual issues were raised and litigated in the prior action. In the federal case, Defendants were awarded summary judgment on Plaintiff's Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA") claims. *Garrison*, 449 F. Supp. 3d 863. Those

claims, as with Plaintiff's claims for trespass and violation of drainage law, arose from a theory that Defendants over-applied manure to their field, which caused runoff to a stream on Plaintiff's property. *Id.* at 873-74; App. Vol. 1, pp. 282-284 (Plaintiff's Answer to Interrogatory No. 24); App. Vol. 1, p. 36 (Petition, ¶ 28). The federal court awarded Defendants summary judgment based upon its factual finding that the water tests did not show a pattern of overapplication. *Garrison*, 449 F. Supp. 3d at 873. Critically, the court held that "Plaintiff's water samples, however, do not show spikes in nitrate levels once or twice a year indicating a pattern of violations correlating with the alleged misapplications or overapplications." *Id.* The court went on to further state that "Plaintiff has provided no evidence that any increased level of nitrates correlates to the once or twice-yearly manure application." *Id.* The court concluded its analysis of the water test results by noting that "plaintiff's water tests do not establish a discernable pattern of violations, nor does plaintiff provide evidence that the nitrate levels are caused by defendants' manure application." *Id.* at 874. It is clear the second prong of the issue preclusion test is satisfied by the federal court's ruling on Defendants' motion for summary judgment.

Third, the factual issues were material and relevant to the federal court's disposition of the federal case. The issue the federal court ruled on –

the evidence, or lack thereof, of nitrates in the water following periods of manure application, constituted the basis for Plaintiff's claim in the federal case and was cited as a reason for judgment against Plaintiff on that claim. *Garrison*, 449 F. Supp. 3d at 873-74; *see Hunter v. City of Des Moines*, 300 N.W.2d 121, 126 (Iowa 1981) (issues are "clearly material and relevant to the disposition of the previous case" where the issues "constituted the bases for" a party's claim).

Finally, the federal court's determination that Plaintiff's water test results fail to establish that the nitrate levels are caused by Defendants' manure application was necessary and essential to the resulting judgment in the federal case. Plaintiff could not demonstrate his claim that Defendants' alleged violations were imminent and ongoing because the water test results showed the opposite. *Garrison*, 449 F. Supp. 3d at 873-74. As there was no ongoing violation, there could be no claim under the CWA or RCRA. *Id.* Judge Williams relied on this factual finding to find that Defendants succeeded on the merits of the RCRA and CWA claims. *Id.* Accordingly, he relieved Defendants of any liability to Plaintiff that Plaintiff sought to establish via the introduction of the water test results. *Id.*

The Court should not allow Plaintiff another bite at the apple. Plaintiff has already lost on this issue in the federal court. This Court should

defer to the federal court's finding, as is required under principles of issue preclusion. The Court should affirm the District Court's grant of summary judgment to Defendants on Plaintiff's trespass and drainage law claims.

2. Plaintiff's Water Test Results Prove Nothing

Even if this Court considers the water tests anew, it should reach the same result. Plaintiff claims a comparison of his 2001-2013 "test results" with his 2016-2019 water test results shows a measurable increase in nitrates. (Plaintiff's Brief, p. 37). Plaintiff argues that the 2001-2013 "test results" show only one test exceeded 10 ppm in nitrates, while the 2016-2019 test results show 46 results above 10 ppm and only 18 results at or below 10 ppm. (*Id.*). As an initial matter, Plaintiff's 2001-2013 "test results" consist of a spreadsheet of dates ranging from May 31, 2001 through September 28, 2013, and supposed nitrate levels ranging from 0-20 ppm. App. Vol. 2, p. 80 (Plaintiff's Water Test Results Spreadsheet). This document wholly lacks foundation – there is no explanation as to when it was created, who created it, how it was created, what the value means, how any water samples were collected, where any water samples were collected from, how any water samples were measured, whether chain of custody was documented, or what

happened to the underlying water test results.[4] The Court should decline to consider the 2001-2013 "test results" spreadsheet in ruling on this appeal. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 106 (Iowa 2012) ("Motions for summary judgment must also be decided based on admissible evidence").

Even if the Court were to consider Plaintiff's 2001-2013 "test results" spreadsheet and compare it to the 2016-2019 water test results, the water test results do not create a genuine issue of material fact on any issue. Plaintiff has failed to disclose an expert to opine as to what the results of the water tests mean or to opine as to how any resulting inference can be correlated or attributed to Defendants. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Disclosures). This is clearly a subject that is beyond the ordinary intelligence of a layperson and must be supported by expert testimony. Plaintiff arbitrarily chooses the number "10 ppm" as a benchmark and suggests that because the 2016-2019 test results show nitrate levels above 10 ppm, this means something.[5] (Plaintiff's Brief, p. 37). But Plaintiff has no expert to explain what, if anything, this means. For all of these same

[4] The metadata to the Excel document Plaintiff produced shows the Excel document was created August 2, 2019, which demonstrates the document was not created contemporaneously with the water tests.

[5] Plaintiff completely disregards the lack of any water test results from 2014 and 2015.

reasons, the federal court found (1) Plaintiff's water test results showed no evidence of increase in nitrate levels, (2) that interpreting the water test results would require expert analysis, and (3) that in the absence of expert testimony, Plaintiff could not link the nitrate levels in the water tests to Defendants. *Garrison*, 449 F. Supp. 3d at 873-74. Whether through issue preclusion or considering the issue anew, this Court should affirm the District Court's ruling that Plaintiff's water test results do not create a genuine issue of material fact on any claim. Plaintiff relies extensively on the water test results to try to establish his trespass and drainage law claims against Defendants. No expert has been disclosed to opine as to what the results of the water tests mean, nor has any expert been disclosed to opine as to how any resulting inference can be correlated or attributed to Defendants. App. Vol. 1, pp. 285-287 (Plaintiff's Expert Witness Disclosures).

Plaintiff believes that the tests show increased levels of pollutants, specifically nitrates, that resulted solely from Defendants' actions. A cursory review of the water test results shows this is incorrect. The nitrate levels taken at the various collection areas have remained constant, and even decreased over time. App. Vol. 2, pp. 80-161 (Water Test Results); App. Vol. 1, pp. 317-321 (Water Test Results Spreadsheet).

Given the lack of expert testimony, Plaintiff asked the federal court, the District Court, and is now asking this Court not only to understand and assign meaning to water test results, but to correlate them to events attributable to one entity. This Court should follow the federal court and the District Court, and decline to act as Plaintiff's expert with regard to the water test results.

D. Plaintiff's Experts Do Not Create Any Genuine Issue of Material Fact

In support of his trespass and drainage law claims, Plaintiff argues that Defendants have overapplied manure to their fields, causing pollutants to be discharged to Plaintiff's property. (Plaintiff's Brief, pp. 38-39). There is no evidence to support this. As set forth above, Plaintiff's water test results prove nothing. Further, Plaintiff admits that Defendants' manure management plan complies with Iowa law. App. Vol. 1, p. 79 (G. Garrison Depo., p. 125:18-23). Defendants have never been cited, warned, or otherwise reprimanded for overapplication of manure or for violation of the manure management plan. Instead, Plaintiff's experts rely on standards that are wholly meaningless for purposes of this case. Paul Kassel opines that Defendants' application rate exceeds the limits set by the "Corn Nitrogen Rate Calculator," but he admits the Iowa DNR has not adopted that standard. App. Vol. 2., p. 185 (Kassel Report, p. 1). Plaintiff's other expert, Robert

Streit, agrees with Kassel's opinion. App. Vol. 2, p. 184 (Streit Report, p. 2). Streit and Kassel have no opinions about Defendants' compliance with Iowa law or any standards that are relevant under Iowa law, and the undisputed material facts show Defendants have complied with Iowa law in applying manure in compliance with their manure management plan. App. Vol. 2, pp. 183-184 (Streit Report); App. Vol. 2, pp. 185-186 (Kassel Report). The District Court correctly granted Defendants' motion for summary judgment on Plaintiff's trespass and "Iowa drainage law" claims.

To the extent Plaintiff intends to rely upon his own expert opinions in support of his trespass and drainage law claims (Plaintiff's Brief, p. 42 – citing January 2021 Affidavit of Plaintiff), these arguments fail because Plaintiff never disclosed himself as an expert witness. *See, e.g.*, *Donovan v. State*, 445 N.W.2d 763, 765-66 (Iowa 1989) (affirming district court's decision to strike the plaintiff's untimely designation of experts served after the plaintiff's expert deadline and after the defendant filed a motion for summary judgment); *City of Riverside v. Metro Pavers, Inc.*, 2017 WL 2875687, at *2 (Iowa Ct. App. 2017) (affirming district court's exclusion of expert not timely disclosed); *Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Stein*, 586 N.W.2d 523, 524-25 (Iowa 1998) (noting the district court found "the plaintiffs' failure to timely designate an expert precluded

them from presenting expert testimony at trial"); *Cox v. Jones*, 470 N.W.2d 23, 27 (Iowa 1991) ("In summary, we hold that the district court did not err in striking plaintiffs' untimely certification of an expert witness and in granting defendants' summary judgment motion"); Iowa R. Civ. P. 1.517(3)(a) (a party who fails to identify a witness as required by Rule 1.500 is "not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless").

E. Plaintiff Has No Evidence of Damages on His Trespass and Drainage Law Claims

It is well-established that the Court is "obliged to affirm an appeal where any proper basis appears in the record for a trial court's judgment, even though it is not one upon which the court based its holding." *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826 (Iowa 1994). Here, the District Court did not address Defendants' argument that Plaintiff has no evidence of damages on his trespass and drainage law claims. However, the record shows this is undisputedly true. This serves as an alternate basis to affirm the District Court's ruling on Plaintiff's trespass and drainage law claims.

Plaintiff claims $100,000 of property damage on each of his trespass and Iowa drainage law claims. App. Vol. 1, pp. 364-367 (Plaintiff's Answer to Interrogatory No. 8). But Plaintiff has no expert to put a number on his

damages or tie these to a trespass or violation of Iowa drainage law. Brent Taylor, Plaintiff's appraiser, expressly states that he "is not trained nor does he have the experience to evaluate the amount of damage, if any, that is caused by the neighboring hog confinement building on the land." App. Vol. 2, p. 317 (Taylor Report, p. 11). Further, Plaintiff admitted in his deposition that he is not qualified to give any opinion on diminution of value. App. Vol. 1, p. 85 (G. Garrison Depo., p. 170:13-23). A plaintiff is required to establish damages "with some degree of reasonable certainty." *Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739, 747 (Iowa 1977). Here, Plaintiff failed to identify any witness or other evidence to support his claim for damages. Without damages, Plaintiff has no claim for trespass or violation of Iowa drainage law. *Krotz v. Sattler*, 2004 WL 2297151, at *3 and n.2 (Iowa Ct. App. Oct. 14, 2004) (unpublished) (directed verdict was proper where the plaintiff failed to prove he sustained any damages in any manner due to the alleged trespass and failure to award nominal damages does not ordinarily warrant reversal); *O'Tool v. Hathaway*, 461 N.W.2d 161, 163 (Iowa 1990) (damages are an element of a claim for violation of Iowa drainage law). Thus, even if the Court were to find the District Court erred on liability with regard to Plaintiff's trespass and drainage law claims,

Plaintiff's lack of damages is an alternative basis to affirm the District Court's ruling.

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

A. Preservation of Error

To the extent Plaintiff appeals the District Court's finding that Iowa Code section 657.11A is constitutional on its face, Defendants agree that Plaintiff preserved error.

To the extent Plaintiff appeals his "as applied" challenge to Iowa Code section 657.11A, the District Court initially reserved ruling on this issue until trial, and thus never ruled on it. As such, Plaintiff has no right to appeal. Iowa R. App. P. 6.101(1) and 6.103(1) (allowing appeals only from final orders and judgments, defined as orders and judgments "involving the merits or materially affecting the final decision").

B. Standard of Review

This Court reviews constitutional issues de novo. *Honomichl*, 914 N.W.2d at 231. "A facial challenge is one in which no application of the statute could be constitutional under any set of facts." *Id.* A facial challenge is the most difficult to mount successfully, "because it requires the challenger to show the statute under scrutiny is unconstitutional in all its applications." *Id.* Every statute is presumed constitutional, "and the party

challenging the statute must prove the unconstitutionality beyond a reasonable doubt." *Id.* at 230.

C. The Court Need Not Address this Constitutional Issue

As an initial matter, if the Court affirms the District Court's rulings on Plaintiff's motion to strike affirmative defenses and Defendants' motion for summary judgment, this Court need not and should not address Plaintiff's facial challenge to Iowa Code section 657.11A, as the issues presented would be moot. *Baker v. City of Iowa City*, 750 N.W.2d 93, 97 (Iowa 2008) ("A case is moot if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent"); *Iowa Mutual Ins. Co. v. McCarthy*, 572 N.W.2d 537, 540 (Iowa 1997) ("our test of mootness is whether an opinion would be of force or effect in the underlying controversy"). Iowa Code section 657.11A concerns damages only. If the Court affirms the District Court on Plaintiff's motion to strike affirmative defenses and Defendants' motion for summary judgment, there will be no claims remaining and no reason to evaluate the damages limitations of Iowa Code section 657.11A. Moreover, under the doctrine of constitutional avoidance, this Court should decline to rule on constitutional issues if the case can be decided on other grounds. *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 210 (Iowa 2014). This Court should exercise judicial

restraint and decline to rule on the constitutionality of Iowa Code section 657.11A.

D. Iowa Code Section 657.11A is Constitutional on its Face

The Iowa Supreme Court has previously upheld constitutional challenges to statutes providing immunity to animal feeding operations from nuisance litigation. *See Gacke*, 684 N.W.2d at 178; *Honomichl*, 914 N.W.2d at 235. The same analysis, and therefore result, applies here. The District Court correctly rejected each of Plaintiff's arguments that the statutory limitations on recoverable compensatory damages contained within Iowa Code section 657.11A(3) violate his constitutional rights as the statute is a reasonable exercise of the state's police power.

1. Promoting Animal Agriculture by Protecting Responsible Producers from Nuisance Lawsuits is Within the State's Police Power and Not a Violation of Article I, Section 1 of the Constitution

It is established Iowa law that the protections of Article I, Section 1 of the Iowa Constitution are not absolute, and are subject to reasonable regulation by the state in the exercise of its police power. *Gacke*, 684 N.W.2d at 176. In determining whether the challenged statute violates Plaintiff's Article I, Section 1 rights as he claims, the Court must determine not only whether the right asserted is protected by this clause but also

whether the challenged statute is a reasonable exercise of the state's police power. *Id.*

As noted by the District Court, the Iowa Supreme Court has long held that a person's right to possess their property under Article I, Section 1 includes their right to use and enjoy the property free from noxious odors. *Gacke*, 684 N.W.2d at 176. When further considering that right, the Iowa Supreme Court held that Iowa Code section 657.11(2) was "a valid exercise of the state police power although individual producers, not the public, were the direct beneficiaries of the statutory immunity." *Gacke*, 684 N.W.2d at 178. As detailed by the Court in *Honomichl:*

> We ruled "[t]he legislature's objective of promoting animal agriculture in this state promotes the interests of the public generally and the immunity granted in this statute bears a reasonable relationship to this legislative objective" even though the statutory immunity directly benefitted animal agricultural producers. This is still the case today, as the claimed government interest for section 657.11(2) to promote "animal agriculture in this state by protecting persons engaged in the care and feeding of animals" continues to promote the interests of the public in general. Iowa Code § 657.11(1). This is true even though the law benefits certain individuals or classes more than others.

Honomichl, 914 N.W.2d at 235 (internal citations omitted). Given the existing precedent that promoting animal agriculture in this state is a valid exercise of the state's police power, *Honomichl*, 914 N.W.2d at 238, section 657.11A(3) clearly survives rational basis review. The District Court found

as much, holding that "there is no doubt that damages cap contained in section 657.11A(3) supports the state's public interests by 'preserving and encouraging the expansion of reasonable animal agricultural production in this state." App. Vol. 1, pp. 377-385 (District Court's Ruling on Plaintiff's Motion to Find Iowa Code Section 657.11A(3) Unconstitutional). This Court should affirm.

2. The Damage Limitations Do Not Deprive Plaintiff of His Right to a Jury Trial

The Iowa Supreme Court has not previously considered the constitutionality of damage limitations such as those contained with Iowa Code section 657.11A(3). Plaintiff argues Iowa Code section 657.11A(3) does not pass strict scrutiny review as it is not narrowly tailored to serve a compelling government interest.

Plaintiff's argument assumes that the damages limitations in Iowa Code section 657.11A infringe on his right to jury trial. Accordingly, before this Court need engage in an analysis of the constitutionality of such provisions, it must first examine whether any right has been infringed. The District Court, in line with courts across the country, correctly noted that a person's right to a jury trial is not impeded by the statute, as the only matter potentially affected is the ultimate recovery post-verdict.

To date, there have been few, if any, cases in Iowa seeking such a

determination under the Iowa Constitution. It should be noted that the Iowa Supreme Court views Iowa's right to a jury trial as similar to that provided by the Seventh Amendment to the United States Constitution. *Pitcher v. Lakes Amusement Co.*, 236 N.W.2d 333, 335 (Iowa 1975). Thus, federal Seventh Amendment jurisprudence is persuasive for this Court's current analysis. *Id.*

An Iowa District Court considered a similar issue in *Channon v. UPS, Inc*. *See Channon v. UPS, Inc.*, No. 66303, 1998 WL 317210, at *1 (Iowa Dist. Ct. May 22, 1998), *aff'd in part, rev'd in part sub nom. Channon v. United Parcel Serv., Inc*., 629 N.W.2d 835 (Iowa 2001). There, the district court considered a plaintiff's claim that 42 U.S.C. section 1981A violated her Seventh Amendment right to jury trial. *Channon*, 1998 WL 317210, at *1. While the district court, and ultimately the Iowa Supreme Court, rested their holdings on the fact that the Seventh Amendment to the United States Constitution does not govern proceedings in state court, the district court offered, as dicta, some analysis of whether such a challenge would be successful. The court cited favorably to the United States Supreme Court's decision in *Tull v. United States*, in which the Court held "[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability." *Tull v. United*

States, 481 U.S. 412 at 425-26 (1987); *see id.* at n.9 ("Nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial. . . We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial"). The district court also cited favorably to *Boyd v. Bulala*, where the Fourth Circuit Court of Appeals held that "it is not the role of the jury to determine the legal consequences of its factual findings." *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989). The court in *Boyd* went on to note that the Constitution allows Congress to create a remedy and at the same time limit the scope of the remedy as it sees fit. *Id.* at 1196 ("If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages for a cause of action as well").

The Eighth Circuit Court of Appeals followed similar reasoning in upholding a challenge to a Nebraska statute capping the damages a plaintiff may recover in a medical malpractice action at $1.75 million. *Schmidt v. Ramsey*, 860 F.3d 1038, 1045 (8th Cir. 2017). The court reasoned that the Nebraska damages statute did not determine damages in the first instance, and therefore the jury performed its historical role by finding liability and assessing damages. *Id*. As the above cases illustrate, federal courts have

found that the right to jury trial is not violated by damage limitations put in place by legislatures, as the Seventh Amendment does not require the jury to determine a remedy.

This pattern is reflected in state courts across the country, where courts have relied upon similar principles to decide that statutory damage limitations do not infringe upon a person's right to jury trial. Notably, courts in states with constitutional provisions nearly identical to Iowa's, stating the right to the jury trial is inviolate, have decided that such damage limitations do not violate the right to a trial by jury.[6] In *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686 (Tenn. 2020), the court examined what restrictions, if any, the legislature may place on a plaintiff's ability to recover noneconomic damages. As in Iowa, the right to a jury trial in Tennessee is expressly guaranteed by the Tennessee Constitution, which mandates that "the right of trial by jury shall remain inviolate[.]" Tenn. Const. art. I, § 6.

The court in *Clay* first noted that it was within the legislature's authority to place reasonable limitations on rights of action in tort, including

[6] It must be noted that one of the cases cited by Plaintiff, *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999), was later overturned by the Oregon Supreme Court. That court has since held that the civil jury trial provision in the state constitution's bill of rights does not limit the legislature's authority to define the extent of damages available. *See Horton v. Oregon Health and Science University*, 376 P.3d 998 (Or. 2016).

the power to create or abolish certain causes of action. *Id*. at 691 (citing *Mills v. Wong*, 155 S.W.3d 916, 923 (Tenn. 2005)). The court went on to state:

> one could view the statutory cap on noneconomic damages as a limitation on the available remedy for certain causes of action, or as an abrogation of causes of action for claims exceeding the statutory limit. Under either view, the General Assembly was within its legislative authority to alter the common law by enacting the statutory cap on noneconomic damages.

Id.; *see also Phillips v. Mirac, Inc.*, 651 N.W.2d 437, 442 (Mich. Ct. App. 2002) ("Where the Legislature can abolish a cause of action, it necessarily follows that it can limit the damages recoverable for the cause of action.").

The court then found that while courts have long recognized that the ascertainment of damages is a question of fact for the jury, the right to a jury trial under the Tennessee Constitution does not entitle a plaintiff to any particular cause of action or any particular remedy. *McClay,* 596 S.W.3d at 691. Instead, the causes of action and remedies a plaintiff may seek are matters of law subject to the legislature's determination. *Id.* Ultimately, the court concluded that the right to trial by jury is satisfied when an unbiased and impartial jury makes a factual determination regarding the amount of noneconomic damages, if any, sustained by the plaintiff. *Id*. at 693. The judge may then apply, as a matter of law, the statutory cap on noneconomic damages. *Id*.

The Tennessee Supreme Court cited to and followed the reasoning of many other states that have concluded statutory caps on damages do not violate a plaintiff's right to trial by jury. In *Murphy v. Edmonds*, Maryland's highest court reasoned that the statutory damage cap did not amount to a restriction upon access to the courts noting "[t]here is a distinction between restricting access to the courts and modifying the substantive law to be applied by the courts." *Murphy v. Edmonds*, 601 A.2d 102, 114 (Md. 1992).

The Idaho Supreme Court similarly held that a statutory cap on noneconomic damages did not violate the right to a jury trial, explaining that "[t]he jury is still allowed to act as the fact finder in personal injury cases." *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115, 1120 (Idaho 2000). The court went on to explain that the plaintiffs:

> had a jury trial during which they were entitled to present all of their claims and evidence to the jury and have the jury render a verdict based on that evidence. That is all to which the right to jury entitles them. The legal consequences and effect of a jury's verdict are a matter for the legislature (by passing laws) and the courts (by applying those laws to the facts as found by the jury).

Id. The Pennsylvania Supreme Court followed similar reasoning, noting that a statutory damages cap does not present a restriction on the right to a jury trial, rather, the "burden lies in the limited amount of recovery allowed, and this obviously is not the same thing." *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1130 (Pa. 2014). The court went on to state that only the

recovery post-verdict was affected, which is not a function of a trial by jury. *Id.*

This line of reasoning, that a limitation does not materially limit the jury's role, has been followed by courts across the country. *See Siebert v. Okun*, 485 P.3d 1265, 1268 (N.M. 2021) (holding that the statutory damage cap does not infringe the right to trial by jury because the cap merely restricts the scope of plaintiff's remedy); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 431 (Ohio 2007) (holding that so long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered as a matter of law); *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 529 (Va. 1989) (holding that once the jury has ascertained the facts and assessed the damages, the constitutional mandate is satisfied); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002) (holding that "a damages cap did not intrude on the jury's fact-finding function, because the cap was a 'policy decision' applied after the jury's determination, and did not constitute a re-examination of the factual question of damages."); *Wright v. Colleton Cnty. Sch. Dist.*, 391 S.E.2d 564, 569-70 (S.C. 1990) (noting that "Although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award, the legal consequences of its assessments.");

Judd v. Drezga, 103 P.3d 135 (Utah 2004); *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234, 238 (Nev. 2015); *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc*., 663 N.W.2d 43, 75 (Neb. 2003).

In this case, Plaintiff's right to a trial by jury would not be infringed by the application of Iowa Code section 657.11A(3). As in the cases discussed above, the Iowa Constitution does not entitle an Iowa plaintiff to any particular cause of action or any particular remedy. *See Weltzin v. Nail*, 618 N.W.2d 293, 299 (Iowa 2000) (noting that in some cases there is simply no right to a jury). Here, the statute contemplates that a jury may fulfill its role by hearing the facts of the case, determining liability, and assessing damages, if any. This is consistent with Plaintiff's right to a jury trial.

Specifically, there are three categories of damages which a plaintiff may be entitled to that a jury can determine. The Court shall then determine, as a matter of law, the damages, if any, that Plaintiff is entitled to recover by statute. There is no arbitrary or specific dollar cap on damages that is to be imposed regardless of the plaintiff's particular circumstances. As in *Schmidt*, Iowa Code section 657.11A does not determine damages in the first instance, and therefore a jury faced with a nuisance case governed by the statute can perform its historical role by finding liability and assessing damages. *See Schmidt*, 860 F.3d at 1045.

Plaintiff's right to a jury trial is not impaired by the damage limitations contained within Iowa Code section 657.11A(3), and therefore the Court need not engage in a constitutional review of the statute.

If this Court determines that the Plaintiff's right to jury trial has been violated, it need not conduct a strict scrutiny review as Plaintiff argues. The District Court property rejected this argument, and concluded that a person's constitutional right to a jury trial is comparable to a person's property rights contained in Article I, Section I of the Iowa Constitution. Therefore, following the same analysis, the statutory limitations are not an unreasonable or arbitrary exercise of the state's police power, given that there is no specific dollar cap contained within the statute. Accordingly, Plaintiff's claim as to the limitations on his right to jury trial fail.

3. The Damage Limitations Do Not Violate the Equal Protection Clause

Plaintiff argues Iowa Code section 657.11A(3) is discriminatory in two ways in violation of the Equal Protection Clause. First, Plaintiff claims the statute discriminates between plaintiffs who can "prove significant non-economic damages in excess of 150% of the loss of value in their property and those plaintiffs who do not have such significant damages." (Plaintiff's Brief, p. 54). Second, Plaintiff argues that parties injured by a nuisance arising from an animal feeding operation are treated differently than those

injured by a nuisance not arising from an animal feeding operation, as plaintiffs in the first instance are limited in what damages they can recover. *Id.* Both arguments fail.

Equal protection demands that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law. *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009). The Iowa Supreme Court has held that any equal protection claim requires an allegation of disparate treatment, not merely disparate impact. *See King v. State*, 818 N.W.2d 1, 24 (Iowa 2012); *see also McQuistion v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015). Specifically, to allege a viable equal protection claim, plaintiffs must allege that the defendants are treating similarly situated persons differently. *Varnum*, 763 N.W.2d at 882. To prove an equal protection claim, the claimant must first establish disparate treatment and then the policy reasons for the classification are scrutinized. *Id.* at 879–80; *see also McQuistion*, 872 N.W.2d at 830.

Here, Plaintiff asserts the statute results in unequal treatment between plaintiffs who are able to prove significant non-economic damages in excess of 150% of the loss of value in their property and those plaintiffs who do not have such significant damages. (Plaintiff's Brief, p. 54). This is merely a disparate impact between plaintiffs. The fact that a statute may result in

disparate impact does not equate to an equal protection violation. *See King*, 818 N.W.2d at 24.

Plaintiff then argues discrimination between a plaintiff injured by a nuisance from an animal feeding operation and those plaintiffs injured by a nuisance from a non-animal feeding operation exists in violation of the Equal Protection Clause. Significantly, under Iowa law, a plaintiff has no vested right in a particular measure of damages. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991). Further, Plaintiff has no vested right in any rule of the common law. *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc*., 507 N.W.2d 405, 410 (Iowa 1993) (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978)).

As the District Court correctly noted, these statutory classifications are subject to a rational basis review as no suspect class is implicated nor is any fundamental right at issue. Further, as Plaintiff acknowledges, the Iowa Supreme Court traditionally applies a rational basis review when "social or economic legislation is at issue." *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). In these situations, "the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even

improvident decisions will eventually be rectified by the democratic processes." *Id.*

As the Court is aware, the rational basis test is a "very deferential standard." *Iowa State Educ. Ass'n v. State*, 928 N.W.2d 11, 16 (Iowa 2019) (citations omitted). The Court must determine whether the classification is rationally related to a legitimate governmental interest. *Doe v. New London Cmty. Sch. Dist.*, 848 N.W.2d 347, 356 (Iowa 2014).

Under this review, the challenged classification must be upheld unless the challenging party can demonstrate that it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. *Kent v. Polk Cnty. Bd. of Sup'rs*, 391 N.W.2d 220, 225 (Iowa 1986) (emphasis added). Under the rational basis test, a legislative classification is upheld if any conceivable state of facts reasonably justifies it. *Matter of Bishop*, 346 N.W.2d 500, 505 (Iowa 1984).

Additionally, the guarantee of equal protection does not exact uniformity of procedure. The legislature may classify litigants and adopt certain procedures for one class and different procedures for other classes, so long as the classification is reasonable. *Id.* at 505; *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a law may satisfy rational basis review "if it can be said to advance a legitimate government interest, even if

the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.").

The Iowa Supreme Court has upheld statutes governing the construction and operation of animal feeding operations under attack via facial challenges in the past. Specifically, in ruling upon such issues, the Court held that the legislative purpose of "promoting animal agriculture in this state" falls "within the police power of the state." *Honomichl*, 914 N.W.2d at 238 (citing *Gacke*, 684 N.W.2d at 178).

The statute at issue was passed to promote animal agriculture in the state, a $38 billion dollar industry (as of 2017) accounting for more than 160,000 Iowa jobs. *See 2017 Iowa Senate Debate*, https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170314163649480&dt=2017-03-14. The Iowa House and Iowa Senate each passed the bill with bipartisan support, evidencing the legislature's clear intent to support animal agriculture by limiting the damages available to a plaintiff proving a nuisance under a certain set of circumstances.

Iowa Code section 657.11, the statute upheld in *Gacke* and *Honomichl*, provided complete immunity for animal feeding operations from liability. In Iowa Code section 657.11A, the legislature adopted a structure whereby a plaintiff seeking damages for an alleged nuisance against an

animal feeding operation may recover a certain set of damages. Such a determination, adopting certain procedures for one class and different procedures for other classes, is permissible so long as the classification is reasonable. *See Matter of Bishop*, 346 N.W.2d at 505; *see also Gacke*, 684 N.W.2d at 177 ("[a]lthough this court must examine the reasonableness of the challenged legislative action, we do not concern ourselves with the wisdom of the policy decisions underlying the statute."). As the District Court correctly found, the relationship of this classification to the stated purpose of the legislation is not so attenuated as to render the distinction arbitrary or irrational, and thereby unconstitutional. This Court should affirm.

4. Iowa Code section 657.11A(3) Does Not Violate the Due Process Clause

Plaintiff also argues that section 657.11A(3) violates his due process rights, based on an alleged violation of his right to a jury trial and rights under the Equal Protection Clause. Plaintiff's claims as to both of these issues are rebutted at length above. The same analysis applies here. Iowa Code section 657.11A does not violate a plaintiff's rights under the Due Process Clause.

CONCLUSION

Plaintiff had two and a half years in two different courts to come up with evidence to support his claims, but failed. The District Court correctly found Iowa Code section 657.11 is constitutional as applied to Plaintiff, and correctly granted summary judgment to Defendants under the statute. The District Court further correctly granted summary judgment to Defendants on Plaintiff's trespass and Iowa drainage law claims. Defendants request this Court affirm the rulings of the District Court.

REQUEST FOR ORAL ARGUMENT

In accordance with Iowa R. App. P. 6.908, Defendants hereby request Oral Argument.

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CERTIFICATE OF COST

I hereby certify that the amount actually paid for printing or duplicating necessary copies of Defendants-Appellees' Proof Brief was $0.00.

/s/ James L. Pray

August 23, 2021
Date

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on August 23, 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/ James L. Pray August 23, 2021
Date

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