

CASE NO. A06-0847

State of Minnesota
In Court of Appeals

WAKEFIELD PORK, INC.,

Appellant,

vs.

RAM MUTUAL INSURANCE COMPANY,

Respondent.

APPELLANT'S REPLY BRIEF

LIND, JENSEN, SULLIVAN
& PETERSON

Thomas D. Jensen, Esq. (#50179)
William L. Davidson, Esq. (#201777)
150 South Fifth Street
Suite 1700
Minneapolis, Minnesota 55402
(612) 333-3637

Attorneys for Respondent

GISLASON & HUNTER, L.L.P.

Dustan J. Cross, Esq. (#248952)
Mark S. Ullery, Esq. (#170434)
2700 South Broadway
Post Office Box 458
New Ulm, Minnesota 56073
(507) 354-3111

Attorneys for Appellant

Charles E. Spevacek #126044
William M. Hart #150526
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Phone: 612-338-0661

*Attorneys for Amicus Curiae
Complex Insurance Claims Litigation
Association*

Laura A. Foggan
John C. Yang
Jonathan S. Woodruff
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
Phone: 202-719-7000

*Of Counsel for Amicus Curiae
Complex Insurance Claims Litigation
Association*

Edward J. Laubach, Jr. #61025
Phillip L. Kunkel #58981
Christopher W. Harmoning #285948
GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
1010 West St. Germain, Suite 600
St. Cloud, MN 56301
Phone: 320-252-4414

*Attorneys for Amici Curiae
Minnesota Department of Agriculture;
Minnesota Pork Producers Association;
AgStar Financial Services, ACA;
Minnesota Agri-Growth Council, Inc.;
AgCountry Farm Credit Services, ACA;
Broiler and Egg Association of Minnesota;
Farm Credit Services of Minnesota Valley,
PCA; Minnesota Corn Growers
Association; Minnesota Farm Bureau
Federation; Minnesota Milk Producers
Association; Minnesota Soybean Growers
Association; Minnesota State Cattlemen's
Association; and Minnesota Turkey
Growers Association*

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I. INTRODUCTION

Wakefield Pork, Inc. (“Wakefield”) submits this Reply Brief to address some of the arguments raised by RAM Mutual Insurance Company (“RAM”), in its Brief (“Respondent’s Brief”). For the reasons set forth below, and for the reasons set forth in Wakefield’s Principal Brief, the District Court erred when it granted summary judgment in favor of RAM.

II. ARGUMENT

A. RAM’S ANALYSIS OF ITS “POLLUTION EXCLUSION” IGNORES THE CRITICAL DIFFERENCES BETWEEN THE “ABSOLUTE” AND “LIMITED” POLLUTION EXCLUSIONS RECOGNIZED BY MINNESOTA CASE LAW.

RAM relies significantly on two cases from this Court, *League of Minnesota Cities Insurance Trust v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. App. 1989), and *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. App. 1999), in support of its position that the RAM Pollution Exclusion unquestionably and under every circumstance unambiguously precluded coverage for any and all allegations in the Wendinger Complaint such that RAM clearly had no duty to defend Wakefield from the underlying lawsuit. Respondent’s Brief, at pages 10, 11. However, both of these cases involved the Court’s construction and application of an “absolute” pollution exclusion which is unlimited and broadly defined without reference to the object allegedly being contaminated, as opposed to the “limited” pollution exclusion used by RAM in its own policies. *See City of Coon Rapids*, 446 N.W.2d at 420 (construing policy excluding any

claims “arising out of the actual alleged or threatened discharge, dispersal, release or escape of pollutants” without reference to what is being polluted); *Hanson*, 588 N.W.2d at 778 (identifying the issue for decision as whether “the so-called ‘absolute pollution exclusion’ clause in the policies preclude appellant's bodily injury claim?”).

In fact, all of the cases cited by RAM on pages 12-13 of its Brief, including the string cite of cases in footnote 7 of its Brief, involve the absolute pollution exclusion, not the partial or limited pollution exclusion used by RAM here.¹

Hanson explicitly recognizes the significantly different analysis that must be applied to a limited pollution exclusion such as RAM's, which only applies if the liability claim results from the discharge, dispersal, release or escape of irritants, contaminants or pollutants “into or upon the land, the atmosphere, or a water course, body of water, bog, marsh, ground water, swamp, or wetland....” *Hanson* noted the critical differences between the two policies as specifically recognized by the Supreme Court in *Board of Regents of Univ. of Minnesota v. Royal Ins. Co.*, 517 N.W.2d 888 (Minn. 1994):

We also observe that the additional holding in *Royal*, that the definition of pollutant is determined with careful reference to the policy's description of the object polluted, mandates our determination that lead in paint in a home qualifies as a pollutant under the exclusion at issue. *Royal* involved the interpretation of two policies. In one, the exclusion precluded coverage for damage arising out of contamination into or upon land, “the atmosphere,” or any water course or body of water. 517 N.W.2d at 890. The other excluded from coverage damages caused by pollution of land, water, “air,” or real or personal property. *Id.* at 893. The court concluded that with the change of the object polluted from “atmosphere” to “air,” the excess policy

¹ All but one of the cases cited by *Amicus* CICLA at pages 16-18 of its Brief also involve only the absolute pollution exclusion. The one exception, *United States Fid. & Guar. Co v Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988), simply recognized that dust (not odor) was a pollutant within the meaning of that policy. *Id.* at 33.

enlarged the scope of the exclusion and encompassed pollution of the air within a building by asbestos fibers. *Id.* at 893-94.

The “absolute pollution exclusion” clause at issue eliminates all language limiting coverage by describing the objects to be affected by the pollutants. The policy only states that the “dispersal,” etc. must occur “at or from” the insured premises. Because the scope of what qualifies as a pollutant has been controlled to a considerable extent by the policy language describing the objects polluted, when there is no such language, the scope of the exclusion is in its broadest form, and in this case it encompasses lead paint in a house.

Hanson, 588 N.W.2d at 780 (footnote omitted). *Hanson* contradicts RAM’s argument that because the alleged hog odors traveled from the Forst Farm to the Wendinger residence, these odors necessarily contaminated the “atmosphere”. *Hanson* tells us that the critical question is what is claimed to be contaminated, not the medium through which the alleged pollutant travels. In this case, while the Wendingers complained in part that their ability to enjoy outdoor activities was adversely affected by the Forst operation, they further explicitly complained in their Complaint that the “air” within their home was impacted by these odors. To that extent, whether or not the odors are or are not otherwise an “irritant, contaminant or pollutant,” the Pollution Exclusion does not apply to those aspects of the Wendinger claims. Just as clearly, the Wendingers’ own personal injury claims are not covered by the limited pollution exclusion as drafted by RAM, since they themselves are neither land, nor atmosphere, nor a water course, etc. See *Royal Ins.*, 517 N.W.2d at 892 (“The [limited] pollution exclusion is directed--at least it was initially--at claims involving the pollution of the natural environment.”). The distinction may “draw a fine line,” but it is precisely the distinction the Supreme Court

has made in *Royal*; and one that RAM could have addressed by amending its pollution exclusion to an absolute exclusion had it desired. *See id.* at 893.

B. ODOR COMPLAINTS, AND ODOR ARISING FROM PROPERLY STORED AND HANDLED MANURE BASINS, ARE NOT POLLUTANTS WITHIN THE MEANING OF THE RAM POLLUTION EXCLUSION.

RAM spends a significant portion of its brief attempting to explain the constituent components of manure odor, recognizing however that while the Wendinger Complaint included allegations of discharges of hydrogen sulfide and other gases, the Wendingers' primary complaints were odor complaints: "The underlying claims all arose from the release of odor...." Respondent's Brief, at page 7. RAM then asserts that a claim of nuisance caused by odors is necessarily subsumed under either the term "fume" or the terms "pollutant, contaminant, or irritant" within the meaning of its Pollution Exclusion. This claim, however, is belied by the fact that liability insurers can, and have, separately identified "odors" in other pollution exclusions in addition to these terms. *See, e.g., Monroe v. Royal & Sun Alliance Company of Canada, Inc.*, 2001 WL 1568674, at *1 (D. Del. Dec. 7, 2001) (construing an absolute pollution exclusion liability insurance policy that defined the term "pollutant" as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, **odour**, vapour, soot, **fumes**, acids, chemicals, and waste) (emphases added); *Sharp v. Vick*, 2003 WL 21544114, at ***5, para. 18 (Wis. App. July 10, 2003) (construing homeowners' policy pollution exclusion which excludes coverage for bodily injury or property damages arising out of "the discharge, dispersal, release or escape of smoke, vapors, **odor**, soot, **fumes**, acids, alkalis, toxic chemicals, liquids or

gases, waste materials, or other irritants, contaminants, or pollutants...”) (emphases added); *Governmental Reinsurance Exchange v. City of Angola*, 8 F. Supp.2d 1120, 1126 (N.D. Ind. 1998) (construing pollution exclusion defining pollutants as including “(a) any solid, liquid, gaseous or thermal irritants, toxicants, toxicoids, mutagens, teratogens or contaminants, including, without implied limitation, smoke, vapor, soot, **fumes**, acids, alkalis, chemicals and waste material ... and (e) **any odor or smell.**”) (emphases added); *see also Frazer Exton Development, LP v. Kemper Environmental, Ltd.*, 2004 WL 1752580, at *3 (S.D. N.Y. 2004) (construing environmental insurance policy defining “pollution conditions” as “a discharge, dispersal, release, seepage, migration, escape or presence of smoke, vapors, **odors**, soot, **fumes**”) (emphases added).

At least one court has recognized that because the term “fume” can be defined either specifically as only smoke or more generally as any gaseous emission (although typically from a burning or evaporating substance), the term is ambiguous and should be construed against the insurer. *See Capital Bank & Trust Co. v. Equitable Life Assurance Society of the United States*, 542 So.2d 494, 496-97 (La. 1989). These cases demonstrate that RAM’s attempt to conflate complaints of generic “odor” into claims of gaseous emissions or fumes is unfounded, and that the Wendinger Complaint did not allege only the “discharge, dispersal, release, or escape” of the “pollutants” identified in General Exclusion No. 12.

RAM also cites an Iowa Supreme Court case, *Weber v. IMT Ins. Co.*, 462 N.W.2d 283 (Iowa 1990), to create the misleading suggestion that hog manure, without more, should always and everywhere be considered a pollutant no matter how used and no

matter of the nature of the allegations in the underlying action. *See* Respondent’s Brief, at page 12 (“This common sense, obvious conclusion from the highest court in a state well-acquainted with hog manure, and its effects should no doubt be persuasive to the courts of this state.”). *Weber*, however, quite carefully limited its holding to the facts of that case, in which manure had spilled onto the roadside: “There may be circumstances when hog manure should be classified as something other than waste material, but when it is spilled on the road it unambiguously constitutes waste. We are, however, inclined to limit our holding to the facts of this case.... We should not be understood to hold that manure always falls within the definition of waste material as set forth in the pollution exclusion. We hold only that under the facts of this case, hog manure spilled on the road is waste material.” *Id.* at 286. Not only does *Weber* not support RAM, in fact the Iowa Supreme Court’s careful delineation between manure used properly as fertilizer and manure spilled on the roadside demonstrates that in this case (where there were no allegations of improper handling of the manure by the Forsts), the allegations arose from claimed odor of manure qua fertilizer, not manure qua waste material.²

It appears that RAM is so uncomfortable with its argument, that it has taken the contradictory step of submitting the “expert” testimony of Mike Frencl to clarify this supposedly straightforward case. Inexplicably, before both the District Court and this Court, RAM claims on the one hand that its Pollution Exclusion is clear and

² The same distinction is true for the unpublished Wisconsin Court of Appeals case cited by Respondent in footnote 5 of its Brief. In *Norks v. American Family Mut. Ins. Co.*, 551 N.W.2d 62, 1996 WL 234384 (Wis. App.), the Court recognized only that cow manure that leaked from a manure pit into surrounding lands and streams was at that point a “waste material” within the meaning of a pollution exclusion, regardless of whether it was originally a valuable fertilizer or not.

unambiguous, but on the other hand submits an “expert” affidavit of Mr. Frencl to help clarify this supposedly unambiguous language. If the language is clear, the Court needs no assistance from an expert; if it is not clear, the ambiguity is construed against RAM and in favor of coverage.

C. THE INCIDENTAL LIABILITY COVERAGE FOR ACCIDENTAL SPILLAGE OF AGRICULTURAL CHEMICALS INDEPENDENTLY CREATED A DUTY TO DEFEND WAKEFIELD FROM THE WENDINGER ACTION.

RAM discusses and cites only Endorsement CF125, and not the policy language from the RAM Policy, which did not contain the “sudden or abrupt and accidental or unexpected” limitation within the definition of the coverage itself. For the reasons set forth in Wakefield’s Principal Brief, this language as set forth in the Policy in effect at the time of the Wendinger Action does not act as a limitation on the overall coverage given the manner in which it was drafted by RAM, and even if it did, the nature of the Wendinger complaints qualify as “sudden or abrupt and accidental or unexpected”.

RAM claims that manure cannot be an “agricultural chemical” because of the “explicit exclusion of nitrate or related nitrogen from a natural or animal source – manure.” Respondent’s Brief, at page 16. This definition actually contradicts RAM’s argument. If RAM had wanted all manure to be excluded from this Incidental Liability Coverage, even when the manure was used as a fertilizer, it could have done so by simply providing that the coverage “does not include fertilizer from a natural or animal source including organic materials” or even simpler, “manure is not an agricultural chemical

within the meaning of this policy even when used as a fertilizer.” RAM did not do this. RAM’s policy only recognizes a subset of the fertilizer uses of manure, its ability to provide nitrogen to the ground, as being excluded from this Incidental Liability Coverage. By doing so, RAM’s policy recognizes not only the obvious fact that manure has been universally used as a fertilizer since the dawn of agriculture, but also that when so used, manure is an “agricultural chemical.” Coverage is therefore available except to the extent that the liability claims arise from nitrate or related nitrogen. RAM does not dispute that a liability claim triggering this coverage also triggers RAM’s duty to defend.

Wakefield need not speculate on why RAM would draft its Incidental Liability Coverage in such a manner, but nitrogen leeching and over-saturation of land with nitrogen is a common concern in agriculture, including detrimental effects on both crops themselves as well as contributing to hypoxia in surface waters. *See, e.g.,* www.mda.state.mn.us/appd/fertilizer/nitroexe.html (Minnesota Department of Agriculture Web Site Executive Summary of the Recommendations of the Nitrogen Fertilizer Task Force on the Nitrogen Fertilizer Management Plan). RAM could very well have been concerned about the frequency and scope of liability claims arising from over-application of nitrogen from manure injection and decided that such exposure should be excluded from its Incidental Liability Coverage. Indeed, RAM itself suggests this reason: “Given the enormous amount of manure applied to farm fields in Minnesota, and the concomitant risk of nitrate releases into ground water, RAM is well within its rights to limit its incidental liability coverage to accidental spills of commercial fertilizers

only.” Respondent’s Brief, at pages 16-17.³ Whatever the reasons, however, RAM’s policy does not, as it now claims, exclude all manure from the definition of an “agricultural chemical,” and the Wendinger Complaint cannot be construed as involving only nitrates or related nitrogen.

D. THE WENDINGER COMPLAINT DOES ALLEGE AN “OCCURRENCE” WITHIN THE MEANING OF THE RAM POLICIES, AND RAM’S “INTENTIONAL ACT” EXCLUSION DOES NOT APPLY.

RAM’s argument, adopted by the District Court, that a legally operating, fully compliant livestock operation accused of the negligent production of nuisance odors cannot be anything but an intentional wrong against that producer’s neighbors, or at least cannot be accidental, is perhaps the most troubling aspect of this case. The District’s Court’s acceptance of this argument has triggered an *amicus* brief joined by trade organizations representing most of the major agricultural commodities in Minnesota (both livestock and grain), as well as the State of Minnesota itself through its Department of Agriculture and other significant stake holders in Minnesota’s agricultural community.

The fundamental problem with the District Court’s analysis and RAM’s argument is that they both conflate the production of odors with the production of *nuisance* odors. Odor in and of itself is not a nuisance, nor is the production of odor in and of itself actionable. Indeed, the very nature of a nuisance cause of action explicitly recognizes that context is all-important. *See, e.g., Citizens for a Safe Grant v. Lone Oak Sportsmen's*

³ RAM may have been “well within its rights” to limit its liability coverage to “commercial fertilizers only,” but as discussed above, it simply did not do so in the RAM Policies at issue here.

Club, Inc., 624 N.W.2d 796, 803 (Minn. App. 2001) (“For an interference with the enjoyment of life or property to constitute a nuisance, it must be material and substantial. A court measures the degree of discomfort by the standards of ordinary people in relation to the area where they reside.”) (citation omitted). In *Jedneak v. Minneapolis Gen. Elec. Co.*, 212 Minn. 226, 4 N.W.2d 326 (1942), the Minnesota Supreme Court found that the following instructions from the trial court to a jury in a nuisance case accurately stated the applicable law:

A nuisance has been defined by our statutes as anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. [Mason St.1927, § 9580.] If it does so it is a nuisance. Industrial nuisances are usually right things in wrong places, or improperly operated things. Circumstances must always determine whether or not one of these is a nuisance. I dare say that most of you would consider it a nuisance to have a church right next to your home, with automobiles parked all around. Perhaps a school house the same way, or perhaps an undertaking establishment, but all of these places, as well as those that are more obviously disagreeable to us, must have their place in city life. We are bound to take what hardships or inconveniences or discomforts that come from them if they are properly located in a location allocated to them, and if they are property operated. If they are not so located, or if they are not so operated then one who is damaged by such improper location or such improper operation is entitled to recover for whatever damage may be sustained.

Id. at 228-29, 4 N.W.2d at 328.

In a rural, agricultural community such as West Newton Township, Nicollet County, Minnesota, a livestock operation being run in accordance with MPCA feedlot regulations and Nicollet County land use controls is not a nuisance simply because the operation may produce odors from time to time; certainly the Nicollet County jury who sat through two weeks of testimony in the underlying lawsuit did not believe so. Under

the District Court's rationale, no trial would have been necessary; the Wendingers would have been entitled to a directed verdict on liability.

The District Court improperly adopted the following faulty syllogism: (1) animal livestock producers intentionally raise livestock knowing that the livestock will produce manure; (2) animal manure often produces an odor; therefore (3) the animal livestock producer knowingly produces a nuisance odor.⁴ Even if the District Court's premises can be accepted, the conclusion simply does not follow from these premises. An odor does not automatically create a nuisance; the act of producing an odor is not an "intentional act" within the meaning of Minnesota insurance law. The Wendinger Complaint nowhere suggests that even the Forsts (much less Wakefield) acted intentionally; in fact, there Complaint alleges just the opposite claiming that the Forsts were only negligent in their operation.⁵

RAM discusses at length its interpretation of the supposed distinction between the *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), on the one hand, and *Bituminous Casualty Corp. v. Bartlett*, 307 Minn. 72, 240 N.W.2d 310 (1976), on the other. Wakefield has addressed those arguments in its Principal Brief, including their application both to the definition of an "occurrence" and to the "intentional act" exclusion, and will not restate them here.

⁴ RAM's argument explicitly adopts this fallacy: "[O]dors are expected and routinely released from a manure lagoon – there is nothing accidental about the odors released from Wakefield Pork's pigs and about which the Wendingers complained." Respondent's Brief, at page 22.

⁵ RAM wisely ignores the District Court's clear error in holding that Wakefield, as opposed to Forst Farms, was responsible for siting the earthen manure basin.

III. CONCLUSION

For all the reasons set forth in Wakefield Pork's Principal Brief and above, as well as for the reasons stated by *Amicus* Minnesota Department of Agriculture *et al.*, Wakefield Pork respectfully requests that this Court reverse the District Court and remand for entry of summary judgment in favor of Wakefield Pork, Inc.

Dated this 14th day of July, 2006.



Dustan J. Cross #248952

Mark S. Ullery #170434

GISLASON & HUNTER LLP

Attorneys for Appellant Wakefield
Pork, Inc.

2700 South Broadway

P. O. Box 458

New Ulm, MN 56073-0458

Phone: 507-354-3111

Fax: 507-354-8447

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a 13 point font. The length of this brief is 3,073 words. This brief was prepared using Microsoft Word 2003.

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Dustan J. Cross #248952
Mark S. Ullery #170434
GISLASON and HUNTER LLP
Attorneys for Appellant
Wakefield Pork, Inc.
2700 South Broadway
P. O. Box 458
New Ulm, MN 56073-0458
Phone: 507 354-3111