

CASE NO. A06-0847

State of Minnesota
In Court of Appeals

WAKEFIELD PORK, INC.,

Appellant,

vs.

RAM MUTUAL INSURANCE COMPANY,

Respondent.

APPELLANT'S BRIEF AND APPENDIX VOLUME I

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STATEMENT OF ISSUES PRESENTED

- I. Whether the District Court erred by concluding that the Wendinger Complaint did not allege an “occurrence” within the meaning of the RAM liability insurance policy.

Holding Below: The District Court held that the Wendinger Complaint, which alleged common law nuisance, negligence, and trespass, did not allege an “occurrence” within the meaning of the RAM liability insurance policy.

Most Apposite Cases:

American Family Ins. Co. v. Walser, 628 N.W.2d 605 (Minn. 2001);

Hauenstein v. St. Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954);

Bituminous Cas. Corp. v. Bartlett, 307 Minn. 72, 240 N.W.2d 310 (1976).

Franklin v. Western Nat. Mut. Ins. Co., 574 N.W.2d 405 (Minn. 1998);

- II. Whether the District Court erred by concluding that RAM’s duty to defend was not triggered by the Wendinger Complaint because of the “pollution exclusion” found in the RAM Policies.

Holding Below: The District Court held that RAM did not have a duty to defend Wakefield because of the “pollution exclusion” found in the RAM Policies.

Most Apposite Cases:

Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888 (Minn. 1994);

Auto Owners Ins. Co. v. Hanson, 588 N.W.2d 788 (Minn. App. 1999).

- III. Whether the District Court erred by concluding that RAM’s duty to defend was not triggered by the Incidental Liability Coverage for Spillage of Agricultural Chemicals found in the RAM Policies.

Holding Below: The District Court held that RAM's duty to defend was not triggered by the Incidental Liability Coverage for Spillage of Agricultural Chemicals found in the RAM Policies.

Most Apposite Cases:

SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305 (Minn. 1995);

Prahm v. Rupp Const. Co., 277 N.W.2d 389 (Minn. 1979);

Anderson v. Minn. Ins. Guar. Ass'n, 534 N.W.2d 706 (Minn. 1995).

IV. Whether the District Court erred by concluding that RAM's duty to defend was not triggered by the Incidental Liability Coverage for Damage to Property of Others found in the RAM Policies.

Holding Below: The District Court held that RAM's duty to defend was not triggered by the Incidental Liability Coverage for Damage to Property of Others found in the RAM Policies.

Most Apposite Cases:

SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305 (Minn. 1995);

Prahm v. Rupp Construction Co., 277 N.W.2d 389 (Minn. 1979);

Anderson v. Minn. Ins. Guar. Ass'n, 534 N.W.2d 706 (Minn. 1995).

V. Whether the District Court erred by concluding that there was a genuine issue of material fact as to the applicability of the "intentional act" exclusion sufficient to overcome RAM's duty to defend in the event that the duty to defend otherwise was triggered.

Holding Below: The District Court held that there was potentially a genuine issue of material fact as to whether the "intentional act" exclusion found in the RAM Policies would provide an independent basis relieving RAM of its duty to defend, but held that since RAM did not have a duty to defend for other reasons, this issue of fact would not preclude entry of judgment in RAM's favor.

Most Apposite Cases:

American Family Ins. Co. v. Walser, 628 N.W.2d 605 (Minn. 2001);

R.W. v. T.F., 528 N.W.2d 869 (Minn. 1995);

Woida v. N. Star Mut. Ins. Co., 306 N.W.2d 570 (Minn. 1981);

Reinsurance Ass'n of Minn. v. Timmer, 641 N.W.2d 302 (Minn. App. 2002).

- VI. Whether the District Court erred by granting RAM's motion for summary judgment and by denying Wakefield's motion for summary judgment, and not awarding Wakefield as damages the full amount requested for its costs incurred in defending the Wendinger Action and prosecuting this Action as set forth in Wakefield's supporting documentation.

Holding Below: The District Court held that RAM was entitled to summary judgment and Wakefield was not entitled to summary judgment, and therefore, Wakefield was not entitled to reimbursement for either its litigation costs in defending the Wendinger Lawsuit or in prosecuting this Action.

Most Apposite Cases:

Morrison v. Swenson, 274 Minn. 127, 142 N.W.2d 640 (1966);

In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405 (Minn. 2003);

Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W. 2d. 724 (Minn. 1997).

STANDARD OF REVIEW

On appeal from the grant of summary judgment, this Court reviews the record to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Hermeling v. Minnesota Fire & Cas. Co.*, 548 N.W.2d 270, 273 (Minn. 1996). “Interpretation of an insurance policy and application of the policy to the facts in a case are questions of law that [an appellate court reviews] de novo.” *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001).

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

This is an Action for declaratory relief brought pursuant to Minn. Stat. Chapter 555 and Rule 57 of the Minnesota Rules of Civil Procedure, venued in Nicollet County District Court (Honorable Allison Krehbiel).

On October 13, 2004, Wakefield Pork, Inc. (“Wakefield”) commenced this Action against RAM Mutual Insurance Company (“RAM”), seeking a declaration that RAM had breached its duty to defend Wakefield against a prior lawsuit also venued in Nicollet County District Court brought by Jerry and Julie Wendinger for common law nuisance, trespass, and negligence (“Wendinger Action”). Wakefield’s Complaint also requested judgment in Wakefield’s favor and against RAM for the costs of defending against the Wendinger Action and the costs of prosecuting this Action. RAM answered generally denying that it had breached its duty to defend Wakefield on the basis of certain provisions and exclusions found in the RAM Policies with Wakefield.

On December 12, 2005, the Court heard cross-motions for summary judgment brought by both Parties. On March 10, 2006, the Court entered an Order granting RAM’s Motion for Summary Judgment and denying Wakefield’s Motion for Summary Judgment. The Court held that RAM had not breached its duty to defend Wakefield from the Wendinger Action because (1) the Wendinger Complaint did not allege an “occurrence” within the meaning of the RAM Policies; (2) the “pollution exclusion” found in the RAM Policies precluded any possible coverage for the Wendinger

Complaint even if there were an “occurrence”; (3) the separate Incidental Liability Coverage for Accidental Spillage of Agricultural Chemicals was not triggered by the Wendinger Complaint; (4) the separate Incidental Liability Coverage for Damage to Property of Others was not triggered by the Wendinger Complaint; and (5) that while there was a genuine issue of fact regarding whether the “intentional act” exclusion did or did not apply, resolution of that question was not material since RAM did not have a duty to defend independent of that issue. The Nicollet County District Court Administrator entered final judgment that same day. Wakefield served and filed its timely Notice of Appeal on May 1, 2006.

STATEMENT OF FACTS

Wakefield is a Minnesota corporation licensed to do business in the State of Minnesota. A2. RAM is an insurance company licensed to do business in the State of Minnesota. A2.

On or about July 12, 2001, Wakefield was served as a Defendant with a Complaint (hereinafter the “Wendinger Complaint”) in an action brought by Jerry and Julie Wendinger venued in Nicollet County District Court, in which the Wendingers sought to recover money damages and other relief against Wakefield under theories of negligence, nuisance, and trespass. A9 to A10. Wakefield owns pigs which are placed with independent contract growers, including Forst Farms, Inc., located in West Newton Township, Nicollet County. A8. The Forst Farm was located approximately ¾ of a mile to the Southeast of the Wendingers’ residence.

In their Complaint, the Wendingers alleged that in the Summer of 1995,¹ Forst Farms constructed a “feeder/fattening pig operation” with a “liquid/slurry manure system utilizing an unlined 1.6 acre lagoon for long-term storage of the liquefied hog manure.”

A8. The Wendingers went on to allege that Wakefield “is the acknowledged owner of the swine being raised at the Forst lot.” *Id.*, para. 4. The Wendingers alleged that “[f]rom the beginning, the site has produced extremely noxious and offensive odors and gases, causing the Wendingers to complain and request relief.” *Id.*, para 7. The Wendingers alleged that “[t]hese odors have been sampled under the direction of the Minnesota Pollution Control Agency and quantitatively found at sites beyond the “fence line” to be at levels clearly constituting nuisance levels.” *Id.*, para. 9. The Wendingers alleged that “[g]ases, hydrogen sulfide among others, from the Defendants’ hogs and hog farm operation have caused and/or exacerbated Plaintiffs [sic] health problems,” and that due to these health problems “caused or exacerbated by the noxious and offensive odors emanating from Defendants [sic] hogs and hog farm, Plaintiffs have been forced to seek medical treatment.” *Id.*, paras. 11-12. The Wendingers alleged that they “no longer have use of their property and have severely curtailed their use and enjoyment of their yard” and that they were forced to make “substantial investments and modifications in an effort to keep these odors out of their home,” which they further alleged resulted in “the market values of Plaintiffs’ property and home hav[ing] been diminished.” *Id.*, paras. 13-15. As a result of allegedly permitting “noxious and offensive odors” to come across their property, the Wendingers alleged causes of action against Wakefield Pork (and others)

¹ In fact, Wakefield’s hogs were first placed at the Forst Facility on June 27, 1994. A346.

for negligence, nuisance, trespass, and “injunctive relief,” and sought compensatory damages. A11.

Since before pigs were first placed with the Forst Facility by Wakefield on June 27, 1994, Wakefield was insured by RAM under certain policies of liability insurance affording both a right of defense and a right of indemnification, including, but not limited to RAM’s “Farm Partner Policy” and “Personal Umbrella Policy.” A15 to A135.²

The Wendinger Complaint is dated July 10, 2001. By letter dated July 18, 2001, Wakefield tendered the Wendinger Lawsuit to RAM, seeking both defense and indemnification under the RAM policies. A152 to A153. By letter dated August 2, 2001, RAM refused to accept the tender of the Wendinger Lawsuit, alleging that the RAM policies provided no coverage for the claims presented therein. A163 to A167. Wakefield attempted to convince RAM to reconsider its position, A169 to A173, but to no avail.

As a result, Wakefield thereafter defended the Wendinger Lawsuit at its own expense. Initially, Wakefield obtained summary judgment in its favor dismissing with prejudice all of the Plaintiffs’ alleged causes of action in the Wendinger Lawsuit. However, a panel of this Court subsequently reversed in part in a published decision. *See Wendinger v. Forst Farms, Inc. et al.*, 662 N.W.2d 546 (Minn. App. 2003). This Court did affirm the trial court’s dismissal of the trespass count. The other counts for

² The policy forms providing the coverage to Wakefield were materially the same during the 1994 to 2001 time period relevant to this action, with one important exception. From March 16, 1993 to March 16, 1996, Incidental Liability Coverage was afforded to Wakefield thorough a separate policy endorsement entitled, “Liability Amendatory Endorsement” and identified as Endorsement CF125 (4-90). A copy of the 1993-1996 coverage declaration sheet identifying Endorsement CF125, and a copy of this endorsement itself, are included as part of the record. The significance of Endorsement CF125 will be addressed in the Argument Section of this Brief.

negligence and nuisance, however, were re-instated. *Id.* Immediately prior to trial, the Wendingers voluntarily dismissed their claim for negligence and tried the case only on a theory of nuisance. The Parties tried the case to a jury in Nicollet County District Court over the course of two weeks in March and April, 2004. On April 5, 2004, the jury returned a special verdict finding that Wakefield (and the other Defendants) had not created a nuisance and awarded no damages to the Wendingers. A345 to 346. The jury further found that the Forst Facility “commenced operations” on June 27, 1994. A346. The Nicollet County District Court subsequently entered judgment in accordance with the jury’s verdict.

In successfully defending the Wendinger Lawsuit, however, Wakefield incurred attorneys’ fees in the amount of \$226,679.75, and expenses and disbursements (including expert witness fees) in the amount of \$51,735.88, for total defense costs of the Wendinger Lawsuit of \$278,415.63. *See* A4.

At the conclusion of the Wendinger Lawsuit, Wakefield demanded reimbursement from RAM for the cost of defending itself in the amount of \$278,415.63. A4. RAM refused such request. A4. As a result, Wakefield commenced this Action by serving the Complaint.

In its Answer, RAM alleged that it did not owe Wakefield a duty to defend it against the Wendinger Lawsuit based upon a myriad of purported exclusions and provisions of the RAM Policies. A140 to A142. However, after Wakefield had filed its summary judgment motion addressing all of the provisions identified by RAM in its Answer, RAM only defended on four grounds, and subsequently raised only these four

grounds in its cross-motion for summary judgment, thereby abandoning those provisions identified in its Answer but not defended or argued before the District Court on summary judgment. *See Thiele v. Stich*, 425 N.W.2d 580, 582-583 (Minn. 1988). RAM claimed, however, that it did not breach its duty to defend Wakefield on the following four bases:

1. The "Pollution Exclusion" set forth in both RAM Policies precluded RAM's duty to defend;
2. The Wendinger Lawsuit did not allege an "Occurrence," and therefore, RAM had no duty to defend;
3. The Incidental Liability Coverage for Accidental Spillage of Agricultural Chemicals did not apply because (1) there was no spillage; (2) manure is not an agricultural chemical; (3) even if manure were an agricultural chemical, the "Nitrate, Nitrogen, and Organic Materials" Exclusion would preclude coverage; and (4) the Wendinger Complaint did not allege a "sudden and abrupt" discharge required to trigger this coverage; and
4. The "Intended Act" Exclusion in both RAM Policies precluded RAM's duty to defend.

As noted in the Statement of the Case above, on December 12, 2005, the Court heard cross-motions for summary judgment brought by both Parties. On March 10, 2006, the Court entered an Order granting RAM's Motion for Summary Judgment and denying Wakefield's Motion for Summary Judgment. The Nicollet County District Court Administrator entered final judgment that same day. Wakefield served and filed its timely Notice of Appeal on May 1, 2006.

ARGUMENT

I. APPLICABLE LAW GOVERNING DECLARATORY JUDGMENT ACTIONS ALLEGING WRONGFUL DENIAL BY THE INSURER OF ITS DUTY TO DEFEND.

“Interpretation of an insurance policy and application of the policy to the facts in a case are questions of law that [an appellate court reviews] de novo.” *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001).

The construction and interpretation of insurance policies present questions of law that can be properly resolved on a motion for summary judgment. *See Brown v. State Auto. and Cas. Underwriters*, 293 N.W.2d 822 (Minn. 1980). “When interpreting an insurance contract, words are to be given their natural and ordinary meaning and any ambiguity regarding coverage is construed in favor of the insured.” *Walser*, 628 N.W.2d at 609. “The language of an exclusionary provision in an insurance policy is to be interpreted in accordance with the expectations of the insured. Insurance contract exclusions are construed strictly against the insurer.” *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002) (citations omitted).

“An insurer assumes two duties to its insured: the duty to defend and the duty to indemnify.” *St. Paul Fire and Marine Ins. Co. v. Nat’l Chiropractic Mut. Ins. Co.*, 496 N.W.2d 411, 415 (Minn. App. 1993), *review denied* (Minn. Apr. 29, 1993). “An insurer’s duty to defend is distinct from and broader in scope than the duty to indemnify.” *Franklin v. W. Nat’l Mut. Ins. Co.*, 574 N.W.2d 405, 406 (Minn. 1998). The duty to defend arises when any part of the claim against the insured is arguably within the policy’s scope. *Metro. Prop. and Cas. Ins. Co. v. Miller*, 589 N.W.2d 297, 299 (Minn.

1999). If a complaint alleges several claims, and any one of them would require the insurer to indemnify, the insurer must provide a defense against all claims. *Franklin*, 574 N.W.2d at 406-07. “An insurer seeking to escape the duty to defend bears the burden of establishing that **all** parts of a cause of action **clearly** fall outside the scope of coverage.” *Id.* at 407 (emphases added). This principle applies even if the claims brought in the underlying action are groundless. *See Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 419 (Minn. 1997) (holding that duty to defend “does not depend on the merits of the claim asserted but on whether the allegations of the complaint against the insured state a cause of action within the coverage afforded by the policy.”).

Specifically, the Minnesota Supreme Court has held as follows:

The obligation to defend is contractual in nature and is determined by the allegations of the complaint and the indemnity coverage of the policy. If any part of a cause of action is arguably within the scope of coverage, the insurer must defend. Any ambiguity is resolved in favor of the insured, and the burden is on the insurer to prove that the claim clearly falls outside the coverage afforded by the policy. If the claim is not clearly outside coverage, the insurer has a duty to defend.

Prahm v. Rupp Const. Co., 277 N.W.2d 389, 390 (Minn. 1979) (citations omitted). “In determining the duty to defend, actual facts outside the complaint, but known to the insurers, may not be ignored and the burden of proof is on the insurance company. Thus, considering all the facts, if the insurance companies cannot show that their respective exclusions apply, then they must defend the plaintiff.” *Lanoue v. Fireman’s Fund Am. Ins. Co.*, 278 N.W.2d 49, 53 (Minn. 1979), *overruled in part on other grounds by American Standard Ins. Co. v. Le*, 551 N.W.2d 923, 927-28 (Minn. 1996).

Applying these hornbook principles of insurance and contract law to the facts of this case demonstrates that the District Court erred when it granted summary judgment to RAM and denied Wakefield's motion for summary judgment.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE WENDINGER COMPLAINT DID NOT ALLEGE AN "OCCURRENCE" WITHIN THE MEANING OF THE RAM POLICIES.

Perhaps the most troubling aspect of the District Court's decision was its conclusion that the Wendinger Complaint did not allege an "occurrence" within the meaning of the RAM Policies. In order to reach this conclusion, the District Court ignored the record and relied upon background biases and experiences to claim that any Minnesota livestock producer knows and expects that the normal operation of their business will necessarily create a nuisance odor as to their neighbors. The District Court made the following statements in the course of its opinion, none of which have any support whatsoever in the record:

- "The notion that the release of odors from an open manure lagoon could be characterized as an accident is non-sensical." A363.
- "These issues are part and parcel of running an operation with significant negative impacts on neighboring properties, and it is incumbent on the business owner to address the complaints of affected neighbors as part of doing business." A363.
- "Because the presence of the odor is the only factual basis for the Wendingers' claims, it is not arguable that their injuries were caused by an accident." A364.
- "Wakefield controlled the decisions of where and how to construct the manure ponds, and Wakefield should have known that the manure ponds would irritate anyone living nearby." A364 to A365.

- “Wakefield made a business decision to place manure pits in a location where it should have expected the Wendingers to be irritated by the smell, and could reasonably have expected the Wendingers to file a lawsuit seeking abatement.” A365.
- “In this case, Wakefield knew that the construction of the open manure storage pits at the Forst Farm would inevitably cause the harm complained of in the Wendinger Action. It is possible that Wakefield did not expect the Wendingers to complain so vociferously, but Wakefield must have expected the Wendingers to experience significant irritation at the smell of hog manure wafting through the air.” A368 to A369.
- “[T]he construction of the open manure pits evinced deliberate indifference to the harm it would cause the Wendingers....” A369.
- “[E]very element of the Wendinger Action was to be expected as part of doing business with hogs and their manure.” A369.

The carelessness with which the District Court reviewed the record is demonstrated by the repeated references to Wakefield’s involvement in the “construction of the open manure pits” and that Wakefield “controlled the decisions of where and how to construct the manure ponds” and made a “business decision” in locating the manure pits where they were. The problem with the District Court’s analysis is that not only is there nothing in the record to support these claims, but they are in fact wrong. Forst Farms, Inc. owned the facility, constructed the facility, and made the decision as to the site of the manure earthen basin (which is what the District Court refers to as an “open manure pit”), all without any involvement whatsoever from Wakefield Pork. Forst Farms, Inc. was an independent contract grower for Wakefield; not its agent or employee. Wakefield had no involvement in the construction of the Forst Facility at all, and neither RAM nor the District Court can point to any part of the record that would suggest otherwise.

The District Court goes so far as to suggest that the construction and operation of a livestock facility that is fully compliant with all applicable State MPCA regulations and County zoning and use ordinances represents a “deliberate indifference” to the safety and welfare of the producer’s neighbors. A369. This term is nearly synonymous with the “deliberate disregard” standard for the imposition of punitive damages under Minn. Stat. § 549.20. *See Johns v. Harborage I, Ltd.*, 585 N.W.2d 853, 864 (Minn. App. 1998) (using the term “deliberate indifference” to summarize the Court’s analysis of the applicability of § 549.20 to the facts of a particular case); *see also* 1990 Minn. Laws ch. 555, § 24 (changing the standard for the imposition of punitive damages from “willful indifference” to “deliberate disregard”). Almost casually, the District Court notes that in its view, the legal and fully-compliant construction and operation of a livestock facility in Minnesota borders on the automatic imposition of punitive damages under § 549.20.

For the above reasons, the District Court’s approach to the issue of whether the Wendinger Complaint alleges an “occurrence” within the meaning of the RAM Policies is fundamentally flawed and should be disregarded by this Court, as of course an appellate court is required to do on an appeal from a grant of summary judgment in any event. A de novo review of the record demonstrates that the Wendinger Complaint does in fact allege an “occurrence” within the meaning of the RAM Policies.

Wakefield’s Farm Partner Policy with RAM provides that RAM will “pay, up to **our limit**, all sums for which an **insured** is liable by law because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies. We will defend a suit seeking damages if the suit resulted from **bodily injury** or **property**

damage not excluded under this coverage.” A54 (hereinafter “Coverage L”) (emphases in original).³ Thus, if the Wendinger Lawsuit alleged bodily injury or property damage caused by an occurrence as those terms are defined within the RAM Policies, RAM breached its duty to defend Wakefield in the Wendinger Lawsuit unless RAM can show that one or more of the exclusions clearly and unequivocally precluded coverage for the Wendinger Lawsuit under any and all circumstances.

The Wendinger Complaint on its face alleged bodily injury. *See* A9, para. 10 (“Gases, hydrogen sulfide among others, from the Defendants’ hogs and hog operation have caused and/or exacerbated Plaintiffs’ health problems”); *id.*, para. 11 (“Plaintiffs have been forced to seek medical treatment”); *id.*, para. 12 (“Due to the health problems caused or exacerbated by the noxious and offensive odors emanating from Defendants hogs and hog farm, Plaintiffs’ quality of life has been severely diminished”). The Wendinger Complaint further alleges property damage. *See id.*, para. 15 (“the market values of Plaintiffs’ property and home have been diminished”). The Wendinger Complaint does not, however, allege that Wakefield intentionally acted to cause them harm; indeed, the Complaint contains a count of negligence as well as claims for nuisance and trespass, none of which are intentional torts.

An “occurrence” is defined by the RAM Policies as “an accident which is neither expected nor intended including continuous or repeated exposure to substantially similar conditions.” A27. In *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), the Minnesota Supreme Court reiterated its prior holding in *Hauenstein v. St.*

³ A **bold** term in RAM’s Policies indicates that the term is separately defined elsewhere in the policy.

Paul-Mercury Indem. Co., 65 N.W.2d 122, 126, 242 Minn. 354, 358 (1954), that an “accident” for purposes of insurance liability coverage is one in which the alleged injury was “an unexpected, unforeseen, or undesigned happening or consequence.” *Id.* at 611. The Court went on to recognize that the *Hauenstein* test basically collapses the “occurrence” coverage analysis and the “intentional act” exclusion analysis into one test:

However, in the absence of a workable definition of accident that yields such a result, it is better here to acknowledge that accidental conduct and intentional conduct are opposite sides of the same coin. The scope of one in many respects defines the scope of the other. Therefore, in applying the *Hauenstein* definition of accident to a coverage provision, particularly the unexpected, unforeseen or undesigned consequence aspect, our cases interpreting intentional act exclusions are instructive; that is, where there is specific intent to cause injury, conduct is intentional for purposes of an intentional act exclusion, and not accidental for purposes of a coverage provision. As was the case under the *Hauenstein* definition, where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional.

Walser, 628 N.W.2d at 611-12.

The Wendingers alleged that defendants (including Wakefield) were negligent in the operation of the Forst Facility, causing their damages. By definition, negligence does not require an intent to injure the Wendingers. The same is true of nuisance. Minn. Stat. § 561.01 (2002); *see also Randall v. Village of Excelsior*, 258 Minn. 81, 85, 103 N.W.2d 131, 134 (1960) (“It is elementary that ‘nuisance’ denotes the wrongful invasion or infringement of a legal right or interest,” including “harms caused by negligence.”). The same is true for trespass. *See, e.g., H. Christiansen & Sons v. City of Duluth*, 225 Minn. 475, 31 N.W.2d 270, 274 (1948) (holding that allegations of intentional conduct are not necessary to maintain a cause of action for trespass).

Before the District Court, RAM argued that the Minnesota Supreme Court decision in *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), had no application to the present case and should be ignored because of a subtle difference between the way the term “occurrence” was defined in the policy at issue in that case and the way it is defined in the RAM Policies. In the insurance policy at issue in *Walser*, the term “occurrence” was defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” 628 N.W.2d at 609. The term is defined in the RAM Policies as “an accident which is neither expected nor intended including continuous or repeated exposures to substantially similar conditions.” Thus, the only difference between the two definitions is that the RAM definition purports to tell us that the “accident” cannot be expected nor intended.

In *Walser*, the Minnesota Supreme Court confirmed that the term “accident,” unless specifically defined otherwise in an insurance policy, means an “unexpected, unforeseen, or undesigned happening or consequence.” 628 N.W.2d at 611. The RAM Policies do not include a specific definition of the term “accident” anywhere in them. RAM’s definition of the term “occurrence” simply includes descriptive language as to the type of “accident” that must have occurred, e.g., an accident that was neither expected nor intended. This descriptive language is in no way different from or inconsistent with the *Walser* definition of “accident.” In fact, it is entirely consistent with it. An “accident” under the RAM Policies is an unexpected or unintended happening or consequence. There is no substantive difference in the definitions of “occurrence” as used in the policy

at issue in *Walser* and in the RAM Policies; *Walser* controls this case with regard to what constitutes an “occurrence.”

Moreover, the Wendinger Complaint alleged an “occurrence” even if the RAM definition of that term could be equated with the definition contained in the policy at issue in *Bituminous Cas. Corp. v. Bartlett*, 307 Minn. 72, 240 N.W.2d 310 (Minn. 1976), the case upon which RAM relies. In *Bartlett*, the Court concluded that the term “occurrence” as defined in the policy at issue in that case required “(1) An accident; (2) resulting in... damage; (3) neither expected nor intended by the insured contractor.” *Id.* at 312. Therefore, even under the *Bartlett* definition, an “occurrence” exists unless the damage was either expected or intended by the insured; *see also Johnson v. AID Ins. Co. of Des Moines, Iowa*, 287 N.W.2d 663 (Minn. 1980) (construing functionally identical definition of “occurrence” in a coverage action resulting from an alleged breach of a construction contract).

In *Bartlett*, the insured building contractor knowingly used chipped bricks and intentionally installed a wall out of plumb in violation of the contract specifications. Both defects “were patent, obvious, and called to the insured’s attention during the course of construction.” 240 N.W.2d at 313. The conclusion that the insured should have expected property damage to follow from his conduct was “inescapable.” *Id.* at 314. In contrast, there is no basis to conclude that Wakefield expected or intended to cause bodily injury or property damage to the Wendingers as a consequence of the operation of this fully permitted hog facility. RAM’s argument and the District Court’s conclusions to the contrary are premised entirely upon the contention that an expectation or intention to

cause injury to other persons or property must automatically follow from the mere act of operating a hog facility in rural Minnesota. This argument is simply untenable.

The District Court concluded that the “existence of an occurrence is determined by the nature of the events giving rise to the cause of action, not the extent of the damages alleged,” and that “[b]ecause the presence of the odor is the only factual basis for the Wendingers’ claims, it is not arguable that their injuries were caused by an accident.” A364 (citing *Johnson*, 287 N.W.2d at 665). The District Court and RAM’s reliance on *Bartlett* and *Johnson* is misplaced. As the Supreme Court recognized in *Johnson*, it had previously distinguished *Bartlett* in the case of *Ohio Cas. Ins. Co. v. Terrace Enter., Inc.*, 260 N.W.2d 450 (Minn. 1977), in which the underlying complaint alleged that a contractor was warned by an engineer subcontractor that the soil at the site needed added protection from freezing, and while the contractor took steps to reevaluate the problem, those steps were inadequate and the resultant settling of an apartment building was found to constitute an occurrence under a policy identical to the definitions found in *Bartlett* and *Johnson*. *Id.* at 452. “A contractor’s mistake or carelessness is covered; but an insured will not be allowed through intentional or reckless acts to consciously control the risks covered by the policy.” *Johnson*, 287 N.W.2d at 665 (citing *Terrace Enter.*, 260 N.W.2d at 452).

In *Johnson*, relied upon by the District Court, the Supreme Court emphasized that the underlying complaint did not allege negligence at all and that the insured’s counsel conceded to “willful and knowing violations of contract specifications,” 287 N.W.2d at 665 and n.3. The District Court also believed that *Franklin v. Western Nat. Mut. Ins. Co.*,

574 N.W.2d 405 (Minn. 1998), was controlling because “[t]he facts before this Court are similar to those in *Franklin* in that Wakefield had complete control over the instrumentalities involved in the Wendinger Action. That is to say, Wakefield controlled the decisions of where and how to construct the manure ponds and Wakefield should have known that the manure ponds would irritate anyone living nearby.” A364 to A365. The District Court is both factually and legally wrong. Wakefield did not control the decision of where or how the manure storage basins would be constructed; Wakefield was not involved in that decision at all. The Court’s suggestion that a legally constructed and operated livestock facility fully regulated by and compliant with MPCA and county regulations would necessarily “irritate anyone living nearby” must be rejected out-of-hand.

The facts of this case are simply not analogous to *Franklin*. In *Franklin*, the insured constructed and maintained outdoor advertising structures, such as billboards, and became involved in a dispute with one of its lessors over the lessor’s right to terminate a lease agreement with the insured upon sale. The insured sued for declaratory judgment asking the court to determine that the lease agreement did not permit the lessor to terminate the lease upon sale. The lessor counterclaimed for fraud, breach of contract, and trespass. On the count of trespass, the counterclaim alleged that the insured “intentionally refuses to remove its sign from the premises of Defendants, despite demand to remove said signs. Plaintiff has intentionally kept its signs on Defendants’ property although not legally privileged to do so.” 574 N.W.2d at 406. Relying on the

trespass claim, the insured tendered the defense of the counterclaim to its insurer, who denied coverage.

The Minnesota Supreme Court held that the insurer did not owe a duty to defend the insured from the trespass counterclaim because that claim did not allege an “occurrence” within the meaning of the insurance policy. The Court noted that the counterclaim “was essentially a breach of contract claim” and that the insured “made intentional decisions” not to comply with the lessor’s notice to vacate. *Id.* at 408. “Furthermore, the trespass count in the counterclaim specifically referred to intentional acts by [the insured], thereby taking it outside the definition of ‘occurrence.’” *Id.* Unlike *Franklin*, the Wendinger Complaint (1) was not “essentially a breach of contract claim”; (2) did not allege an intentional tort; and (3) did, in fact, specifically allege negligence. The District Court’s reliance on *Franklin* as dispositive in this case was misplaced.

The Wendinger Complaint make allegations which, if true, would constitute an “occurrence” within the meaning of the RAM Policies. The District Court’s conclusion to the contrary is error. Nowhere do the Wendingers allege that Wakefield’s involvement in the Forst operation was designed or operated specifically to harm them and for no other purpose. Such a construction of the Wendinger Complaint, or the facts which form the basis for the Wendingers’ claims, is wrong.

III. THE DISTRICT COURT ERRED IN HOLDING THAT GENERAL EXCLUSION NO. 13, RAM'S "POLLUTION EXCLUSION" PRECLUDED RAM'S DUTY TO DEFEND WAKEFIELD AGAINST THE WENDINGER COMPLAINT.

With little analysis, the District Court concluded that even if the Wendinger Complaint did allege an occurrence, RAM still had no duty to defend Wakefield because RAM's "pollution exclusion" necessarily and clearly excluded coverage for all aspects of the Wendinger Complaint. A365. The Court stated that "[t]he release of fumes into the atmosphere is the only factual allegation underlying the Wendinger Action," and "the terms 'fume' and 'odor' have the same meaning." A365 to A366.⁴

RAM's Farm Partner Policy General Exclusion No. 13, its so-called "pollution exclusion" reads as follows:

This policy does not apply to liability which results directly or indirectly from:

13. the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, sound emissions, magnetic or electrical emissions, or other 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, except as provided by Incidental Liability Coverage. (This exclusion does not apply to **bodily injury** or **property damage** caused by reduced visibility from smoke.)

This language is a modified version of the original "limited pollution exclusion" added first as an endorsement in 1970 and then as part of the policy itself in 1973 by the

⁴ The District Court claimed that "Wakefield argues that odor is not technically 'pollution'," but that "[t]he definition of the term 'pollution' is, however, irrelevant because it does not appear in the pollution exclusion." A365 to A366. The District Court is correct that the term "pollution" does not appear in General Exclusion No. 13, but incorrect that Wakefield ever argued that odor is or is not "pollution." Wakefield did argue (and continues to argue) that odor is not a "pollutant" within the meaning of the RAM policies, a term which does appear in General Exclusion No. 13.

Insurance Services Office's ("ISO") Standard CGL Policy. The only difference is that RAM's Farm Partner Policy has deleted the "sudden and accidental" exception to the pollution exclusion found in ISO CGL Policies until 1985.⁵

The question becomes whether the allegations of the Wendinger Complaint necessarily involve only allegations that fall within the scope of General Exclusion No. 13 (and are not otherwise covered by the Incidental Liability Coverage discussed below). The District Court concluded that all of the allegations of the Wendinger Complaint necessarily and clearly fell within the scope of General Exclusion No. 13, although it did so with little to no analysis. If any reasonable construction of the Wendinger Complaint includes a claim that would not fall within the scope of that exclusion, RAM's duty to defend was triggered and its failure to provide a defense to Wakefield was a breach of its insurance contract regardless of whether any or most of the other claims in the Wendinger Complaint would fall under the exclusion.

A. RAM'S POLLUTION EXCLUSION DOES NOT EXCLUDE COVERAGE FOR CLAIMED DAMAGES WITHIN WENDINGERS' HOME OR TO THE WENDINGERS' PERSONAL INJURY CLAIMS.

Courts in numerous states, including Minnesota, recognize that the limitation "into or upon the land, the atmosphere, or a water course..." contained in RAM's General Exclusion No. 13 would cause that exclusion not to apply to all of the factual allegations set forth in the Wendinger Complaint. The Wendingers' Complaint, at least in significant

⁵ The 1985 CGL Policy, often referred to by commentators as the "absolute pollution exclusion", substantially re-wrote the entirety of the "pollution exclusion". However, RAM's policy retains the wording from the 1973 CGL Policy, known as the "limited pollution exclusion", except that the "sudden and accidental" exception was deleted. Therefore, cases such as *League of Minn. Cities Ins. Trust v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. App. 1989), which construe portions of the pollution exclusion from the 1985 CGL, are inapposite.

part, is not that the Forst operation polluted the environment, but that odors from the operation caused them bodily injury. They do not allege that these odors have caused environmental damage to the land itself, nor to the atmosphere, nor to any water course. It is not damage to the environment that forms the gravamen of their complaint; it is the bodily injury that they claim to have experienced by living in proximity to the Forst operation, and as significantly, it is the presence and trapping of odors within their home which formed the basis for their claims. *See* Wendinger Complaint, para. 14 (“Due to the noxious and offensive odors emanating from Defendants hogs and hog farm, Plaintiffs have made substantial investments and modifications **in an effort to keep these odors out of their home.**”) (emphasis added). General Exclusion No. 13, which again is based on the original CGL pollution exclusion from 1973, does not reach such claims that do not involve or require environmental damage as a component of the original plaintiff’s cause of action. For instance, in *MacKinnon v. Truck Ins. Exch.*, 115 Cal. Rptr.2d 369 (2002), a tenant sued his landlord for a death allegedly caused by pesticide spraying. The landlord sought coverage under his CGL Policy, arguing that because the damage was narrowly focused and did not extend to environmental damage, the absolute pollution exclusion did not apply. The California Court of Appeals disagreed and affirmed summary judgment in favor of the insurer, but did so on the basis that while the insured’s argument would have had merit under the pre-1985 version of the CGL pollution exclusion (i.e., the same version that RAM used in the RAM Policies) insofar as such damages would not be considered “into or upon the land, the atmosphere, or any water course or body of water”. The subsequent amendment and deletion of that limitation by

the ISO in the 1985 CGL policy removed that argument for the insured in that case. *See also Regional Bank of Colo., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir. 1994); *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30 (1st Cir. 1999); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 38 (2nd Cir. 1995); *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997).

Similarly, the Minnesota Supreme Court recognized precisely this same distinction in *Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.* 517 N.W.2d 888 (Minn. 1994), by holding that the limitation of the exclusion to “the atmosphere” did not exclude claims that occur for damage to the environment within a structure as opposed to the outside ambient air:

When the air supply within a building becomes contaminated, it is harmful to the controlled environment of that building; but the contamination of the air in a building is not harmful to the surrounding natural environment, at least not until it escapes into that environment so as to cause personal injury or property damage--a claim not made here. We conclude, therefore, that the term “atmosphere” in the pollution exclusion does not exclude coverage under the primary policies for the contamination or pollution of air within a building.

At one level, the distinction we make may seem to draw a fine line. But words are deliberately chosen in insurance policies to make distinctions, and we think the construction we have given the word “atmosphere” here is contextually sound and functionally pertinent.

Id. at 893. In *Royal*, the Court noted that the excess policies had adopted the broader pollution exclusion which broadly applied to “contamination or pollution of land, water, air or real or personal property or any injuries or damages resulting therefrom caused by an occurrence.” *Id.* The Court recognized that unlike the primary policies (and unlike the RAM Policies in this case), the excess policies made no attempt to identify particular

pollutants or contaminants, and “in defining what is being polluted, the exclusion does not use language descriptive of the natural environment only.” *Id.* Therefore, the Supreme Court concluded that the excess policies in *Royal* did not provide coverage for contamination or pollution of the air within a building. *Id.* at 893-94. In this case, because the Wendinger Complaint alleged that the Forst Facility caused odors to be present within their home rather than in “the natural environment only,” General Exclusion No. 13 did not apply to that extent and RAM’s failure to provide a defense to Wakefield was a breach of the RAM Policies.

In *Auto Owners Ins. Co. v. Hanson*, 588 N.W.2d 788 (Minn. App. 1999), this Court recognized precisely the significance of the Supreme Court’s focus in *Royal*, when construing the limited pollution exclusion such as RAM used here, on the object that is claimed to be polluted. *Id.* at 780 (noting that because of *Royal* “the definition of pollutant is determined with careful reference to the policy’s description of the object polluted”). Comparing the two policies construed in *Royal*, this Court recognized that “with the change of the object polluted from “atmosphere” to “air,” the excess policy enlarged the scope of the exclusion and encompassed pollution of the air within a building by asbestos fibers.” *Id.* *Hanson* recognizes that policies such as the RAM policy, which use the limited pollution exclusion focusing on and limited to specified objects being polluted, do not preclude coverage for claims of damage to the air within a structure as opposed to claims of damage to the outside, ambient air. The Wendingers’ Complaint alleges damage to themselves and to the air within their home, and under

Royal, these claims of damage are not reached by the pollution exclusion as drafted by RAM.⁶

As the Minnesota Supreme Court has stated:

This much is clear. The pollution exclusion is directed--at least it was initially--at claims involving the pollution of the natural environment. Thus the exclusion is worded broadly to encompass the natural resources of this planet in their natural setting, namely, land, the atmosphere, and bodies of water. It is less clear, however, whether the exclusion was meant to include contamination of these resources outside their natural setting.

Significantly, the pollution exclusion does not use the generic term "water" but rather the phrase "any watercourse or body of water," a description indicative of water in streams, ponds or lakes. The use of the term "land," instead of "property," whether real or personal, likewise appears directed at land as a natural resource. And, within this context, the term "atmosphere," we think, refers to the ambient air.

Royal, 517 N.W.2d at 892-93. Because the Wendinger Lawsuit involved claims of odor within their home, and these claims were fairly presented as part of the Wendinger Complaint (*see, e.g.*, Wendinger Complaint, para. 18 ("Defendants breached that duty by causing noxious and offensive odors to come onto Plaintiffs' land **and into and around Plaintiffs' home**" (emphasis added))), RAM's denial of coverage and its duty to defend based on the Pollution Exclusion are misplaced regardless of whether odor is or is not

⁶ In *Hanson*, the Court was construing a policy with an "absolute pollution exclusion". The Court recognized that such exclusions are significantly different than the limited pollution exclusion construed in *Royal* and used by RAM in this case:

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.

otherwise considered an “irritant, contaminant or pollutant” within the meaning of those Policies. RAM did not exclude coverage under the RAM Policies for contamination or pollution of air within the Wendinger home (i.e., a building) or for personal injury claims, and RAM’s duty to defend was therefore triggered and breached when RAM refused Wakefield’s tender.

B. THE WENDINGER COMPLAINT DOES NOT ALLEGE ONLY THE DISPERSAL OF “OTHER IRRITANTS, CONTAMINANTS, OR POLLUTANTS”

Odor is not itself a pollutant, and General Exclusion No. 13 does not apply.

“General contract principles govern the construction of insurance policies, and insurance policies are interpreted to give effect to the intent of the parties. Because most insurance policies are presented as preprinted forms, which a potential insured must usually accept or reject as a whole, ambiguities in a policy are generally resolved in favor of the insured.” *Nathe Bros., Inc. v. American Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000) (citations omitted).

General Exclusion No. 13 does not identify “odors” as being subject to the exclusion. The Wendinger Complaint primarily asserts that “odors emanating from the Defendants hogs and hog farm” are the cause of their alleged injuries. *See, e.g.*, Wendinger Complaint, para. 11. Odor, however, is distinct from the individual chemical compounds and/or particulate matter associated with a particular type of livestock or the

waste that they generate. Odor is not a smoke, a vapor, soot, a fume,⁷ an acid, or an alkali, nor does it necessarily consist of a toxic chemical, nor can it be classified as a liquid or necessarily even a gas. The question is whether a claim of nuisance odor arising from the normal operation of a livestock confinement facility is necessarily and only one which alleges harm from the “discharge, dispersal, release or escape” of “irritants, contaminants, or pollutants into or upon the land, the atmosphere, or a water course....”

The MPCA recognizes that odor is not regulated as a pollutant nor is it treated as such by that agency. The MPCA’s “Odor Policy” states that “[t]he MPCA does not have a state odor rule, but **sometimes** odors can be an indicator of pollutants that have emission limits. In some cases, odor can be detectable even when a company is within its emission limits; in that case, although the state has no regulatory recourse the case can be referred to city and county officials to ensure the facility is in compliance with local rules.” MPCA Odor Policy, available at www.pca.state.mn.us/programs/odor.html (emphasis added) (hereinafter “MPCA Odor Policy”). The MPCA’s recognition that if specific emission thresholds are not violated then it has no “regulatory recourse” is an explicit acknowledgement that odor in and of itself is not a pollutant, since the MPCA is statutorily authorized to regulate all air pollutants within the State of Minnesota. *See* Minn. Stat. § 116.07, subd. 4 (generally authorizing the MPCA to adopt rules and standards for the “prevention, abatement, or control of air pollution”); *see also id.*

⁷ The District Court held without citation or explanation that “the terms ‘fume’ and ‘odor’ have the same meaning.” A365. Not even RAM had made this argument and there is no basis for it. A “fume” is defined alternatively as a smoke or a smoky or vaporous exhalation or an offensive or noxious or stifling exhalation. *Webster’s New Int’l Dictionary*, at 11018 (2nd Ed. 1953). This is not synonymous with odor, nor does the term “fume” describe the factual allegations in the Wendinger Complaint.

§ 116.06, subd. 4 (defining “air pollution” as “the presence in the outdoor atmosphere of any air contaminant or combination thereof in such quantity, of such nature and duration, and under such conditions as would be injurious to human health or welfare, to animal or plant life, or to property, or to interfere unreasonably with the enjoyment of life or property”).

Although the term “other irritants, contaminants, and pollutants” has not been extensively construed in Minnesota, the Supreme Court in *Royal* did give an indication of the contours of this limitation by noting that asbestos fibers were an irritant since the fibers are a “health hazard because of their irritant effects on the human body.” 517 N.W.2d at 893. However, odors are not in and of themselves a health hazard: “Odor is rarely useful in determining a human health risk. Not all unpleasant odors are human health concerns.” MPCA Odor Policy. The MPCA recognizes that a reduction in specific chemical emissions, which arguably may be pollutants or other irritants within the meaning of General Exclusion No. 13, may have the side effect of reducing odors, but the two are certainly not coextensive:

In some limited circumstances, however, a facility that reduces its emissions of certain chemicals may also reduce neighborhood odor. In these rare cases, the MPCA may be able to use odor measurement as a surrogate for specific chemical concentrations. Generally the MPCA will address health concerns by considering the primary pollutants, with odor reduction a by-product of reducing these pollutants.

MPCA Odor Policy.

In construing whether a substance is a “pollutant” or a “contaminant”, courts recognize that the substance must generally “occur in a setting such that they would be

recognized as a toxic or particularly harmful substance in industry or by governmental regulators.” *Regional Bank of Colorado, N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir. 1994). A broader reading of these terms could potentially eliminate coverage in virtually all situations, and therefore many courts have recognized the need to have a limiting construction placed on the terms in accordance with the Tenth Circuit’s approach. *See, e.g., In re Hub Recycling*, 106 B.R. 372, 375 (D. N.J. 1989); *Sullins v. All-State Ins. Co.*, 667 A.2d 617, 621 (Md. 1995); *Certain Underwriters at Lloyd’s London v. C.A. Turner Constr. Co.*, 112 F.3d 184, 188 (5th Cir. 1997); *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.*, 768 F.Supp. 1463, 1470 (D. Kan. 1991). Even applying the plain meaning approach adopted by the Supreme Court in *Royal*, “an ordinarily intelligent insured could reasonably interpret the pollution exclusion clause as applying only to environmental pollution,” as opposed to personal injury claims brought by private landowners. *See Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30 (1st Cir. 1999); *see also Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 38 (2nd Cir. 1995) (stating that pollution exclusion clause can be reasonably interpreted as applying only to environmental pollution); *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997) (stating “we hold that the exclusion applies only to those injuries caused by traditional environmental pollution”).

IV. THE DISTRICT COURT ERRED IN HOLDING THAT RAM'S INCIDENTAL LIABILITY COVERAGE FOR ACCIDENTAL SPILLAGE OF AGRICULTURAL CHEMICALS DID NOT PROVIDE AN INDEPENDENT BASIS FOR ARGUABLE COVERAGE TRIGGERING RAM'S DUTY TO DEFEND.

The Farm Partner Policy also contains a number of Incidental Liability Coverages, including one for “Accidental Spillage of Agricultural Chemicals.” Farm Partner Policy, page 5 (which coverage is explicitly excluded from General Exclusion No. 13). RAM acknowledges that the Pollution Exclusion does not apply to this coverage. A140. The District Court, however, concluded without analysis that this coverage is “only triggered by sudden or abrupt and accidental or unexpected spillages of agricultural chemicals,” and that “there is no way to construe the allegations in the Wendinger Action as arising from an accidental or unexpected release of noxious odors from the Forst Farm feeding operation.” A366 to 367. An examination of the relevant policy language, however, demonstrates that (1) the District Court was wrong in concluding that there is a “sudden or abrupt and accidental or unexpected” requirement for coverage under this Incidental Liability Coverage; and (2) even if there were, the Wendinger Complaint does not so clearly fall under that exclusion such that RAM was relieved of its duty to defend.

This Incidental Liability Coverage provides that RAM will pay for liability “caused by the actual discharge, dispersal, release or escape of **agricultural chemicals**, liquids or gases.” This Coverage goes on to provide, however, that it does not apply to “liability which results directly or indirectly from: ... (2) nitrate or related nitrogen from a natural or animal source including organic materials.” *Id.* RAM therefore alleges that it had no duty to defend Wakefield “by operation of the nitrate, nitrogen, and organic

materials exclusion set forth in the Farm Partner Policy.” A140. The term “agricultural chemicals” is defined by the Policy as follows:

Agricultural Chemical means pesticides, herbicides, fertilizers, plant amendments or soil amendments used or intended for use in usual farming or agricultural operations. This does not include nitrate or related nitrogen from a natural or animal source including organic materials.

A53. This Incidental Liability Coverage was also triggered by the allegations of the Wendinger Lawsuit, and RAM’s failure to defend Wakefield on the basis of this available coverage also constituted a breach of its duty to defend Wakefield.

As to the Incidental Liability Coverage, General Exclusion No. 13 does not apply whatsoever to this coverage and RAM has so conceded. A413 (Mr. JENSEN: “Yeah – and obviously, in all candor, the pollution exclusion does not apply to this particular coverage because it’s a very specific form of coverage.”). General Exclusion No. 13 specifically states that its exclusion only applies “except as provided by Incidental Liability Coverage.” Therefore, if the Incidental Liability Coverage applies to the Wendinger Lawsuit, whether or not the claims in the Wendinger Complaint can be construed as alleging only liability for the discharge, dispersal, release or escape of irritants, contaminants or pollutants is irrelevant; RAM’s duty to defend Wakefield would be separately triggered by the Incidental Liability Coverage.

The Wendinger Complaint alleges odors arising from the Forst Facility’s hog barns and waste storage facility, which in the case of the Forsts is commonly referred to as an open-air earthen basin or lagoon. Hog waste is well-recognized as a fertilizer and in fact is so used universally, and was in fact used by the Forsts as fertilizer for their

fields during the period of time that was the subject of the Wendinger Complaint. *See, e.g., MPCA and Univ. of Minn. Extension Office, Manure Management Plan: A Step-by-Step Guide for Minnesota Feedlot Operators*, at 3, available at www.pca.state.mn.us/publications/wq-f8-09.pdf (June 2005) (“Manure should not be considered a waste product requiring disposal. Rather, it should be stored, handled and applied with the same care given to expensive commercial fertilizers. Applied properly, manure can yield considerable savings in fertilizer costs.”). It is, therefore, clearly an “Agricultural Chemical” within the meaning of the RAM Policies unless the exception from that definition for “nitrate and related nitrogen from a natural or animal source including organic materials” applies. As mentioned above, both the definition of Agricultural Chemicals and the Incidental Liability Coverage extended for “Accidental Spillage of Agricultural Chemicals”⁸ contain an exclusion for “nitrate or related nitrogen from a natural or animal source including organic materials.” The Incidental Liability Coverage is actually broader than the definition of Agricultural Chemicals since the coverage extends not only to a “discharge, dispersal, release or escape of agricultural chemicals,” but also to a “discharge, dispersal, release or escape” of “liquids or gases”, which are not further defined by the RAM Policy.

RAM’s exclusion for “nitrate or related nitrogen from a natural or animal source including organic materials” does not make all aspects (or even any aspect) of the Wendinger Lawsuit subject to the exclusion. First, a “nitrate” is defined as “a salt or

⁸ RAM’s use of the term “Spillage” in the title of its Incidental Liability Coverage No. 12 is somewhat misleading as it implies a liquid discharge. However, the coverage extends to any liability “caused by the actual discharge, dispersal, release or escape of **agricultural chemicals**, liquids or gases....”

ester of nitric acid” or “potassium nitrate or sodium nitrate.” *Webster’s New Int’l Dictionary Unabridged*, at page 1655 (2nd ed. 1953). Nitric Acid is a chemical compound consisting of hydrogen, oxygen, and nitrogen (HNO₃). *Id.* Potassium nitrate is a chemical compound consisting of potassium, nitrogen and oxygen (KNO₃). *Id.* at 1932. Sodium nitrate is a chemical compound consisting of sodium, nitrogen and oxygen (NaNO₃). *Id.* at 2389. This exclusion does not apply to all claims for damage from animal manure when used or stored as a fertilizer, only to those claims which arise from those portions of animal manure consisting of a nitrate or related nitrogen. The phrase “including organic materials” is similarly a clarification of the extent to which the “nitrate or related nitrogen” exclusion applies and is not an expansion of the exclusion to organic materials generally (the term “including” is a restrictive phrase of “natural or animal source,” which itself is part of a restrictive phrase (i.e., “from”) of “nitrate or related nitrogen”).⁹ In short, this exclusion does not apply (1) to nitrates or related nitrogen from a commercial fertilizer, herbicide, pesticide, etc.; or (2) to fertilizers from a natural or animal source to the extent that the claimed damage is not based on the “nitrate or related nitrogen” components of that natural or animal source. This exclusion applies only to the extent that hog manure (or other animal source products) are used as fertilizer and the claim is based on leeching or other environmental damage caused by overapplication of nitrogen or other nitrates; it does not exclude coverage simply for any claim arising from the storage or application of fertilizer from a natural or animal source.

⁹ To the extent there is any ambiguity on this issue, of course, the ambiguity is resolved against the insurer and in favor of coverage. *Atwater Creamery Co. v. Western Nat’l Mut Ins Co.*, 366 N.W.2d 271, 277 (Minn. 1985).

Hog manure is a complex amalgam of numerous chemical components of various types, including ammonia, hydrogen sulfide, potassium, phosphorous, and volatile organic compounds (“VOCs”). See generally Susan S. Schiffman, et al., *Quantification of Odors and Odorants from Swine Operations in North Carolina*, 108 Agric. and Forest Meteorology 213 (2001) (noting that a total of 331 different organic and chemical compounds were detected in hog manure tested in North Carolina); T.T. Linn, et al., *Characteristics and Emission Rates of Odor from Commercial Swine Nurseries*, 44 Transactions of the Am. Soc’y of Agric. Engineers 1275, 1276 (2001) (noting that “[o]dor intensity is the relative perceived psychological strength of an odor and is independent of the knowledge of odor concentration.”).¹⁰ The odor associated with hog manure has never been specifically associated with any one or several of those chemical components. However, one of the “surrogates” often used by analysts and regulatory agencies (including the Minnesota Pollution Control Agency) in an attempt to quantify odor from a livestock operation is hydrogen sulfide (H₂S), which, as noted above, is clearly neither nitrogen nor a nitrate. Indeed, the Wendingers specifically cited hydrogen sulfide in their Complaint as one of the components of the “noxious and offensive” gases and odors. Wendinger Complaint, para. 11.

It bears emphasizing that RAM’s “nitrate, nitrogen, and organic materials” exclusion (to use RAM’s characterization of the provision) recognizes (a) that manure is a fertilizer and therefore qualifies as an “agricultural chemical;” and (b) that not all

¹⁰ For the record, the undersigned wishes to make clear that while he cites Dr. Schiffman’s article for the general proposition concerning the chemical makeup and complexity of hog manure, he does not in any way endorse or agree with the methodology used or conclusions reached by Dr. Schiffman in her article.

manure is subject to the exclusion. If manure were not a fertilizer or an agricultural chemical, there would be no need for the limited exclusion. If all manure were excluded from the Incidental Liability Coverage, the exclusion would have said so and not limited itself to nitrogen and nitrates. RAM could easily have drafted the exclusion broadly to provide that the Incidental Liability Coverage does not apply to “liability which results directly or indirectly from a natural or animal source,” but did not do so. Regardless of whether some portions of the Wendinger Lawsuit could be attributable to odor arising from nitrogen or nitrates, clearly there are numerous other compounds that allegedly contributed to the odor that could not be so traced, and certainly neither the face of the Wendinger Complaint nor the facts subsequently developed through discovery demonstrated conclusively that the Wendingers were only or even principally complaining of the nitrate components of the odor they were claiming were emitting from the Forst Facility. Why RAM chose to make this distinction in its Incidental Liability Coverage for Accidental Agricultural Chemical Spillage is irrelevant. “Exclusions are narrowly interpreted against the insurer.” *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995). RAM chose to draft the exclusion in the Incidental Liability Coverage in the manner it did. As the Court in *Royal* noted “words are deliberately chosen in insurance policies to make distinctions,” and this is the distinction RAM has drawn. *See Royal*, 517 N.W.2d at 893.

Since Wakefield prevailed in the underlying lawsuit, there is no need to separate out the two for purposes of determining which portions of the Wendingers’ claim would be covered by the Incidental Liability Coverage and which would not be for purposes of

determining the extent of RAM's indemnity obligation. If any portion of the Wendinger Lawsuit is arguably covered by the RAM Policies, RAM's duty to defend was triggered and it was breached by RAM when it refused the tender of the defense of that matter. *Prahm v. Rupp Const. Co.*, 277 N.W.2d 389, 390 (Minn. 1979) (citations omitted) ("If any part of a cause of action is arguably within the scope of coverage, the insurer must defend.").

Moreover, even if the Wendinger Complaint had specifically alleged that the claimed odors arose exclusively from nitrates or related nitrogen, which it did not, RAM would still have had a duty to defend under the Incidental Liability Coverage afforded to Wakefield pursuant to the 1994 through 1996 version of RAM's Farm Partner Policy. Under the wording of the latter (post 1996) version of the policy which RAM is relying upon, the Incidental Liability Coverage arguably does not apply even if "liquids or gases" (as opposed to the separately defined "Agricultural Chemicals") are at issue, so long as the liability results from "nitrate or related nitrogen from a natural or animal source including organic materials." However, that is not the case under the 1994-1996 version of the policy.

Under the 1994-1996 version of the policy, the Incidental Liability Coverage is afforded not in the body of the policy form itself, but rather pursuant to a separate endorsement entitled "Liability Amendatory Endorsement" and identified as Endorsement CF125 (4-90). *See* A343. Under Endorsement CF125, the exclusionary language concerning "nitrate and related nitrogen from a natural or animal source including organic materials" applies only to the definition of "agricultural chemical."

There is no separate exclusionary language applicable to the extended coverage that is afforded to claims that arise from the “discharge, dispersal, release or escape” of “liquids or gases.” Since RAM intended the term “gases” to mean something different than “agricultural chemicals” given RAM’s separate use of these terms, the limiting definition of “agricultural chemicals” cannot be applied to the term “gases.”

As discussed above, odor is not necessarily classified as a “gas.” However, since RAM is apparently taking the position that odor is a gas for purposes of applying the general pollution exclusion, RAM is obviously precluded from arguing otherwise for purposes of analyzing the Incidental Liability Coverage. Further, as also discussed above, all uncertainties and ambiguities in an insurance policy must be strictly construed in favor of the insured and a finding of coverage and against the insurer.

The District Court held that this Incidental Liability Coverage did not trigger RAM’s duty to defend because of a purported requirement that any discharge or emission be “sudden or abrupt and accidental or unexpected.” A366. However, the District Court erred both because (1) the “sudden or abrupt and accidental or unexpected” language does not limit the applicability of the Incidental Liability Coverage; and (2) even assuming *arguendo* that it did apply, the claims asserted by the Wendingers would qualify within the meaning of that term.

The Incidental Liability Coverage for Accidental Spillage of Agricultural Chemicals reads in its entirety as follows:

12. **Accidental Spillage of Agricultural Chemicals.** When the **insured** is liable, we pay for **bodily injury** or **property damage** or the cost of the cleanup and removal caused by the actual discharge, dispersal, release or escape of **agricultural**

chemicals, liquids or gases up to a limit of \$50,000 per **occurrence** subject to the annual aggregate and a \$1,000 deductible **per occurrence**.

a. This incidental coverage does not apply to liability which results directly or indirectly from:

- (1) custom spraying of **agricultural chemicals** if done for others for pay;
- (2) nitrate or related nitrogen from a natural or animal source including organic materials;
- (3) the manufacturing, production, selling, distribution or disposal of any **agricultural chemical**, liquids or gases; or
- (4) any claims made by or on behalf of any local, state or federal entity.

b. We pay for the actual **bodily injury** or **property damage** not to exceed **our** limit of liability under this Incidental Liability Coverage if incurred or determined within 12 months from the date of the sudden or abrupt and accidental or unexpected discharge, dispersal, release or escape of the **agricultural chemicals**, liquids, or gases.

c. The actual discharge, dispersal, release or escape of **agricultural chemicals**, liquids or gases must occur during the policy period.

d. **Excess Coverage.** This Incidental Liability Coverage is excess over any local, state or federally funded reimbursement program or fund. **You** must first exhaust **your** efforts in obtaining reimbursement with any local, state or federal program before this coverage applies.

e. **Deductible.** This Incidental Liability Coverage – Accidental Spillage of Agricultural Chemicals, is subject to a \$1,000 deductible from each discharge, dispersal, release or escape of the **agricultural chemicals**, liquids or gases.

The coverage afforded by this Incidental Liability Coverage is found in the main body of Paragraph 12, which does not contain this purported limitation at all. Paragraph 12(b) does not in any way narrow the broader coverage found in the main body of this Incidental Liability Coverage. Clearly, RAM knows full well how to draft exclusions. Paragraph 12(a) contains the exclusions to which the coverage in Paragraph 12 is subject,

and it clearly and unambiguously states that by stating that the coverage “does not apply to liability which results directly or indirectly from” any of the excluded circumstances. Further, as shown by its previous endorsement, RAM could have (and previously did), provide the same “sudden or abrupt and accidental or unexpected” language in the main provision affording coverage. Paragraph 12(b) appears to be at most a time limitation for claims arising from a particular subset of “spillage,” i.e., a claim arising from a “sudden or abrupt” discharge must be brought within 12 months when the damage was “incurred or determined.” In any event, whatever Paragraph 12(b) means (and it is, of course, RAM who drafted this policy and against whom all ambiguities must be construed), it is not an exclusion or a limitation on the coverage afforded by this Incidental Liability Coverage, and RAM’s claims that the Wendinger Complaint can in no circumstances be said to allege a “sudden or abrupt and accidental or unexpected” circumstance are simply irrelevant to the availability of a duty to defend by RAM in this case.

Even assuming *arguendo* that this “sudden or abrupt and accidental or unexpected” clause were to govern the availability of coverage under the Accidental Spillage of Agricultural Chemicals Incidental Liability Coverage, RAM would still have had a duty to defend Wakefield in the underlying action. In *Royal*, the Supreme Court held “that the term ‘sudden’ is used to indicate the opposite of gradual.” *Id.* It noted that the term “sudden and accidental” “refers not to the placement of waste in a particular place but to the discharge or escape of the waste from that place.” *Id.* “It seems incongruous, too, to think of a leakage or seepage that occurs over many years as happening suddenly.” *Id.* However, the odor complaints alleged by the Wendingers

were not gradual; they were not the result of “leakage or seepage that occurs over many years.” Rather, the Wendingers were alleging that when the wind blew from the southeast on a particular day and in particular weather conditions, that abrupt discharge of odors from the Forst earthen storage basin would in and of itself constitute a nuisance. The Wendingers were not complaining that there was a gradual accumulation of odor (or anything else) that in any one particular instance was not of itself problematic but through the gradual accumulation of one small impact upon another became actionable, they were alleging that each discharge in and of itself (and without more) was actionable. Simply because the Wendingers alleged this happened numerous times does not detract from the fact that the Wendingers were claiming that the odors were sudden; they did not need to gradually accumulate over time. Under the plain meaning of the definition of “sudden” adopted by the Minnesota Supreme Court in *Royal*, the Wendinger Complaint alleged the sudden and accidental discharge of agricultural chemicals such that RAM’s duty to defend was triggered by operation of the Incidental Liability Coverage for Accidental Spillage of Agricultural Chemicals. *See also Anderson v. Minnesota Ins. Guar. Ass’n*, 534 N.W.2d 706, 709 (Minn. 1995) (noting that while a CGL Policy with the “sudden” exception to the absolute pollution exclusion “affords no coverage for a waste disposal site which gradually over time pollutes an area” “[o]n the other hand, if an explosion sends chemical fumes over a residential area, or an oil truck overturns and spills oil into a marsh, these would be sudden and accidental happenings, so that the exclusion would not apply and there would be insurance coverage.”). Because the Wendinger Complaint and Minnesota law would appear to permit a separate and distinct new cause of action for

each and every instance of an odor incident, *see Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. App. 2001) (holding that a nuisance claim “must be viewed as an ongoing series of injuries to respondents’ properties” such that each day a claimed nuisance exists, a new cause of action arises), this is not a “gradual” damage within the meaning of *Royal*, and the “sudden or abrupt” language in Paragraph 12(b) would not act to bar RAM’s duty to defend Wakefield even if it were otherwise necessary for coverage under the Accidental Spillage of Agricultural Chemicals (which it is not).

RAM owed a duty of defense to Wakefield under the Incidental Liability Coverage, and RAM breached that duty by refusing to provide a defense. The District Court erred in holding otherwise.

V. **THE DISTRICT COURT ERRED IN HOLDING THAT RAM’S INCIDENTAL LIABILITY COVERAGE FOR “DAMAGE TO PROPERTY OF OTHERS” DID NOT TRIGGER A DUTY TO DEFEND.**

In addition to the Incidental Liability Coverage for Accidental Spillage of Agricultural Chemicals, the RAM Farm Partner Policy includes another Incidental Liability Coverage for “Damage to Property of Others”, which provides in relevant part as follows:

Regardless of an **insured’s** legal liability, we pay for property of others damaged by an **insured**, or we repair or replace the property, to the extent practicable, with property of like kind and quality. **Our** limit for this coverage is \$500 per **occurrence**, unless a higher limit is indicated on the declarations.

The exclusions that apply to Coverages “L” and “M” do not apply to this coverage.

“Property of Others” is not defined anywhere in the RAM Policy. “Property Damage,” which is not necessarily the same thing, is defined in the RAM Policy as including “loss of use of tangible property that is not physically injured,” which is the *sine qua non* of a nuisance cause of action. *See* Minn. Stat. § 561.01 (statutorily defining “nuisance” as “an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.”). The Damage to Property of Others Coverage specifically states that the “exclusions that apply to Coverages “L” and “M” do not apply to this coverage,” and in fact makes the coverage available “[r]egardless of an **insured’s** legal liability.” Therefore, General Exclusion No. 13 does not apply to limit this coverage as it would under Coverage L.

Contrary to what the District Court concluded, the Wendinger Complaint alleges damage to the Wendingers’ home (i.e., physical injury to tangible property) within the meaning of the Policy’s definition of “Property Damage.” *See* Wendinger Complaint, para. 14. Therefore, RAM also had a duty to defend Wakefield from the Wendinger Lawsuit pursuant to the “Damage to Property of Others” Provision of its Incidental Liability Coverage.

VI. THE DISTRICT COURT ERRED IN HOLDING THAT THERE WAS A GENUINE ISSUE OF FACT CONCERNING WHETHER RAM’S “INTENTIONAL ACT” EXCLUSION WOULD APPLY TO DEFEAT RAM’S DUTY TO DEFEND IF THAT DUTY WERE OTHERWISE TRIGGERED BY THE WENDINGER COMPLAINT.

As with its treatment of the “occurrence” issue, the District Court’s analysis of the applicability of RAM’s “intentional acts” exclusion to the conduct of Wakefield as

alleged in the Wendinger Complaint is extremely troubling.¹¹ The District Court recognized that “the purpose of the intentional act exclusions [sic] is to exclude insurance coverage for wanton and malicious acts by an insured.” A368 (*quoting Walser*, 628 N.W.2d at 613). The District Court then claimed that the “case at bar does not fit easily into the case law regarding the intentional acts exclusion,” but nonetheless “raises the question” of whether the Forst operation (or more specifically, Wakefield’s mere ownership of pigs at the Forst site) “rises to the level of maliciousness required to trigger the intended acts exclusion.” A368. Then the District Court goes on to conclude casually that “Wakefield knew that the construction of the open manure storage pits at the Forst Farm would **inevitably** cause the harm complained of in the Wendinger Action.” A368 (emphasis added). Under the District Court’s analysis, no jury trial on the Wendinger’s nuisance claim would have ever been necessary; since the harm complained of by the Wendingers was “inevitable,” the Wendingers would have been entitled to a directed verdict on liability, and any neighbor of a livestock producer presumably would similarly be entitled to a directed verdict on nuisance liability by the mere fact that livestock production “inevitably” causes the nuisance harm necessary to trigger liability. The District Court ultimately concludes that a “factual inquiry would be needed to determine whether the construction of the open manure pits at the Forst Farm site was so callously indifferent to the irritation it would cause the Wendinger’s [sic] as to trigger the

¹¹The District Court’s Memorandum accompanying its Order is basically 11 pages long (page 12 contains a brief 3-line conclusion). Of those 11 pages, 2 are devoted to a recitation of the basic facts and a statement of the issues; 1 page is devoted to a discussion of the background principles of law; and only 1 page total addresses both the Pollution Exclusion and the Incidental Coverage for Spillage of Agricultural Chemicals issues. The remaining 6 pages address the Court’s analysis of the “occurrence” issue and the “intentional acts” exclusion.

‘intentional acts’ exclusion contained in the RAM insurance policies,” but that such an inquiry is not necessary here since “RAM’s duty to defend was precluded on other grounds.” A369.

The District Court ignores the fact, of course, that (1) there was never any evidence that Wakefield had anything to do with the siting or construction of the Forst earthen manure basin at all; (2) the jury found in Wakefield’s favor on liability, thus contradicting the District Court’s “inevitable harm” conclusion in this very case; (3) there was never any evidence in either this record or in the Wendinger Action that Forst Farms, much less Wakefield, had ever violated any applicable state MPCA or Nicollet County rules or regulations; and (4) the logical extension of the Court’s analysis is that any livestock producer within Minnesota is necessarily and “inevitably” creating a legally cognizable nuisance odor as to that producer’s neighbors and the public at large.

RAM’s Farm Partner Policy contains General Exclusion No. 19, which reads as follows:

This policy does not apply to liability which results directly or indirectly from:

19. any act intended by an **insured**, or done at the direction of an **insured**, whether or not the **bodily injury** or **property damage** was intended.

In *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), the Minnesota Supreme Court summarized the relevant standard to be applied by Courts when considering the “intentional act” exclusion:

In order for coverage to be excluded as intentional, a court must find that the insured acted with “specific intent to cause” harm and that the insured “intended the harm itself, not merely that the insured generally intended to

act.” *R.W. v. T.F.*, 528 N.W.2d 869, 873 (Minn. 1995). When applying this principle, we inquire into the intentions of the insured, but we do not inquire whether the insured’s conduct was wrongful. *E.g., see id.* Thus, there is coverage for an incident “when the act inflicting the assault and battery is intended, but the resulting injury is not intended.” *Woida v. N. Star Mut. Ins. Co.*, 306 N.W.2d 570, 573 (Minn. 1981).

Id. at 611 (footnote omitted). As noted above, in Section II of this Brief, the Minnesota Supreme Court in *Walser* held that for all practical purposes, the issue of an “occurrence” for purposes of determining coverage in the first instance and the applicability of an “intentional act” exclusion involve the same analysis. An intentional act for purposes of the exclusion is also not an occurrence for purposes of coverage in the first instance, and similarly, an occurrence is, by definition, not an intentional act for purposes of the exclusion.

Before the District Court, RAM argued that the wording of its “intended act” exclusion allows it to avoid coverage for any claim resulting from *any act* that was intended by its insured, regardless of whether or not the insured had any intent whatsoever to cause harm. This is the same argument RAM raised in *Reinsurance Ass’n of Minn. v. Timmer*, 641 N.W.2d 302 (Minn. App. 202), *rev. denied* (Minn. May 14, 2002), and should be rejected for the same reasons rejected by this Court in that case. As RAM’s argument goes, since Wakefield intended the Forsts to operate a hog facility, any claim arising from that act is excluded without the need for any further analysis. If RAM’s interpretation of the effect of this exclusion is accepted, it would follow that there would be no coverage for any claim that is related to any form of conscious conduct on the part of an insured. For example, there would be no coverage for an accident arising

out of the insured's negligent operation of farm machinery, since the insured intended to operate the machine. RAM's position is akin to an automobile liability insurer contending that it owes no duty to defend an insured who is being sued for alleged negligence in operating a motor vehicle, again because the insured intentionally operated a motor vehicle.

RAM's contention that it can avoid its defense obligation under the guise of its "intended act" inclusion, even in the absence of any evidence (or even claim) that Wakefield acted with intent to cause harm, is in direct contradiction to established law. The "purpose of intentional act exclusions is to exclude insurance coverage for wanton and malicious acts by an insured...." *Walser*, 628 N.W.2d at 613. Further, exclusionary clauses are to be construed "strictly against the insurer," as well as "in accordance with the expectations of the insured party." *Id.* It follows that regardless of the particular fashion in which an insurer may choose to draft an intentional act exclusion, such an exclusion is subject to the fundamental analysis as developed by the Minnesota Supreme Court.¹² Under the law as developed by the Minnesota Supreme Court, an intentional act exclusion cannot be given effect unless the Court finds "that the insured acted with 'specific intent to cause' harm and that the insured 'intended the harm itself, not merely that the insured generally intended to act.'" *Id.* at 611 (*quoting R.W. v. T.F.*, 528 N.W.2d 869, 873 (Minn. 1995)). The Wendinger Complaint makes no such claim, and RAM's contention that intent to injure can somehow be inferred from the mere act of operating a

¹² Indeed, the Minnesota Supreme Court states in *Walser* that lack of specific intent to injure "will be determinative" in any intentional act exclusion analysis. 628 N.W.2d at 612

hog facility is, as already addressed above, simply wrong, as is the District Court's conclusion that additional fact finding would be necessary to resolve this question. Accordingly, RAM's "intended act" exclusion has no application and did not relieve RAM from its duty to provide Wakefield with a defense. *See Timmer*, 641 N.W.2d at 313.

For the reasons given in Section II above, the intentional act exclusion has no applicability to the issues presented in this case, and the District Court erred in concluding otherwise.

VII. THE DISTRICT COURT ERRED IN DENYING WAKEFIELD'S MOTION FOR SUMMARY JUDGMENT AND NOT ENTERING JUDGMENT IN WAKEFIELD'S FAVOR FOR THE DAMAGES ESTABLISHED BY THE AFFIDAVITS ACCOMPANYING WAKEFIELD'S MOTION.

For the reasons set forth above, the District Court erred in granting RAM's motion for summary judgment. Moreover, because there is no genuine issue of material fact precluding Wakefield's entitlement to summary judgment, Wakefield respectfully submits that this Court should reverse the District Court and direct entry of judgment in Wakefield's favor. Moreover, because RAM did not raise a genuine issue of material fact disputing Wakefield's evidence of its damages, Wakefield respectfully submits that this Court should enter judgment in Wakefield's favor on the amounts set forth in the Affidavits of Wakefield's Counsel submitted to the District Court, together with leave for Wakefield to recover its attorneys' fees in this appeal, and with Wakefield's entitlement to pre-judgment interest and such costs and disbursements as are taxable.

In addition to recovering the attorneys' fees and expenses, which it was forced to incur in defending the Wendinger Lawsuit, Wakefield is also entitled to recover the fees and expenses incurred in prosecuting this Action. The Minnesota Supreme Court has held that an insurer who breaches its duty of defense is liable to the insured not only for the cost of defending the underlying action, but also for the attorneys' fees and costs incurred in bringing the declaratory judgment action to enforce that duty. *Morrison v. Swenson*, 274 Minn. 127, 142 N.W.2d 640 (1966); *see also In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 422 (Minn. 2003) (“[I]n the insurance context, we have carved out a narrow exception to the general rule: attorney fees are recoverable when an insurer breaches its duty to defend.”). Wakefield seeks this additional relief in its Complaint and is unquestionably entitled to it.

As itemized in the exhibits to the Cross Affidavit and consistent with Rule 119 of the Minnesota General Rules of Practice, Wakefield has demonstrated that it was entitled to \$275,601.25 for the attorneys' fees and expenses/disbursements incurred in successfully defending the Wendinger Lawsuit and an amount to be determined (but preliminary itemized in Exhibit H to the Cross Affidavit through October 23, 2005) for the attorneys' fees and expenses/disbursements incurred for having prosecuted this Action. Wakefield is further entitled to tax such additional costs and disbursements as are available to a prevailing party following entry of judgment, including but not limited to pre-judgment interest and post-judgment interest.

The standard for recovery of defense costs is whether those costs were reasonable and necessary to the defense of the action. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563

N.W. 2d. 724, 738 (Minn. 1997). The reasonableness standard also applies with respect to the costs incurred by the insured in pursuing a declaratory judgment action against an insurer who has breached its duty to defend. *Id.* at 741. There can be no question but that the fees and expenses sought by Wakefield meet these requirements, and that Wakefield is entitled to an award of the full amounts sought.

CONCLUSION

For all the reasons set forth above, Wakefield respectfully requests that this Court reverse the District Court's grant of summary judgment in favor of RAM and hold that Wakefield is entitled to summary judgment in its favor declaring that RAM breached its duty to defend Wakefield from the Wendinger Action and entering judgment in Wakefield's favor for the full amount of its litigation costs in the Wendinger Action and this Action as set forth in the Affidavits filed with the District Court, together with Wakefield's costs and disbursements, and such additional costs and attorneys' fees Wakefield incurred in prosecuting this appeal.

Dated this 26th day of May, 2006.



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No. A06-0847

STATE OF MINNESOTA
IN COURT OF APPEALS

Wakefield Pork, Inc.

Appellant,

vs.

RAM Mutual Insurance Company,

Respondent.

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 13,142 words. This brief was prepared using Microsoft Word 2003.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).