
STATE OF MINNESOTA
IN COURT OF APPEALS

WAKEFIELD PORK, INC.,

Appellant,

vs.

RAM MUTUAL INSURANCE COMPANY,

Respondent.

**BRIEF AND APPENDIX OF AMICI CURIAE
MINNESOTA DEPARTMENT OF AGRICULTURE, ET AL.**

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STATEMENT OF THE CASE¹

The Nicollet County District Court granted summary judgment in favor of Respondent RAM Mutual Insurance Company (“RAM”) on March 9, 2006. (Appellant’s Appendix (“A.A.”) at A358). In its Order, the District Court concluded that RAM’s insurance policies provided no coverage and no duty to defend Appellant Wakefield Pork, Inc. (“Wakefield”) in an action brought against Wakefield by two neighboring landowners for damages based on allegations of negligence, nuisance, and trespass. (A.A. at A362-66). The allegations in the underlying action related, in part, to Wakefield’s ownership of hogs that were placed on a farm operated by Forst Farms, Inc., an independent contract grower. (A.A. at A7-8). After the claims based on negligence and trespass were dismissed, Wakefield obtained a jury verdict in its favor on the nuisance claim. (A.A. at A345-46). Wakefield then commenced this declaratory judgment action to determine whether RAM had a duty to defend Wakefield under the terms of its insurance policies. (A.A. at A1-5).

In reaching its conclusions, the District Court apparently determined that Wakefield knew or should have known that all hog operations were inherently and inevitably offensive to others by making, *inter alia*, the following statements:

- “The notion that the release of odors from an open manure lagoon could be characterized as an accident is *non-sensical* [sic]” (A.A. at A363) (emphasis added);

¹ Pursuant to rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, counsel for the Amici Curiae certify that they have authored this brief in its entirety and that no persons or entities other than the Amici Curiae have made monetary contributions to the preparation or submission of the brief.

- “Insurance carriers * * * are not in the business of indemnifying their clients from the consequences of *poor decision making*” (A.A. at A364) (emphasis added);
- “Wakefield *should have known* that the manure ponds would irritate anyone living nearby” (A.A. at a365) (emphasis added);
- “Wakefield *knew* the potential liabilities *inherent* in its hog farming operations” (A.A. at A365) (emphasis added);
- “Wakefield *knew* that the construction of open manure storage pits at the [farm] would *inevitably* cause the harm complained of in the [underlying action]” (A.A. at A368) (emphasis added);
- “Wakefield *must have expected* the [neighbors] to experience significant irritation” (A.A. at A369) (emphasis added); and
- “[E]very element of the [underlying action] *was to be expected* as part of doing business with hogs and their manure” (A.A. at A369) (emphasis added).

Wakefield appealed from the District Court’s decision by filing a Notice of Appeal to the Minnesota Court of Appeals on May 1, 2006. (A.A. at A371-74).

On May 8, 2006, the Minnesota Department of Agriculture; Minnesota Pork Producers Association; AgStar Financial Services, ACA; Minnesota Agri-Growth Council, Inc.; AgCountry Farm Credit Services, ACA; Broiler and Egg Association of Minnesota; Farm Credit Services of Minnesota Valley, PCA; Minnesota Corn Growers Association; Minnesota Farm Bureau Federation; Minnesota Milk Producers Association; Minnesota Soybean Growers Association; Minnesota State Cattlemen’s Association; and Minnesota Turkey Growers Association (collectively referred to as the “Amici Curiae”) submitted to the Clerk of Appellate Courts a Request for Leave to Participate as Amici Curiae in this appeal to the Court of Appeals, pursuant to rule 129.01 of the Minnesota

Rules of Civil Appellate Procedure. (Appendix of Amici Curiae (“App. of A.C.”) at 1-5).

The Court of Appeals granted the request on May 17, 2006. (App. of A.C. at 6-7).

STATEMENT OF THE PARTIES’ INTERESTS

The Amici Curiae represent a broad range of both public and private interests. For example, the Minnesota Department of Agriculture is an agency of the State of Minnesota whose mission is to work toward a diverse agricultural industry that is profitable and environmentally sound; to protect public health and safety regarding food and agricultural products; and to ensure orderly commerce in agricultural and food products. (App. of A.C. at 121).

A second set of the Amici Curiae includes the following trade associations, whose membership is made up of a significant number of agricultural producers,² organizations, and groups that collectively represent a wide array of public and private interests throughout the State of Minnesota:

Minnesota Pork Producers Association;
Minnesota Agri-Growth Council, Inc.;
Broiler and Egg Association of Minnesota;
Minnesota Corn Growers Association;
Minnesota Farm Bureau Federation;
Minnesota Milk Producers Association;
Minnesota Soybean Growers Association;
Minnesota State Cattlemen’s Association; and
Minnesota Turkey Growers Association.

The trade associations actively represent their members’ interests and Minnesota’s strong agrarian roots by providing a more effective voice at local, state, and national levels and

² Livestock owners, operators, and producers – like Wakefield and the other co-defendants in the underlying action – undoubtedly represent a large group of insureds with a direct interest in the outcome of this appeal.

by working in many areas to promote the agricultural industry, which is a key economic engine for the State of Minnesota.

A third and related set of the Amici Curiae include the following agricultural lenders that are organized for the specific purpose of providing financing to agricultural producers and businesses, many of whom are also active members in the aforementioned trade associations:

AgStar Financial Services, ACA;
AgCountry Farm Credit Services, ACA; and
Farm Credit Services of Minnesota Valley, PCA.

As a result, the Amici Curiae all have a vested interest in the outcome of the appeal and submit this brief in support of Wakefield.

STATEMENT OF FACTS

Minnesota's diverse livestock industry (hogs, beef, dairy, and poultry) generates approximately \$4.3 billion in annual cash receipts, which accounts for more than 50% of the state's total agricultural sales. (App. of A.C. at 13, 71, 77). The full economic impact from the state's livestock production, including indirect and induced impacts, exceeds \$10.7 billion per year. (App. of A.C. at 13, 71, 77). In addition, the livestock industry supports nearly 100,000 jobs³ and generates a significant demand for corn and soybeans,

³ The industry directly provides approximately 28,000 jobs and is credited with creating business activity that supports another 70,000 jobs. (App. of A.C. at 71, 77).

which consumption annually adds more than \$2 billion to the value of the state's crops.⁴ (App. of A.C. at 13, 71, 77).

Minnesota's hog production is the largest of the state's four primary livestock sectors and is the third largest among all 50 states. (App. of A.C. at 79, 125, 127). Minnesota pork producers generate approximately \$1.7 billion per year in gross sales and annually contribute a total of \$6.4 billion to the state's economy. (App. of A.C. at 127). The pork industry alone supports more than 35,000 jobs for Minnesotans.⁵ (App. of A.C. at 79). And the state's 15 million hogs consume approximately 115 million bushels of corn and 45 million bushels of soybean meal each year. (App. of A.C. at 128).

A secondary benefit of Minnesota's livestock industry relates to the economic contribution of manure to the state's cropland. (App. of A.C. at 83). Specifically, manure supplies nutrients to crops,⁶ builds and maintains soil structure, improves soil aeration, and reduces soil erosion. (App. of A.C. at 83, 125, 128). In addition, manure is a better and more cost-effective alternative than commercial fertilizers. (App. of A.C. at 83, 103, 126, 128).

⁴ Minnesota livestock annually consume roughly 20% of the state's corn and soybean crops. (App. of A.C. at 71, 82).

⁵ The state's pork industry employs more Minnesotans than Northwest Airlines, 3M, and Target Corporation combined. (App. of A.C. at 13).

⁶ The results of a 12-year research project showed that hog manure as fertilizer produces a significant yield advantage for corn crops compared to commercial fertilizers. (App. of A.C. at 128).

For purposes of brevity, and to avoid any unnecessary duplication, the Amici Curiae also adopt and incorporate by reference the Statement of Facts offered by Wakefield in its principal brief.

STATEMENT OF THE ISSUES

1. Whether the District Court erred by concluding that the neighbors' Complaint, which asserted claims for personal injuries based on allegations of negligence and other negligent conduct creating a nuisance, does not form the basis of an accidental occurrence?

Decision: The District Court concluded that the allegations contained in the Complaint did not relate to an occurrence under the terms of the insurance policies because the alleged release of odors and the neighbors' claimed personal injuries were expected from the very nature of Wakefield's business and were not accidental.

Apposite authority: *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 611-13 (Minn. 2001) (stating that, in determining whether an incident constitutes an accident, courts must consider whether insured acted with specific intent to cause injury); *Hauenstein v. St. Paul-Mercury Indem. Co.*, 242 Minn. 354, 358-59, 65 N.W.2d 122, 126 (1954) (defining accident as unexpected, unforeseen, or undesigned happening or consequence).

2. Whether the District Court erred by concluding that the alleged odors produced by a highly regulated agri-business legally operated in conformance with all applicable environmental and land-use regulations preclude insurance coverage under the policies' pollution exclusion?

Decision: The District Court concluded that the alleged noxious and offensive odors fell within the “pollution exclusion” contained in the insurance policies, thereby precluding coverage.

Apposite authority: Minn. R. 7020 (regulating manure management and disposal); Minn. R. 4410 (providing procedures for environmental review); and Nicollet County Zoning Ordinance § 713 (requiring conditional use permits for feedlots).

ARGUMENT

I. The Record on Appeal Demonstrates that the Allegations Contained in the Neighbors’ Complaint Relate to an Occurrence.

RAM, like many insurance companies, provides insurance coverage for bodily injury or property damage caused by an occurrence. (A.A. at 106). The District Court, in determining that RAM did not owe Wakefield a duty to defend in the underlying action, concluded that the allegations contained in the original Complaint did not relate to an occurrence⁷ under the terms of the insurance policies because the alleged release of odors and the neighbors’ claimed personal injuries were expected from the very nature of Wakefield’s business and were not accidental. (A.A. at A362-65). We disagree.

A. Wakefield Did Not Act with Specific Intent to Cause Injury to the Neighbors and Any Alleged Harm Was an Unexpected, Unforeseen, or Undesigned Happening or Consequence.

The Minnesota Supreme Court, in *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), closely examined an insurance policy that contained a

⁷ The polices define an occurrence as “an accident which is neither expected nor intended including continuous or repeated exposure to substantially similar conditions.” (A.A. at A106).

definition of “occurrence” that is very similar to the definition at issue in this appeal.⁸ *Id.* at 609. Like RAM’s policies, the policy in *Walser* did not define the term accident. *Id.* The Supreme Court therefore concluded that, pursuant to prior caselaw and a definition that remained applicable, an accident is “an unexpected, unforeseen, or undesigned happening or consequence.” *Id.* at 611 (citing *Hauenstein v. St. Paul-Mercury Indem. Co.*, 242 Minn. 354, 358-59, 65 N.W.2d 122, 126 (1954)).

The Supreme Court, in *Walser*, also adopted a more workable test and acknowledged “that accidental conduct and intentional conduct are opposite sides of the same coin.” *Id.* As a result, the Court further advised that, “where there is no [specific] intent to injure, the incident is an accident, *even if the conduct itself was intentional.*” *Id.* at 612 (stating that lack of specific intent to injure will be determinative in analyzing whether incident was accidental for purposes of insurance coverage) (emphasis added).

Wakefield planned to place its hogs at a facility operated by Forst Farms, an independent contract grower responsible for the feeding, raising, growing, and finishing of the livestock. (A.A. at A7-8). But all parties involved in the feeding, raising, growing, and finishing of livestock plan or intend such conduct. Yet, none of the parties had any specific intent to cause injury or damage to persons living near such livestock operations. Wakefield’s attorneys therefore urged the District Court to consider that “the claims for personal injury and property damage were accidental and not intended by the insured.”

⁸ In *Walser*, the policy defined an occurrence as “an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions.” *Id.*

The District Court nevertheless rejected Wakefield's arguments, stating that Wakefield *should have known* and *must have expected* that the hog operations would *inherently* and *inevitably* cause the neighbors' alleged personal injuries. (A.A. at A363-69). It is clear that the District Court ignored the Supreme Court's ruling in *Walser*, which provides that courts must examine whether an insured had any specific intent to cause the alleged injury or harm. Nothing in the record on appeal comes close to suggesting such an intent by Wakefield.

Because the neighbors' claims for personal injuries based on allegations of negligence and other negligent conduct creating a nuisance were unintended and unexpected by Wakefield, and because Wakefield did not act with specific intent to cause the neighbors' alleged injuries, the District Court erred in concluding that the neighbors' Complaint does not form the basis of an accidental occurrence.

B. The District Court's Order Represents a Significant Threat to Minnesota's Livestock and Agricultural Industries.

Local zoning, statewide permitting, and environmental review are critical factors that affect the overall health and competitiveness of Minnesota's livestock industry. (App. of A.C. at 87). Recently, many producers have faced stronger, more organized public opposition with respect to such regulatory processes. (App. of A.C. at 85). And the perception of difficult, costly, and time-consuming challenges discourages producers from modernizing, expanding, or building a new livestock operation. (App. of A.C. at 89, 94). There is also a belief that western states are more accepting of modern, large-scale livestock facilities than those in the Midwest. (App. of A.C. at 86). As a result, a

lack of predictability and uniformity associated with these factors has presented significant barriers for agricultural producers and may have a chilling effect on the growth of Minnesota's livestock industry. (App. of A.C. at 85-86).

The Amici Curiae respectfully disagree with the District Court's factual findings and legal conclusions and are compelled to respond to its unjustified characterization of a lawful agricultural business operating in the State of Minnesota. The District Court completely disregarded the fact that Wakefield prevailed on all claims in the underlying nuisance action, including all issues tried to a jury as finder-of-fact. By ignoring such results, the District Court effectively determined that allegations similar to those asserted in the underlying action can never trigger an obligation to defend by an insurance company and that fact issues related to alleged acts of negligence or the existence of a nuisance need not be determined on a case-by-case basis.

The implications of the decision on Minnesota's livestock and agricultural industries are staggering.⁹ The Amici Curiae therefore assert that the District Court's Order must be reviewed and modified and that the Minnesota Court of Appeals should reject the findings, conclusions, statements, and reasoning adopted by the District Court.

⁹ In light of the District Court's Order, the livestock industry can no longer rely on compliance with the already stringent regulatory framework in place at the federal, state, and local levels. *See* discussion *infra* Part II.B.

II. The Alleged Odors Produced by Wakefield's Hogs Are Not Subject to the Pollution Exclusion.

The District Court ruled that the alleged gases and odors purportedly produced by Wakefield's hogs fell within the pollution exclusion¹⁰ contained in RAM's policies, thereby precluding insurance coverage. Because the District Court erred in its interpretation of the pollution exclusion, and because the District Court's conclusions are entirely inconsistent with both the applicable regulatory processes and the jury's verdict in the underlying action, summary judgment must be reversed.

A. The Term Fume Is Ambiguous and Must Be Construed in Favor of Wakefield and Against RAM.

RAM's insurance policies do not refer to odors for purposes of applying the pollution exclusion. The District Court nevertheless concluded that "the terms 'fume' and 'odor' have the same meaning" and that the allegations in the underlying action "[fell] squarely within the boundaries of the * * * pollution exclusion." (A.A. at A366).

Minnesota courts have concluded that, in "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." *See, e.g., Walser*, 628 N.W.2d at 609 (citation omitted). The language in an insurance policy is ambiguous if a term "is reasonably subject to more than one interpretation." *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979).

¹⁰ The pollution exclusion provides that the policy does not apply to liability that results directly or indirectly from "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." (A.A. at A110).

A fume is defined as either “[a]n exhalation of smoke, vapor, or gas” or “[a] strong or acrid odor.” *The American Heritage Dictionary of the English Language*, at 532 (New College Ed. 1976). The term therefore includes both a tangible definition – smoke, vapor, or gas – and an intangible definition – strong or acrid odor. Because the term is susceptible to more than one meaning, it is ambiguous and must be construed in favor of Wakefield and against RAM.¹¹ As a result, the District Court erred in concluding that the terms fume and odor have the same meaning and that the pollution exclusion applied to preclude insurance coverage for Wakefield.

B. The District Court’s Conclusions Are at Odds with State and Local Regulatory Procedures.

Feedlots are subject to more rigorous federal and state standards than ever before. (App. of A.C. at 27). In Minnesota, livestock producers must obtain permits from both state and local governing authorities before commencing operations. (App. of A.C. at 93). For example, the typical regulatory process includes the following:

- state permitting under Minn. R. 7020;¹²
- local permitting by planning and zoning authority;¹³ and

¹¹ Thus, the applicable policy definition of fume must exclude odors.

¹² Minnesota Rules, Chapter 7020, which is administered by the Minnesota Pollution Control Agency (the “MPCA”), governs the storage, transportation, disposal, and utilization of animal manure, including the application for and issuance of permits related to the construction and operation of animal manure management and disposal systems. *See* Minn. R. 7020.0200 to .2225.

¹³ Most local ordinances follow a three-part regulatory formula by (1) imposing minimum setbacks from specified natural resources; (2) requiring minimum separation distances between feedlots and nonfarm uses; and (3) establishing special review and approval

- environmental review under the Minnesota Environmental Policy Act.¹⁴

(App. of A.C. at 93). Nicollet County requires the issuance of a conditional use permit (“CUP”) for feedlots above a certain size.¹⁵ Nicollet County Zoning Ordinance § 713.3. (App. of A.C. at 129-30).

The MPCA also regulates air pollution within the State of Minnesota. *See* Minn. Stat. § 116.07, subd. 4 (2004) (providing that agency may adopt rules and standards related to prevention, abatement, or control of air pollution); *see also* Minn. Stat. § 116.06, subd. 4 (2004) (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”). The MPCA’s rules and standards do not regulate odors

procedures for feedlots above specified size thresholds. (App. of A.C. at 27). Many ordinances include additional environmental and health standards governing such matters as odor control, manure management, and dead-animal disposal. (App. of A.C. at 27).

¹⁴ An environmental assessment worksheet (“EAW”), the purpose of which is to assess whether a project has the potential for significant environmental effects, is prepared by the responsible governmental unit (“RGU”). Minn. R. 4410.1000. An EAW must be prepared before the construction of an animal feedlot facility with a capacity of 1,000 or more animal units. Minn. R. 4410.4300, subpt. 29(A). In addition, an EAW is required if the Environmental Quality Board (the “EQB”) determines that a project may have the potential for significant environmental effects. Minn. R. 4410.1000, subpt. 3(C).

¹⁵ In addition to other general requirements, a permit applicant for a feedlot (1) must demonstrate that there will be no detrimental effects; (2) is subject to additional conditions related to setbacks, manure disposal, hours of operation, and screening; and (3) must submit a map showing the location of the feedlot and all existing land uses and properties within ½ mile. Nicollet County Zoning Ordinance § 713.3. The zoning ordinance also provides certain required setbacks for new feedlots, including setbacks for existing dwellings that are not designated as accessory to the feedlot. *Id.*

as pollutants or air contaminants. *See* Minn. R. 7009.0080 (providing ambient air quality standards for pollutants and air contaminants); *but see* Minn. R. 7020.0505, subpt. 4(b)(1) (requiring submission of air emission plan for livestock facilities capable of holding more than 1,000 animal units).

It is axiomatic that a legitimate agri-business operating in conformance with all necessary environmental and land-use regulations will not, as a matter of law, allow the dispersal, discharge, release, or escape of irritants, contaminants, or pollutants. Forst Farms, like other producers in the livestock industry, operates a highly regulated facility, which is supplied with hogs from Wakefield and must comply with all federal, state, and local guidelines, including but not limited to all applicable permitting procedures. And the record on appeal contains no allegations that either Forst Farms or Wakefield has violated the terms of any permits or other regulatory requirements.

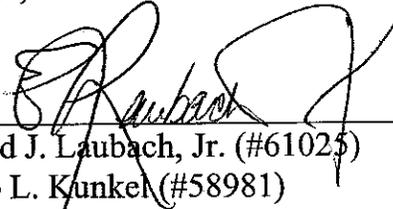
C. The District Court's Conclusions Are at Odds with the Jury's Verdict.

In the underlying action, the jury expressly found that Wakefield and the other co-defendants, whose hog operations began on June 27, 1994, did not create a nuisance that affected the neighbors' property. (A.A. at A345-46). Yet, the District Court somehow concluded in this matter that Wakefield *should have known* and *must have expected* that the hog operations would *inherently* and *inevitably* cause the neighbors' alleged personal injuries. (A.A. at A363-69). Because the District Court's after-the-fact conclusions effectively turn the jury's verdict on its head, summary judgment must be reversed.

CONCLUSION

For all of the above-stated reasons, the Amici Curiae respectfully request that the Minnesota Court of Appeals reverse the Nicollet County District Court's Order dated March 9, 2006, which granted summary judgment in favor of Respondent RAM Mutual Insurance Company. In addition, the Amici Curiae request that the Court of Appeals remand this matter to the District Court with instructions to grant summary judgment in favor of Appellant Wakefield Pork, Inc.

Respectfully submitted this 7th day of June, 2006.



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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).