

NO. A06-847

State of Minnesota  
**In Court of Appeals**

WAKEFIELD PORK, INC.,

*Appellant,*

vs.

RAM MUTUAL INSURANCE COMPANY,

*Respondent.*

**RESPONDENT'S BRIEF AND APPENDIX**

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## Statement of Legal Issues

1. Whether the district court properly granted summary judgment to Respondent RAM Mutual Insurance Company (“RAM”) given that the pollution exclusion in RAM’s policy precluded coverage for the underlying claims arising out of the noxious odors created from a confined-animal feeding operation that housed thousands of Appellant Wakefield Pork, Inc.’s pigs.

### **Apposite authority:**

*Weber v. IMT Insurance Co.*, 462 N.W.2d 283 (Iowa 1990)

*League of Minnesota Cities Insurance Trust v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. Ct. App. 1989)

*Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. Ct. App. 1999)

2. Whether the district court properly granted summary judgment to Respondent RAM and concluded that no coverage existed for the underlying claims under the incidental liability provisions in RAM’s policy.

### **Apposite authority:**

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

*Tschimperle v. Aetna Cas. & Surety Co.*, 529 N.W.2d 421 (Minn. Ct. App. 1995)

*O’Brien Energy Systems, Inc. v. American Employers’ Ins. Co.*, 427 Pa.Super. 456, 629 A.2d 957 (1993)

3. Whether the district court properly granted summary judgment to Respondent RAM given that the underlying complaint did not allege an “occurrence” under the terms of RAM’s policy.

### **Apposite authority:**

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

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

4. Whether the district court erred in concluding that a material fact dispute existed as to whether the intentional act exclusion in RAM's policy precluded coverage as to the underlying claims.

**Apposite authority:**

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

*Dakhue Landfill, Inc. v. Employers Ins. of Wausau*, 508 N.W.2d 798 (Minn. Ct. App. 1993)

**Statement of the Case**

This declaratory judgment action arises out of an underlying lawsuit that complained about the noxious odors arising from a confined-animal feeding operation ("CAFO") that housed thousands of pigs that Appellant Wakefield Pork, Inc. ("Wakefield Pork") owned. This Court reviewed the underlying matter and remanded it for trial as to a nuisance claim. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003).<sup>1</sup> After successfully defending against the nuisance claims, Wakefield Pork sued Respondent RAM Mutual Insurance Co. ("RAM") and claimed that RAM breached its duty to defend Wakefield Pork in the underlying suit.

The Nicollet County District Court, the Honorable Allison Krehbiel, heard cross-motions for summary judgment and granted RAM's motion and denied Wakefield Pork's

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<sup>1</sup> This Court concluded that: the alleged invasive odors that emanated from the CAFO did not support a trespass claim; evidence of intentional conduct might support a nuisance claim; that no absolute two-year limitation applied to nuisance claims against an agricultural operation; no statutory affirmative defense existed for "generally accepted agricultural practices;" and, it would not review the purported agency relationship between the owner and operator of the confined-animal feeding operation due to a lack of evidence. This Court also noted that the underlying claimants complained that the odors interfered with their use and enjoyment of their land, and not with their exclusive possession of it. *Wendinger*, 662 N.W.2d at 550.

motion. The district court concluded that the underlying complaint did not allege an “occurrence,” that the pollution exclusion precluded any coverage for the underlying claims, and that other portions of RAM’s policy were not triggered. Wakefield Pork appealed. RAM filed a Notice of Review to challenge the district court’s decision that a fact dispute existed as to whether Wakefield Pork’s intentional acts also might preclude coverage.

### Statement of Facts

Appellant Wakefield Pork, Inc. (“Wakefield Pork”) is one of the nation’s largest pork producers, “ranked nationally in the top 25 by Successful Farming magazine.” <http://www.wakefieldpork.com/AboutWPI.asp> (as of July 5, 2006). Its pigs are housed and fed on farms throughout Minnesota and Iowa.

In 1994 Wakefield Pork entered into an agreement with Forst Farms, Inc. (“Forst”) under which Forst agreed to construct and operate a CAFO to house and feed pigs that Wakefield Pork owned. *Wendinger*, 662 N.W.2d at 549. In late 1995, neighbors to the site, the Wendingers, began filing numerous odor complaints with local and state authorities about the odor from the hog manure generated at the operation. *Id.* The Minnesota Department of Public Safety in its Air Quality Hazardous Material Incident Reports (“AQHMIR”) responding to calls from the Wendingers characterized the releases as “hog gas” that had “escaped” from the Forst CAFO. R.A.12. It was also referred to as “hog gas odors,” “gas coming off the lagoon,” “hog gas fumes from the hog lagoon,” “hog lagoon fumes,” “hog manure fumes,” “hog fumes,” “toxic hog odor,” “toxic fumes,” “gas,” “hog gas from lagoon,” and “noxious hog fumes.” R.A.12-23.

The Wendingers ultimately sued Wakefield Farms and others claiming negligence, nuisance, and trespass. A.154. The Wendingers alleged that the CAFO was designed and permitted to operate with 2,400 hogs. A.156 (Complaint, ¶ 5). The Wendingers alleged that the “operation was built with a liquid/slurry manure system” using “an unlined 1.6 acre, lagoon for long term storage of the liquefied hog manure.” A.156 (Underlying Complaint, ¶ 5). The Wendingers claimed that “the site has produced extremely noxious and offensive odors and gases” from the beginning the site operated. A.156 (¶ 7). Odor samples tested by the “Minnesota Pollution Control Agency” were alleged to constitute nuisance levels. A.156 (¶ 9). “Gases, hydrogen sulfide among others” from Wakefield Pork’s hogs allegedly caused the Wendingers’ health problems. A.157(¶ 10). Other problems were alleged to have been caused by the “noxious and offensive odors emanating from [Wakefield Pork’s] hogs . . .” A.157 (¶¶ 11-15). These odors allegedly came “onto [the Wendingers’] land and into and around their home.” (*Id.* ¶¶ 18, 23, 26, 28 and 29). Because of the “noxious and offensive odors emanating from” Wakefield Pork’s hogs at the CAFO, the Wendingers claimed they no longer had “use of their property and [that they] severely curtailed their use and enjoyment of their yard.” A.157 (¶ 13).

RAM’s policies contain a pollution exclusion. General Exclusion 12 of RAM’s policy provides in relevant part as follows:

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

- . . . .
12. the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste

materials 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 (*Coverage 'N'*).<sup>2</sup>

R.A.132, 137 (FCPL, p. 10 and Endorsement CF125; Jensen Aff., Ex. S).

### Argument and Authorities

#### I. Introduction, Standard of Review, and Insurance Coverage Principles.

The “pollution” exclusion in RAM’s policies bar coverage and the duty to defend. The Wendingers complained about the release of fumes, acids, alkalis, gases, waste materials, irritants, contaminants or pollutants into the atmosphere. Moreover, no “occurrence” existed with respect to the allegations asserted against Wakefield Pork for the odors from the manure that its pigs created at the hog confinement facility. Finally, the intended act exclusion in RAM’s policies applies in this case.

In an appeal from a summary judgment, an appellate court determines whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *Offerdahl v. University of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). A party opposing summary judgment must do more than create a metaphysical doubt as to a factual issue and may not rest on mere averments. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995).

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<sup>2</sup> The Incidental Liability Coverage exceptions for which the “pollution” exclusion does not apply include Coverage 9 (“Custom Farming”) which provides coverage for certain herbicide and pesticide spray applications, Coverage 10 (“Property in Control of Insured”) which provides certain coverage for smoke damage, and Coverage 11 (“Accidental Spillage of Agricultural Chemicals”) which provides coverage for certain commercial fertilizer spillage losses.

Insurance coverage issues ordinarily present questions of law that are reviewed *de novo*. See *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). Parties to an insurance contract, as in other contracts, are free to contract as they see fit, and an insurer's liability is governed by the contract the parties entered. *American Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983); *Bobich v. Oja*, 258 Minn. 287, 104 N.W.2d 19, 24 (1960). The language used in the contract must be given its usual and accepted meaning. *Id.*

Courts do not redraft insurance policies to provide coverage where the plain language of the policy indicates no coverage exists. *Newberg v. Commercial Union Ins. Co.*, 619 N.W.2d 757, 759 (Minn. Ct. App. 2000). Courts may not read an ambiguity into the plain language of a policy in order to construe it against the insurer. *Bobich*, 258 Minn. 287, 104 N.W.2d at 24. Nor do they thrust upon an insurer a risk it did not accept and for which it was not paid a premium. *Simon v. Milwaukee Auto. Mut. Ins. Co.*, 262 Minn. 378, 115 N.W.2d 40, 49 (1962).

An insurer is not bound to defend a suit on a claim outside the coverage of the policy. *Bobich*, 258 Minn. 287, 104 N.W.2d at 24. If there is no duty to indemnify, there is no duty to defend. *State Farm Fire Cas. Co. v. Williams*, 355 N.W.2d 421, 425 (Minn. 1984); *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 574 (Minn. 1981).

In determining whether a duty to defend exists, courts compare the allegations in the underlying complaint with the relevant insurance policy language. *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997). The allegations of the complaint are controlling as to the issue of duty to defend unless actual facts within the

insurer's knowledge clearly establish the existence or non-existence of a duty to defend. *Id.* at 418 n. 19. When the various claims asserted in a complaint derive from excluded conduct, no duty to defend exists. *See Allstate Ins. Co. v. S.F.*, 518 N.W.2d 37, 40 (Minn. 1994); *National Union Fire Ins. Co. v. Gates*, 530 N.W.2d 223, 229 (Minn. Ct. App. 1995).

If there is no coverage by reason of a policy exclusion, the insurer has no obligation to defend. *Bobich*, 258 Minn. 287, 104 N.W.2d at 24; *Langford Electric Co. v. Employers Mut. Indem. Corp.*, 210 Minn. 289, 297 N.W. 843, 846 (1941). Exclusions in an insurance policy are as much a part of the contract as other parts and must be given the same consideration in determining coverage. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998).

**II. The district court correctly concluded that the pollution exclusion in RAM's policies applied to preclude coverage and that RAM did not owe a duty to defend.**

The underlying claimants alleged damages resulting from the release of noxious and offensive odors and gases, including hydrogen sulfide. A.156-157 (Complaint, ¶¶ 7-10). The claims they alleged fall squarely within the ambit of RAM's pollution exclusion, which expressly references "vapors . . . fumes . . . gases, toxic chemicals, waste materials, or other irritants, contaminants or pollutants." The underlying claims all arose from the release of odor into the atmosphere from Wakefield Pork's pigs. Wakefield Pork's manager conceded that one could assume that "some people might believe that smells from hog manure could be considered a pollutant." R.A.47 (10/20/2005 Langhorst Dep., p. 85).

James E. Sullivan of the Minnesota Pollution Control Agency characterized feedlot odor as follows:

Air emissions from feedlots are a diverse group of *gases* and particles. Often times these emissions are referred to as '*odor*,' however, the emissions contain many specific constituents, such as *hydrogen sulfide*, *ammonia*, and *methane*. Researchers have indicated that the chemistry of feedlot odor may contain 168 separate chemical substances. At least four sources of feedlot air emissions have been identified. One source of emissions is the animal itself that is in part dependent on diet and metabolism. Another source is the animal housing unit or barn that is closely related to the first emission source. The third emission source identified is the *animal waste* storage system and lastly, the land application of animal waste. The emissions from the animal waste storage system are a result of the natural biological and bacterial activities that occur within the animal waste.

R.A.24 (7/20/1999 James E. Sullivan letter) (emphasis added). The MPCA employed Sullivan in its air quality and feedlot compliance program. R.A.27 (3/1/2002 Sullivan Dep., p. 17). He was continuously involved in dealing with the Wendingers' ambient air<sup>3</sup> complaints from the public enforcement perspective. He testified in the *Wendinger* case on the subjects of manure, gas, and odor.

Hydrogen sulfide is a gas. R.A.28 (Sullivan Dep., p. 22). An odor plume has a number of chemicals involved. *Id.* Odor involves a chemical stream involving gases and particulate matter. R.A.29 (Sullivan Dep., p. 126). Odor is a gas as well as a particulate. R.A.30 (Sullivan Dep., p. 132). There are literally hundreds of volatile compounds in hog manure. R.A.32 (Sullivan Dep., p. 156). Hog manure includes both volatile gases

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<sup>3</sup> Ambient air is air beyond the property line of the emitting source and may be thought of as "public air" in that any person may breathe it. R.A. 131 (AQ&O Scoping Document, p. 131; Jensen Aff., Ex. J)

and reactive gases. R.A.33 (Sullivan Dep., p. 157). The MPCA focuses on hydrogen sulfide in evaluating manure gases because that is the only gas the Agency has sensory standards for. *Id.* (Sullivan Dep., pp. 157-58). Livestock operations in general have odor. R.A.34 (Sullivan Dep., p. 219). Manure contains a number of chemicals and at the present time, the state tests only for hydrogen sulfide – a gas that is used as a surrogate for odor. R.A.35 (Sullivan Dep., p. 230).<sup>4</sup>

Given these undisputed facts, the district court did not err in finding that the pollution exclusion applied to the Wendingers' claims that arose from the odor from the manure from Wakefield Pork's pigs.

The Wendingers' suit against Wakefield Pork involved allegations of a "discharge." It involved a "dispersal." It involved a "release." It involved an "escape." It involved "fumes." It involved "alkalis." It involved "toxic chemicals." It involved

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<sup>4</sup> Studies that the Minnesota Environmental Quality Board undertook note that:

Animal agriculture is a source of numerous airborne *contaminants*, including *gases, odor*, dust, and microbes that are produced or emitted inside or near animal production facilities and when manure is land-applied. Numerous gaseous compounds and living organisms are generated from livestock and poultry manure decomposition shortly after it is produced or during storage. *For a comprehensive listing of 168 chemicals detected in livestock wastes for which odor thresholds have been established, the reader may consult Table 5 of the Scoping Document Summary, beginning on page H-28.*

R.A.61 (MEQB Air Quality & Odor Scoping Document ("AQ&O Scoping Document") p. 130; Jensen Aff., Ex. J) (emphasis added). The MEQB further notes that air pollutants from manure include hydrogen sulfide, ammonia, odorous compounds, fungi, particulates, and endotoxins. *Id.*

“liquids.” It involved “gases.” It involved “waste materials.”<sup>5</sup> It involved “other irritants, contaminants or pollutants.” Moreover, these things occurred “into or upon the [Wendingers’] land.” They also allegedly occurred “into . . . the atmosphere.”

Pollution exclusions have been broadly read. *See League of Minnesota Cities Insurance Trust v. City of Coon Rapids*, 446 N.W.2d 419, 421 (Minn. Ct. App. 1989). A non-technical, plain-meaning approach to interpreting a pollution exclusion is proper. *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779 (Minn. Ct. App. 1999). The phrase “other irritants, contaminants, or pollutants” ought to be construed in conformity with the English language. *See Board of Regents of Univ. of Minn. v. Royal Ins. Co.*, 517 N.W.2d 888, 892 (Minn. 1994). There is thus no legal requirement that chemicals must be hazardous for the pollution exclusion to apply; a mere irritant is enough. *Kruger Commodities, Inc. v. United States Fidelity & Guaranty*, 923 F. Supp. 1474, 1479 (M.D. Ala. 1996) (noting that the plain meaning of the exclusion is that a reasonable person would understand it includes odors produced by a plant processing animal carcasses). An “ordinary meaning” test to evaluate a pollution exclusion should apply. *Auto-Owners Ins.*, 588 N.W.2d at 779.<sup>6</sup>

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<sup>5</sup> Liquid manure is a “waste material” whether or not it can also be a “valuable fertilizer.” *Norks v. American Family Mut. Ins. Co.*, 202 Wis. 2d 648, 551 N.W.2d 62, 1996 WL 234384, p. 4, n. 2 (Wis. App.) (unpublished).

<sup>6</sup> *Auto-Owners Ins.* addressed whether a pollution exclusion precluded coverage for underlying bodily injury claims arising out of the ingestion and absorption of lead from the paint at a rental property. *Id.*, 588 N.W.2d at 778. This Court affirmed a district court’s conclusion that no coverage existed. *Id.* After first concluding that lead in paint is a pollutant, *id.* at 780-81, this Court concluded that the underlying allegations of bodily injury “resulted from” the discharge, dispersal, or release of the lead in the paint. *Id.* at 781.

The term “atmosphere” refers to the ambient air, such that the pollution exclusion applies to property damage arising from the discharge of pollution into the external environment. *Board of Regents*, 517 N.W.2d at 893. “Discharge, dispersal, release or escape” of pollutants means issuance from the state of confinement. *SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 588, 598 (Minn. App. 1994), *aff’d in part, rev’d in part*, 536 N.W.2d 305 (Minn. 1995). The terms “discharge,” “dispersal,” “release,” and “escape,” are not given a meaning limited to “terms of art” in environmental law, but instead are given their plain meaning. *See Auto-Owners Ins.*, 588 N.W.2d at 779; *League of Minnesota Cities Insurance Trust*, 446 N.W.2d at 422 (applying pollution exclusion to exclude coverage for release of nitrogen dioxide from a Zamboni machine in an ice arena).

Hog manure and its constituents include most of the descriptive terms itemized in RAM’s “pollution” exclusion. R.A.139-141 (Frencl Aff., ¶¶ 5, 8-12). They all were released into the atmosphere and adversely affected the Wendingers. RAM therefore was not obligated to defend the underlying case.

The Iowa Supreme Court considered one of the same questions presented here and held that a pollution exclusion bars coverage for claims asserting damages arising from the odor of hog manure. In *Weber v. IMT Insurance Co.*, 462 N.W.2d 283 (Iowa 1990), the defendant farmer raised crops and hogs. He used hog manure to fertilize his crops. He hauled the manure to his fields with a manure spreader on a road that passed by a neighboring farmer’s property. During transport some of the manure fell onto the road. The neighboring farmer sued alleging that the odor from the manure contaminated his

sweet corn crop to the point it was unmarketable and also interfered with the enjoyment of his property. *Id.* at 284. Defendant tendered the suit to his liability insurer. The insurer declined to defend based upon, *inter alia*, a pollution exclusion. The exclusion barred coverage for liability:

arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, or gases, waste materials or other irritants, contaminants or pollutants.

*Id.* at 285. This exclusion is in all material respects identical to the exclusions in RAM's policies. The Iowa Supreme Court held that the pollution exclusion applied because hog manure is "waste material." While the policy did not define "waste material," the *Weber* court stated:

We believe that the ordinary meaning of waste material encompasses the hog manure that was spilled on the road in this case, and, we believe that waste material is not ambiguous as it applies in this case.

*Id.* at 286. This common sense, obvious conclusion from the highest court in a state well-acquainted with hog manure and its effects should no doubt be persuasive to the courts of this state.

In similar contexts, pollution exclusions have barred coverage for claims involving allegations of harm arising from gases and odors. In *City of Bremerton v. Harbor Insurance Co.*, 92 Wash. App. 17, 963 P.2d 194 (1998), an association of homeowners sued the city alleging damages due to the emission of noxious fumes, "foul and obnoxious odors and toxic gases." *Id.*, 963 P.2d at 197. The city's liability policy contained an exclusion for "liability arising out of the . . . discharge, dispersal, release or escape of pollutants . . ." The exclusion defined "pollutants" as "all irritants and

contaminants including but not limited to smoke, vapors, soot, fumes, acids, alkalis, chemicals, solids, liquids or gases and thermal pollutants”. *Id.*, 963 P.2d at 195. In holding that this exclusion barred coverage, the court reasoned that the exclusion’s language specifically mentions “fumes” and “gases,” and that these are non-exclusive types of pollutants. *Id.*, 963 P.2d at 197. The court then observed that the list of examples in the definition of “pollutant”:

is illustrative and not exhaustive and odors are effectively excluded as well. A reasonable person reviewing this language would expect that ‘noxious and toxic fumes’ and ‘foul and toxic odors and gases’ are ‘pollutants’ within the meaning of the pollution exclusion.

*Id.* The exclusions in *City of Bremerton* and in this case are identical in two important respects: all of the examples of “pollutants” in the *City of Bremerton* exclusion are found in RAM’s exclusion, and in both cases the list is not exhaustive.

In addition, a pollution exclusion has been found to bar coverage for claims arising from odors emanating from a compost facility. In *City of Spokane v. United National Ins. Co.*, 190 F.Supp.2d 1209 (E.D. Wash. 2002) the court held that claims arising from a compost facility’s odors were barred by a pollution exclusion that defined pollutants and excluded coverage for “‘smoke, vapors, . . . fumes, acids, . . . gases, . . . and all other irritants and contaminants including waste.’” *Id.* at 1219. The court reasoned that although the exclusion did not expressly list “odors” in this definition, in fact the term “odors” was included in that definition by practical construction. *Id.*<sup>7</sup>

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<sup>7</sup> Pollution exclusions in other liability policies have also been held to bar coverage for damage resulting from the odor of fuel oil, *State Farm Fire & Casualty Co. v. Acuity*, 695 N.W.2d 883 (Wis. App. 2005), from fumes from a chemical sealant applied to a deck,

Wakefield Pork's brief engaged in an extensive discussion of *Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888 (Minn. 1994). The distinction Wakefield Pork seeks to draw from *Board of Regents* regarding a release into the atmosphere versus a release into the air inside a building, however, does not exist.

*Board of Regents* addressed whether pollution exclusions excluded coverage for asbestos claims. The underlying claims were asserted against a manufacturer of asbestos-containing fireproofing material, and sought damages for the cost of removing the asbestos from the buildings. They alleged that asbestos fibers in those materials were released from the fireproofing materials that were installed inside a building. *Board of Regents* did not address a situation where contaminants were released "into the atmosphere" from neighboring land and then contaminated or polluted air inside a building. Instead, it dealt with a case where the contaminant asbestos fibers always were inside buildings and were released solely into the air inside the buildings.

Here, the odor from the manure was released directly – in the specific words of RAM's pollution exclusion – "into or upon . . . the atmosphere." Any injury or damage claims "arising out of the" discharge or release of that odor into or upon the atmosphere

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*Quadrant Corporation v. American States Ins. Co.*, 110 P.3d 733 (Wash. 2004), from fumes from a fire-and-odor eliminator sprayed inside an airplane, *Zaiontz v. Trinity Universal Life Ins. Co.*, 87 S.W.3d 565 (Tex. App. 2002), from emission of dust from the manufacture of cement, *South Dakota State Cement Plant Commission v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397, 406 (S.D. 2000), from fumes from a rendering plant, *Kruger Commodities Inc. v. U.S. Fidelity and Guaranty*, 923 F. Supp. 1474 (M.D. Ala. 1996), and fumes from the manufacture of fiberglass bathtubs, *Hydro Systems, Inc. v. Continental Ins. Co.*, 929 F.2d 472, 474 (9th Cir. 1991).

is excluded. The underlying injury or damage claims all arose from the discharge or release from the odor from the manure into the atmosphere.

While the Wendingers alleged that noxious odors and gases released from Wakefield Pork's pigs entered inside the Wendingers' house, this allegation does not change the plain meaning of RAM's pollution exclusion. All of the Wendingers' claims alleged damage or injury that arose from the release of the odor into the atmosphere from Wakefield Pork's pigs. Accordingly, the district court correctly granted judgment to RAM and found that it did not breach any duty to defend Wakefield Pork.

**III. RAM's incidental liability provisions do not apply and there is no coverage for the underlying claims under these provisions**

The district court correctly rejected Wakefield Pork's attempt to claim coverage where it did not exist, concluding that two incidental coverage provisions in RAM's policies did not apply to the underlying claims. A.366-67. Specifically, the incidental coverage for "Accidental Spillage of Agricultural Chemicals," Exclusion 12, does not create a duty to defend. Similarly, the incidental coverage for "Damage to Property of Others," does not create a duty to defend.

**A. There was no accidental spillage of agricultural chemicals.**

The district court correctly rejected Wakefield Pork's coverage argument as to RAM's incidental liability coverage for accidental spills of agricultural chemicals. Endorsement CF125 to RAM's FCPL policy provides incidental coverage for accidental spills of agricultural chemicals as follows:

When the insured is liable, we pay for bodily injury or property damage or the cost of 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 loss, subject to annual aggregate, used or intended for use in usual farming or agricultural operations when the discharge, dispersal, release or escape is both sudden or abrupt and accidental or unexpected.”

R.A.137 (CF125 Endorsement; Jensen Aff., Ex. S) (original emphasis). The endorsement includes this definition of “[a]gricultural 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 and related nitrogen from a natural or animal source including organic materials.

*Id.*

Wakefield Pork incorrectly contends that hog manure constitutes an “agricultural chemical” that was suddenly and accidentally released, and that therefore this coverage applies. This argument fails for several reasons.

First, the manure that Wakefield Pork’s pigs generated is not an “agricultural chemical” as defined in RAM’s policy. The policy specifically excludes “nitrate and related nitrogen from a natural or animal source including organic materials” from the definition of “agricultural chemical.” Although fertilizers are included in the definition of “agricultural chemical,” any argument that the manure at issue in this case fits within that description must be rejected given the explicit exclusion of nitrate and related nitrogen from a natural or animal source – manure. Significantly, Wakefield Pork’s own management does not consider hog manure to be an agricultural chemical. R.A.48 (Langhorst dep., p. 89). Given the enormous amount of manure applied to farm fields in Minnesota, and the concomitant risk of nitrate releases into groundwater, RAM is well

within its rights to limit its incidental liability coverage to accidental spills of commercial fertilizers only.

Second, and more importantly, the odors from the manure Wakefield Pork's pigs generated, was not the result of a sudden and accidental spillage. There is no coverage because there is no evidence the releases the Wendingers alleged were "sudden or abrupt and accidental or unexpected" as RAM's policies require. See *O'Brien Energy Systems, Inc. v. American Employers' Ins. Co.*, 427 Pa.Super. 456, 629 A.2d 957, 962 (1993) (pollution exclusion barred coverage; basis for the underlying litigation was gradual discharge of methane gas over time, which was not a "sudden and accidental" discharge). Wakefield Pork conceded that the process of dealing with the manure generated from thousands of its pigs did not involve a sudden or abrupt event. R.A.48 (Langhorst Dep., pp. 89-90). Wakefield Pork has the burden of proof to show that this coverage applied. See *Boedigheimer v. Taylor*, 287 Minn. 323, 178 N.W.2d 610, 614 (1970). Wakefield Pork failed to show that the odor released from its pigs' manure was both sudden, meaning abrupt and lasting only a short time, as well as accidental, meaning unexpected. *Anderson v. Minnesota Ins. Guar. Ass'n*, 534 N.W.2d 706, 709 (Minn. 1995) (policy with a pollution exclusion affords no coverage for a waste disposal site that over time gradually pollutes an area); *Westling Mfg. Co. v. Western Nat. Mut. Ins. Co.*, 581 N.W.2d 39 (Minn. Ct. App. 1998); see also *Board of Regents*, 517 N.W.2d at 892. Accordingly, no defense obligation was triggered under the "agricultural chemicals" incidental coverage.

**B. There is no coverage for “damage to property of others.”**

Regarding Wakefield Pork’s argument regarding “damage to property of others,” this Court should reject it as unsupported by any legal authority. *See* Minn. R. Civ. App. P. 128.02; *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (declining to address issue unsupported by legal analysis).

Even assuming this Court considers Wakefield Pork’s “damage to property of others” argument, there is no coverage under this policy provision.

RAM’s FCPL policy sets forth various incidental liability coverages that are designated as Coverage “N.” They appear on pages 3-5 of the FCPL policy form.<sup>8</sup> R.A. 125-127, Incidental coverage 1 provides in relevant part<sup>9</sup> as follows:

Damage to Property of Others. Regardless of an insured’s liability, we pay for property of others damaged by an insured, or we repair or replace that 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.

R.A. 125 (FCPL, p. 3). The underlying claims did not trigger this coverage.

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<sup>8</sup> Pages 3 to 5 include ten of the incidental coverages; the 11<sup>th</sup> is added by way of the Liability Amendatory Endorsement bearing form number “CF125.” R.A. 137.

<sup>9</sup> The specific exclusions applicable to “damage to property of others” coverage are not relevant and thus are not quoted.

First, the purpose of this coverage is obvious from its terms. RAM covers claims involving modest sums of money (no more than \$500) regardless of fault when an insured damages property of others. The coverage is limited to “damage to property.” RAM will either pay the damaged property’s value or it will repair or replace the damaged property, similar to property insurance. This incidental coverage, however, does not include “Property Damage” as defined by the policy to include “loss of use of tangible property that is not physically injured.” R.A. 124 (FCPL, p. 2). This broad definition of Property Damage including “loss of use” of property “not physically injured” prevents RAM from arguing that the Wendinger claim is outside coverage under the personal liability coverage (Coverage “L”) because the Wendingers alleged loss of use. A.157-158 (Complaint ¶¶ 13, 21).

Nothing in the underlying complaint, however, alleged damage to the Wendingers’ property. The Wendingers did not sue Wakefield Pork seeking payment for property that Wakefield Pork damaged, nor did the Wendingers ask that Wakefield Pork “repair or replace” the Wendingers’ property. Instead they complained of odors on their property that caused a loss of use and reduced the market value of their home. A.157 (Complaint, ¶¶ 13, 15). That is not “damage” to property. *See Tschimperle v. Aetna Cas. & Surety Co.*, 529 N.W.2d 421, 425 (Minn. Ct. App. 1995) (loss of value, or similar economic losses, are not considered damage to property).

Second, the incidental coverage for “damage to property of others” is subject to RAM’s “pollution” exclusion. The coverage provides that “[t]he exclusions that apply to Coverages “L” and “M” do not apply to this coverage.” R.A. 125 (FCPL, p. 3) The

Coverage “L” and Coverage “M” exclusions appear at page 11 of the FCPL. These “Specific Exclusions” include “exclusions that apply only to coverage ‘L’” and “exclusions that apply only to coverage ‘M.’” These specific exclusions therefore do not apply to the “damage to property” coverage.

However, the “General Exclusions” set forth on page 10 of the FCPL, R.A. 132, expressly do apply to the “Incidental Coverages (Coverage ‘N’).” Therefore, General Exclusion 12, the “pollution” exclusion, plainly applies to the incidental “damage to property of others” coverage. Even assuming there was an allegation of damage to property of others, it arose from the discharge, dispersal, release or escape of fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into the atmosphere, and therefore is expressly excluded from coverage.<sup>10</sup>

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<sup>10</sup> Wakefield Pork incorrectly argues that no exclusions apply to the “damage to property of others” coverage. Wakefield Pork argues that none of the General Exclusions set forth in the FCPL policy apply because the General Exclusions do apply to the liability coverage (Coverage “L”). As noted above, a plain reading of the policy itemizes the Specific Exclusions that apply to Coverage “L” and to Coverage “M.” The General Exclusions, on their face, apply to Coverage “N.” This is shown by the first sentence of the Incidental Liability Coverage, “[t]hese coverages are subject to all the terms of Coverages ‘L’ and ‘M.’” “Terms” is defined in the policy at page 2 of the FCPL to mean “all . . . exclusions” in the policy.” This is also clear from endorsement CF125 which states that “[t]he following exclusions that apply to *Coverage ‘L’*, *Coverage ‘M’* and *Coverage ‘N’* are deleted” [the “pollution” exclusion and another] and the endorsement then continues that “[t]he above exclusions are *replaced* by the following exclusions [the revised “pollution” exclusion and another].” (emphasis added). The policy and endorsement make clear that the General Exclusions apply to the Incidental Liability Coverages. If Wakefield Pork’s argument is to be believed, damage to property caused by war battles, drag racing, professional services, nuclear catastrophes, punitive damages, and damage to property occurring from illegal drug sales are supposedly covered.

**IV. The district court correctly concluded that the underlying allegations were not an “occurrence” under RAM’s policies and that RAM therefore did not owe a duty to defend.**

The underlying allegations asserted against Wakefield Pork did not constitute an “occurrence” under the terms of RAM’s policies.

RAM’s policy defines “occurrence” to mean:

An accident which is neither expected nor intended, including continuous or repeated exposure to substantially similar conditions.

R.A. 124 (FCPL, p. 2). No “occurrence” exists with respect to the allegations asserted against Wakefield Pork because the resulting gas emissions and odors from a CAFO housing thousands of pigs are not unexpected or unintended accidents. To the contrary, they are a certainty. The evidence is undisputed that a hog confinement facility and manure lagoon will cause the release of gases and concomitant odors that affect others. Nobody, except perhaps those engaged in such endeavors, is neutral about hog manure.

Wakefield Pork’s management grudgingly conceded these obvious points. Hog manure includes nitrogen, potassium and phosphorous. R.A.43 (10/20/2005 Langhorst Dep., p. 28). A hog facility has “a smell to it.” R.A.41, 43 (Langhorst Dep., pp. 20, 27). News articles report that “some people have an adverse reaction to the smell of hog manure.” R.A.41 (Langhorst Dep., p. 21). Wakefield Pork’s secretary treasurer and owner commented:

I mean, I think everybody agrees that – that a hog site – I mean it’s going to smell. I live on a hog site. I mean there’s some odor outside a hog barn.

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Insurance policies are not to be read to advance absurd results. *North Star Mut. Ins. Co. v. Johnson*, 352 N.W.2d 791 (Minn. Ct. App. 1984).

R.A.52-53 (4/15/2002 Langhorst Dep., pp. 7, 87-88). It would be a “very, very rare” facility that would not have a detectable odor when you drove up to it. *Id.* (Langhorst Dep., p. 88).

The manure lagoon for Wakefield Pork’s pigs contained 1½ million gallons of hog manure. R.A.55 (4-9-2002 Jerome Forst Dep., p. 24). The Forsts “definitely” smelled hog odor at their facility. R.A.57 (4-13-2002 Jerome Forst Dep., p. 148). A power ventilation system draws barn air out of the Forst facility releasing it into the atmosphere. R.A.58 (Jerome Forst Dep., pp. 150-152). Forst knew that technology existed to “cut gases and air emissions from open hog lagoons.” R.A.59 (Jerome Forst Dep., p. 223).<sup>11</sup>

Given these undisputed facts, Wakefield Pork incorrectly accuses the district court of numerous failings. *See* Wakefield Pork’s Brief at 19-20. The district court simply noted the undisputed and common-sense understanding: odors are released from a 1.6 acre open manure lagoon holding over a million gallons of liquefied manure. There is nothing nefarious about stating the obvious: odors are expected and routinely released from a manure lagoon – there is nothing accidental about the odors released from Wakefield Pork’s pigs and about which the Wendingers complained.

The expected and intended odors and waste resulting from the raising of hundreds or thousands of pigs in a CAFO necessarily explains in part the various local, state, and federal efforts that attempt to regulate the operation of such facilities. *See, e.g.* Minn.

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<sup>11</sup> The Minnesota Pollution Control Agency agrees that hydrogen sulfide, at the Forst property, is a “gas.” R.A.70 (10/13/200 Sullivan letter).

Stat. § 116.07; Minn. Rules Ch. 7009; Minn. Rules Ch. 7020. Wakefield Pork's supporting amici recognize the extensive regulatory efforts various levels of government undertake to address air quality issues resulting from the operation of CAFOs.

An "occurrence" requires two conditions: (1) an accident, that (2) is neither expected nor intended by the insured. *Franklin v. Western Nat. Mut. Ins. Co.*, 574 N.W.2d 405, 408 (Minn. 1998).<sup>12</sup> If either of the conditions is not met, there is no occurrence and no duty to defend. *Sage Co. v. Insurance Co. of North America*, 480 N.W.2d 695, 698 (Minn. Ct. App. 1992). An "accident" is simply a happening that is unexpected and unintended. *Nygaard v. State Farm Ins. Co.*, 591 N.W.2d 738, 741 (Minn. Ct. App. 1999). A conscious decision to act with respect to property does not constitute an unexpected or unintended event that satisfies the definition of "occurrence." *In re Liquidation of Excalibur Ins. Co.*, 519 N.W.2d 494, 497 (Minn. Ct. App. 1994). If no damage of any sort is intended, but where the insured has knowledge that a high expectation of damage may occur, an occurrence is not involved. *Farmers Union Oil Co. v. Mut. Service Ins. Co.*, 422 N.W.2d 530, 533 (Minn. Ct. App. 1988).

Where an insured makes intentional decisions in the course of its business that result in "a highly predictable outcome," no occurrence exists. *Franklin*, 574 N.W.2d at 408. For example, a conscious decision to dump pollutants into a water body is the antithesis of an accident. *City of Maple Lake v. American States Ins. Co.*, 509 N.W.2d 399, 405 (Minn. Ct. App. 1993). The test of what a policyholder expected is an objective

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<sup>12</sup> The *Franklin* case found three occurrence preconditions that included bodily injury or property damage.

– not a subjective – standard. *Dakhue Landfill, Inc. v. Employers Ins. of Wausau*, 508 N.W.2d 798, 804 (Minn. Ct. App. 1993) (noting that the policyholder expected the release of leachate from a landfill by applying an objective standard of what a reasonable insured should have known).

Here, Wakefield Pork made a conscious business decision to house thousands of its pigs in a CAFO, whose manure would be stored in a lagoon. That decision, with the expected resulting odors, is not an “occurrence” as defined in RAM’s policy.

Wakefield Pork claims that an “occurrence” exists because no proof exists that it intended to cause harm to the Wendingers and relies upon the Minnesota Supreme Court’s decision in *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001). This argument, however, is misplaced because RAM’s policies include a specific definition of “occurrence” that *Walser* did not address.

In *Walser*, a student was injured after fellow students pulled on his ankles while he was hanging from a basketball hoop. When the student’s strength gave out and his grip gave way, he sustained injuries when he struck the gymnasium floor. American Family’s insured was one of the students pulling, and he tendered defense of the subsequent personal injury lawsuit to American Family. In the declaratory judgment action, the district court found that American Family’s insured did not intend to injure the student and, therefore, there was no occurrence because there was no accident. The Court of Appeals reversed, and the Minnesota Supreme Court accepted review.

Importantly, the American Family policy defined “occurrence” to mean “an accident, including continuance or repeated exposure to substantially the same general

harmful conditions.” Based upon this definition, incorporating the term “accident,” the Supreme Court applied the definition of accident set forth in *Hauenstein v. St. Paul-Mercury Indemnity Co.*, 242 Minn. 354, 65 N.W.2d 122, 126 (1954). In that case, the policy did not contain a definition of accident, so the *Hauenstein* court defined it as “an unexpected, unforeseen, or undersigned happening *or consequence . . .*” *Id.* (emphasis added) Because this definition included the term “consequence,” *Hauenstein* could be read to say that intended conduct resulting in an unintended consequence would still constitute an occurrence under the policy. In *Walser*, there was no evidence that the students intended to cause the specific injury the student suffered when he was pulled to the floor. Therefore, in reliance upon the term “consequence,” the *Walser* court held – adopting the *Hauenstein* definition of accident – an occurrence existed because the students did not intend the specific injury that the other student suffered.

In reaching this conclusion, *Walser* specifically noted that the *Hauenstein* definition applied because American Family’s policy did not define “accident.” In doing so, however, *Walser* distinguished precedent from cases that provided their “own definition of accident.” *Walser*, 628 N.W.2d at 610 (citing *Bituminous Casualty Corp. v. Bartlett*, 307 Minn. 72, 240 N.W.2d 310 (1976), *overruled on other grounds*, *Prahm v. Rupp Construction Co.*, 277 N.W.2d 389 (Minn. 1979)).

In *Bartlett*, the insured masonry construction contractor sought coverage even though it intentionally constructed a masonry wall in an unworkmanlike manner. The insurer denied a duty to defend. The evidence was that the insured installed chipped bricks that were a “patent and obvious condition which is easily noticeable by the person

who installs them.” *Bartlett*, 240 N.W.2d at 314. Similarly, the insured knew that he had installed a wall out of plumb. In evaluating whether an occurrence existed, the *Bartlett* policy defined occurrence as “an accident, including injurious exposure to conditions, which results . . . in . . . property damage, neither expected nor intended from the standpoint of the insured.” *Id.* at 312.

Based upon this definition, the Supreme Court noted:

For the purposes of this case, then, an occurrence requires: (1) an accident; (2) resulting in property damage; [that is] (3) neither expected nor intended by the insured contractor.

*Id.* The Supreme Court then held that the installation of chipped bricks and out-of-plumb walls caused property damage that “was expected from the standpoint of the insured.” *Id.* at 313. “Therefore, any damage from [the defects] should have been expected by [the insured].” *Id.* The Supreme Court found that the insurer was “not obligated to defend its insured.” *Id.* at 314.

As noted above, RAM’s definition of occurrence tracks on all fours with the *Bartlett* definition. An occurrence requires an accident that is neither expected nor intended by the insured.<sup>13</sup> Therefore, the *Hauenstein/Walser* expansion of the scope of an occurrence – that intended conduct resulting in unintended harm nevertheless remains an occurrence – has no application here because RAM’s policy defines occurrence in a manner unlike the *Hauenstein/Walser* policies.

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<sup>13</sup> The only difference is that the *Bartlett* policy included “property damage” within the definition of occurrence, whereas in RAM’s policy, “property damage” is dealt with in the general insuring agreement of coverage “L.”

So, is Wakefield Pork's decision to raise thousands of its pigs at a CAFO, including a liquid manure lagoon, an occurrence? No. Production of hog manure gas and odor that would be released into the atmosphere was expected. Wakefield Pork's business relationship with Forst was not an accident. The decision to raise and house thousands of pigs in a CAFO was designed. The resulting transfer of hog gases and odors into the atmosphere was not unexpected or unintended. Accordingly, the district court did not err in concluding that no "occurrence," as defined in RAM's policies, existed.

**V. There is no coverage and no duty to defend the underlying allegations given the terms of RAM's intentional act exclusion.**

The district court erred in concluding that a fact issue existed regarding RAM's intentional acts exclusion. General Exclusion 18 of RAM's policy provides that it does not apply to liability that results directly or indirectly from:

18. 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 . . .

R.A.133 (FCPL, p. 11). For reasons similar to those discussed in RAM's argument regarding an "occurrence," this exclusion bars Wakefield Pork's claim for coverage. *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), also speaks to this issue. American Family argued in *Walser* that its intentional act exclusion precluded coverage. In *Walser*, American Family's "intentional injury" exclusion precluded coverage in these circumstances:

We will not pay for damages due to bodily injury or property damage expected or intended from the standpoint of the insured.

*Id.* at 609. The insurer argued that the students who pulled the victim off the basketball hoop intended their conduct and, thus, the exclusion precluded coverage. *Walser* ultimately concluded that the intentional injury exclusion did not apply absent evidence that the insured had a specific intent to cause injury at the time he acted.<sup>14</sup> In evaluating this issue, however, *Walser* acknowledged that it did “not conclude or suggest that the scope of coverage for accidents will always coincide with the scope of an exclusion for intentional acts.” *Id.* at 612. Indeed, *Walser* noted that if there is a difference in the extent to which wrongful conduct may warrant different insuring treatment, “it makes more sense to address it in the context of an intentional act exclusion.” *Id.* at 611.

Minnesota law is clear that an insurance policy should not be distorted from its natural meaning, nor should it be enlarged so that a new contract is imposed. *Benson v. Continental Cas. Co.*, 275 Minn. 544, 146 N.W.2d 358, 364 (1966). Stated another way, courts may not rewrite insurance contracts. *Donarski v. Lardy*, 251 Minn. 358, 88 N.W.2d 7, 10 (1958). In the absence of any legal prohibition or restriction – statutory or otherwise – parties are free to contract as to insurance as they see fit. *Krueger v. State Farm Fire & Cas. Co.*, 510 N.W.2d 204, 209 (Minn. Ct. App. 1993).

RAM’s General Exclusion 18 does not tie intended conduct to an injury or property damage as did the exclusions in *Walser* and *R.W.* In fact, quite to the contrary, General Exclusion 18 excludes coverage for liability arising out of “any act intended by

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<sup>14</sup> In reaching this conclusion, the Supreme Court relied upon *R.W. v. T.F.*, 528 N.W.2d 869, 872 (Minn. 1995) where the policy at issue was similar to American Family’s in that it excluded coverage “for injury ‘caused intentionally’ by the insured.”

an insured” whether or not the injury or damage “was intended.” R.A. 133. This provision is not contrary to the statutory law of Minnesota, nor to decisions such as *Walser* and others that construed intentional act exclusions that tie the complained of conduct to the injury or damage. Given that Wakefield Pork intended to place thousands of its pigs in a CAFO and expected gases and odors to result, General Exclusion 18 bars the claim to coverage.

Wakefield Pork knew and intended that its thousands of pigs would be raised in a CAFO, which would create manure that was stored and processed in a 1.6 acre lagoon. Wakefield Pork is not a “mom-and-pop” unsophisticated enterprise. In 1995 it had arrangements with over twenty hog producers at various locations. *See* A.338-39. Although Wakefield Pork’s manager repeatedly denied that he ever expected anyone to complain about odor arising from hog manure, R.A.46 (Langhorst Dep., p. 69), no *genuine* issue of material fact necessitating a trial is required to test the legitimacy of this denial. Ultimately in the deposition even the manager acknowledged that it is “possible” “that some human beings out there might believe that hog manure had a bad smell.” *Id.* (Langhorst Dep., p. 71) In evaluating whether a policyholder expected or intended any release of a pollutant an objective standard is used as to what a reasonable insured should have known. *Dakhue Landfill*, 508 N.W.2d at 804. Accordingly, RAM’s intended act exclusion precluded a defense obligation.

**VI. Coverage does not automatically exist given that the operation of a confined-animal feeding operation is lawful and heavily regulated.**

Both Wakefield Pork and its supporting amici essentially contend that because the operation of a CAFO is lawful, coverage must exist. Wakefield Pork's supporting amici also suggest that coverage must naturally exist because livestock producers comply with numerous governmental regulations. Wakefield Pork's supporting amici notes the economic impact from Minnesota's livestock industry. They also assert a parade of horrors.

These arguments are misplaced because whether an insurer and insured have agreed to coverage depends on the terms of the insurance policy itself. Coverage turns on what the policy provides, and not on whether a particular activity is characterized as lawful. *Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 77 (Minn. Ct. App. 1997); *see also RLI Ins. Co. v. Heling*, 520 N.W.2d 849, 851 (N.D. 1994) (noting that insurance companies are free to decide what risks to undertake and what risks to reject while parties are free to decide what insurance coverage they want and will pay for). Insurers and insureds are both entitled to agree upon the risk that will be insured.

This Court already considered and rejected the argument that legal conduct is entitled to special protection. In *Wendinger* this Court rejected the notion that a statutory affirmative defense existed for "generally accepted agricultural practices." *Id.* at 553. It went on to note that a finding of negligence is not precluded just because an agricultural operator complies with generally accepted agricultural practices. *Id.* at 555.

Footnote 9 in the brief of Wakefield Pork's supporting amici cryptically asserts that "the livestock industry can no longer rely on compliance with the already stringent framework in place at the federal, state, and local levels" for protection. This argument misses the point, for despite the "stringent" regulations in place, Wakefield Pork and the rest of Minnesota's livestock industry could never rely on such protection from a possible nuisance action. *See Fish v. Hanna Coal & Ore Corp.*, 164 F.Supp. 870 (D. Minn. 1958); Minn. Stat. § 561.01. This is evidenced by the underlying nuisance lawsuit itself, which continued to a jury verdict even though operating a CAFO is lawful.

Wakefield Pork's supporting amici assert that it is "axiomatic" that regulated businesses complying with governmental regulations "will not, as a matter of law, allow the dispersal, discharge, release, or escape of irritants, contaminants, or pollutants." Amici Brief at 14. There is nothing axiomatic about this unsupported assertion. Indeed, if only that Utopian wish were true, there would be no need for the coverage that Wakefield Pork seeks.

In any event, as discussed above, there is no coverage for the alleged release of the odor from the manure of Wakefield Pork's pigs.

**VII. Wakefield Pork's request for attorney fees should be remanded to allow the district court to resolve the dispute that exists concerning the amount claimed for underlying defense costs.**

Wakefield Pork's attempt to obtain a summary determination from this Court regarding the attorney fee dispute should be rejected. The district court did not reach the attorney fee dispute, and thus has not determined what reasonable fees might be recovered in the underlying matter or in this declaratory judgment action. If this Court

finds that RAM owed and breached its duty to defend, it should remand to the district court to allow for it to perform its proper role in the first instance to examine and resolve any disputes over the claimed fees.

Regarding fees claimed for prosecuting this declaratory judgment action, no evidence regarding the amount of those claimed fees has been submitted. If Wakefield Pork succeeds, it will need to seek those fees at the district court. Thus, it makes sense for all fee issues to be resolved before the district court. As for the defense costs for the underlying case, RAM did challenge some of those fees as unrelated to the defense of the underlying matter, and did contend that Wakefield Pork is not entitled to recover from RAM some \$10,000 in fees that Wakefield Pork did not have to pay because of a “professional courtesy discount” its attorneys apparently gave it.

Because it is appropriate and makes sense for any fee issues to be resolved at the same time before the district court, and because a fact dispute remains to be resolved, this Court should reject Wakefield Pork’s request for a full award of all of its claimed fees and costs.

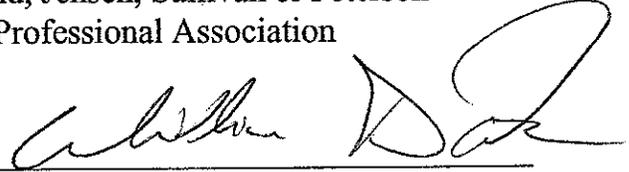
### **Conclusion**

This Court should affirm the district court’s decision that RAM owed no duty to defend Wakefield Pork. The underlying allegations arising from the odor from the manure that Wakefield Pork’s pigs generated are excluded from coverage under the applicable pollution exclusions. As well, the resulting odor from the thousands of pigs and the manure lagoon was not an unexpected accident, and thus was not an “occurrence.” Finally, because Wakefield Pork contracted to raise thousands of its pigs

at a confined-animal feeding operation, and knew that odors would result, the intentional act exclusion applies to preclude coverage for the underlying claims.

Dated: July 5, 2006

Lind, Jensen, Sullivan & Peterson  
A Professional Association

Handwritten signatures of Thomas D. Jensen and William L. Davidson.

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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).