

STATE OF MINNESOTA
IN COURT OF APPEALS

GERALD WENDINGER and
JULIE WENDINGER,

Appellants,

v.

JEROME, ALMA and JAMES
FORST; FORST FARMS, INC.;
and WAKEFIELD PORK, INC.,

Appellees.

**BRIEF AND APPENDIX
OF *AMICUS CURIAE*
LAND STEWARDSHIP
PROJECT**

Appellate Court File No.
CX-02-1603

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I. *AMICUS CURIAE*

The Land Stewardship Project (LSP) is a nonprofit membership organization founded in 1982 to foster an ethic of stewardship for farmland, to promote sustainable agriculture and to develop sustainable communities. LSP's membership is made up of farmers, as well as rural and urban residents. LSP has appeared as *amicus curiae* before the Minnesota Supreme Court in *Minnesota Ctr. for Env'tl. Advocacy v. Metropolitan Council*, 587 N.W.2d 838 (Minn. 1999). Farmers' Legal Action Group, Inc. (FLAG) is a non-profit, public interest law center dedicated to the preservation of family farms. For more than fifteen years, FLAG has provided legal services to thousands of family farmers in Minnesota and throughout the country in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural credit and farm program issues.¹

II. QUESTION

This *amicus* brief addresses only the question of whether the Forsts and Forst Farms, Inc. are agents of Wakefield Pork, Inc. Appellants moved for summary judgment on this issue. The trial court granted all of Respondents' motions for summary judgment, and therefore did not explicitly address Appellants' motion for summary judgment on the issue of liability of Wakefield Pork, Inc.

¹ This brief was not authored in whole or in part by counsel for either party to this appeal. No other person or entity made a monetary contribution to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

III. DISCUSSION

This case presents an issue of first impression in Minnesota: whether a corporate owner of livestock that enters into a contractual arrangement for raising its livestock should also be liable to third persons for any damages caused by that livestock. *Amicus* respectfully submits that, where the corporate livestock owner retains ownership of the livestock and controls or has the right to control nearly all aspects of raising the livestock, it should be subject to liability for damages caused by its livestock. This conclusion is supported by precedent from this jurisdiction and others, applying principles of agency. This conclusion is also correct as a policy matter. Certain duties are not delegable, the duty to refrain from creating a nuisance among them. *Amicus* respectfully submits that it is sound public policy to hold corporate livestock owners accountable for any damages caused by the livestock they own.

A. Application of Minnesota Law and Principles of Agency Compel the Conclusion that Wakefield Pork, Inc. Is Also Liable for Any Nuisance Violation

If the Forsts and Forst Farms, Inc. (collectively, “Forst Farms”) are found to be an agent of Wakefield Pork, Inc. (“Wakefield Pork”), then Wakefield Pork is also subject to liability. *See Meyers v. Tri-State Auto. Co.*, 121 Minn. 68, 140 N.W. 184 (Minn. 1913); Restatement (Second) of Agency § 140 (1957). The term “agency” refers to:

[T]he fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.

Jurek v. Thompson, 308 Minn. 191, 197, 241 N.W.2d 788, 791 (Minn. 1976), *quoting* Restatement (Second) of Agency § 1 (1957). In determining whether an agency

relationship exists, courts look to the course of dealings between the parties, rather than how the parties themselves characterize the relationship. *A. Gay Jenson Farms Co. v. Cargill*, 309 N.W.2d 285, 290 (Minn. 1981).

The primary factor that determines whether one party is the agent of another is the amount of control the principal may exercise over the other party. The principal need not exercise physical control over the agent. *Jurek*, 241 N.W.2d at 791-92 (“While strict right of physical control is not necessary, there must be at least some element of control and a fiduciary relationship before agency can be established.”); *see also Dalager v. Montgomery Ward & Co., Inc.*, 350 N.W.2d 391, 394 (Minn. Ct. App. 1984) (“an independent contractor may be an agent of the hirer for purposes of vicarious liability even if he uses his own tools and is not strictly under the physical control or supervision of the hirer as long as there is some element of control and a fiduciary relationship. . . .”).

Moreover, it is the *right* to control the work, rather than the actual control of the work, that is determinative. *Burman Co. v. Zahler*, 286 Minn. 402, 411-12, 178 N.W.2d 234, 241-42 (Minn. 1970) (finding defendant company liable as principal even though it may not have exercised day-to-day control over operations, where it had the right of control and the power to make that right meaningful: “the extent to which he did in fact direct [the agent] is of minimal significance.”).

In this case, Wakefield Pork controls or has the right to control nearly all aspects of Forst Farms’ operations. The “Independent Contractor Agreement” (“Agreement”) between Wakefield Pork and Forst Farms provides, among other things, that: (1) Wakefield Pork owns the pigs at all times; (2) Wakefield Pork provides all the feed for

the pigs; (3) Wakefield Pork provides all of the veterinary services for the pigs; (4) Wakefield Pork obtained comprehensive liability insurance for liability for injuries or property damages; (5) Wakefield Pork retains the right to enter Forst Farms' premises at any time to inspect the pigs; (6) Forst Farms is obligated to accept delivery of pigs from Wakefield Pork, and can not raise pigs for itself or any other party on its land without Wakefield Pork's consent; and (7) Forst Farms had to construct barns to Wakefield Pork's specifications to house Wakefield Pork's pigs. Agreement §§ 1.0 A, C; 3.0 B, C, E; 4.0 C, F; 5.0, Appellants' Appendix ("App.") at 18 – 23. Wakefield Pork imposed very specific ventilation, temperature, and feed requirements for the hog barns, and conditioned its agreement with Forst Farms on Wakefield Pork's satisfaction with the barns. Agreement § 1.0 A(ii), App. at 18. In addition, Wakefield Pork is obligated to "provide general instructions with respect to the care and proper husbandry with regard to pigs" delivered to Forst Farms. Indeed, Wakefield Pork provided Forst Farms with a twenty-two-page "Wakefield Pork, Inc. Finishing Procedures Manual" that sets forth with great detail the procedures that Forst Farms is required to follow on a daily basis while caring for Wakefield Pork's pigs.² Steve Langhorst Depo. pp. 132-34, Ex. 22.

² These elements of control Wakefield Pork exercises over Forst Farms are also indicia of a fiduciary relationship. *See Corcoran v. Land O'Lakes, Inc.*, 39 F. Supp. 2d 1139, 1154-55 (N.D. Iowa 1999) (denying summary judgment on plaintiff's breach of fiduciary duty claim because the agreement between the contract farmer and Land O'Lakes gave Land O'Lakes the right to direct Corcoran with respect to care of livestock, and Land O'Lakes was required to "provide continuing counsel and advice in the care and production of the livestock.").

Significantly, in the event of any default on the part of Forst Farms, Wakefield Pork has the right to take possession of Forst Farms' hog facility, make payments to the third-party lender, provide "substitute labor" to do Forst Farms' work under the Agreement, "and in all respects to continue growing pigs at [Forst Farms'] facility but under Wakefield's exclusive direction, under its control, and according to such terms as may be acceptable to Wakefield for all or a part of the balance of this contract term." Agreement §§ 9.0A, 10.0 A, App. at 24-25. The Agreement further provides that Forst Farms' "failure to follow reasonable written instructions given by Wakefield directed toward performance of this agreement" constitutes default. Agreement § 9.0 C, App. at 24.

In *A. Gay Jenson Farms*, Cargill was held liable for contractual obligations of grain elevator to 86 farmers, based on its exercise of control over the grain elevator. In finding Cargill liable to the third parties, the court relied on, among other things, the fact that Cargill had the right of entry onto the elevator premises to do checks and audits; made comments on the running of the elevator's affairs; and retained the power to discontinue the financing relationship. 309 N.W.2d at 291.

In *Dalager*, this Court upheld a finding of an agency relationship (and thus liability of the principal to third parties) between a roofer who was identified as an independent contractor and Montgomery Wards. *Dalager*, 350 N.W.2d at 395. This Court upheld that finding, even though Montgomery Wards did not rigidly supervise the roofer's work but only occasionally inspected the work; where the roofer supplied the tools and equipment; and where Wards did not withhold taxes or social security from the

roofer's pay and did not pay workers' compensation insurance. The critical factor was that Wards had the *power* to insist on how the work was performed, and represented to the customer that it would do the installation and guarantee the finished product.

Dalager, 350 N.W.2d at 394.

In this case, Wakefield Pork has the right to exercise at least as much control as Cargill or Wards in the cases above. Like Cargill, Wakefield Pork has the right of entry onto Forst Farms to inspect the pigs, provides instructions on how the pigs are to be raised, and retains the power to discontinue the relationship. Agreement §§ 5.0, 9.0 and Exhibit B, App. at 23, 24, and 30. Like Montgomery Wards, Wakefield Pork has the power to insist that Forst Farms follow its very detailed instructions on how the pig barns are to be built, conditioning the entire agreement on its satisfaction with those buildings. Agreement §§ 1.0A(ii), C, App. at 18-19. It also has the power to insist that Forst Farms follow its 22-page "Finishing Procedures Manual," and can take over the entire hog operation if Forst Farms fails to "follow reasonable written instructions given by Wakefield directed toward performance" of the Agreement. Agreement § 9.0C, App. at 24. If Forst Farms defaults or fails to follow Wakefield Pork's "reasonable written instructions," Wakefield Pork has the power to come onto the Forsts' land and take over and operate the entire hog operation. Agreement §§ 9.0, 10.0, App. at 24, 25. In addition, Wakefield Pork at all times retains ownership of the hogs.³

³ This factor alone distinguishes this case from *Jurek*, where a grain hauler was found not to be an agent of a corn farmer, since the grain hauler had title to the corn once he took it from the farmer. 241 N.W.2d at 792-93. In addition, unlike the instant case, where

Wakefield Pork controls or has the right to control nearly every aspect of the raising of its hogs on Forst Farms' land. Under Minnesota precedent and principles of agency, Forst Farms is unquestionably Wakefield Pork's agent.

B. Other States Have Determined That Contract Farmers Are Agents of the Corporate Owners of Livestock.

In a similar case in Alabama, the Supreme Court of Alabama affirmed a finding that a contract hog farmer was an "agent" of Tyson's for a nuisance created by the contract farmer's hog operation, thereby rendering Tyson liable with the contract farmer for the nuisance. *Tyson v. Stevens*, 783 So. 2d 804 (Ala. 2001). Like Minnesota courts, the court in *Tyson* noted that whether a relationship is an agency relationship depends largely on "whether the entity for whom the work is performed has reserved the right to control the means by which the work is done." *Id.* at 808, quoting *Keebler v. Glenwood Woodyard, Inc.*, 628 So. 2d 566, 568 (Ala. 1993). The Alabama Supreme Court acknowledged that the contract between Tyson and the contract hog farmer stated that the contract farmer was an independent contractor, but noted: "whether an agency exists is determined from the facts, not by how the parties choose to characterize their relationship." *Id.*, citing *Curry v. Welborn Transport*, 678 So. 2d 158, 161 (Ala. Civ. App. 1996). The court found the following evidence was sufficient to support a finding of agency: (1) Tyson specified where the hog houses should be located, how large each house should be, and arranged for financing of the houses; (2) Tyson required that the

Forst Farms is prohibited by Wakefield Pork from raising pigs on its own or for anyone else without Wakefield Pork's prior written consent, the grain hauler in *Jurek* did not have an exclusive arrangement with the farmer. *Id.*

contract farmer implement a specific waste-management system; (3) Tyson inspected the hog operation almost every week and recommended solutions for the contract farmer's waste management problems; and (4) Tyson provided the hogs, the food for the hogs, veterinary supplies, and veterinary care for the hogs. Like Forst Farms, the contract farmer's primary responsibility was to feed, water and care for the hogs. *Id.*

Contract arrangements for the care of livestock are becoming increasingly common. Livestock Mandatory Reporting, 65 Fed. Reg. 75,464 (Dec. 1, 2000) (codified at 7 C.F.R. pt. 59) (USDA estimates 75 percent of hog transactions are not reported, *i.e.*, are under contract); Cynthia M. Roelle, *Pork, Pollution, and Priorities: Integrator Liability in North Carolina*, 35 Wake Forest L. Rev. 1055, 1058 (2000). The Oklahoma Attorney General was recently asked to opine on the issue of whether or not contract livestock growers, such as Forst Farms here, are truly "independent contractors" or if they are, in fact, employees of the company that owns the livestock. The Oklahoma Attorney General found that the most significant factor demonstrating an employment relationship is the degree of control the company possesses over the manner in which the livestock are raised. The Oklahoma Attorney General found that these factors indicated an employment, rather than independent contractor, relationship: the company provides feed, medicine and some other supplies; performance under the contract may not be assigned to another; and the contract prohibits the grower from raising livestock for himself or for any other integrator. Ok. Op. Att'y Gen. No. 01-17, 2001 AG LEXIS 17 (Apr. 11, 2001). Although the Attorney General cautioned that the opinion does not determine that any one particular contract establishes an employer-employee relationship,

it did conclude: “Where an integrator directs in detail the manner in which raising of the crop is to be performed the contract grower is the employee of the integrator.” *Id.* at *13. Applying this analysis, Forst Farms would be considered Wakefield Pork’s employee and would thus be liable for damages caused by its livestock.

Application of Minnesota law and principles of agency, as well as precedent precisely on point from other jurisdictions, compels the conclusion that Forst Farms is Wakefield Pork’s agent. Wakefield Pork cannot hide behind the “independent contractor” label when the Agreement and the facts clearly indicate a relationship of agency. Wakefield Pork’s control over and right to control nearly every aspect of Forst Farms’ operations and day-to-day activities undoubtedly makes Forst Farms an agent of Wakefield Pork. If liability is found, Wakefield Pork should also be held liable since it controls or has the right to control nearly every facet of Forst Farms’ hog operation.

C. Policy Dictates That an Owner of Livestock Has a Nondelegable Duty to Others for a Nuisance Caused by the Livestock.

Even if Forst Farms is not Wakefield Pork’s agent, Wakefield Pork should be subject to liability for the hogs it owns, since it possesses a nondelegable duty with regard to those hogs. Courts have long found that certain duties are not delegable to others. One such nondelegable duty exists for public or private nuisances:

One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another *or the creation of a public or a private nuisances*, is subject to liability for harm resulting to others from such trespass or nuisance.

Restatement (Second) of Torts § 427B (1965) (emphasis added); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353-54 (Fed. Cir. 2001) (finding utility company could be liable for public nuisance caused by independent contractor's processing of nuclear fuel); *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 980 (Ind. 1998) (finding principal corporation liable for nuisance caused by independent contractor delivering its gasoline into leaking underground tanks); *Budagher v. AMREP Corp.*, 97 N.M. 116, 121, 637 P.2d 547, 552 (N.M. 1981) (finding lower court should have instructed jury regarding the exceptions, specifically Restatement (Second) of Torts § 427B, to the general rule against liability in nuisance case involving flood damage from dam and culvert system built by independent contractor for defendant); *State of New Jersey, Dep't of Env'tl. Protection and Energy v. Gloucester Env'tl. Mgmt. Services, Inc.*, 821 F. Supp. 999, 1012 (D.N.J. 1993) (motion for summary judgment denied in part because, under Restatement (Second) of Torts § 427 B, whether waste that causes nuisance is hauled by independent contractors is not relevant to the city's liability for that nuisance).

The rationale underlying the nondelegable duty rule is that it is intended “to prevent one from contracting out [hazardous] work to an independent contractor and thereby escaping the responsibility to the general public and adjoining property owners of dangers inherent in hazardous activities.” *Vagle v. Pickands Mather & Co.*, 611 F.2d 1212, 1218 (8th Cir. 1979). The Eighth Circuit explained:

Where the law imposes a definite, affirmative duty upon (an employer) by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons

cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor.

Id. at 1217; *quoting* F. Harper, Law of Torts § 292 (ed. 1933).

In most cases, such as the instant case, the principal was aware of the nuisance its activities created. In *Bleeda v. Hickman-Williams & Co.*, 44 Mich. App. 29, 30, 205 N.W.2d 86 (Mich. Ct. App. 1972), the Court of Appeals of Michigan held Hickman-Williams and Company (Hickman) vicariously liable under Restatement (Second) of Torts § 427B for harm caused to nearby property owners for “obnoxious dust and odors emanating” from a coke screening plant owned by another company that processed coke owned by Hickman. In response to Hickman’s argument that it should not be liable for acts of the plant owner, who was an independent contractor, the *Bleeda* court determined that Hickman “knew how [the coke screening plant] conducted” its operations; contemplated the method at the “time of contracting;” had known for some time “the extent of damage . . . caused to the plaintiffs”; and retained title to the coke at all times. *Id.* at 31, 37. The court thus held that Hickman should not “be permitted to lop off responsibility for a nuisance created by the screening process” by contracting the work with an independent contractor. *Id.* at 37; *see also*, *McQuilken v. A&R Dev. Corp.*, 576 F. Supp. 1023, 1033 (E.D. Pa. 1983) (denying principal employer’s motion for summary judgment in part because a “genuine issue of material fact” existed as to whether principal employer knew or had reason to know pile-driving and/or other construction activities by its construction contractor constituted abnormally hazardous activities); *Piccolini v. Simon’s Wrecking*, 686 F. Supp. 1063, 1070-71 (M.D. Pa. 1988) (motion to

dismiss nuisance claim in disposal of hazardous waste case in landfill denied because “liability may attach on the sole ground” that a principal has reason to recognize that a nuisance was likely to occur).

In the instant case, Wakefield Pork knew and directed the method of raising its hogs, including how they would be housed and fed. It also was well aware of the Wendingers’ complaints concerning and the difficulty of effectively addressing the odors emanating from the Forsts’ facility. For example, on August 5, 1998, representatives of Wakefield Pork participated in a meeting regarding the Wendingers’ complaints against the Forsts’ facility. William T. O’Connor Letter, dated August 6, 1998, App. at 11-12. Wakefield Pork was also aware that the Wendingers had complained to the Minnesota Pollution Control Agency and that the odor problems had not been resolved. O’Connor Letter, App. at 11.

Sound public policy dictates that Wakefield Pork cannot delegate its duty of care for the harms to nearby property owners caused by the pigs it owns and regularly delivers to Forst Farms’ confined hog feeding operation for feeding and finishing. Where, as here, a corporate livestock owner at all times retains ownership of the livestock, and as described above, sets forth in specific detail how that livestock is to be kept, fed, and cared for, liability for damages caused by that livestock should attach to that corporate livestock owner, in addition to the contractor charged with the livestock’s care.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Minnesota Court of Appeals reverse the trial court and hold that, if liability to the Wendingers is found, Wakefield Pork must share in that liability.

Dated: December 4, 2002.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief produced using proportional serif font, 13-point or larger. The length of this brief is 3,283 words. This brief was prepared using Microsoft Windows 2000 and XP, Microsoft Word 2000.

s/ Susan E. Stokes _____

Susan E. Stokes

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Susan E. Stokes, being first duly sworn, states that on the 4th day of December, 2002, she served the foregoing Brief and Appendix of an *Amicus Curiae* on the following individuals by United States Mail.

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Subscribed and sworn to before me
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s/ Ann Pagel Newman
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APPENDIX

Office of the Attorney General of the State of Oklahoma, No. 01-17, 2001 Okla. AG LEXIS 7 (2001).....	App. 1-5
Restatement (Second) of Agency § 1 (1957)	App. 7
Restatement (Second) of Agency § 140 (1957)	App. 8
Restatement (Second) of Torts § 427B (1965).....	App. 10