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20040371

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
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APR 11 2005  
STATE OF NORTH DAKOTA

Farmers Union Mutual Insurance )  
Company, )  
Plaintiff and Appellee, )  
and Cross-appellant )

Supreme Court #20040371

v. )

Stark County District Court  
Civil # 45-04-C-00221/001

Martin Decker, Donald Decker, )  
Gerald Decker, Jamie Iverson, )  
and Rodney Iverson, )  
Defendants and Appellants, )  
and Cross-appellees )

APPEAL FROM A SUMMARY JUDGMENT  
OF DISMISSAL OF THE DISTRICT COURT

**REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES**

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Table of Authority

Case:

Mills v. Agrichemical Aviation, 250 NW2d 663 (ND 1977) 6,7

## Argument

Judge Schmalenberger noted, in his Memorandum Decision, that the underlying action is premised on the allegation of the Amended Complaint (allegation 6) that:

The motorcycle was designed for travel on public roads and was subject to licensure if used on the public roads.

Memorandum Decision, p. 8. App., p. 50.

Farmers Union, in its responsive Brief (p. 18), argues that the motorcycle involved in the accident was a “motor vehicle” under the terms of the policy, under either of two alternative definitions in the policy. If it had so argued, or had intended to so argue, to the District Court, that was certainly neither Judge Schmalenberger’s understanding of its position, nor the basis of his holding. Judge Schmalenberger said:

In fact, [if] Farmers Union’s explanation of the policy is used, this motorcycle would not even fall under the definition of “motor vehicle” in the policy. As stated, a “motor vehicle,” under the policy, must be “subject to motor vehicle registration.”

Memorandum Decision, p. 10, App., p. 52.

Our position, in both our pleading and in the summary judgment proceedings below, was that the motorcycle was a “motor vehicle,” as defined by the policy. Motorized land vehicles are generally excluded from coverage under the terms of the policy, but under

certain circumstances are excepted from the exclusion.

Farmers Union now apparently reverses its position and argues to this Court that the motorcycle owned by Gerald Decker was a “motor vehicle.” as defined by its policy, thus bringing the exclusion, and the provisions of the policy excepting Decker’s motorcycle from the exclusion, back into to issue.

We. therefore. address that issue in this Reply Brief.

#### The Exception to the Exclusion to Coverage

Straightforward. clear, expository writing eschews the double negative; it’s hard to follow. This point appears to be lost on the insurance industry and on the ISO, which drafts its policies.

The Farmers Union’s position on appeal appears to be that the policy’s definition of a “motor vehicle” is so framed as to exclude any motorized land vehicle; part “a” of the exclusion excluding anything usable on public roads, and part “b” anything useable off of the public roads.

But there is clearly an exception to the exclusion stated in the policy and this leads to the inescapable question. then, as to just what application the exception to the exclusion can logically have, if the Company’s position is to be accepted.

The exception to the general exclusion is found in part “f (2)” of the policy, at page 4 of 8, and reads as follows (the bold faced terms being terms of art specifically defined in the policy):

Coverage applies on the **insured location** if the **motor vehicle** is subject to be licensed for use on public roads and it is unlicensed and it is used exclusively on the **insured location**, or kept there in dead storage.

App., p. 35.

As to the first definition of a “motor vehicle,” that it is a vehicle subject to license for use on the public roads, Judge Schmalenberger addressed the issue as follows:

The sentence “subject to be licensed for use on public roads” is intended to mean that if the policy-holder wished to use the vehicle on public roads, he could do so only after obtaining a license to do so.

Memorandum Decision, pp. 9 and 10, App., pp. 51 and 52.

Thus, the two remaining criteria to be satisfied to establish an exception to the exclusion of coverage of a motor vehicle are: whether the vehicle was used exclusively on an “**insured location**,” and whether the accident occurred on an “**insured location**,” as that term is defined in the policy. The policy says:

7. “**Insured Location**” in this policy means:

a. all farm locations which you own, rent, or operate or other locations you maintain as a **residence premises**. “**Insured location**” also includes the

ways and means immediately adjoining the **insured location**.

...

c. locations in which you temporarily reside but do not own....

Insurance Contract, p. 1 of 8. App., p. 32.

The fact that the motorcycle was used exclusively, and that the accident occurred on, an **insured location**, as defined by the policy, was alleged specifically in the Amended Complaint and verified as fact for the summary judgment proceeding by Gerald Decker's Amended Answers to the Farmers Union's Interrogatories.

The Amended Complaint in the underlying action is dispositive as to coverage unless contradicted by competent evidence. It was alleged:

The motorcycle was not, however, used on the public roads, but was operated exclusively upon the defendant's premises, or in other places not owned by the defendant, off the public roads, where the defendant was physically present, residing on a temporary basis.

Amended Complaint, allegation 6, Farmers Union Mutual App., p. 14.

Farmers Union addressed interrogatories specifically to this allegation, the answers to which verified the accuracy of the allegation. Gerald Decker's answers, the accuracy of which have not be disputed by Farmers Union, were as follows:

Interrogatory 18:

Describe in detail all the places you or anyone else with your permission has used the trail bike since you acquired it...

Answer to 18:

On our farmstead, off any public right of way; at Andrus Resort, formerly Voight's Bay (one time only) on the south side of Lake Sakakawea, also off any public right of way.

Interrogatory 28:

Were you physically present each and every time the trail bike was operated by another person when it was used at locations other than your home premises?

Answer to Interrogatory 28:

Yes.

Gerald Decker's Answers to Interrogatories, Farmers Union Mutual App., pp. 29 and 32.

The policy, by its own choice of language, does not limit coverage to permanent residences (which may change any number of times as the insured moves), but extends it to temporary residence, as well, which the policy does not define. It obviously is residence which, by duration, does not become permanent, but is not otherwise defined by the policy. Overnight residence, while camping or for any other purpose, is temporary. Farmers Union chose the language and could have tightened it up, further, if it chose.

Judge Schmalenberger addressed this in his Memorandum Decision, appearing to concede the point, but nevertheless dismissing it without explanation:

Farmers Union also contends that because Gerald Decker used this motorcycle at Andrus Resort near Lake Sakakawea, he has failed the final prong of the test; that he used the vehicle “exclusively on the insured location.” Admittedly, this is a very strict interpretation of the policy.

Memorandum Decision, p. 10, App.. p. 52.

The problem with Judge Schmalenberger’s treatment of the issue is that under North Dakota law, insurance policies are strictly construed against the insurer, not in favor of it.

In Mills v. Agrichemical Aviation, 250 NW2d 663 (ND 1977), the Court succinctly summarized the law as it pertains to interpretation of ambiguous or confusing policy language and the expectations of the insured, in its constitutional syllabus, which summarizes the law, as follows:

1. An insurer who selects standardized contracts and offers them to the insured on a “take-it-or-leave-it” basis must assume responsibilities for disharmonious policy provisions.

...

4. Any ambiguity or reasonable doubt as to the meaning of a policy is to be construed strictly against the insurer and in favor of the insured.

5. If the language in a policy will support an interpretation which will impose liability on the insurer and language which will not, the former interpretation will be adopted.

6. The Doctrine of Reasonable Expectations has evolved as an interpretive tool to aid courts in discerning the intention of the parties bound by adhesion contracts.

Mills, *supra*, at 664.

Therefore, the policy must be construed as extending coverage. Even if, as Farmers Union has now decided to argue on appeal, Gerald Decker's motorcycle were to be deemed to fall within the policy exclusion of a defined "**motor vehicle**," coverage is specifically re-extended by the policy, having been used exclusively off of the public roads and exclusively on an "**insured location**," including at the time of the accident.

It is established, without dispute, that the vehicle was used during the policy period only off the public right of way on the insured's farm (including at the time of the accident) and that the only other time it was ever operated off of the farm was on a camping trip to Voight's Bay, a place of temporary residence in the literal sense of the word.

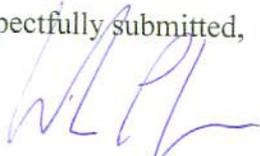
Even if the Company were to be allowed to benefit by a strict interpretation of "temporary" residence to otherwise escape liability under the policy, two additional problems remain.

First, the accident, which is the occurrence covered by the policy clearly occurred on Decker's permanent place of residence, which is clearly an "**insured location**."

Secondly, and more elementally, the usage at Voight's Bay clearly occurred during a different policy period and, therefore, under a legally separate contract of insurance. The accident occurred in June of 2002. Amended Complaint, allegation 2, Farmers Union Mutual App., p. 13. The usage at Voight's Bay occurred two years before, in the summer of 2000. Gerald Decker's Amended Answers to Interrogatories, answer 18 (b), Farmers Union Mutual App., p. 29. The contractual periods of the policy are annual, making the usage at Voight's Bay irrelevant, for it occurred during an earlier contractual period. Under any possible interpretation, it was never used away from Gerald Decker's farmstead during the contractual period of the applicable annual policy.

As to the issue of attorneys' fees, they are all appropriately compensable because there is coverage.

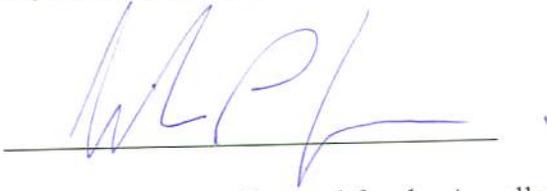
Respectfully submitted,



William P. Zuger

Certification of Service

I hereby certify that the foregoing brief was served on Lawrence R. Klemin, counsel of record for Appellee and Cross-Appellant, Box 955, Bismarck, ND 58502-0955, on April 11, 2005, by first class US Mail.



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