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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Chase Wisness, Plaintiff/Appellant, vs. Nodak Mutual Insurance Company and Eric Mogen, Defendants/Appellees	)	Supreme Court No.: 20100401 McKenzie County No.: 27-10-C-026

APPEAL FROM JUDGMENT OF DISMISSAL DATED OCTOBER 27, 2010
DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT
MCKENZIE COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE DAVID W. NELSON, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

I. Whether the district court erred in finding the Farm and Ranch Excess Liability Policy did not provide coverage for underinsured motorist benefits, and was not ambiguous.

I. STATEMENT OF THE CASE

2. In this action, C.W. claims entitlement to underinsured motorist benefits under a Farm and Ranch Excess Liability Policy issued by defendant Nodak Mutual Insurance Company ("Nodak Mutual") to his father Milo Wisness. This action was commenced by Milo Wisness, on C.W.'s behalf, in April of 2009. See Appellant's Appendix (hereinafter "App.") at 7. The Complaint named two defendants: Nodak Mutual, the company issuing the excess liability policy; and Eric Mogen, Milo Wisness's insurance agent. Id. The Complaint included three counts: 1) wrongful denial of underinsured motorist coverage (essentially, breach of the insurance contract); 2) bad faith; and 3) "error and omission" against agent Eric Mogen. Id.

3. On May 12, 2009, plaintiff C.W. filed a Motion for Partial Summary Judgment. R-12. The basis of the motion was that the farm and ranch excess liability policy provided coverage for underinsured motorist benefits as a matter of law. Id. Nodak Mutual responded with a Cross-Motion for Summary Judgment on July 2, 2010. R-16. In that motion, Nodak asserted: 1) that the excess liability policy by its plain language does not provide coverage for first-party underinsured motorist benefits; and 2) that Eric Mogen should be dismissed as there was no evidence he was negligent or had a special relationship with Wisness which would have imposed a heightened duty. Id.

4. Oral argument on the motions was held on September 1, 2010 in Watford City. On October 19, 2010, the Court issued an Order Granting Summary Judgment in Favor of Defendants. Addendum (hereinafter "Add."). Judgment

was entered on October 27, 2010. R. 26. Wisness filed his Notice of Appeal on December 20, 2010. R. 31.

5. Appellants do not appeal from the District Court's decision granting summary judgment to Eric Mogen. See Appellant's Brief, p. 3-4, ¶ 9. Thus, the sole issue on appeal is whether Milo Wisness's Farm and Ranch Excess Liability policy can be interpreted to provide coverage for first-party underinsured motorist benefits.

6. Simultaneously with their Appellate Brief, Appellants filed a Motion for Leave to File Supplemental Appendix. See Supreme Court Docket (hereinafter "S.C.R.") - 7. That motion was denied. S.C.R. 9. Unfortunately, Appellant's Brief contains references to and quotations of documents contained in the unfiled Supplemental Appendix, but which are not contained in the record in this case. In his brief, Appellant states: "In the event that the motion [for Leave to File Supplemental Appendix] is denied and the Proposed Supplemental Appendix is not filed with the Court, then the Court may nevertheless accept the language of the 2007 policy as being undisputed and consider it in deciding this appeal because the defendants below raised the language of the 2007 policy in their argument. Leingang v. City of Mandan Weed Bd., 468 N.W.2d 397, 397, n.1 (N.D. 1991)." Appellant's Brief, p. 8, fn 2. The footnote in Leingang is the sole authority cited by the Appellant for this proposition, and it reads as follows:

> 1. Leingang has not provided a transcript of proceedings as required by Rule 10(b), North Dakota Rules of Appellate Procedure. Although the parties stipulated that a transcript was not needed, they did not prepare a statement of the case using Rule 10(g), North Dakota Rules of Appellate Procedure or stipulate to any facts. We, therefore, base our

recitation of facts upon undisputed assertions made by the parties on appeal.

7. Reliance on and citation to facts not in the record in an appellate brief is improper. N.D.R.Civ.P. 28; Hurt v. Freeland, 1997 ND 194, ¶ 8, 569 N.W.2d 266. "Inappropriate attempts to supplement the evidentiary record at the appellate level cannot be condoned." Van Dyke v. Van Dyke, 538 N.W.2d 197, 203 (N.D.1995).

8. The Appellant's argument on appeal focuses significantly on these extra-record documents. The defense submits these arguments and documents are wholly irrelevant to the issue on this appeal. They are irrelevant because they had nothing to do with the insurance contract at issue, and they certainly were not considered by the District Court. Nevertheless, the Appellant's discussion and quotation of these extra-record documents in his brief creates a Hobson's choice for the Appellee. The natural inclination is to directly rebut Appellant's arguments, despite their irrelevance. This cannot fully be done without the Appellee violating the rules as well. The Appellee respectfully requests the arguments in Appellant's Brief based on these documents be stricken.

II. STATEMENT OF FACTS

9. On June 1, 2007, sixteen-year-old C.W. was a passenger in a vehicle driven by another juvenile, R.N. See Defendants' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and In Support of Defendants' Cross-Motion for Summary Judgment, R. 17, (hereinafter "R. 17"), p. 2. On a rural highway in McKenzie County, R.N. entered the ditch and the vehicle rolled.

C.W. sustained permanent spinal cord injuries in the accident and is paralyzed. App. 9.

10. At the time of the accident, C.W.'s father Milo Wisness had a Nodak automobile insurance policy with underinsured motorist limits of $500,000. App. 68. C.W. settled with Nodak for those limits. App. 9-10; Tr. 26.

11. At the time of the accident, Milo Wisness also had a Farm and Ranch Excess Liability Policy issued by Nodak to Wisness Farms, a farming operation run by Milo, his brother Paul Wisness, and his father, Lester Wisness. App. 44-58. The policy provided excess liability coverage in the amount of $2,000,000.00. Id. As part of the settlement of the underinsured motorist claim on Milo's automobile policy, Milo reserved the right to pursue a claim for underinsured motorist benefits under the farm's excess liability policy. App. 9.

12. The relevant provisions of the Farm and Ranch Excess Liability Policy in place at the time of this accident are as follows:

Coverage A. Bodily Injury and Property Damage Liability

1. **Insuring Agreement**

a. We will pay on behalf of the insured for "ultimate net loss" in excess of the "retained limit" because of "bodily injury" or "property damage" to which this insurance applies. We will have the right to associate with the "underlying insurer" and the insured to defend any "claim" or "suit" seeking damages for "bodily injury" or "property damage" to which this insurance applies.

App. 46.

26. **"Ultimate net loss"** means the total amount of damages for which the insured is legally liable in payment of "bodily injury," "property damage," "personal injury," or

"advertising injury." "Ultimate net loss" must be fully determined as shown in Condition 19 – When Loss Payable. "Ultimate net loss" shall be reduced by any recoveries or salvages which have been paid or will be collected, but the amount of "ultimate net loss" shall not include any expenses incurred by any insured, by us or by any "underlying insurer."

App. at 58 (emphasis added).

20. **"Retained limit"** means the greater of:

a. The sum of amounts applicable to any "claim" or "suit" from:

(1) "Underlying insurance," whether such "underlying insurance" is collectible or not; and

(2) Other collectible primary insurance; or

b. The "self-insured retention.

App. 58.

6. **"Claim"** means any demand upon the insured for damages or services alleging liability of the insured as the result of an "occurrence" or "offense."

App. 56 (emphasis added).

25. **"Suit"** means a civil proceeding in which damages because of "advertising injury," "bodily injury," "personal injury" or "property damage" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or submits with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits without consent.

App. 58 (emphasis added).

13. The exclusion relied upon by C.W. on this appeal, which he asserts creates an ambiguity in the policy, reads as follows:

> 2. Exclusions
>
> This insurance does not apply to:
>
> ...
>
> d. Liability imposed on the insured or the insured's insurer, under any of the following laws:
>
> (1) Employees' Retirement Income Security Act of 1974 (E.R.I.S.A.) as now or hereafter amended;
>
> (2) Any uninsured motorists, underinsured motorists, or automobile no-fault or first party "bodily injury" or "property damage" law; or
>
> (3) Any workers' compensation, unemployment compensation or disability benefits law or any similar law.

App. 46-47 (emphasis added).

14. The District Court correctly found that this excess liability policy did not provide underinsured motorist coverage. See Addendum, pp. 1-10. First it found that the insuring language of the policy did not mention underinsured motorist coverage and in fact refers only to "damages for which the insured is legally liable in payment." Add. 4, 10. Second, the District Court found the exclusion for underinsured motorist benefits "rather than creating an ambiguity,...actually eliminates a potential ambiguity." Add. 10.

15. The above are the only facts relevant to the issue on this appeal. However, recitation of additional facts is warranted based on arguments made in Appellant's Brief, including those reliant on extra-record materials.

16. First, an explanation of the Appellant's argument based on extra-record materials, and how that argument developed, is warranted. As noted above, the road to the District Court's Summary Judgment in favor of defendants, began with C.W.'s Motion for Partial Summary Judgment. R-10. This was a "partial" motion only because C.W. did not seek a determination that Eric Mogen was negligent. Rather, acknowledging no genuine issues of material fact on insurance coverage, C.W. sought a determination that the excess policy provided underinsured motorist coverage. In that motion, he argued that the exclusion's reference to underinsured motorists "law" meant that the exclusion was intended to reduce the excess underinsured motorist coverage by the legal minimum of underinsured motorist coverage under North Dakota's financial responsibility law, or $25,000. R-10 at p. 11. Thus, according to C.W.'s argument, he was entitled to $1,974,000.00 in excess underinsured motorist benefits ($2,000,000 excess limits, minus $1,000 retained limit, minus $25,000.00). R-10 at p. 13. With minor mathematical modifications, this is still the outcome C.W. seeks on this appeal.

17. C.W.'s argument on his Motion for Partial Summary Judgment relied solely on the language of the excess policy in place, and the law applicable to insurance policy interpretation in North Dakota. See R. 10.

18. Nodak responded to C.W.'s Motion for Partial Summary Judgment with a Cross-Motion, seeking a determination that the excess policy did not provide underinsured motorist benefits, and also that Eric Mogen was entitled to summary judgment on the E&O claim. R. 17.

19. It was not until C.W. filed its reply to Nodak's Brief in Opposition to Motion for Partial Summary Judgment that C.W. referenced an endorsement Nodak made available to its excess policy customers beginning in 2007. R. 21, p. 9-11. That endorsement read as follows:

> **Excess Liability Policy**
>
> **UNINSURED/UNDERINSURED MOTORIST ENDORSEMENT**
>
> In consideration of an additional premium, it is agreed that the Exclusion in the policy for Uninsured/Underinsured motorist coverage(s) does not apply.

App. 85.

20. This endorsement was offered to new customers beginning January 1, 2007, and to the renewal of existing policies effective May 1, 2007. App. 82-83; see also Defendants' Reply Brief in Support of Defendants' Cross-Motion for Summary Judgment, R. 24, (hereinafter "R. 24"), p. 6. The Wisness's renewal date was February 27th of each year, meaning they were not offered, and were not eligible for the endorsement until February 27, 2008. Id. This endorsement was offered as part of a new excess policy form, different from the excess policy Wisness had in place at the time of the accident. Id. This new policy form was not in the record, as Nodak pointed out in its reply brief, filed prior to oral argument on the motions for summary judgment. Id.

21. In his reply brief, C.W. attempted to make two points with this endorsement. See Plaintiff's Reply Brief in Support of Plaintiff's Motion for Partial Summary Judgment and Response Brief in Opposition to Defendants' Cross-Motion for Summary Judgment, R. 21, (hereinafter "R. 21"). First, he

argued the endorsement negated Nodak's argument that the insuring language did not provide underinsured motorist coverage. C.W.'s primary argument, however, was that Eric Mogen was negligent for not cancelling Wisness's existing policy and placing him on the new policy form as soon as excess underinsured motorist coverage became available on May 1, 2007 (30 days prior to the accident), a procedure Nodak did not allow. R-21 at p. 15.

22. It was undisputed in the Court below that Wisness never spoke to Mogen about underinsured coverage prior to the accident. App. 30-31. It was undisputed he merely "assumed" the $2,000,000.00 in excess coverage applied to all risks he insured on the farm, even though no one from Nodak ever told him anything that led him to believe that. Id. Interestingly, in February of 2008 and February of 2009, when Wisness did renew his policy and receive the new form, he declined excess underinsured motorist coverage on both occasions. R-19, Exhibits B and C.

23. At oral argument on the motions, Nodak noted that the new policy form is not in the record, and it made no difference anyway; that what the Court needed to consider was the excess policy indisputably in place at the time of the accident – the insuring agreement in connection with the exclusion – and determine if they were ambiguous on their face. Tr. 36-37. But the District Court did indeed consider the new 2007 endorsement and determined that this document, which was not a part of the policy at issue, did not create an ambiguity. Add. 6-10.

III. LEGAL ARGUMENT

A. The District Court Correctly Found That The Farm And Ranch Excess Liability Policy Did Not Provide Coverage For Underinsured Motorist Benefits, And Was Not Ambiguous.

1. Principles Of Interpretation

24. This Court has held that insurance policies are to be interpreted according to standard statutory principles of contract interpretation. See Hanneman v. Cont'l W. Ins. Co., 1998 ND 46, 575 N.W.2d 445; Walle Mut. Ins. Co. v. Sweeney, 419 N.W.2d 176 (N.D. 1988).

25. To determine if insurance coverage exists under the provisions of an insurance policy, courts generally consider the following issues in order: 1) whether coverage exists under the insuring provisions, 2) if coverage exists under the insuring provisions, whether an exclusion excludes coverage, and 3) if an exclusion excludes coverage, whether an exception to the exclusion applies. One court has explained the analysis as follows:

> A court faced with deciding whether an insurer is responsible for covering a particular category of damages should first determine if coverage exists for the alleged damages under the insuring clause. See Amerisure, Inc. v. Wurster Construction Co., Inc., 818 N.E.2d 998, 1005 (Ind. App. 2004). If the language in the insuring clause applies to the damages, the court must then consider if any exclusions exclude coverage. Finally, the court should consider if an exception to an exclusion restores coverage. "[T]he entire process must begin with an initial grant of coverage via the insuring clause; otherwise, no further consideration is necessary." Id.

Selective Ins. Co. of the Se. v. Cagnoni Dev., LLC, 2008 WL 126950, *9 (S.D. Ind. Jan. 10, 2008).

26. As discussed below, the insuring provisions of the excess liability policy do not provide underinsured motorist coverage and thus no further analysis is necessary. C.W.'s basic argument is that an exclusion to the Nodak policy creates an ambiguity that should allegedly be resolved in favor of the insured. However, as discussed more thoroughly below, the Nodak insurance policy is unambiguous and does not provide underinsured motorist coverage.

27. This Court has explained, "[w]hen the language of an insurance policy is unambiguous it should not be strained to impose liability on the insurer." Bjornson By & Through Bjornson v. Guar. Nat. Ins. Co., 539 N.W.2d 46 (N.D. 1995). It has further stated, "[a]lthough this Court may construe an exclusionary provision strictly, we do not automatically construe every insurance exclusion provision against an insurer and in favor of coverage for the insured." Grinnell Mut. Reinsurance Co. v. Lynne, 2004 ND 166, ¶ 22, 686 N.W.2d 118 (citing Nationwide Mut. Ins. Co. v. Lagodinski, 2004 ND 147, ¶ 9, 683 N.W.2d 903). This Court has also explained, "[t]his Court will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage." Nationwide Mut. Ins. Co. v. Lagodinski, 2004 ND 147, ¶ 9, 683 N.W.2d 903 (citing Nw. G.F. Mut. Ins. Co. v. Norgard, 518 N.W.2d 179, 181 (N.D. 1994)). "Denying coverage on the basis of a contract term may appear unduly harsh, but straining the language of an insurance policy to favor the insured would do greater harm to the public interest by creating uncertainty in an otherwise unambiguous contract." Martin v. Allianz Life Ins. Co. of N. Am., 1998 ND 8, ¶ 16, 573 N.W.2d 823 (internal citations omitted). This Court has further stated:

> Although an ambiguity occurs when a term has two alternative meanings, Martin, 1998 ND 8, ¶ 10, 573 N.W.2d 823, merely because a contract term is undefined, disputable, or vague does not mean the issue is automatically resolved in favor of the insured. Id. (noting a party "jumps the gun" on contract interpretation by suggesting there is an ambiguity without first looking to the plain meaning). Rather, we principally look to the plain, ordinary meaning of the undefined term to guide our interpretation. Martin, 1998 ND 8, ¶ 9, 573 N.W.2d 823 (citing Aid Ins. Servs., Inc. v. Geiger, 294 N.W.2d 411, 414-15 (N.D. 1980)); N.D.C.C. § 9-07-09 (stating in part contract terms are to be understood in their ordinary sense). The plain meaning of a term is essential to our interpretation because we consider "whether a person not trained in the law or in the insurance business can clearly understand the language." Kief Farmers, 534 N.W.2d at 32. But we also look to other relevant rules of contract interpretation to determine the intent of the parties. Continental Cas. Co. v. Kinsey, 499 N.W.2d 574, 578 (N.D. 1993). See N.D.C.C. Ch. 9-07.

Hanneman v. Cont'l W. Ins. Co., 1998 ND 46, ¶ 28, 575 N.W.2d 445.

2. The Insuring Provisions Of The Excess Liability Policy Do Not Provide Underinsured Motorist Coverage

28. Initially, it should be noted the subject excess liability policy was not required by law to provide underinsured motorist benefits. In that regard, the North Dakota Century Code states:

> No insurer is required to offer, provide, or make available coverage conforming to sections 26.1-40-15.1 through 26.1-40-15.7[1] in connection with any excess policy, umbrella policy, or any other policy which does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation, or use of a specifically insured motor vehicle.

N.D.C.C. § 26.1-40-15.7(2) (emphasis added).

29. Let us then analyze, initially, the insuring language of the excess liability policy. The plain language of the excess liability policy indicates the policy only covers excess liability the insured may be required to pay to third parties. It does

[1] Underinsured motorist coverage is governed by N.D.C.C. § 26.1-40-15.3.

not provide first person coverage; in other words, coverage for injuries to the insured himself, such as underinsured motorist coverage.

30. The section of the policy relied upon by C.W., entitled "Coverage A. Bodily Injury and Property Damage Liability," reads as follows:

> **1. Insuring Agreement**
>
> a. We will pay on behalf of the insured for "ultimate net loss" in excess of the "retained limit" because of "bodily injury" or "property damage" to which this insurance applies. We will have the right to associate with the "underlying insurer" and the insured to defend any "claim" or "suit" seeking damages for "bodily injury" or "property damage" to which this insurance applies.

App. 46.

31. Importantly, "ultimate net loss" is defined as follows in paragraph 26 of the Definitions section:

> **"Ultimate net loss"** means the total amount of damages for which the insured is legally liable in payment of "bodily injury," "property damage," "personal injury," or "advertising injury." "Ultimate net loss" must be fully determined as shown in Condition 19 – When Loss Payable. "Ultimate net loss" shall be reduced by any recoveries or salvages which have been paid or will be collected, but the amount of "ultimate net loss" shall not include any expenses incurred by any insured, by us or by any "underlying insurer."

App. 58 (emphasis added).

32. In other words, the insuring language of this policy states the Nodak will pay "damages for which the insured is legally liable in payment..." This language unambiguously provides that this policy will only provide protection for suits against the insured and claims which subject the insured to liability, not first-party claims in which the insured would be paid benefits to him or herself.

33. Additional definitions of terms contained in the insuring agreement make this truism even more clear. The phrase "retained limit" is defined as follows in paragraph 20 of the Definitions section:

> **"Retained limit"** means the greater of:
>
> a. The sum of amounts applicable to any "claim" or "suit" from:
>
> (1) "Underlying insurance," whether such "underlying insurance" is collectible or not; and
>
> (2) Other collectible primary insurance; or
>
> b. The "self-insured retention.

App. 58 (emphasis added).

34. The terms "claim" and "suit" are defined as follows in paragraph 6 of the Definitions section:

> **"Claim"** means any demand upon the insured for damages or services alleging liability of the insured as the result of an "occurrence" or "offense."

App. 56 (emphasis added). According to paragraph 25 of the Definitions section:

> **"Suit"** means a civil proceeding in which damages because of "advertising injury," "bodily injury," "personal injury" or "property damage" to which this insurance applies are alleged. "Suit" includes:
>
> a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or submits with our consent; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

App. 58 (emphasis added).

35. In short, this excess liability policy only provides coverage for "ultimate net loss." "Ultimate net loss" is defined as "the total amount of damages for which the insured is legally liable in payment." Id. The "insured" in this case is either Milo or C.W. App. 51. Neither of these insured's is "legally liable in payment" for anything. They could only be "legally liable in payment" if a third party liability claim were brought against them, which is what the excess liability policy was intended to cover.

36. Further evidence of the clear intent of the excess liability policy is found in remaining language of the insuring provisions. It provides that the insurer has the right to associate with the "underlying insurer" in defending a "claim" or "suit" against the insured. App. 50. This language simply cannot be reconciled with a first-party claim.

37. Courts that have addressed similar language in an insurance contract have uniformly held that this type of excess liability policy does not provide first party underinsured or uninsured coverage. For example, the Court in Freese v. Bituminous Cas. Corp., 549 N.W.2d 525 (Ia. 1996), interpreted the identical language of the Nodak excess liability policy and specifically the term "ultimate net loss":

> The primary insuring agreement of the umbrella clearly limits its coverages to payment of the "ultimate net loss" in excess of the limits of the underlying policy. Ultimate net loss is defined exclusively in terms of amounts of damages for which the insured is legally liable. The umbrella clearly provides no coverages other than liability coverages.

Id. at 527. The Court thus denied the plaintiff's claim for uninsured motorist benefits. Id.

38. The policy at issue in Mass v. U.S. Fidelity and Guar. Co., 610 A.2d 1185 (Conn. 1992) also included the similar "ultimate net loss" language in the insurance policy. Id. at 1189, fn. 4. Once again, the Court found no uninsured motorist coverage. In that case, the Court addressed the argument that because the policy did not reference uninsured motorist coverage, it was ambiguous:

> Because the Masses' personal excess policy did not expressly provide uninsured motorist coverage, USF & G was under no obligation to exclude such coverage expressly. See Hammer v. Lumberman's Mutual Casualty Co., 214 Conn. 573, 588-89, 573 A.2d 699 (1990) (before need for exclusion arises, there must be coverage within defined scope of policy).
>
> FN10. An insurance contract whose terms are ambiguous must be construed in favor of the insured. Griswold v. Union Labor Life Ins. Co., 186 Conn. 507, 513, 442 A.2d 920 (1982). Although this rule of construction extends to exclusion clauses; id., at 514, 442 A.2d 920; "[a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity." (Internal quotation marks omitted.) Hammer v. Lumberman's Mutual Casualty Co., 214 Conn. 573, 584, 573 A.2d 699 (1990). In the present case, where the personal excess policy did not refer to uninsured motorist coverage, to construe the policy to provide uninsured motorist coverage on the basis that such coverage was not expressly excluded would be to "read into the insurance contract that which is not there." Id., at 591, 573 A.2d 699.

Id. at 1191.

39. In Kromer v. Reliance Ins. Co., 677 A.2d 1224 (Pa. Super. 1996), the Court focused on the language of the insuring agreement in two potentially-applicable excess policies. The Court went on to discuss the issue at some length, and presented convincing arguments equally applicable to the current case:

> Federal's Commercial Excess Liability Policy also provided that "loss" means in pertinent part:
>
> all sums actually paid or sums which the insured is legally obligated to pay in the settlement or satisfaction of a claim ...

> Neither of the above policies express any intention of providing first party underinsured motorist coverage. In fact, it is clear from the language of both policies that they provide third party liability coverage only. FN3. This is evident from the phrase used in both policies: "to pay on behalf of the insured ... sums which the insured is legally obligated to pay". Here, the appellee Hoch is obviously the insured. Reliance and Federal's obligation as insurers of Hoch, is to pay on the part of Hoch, sums Hoch is legally obligated to pay to third parties. As the trial court properly concluded "[t]he underinsured motorists claims of [appellants] do not constitute sums which the insured is legally obligated to pay nor are they payments made on behalf of the insured." Here, appellants, who are employees of Hoch, are making a claim for first party underinsured motorist coverage under Reliance's Umbrella Policy and Federal's Commercial Excess Policy when the language of both clearly indicates that no such coverage exist. Coverage under Federal's and Reliance's excess policies is only triggered by claims of liability against the insured from third parties. Such coverage is not triggered by claims for first party uninsured motorist coverage. Accordingly, we find that neither of the subject excess insurance policies provide underinsured motorist coverage. *See* Liberty Mutual Insurance Company v. McLaughlin, 412 Mass. 492, 590 N.E.2d 679 (1992) (clear language of policy protects from excess judgment against an insured; does not provide uninsured motorists coverage); Cincinnati Insurance Company v. Miller, 190 Ill.App.3d 240, 137 Ill.Dec. 755, 546 N.E.2d 700 (1989) ("liability" in excess policy refers to liability for losses to persons other than the insured); Matarasso v. Continental Casualty Company, 82 A.D.2d 861, 440 N.Y.S.2d 40 (1981), affirmed 56 N.Y.2d 264, 451 N.Y.S.2d 703, 436 N.E.2d 1305 (1982) (umbrella policy protects against claims from third parties; "[t]he uninsured motorist coverage provided by the underlying automobile policy does not involve claims of liability against the insured from third parties and is not incorporated by the umbrella policy").

FN3. An insurance expert testified at trial and succinctly explained the difference between a liability insurance coverage and underinsured/uninsured motorist coverage:

> A liability policy is commonly known and referred to as a [sic] third party coverage. There are three parties, the insurance company, the insured and the claimant.... [I]f the insured is liable for whatever is claimed, the insurance company will pay on behalf of the insured to the claimant the damages sought up to the liability

> limits.... [U]ninsured/underinsured motorist coverage is not liability coverage in that it's [ ] first party coverage. It deals between the insurance company and the insured, and the insurance company agrees to reimburse or to pay the insured, what the insured is entitled to because of damages it sustained by some negligent tortfeasor.
>
> Trial Transcript at 35-36, 10/26/94.

Id. at 1230-31.

40. It should be noted that since the insuring agreement in the Nodak excess liability policy does not provide coverage for uninsured or underinsured benefits, Milo did not pay a premium for these coverages. See Affidavit of Eric Mogen, R. 19, (hereinafter "R. 19"), ¶ 4. It has been noted by one commentator that to require first party coverages on excess liability policies would result in "[s]uch [excess or umbrella] coverage being withdrawn from potential insureds or in premium rates being raised so substantially that they will become priced out of the range of most buyers." 8C J. & J. Appleman, Insurance Law and Practice (1981) § 5071.65, p. 108.

41. Finally, the excess liability policy at issue is titled "Farm And Ranch Excess Liability Policy" and the Declarations page is titled "Comprehensive Catastrophe Excess Liability Policy", clearly indicating the policy covers excess liability, not underinsured motorist benefits for injuries to the insured himself. App. 40, 44. This Court has noted insurance policy titles may be used to interpret the type of coverage afforded:

> In the present case Martin was covered by a group policy with the title "ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE." To conclude the definition of "severance" is somehow broader than the main "dismemberment" title would turn the typical insurance contract on its head. From our observations it

> is typical for the initial portions of an insurance contract to describe in broad terms the coverage provided with the limitations appearing later, in the "small print." This Court construes insurance policies as a whole to give meaning to each word and phrase. Symington v. Walle Mut. Ins. Co., 1997 ND 93, ¶ 17, 563 N.W.2d 400. **Thus, we would ordinarily consider insurance contract titles as descriptive of the coverage provided.** See, e.g., Id. and Kief Farmers, 534 N.W.2d at 32 (stating "[w]e consider whether a person not trained in the law or in the insurance business can clearly understand the language"). *Compare* Stanley v. Safeco Ins. Co. of America, 109 Wash.2d 738, 747 P.2d 1091, 1094 (1988) (Durham, J., dissenting) (noting the heading is part of the contract and informs the average person purchasing insurance of the type of coverage provided).

Martin v. Allianz Life Ins. Co. of N. Am., 1998 ND 8, ¶ 15, 573 N.W.2d 823 (emphasis added).

42. Thus, based on the plain language of the Nodak excess liability policy, there is no coverage for underinsured motorist benefits.

3. The Underinsured Motorist Exclusion Excludes Underinsured Motorist Coverage And Does Not Create An Ambiguity

43. It is important to note that C.W. neither on this appeal or below, argued that the insuring language of this policy somehow conferred underinsured motorist coverage. Rather he relies solely on an exclusion to purportedly establish an ambiguity, which according to C.W., must be resolved in favor of the insured. C.W. relies on the following exclusion as allegedly providing coverage for underinsured motorist benefits:

> 2. Exclusions
>
> This insurance does not apply to:
>
> ...
>
> d. Liability imposed on the insured or the insured's insurer, under any of the following laws:

(1) Employees' Retirement Income Security Act of 1974 (E.R.I.S.A.) as now or hereafter amended;

(2) Any uninsured motorists, underinsured motorists, or automobile no-fault or first party "bodily injury" or "property damage" law; or

(3) Any workers' compensation, unemployment compensation or disability benefits law or any similar law.

App. 46-47 (emphasis added).

44. Importantly, the above exclusion is the only mention of underinsured motorist benefits and the only reference to any first party coverage, anywhere in the excess liability policy. Rather than a grant of underinsured motorist coverage, the provision is a clear exclusion of underinsured motorist coverage.

45. C.W.'s argument can be fairly summarized as follows: since the above exclusion only excludes underinsured motorist coverage imposed under the state underinsured motorist law, the insurance policy must provide broad underinsured motorist coverage from which the statutory minimum is subtracted. In other words, C.W. argues a limited exclusion implies there is more broad coverage in the insuring provisions, or creates an ambiguity as to the scope of coverage. Even on appeal, C.W. cites absolutely no case law in any jurisdiction in support of this position. Nevertheless, while this Court has never considered the issue, C.W.'s argument is not novel. The argument has been made by plaintiffs in other jurisdictions, and has been soundly rejected by the courts.

46. In Muehlenbein v. West Bend Mut. Ins. Co., 499 N.W.2d 233 (Wis. Ct. App. 1993), the Wisconsin Court of Appeals has considered the precise argument made by plaintiff on this appeal and rejected that the insurance policy was

ambiguous or provided coverage. Defendants have not found any authority to the contrary, and plaintiff has not cited any authority to the contrary.

47. In Muehlenbein, plaintiff Mark Muehlenbein was seriously injured in an accident while driving his employer's vehicle. Id. at 234. "The vehicle was insured under a commercial automobile insurance policy and an umbrella policy issued by [the defendant]." Id. Mark Muehlenbein received liability policy limits from the insurer of the other vehicle involved in the accident. Id. He also received the underinsured motorist policy limit from his employer's commercial automobile insurance policy. Id. Mark Muehlenbein and his wife (the plaintiffs) then sought additional underinsured motorist coverage under the umbrella policy issued by the defendant. Id.

48. The umbrella policy in Muehlenbein contained the following endorsement labeled "Uninsured / Underinsured Motorist Coverage Exclusion", which is substantively similar to the policy exclusion at issue in this case: "**[w]e do not cover any claim or obligation imposed by an Uninsured or Underinsured Motorists law**, or which is covered by the Uninsured or Underinsured Motorist coverage part of any insurance policy covering you as an insured person." Id. Similar to the current case, the court noted in Muehlenbein, "[u]ninsured or underinsured motorist coverage is not mentioned anywhere else in the umbrella policy." Id. The District Court granted summary judgment in favor of the defendant. Id. On appeal, the plaintiffs argued:

> that the language of the uninsured/underinsured motorist exclusion is ambiguous. Therefore, the exclusion endorsement must be harmonized with the rest of the policy. They assert that "the language of this endorsement clearly seems to state that

> underinsured motorist coverage is excluded under the commercial umbrella policy only to the extent that the insured is covered by the uninsured or underinsured motorist coverage part of any other policy covering the insured." Unless the endorsement is interpreted to provide excess coverage, the Muehlenbeins argue that the clause becomes meaningless.

Id. at 235.

49. Almost identically to C.W.'s argument on the current appeal, the plaintiffs in Muehlenbein also argued the following, as explained by the court:

> The Muehlenbeins argue that the lack of mention of uninsured or underinsured motorist coverage in the umbrella policy creates an ambiguity with respect to the exclusion. They claim that coverage cannot be subtracted from if it does not exist in the first instance. They ask us to imply uninsured and underinsured motorist coverage into the umbrella policy to resolve the claimed ambiguity. This reading, they suggest, is consistent with the policy of construing ambiguities in an insurance policy against the insurer.

Id. (citations omitted).

50. The court in Muehlenbein rejected the plaintiff's arguments, as this Court should reject the same arguments made by plaintiff in this case.

51. The court in Muehlenbein first considered the kind of coverage afforded by the policy, noting, "[t]he umbrella policy is a *liability* policy." Id. (emphasis in original). The court stated: "[t]he policy does not reimburse the insured for his or her own loss. Instead, 'it protects the insured against damages which he may be liable to pay to other persons by virtue of this own actions.'" Id. at 236. The court further stated, "[b]ased solely on the kind of insurance afforded by the umbrella policy, a reasonable person could not believe that the policy covers damage caused by uninsured or underinsured motorists." Id. Finally, the court reiterated that "[a]n exclusion is a clause that *subtracts* from coverage and puts a

reasonable person on notice that coverage will be limited." Id. at 235 (emphasis in original).

52. The court in Muehlenbein then discussed Wisconsin statutes, similar to North Dakota statutes, which required automobile liability insurance policies to contain uninsured motorist coverage. Id. at 236. The plaintiffs in Muehlenbein had an underlying liability policy that provided uninsured and underinsured motorist coverage. The court explained that "an enterprising insured" might argue there is coverage "by linking the umbrella policy's excess clause to [the underlying] underinsured motorist policy." Id. The court stated, "[b]ecause the umbrella policy requires automobile liability insurance, which in turn must include uninsured motorist coverage, an insured might potentially argue that the excess clause applies to uninsured motorist coverage." Id. The court stated, "rather than creating an ambiguity, the endorsement at issue in this case actually eliminates a potential ambiguity in the body of the umbrella policy", and "there is no proscription against an insurer using an endorsement to protect itself from potential arguments about what is covered." Id. at 235, 237.

53. The court noted, "[t]he Muehlenbeins' interpretation would force [the defendant] to assume risks for which it has not been paid and did not contemplate." Id. at 237 (citations omitted). This Court should adopt the reasoning of the court in Muehlenbein.

54. The Muehlenbein analysis has been applied in subsequent cases. See e.g. Jaderborg ex rel. Bye v. Am. Family Mut. Ins. Co., 2000 WI App 246, ¶¶ 11-12,

620 N.W.2d 468. Likewise, in Moody v. Federated Mut. Ins. Co., the court stated:

> Moody also contends that he is entitled to recover under an umbrella policy that Daugherty Brothers maintained with Federated. However, an exclusion in the umbrella policy specifically provides, "[t]his insurance does not apply to ... liability imposed on the insured under any of the following laws: ... (b) any uninsured motorists, underinsured motorists, or automobile no-fault or first party personal injury law, unless this policy is endorsed to provide such insurance." The umbrella policy will not provide coverage for Moody's injuries because no such endorsement exists, nor is it required. See Va.Code Ann. § 38.2-2206(J) (Supp. 1993) (excluding umbrella policies from the requirements of the uninsured motorist statute).

886 F. Supp. 5, n. 5 (W.D. Va. 1994) aff'd, 48 F.3d 1216 (4th Cir. 1995).

55. C.W.'s attempt to distinguish these cases is unpersuasive. These cases clearly explain why the exclusion is included in this and similar excess policies. C.W. states that the Muehlenbein Court did not "reproduce the insuring agreement in its opinion." Appellant's Brief, p. 23. This is incorrect. The insuring language is reproduced on page 235-26 of Muelenbein opinion, as follows:

> A reading of West Bend's umbrella policy as a whole does not support the Muehlenbeins' argument. We first consider the kind of coverage afforded by the policy. The umbrella policy is a *liability* policy. It clearly states:
>
> > **I. Coverage:** The company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums *which the Insured shall be obligated to pay by reason of the liability*
> >
> > (a) imposed upon the Insured by law, or
> >
> > (b) assumed under contract or agreement by the Named Insured and/or any

> officer, director, stockholder, partner or employee of the Named Insured while acting in his capacity as such.... [Emphasis added.]
>
> The policy does not reimburse the insured for his or her own loss.

Muehlenbein, 499 N.W.2d at 235-36 (emphasis in original).

56. The same is true for the insurance policy in this case. Further, C.W. cites the insuring language in Jaderborg as follows: "We will pay up to our limit, compensatory damages for which an insured becomes legally liable for injury caused by an occurrence covered by this policy." Appellant's Brief, p. 23. This language is substantively identical to the language at issue in this case. As in Muehlenbein and Jaderborg, there is absolutely no reasonable argument that the insuring language of this policy contains any language whatsoever that could be interpreted to provide first-party coverage of any kind. What these cases also show is that the language of Milo's policy, and cases interpreting it, are not unique. Yet not only has C.W. failed to distinguish the cases cited by the district court in support of its position, he again fails to produce even one case which supports his interpretation of this policy.

57. The exclusion of underinsured motorist benefits is not a grant of coverage and does not create an ambiguity but rather makes clear uninsured motorist coverage is excluded. North Dakota Century Code section 26.1-40-15.7(2) indicates that excess liability insurance policies are not required to provide underinsured motorist coverage and the subject exclusion makes clear that Nodak was exercising its right not to provide such coverage. C.W. is attempting to obtain insurance coverage that was never paid for and that is not mentioned

anywhere in the policy other than an exclusion. This Court should not strain the plain meaning of the excess liability policy to provide underinsured motorist coverage where none exists.

4. Plaintiff's Interpretation Of The Nodak Insurance Policy Would Create Absurd Results

58. If the Court accepts C.W.'s argument that the underinsured motorist exclusion provides underinsured motorist coverage, there would be numerous absurd results.

59. For example, in addition to excluding coverage imposed by underinsured motorist law, the exclusion at issue also excludes insurance coverage imposed by "[a]ny workers' compensation, unemployment compensation or disability benefits law or any similar law." App. 46-47. Like underinsured motorist benefits, none of these coverages are mentioned in the insuring language of the policy. If C.W.'s reasoning is accepted, coverage must also be implied in the excess liability policy for workers' compensation, unemployment compensation, disability benefits, and any similar benefits. Plaintiff's argument turns an excess liability policy into an extraordinarily broad insurance policy covering essentially all possible losses. Obviously, the excess liability policy was not meant to provide unemployment compensation, but plaintiff's strange logic that turns an exclusion into a grant of coverage would provide just that. The Nodak excess liability insurance policy cannot possibly be read so broadly.

60. Second, C.W. argues the amount of underinsured motorist coverage afforded under the policy is $2 million minus the statutory minimum of $25,000 and minus the $1,000 retained limit, for a total amount of $1,974,000 in coverage.

That this unambiguous exclusion was simply intended to avoid off $25,000 from a $2,000,000 liability limit strains credulity. Rather, as the Court noted in Muehlenbein, the language was clearly intended to avoid the argument that a state's mandatory underinsured motorist coverage laws extend to this excess policy, regardless of whether a premium is paid for that significant coverage.

61. As indicated above, at the time Milo purchased the subject Nodak excess liability policy, Nodak did not underwrite underinsured motorist coverage for excess liability policies and no premium was paid for underinsured motorist coverage. R. 19, ¶ 4. Therefore, if the Court finds underinsured motorist coverage in the subject Nodak insurance policy, plaintiff would be receiving benefits for which no premium was paid.

62. The above absurdities illustrate how it could not have been and in fact was not the intention of the parties to include underinsured motorist coverage in the excess liability policy. As a matter of common sense, insurance policies simply do not provide coverage that is entirely unexplained and not mentioned anywhere in the policy other than an exclusion. Underinsured motorist insurance is a vast area of the law with many appellate cases and statutes regarding the details of coverage. The parties to the insurance contract could not have intended to exclude the coverage afforded by those laws and include some broader underinsured motorist coverage with no explanations, definitions, or other important information. C.W.'s interpretation renders the unambiguous policy virtually indecipherable and absurd. Instead, this Court should adopt the reasoning of other jurisdictions that make the policy comprehensible and apply

the clear intent of the parties to provide only excess liability insurance, not underinsured motorist benefits.

5. Nodak's Subsequent Offering Of Endorsement EL-76, Which Was Not Available To Wisness Prior To The Accident, Does Not Render The Policy Ambiguous

63. Recognizing that his argument on the policy language itself is unpersuasive, C.W. places great emphasis in his brief on an endorsement offered to Nodak excess policy customers after pertinent events in this case took place. It must be remembered that this endorsement was not placed in the record, and not referenced by either party until C.W. argued it in his reply to Nodak's Brief in Opposition to his Motion for Summary Judgment. Needless to say, the record on this issue is undeveloped.

The endorsement is in the record, and it reads as follows:

> **Excess Liability Policy**
>
> **UNINSURED/UNDERINSURED MOTORIST ENDORSEMENT**
>
> In consideration of an additional premium, it is agreed that the Exclusion in the policy for Uninsured/Underinsured motorist coverage(s) does not apply.

App. 85.

64. Let us first point out what is undisputed and what is in the record. It is undisputed this endorsement is not a part of the policy at issue on this appeal. It is undisputed that this endorsement was offered to existing Nodak customers only upon renewal after May 1, 2007, and was an endorsement to a new excess policy form. It is undisputed the EL-76 endorsement was never used in connection with the contract at issue in this case. It is undisputed this endorsement could not have

been sold to Wisness by Mogen, and was unavailable to him at the time of this accident. It is undisputed that the new excess policy form to which this endorsement applied is not in the record.

65. It is important to note initially that by basing his primary argument on this endorsement – which was not a part of the policy at issue, C.W. is skipping a step in the analysis. This Court recently set forth once again its standard for construing insurance contracts:

> Our goal when interpreting insurance policies, as when construing other contracts, is to give effect to the mutual intention of the parties as it existed at the time of contracting. We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract. While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage. We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others.

Grinnell Mut. Reinsurance Co. v. Thompson, 2010 ND 22, ¶10, 778 N.W.2d 526, citing Schleuter v. Northern Plains Ins. Co., *2009 ND 171, ¶ 8, 772 N.W.2d 879* (quoting Ziegelmann v. TMG Life Ins. Co., 2000 ND 55, ¶ 6, 607 N.W.2d 898) (internal quotes omitted) (emphasis added).

66. To this day, C.W. has not articulated an argument as to how the insuring language in this excess policy grants underinsured motorist coverage, or any coverage except for "damages for which the insured is legally liable in payment." He certainly has failed to cite any precedent for the proposition that it does. Yet

on this appeal, he skips a step, assumes an ambiguity, and asks this Court to rely on evidence extrinsic to this contract, including evidence not contained in the record. This should not be allowed.

67. C.W.'s logic fails in another respect as well. C.W.'s argument is inherently, and fatally, circular. First, he argues that excluding coverage that was not granted in the insuring language creates an ambiguity. Then he argues that the insuring language must create coverage because of Nodak's actions subsequent to the execution of this insurance contract and the accident, but he ignores the exclusion for underinsured motorist coverage. If the insuring language of the policy before this Court somehow created coverage, then the exclusion for "[l]iability imposed on the insured or the insured's insurer, under any ... uninsured motorists, underinsured motorists, or automobile no-fault or first party 'bodily injury' or 'property damage' law" would exclude it.

68. The Appellant cannot have it both ways. Even if the insuring language of this contract somehow conferred underinsured coverage, and it is impossible on its plain language to see how, C.W.'s awkward interpretation of the exclusion as only excluding North Dakota's statutory minimum underinsured limits still strains credulity. The well-reasoned opinion of the District Court must be affirmed.

IV. CONCLUSION

69. The Appellee, Nodak Mutual Insurance Company requests that the decision of the District Court be affirmed in its entirety.

Dated this 21st day of April, 2011.

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CERTIFICATE OF COMPLIANCE

70. The undersigned, as attorneys for the defendant/appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 8,218.

Dated this 21st day of April, 2011.

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CERTIFICATE OF SERVICE

71. I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was on the 21st day of April, 2011, electronically filed with the following:

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By */S/ Scott K. Porsborg*
SCOTT K. PORSBORG

ADDENDUM

OCT 2 1 2010

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF MCKENZIE

NORTHWEST JUDICIAL DISTRICT

Chase Wisness,

Plaintiff,

Vs.

Nodak Mutual Insurance Company and Eric Mogen,

Defendants.

Civil No. 27-10-C-026

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

This case arises out of an automobile accident that occurred on or about June 1, 2007, and resulted in injuries to Plaintiff Chase Wisness that rendered him a paraplegic. The action was commenced by Chase's father, Milo Wisness, on behalf of Chase. At the time of the accident, Chase was sixteen years old and living at home with his parents. When Chase reached the age of majority, the parties stipulated to substitute Chase Wisness for Milo Wisness as Plaintiff.

Following the accident, all of the insurance coverage available to the driver of the vehicle in which Chase was a passenger, as well as the underinsured motorist ("UIM") coverage available to Chase through an automobile policy held by Milo, was exhausted. Chase then sought coverage from a Farm and Ranch Excess Liability Policy ("excess policy") issued by Defendant Nodak Mutual Insurance Company ("Nodak"). Defendant Eric Mogen was the insurance agent who sold the policy to Milo.

Coverage was denied by Nodak, and on or about April 1, 2009, this action was commenced, seeking a declaration by the Court that Chase is entitled to additional underinsured motorist coverage under Milo's excess policy; for a

finding of bad faith on the part of Nodak in denying coverage, or, in the alternative, for a judgment against Mogen for negligence.

Chase filed a motion for partial summary judgment on May 5, 2010, on the issue of coverage of the excess policy. Nodak filed a response and cross-motion for summary judgment on July 2, 2010, on all issues. Chase filed a response and reply brief on August 24, 2010, and Nodak filed a reply brief on August 31, 2010. Affidavits were filed by Scott Porsborg, attorney for Nodak, Dennis Johnson, attorney for Chase Wisness, Eric Mogen, and Milo Wisness.

Oral arguments on the motions were heard on September 1, 2010. Appearing at the hearing were Attorney Dennis Johnson, Milo Wisness, Attorney Scott Porsborg, and Dale Haake, Director of Casualty Claims for Nodak Mutual Insurance Company.

After consideration of the parties' briefs, exhibits, and oral arguments, the Court finds that there are no genuine issues of material fact, and Nodak Mutual Insurance Company is entitled to judgment as a matter of law.

SUMMARY JUDGMENT

"Under N.D.R.Civ.P. 56, summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from the undisputed facts, or if resolving disputed facts would not alter the results." *Schleuter v. Northern Plains Ins. Co., Inc.*, 2009 ND 171, ¶ 6, 772 N.W.2d 879 (citing *Farmers Union Mut. Ins. Co. v. Associated Elec. & Gas Ins. Serv. Ltd.*, 2007 ND 135, ¶ 7, 737 N.W.2d

253). "The party moving for summary judgment has the burden of establishing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Id.* A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. *Investors Real Estate Trust v. Terra Pacific Midwest, Inc.*, 2004 ND 167, ¶ 5, 686 N.W.2d 140. Negligence actions involve questions of fact and are generally inappropriate for summary judgment unless a reasonable finder of fact could reach only one conclusion from the evidence. *Perius v. Nodak Mut. Ins. Co.*, 2010 ND 80, ¶ 13, 782 N.W.2d 355.

DISCUSSION

I. EXCESS POLICY

At the time of Chase's accident, Milo Wisness had a personal auto insurance policy in place that covered liability for, among other things, underinsured motorists.

Wisness Farms, including Lester Wisness (Milo's father), Milo Wisness and Paul Wisness (Milo's brother) had a Farm and Ranch Excess Liability Policy in place, which, Chase argues, when properly construed, provides coverage for underinsured motorists, such as himself.

The excess policy, in pertinent parts, stated the following:

"COVERAGE A. Bodily Injury and Property Damage Liability

1. Insuring Agreement

a. We will pay on behalf of the insured for 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' or 'property damage' to which this insurance policy applies. . . .

***

2. Exclusions

This insurance does not apply to:

***

d. Liability imposed on the insured or the insured's insurer, under any of the following laws;

(1) Employees' Retirement Income Security Act of 1974 (E.R.I.S.A.) as now or hereafter amended;
(2) Any uninsured motorists, underinsured motorists, or automobile no-fault or first party 'bodily injury' or 'property damage' law; or
(3) Any workers' compensation, unemployment compensation or disability benefits law or any similar law."

"*Ultimate net loss*" is defined in the excess policy as:

". . . the total amount of damages for which the insured is legally liable in payment of 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury.'. .'Ultimate net loss' shall be reduced by any recoveries or salvages which have been paid or will be collected. . . ."

The excess policy required that the 'underlying insurance' described in the Declarations be kept in full force and effect during the policy period of the excess policy. The underlying insurance described on the excess policy's declarations page for Milo was "automobile" and "Farm & Ranch."

Chase argued there are three reasons to find that the excess policy provided UIM coverage: (1) that the exclusion created an ambiguity that must be construed in favor of the insured; (2) that by adding an endorsement for UIM coverage in 2007, Nodak was admitting that without the exclusion at issue, the

policy would include UIM coverage; and (3) that because an underlying insurance policy -- Milo's auto policy – provided UIM coverage, it was reasonable for Milo to believe that a comprehensive catastrophic excess liability policy would provide coverage in excess of that covered by his auto policy.

1. Ambiguity / Endorsement

Reasons (1) and (2), above, are closely related and will be discussed together.

In *Peterson v. Dakota Molding, Inc.*, 2007 ND 144, ¶ 10, 738 N.W.2d 501, the Supreme Court of North Dakota stated that insurance policies are construed as a whole, giving effect to each and every provision, if possible. Chase argues that if the excess policy's insuring agreement (Coverage A) does not provide UIM coverage, the exclusion of liability imposed under the state underinsured motorist law is deprived of any meaning, which is not permissible under the laws governing the interpretation of insurance policies. In other words, Chase argued, the exclusion had to be excluding something that existed in the first place.

Chase also argued that the proper interpretation of the insurance policy, and one that respects all of the policy's provisions, is that its insuring agreement provides UIM coverage up to the stated policy limits, *less* the amount required by North Dakota's underinsured motorist law (N.D.C.C. § 26.1-40-15.3).

It is Chase's position that the inclusion of the words "first party" [1] in the excess policy's Exclusion (2)(d)(2) is an indication that the insuring agreement

[1] First party coverage is coverage for loss or damage sustained by the insured in which the insurer usually promises to pay money to the insured upon the happening of the risk insured against; third party coverage is coverage for the insured's liability for damage or loss sustained by another. *Grinnell Mutual Reinsurance v. Thies*, 2008 ND 164, ¶ 14, 755 N.W.2d 852.

provided first-party coverage and that it would be nonsensical to exclude first-party coverage from an insuring agreement that does not provide first-party coverage to begin with. According to Chase, this creates an ambiguity, especially when considered in light of the 2007 addition of Endorsement EL-76, quoted below, which is an indication that, but for the excess policy's exclusion, the policy *would* include underinsured motorist coverage. The endorsement states:

"Excess Liability Policy

UNINSURED/UNDERINSURED MOTORIST ENDORSEMENT

> In consideration of an additional premium, it is agreed that the Exclusion in the policy for Uninsured/Underinsured motorists coverage(s) does not apply."

See, Exhibit B attached to "*Affidavit of Dennis Edward Johnson.*"

Whether an insurance policy is ambiguous is generally a question of law. *Grinnell Mutual Reinsurance v. Lynne*, 2004 ND 166, ¶ 20, 686 N.W.2d 118. "An ambiguity exists when good arguments can be made for two contrary positions about the meaning of a term in a document." *Id.* Ambiguities in insurance policies are resolved in favor of the insured. *Id.* at ¶ 21.

There is no North Dakota case law that addresses the issue of UIM coverage under the circumstances presented in the case at bar. In support of its position, Nodak, instead, relied up a Wisconsin case, *Muehlenbein v. West Bend Mututal Insurance Co.*, 499 N.W.2d 233 (Wisc.App. 1993).

The issue in *Muehlenbein* was "whether an endorsement to [a commercial umbrella] policy expanded the scope of the policy, when the body of

the policy was clear and unambiguous and did not mention the coverage excluded by the endorsement." 499 N.W.2d at 234.

In the case, the Muehlenbeins argued that the uninsured/underinsured motorist exclusion was ambiguous; therefore, the exclusion endorsement must be harmonized with the rest of the policy. *Id.* at 235. The Muehlenbeins asserted that 'the language of this endorsement clearly seems to state that underinsured motorist coverage is excluded under the commercial umbrella policy only to the extent that the insured is covered by the uninsured or underinsured motorist coverage part of any other policy covering the insured," and "unless the endorsement is interpreted to provide excess coverage, the clause becomes meaningless." *Id.*

West Bend responded that "in light of the clear absence of underinsured motorist coverage in the insuring agreement, the exclusion endorsement really is not legally necessary to preclude underinsured motorist coverage." *Id.* West Bend stated that the Muehlenbeins "are attempting to conjure up an ambiguity and thus create coverage where none exists." *Id.* West Bend pointed out that even though policy language is to be construed against the insurer, such construction should not be strained construction. *Id.*

The *Muehlenbein* court concluded: "[r]ather than creating an ambiguity, the endorsement at issue in this case actually eliminates a potential ambiguity in the body of the umbrella policy." *Id.* The court reasoned as follows:

> "Because the umbrella policy requires automobile liability insurance, which in turn must include uninsured motorist coverage, an insured might potentially argue that the excess clause applies to uninsured motorist coverage.

> Additionally, West Bend issued Servicemaster's underlying automobile insurance policy. It is reasonable to assume that West Bend was aware of the policy's terms, which included underinsured motorist coverage. Therefore, West Bend no doubt believed that an enterprising insured might try to assert coverage where none existed by linking the umbrella policy's excess clause to underinsured motorist coverage.
>
> West Bend eliminated these uncertainties surrounding uninsured and underinsured motorist coverage by issuing the exclusion endorsement at issue in this case. The endorsement clearly and unambiguously excludes coverage for any claim that is covered under the uninsured or underinsured motorist provision of any policy covering the insured. We hold there is no proscription against an insurer using an endorsement to protect itself from potential arguments about what is covered."

Id. at 236-37.

In another Wisconsin case decided after *Muehlenbein*, the Wisconsin Court of Appeals considered an umbrella policy that included an exclusion [rather than an endorsement, as in *Muehlenbein*] for uninsured and underinsured motorist coverage or similar coverage "unless this policy is endorsed to provide such coverage." *Jaderborg v. American Family Mutual Insurance Company,* 620 N.W.2d 468 (Wisc.App. 2000). The Court concluded that "[u]nlike the policy in *Muehlenbein*, the umbrella policy here contains an underinsured motorist exclusion. The Court concluded the effect, however, was the same as in *Muehlenbein.* 720 N.W.2d at 470.

Chase attempted to distinguish *Muehlenbein* on the ground that *Muehlenbein* involved an endorsement, not an exclusion. There was an attempt to distinguish *Jaderborg* as well, but the Court was not persuaded by either argument. Rather, the Court adopts the rationale in *Muehlenbein* and *Jaderborg*

and finds it applicable to the case at bar. In accordance with the conclusion of the *Muehlenbein* court, this Court finds there is no proscription against an insurer using an exclusion to protect itself from potential arguments about what is covered.

2. Reasonable expectations

Chase has presented nothing to indicate to the Court that Milo ever entered into any discussions with Nodak about UIM coverage in the excess policy. Milo merely assumed he had UIM coverage over and above that provided in his auto policy.

In an affidavit dated May 5, 2010, Milo stated he relied on Nodak's agent, Eric Mogen, to provide him with "the best and most complete coverage available, including underinsured motorist coverage available." "*Affidavit of Milo Wisness in Support of Plaintiff's Motion for Partial Summary Judgment*," ¶ 2 (Exhibit C attached to "*Brief in Support of Plaintiff's Motion for Partial Summary Judgment.*" Milo stated further that it was his understanding the excess policy would protect him and his family from any situation where claims were made against them or injuries cause to them by someone without adequate insurance. *Id.* at ¶ 6. Milo testified by deposition on June 9, 2010, that he assumed he had UIM coverage. "*Deposition of Milo Wisness*," (Exhibit B attached to "*Affidavit of Scott K. Porsborg*"), p. 20, ll. 7-16; p. 44, ll. 1-2; p. 64, ll. 8-11. Milo, however, also testified he never told Eric Mogen he wanted $2 million in UIM coverage (*Id.* at p. 47, ll. 7-8), and Eric never led him to believe that the $2 million excess policy applied to underinsured motorist benefits. *Id.* at p. 18, ll.6-12. Milo filed a

second affidavit on August 24, 2010, in which he stated that because of the title "Comprehensive Catastrophe Excess Liability Policy," he believed the excess policy would cover every type of catastrophe that might occur for which his other insurance provided initial coverage. "*Affidavit of Milo Wisness*," ¶ 4.

Chase argued the policy must be interpreted to provide coverage because the reasonable expectations of Milo, based on the ambiguity in the policy and Nodak's communication of his coverage to him, were that the underinsured motorist coverage was part of the excess policy.

"The doctrine of reasonable expectations is an interpretive tool employed by courts which considers the experience and knowledge of the insured when purchasing insurance." *Nationwide Mutual Insurance Companies v. Lagodinski*, 2004 ND 147, ¶ 29, 683 N.W.2d 903. The Supreme Court of North Dakota has not adopted the doctrine, and even if it had, an insurance policy must first be found to be ambiguous in order to apply the doctrine. *Id.* at ¶ 31.

Conclusion

The Court finds no ambiguity in the excess policy with regard to UIM coverage. The insuring agreement does not mention UIM coverage, and, under the rationale adopted by this Court from *Muehlenbein*, rather than creating an ambiguity, the exclusion actually eliminates a potential ambiguity. Refer, *Muehlenbein*, 620 N.W.2d at 235.

II. ERIC MOGEN

Count III of the Complaint alleges negligence on the part of Eric Mogen.

Without concluding that the insurance business is a profession, the North Dakota Supreme Court noted in *Rawlings v. Fruhwirth*, 455 N.W.2d 574, 576 (N.D. 1990) that the elements of a professional negligence action include: (1) the existence of a duty; (2) a failure to discharge that duty; (3) a resulting injury; (4) caused by the breach of duty.

The Complaint filed in this action alleges that:

> 6. [Milo] Wisness had a special relationship with Mogen as his insurance agent and relied upon Mogen to advise and procure insurance for Wisness.
>
> ***
>
> 38. At all times pertinent to this cause of action, Wisness had a special relationship with Mogen as his insurance agent.
>
> 39. Mogen was aware of the types of insurance coverage which would be prudent for Wisness to have both in his business and personally.
>
> 40. Mogen provided professional advice and counseling to Wisness in advising Wisness of the types of insurance available for Wisness for the business and personal needs for Wisness to consider and obtain insurance coverage.
>
> 41. Wisness relied upon such counseling and advice of Mogen and reasonably relied upon Mogen to advise and assist Wisness in procuring insurance coverage that was prudent and reasonable for Wisness' insurance needs.

In his motion for partial summary judgment, Chase took the position that when Milo entered into the excess policy, it was Milo's understanding it would provide UIM coverage over and above that provided in his automobile policy and that Milo was led to this understanding by the representations of Eric Mogen.

In *Rawlings,* the Supreme Court of North Dakota adopted the Minnesota standard of care that requires insurance agents to "exercise the skill and care which a reasonably prudent person engaged in the insurance business would

use under similar circumstances." [2] 455 N.W.2d at 577. The *Rawlings* Court stated "[t]his duty is ordinarily limited to the duties imposed in any agency relationship to act in good faith and follow directions." *Id.* In *Kaleb E. Lindquist American Legion Post # 24 v. Lake of the Woods Agency, Inc.*, 2003 WL 22076615 (D. Minn.), the court acknowledged an insurance agent's duty to act in good faith and follow instructions, and added, ". . . when 'special circumstances' exist, such as a 'special relationship,' an insurance agent may be under a duty to take some affirmative action, such as offering, advising or furnishing coverage, rather than merely following the client's instructions."

In a negligence claim, the existence of a duty is generally an initial question of law. *Rawlings*, 455 N.W.2d at 577. The *Rawlings* court said further:

> However, if the existence of a duty depends upon factual determinations, the facts must be resolved by the trier of fact. Issues which are questions of fact for the jury may become issues of law for the court, however, where the facts are such that reasonable persons could not differ."
> *Id.*

A. Special relationship

In *Bruner v. League General Insurance Company*, 416 N.W.2d 318, 321 (Mich.App.1987), the court said:

> While is it perhaps difficult to derive any absolute rule of law from these cases [which address special relationships], it is apparent that something more than the standard policyholder-insurer relationship is required in order to create a question of fact as to the existence of a "special relationship" obligating the insurer to advise the policyholder about his or her insurance coverage. There must be, in a long-standing relationship, some type of interaction on a

[2] Because the Supreme Court of North Dakota adopted Minnesota's standard of care for insurance agents, this Court will look, in large part, to Minnesota caselaw to clarify that standard of care.

question of coverage, with the insured relying on the expertise of the insurance agent to the insured's detriment.

The existence of a "special relationship" between an insurance agent and his insured will give rise to a duty to advise. *Ray v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 172559 * 6 (D. Minn.) (quoting *Harts v. Farmers Ins. Exchange*, 597 N.W.2d 47, 52 (Mich. 1999) (modifying *Bruner*, 416 N.W.2d 318). "A special relationship exists when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured." *Id.*

"Minnesota courts find a 'special relationship' or "special circumstances" when an agent knows that the insured (1) is unsophisticated in insurance matters, (2) is relying upon the agent to provide appropriate coverage, and (3) needs the protection at issue. *Murphy v. American Family Mutual Insurance Co.*, 1992 WL 25441 * 1 (Minn.App.); *Kaleb E. Lindquist American Legion Post # 24 v. Lake of the Woods Agency, Inc.*, 2003 WL 22076615 * 3 (D. Minn.) (citing *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 544 (Minn.)).

In support of his contention that a "special relationship" existed between Milo and Mogen, Chase argued Milo had a long-standing relationship with Mogen and Nodak. Milo testified at his deposition that the excess policy at issue had been in place for about ten years (*Deposition*, p. 63, ll. 5-8; *see also*, "*Affidavit of Milo Wisness*," dated August 22, 2010, ¶ 2), and Mogen has worked with Milo as

Nodak's agent since 2004. *Id.* at p. 14, ll. 16-21. Milo also testified he has known Mogen for most of his life (*Deposition*, p. 15, ll. 5-6), Milo and Mogen grew up on farms that are close in proximity (*Id.* at p. 15, ll. 13-23), and Mogen's father is Milo's first cousin. *Id.* at p. 15, ll. 10-12.

There was no showing that Milo was unsophisticated in insurance matters. Milo testified he has handled insurance matters for the family over the years. (*Deposition*, p. 12, ll. 1-6) and that he had a general understanding of underinsured motorist coverage,

> "through the news and probably through Carol Norgard when we first started taking insurance out with her. It's pretty self-explanatory."

Deposition, p. 21, ll. 1-4.

There was no showing, beyond Milo's bare assertion, that Milo was relying on Mogen to provide the coverage at issue. There was no evidence that, prior to the accident, Milo and Mogen had ever even discussed UIM coverage. Milo testified as follows:

> Q. In the affidavit you indicate that you believed at the time of the accident involving Chase that your excess liability policy provided underinsured motorist benefits as well as liability coverages; is that right?
>
> A. Yes.
>
> Q. And you believed that prior to the accident with Chase?
>
> A. Yes.
>
> Q. All right. In the affidavit you don't indicate anywhere that Eric Mogen told you that you had $2 million in underinsured motorist coverage. Eric Mogen didn't tell you that, did he?
>
> A. No.

***

Q. Are you alleging that Eric Mogen told you something prior to the accident involving Chase that led you to believe that the $2 million in underinsured motorist coverage applied – or $2 million excess policy applied to the underinsured motorist benefits?

A. No.

Deposition, p. 17, l. 11 – p. 18, l. 12.

Milo testified further:

Q. But you never told Eric that, that you wanted $2 million in UIM coverage; correct?

A. Not specifically.

Q. Other than Eric Mogen, can you tell me about any other conversations that you have had with anyone at Nodak about UIM coverage, either before or after the accident?

A. I suppose with Carol Norgard before.

Q. Carol Norgard never told you that you had UIM coverage under your excess policy either, did she?

A. No.

Deposition, p. 47, ll. 7-18.

Chase stated in his brief in support of his motion for partial summary judgment that Milo was led to believe the excess policy included UIM coverage by misrepresentations made by Mogen. Chase did not, however, specify what those misrepresentations were.

A special relationship exists when an insured asks the agent to examine the insured's exposure and advise the insured on the potential exposure. *Scottsdale Ins. Co. v. Transport Leasing/Contract, Inc.*, 671 N.W.2d 186, 196 (Minn.App. 2003). Chase has not established there had ever been an inquiry

made by Milo or any discussions between Milo and Mogen, or Milo and anyone else at Nodak, about UIM coverage prior to Chase's accident.

There are no disputed facts about Milo's relationship with Mogen, and the Court finds, as a matter of law, that the relationship between Milo and Mogen did not rise to the level of "special," and was simply one of policyholder and insurance agent.

B. Special circumstances

North Dakota has not defined what "special circumstances" must exist to impose a heightened duty on insurance agents. In Minnesota, courts have found "special circumstances" in only a few cases; e.g., *Beauty Craft Supply & Equip. Co. v. State Farm Fire and Cas. Ins. Co.*, 479 N.w.2d 99, 101-02 (Minn.App. 1992) (holding special circumstances may arise when the insured delegates decision-making authority to the agent and agent acts as an insurance consultant); *Osendorf v. American Family Ins. Co.*, 318 N.W.2d 237, 238 (Minn. 1982) (finding insurance agent may be under obligation to update insurance policy when agent knew insured was unsophisticated in insurance matters and agent knew insured was relying on agent to produce adequate coverage); *Johnson v. Urie*, 405 N.W.2d 887, 889 (Minn. 1987) (holding that duty to "offer, advise or furnish insurance coverage" may arise from "circumstances of the transaction and the relationship of the agent vis-à-vis the insured").

The "special circumstance" argued by Chase was that Nodak offered UIM coverage in January 2007 for new policies but did not offer it to renewals until May 2007, three months after Milo renewed the excess policy for the year. Milo

stated in his affidavit that he would have taken out the UIM coverage that became available through Nodak in 2007 if anyone had explained to him that the excess policy did not include UIM coverage. *Affidavit* dated August 22, 2010 at ¶ 8. That is speculative, but even if true, the Court does not see that the timing of Nodak's ability to offer UIM coverage in excess policies is a "special circumstance" that would trigger an expanded duty by Mogen to Milo. Even if it was found to be a "special circumstance," it is not disputed that Milo and Mogen, or Milo and anyone at Nodak, never had a discussion about UIM coverage with regard to the excess policy.

Conclusion

Having considered Chase's arguments in support of a heightened duty by Mogen, the Court finds Chase has not established there was a special relationship between Milo and Mogen or that there was a special circumstance involved that would impose on Mogen a duty to do anything other than to act in good faith and to follow Milo's instructions. As to Mogen's duty to act in good faith, there has been no bad faith allegation made against Mogen in this case. The only allegation of bad faith is made against Nodak for denying additional UIM coverage under the excess policy. *Complaint* at ¶¶ 31-34. As to Mogen's duty to follow Milo's instructions, there has been no allegation that, prior to Chase's accident, Milo requested additional UIM coverage in the excess policy and that Mogen failed to follow Milo's instructions. The Complaint merely alleged that "Mogen was aware of the types of insurance coverage which would be prudent for Wisness to have both in his business and personally." *Complaint* at ¶ 39.

The Court finds that Chase was unable to establish that Mogen had a heightened duty to Milo or that Mogen breached his ordinary duty to act in good faith and follow Milo's instructions.

IT IS, THEREFORE, ADJUDGED, ORDERED, AND DECREED that Plaintiff's "Motion for Partial Summary Judgment" is **DENIED** and Defendant's "Cross Motion for Summary Judgment" is **GRANTED**, with prejudice, consistent with this Order.

Dated at Williston, North Dakota, this 19 of October, 2010.

BY THE COURT:

David W. Nelson
Judge of the District Court

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2010, a copy of the foregoing ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS was mailed by U.S. first-class mail at Williston, North Dakota, to:

Dennis Edward Johnson
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Dated this 20th day of October, 2010.

JEANNE R. BREVIK
Scheduling Clerk/Secretary