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FILE CASE NO. 29-2012-CV-00087

STATE OF NORTH DAKOTA
IN SUPREME COURT

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JAN 30 2014

STATE OF NORTH DAKOTA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff and Appellee,

vs.

SANDY GRUEBELE A.K.A. SANDY GOETZ AND S█████ G█████, AND JOHN
ALLMER,

Defendants,

JOHN ALLMER,

Appellant.

BRIEF OF APPELLANT JOHN ALLMER FROM SUMMARY JUDGMENT

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FEB 05 2014

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STATEMENT OF THE LEGAL ISSUE

- I. Whether the trial court erred when it granted Summary Judgment to the Appellee, and held that the State Farm insurance policy number 20 0282-E04-34A provided no coverage for the accident that occurred on May 15, 2011 between S█████ G████ and John Allmer.

STATEMENT OF THE CASE

Appellant appeals the Order for Judgment (hereinafter "Order") issued by the District Court on November 5, 2013. In the Order, the district court held that, as a matter of law, the State Farm policy at issue, No. 20 0282-E04-34A, provides no coverage for the accident that occurred on May 15, 2011 between S█████ G████, a minor, and John Allmer. The Appellant appeals the order because the facts indicate that the policy in question was an owner-operator policy and as such, affords insurance coverage for the accident.

STATEMENT OF FACTS

On May 15, 2011, S█████ G████, the 15 year old daughter of Sandy and Steve Goetz, was involved in a motor vehicle accident with John Allmer. (App. 2-5, 77-78). S█████ G████ was liable for the accident. (App. 2-5, 77-78, Doc. ID # 29). John Allmer sustained extremely severe injuries in the accident. (App. 2-5, Doc. ID 29). Past medical bills and expenses total more than one million dollars. (Doc ID # 29, 48, 49). John Allmer has been either hospitalized or in a nursing home from the date of the accident through the present time and it is anticipated that he will remain in some type of institutionalized setting for the rest of his life. (Doc ID # 29, 48, 49).

At the time of the accident, S█████ G█████ was operating a motor vehicle which was owned by her father, Steven Goetz. (App. 2-5, Doc ID # 29). The automobile that she was driving, a 1990 Oldsmobile, had a \$250,000 primary liability policy and a \$1 million umbrella policy. (App. 49, 50, Doc ID # 29). S█████'s parents divorced in 1997 and S█████ primarily lives with her mother, Sandy Goetz. (App. 42 and 43, Doc ID #20). S█████ G█████ had obtained her driver's license six months prior to the accident. (App. 44) In order to get a driver's license, S█████ G█████' mother, Sandy Goetz, was required to sign a "sponsorship form" which indicates the following:

The party signing as sponsor assumes the financial liability for the negligent acts of the designated minor arising from the operation of a motor vehicle. (N.D.C.C. Section 39-06-08 and 39-06-09). The sponsorship shall be signed by the father, mother, or legal guardian. When a guardian signs, guardianship papers must be attached to the application. Sponsorship may be waived if proof of financial responsibility is filed on behalf of the minor. In the event there is no living parent or legal guardian another responsible adult may sign the sponsorship, such party swearing that the minor named herein residing in his or her household. This sponsorship is valid for all subsequent permits and licenses of the minor unless canceled by the sponsor. A sponsor may cancel by filing with the director a verified written request that the permit or license of the minor so granted be canceled. (N.D.C.C. Section 39-06-11).

Sandy Goetz signed this sponsorship on April 22, 2010. (App. 111)

State Farm has indicated that it believes its policy is an owner's policy pursuant to N.D.C.C. § 39-16.1-11 (2) and has conceded that if the insurance policy was an operator's policy, it would be governed by N.D.C.C. § 39-16.1-11(3). (Doc. ID # 20) State Farm has conceded that the operator's policy protects the named insured against liability from the use of any motor vehicle. (Doc. ID # 20).

The parties filed cross motions for summary judgment in this case. Before the court issued its order in this case, the parties stipulated that State Farm's insurance agent, Kathy Kelsch's deposition needed to be taken before the court would enter an order. (Doc. ID # 51). Despite this stipulation, the court entered an order granting State Farm summary judgment; in that order, the court provided, "[t]he State Farm insurance policy at issue is an owner's policy in that it specifically lists the vehicle and driver covered by the policy on the Declarations Page." (App. 7-14). The parties took the deposition of Kathy Kelsch, State Farm's Insurance agent. (App. 19-33). Sandra Goetz purchased the policy through Kathy Kelsch. (App. 26, Folio 14). Ms. Kelsch provided the following information:

Q: As far as you are aware is there anything on the Internet that would be available to you as a claim's adjuster where you could look and say what is this supposed to mean?

A: No, my resource would be to call claims.....

(App. 29, Folio 26).

Q: And the reason we're here today is with regard to an automobile insurance policy. To your knowledge what type of automobile insurance policies does State Farm sell through your agency?

A: Owner-operator.

Q: Okay.

A: That is typically what we sell.

Q: Are there different types of policies or it is one policy?

A: One policy.

(App. 25-26, Folio 10-11).

State Farm's insurance agent has indicated that State Farm does not sell owner policies or operator policies (App. 26, Folio 13-14). The policy that State Farm sells in North Dakota is an owner-operator policy, a combination. (App. 25, Folio 10, App. 13, Folio 13). To the best of the insurance agent's knowledge, she would not have discussed the difference between an owner's policy and an operator's policy with Sandy Goetz. (App. 27, Folio 16-17) To the best of the insurance agent's knowledge, State Farm would never have sent Sandy Goetz any information explaining the difference between an owner's policy and an operator's policy. (App. 27, Folio 17).

John Allmer moved for relief from the court order based in part upon the insurance agent's testimony that the policy in question is an owner-operator's policy. (Doc ID # 45) On October 30, 2013, the court denied John Allmer's motion but made no additional findings regarding the legal implications of an owner-operator policy. (App. 15).

ARGUMENT

- I. Whether the trial court erred when it granted Summary Judgment to the Appellee, and held that the State Farm insurance policy number 20 0282-E04-34A provided no coverage for the accident that occurred on May 15, 2011 between S█████ G█████ and John Allmer.**

This matter was subject to Summary Judgment. "Whether summary judgment was properly granted is 'a question of law which we review de novo on the entire record.'" Zuger v. State, 2004 ND 16, ¶ 7, 673 N.W.2d 615, 619 (N.D. 2004).

Summary Judgment is "a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no disputed issues of material fact or

inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." Perius v. Nodak Mut. Ins. Co., 2010 ND 80, ¶ 9, 782 N.W.2d 355, 358-359 (N.D. 2010), *citing* Klingle v. Bahl, 2007 ND 13, ¶ 4, 727 N.W.2d 256, 258 (N.D. 2007). "Evidence presented on a motion for summary judgment is viewed in the light most favorable to the party opposing the motion, and that party is given the benefit of all favorable inferences which reasonably can be drawn from the evidence." Perius, at ¶ 9, 782 N.W.2d at 359, *citing* Halvorson v. Sentry Ins., 2008 ND 205, ¶ 5, 757 N.W.2d 398, 400 (N.D. 2008). "Summary judgment is appropriate 'against a party who fails to establish the existence of a factual dispute as to an essential element of his claim and on which he will bear the burden of proof at trial.'" Perius, at ¶ 9, 782 N.W.2d at 359, *citing* Halvorson, at ¶ 5, 757 N.W.2d at 400. "A party seeking summary judgment has the initial burden of showing that no dispute exists as to either material facts or inferences to be drawn from undisputed facts and that the movant is entitled to judgment as a matter of law." Perius, at ¶ 9, 782 N.W.2d at 359, *citing* Halvorson, at ¶ 5, 757 N.W.2d at 400. "If the movant meets that initial burden, the opposing party 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 and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.'" Perius, at ¶ 9, 782 N.W.2d at 359, *citing* Beckler v. Bismarck Pub. Sch. Dist., 2006 ND 58, ¶ 7, 711 N.W.2d 172, 175 (other citations omitted).

N.D.C.C. § 39-06-09 and 39-16.1-11 clearly show that Sandy Goetz is responsible for the damages incurred by John Allmer.

N.D.C.C. § 39-06-09 provides, “Any negligence of a minor when driving a motor vehicle upon a highway must be imputed to the person who has signed the application of such minor for permit or license, which person must be jointly and severally liable with such minor for any damages caused by such negligence, except as otherwise provided in Section 39-06-10.”

The North Dakota Supreme Court has held this statute to mean, “N.D.C.C. 39-06-09 requires the imputation of all negligence, not solely financial liability, to the signing parent or guardian.” Anderson v. Anderson, 1999 ND 57, ¶ 9, 591 N.W.2d 138, 140 (N.D. 1999). The Court also held that the signing driver is liable as if she were the driver. In Rogers v. MFA Mut. Ins. Co., the Supreme Court of Arkansas decided a case similar to the one at hand. 262 Ark. 55, S.W.2d 327 (Ark. 1977). In that case, after a husband and wife divorced, their minor child was involved in an accident with mom’s car and the father, Rogers, signed the sponsorship form. Rogers was sued because of his statutory liability for signing the sponsorship form. His insurance company had issued him an automobile liability insurance policy upon his own automobile. To avoid liability under the policy, Rogers’ insurance company provided the following:

The question presented is whether coverage under the MFA policy insures the appellant for a statutory liability, imputed to him, for the alleged negligence of [his daughter] which driving an automobile, owned by his ex-wife, and insured by another company.

Id. at 58, 55 S.W.2d at 329. This is the exactly the same to the case at hand and is the question before the Court on appeal. In Rogers, the Arkansas Supreme Court provided,

“Actual use” as is used in the policy obviously does not mean that the non-owned automobile must be operated by the named insured- - the language of [the] policy provides:

“With respect to a non-owned automobile. . . provided his. . . actual operation or (if he. . . is not operating) the other actual use thereof by the named insured. . .”

Since actual use then must mean something more than operation it becomes ambiguous and subject to the interpretation that it would include that use which is imputed to an individual through what is known in law as vicarious liability....[The sponsorship statute] with reference to damages caused by the negligent operation of an automobile by a minor child, places a parent in the position of an actual user of an automobile any time the parent knowingly permits a minor to drive an automobile upon a highway. We must conclude that appellant was a user of the non-owned automobile within the meaning of the policy at the time of the collision with Watkins and that the trial court erred in ruling to the contrary.

MFA also contends that the trial court was correct because its policy provides that “Coverages A and B do not apply to ...liability assumed by the insured under any agreement.” We find no merit to this contention because the liability imposed upon appellant, as a parent having custody of a minor, is by statute and not as the result of any agreement.”

Id. at 60, 55 S.W.2d at 330. The Arkansas case, although persuasive authority, is on-point with this case. North Dakota requires a parent to sign a sponsorship form which holds the parent or guardian responsible for the negligent acts of the minor. So, too, insurance coverage should be extended to the named insured, as he or she is placed in the position of the minor child in the event of an accident, even though the named insured is not actually driving the car.

N.D.C.C. § 39-16.1-11 provides the following in part,

1. A "motor vehicle liability policy" as said term is used in this chapter means an owner's or an operator's policy of

liability insurance, certified as provided in sections 39-16.1-09 and 39-16.1-10 as proof of financial responsibility, and issued, except as otherwise provided in section 39-16.1-10, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

2. Such owner's policy of liability insurance:

a. Must designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and

b. Must insure the person named therein and any other person, as insured, using such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and subject to said limit for one person, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.

3. Such operator's policy of liability insurance must insure the person named as insured therein against loss from the liability imposed upon the person by law for damages arising out of the use by the person of any motor vehicle, either unlimited, or limited by excluding certain classes or types of motor vehicles, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

In its brief in support of its motion for summary judgment, State Farm has provided the following,

N.D.C.C. § 39-16.1-11(1) states that there are two types of insurance policies that comply with the statutory requirements for insurance coverage. There are owner's policies and operator's policies. Owners policies are governed by N.D.C.C. § 39-16.1-11(2) and operator's

policies are governed by N.D.C.C. § 39-16.1-11(3). The policy, here, was an owner's policy and it complied with the statutory requirements to provide an explicit reference to all motor vehicles covered under the policy....

The basic difference between an owner's policy and an operator's policy is that an owner's policy protects the owner, as the named insured, as well as any other permissive user. It does not protect against liability resulting from the use of a motor vehicle not described in the policy. An operator's policy, on the other hand, protects the named insured against liability arising from the use of any motor vehicle. In other words, the driver or operator would be insured no matter what vehicle was driven if they had an owner's policy. Either is permissible under North Dakota law.

There is no dispute that State Farm's own insurance agent has stated that the policy sold by State Farm is an owner-operator policy.

As N.D.C.C. 39-06-09 places Sandy Goetz in the position of the driver by imputing negligence to her and State Farm's insurance agent has indicated that the policy is an owner-operator policy, Sandy Goetz is covered under the plain meaning of the statute. The provisions of N.D.C.C. 39-16.1-11(3) apply which provide that State Farm must insure Sandy Goetz from liability for damages arising out of the use by her of any motor vehicle. (emphasis added)

State Farm has indicated that the policy does not cover this accident because the vehicle was not listed under one of the named exceptions, "your car", a "newly acquired car", a "trailer" a "non-owned" car, or a "temporary substitute car". If that is the case, then State Farm's insurance policy directly contradicts N.D.C.C. § 39-16.1-11(3), which states that Sandy Goetz must be insured for her use of any motor vehicle, not just the named exceptions.

In this case, State Farm attempts to rely solely upon the facts as they relate to ~~Sandra Goetz~~ and her relationship to her father and her relationship to her father's motor vehicle. However, in this case State Farm's named insured is Sandra Goetz. Sandra signed the form which indicated that she would be financially liable for the negligent acts of her daughter. North Dakota also imputes negligence directly to Sandra for the negligent acts of her daughter. According to State Farm's agent, it did not inform Sandra Goetz of the difference between an owner policy and an operator policy. State Farm's agent stated that she did not discuss the difference between an owner policy and an operator policy. Sandra Goetz obtained insurance and paid her premiums.

There is no public policy reason why State Farm should not be obligated to afford coverage. Divorce is a common fact. There are many couples in the same situation as the Goetz family. Mom has signed the form stating that she would be responsible for her child's negligent acts while Dad has purchased a vehicle for the child and had obtained insurance coverage for that vehicle. However, it is not sound public policy for insurance companies to refuse coverage to mom for the negligence of her child when she has purchased an owner-operator policy. To grant a different outcome places many people who are in a similar situation at terrible risk for financial calamity, unbeknownst to them. What State Farm is essentially stating in this case is that even though their insured had insurance coverage under an owner-operator policy, State Farm is going to favor the "owner" portion of that description, which denies coverage to mother, statutorily, resulting in a scenario where the injured party must hold mom personally financially liable for the negligent acts of her child. State Farm does not present any information to their insured explaining the difference between an owner's policy and an operator's

policy so that the insured may be educated about the risks that he or she is taking by utilizing one or the other. In fact, State Farm's agents present the policy to the insured as an owner-operator policy; so even if the insured were informed that there is a statutory difference between an owner's policy and an operator's policy, each would assume that they were covered under both provisions of the statute.

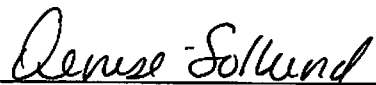
In this case, no one was trying to avoid paying for insurance coverage. In fact, ~~Sandra Goetz~~ Goetz' father did have substantial liability insurance and an umbrella policy on the vehicle at the time of the accident. Sandra Goetz's policy does specifically contain language that indicates that it will afford coverage required by North Dakota law. Further, the policy provides excess coverage available after other insurance coverage is exhausted. Under the plain language of the policy, Sandra Goetz is entitled to have coverage for this accident. Under the North Dakota Supreme Court's ruling in Anderson, Sandra Goetz is essentially transformed into the driver of the motor vehicle that struck John Allmer and caused serious injuries. She is now financially responsible for the entire amount of those injuries and there is no exclusion that State Farm has pointed to that should deprive her of the right to coverage under a policy which she paid a premium to receive.

CONCLUSION

Based upon the plain meaning of North Dakota law, State Farm's Insurance policy number 20 0282-E04-34A provides coverage for the accident that occurred on May 15, 2011 between ~~Sandra Goetz~~ Goetz and John Allmer. John Allmer is asking the North Dakota Supreme Court to reverse the Mercer County District Court Order and find that State Farm's Insurance policy in this case provides coverage as a matter of law.

Dated this 5 day of February, 2014

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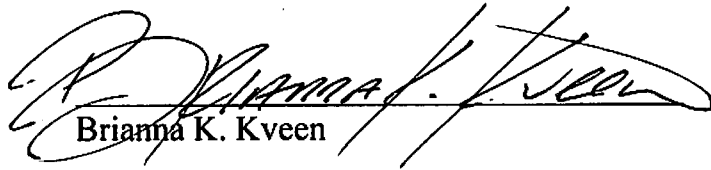
STATE OF MINNESOTA)
) ss.
COUNTY OF KITTSON)

I, Brianna K. Kveen, of the City of Hallock, County of Kittson in the State of Minnesota, being duly sworn, says that at the City of Hallock, County of Kittson and State of Minnesota on the 30th day of January, 2014 she mailed the following documents:

**APPELLANT'S BRIEF
AND
APPELLANT'S APPENDIX**

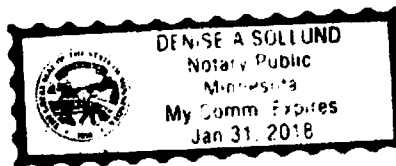
to the following persons, by mailing to them a copy thereof, enclosed in an envelope, certified mail, postage prepaid, in a hand addressed envelope with no return address and by depositing same in the post office at Hallock, Minnesota and directed to said persons at their last known address(es) as follows:

Jason R. Vendsel
Attorney at Law
P.O. Box 998
Minot, ND 58702-0998


Brianna K. Kveen

Subscribed and sworn to before
me this 30th day of January, 2014


Notary Public



AFFIDAVIT OF SERVICE BY MAIL

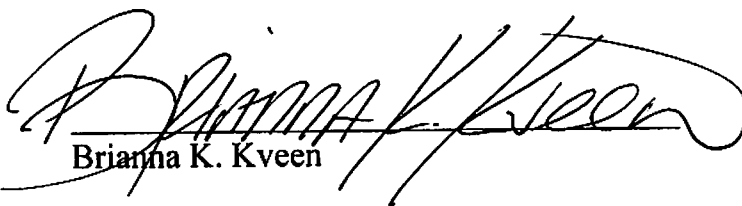
STATE OF MINNESOTA)
) ss.
COUNTY OF KITTSON)

I, Brianna K. Kveen, of the City of Hallock, County of Kittson in the State of Minnesota, being duly sworn, says that at the City of Hallock, County of Kittson and State of Minnesota on the 5th day of February, 2014 she mailed the following documents:

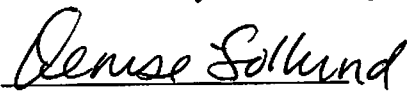
**APPELLANT'S BRIEF
AND
APPELLANT'S APPENDIX**

to the following persons, by mailing to them a copy thereof, enclosed in an envelope, certified mail, postage prepaid, in a hand addressed envelope with no return address and by depositing same in the post office at Hallock, Minnesota and directed to said persons at their last known address(es) as follows:

Jason R. Vendsel
Attorney at Law
P.O. Box 998
Minot, ND 58702-0998


Brianna K. Kveen

Subscribed and sworn to before
me this 5th day of February, 2014


Notary Public

