20190135

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SEPTEMBER 19, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

North Star Mutual Insurance Company, Plaintiff and Appellant, v. Jayme Ackerman d/b/a Ackerman Homes, Kyle Lantz, Levi Chase, Progressive Insurance Company, and State Farm Mutual Defendants and Appellees.	Supreme Court No.: 20190135 Stark County No.: 45-2017-CV-00959

BRIEF OF APPELLANT

Appeal from Order Reversing Decision for Evidentiary Hearing and Ruling Upon Motions for Summary Judgment dated March 13, 2019
Appeal from Amended Judgment dated April 24, 2019
In the District Court of Stark County
The Honorable Dann Greenwood, Presiding

Supreme Court No. 20190135
Stark County No. 45-2017-CV-00959

ORAL ARGUMENT REQUESTED

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C. The district court erred in concluding Coverage A – Contractors Equipment provision of North Star's Policy provides coverage for bodily injuries because that provision only provides coverage for property damage.

STATEMENT OF THE CASE

[¶4] This is an appeal from the Amended Judgment, Judgment, and Order Reversing Decision for Evidentiary Hearing and Ruling Upon Motions for Summary Judgment. This case centers on whether North Star Mutual Insurance Company's Commercial General Liability Policy provides coverage for injuries resulting from a wheelbarrow that may have fallen out of a motor vehicle.

[¶5] North Star Mutual Insurance Company ("North Star") filed a declaratory action against Jayme Ackerman d/b/a Ackerman Homes ("Ackerman"), Kyle Lantz ("Lantz"), Levi Chase, and Progressive Insurance Company asking the court to conclude North Star's Commercial General Liability Policy No. CM43504 does not provide coverage for the injuries resulting from the July 13, 2017 accident.

[¶6] North Star and Lantz filed competing motions for summary judgment. On February 13, 2019, the district court ordered an evidentiary hearing to determine ownership of the wheelbarrow and the object in the roadway, stating whether coverage applied hinged upon those determinations. Subsequently, both parties requested a judicial determination of coverage based on an assumption the wheelbarrow both belonged to Ackerman and was the object in the roadway. On March 13, 2019, the district court issued its Order Reversing Decision for Evidentiary Hearing and Ruling Upon Motions for Summary Judgment, holding there is coverage under Policy No. CM43504 ("North Star's Policy"). The Judgment and Amended Judgment were subsequently entered. On April 26, 2019, North Star issued its timely Notice of Appeal of the Judgments.

STATEMENT OF THE FACTS

[¶7] This declaratory judgment action arises from personal injuries incurred in a motor vehicle accident that occurred on Interstate 94 near mile marker 92 on the evening of July 13, 2017. See Appellant's Appendix, 099; Malafa Dep. 59:6-11. Levi Chase was traveling eastbound in the

driving lane and swerved to miss an object in the middle of the roadway. See Appellant's Appendix, 091; Chase Dep. 14:21-15:2. Mr. Chase described the object as a yellow chair, ladder, or wheelbarrow. See Appellant's Appendix, 091; Chase Dep. 15:11-19; See Appellant's Appendix, 091; Chase Dep. 16:2-6. Upon swerving to miss the object, Mr. Chase lost control of his car causing him to proceed into the westbound lane of traffic and collide with a motorcyclist, Kyle Lantz. Mr. Lantz was severely injured.

[¶8] North Star insures Ackerman under a Commercial General Liability Policy issued as Policy Number CM43504 to Jayme Ackerman d/b/a Ackerman Homes. See Appellant's Appendix, 014. The Policy provides in relevant part:

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or

"property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1 of Section II – Who is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury."

2. Exclusions

This insurance does not apply to:

* * *

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

* * *

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

* * *

SECTION V – DEFINITIONS

* * *

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment."

* * *

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft of "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto."

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

f. Vehicles not described in Paragraph **a., b., c.,** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

See Appellant's Appendix, 014.

[¶9] The Policy also contains an additional property coverage provision which provides:

COVERAGE A – CONTRACTORS EQUIPMENT

1. **Scheduled Tools and Equipment.** We cover only those described items for which a coverage amount is shown.
2. **Unscheduled Tools and Equipment.** We cover portable tools and equipment that you use to repair, restore, test, alter, service or maintain the property of your customers.

Id. at 030.

[¶10] On July 13, 2017, at approximately 11:00 P.M., Kyle Lantz was injured in the accident that is the subject of this action. See Index # 56. Levi Chase was the driver of the automobile involved in the accident. Chase and Lantz are not named insureds on North Star Policy No.: CM43504. See generally Appellant's Appendix, 014.

[¶11] Hours before the accident, Ackerman was helping his friend, Justin Hoerner, complete a concrete job at Thumper Gunsmith in Belfield, North Dakota. After the job was completed, Ackerman returned to Mr. Hoerner's house near Belfield to shower. While showering, Mr. Hoerner loaded Ackerman's wheelbarrow into Ackerman's **personal vehicle** and secured it. See Appellant's Appendix, 096, Hoerner Dep. 14:20-23, 17:10-11. Ackerman then proceeded to drive to his home in Mandan, North Dakota. At approximately 10:20 P.M., Ackerman stopped in New Salem for gas and noticed the wheelbarrow was missing. See Appellant's Appendix, 099, Malafa Dep. 29:6-19. Ackerman did not notice the wheelbarrow had fallen out and was even unsure whether it had been loaded into his truck. See Appellant's Appendix, 094, Ackerman Dep. 25:13-21. Ackerman then called Mr. Hoerner to inquire whether the wheelbarrow had been loaded. Id.

[¶12] Around 11:00 P.M., Levi Chase swerved to avoid an object in the road, lost control of his vehicle, and collided with Kyle Lantz. Lantz was driving a motorcycle and was severely injured.

[¶13] The wheelbarrow that allegedly caused Mr. Chase to lose control of his vehicle was found roughly four (4) days after the accident and five (5) miles away from where the accident occurred.

See Appellant's Appendix, 099; Malafa Dep. 25:12-16. The wheelbarrow was disposed of by law enforcement and has never been affirmatively identified as Ackerman's. For purposes of determining coverage under North Star's Policy, it is assumed the obstruction in the roadway was the wheelbarrow and belonged to Ackerman.

STANDARD OF REVIEW

[¶14] A district court's interpretation of an insurance policy is a question of law that is fully reviewable on appeal. See Center Mutual Ins. Co. v. Thompson, 2000 ND 192, ¶14, 618 N.W.2d 505. The district court's interpretation of an insurance policy is reviewed by independently examining and construing the policy. See W. Nat'l Mut. Ins. Co. v. Univ. of N.D., 2002 ND 63, ¶ 7, 643 N.W.2d 4. This Court has further elaborated rules for construing an insurance policy:

> [O]ur 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.

Ziegelmann v. TMG Life Ins. Co., 2000 ND 55, ¶6, 607 N.W.2d 898 (internal citations omitted). "All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees." N.D.C.C. § 32-23-07.

LEGAL ARGUMENT

[¶15] The district court erred in finding coverage under the Policy by concluding: (1) coverage exists pursuant to the concurrent cause doctrine; (2) Ackerman was negligent and North Star's Commercial General Liability Policy provides coverage for his negligence; and (3) the Contractor's

Equipment provision of Policy No. CM43504 covers bodily injuries caused by Ackerman's tools and equipment.

I. Whether the district court erred in deciding that North Star's Commercial General Liability Policy No. CM43504 provided coverage for injuries arising out of the use of a motor vehicle.

[¶16] North Star brought this action seeking a declaratory judgment See Appellant's Appendix, at 007. The district court concluded North Star's commercial general liability Policy excludes vehicle-related acts arising out of the use and ownership of an auto, including loading and unloading. See Appellant's Appendix, at 117, ¶ 20. Despite recognizing this exclusion, the court read coverage into the Policy and determined non-vehicle related acts of negligence caused the accident. The court incorrectly concluded Ackerman was negligent, and his negligence was a separate, non-excluded cause of the accident.

A. The district court erred in concluding coverage exists under the concurrent cause doctrine because the only provision providing coverage for the accident specifically excludes coverage for accidents arising out of the use of an auto.

[¶17] The concurrent cause doctrine applies where both an included and excluded risk contributed to the accident. Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, ¶ 24, 658 N.W.2d 363. The doctrine applies if any of the causes of loss are covered under an insurance policy. 3 New Appleman Insurance Law Practice Guide 31.06 (2018). For example, this Court has noted that both a farm and auto policy provided coverage for injuries where sugar-beet trucks deposited mud on the highway which later became wet and caused an accident. See Houser v. Gilbert, 389 N.W.2d 626 (N.D. 1986). This Court determined both policies provided coverage because the accident occurred while driving a vehicle, and hauling sugar-beets is a farming operation or activity. Id. Here, the concurrent cause doctrine is not applicable because none of the causes of the accident are covered losses under North Star's Policy.

[¶18] The district court erred in applying the concurrent cause doctrine and failed to provide any analysis of the similarities between case law cited by the court and this matter. The district court primarily relied on Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co. to reach its conclusion that North Star's Commercial General Liability Policy provides coverage pursuant to the concurrent cause doctrine. See Appellant's Appendix, at 144, ¶ 12 (citing Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, ¶¶ 24, 32, 658 N.W.2d 363). The Grinnell decision analyzed holdings from different jurisdictions illustrating how other jurisdictions have applied the doctrine. Relying on Grinnell, the district court determined the accident in this matter occurred due to vehicle and non-vehicle acts of negligence. Appellant's Appendix, at 117, ¶ 20.

[¶19] The district court's application of Grinnell is flawed. Grinnell involved a coverage dispute between an auto policy and a farm and ranch policy. See Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, 658 N.W.2d 363. In Grinnell, a coverage dispute arose from an injury sustained while towing a tractor with a personal auto. The North Dakota Supreme Court, applying the concurrent cause doctrine, concluded: (1) the auto coverage explicitly provided coverage for towing a farm implement; and (2) the farm and ranch policy provided coverage because the injury occurred while using the tractor, a farm implement, for farm related purposes. Id. Although the farm and ranch policy excluded liability arising out of the use of an auto, the Court held the policy covered injuries arising out of the "ownership, maintenance, rental or use of a farm implement." Id. at ¶ 20. Towing a farm implement is an activity contemplated under a general liability farm policy. See id. at ¶ 32. The Court held coverage applied because the act of towing the tractor involved both motor-vehicle related acts of negligence and non-motor-vehicle related acts of negligence. Id. at ¶ 32.

[¶20] The issue in this matter is much different. In Grinnell, coverage existed because the negligent attachment of the tow rope to the hitch was an independent cause of the accident. Id. Towing a farm implement was covered under the policy. Thus, negligent towing—hooking up the rope negligently—was a covered loss under the farm policy.

[¶21] Unlike Grinnell, there is a specific exclusion in North Star's Policy No. CM43504 that precludes coverage for bodily injuries arising out of the use of an auto. North Star's Policy specifically excludes injuries arising out of the ownership or use of an auto. See Appellant's Appendix, 016. The Policy further provides that injuries arising out of "loading or unloading" are also excluded. See Appellant's Appendix, 049. Under North Star's Policy, "loading or unloading" is defined as:

> **11.** "Loading or unloading" means the handling of property:
>
> **a.** After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
>
> **b.** While it is in or on an aircraft, watercraft or "auto"; or
>
> **c.** While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
>
> but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

Id. at 049.

[¶22] The distinction between Grinnell and this case is the farm policy in Grinnell expressly provided coverage for farm operations which included towing a tractor. Here, there is no provision in North Star's Policy that grants coverage. The use of an auto, which includes the transportation, loading, and unloading of the wheelbarrow is specifically excluded in North Star's Policy.

[¶23] The concurrent cause doctrine can only apply when there is a covered risk. Lantz and the district court were unable to cite any provision in North Star's Policy that grants coverage. Instead, the district court concluded there is coverage under the Policy because it "does not exclude what can be characterized as non-vehicle acts . . . ." See Appellant's Appendix, 118, ¶ 3. The wheelbarrow fell out of Ackerman's vehicle on his trip home. Thus, the injuries incurred by Lantz necessarily arose out of the transportation and loading of the wheelbarrow, which is expressly excluded in North Star's Policy. The district court incorrectly applied the concurrent cause doctrine by reading coverage into the Policy where an unexpected and unanticipated event was not expressly excluded.

[¶24] Contrary to the district court's holding, there cannot be an exclusion without a grant of coverage. You cannot take away something from nothing. For these reasons, the district court erred in concluding North Star's Policy provides coverage for Lantz's injuries.

B. The district court erred in finding North Star's Policy covers Ackerman's alleged negligence because the negligent act arose from the use of an auto.

[¶25] The district court incorrectly concluded North Star's Policy covers "nonvehicle acts, which would include failure to remove the wheelbarrow from the highway after it fell from the pickup and the failure to give notice to the public of the presence of the wheelbarrow upon the highway." Appellant's Appendix, 117-118, ¶ 20. In reaching this conclusion, the district court reads coverage into the Policy and creates a duty that does not exist in law.

[¶26] Like the Grinnell court, the district court also relies on Houser v. Gilbert and Schlueter v. Grinnell Mut. Reinsurance Co. to support its conclusion that Ackerman owed a duty to warn and remove the wheelbarrow from the roadway. Id. at ¶ 18 (citing Houser v. Gilbert, 389 N.W.2d 626, 630 (N.D. 1986) and Schlueter v. Grinnell Mut. Reinsurance Co., 553 N.W.2d 614 (Iowa Ct. App. 1996)). Houser and Schlueter involved more general and expansive insurance policies – a farm

and an auto policy. Houser v. Gilbert, 389 N.W.2d 626, 630 (N.D. 1986); Schlueter v. Grinnell Mut. Reinsurance Co., 553 N.W.2d 614 (Iowa Ct. App. 1996). Most importantly, Houser and Schlueter involved farm and auto acts that were covered under the policies. Id. Houser discussed a coverage issue where trucks deposited mud on the highway while hauling sugar-beets. Houser, 389 N.W.2d at 630. The mud eventually caused an accident. Id. The court in Houser held that failing to remove the mud on the highway was a non-vehicle related act of negligence that was covered under the farm policy. Id.

[¶27] North Star's Policy does not contain a provision that covers negligent failure to remove a wheelbarrow from the road or warn motorists of the object in the roadway. The district court's reliance on Houser is misplaced and it fails to articulate its application to this case. Significantly, the district court fails to observe that failure to remove the mud and the failure to warn were covered losses under the farm policy. Houser, 389 N.W.2d at 630. The farm policy carrier in Houser acknowledged the policy covered the negligent failure to remove the mud. Id. at 630. The dispute in Houser was over which carrier had to pay.

[¶28] The district court's conclusion that Ackerman had both a duty to warn and remove the wheelbarrow from the roadway is erroneous and should be reversed. The court's finding imposes an affirmative duty upon Ackerman to backtrack from New Salem to Belfield, approximately eighty (80) miles, in search of his wheelbarrow in the dark. The court imposes this duty despite the fact Ackerman was unaware the wheelbarrow had potentially fallen out of his vehicle. Indeed, Ackerman was uncertain whether the wheelbarrow had even been loaded into his vehicle. See Appellant's Appendix, 094; Ackerman Dep. 25:13-21. Even if Ackerman had backtracked and looked for the wheelbarrow, he would not have found it until he turned back around in Belfield to head back to his home because the wheelbarrow was located in the eastbound lane of traffic. To

impose such a duty is arbitrary and capricious. It is also a duty that is not contemplated, much less covered, in North Star's Policy. Imposing a duty to warn when Ackerman did not have knowledge of the wheelbarrow being in the roadway should not be sanctioned by this Court. Therefore, North Star submits the district court erred in imposing a duty on Ackerman to warn of the wheelbarrow and remove it from the roadway and respectfully requests this Court reverse the district court's finding.[1]

C. The district court erred in concluding Coverage A – Contractors Equipment provision of North Star's Policy provides coverage for bodily injuries where there is no provision under that section providing coverage for bodily injuries.

[¶29] The Contractors Equipment provision in North Star's Policy does not provide or contemplate coverage for bodily injuries. See generally Appellant's Appendix, 014. The provision at issue provides:

> **COVERAGE A – CONTRACTORS EQUIPMENT**
>
> 1. **Scheduled Tools and Equipment.** We cover only those described items for which a coverage amount is shown.
> 2. **Unscheduled Tools and Equipment.** We cover portable tools and equipment that you use to repair, restore, test, alter, service or maintain the property of your customers.

Appellant's Appendix, 032.

[¶30] The provision provides coverage for **property damage** and specifically covers "portable tools and equipment" that Ackerman uses to "repair, restore, test, alter, service, or maintain the property." Id. The Contractors Equipment provision does not provide coverage for bodily injury. This is evident by the $1,000 limit. See Appellant's Appendix, 016. It appears the district court uses the Contractors Equipment provision of North Star's Policy to conclude that, because there

[1] North Star further submits a finding of negligence is outside the scope of a declaratory judgment action.

was no exclusion relating to the use of the wheelbarrow and Ackerman's alleged negligence, North Star's Policy provides coverage. See Appellant's Appendix, 114-118, ¶¶ 13, 16, 20.

[¶31] The district court also incorrectly concluded North Star does not contest injuries caused by the wheelbarrow are covered losses. See Appellants' Appendix, at 114-115, ¶ 14. This is not true. North Star asserted in its Brief in Support of Motion for Summary Judgment that it was undisputed the Contractors Equipment provision does **not** provide coverage for negligence. See Appellant's Appendix, 014. Prior to the district court's decision, it was undisputed the Contractors Equipment only provides coverage for property damage, not for bodily injuries. See Transcript of Proceedings. While Lantz agreed the Contractors Equipment provision does not provide coverage, Lantz broadly asserted North Star's Policy No. CM43504 covers negligence arising out of the use of the wheelbarrow because such use is not specifically excluded. Id.

[¶32] In support of his argument, Lantz points to the Contractors Equipment provision of the Policy. Without pointing to a specific policy provision granting coverage, Lantz argued because using tools and equipment are contemplated by the Policy, any bodily injuries arising from that use are covered. Id. Lantz **did not** argue the Contractors Equipment provision provides coverage. Id. The district court erred in construing the Contractors Equipment provision as providing coverage for the injuries suffered by Lantz because of the alleged negligence of Ackerman. The tools and equipment coverage in a property damage provision provides coverage to the insured; it is not a grant of bodily injury coverage to third persons. Therefore, North Star asks this Court to reverse the district court and conclude there is no coverage under North Star's Contractor's Equipment provision and that the absence of an exclusion is not a grant of coverage.

CONCLUSION

[¶33] For the reasons set forth herein, Appellant North Star Mutual Insurance respectfully requests this Court REVERSE the district court's Judgment, Amended Judgment, and Order Reversing Decision for Evidentiary Hearing and Ruling Upon Motions for Summary Judgment in their entirety and CONCLUDE as a matter of law that North Star's Commercial General Liability Policy No. CM43504 does not provide coverage for the accident. North Star further requests this Court REVERSE the district court's finding that Ackerman owed a duty to both warn of the wheelbarrow and remove it from the roadway.

[¶34] DATED September 11, 2019.

/s/ Jonathon F. Yunker
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Jonathon F. Yunker (ND #08709)
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Attorneys for Plaintiff North Star Mutual Insurance

CERTIFICATE OF COMPLIANCE

I, Jonathon (Jack) F. Yunker, hereby certify that the above Brief of Appellant complies with the page limitation set forth under Rule 32(a)(8)(A) N.D.R.App.P. I further certify that the Brief of Appellant contains eighteen (18) pages.

DATED September 23, 2019.

/s/ Jonathon F. Yunker

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Jonathon F. Yunker (ND #08709)
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Star Mutual Insurance, Plaintiff-Appellant, vs. Jayme Ackerman d/b/a Ackerman Homes, Kyle Lantz, Levi Chase, and Progressive Insurance Company, Defendants-Appellees.	Supreme Court No. 20190135 Stark County Civil No. 45-2017-CV-00959

AFFIDAVIT OF SERVICE VIA ELECTORNIC MEANS

STATE OF NORTH DAKOTA

COUNTY OF RAMSEY

ss

[¶1] Andrea Johnson, being first duly sworn on oath, does depose and say: She is a legal resident of the State of North Dakota, of legal age, and not a party to the above-entitled matter.

[¶2] That on September 11, 2019, affiant served via electronic means, a true and correct copy of the following document(s):

1. Brief of Appellant; and
2. Appendix to Brief of Appellant

[¶3] The copies of the foregoing were securely sent via electronic mail to the address as follows:

David S. Maring
dmaring@maringlaw.com
Jared J. Wall
jwall@maringlaw.com

Brianna L. Rummel
brummel@vogellaw.com

[¶4] To the best of affiant's knowledge, the address above given was the actual electronic mail address of the party intended to be served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.

Andrea Johnson

[¶5] Subscribed and sworn to before me on September 11, 2019.

LEANA HAUGEN
Notary Public
State of North Dakota
My Commission Expires November 14, 2022

Notary Public

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Star Mutual Insurance, Plaintiff-Appellant, vs. Jayme Ackerman d/b/a Ackerman Homes, Kyle Lantz, Levi Chase, and Progressive Insurance Company, Defendants-Appellees.	Supreme Court No. 20190135 Stark County Civil No. 45-2017-CV-00959

AFFIDAVIT OF SERVICE VIA ELECTORNIC MEANS

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[¶2] That on September 23, 2019, affiant served via electronic means, a true and correct copy of the following document(s):

1. Brief of Appellant; and
2. Appendix to Brief of Appellant

[¶3] The copies of the foregoing were securely sent via electronic mail to the address as follows:

William Harrie
wharrie@nilleslaw.com

Jerry Evenson
jervenson@esattorneys.com

[¶4] To the best of affiant's knowledge, the address above given was the actual electronic mail address of the party intended to be served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.

Andrea Johnson

[¶5] Subscribed and sworn to before me on September 23, 2019.

PAULA DUBOIS
Notary Public
State of North Dakota
My Commission Expires Nov 17, 2019

Notary Public

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Star Mutual Insurance, Plaintiff-Appellant, vs. Jayme Ackerman d/b/a Ackerman Homes, Kyle Lantz, Levi Chase, and Progressive Insurance Company, Defendants-Appellees.	Supreme Court No. 20190135 Stark County Civil No. 45-2017-CV-00959

AFFIDAVIT OF SERVICE VIA ELECTORNIC MEANS

STATE OF NORTH DAKOTA

COUNTY OF RAMSEY

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[¶1] Andrea Johnson, being first duly sworn on oath, does depose and say: She is a legal resident of the State of North Dakota, of legal age, and not a party to the above-entitled matter.

[¶2] That on September 23, 2019, affiant served via electronic means, a true and correct copy of the following document(s):

1. Brief of Appellant (Revised as to format); and
2. Appendix to Brief of Appellant (Revised as to format)

[¶3] The copies of the foregoing were securely sent via electronic mail to the address as follows:

William Harrie
wharrie@nilleslaw.com

Jerry Evenson
jervenson@esattorneys.com

David S. Maring
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Jared J. Wall
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Brianna L. Rummel
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[¶4] To the best of affiant's knowledge, the address above given was the actual electronic mail address of the party intended to be served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.

Andrea Johnson

[¶5] Subscribed and sworn to before me on September 23, 2019.

PAULA DUBOIS
Notary Public
State of North Dakota
My Commission Expires Nov 17, 2019

Notary Public