20190135
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 11, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

North Star Mutual Insurance,
Plaintiff/Appellant

vs.

Jayme Ackerman d/b/a Ackerman Homes, Kyle Lantz,
Levi Chase, Progressive Insurance Company, and State Farm Mutual
Defendants/Appellees

Appeal from Order Reversing Decision for Evidentiary Hearing and Ruling Upon Motions for Summary Judgment Entered on March 13, 2019
In the District Court, Southwest Judicial District,
Stark County, North Dakota
The Honorable Dann Greenwood

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

Maring Williams Law Office, P.C.
David S. Maring (ID 03175)
Jared J. Wall (ID 07906)
1661 Capitol Way, Suite 103LL
Bismarck, ND 58501
(701) 224-0430

Attorneys for Appellee, Kyle Lantz

TABLE OF CONTENTS

PARAGRAPH

[1] TABLE OF AUTHORITIES

CASES: **PARAGRAPH**

STATUTES:

JURY INSTRUCTIONS:

[2] **STATEMENT OF THE ISSUES**

I. Whether the District Court Correctly Determined that North Star Commercial General Liability Policy No. CM43504 Provides Coverage for the Injuries Kyle Lantz Sustained in a Motor Vehicle Collision on July 13, 2017.

II. Whether the District Court Correctly Determined that the Concurrent Cause Doctrine Applies and the Use of a Motor Vehicle Exclusion Does Not Bar Coverage for Non-Vehicle Related Acts of Negligence.

[3] **STATEMENT OF THE CASE**

[4] Appellant, North Star Mutual Insurance (North Star) appeals from the District Court's Order Reversing Decision for Evidentiary Hearing and Ruling Upon Motions for Summary Judgment (Order Reversing) entered by the District Court on March 13, 2019. Order, 03/13/2019 (Doc. 82); Appellant's Appendix (App.) at 109 – 19.

[5] As part of the Order Reversing, the District Court made the following determinations:

1. North Star's Policy No. CM43504 provides coverage, generally, as concerns portable tools and equipment (including the subject wheelbarrow) used to repair, restore, test, service or maintain the property of Ackerman Homes' customers.
2. North Star's Policy No. CM43504 specifically excludes what can be characterized as vehicle-related acts arising out of the ownership, maintenance, use or entrustment to others of any .. "auto" .. owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."
3. North Star's Policy No. CM43504 does not exclude what can be characterized as 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.
4. A person who causes or permits an item, the presence of which creates an unreasonable risk of injury, to be placed upon a public highway has a duty to remove that item from the highway and a duty to give notice to the public of the presence of that item upon the highway.
5. Lantz's claims assert both included and excluded risks which contributed to the accident such that the concurrent cause doctrine applies.
6. North Star's Policy No. CM43504 provides coverage concerning liability of, and North Star has the duty to defend Ackerman.

Order, 03/13/2019, ¶ 20 (Doc. No. 82); App. 118 – 19.

[6] **STATEMENT OF THE FACTS**

[7] On July 13, 2017 a vehicle driven by Levi Chase (Chase) collided with a motorcycle driven by Lantz. Immediately before the collision, Chase swerved to avoid an item, later identified as a wheelbarrow, in the driving lane of eastbound I-94. Affidavit of Attorney Jared J. Wall (Aff. of Wall), Ex. 1 – Tr. Depo. Levi Chase, 12/03/18 (Chase Depo.), 14:19 – 15:22; 41:8 – 12 (Doc. 51).

[8] In the days before the collision, Ackerman was working with Justin Hoerner (Hoerner) and Gene Horner on a construction project for Thumpers Gun & Ammo (Thumpers Gun) in Belfield, ND. Aff. of Wall, Ex. 2 – Tr. Depo. Jayme Ackerman (Ackerman Depo.), 11:19 – 12:15; 14:8 – 19; 16:4 – 9, 10/15/18 (Doc. 52); Aff. of Wall Ex. 3 – Tr. Depo. Justin Hoerner (Hoerner Depo.), 11:19 – 12:6; 17:21 – 18:9, 10/15/18 (Doc. 53). On the evening of July 13, 2017, after finishing the Thumpers Gun job, Ackerman and Hoerner returned to Gene Hoerner's home in Dickinson, ND. Ackerman Depo., 15:8 – 16:18; Hoerner Depo., 14:15 – 19. While Ackerman was inside showering and preparing to return home to Mandan, ND, Hoerner loaded the wheelbarrow into the bed of Ackerman's pickup. Hoerner Depo., 14:20 – 23; Ackerman Depo., 15:5 – 7; 34:19 – 21. Ackerman did not load the wheelbarrow. Id.

[9] The wheelbarrow was owned by Ackerman. Id. Ackerman **purchased the wheelbarrow for use in his construction business, Ackerman Homes**. Ackerman Depo., 19:11 – 14; 35:17 – 36:6 (Doc. 52). Both Ackerman and Hoerner described the wheelbarrow as a yellow, plastic wheelbarrow with metal or wooden handles. Id. at 20:3 – 21; Hoerner Depo., 15:17 – 16:6 (Doc. 53). Hoerner was returning the wheelbarrow to **Ackerman**

because Ackerman needed it for an Ackerman Homes project that weekend. Hoerner Depo., 20:17 – 21:2; Ackerman Depo., 34:19 – 36:6.

[10] When Hoerner placed the wheelbarrow in the bed of the pickup he placed a single strap over the top of the bed from side to side. Hoerner Depo., 16:7 – 17:13; 22:23 – 23:4; 25:21 – 26:3 (Doc. 53). The strap did not go through any portion of the wheelbarrow. Id. Before leaving Gene Hoerner's home, Ackerman noticed the wheelbarrow in the bed of the truck. Ackerman Depo., 18:9 – 23; 22:2 – 14; 37:16 – 18 (Doc. 52). Ackerman did **not** inspect the wheelbarrow or ensure that it was properly positioned or tied down before leaving. Id. at 18:9 – 21; 37:22 – 25. Ackerman was also pulling an empty trailer at the time. Id. at 17:14 – 21; 18:20 – 23; 36:7 – 12.

[11] After leaving, Ackerman traveled through Gladstone, ND before entering eastbound I-94 to return to Mandan, ND. Ackerman Depo., 22:16 – 23:7 (Doc. 52). Ackerman's trip was uneventful until he stopped in New Salem, ND for gas and realized the wheelbarrow was no longer in the bed of his vehicle. Id. at 24:12 – 21. At that time, Ackerman called Hoerner and informed him that the wheelbarrow had fallen out of his vehicle. Id. at 25:11 – 21; 39:4 – 6; Hoerner Depo., 24:10 – 22 (Doc. 53). Ackerman called Justin Hoerner at approximately **10:20 p.m**. Aff. of Wall, Ex. 4 – Tr. Depo. Trooper Darin Malafa (Trooper Malafa Depo.), 28:11 – 29:19, 11/07/18 (Doc. 54). New Salem, ND is located at I-94 exit 127, approximately 34 miles from the collision scene. Aff. of Wall, Ex. 8 – Google Maps Directions (Doc. 58). After speaking with Hoerner, Ackerman finished fueling and continued home. Ackerman Depo., 26:16 – 27:1.

[12] Ackerman did **not** look for the wheelbarrow that night. Ackerman Depo., 39:7 – 9 (Doc. 52). Ackerman did **not** find the wheelbarrow that night. Id. at 39:10 – 12.

Ackerman did **not** put out any warning signs or take any other action to alert oncoming motorists. Id. at 39:13 – 15. Ackerman did **not** call law enforcement to alert them that he lost a wheelbarrow. Id. at 39:16 – 19. Ackerman did **nothing** to attempt to locate the wheelbarrow or warn other motorists. Id. at 39:21 – 23.

[13] At approximately, **10:53 p.m**. on July 13, 2017, a call came in over the North Dakota Highway Patrol (NDHP) emergency dispatch system that there was a wheelbarrow in the driving lane of eastbound I-94 near MM 93. Aff. of Wall, Ex. 6 – ND Highway Patrol Event Reports (Event Reports) (Doc. 56). At **10:59 p.m.** a second call came in about a wheelbarrow in the driving lane of eastbound I-94. Id.

[14] Thereafter, Chase was driving eastbound in the driving lane of I-94, swerved to avoid the wheelbarrow, and the collision occurred. Chase Depo., 18:4 – 6 (Doc. 51). The 911 call concerning the crash was made at approximately **11:01 p.m.** Event Reports (Doc. 56). The collision occurred approximately **40 minutes** after Ackerman called Hoerner and, assuming it took Ackerman approximately 30 minutes to drive the 34 miles from MM 93 to New Salem, **over an hour after the wheelbarrow fell out of Ackerman's vehicle**. Google Directions (Doc. 58); Event Reports (Doc. 56); Trooper Malafa Depo., 28:11 – 29:19 (Doc. 54); Ackerman Depo., 25:11 – 21; 39:4 – 6 (Doc. 52); Hoerner Depo., 24:10 – 22 (Doc. 53).

[15] Lantz was seriously injured as a result of the collision. Trooper Malafa Depo., 9:22 – 10:3 (Doc. 54). As a result of his injuries, Lantz's left leg has been amputated below the knee. Following the collision, both Chase and Ben Lantz, Lantz's brother who had been traveling with Lantz on a separate motorcycle, heard a semi-truck traveling on eastbound I-94 hit something in the roadway. Chase Depo., 25:9 - 25; 26:16 – 18; 37:15 – 20 (Doc. 51); Malafa Depo., 19:2 – 19 (Doc. 54). Sometime after the collision, North Dakota Department

of Transportation personnel located a yellow, True Temper wheelbarrow near MM 97 on eastbound I-94. Trooper Malafa Depo., 25:3 – 26:9 (Doc. 54); Aff. of Wall, Ex. 7 – wheelbarrow photographs taken on 07/17/17 (Doc. 57).

[16] Days later, after hearing about the collision, Ackerman called law enforcement to report that he had lost a wheelbarrow on July 13, 2017 in the vicinity of the collision. Ackerman Depo., 27:4 – 28:12 (Doc. 52). He was later shown photographs of the recovered wheelbarrow through text messages and testified that the wheelbarrow he was shown looked like the wheelbarrow he had lost. Id. at 30:8 – 31:15. Additionally, Trooper Darrin Malafa testified that based on his training, experience, and investigation the wheelbarrow that was recovered was Ackerman's wheelbarrow and was involved in the incident. Trooper Malafa Depo., 27:7 – 28:2; 28:11 – 25 (Doc. 54).

A. **Relevant Policy language.**

[17] Commercial General Liability Policy no CM43504 (the Policy) issued to Ackerman Homes by North Star states "[w]e 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**." App. at 36 (emphasis added).

[18] The Policy coverages state:

> **COVERAGE A – CONTRACTORS EQUIPMENT**
> . . .
> 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.

App. at 32 (emphasis in original).

[19] The Policy includes an exclusion for bodily injuries arising out of the use of a motor vehicle. The exclusion provides:

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. . . ."

App. at 039.

[20] "Auto" is defined as:

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".

App. at 048.

[21] "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".

App. at 049 (emphasis added).

[22] STANDARD OF REVIEW

[23] Recently, in Borsheim Builders Supply, Inc. v. Manger Insurance, Inc., 2018 ND 218, ¶ 7, 917 N.W.2d 504, this Court outlined the standard of review from a Motion for Summary Judgment in an action for a Declaratory Judgment under North Dakota Century Code Chapter 32-23 holding:

[The] standard for reviewing summary judgment is well established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine 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. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Id. at ¶ 7.

[24] "Insurance policy interpretation is a question of law, which is fully reviewable on appeal." Forsman v. Blues, Brews and Bar-B-Ques Inc., et al., 2017 ND 266, ¶ 10, 903 N.W.2d 524. The Court independently examines and construes the insurance contract on appeal to decide whether coverage exists. K & L Homes, Inc. v. American Family Mut. Ins. Co., 2013 ND 57, ¶ 8, 829 N.W.2d 724. The Court construes policy language to give effect to the parties' mutual intention at the time of contracting. Forsman, 2017 ND at ¶ 10, 903 N.W.2d 524.

[25] "Exclusions from coverage must be clear and explicit and are strictly construed against the insurer." Schleuter v. N. Plains Ins. Co., Inc., 2009 ND 171, ¶ 8, 772 N.W.2d 879. "While exclusionary clauses are strictly construed, a contract will not be rewritten to impose liability when the policy unambiguously precludes coverage." Forsman, 2017 ND at ¶ 10, 903 N.W.2d 524.

[26] **LAW AND ARGUMENT**

[27] The issue before the Court is whether there is coverage under the Policy issued by North Star to Ackerman, d/b/a Ackerman Homes. Coverage issues under North Dakota Century Code Ch. 32-23 can be decided "even though the insured's liability for the loss may not have been determined." Midwest Medical Insurance Co. v. Doe, 1999 ND 17, ¶ 7, 589 N.W.2d 581. The issue is whether the claims give rise to **potential liability** or a **possibility of coverage**. Nodak Mut. Ins. Co. v. Heim, 1997 ND 36, ¶ 11, 559 N.W.2d 846 (emphasis added).

[28] North Star makes three broad contentions on appeal. First, that there is no coverage under Coverage A – Contactors Equipment – because the provision "does not provide or contemplate coverage for bodily injury." Appellant's Br. at ¶ 29. Second, North Star contends that the District Court erred in applying the concurrent cause doctrine to find that there was coverage under the Policy for non-vehicle related acts of negligence. Id. at ¶¶ 17 – 24. Lastly, North Star contends that the District Court erred in determining that Ackerman had a duty to remove the wheelbarrow from the roadway and a duty to warn of the danger caused by the wheelbarrow. Id. at ¶¶ 25 – 28.

[29] Each of these contentions is inaccurate. The District Court did not find that Coverage A – Contractors Equipment – provided coverage for Lantz's injuries. The District Court found that the Policy "generally" provided coverage for bodily injury related to Ackerman Homes' tools and equipment. Order, 03/13/2019, ¶ 20 (Doc. 82), App. at 118. This coverage stems from the broad grant of coverage concerning bodily injuries "to which [the Policy] applies." App. at 036. Likewise, the District Court did not err in finding that

there were non-vehicle related acts of negligence present or that there is a duty to warn of or remove a hazard from the roadway.

I. The North Star CGL Policy Provides Coverage for Injuries Caused By Ackerman Homes' Tools and Equipment.

[30] As an initial matter, it is unclear whether North Star is arguing that there is no coverage under the policy, generally, for bodily injury caused by Ackerman Homes' tools and equipment or whether North Star is alleging that there would be coverage but that coverage is excluded under the "use of a motor vehicle exclusion" contained in the Policy. Initially, North Star admits that there is coverage under the Policy, but argues that coverage is excluded. Appellant's Br. at ¶¶ 16 – 17. North Star notes "the only provision **providing coverage** for the accident specifically excludes coverage . . ." Id. (emphasis added). Later, however, North Star states "none of the causes of the accident are covered losses. . . ." Id. at ¶ 17. North Star makes this contention while arguing that all the causes of the accident relate to the use of a motor vehicle and are excluded. See, Id. at ¶¶ 17 – 32. It appears from the issues outlined and briefed by North Star, that its' position is that there would be coverage for Lantz's injuries but coverage is excluded as relating to the use of a motor vehicle. Id., at ¶¶ 16 – 28.

[31] Despite this confusion, when interpreting an insurance policy, the Court first examines coverages before examining exclusions. Forsman, 2017 ND at ¶ 11, 903 N.W.2d 524. "If and only if a coverage provision applies to the harm at issue will the court then examine the policy's exclusions and limitations of coverage." Wisness v. Nodak Mut. Ins. Co., 2011 ND 197, ¶ 16, 806 N.W.2d 146. "An exclusionary provision, or the absence of one, cannot be read to provide coverage that does not otherwise exist." Id. However, "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." Forsman, 2017 ND at ¶ 10, 903 N.W.2d 524 (emphasis added).

[32] "The burden of proof rests upon the party claiming coverage under an insurance policy." Forsman, 2017 ND at ¶ 12, 903 N.W.2d 524. "While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions." Id.

[33] CGL policies, like the Policy at issue here, are designed to protect an insured against losses **arising out of business operations**. K & L Homes, 2013 ND at ¶ 16, 829 N.W.2d 724 (emphasis added). These coverages include damages that are not expected or intended from the standpoint of the insured. Id. at ¶ 13. "The coverage applicable under the CGL policy is for **tort liability** for injury to persons and damage to other property. . . ." Acuity v. Burd & Smith Const., Inc., 2006 ND 187, ¶ 11, 721 N.W.2d 33 (emphasis added)(internal citations omitted). A CGL policy "insures consequential damages that stem" from the insured's work. Id. at ¶ 12. CGL policies "may provide coverage for claims arising out of tort, breaches of contract, and statutory liabilities as long as the requisite accidental occurrence and [bodily injury] are present." Id.

[34] The CGL Policy, in question, starts with an initial broad grant of bodily injury and/or property damage coverage pertaining to the business operations of the insured. App. at 036. It then limits the coverage available through the use of exclusionary provisions. Id. at 037 – 41. In the present case, North Star issued the Policy to Jayme Ackerman d/b/a Ackerman Homes. App. at 015. The Policy was intended to provide coverage to Ackerman Homes' business operations and endeavors. Under the Policy, North Star "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**." App. at 036 (emphasis added). This is a broad grant of coverage. Practically speaking, this provision covers all bodily injury arising out of the business operations of Ackerman Homes unless otherwise excluded in the Policy.

[35] The Policy also includes a provision related to Coverage A – Contractors Equipment – which states North Star "covers portable tools and equipment that ***you*** use to repair, restore, test, alter, service, or maintain the property of ***your*** customers." App. at 032 (emphasis in original). As a result, Ackerman Homes' tools and equipment are items "to which [the Policy] applies" as required by the bodily injury provision for coverage. Id. at 036.

[36] Prior to the collision, Ackerman was transporting a wheelbarrow that he had purchased for use in Ackerman Homes in order to use it in an Ackerman Homes' project. Ackerman Depo., 19:11 – 14, 34:19 – 36:6 (Doc. 52); Hoerner Depo., 20:17 – 21:2 (Doc. 53). There should be little dispute that this is an Ackerman Homes' business endeavor. But for the need to use the wheelbarrow in an Ackerman Homes' project, Ackerman would not have been transporting the wheelbarrow. Based on these facts, and the coverage provisions in the Policy, the District Court found that the Policy "provides coverage, generally, as concerns portable tools and equipment (including the subject wheelbarrow) used to repair, restore, test, service or maintain the property of Ackerman Homes' customers." Order, 03/13/2019, ¶ 20 (Doc. 82), App. at 117 – 18.

[37] North Star contends that the District Court erred in this finding because the "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." Appellant's Br., at ¶ 27. This position is incorrect. North Star's argument hinges on a claim that the District Court

determined that the Coverage A – Contractors Equipment – provision provided coverage for bodily injury directly. North Star's position is an incomplete reading of the Policy and an inaccurate representation of the District Court's findings.

[38] The Court must construe the whole contract together and use "each clause is to help interpret the others." Forsman, 2017 ND at ¶ 10, 903 N.W.2d 524. In the present case, the bodily injury provision at issue provides that North Star "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.**" App. at 036 (emphasis added). Through the Coverage A – Contactor's Equipment – provision the Policy "applies to" Ackerman Homes' tools and equipment and there is bodily injury coverage for injuries caused by those items through the bodily injury provision. App. at 032, 036.

[39] The District Court stated as much by finding "coverage, generally, as concerns portable tools and equipment" used by Ackerman Homes. Order, 03/13/2019, ¶ 20 (Doc. 82); App. at 118. The District Court did not find that Coverage A specifically provided coverage for Lantz's injuries but that Lantz's injuries were covered under the bodily injury provision of the Policy as evidenced by the specific reference to those items in the Policy.

[40] The District Court's decision is consistent with holdings from Courts addressing similar issues. In Schlueter v. Grinnell Mut. Reinsurance Co., 553 N.W.2d 614, 617 (Iowa Ct. App. 1996), the Iowa Court of Appeals, while examining coverage and the application of the concurrent cause doctrine, found that transporting a bale of hay for farm purposes **did not cease to be farm related** because a motor vehicle was involved and that coverage was applicable. In Schlueter, a farmer loaded a bale of hay onto a tractor that was then loaded onto a trailer that was hitched to a pickup. Id. at 615. During transport, the hay

bale fell off and was hit by a vehicle. Id. Likewise, in Pennsylvania General Ins. Co. v. Cegla, 381 N.W.2d 901, 902 (Minn. Ct. App. 1986), the Minnesota Court of Appeals determined that coverage was triggered under a homeowner's policy for an accident caused when a wire roll fell onto the highway from a truck causing a motorcyclist to lose control and be struck and killed by a following motorist. Id.

[41] In the present case, there is a grant of bodily injury coverage for injuries arising out of Ackerman Homes' business operations. App. at 036. There is also a provision identifying tools and equipment as part of Ackerman Homes. Id. at 032. "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." Forsman, 2017 ND at ¶ 10, 903 N.W.2d 524. At the time the wheelbarrow was deposited onto the roadway, Ackerman was transporting the wheelbarrow in a business endeavor. Hoerner Depo., 20:17 – 21:2 (Doc. 53); Ackerman Depo., 34:19 – 36:6 (Doc. 52). "Just because a motor vehicle was involved, the act of "transporting the [wheelbarrow] did not cease to be [business]-related." See, Schlueter, 553 N.W.2d at 617.

[42] The Policy language also reveals that this type of business activity was contemplated by the parties. Under the bodily injury coverage, Ackerman Homes' tools and equipment are specifically addressed as being part of Ackerman Homes. App. at 032. There is also a policy exclusion that addresses transportation of "mobile equipment" as defined under the policy. App. at 039. This means that the parties were aware that Ackerman Homes would be transporting items as part of its business operations and the parties specifically addressed those items – mobile equipment – that would be excluded from coverage during transportation.

[43] Practically speaking, North Star is arguing that the Policy would **never** afford coverage for injuries caused by Ackerman Homes' tools and equipment. This is a tortured reading of the Policy. North Star is, in effect, alleging that if an Ackerman Homes' employee dropped a hammer from scaffolding striking a passerby there would be no coverage. North Star is, in effect, arguing that if an Ackerman Homes' nail gun was discharged striking an individual there would be no coverage. North Star **is arguing** that if a piece of equipment was inadvertently left in the roadway, causing a crash, there would be no coverage. This is a faulty reading of the Policy coverages and begs the question what, if anything, does the bodily injury provision of the Policy cover?

[44] In this instance, coverage for injuries caused by Ackerman Homes' tools and equipment is contemplated under the bodily injury provisions of the Policy as evidenced by the specific provision regarding those items. Therefore, coverage is provided unless one of the exclusions is applicable **and** bars coverage. As a result, Lantz respectfully requests that the Court affirm the District Court's finding of coverage under the Policy.

II. The District Court Correctly Concluded that the Use of A Motor Vehicle Exclusion Does Not Bar Coverage for Non-Vehicle Related Acts of Negligence.

[45] North Star contends that the District Court erred in applying the concurrent cause doctrine and finding that there were alleged non-vehicle related acts of negligence that contributed to Lantz's injuries. Appellant's Br. at ¶¶ 17 – 24. North Star also contends that the District Court erred in determining that Ackerman had a duty to remove the item from the roadway and a duty to warn of the danger caused by the wheelbarrow. Id. at ¶¶ 25 – 28.

A. The use of a motor vehicle exclusion is applicable, but does not bar coverage for non-vehicle related acts of negligence.

[46] Initially, the Court must decide whether or not the injuries in this case arise out of the use of a motor vehicle. In Norgaard v. Nodak Mut. Ins. Co., 201 N.W.2d 871, 875 (N.D. 1972), this Court, examining the applicability of a motor vehicle insurance policy to the death of a passenger, adopted the causal connection test to determine whether or not an injury arises out of the ownership, maintenance, or use of a motor vehicle. In Norgaard, the driver of a vehicle pulled over to the side of the road to shoot at waterfowl flying in an adjacent field. Id. at 874. After exiting the vehicle, the driver used the roof of the vehicle as a rest for his rifle. Id. As the driver was firing, the passenger alighted from the vehicle and was fatally injured. Id.

[47] The Court held that the death did not arise out of the use of the motor vehicle, but instead, out of the use of the rifle. Norgaard, 201 N.W.2d at 876. The rifle being an independent cause of the passenger's death. Id. The Court found that use, to result in liability on the part of the insurance carrier, must be such use as arises out of the inherent nature of the automobile. Id.

[48] The Court found the automobile insurance policy at issue was not applicable because the death did not arise out of the use of a motor vehicle, and explained:

> [A] causal relation or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for the accident or injury to come within the meaning of the clause . . . and where such a causal connection or relation is absent coverage will be denied. The difficulty therefore related mainly to the determination whether or not there was under the facts of the particular case the required causal relationship.

Id. at 875(internal quotations omitted). "If an injury is directly caused by some independent or intervening cause it does not arise out of the use of an automobile,

notwithstanding there may have been some remote connection between the use of an automobile and the injury complained of." Id.

[49] The Court reasoned:

> The phrase 'arising out of' is not to be construed to mean 'proximately caused by'. . . . The phrase itself is much broader than a phrase such as 'proximately caused by the use of an automobile.' The words 'arising out of' mean causally connected with, not 'proximately caused by'. . . . 'But for' causation, i.e., a cause and result relationship, is enough to satisfy the provision of the policy.

Norgaard, 201 N.W.2d at 875.

[50] The Court determined that a causal connection does not require a finding that the injury was proximately caused by the use of an automobile, but only that it arose out of the use. Norgaard, 201 N.W.2d at 875. "An injury does not arise out of the use of a motor vehicle if it is directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from its use." Id.

[51] In Houser v. Gilbert, 389 N.W.2d 626 (N.D. 1986), the Court applied the causal connection test to determine that mud, which later combined with rain to cause slippery conditions on the roadway and a crash, "could not have been deposited on the roadway without the use of" a vehicle. Id. at 628. In Houser, the insureds, while trucking sugar beets, deposited mud and dirt on the highway, which later became slippery after a rain, causing a driver to lose control of his truck and strike another vehicle. Houser, 389 N.W.2d at 627 – 28. The owner of the sugar beet truck was insured under two vehicle policies and a farm liability policy. Id. The vehicle insurers argued their policies were not applicable because the trucks involved were not being used for transportation at the time of the collision and, therefore, the loss was not caused by the use of a motor vehicle. Id. Ultimately, the Court held that the loss was caused by both vehicle-related acts – use of trucks to deposit dirt and

mud on the highway – and non-vehicle-related acts – failure to remove the mud from the highway once deposited or to warn of the danger. Id. at 628.

[52] As a result of the holding in Houser, there is little doubt that the wheelbarrow in this case could not have been deposited on the roadway without the use of a motor vehicle and, therefore, the exception for injuries arising out of the use of a motor vehicle is applicable. However, that does not end the Court's inquiry. Despite the applicability of the use of a motor vehicle exclusion, there are alleged non-vehicle related acts of negligence that are covered under the Policy and, through application of the concurrent cause doctrine, there is coverage for Lantz's injuries. See, Houser, 389 N.W.2d 626 (N.D. 1986); Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, 658 N.W.2d 363; Cegla, 381 N.W.2d 901 (Minn. Ct. App. 1986).

[53] Under the concurrent cause doctrine, coverage is afforded when both an included and an excluded risk contribute to cause an accident. See, Grinnell, 2003 ND 50, ¶¶ 24 – 33, 658 N.W.2d 363. The concurrent cause doctrine is "broad and comprehensive in scope." Id. at ¶ 14. When the concurrent cause doctrine is applied, "[c]overage cannot be defeated simply because a separate excluded risk constitutes an additional cause of the injury." Houser, 389 N.W.2d at 631.

[54] This Court has used the concurrent cause doctrine to provide coverage in several instances regardless of the applicability of a use of a motor vehicle exclusion. In Grinnell, this Court discussed whether an automobile insurance policy and a farm policy provided coverage for injuries sustained while the insured and a neighbor were attempting to tow a tractor with a pickup and nylon rope. Grinnell, 2003 ND at ¶ 14, 658 N.W.2d 363. The farm policy at issue contained an exclusion for injuries arising out of the "ownership,

operation, maintenance, rental or use of" a motor vehicle. Id. at ¶ 20. North Star inaccurately notes that there was not "a specific exclusion . . . for bodily injuries arising out of the use of an auto" at issue in Grinnell. Appellant's Br. at ¶ 21; cf. Id. There was.

[55] In finding coverage under the farm policy, the Grinnell Court noted that the choice of the nylon rope and the negligent attachment of the tow rope **were independent factors which contributed to the injuries sustained**. Grinnell, 2003 ND at ¶ 32, 658 N.W.2d 363. The Court reasoned that because the towing of a farm implement was covered by the farm policy, the coverage could not be denied because of the use of a motor vehicle exclusion holding that "when two independent acts of negligence are alleged, one vehicle-related and one not vehicle-related, coverage is still provided … unless the vehicle-related negligence is the **sole proximate cause of the injury**." Id. at ¶ 26 (emphasis added) (citing Kalell v. Mut. Fire and Auto. Ins. Co., 471 N.W.2d 865, 868 (Iowa 1991)).

[56] The Grinnell Court cited Schlueter v. Grinnell Mut. Reinsurance Co., 553 N.W.2d 614 (Iowa Ct. App. 1996), a decision by the Iowa Court of Appeals, favorably. In Schlueter, a farmer loaded a bale of hay onto a tractor that was then loaded onto a trailer that was hitched to a pickup. Id. at 615. During transport, the hay bale fell off and was hit by a vehicle causing injury. Id. The farm policy at issue in Schlueter, like the policy here, excluded claims "arising out of the ownership, operation, maintenance, rental or use … of any motor vehicle by any insured person. …" Id. The Court of Appeals of Iowa held that:

> Although the accident … arose out of the use of a vehicle that is excluded under the policy, it also allegedly arose out of one or more concurrent nonvehicle-related acts including the **decision to load and secure the bale in the method chosen and the failure to immediately remove the hay bale once it fell off onto the road**.

Id. (emphasis added). The Schlueter court held that just because a motor vehicle was involved, the act of transporting the bale of hay "did not cease to be farm related." Id.

[57] Similarly, this Court has stated that whenever a non-vehicle related "risk is a proximate cause of an injury, liability attaches to the insured, and coverage for such liability should naturally follow." Houser, 389 N.W.2d at 630 – 31. In Houser, this Court determined that the failure of an insured to **remove mud and dirt from the highway** that had been deposited by a sugar beet truck or **to warn of the danger were non-vehicle related acts** for purposes of the concurrent cause doctrine and a determination of primary or excess coverage. Id. (emphasis added).

[58] Several other courts have reached the same conclusion. In Kalell v. Mut. Fire and Auto. Ins. Co., the Iowa Supreme Court found that the use of a vehicle to provide force did not excuse the insured from any negligence in the decision to remove a limb with the rope. Id. at 868. There, after cutting two-thirds of the way through a tree limb, the insured attached a rope from the limb to the vehicle and used the truck to pull the limb, which broke, causing injuries to a third party. Id. at 866. The homeowner's insurance policy at issue contained an exclusion for injuries arising out of the use of a motor vehicle. Id.

[59] In Waseca Mut. Ins. Co. v. Noska, 331 N.W.2d 917(Minn. 1983), the Minnesota Supreme Court addressed whether placing live embers in open barrels triggered coverage under a homeowner's policy when it concurred with the vehicle-related act of driving to cause a nine day forest fire. The policy at issue in Waseca excluded coverage for bodily injury arising out of the use of a motor vehicle. Id. at 919. Ultimately, after applying the causal connection test, the Waseca court concluded that the fires were related to the use

of a motor vehicle, but recovery against both insurers was permissible because there were two independent acts, one vehicle-related and one non-vehicle-related, involved. Id. at 921.

[60] The Waseca Court determined that "the act of placing live embers in an uncovered barrel with other debris was a cause of the fire and was non-automobile related." Id. at 923. The Waseca Court concluded that "the insurer agreed to pay for **liability accruing … which arose from non-automobile-related causes and accepted a premium for assuming this risk**." Id. (emphasis added).

[61] The Minnesota Court of Appeals has also determined that the failure to tie down a wire roll was a non-vehicle related act that triggered coverage under a homeowner's policy excluding injuries arising out of the ownership, maintenance, or use of a motor vehicle. Pennsylvania General Ins. Co. v. Cegla, 381 N.W.2d 901, 902 (Minn. Ct. App. 1986). In Cegla, coverage was triggered under a homeowner's policy for an accident caused when the wire fell onto the highway from a truck causing a motorcyclist to lose control and be struck and killed by a following motorist. Id. Likewise, in Vang v. Vang, 490 N.W.2d 647 (Minn. Ct. App. 1992), the Minnesota Court of Appeals found that there was coverage under a farm liability policy for injuries caused when an individual was pinned between a vehicle and a defective barn door. The Court held that the negligent failure to **warn of the defective door was independent of the negligent driving of the vehicle** and was no **inextricably linked with the operation of a motor vehicle**." Id. at 653. The policy at issue in Vang contained an exclusion for injuries arising out of the use of a motor vehicle. Id. at 649.

[62] In the present case, vehicle-related acts of negligence are not the "sole proximate cause" of Lantz's injuries. See, Grinnell, 2003 ND at ¶ 26, 658 N.W.2d 363. Several alleged negligent acts by Ackerman are not related to the use of the motor vehicle,

did not arise out of the inherent nature of an automobile, and concurred to cause Lantz's injuries. First, Ackerman failed to properly inspect the wheelbarrow to confirm that it was properly positioned or secured prior to embarking and made a negligent decision in not moving the wheelbarrow to the empty trailer. See, Cegla, 381 N.W.2d at 902; see also, Schlueter, 553 N.W.2d 614 (Iowa Ct. App. 1996); Waseca, 331 N.W.2d 917 (Minn. Ct. App. 1983). Second, Ackerman failed to remove the wheelbarrow from the roadway or notify authorities that a wheelbarrow had fallen from his vehicle. See, Houser, 389 N.W.2d at 627; see also, Schlueter, 553 N.W.2d 614. Third, Ackerman failed to properly warn other motorists of the danger caused by the wheelbarrow. See, Houser, 389 N.W.2d at 627; Vang, 490 N.W.2d 647 (Minn. Ct. App. 1992). Lantz's injuries, also, arose out of these alleged independent acts that are related to the supervision, maintenance, and use of the wheelbarrow and do not "arise out of the inherent nature of any automobile." Norgaard, 201 N.W.2d at 874.

[63] In this case, the wheelbarrow laid in the roadway for over an hour before the collision. It did not become the hazard that caused the collision until over an hour after it left Ackerman's vehicle. At the time of the collision, Ackerman was, presumably, at home in Mandan, ND along with his vehicle. The failure to remove the wheelbarrow from the roadway and the failure to warn of the danger caused by the wheelbarrow were concurrent causes of the collision. These alleged non-vehicle related acts of negligence are separated from any vehicle related acts of negligence by over an hour and a distance exceeding sixty miles. If the wheelbarrow is not in the roadway or there is an appropriate warning, the collision does not occur. As a result, Lantz's injuries also "arise out of" the failure to remove the wheelbarrow from the roadway and the failure to warn of the danger caused by the

wheelbarrow. These acts of negligence do not "arise out of the inherent nature of the automobile." Houser, 389 N.W.2d at 628; Cf. Norgaard, 201 N.W.2d at 875. These acts are unrelated and remote to the use of the vehicle by over an hour and in excess of sixty miles.

[64] Each of these alleged non-vehicle related negligent acts have been found by courts to be non-vehicle related acts of negligence for purposes of the concurrent cause doctrine and the application of a use of a motor vehicle exclusion. As a result, Ackerman should not be excused from "negligence in his decisions," to not inspect the wheelbarrow, to transport the wheelbarrow in the method chosen, to not look for the wheelbarrow, to not remove the wheelbarrow from the roadway, and to not warn authorities or anyone else of the danger caused by the wheelbarrow. See, Kalell, 471 N.W.2d at 868.

[65] North Star argues that each of these instances of the alleged non-vehicle-related acts of negligence are related to the use of a vehicle or occurred during the loading or unloading of the vehicle because "the use of an auto includes the transportation, loading, and unloading of the wheelbarrow." Appellant's Br. at ¶ 22. However, in making these broad contentions, North Star cites to no contrary authority, ignores the holdings in Houser and Grinnell, and ignores the Policy definition of "loading and unloading" which requires "the **handling** of property." App. at 049 (emphasis added).

[66] More importantly, the main issue is not whether the injuries arise out of the use of a motor vehicle, but whether the injuries, also, arise out of a concurrent cause of negligence. As discussed above, Lantz does not dispute that the collision arose, partly, out of the use of a motor vehicle. Lantz agrees that the use of a motor vehicle exclusion applies in this instance, but it does **not** bar coverage because there are non-vehicle related acts of negligence that concurred to cause Lantz's injuries which are covered under the Policy.

Because these other alleged acts of negligence are not related to the use of a motor vehicle, they cannot be excluded by the use of a motor vehicle exclusion. Under the concurrent cause doctrine, "coverage is afforded when both an included and an excluded risk contribute to cause an accident" and "[c]overage cannot be defeated simply because a separate excluded risk constitutes an additional cause of the injury." See, Grinnell, 2003 ND at ¶ 30, 658 N.W.2d 363.

[67] This Court has rejected the holdings of several cases relied upon by North Star. See, Grinnell, 2003 ND at ¶ 31, 658 N.W.2d 363. Moreover, any cases, arguably, supporting North Star's position are distinguishable on the merits. In Allstate Ins. Co. v. Jones, 139 Cal. App.3d 271 (Cal. Ct. App. 1983), the California Court of Appeals determined that there was no coverage under the General Liability Agreement provisions of a comprehensive policy issued by Allstate for injuries sustained when rebar, negligently loaded in the vehicle, was ejected from the vehicle during a collision striking another driver in the head resulting in his death five months later. Id. at 279. The liability agreement contained an exclusion for injuries arising out of the ownership, maintenance, operation, use, loading or unloading of an automobile. Id. at 275.

[68] The Jones Court, determined that there was no coverage afforded because "both acts of negligence which occurred . . . were auto-related." Id. at 277. The Court reasoned the "improperly loaded rebar **depended on the truck's movement and velocity to become a hazard**" and concluded that when all "independent acts of negligence which concurred to cause the injury were auto-related, there was no coverage." Id. (emphasis added).

[69] However, this Court cited and rejected Jones in its Grinnell decision. See, Grinnell, 2003 ND at ¶ 31, 658 N.W.2d 363. The Court found that the reasoning and holdings of the Jones Court were not persuasive. Id. This Court specifically held "we do not find the cases contrary to our holding persuasive." Id.

[70] Also, in Jones, the rebar became a hazard **during** the collision. It was the motion and velocity of the vehicle that made the rebar a hazard. Jones, 139 Cal. App.3d at 277. In this case, the wheelbarrow was stationary in the roadway for over an hour prior to the collision and had not just fallen from a vehicle. The failure to remove the wheelbarrow and the failure to warn of the danger that caused the collision are concurrent causes of the collision. At the time the collision occurred, Ackerman was, presumably, at home in Mandan, ND. As a result, these non-vehicle related acts of negligence are separated from the vehicle related acts of negligence by a significant distance and a significant period of time.

[71] In Columbia Mut. Casualty Ins. Co. v. Coger, 811 S.W.2d 345, 346 (Ark. Ct. App. 1991) the Arkansas Court of Appeals determined that a CGL policy did not provide coverage for injuries caused by lumber falling off a truck, landing on the highway, and colliding with a van travelling in the opposite direction. The Appeals Court determined that the language of the exclusion was clear and whether the negligent act was the operation of the vehicle or the securing of the load, the injury and damage clearly arose out of the ownership, maintenance, or use of the truck or attached equipment and was therefore not covered by the policy. Id. at 348.

[72] As discussed above, this Court did not find the Coger Court's rationale persuasive in Grinnell. See, Grinnell, 2003 at ¶ 31, 658 N.W.2d 363. Coger is also distinguishable from the instant case because the collision happened immediately after the

items fell on to the roadway. Coger, 811 S.W.2d at 346. The Coger Court did not address liability regarding a failure to remove the lumber from the roadway or a failure to warn of the danger. Id. at 348. The only non-vehicle related act of negligence alleged there was the negligent securing of the load. Id.

[73] In Newton v. Nicholas, 887 P.2d 1158, 1164 – 65 (Kan. Ct. App. 1995), the Kansas Court of Appeals determined that injuries caused when a car hit a water tank that had fallen from a truck were not covered by an Ohio Casualty Insurance Company policy. The policy at issue excluded coverage for "injuries arising out of the ownership, maintenance, use, loading, or unloading of" motor vehicles. Id. at 1162. Like Jones and Coger, the water tank at issue in Newton, caused a collision immediately after entering the roadway and its reasoning was not persuasive to Grinnell Court. See, 2003 ND at ¶ 31, 658 N.W.2d 363.

[74] It is undisputed that Justin Hoerner loaded the wheelbarrow into the vehicle. Hoerner Depo., 14:20 – 23 (Doc. 53); Ackerman Depo., 15:5 – 7; 34:19 – 21 (Doc. 52). As a result, Ackerman never "handled" the wheelbarrow and Ackerman's alleged non-vehicle related acts of negligence related to not inspecting the wheelbarrow or the decision to transport the wheelbarrow in the bed of the truck and not the empty trailer cannot meet the policy definition of "loading and unloading." See, App. at 049.

[75] In the present case, given that the Policy definition of "loading or unloading" requires "the **handling** of property" the Court should conclude that Ackerman's failure to properly inspect the wheelbarrow or decision to haul the wheelbarrow in his vehicle instead of his trailer did not occur in the "loading or unloading" of the vehicle because Ackerman never "handled" the wheelbarrow as required by the policy definition. Moreover, these acts of negligence have also been found to be non-vehicle related for purposes of the concurrent

cause doctrine. See, Cegla, 381 N.W.2d at 902. Even if the Court determines that these negligent acts are related to the use of a motor vehicle, Ackerman's failure to remove the wheelbarrow from the roadway or to warn of the danger are non-vehicle related acts for purposes of the concurrent cause doctrine. See, Houser, 389 N.W.2d at 630 – 31; Schlueter, 553 N.W.2d at 618.

[76] In this case, the non-vehicle related acts of negligence concurred with vehicle-related acts of negligence to cause the collision and "[c]overage cannot be defeated simply because a separate excluded risk constitutes an additional cause of the injury." Houser, 389 N.W.2d at 630 – 31; see also, Cegla, 381 N.W.2d at 902; Schlueter, 553 N.W.2d at 618. The above referenced cases, arguably, supporting North Star's argument, do not address the non-vehicle related acts of negligence alleged here because the collisions in those instances occurred almost immediately after the items fell onto the roadway. In this instance, the alleged non-vehicle related acts of negligence are separated from the vehicle related acts by time and distance. As a result, Lantz respectfully requests that the Court affirm the District Court's determination that there are alleged non-vehicle related acts of negligence and the Policy provides coverage in the instant case.

B. There is a duty to remove items from the roadway and to warn of the danger caused by items in the roadway.

[77] North Star also argues that the District Court erred by finding that there is a duty to remove or warn of hazards in the roadway because the finding "imposes an affirmative duty upon Ackerman to backtrack from New Salem to Belfield, approximately 80 miles, in search of his wheelbarrow in the dark." Appellant's Br. at ¶ 28. Ackerman also asserts that

the District Court found that "Ackerman was negligent. . ." Id. at ¶ 15. Both of these arguments are misplaced.

[78] The District Court ruled that an individual who allows an item "the presence of which creates an unreasonably risk of injury, to be placed upon a public highway has a duty to remove that item form the highway and a duty to give notice to the public of the presence of that item upon the highway." Order, 03/13/2019, ¶ 20 (Doc. 82); App. at 118. At no point, did the District Court rule that Ackerman violated these duties or was negligent, only that the duties existed as a matter of law. Id. The District Court made this determination **in response to North Star's argument** that Lantz had not established "Ackerman's duty to warn and duty to remove the wheelbarrow" as part of the coverage dispute and Ackerman's potential liability. North Star's Br. in Resp. to Lantz's Mot. For Sum. J., 1/22/19, ¶ 13 (Doc. 71); cf. Reply to Plaintiff North Star Mut. Ins.'s Br. in Res. To Def. Kyle Lantz's Mot. For Sum. J., 1/23/19, ¶¶ 23 - 31 (Doc. 73).

[79] The District Court noted that, "North Star argues that the Court cannot rely upon Ackerman's failure to remove the wheelbarrow or to give notice of the presence of the wheelbarrow upon the highway as concurrent causes because Lantz has not shown that Ackerman had a duty to do so." Order, 03/13/2019, ¶ 17 (Doc. 82); App. at 116. The issue before the Court is coverage which can be decided "even though the insured's liability for the loss may not have been determined." Doe, 1999 ND at ¶ 7, 589 N.W.2d 581. "The issue is whether the claims give rise to **potential liability** or a possibility of coverage." Heim, 1997 ND at ¶ 11, 559 N.W.2d 846 (emphasis added).

[80] "An **actionable negligence** consists of **a duty on the part of an allegedly negligent party** to protect the plaintiff from injury . . . ." Forsman v. Blues, Brews and Bar-

B-Ques, Inc. et al., 2012 ND 184, ¶ 13, 820 N.W.2d 748 (emphasis added). Generally, the existence of a duty is a question of law for the court to decide." Id. It is logical that in order for there to be potential liability for alleged non-vehicle related acts of negligence that there must be "actionable negligence" related to those alleged acts and a duty under the law before coverage can be afforded.

[81] North Star argued at the lower court level that the alleged acts of non-vehicle related negligence could not give rise to potential liability on the part of Ackerman because there is no duty under the law. As a result, the Court was required to determine whether there was a duty associated with the alleged acts of negligence in order to establish whether Ackerman had potential liability for the claims. Put simply, if there is not a duty under the law, there is no actionable negligence and no potential liability for purposes of the coverage dispute. See, Forsman, 2012 ND at ¶ 13, 820 N.W.2d 184.

[82] As a result, the District Court, in response to argument by North Star, found it necessary to address the issue of a legal duty. The determination of a duty under the law is a question of law for the Court and was appropriate for the District Court to address in order to establish potential liability related to Ackerman's alleged non-vehicle related acts of negligence and potential liability. See, Forsman, 2012 ND at ¶ 13, 820 N.W.2d 184

[83] The District Court's decision is supported by North Dakota law. North Dakota Century Code § 39-10-59 states "[a]n individual who deposits, or permits to be deposited, upon a highway a destructive or injurious material **shall immediately remove or cause to be removed** the material." N.D.C.C. § 39-10-59(2)(emphasis added). This duty is also outlined for use in a pattern jury instruction. See, N.D.J.I. – Civ. C – 3.41. The instruction provides that:

> A person **may not deposit upon a highway** any glass bottle, glass, nails, tacks, wire, cans, rubbish, litter, or **any other substance likely to injure a person**, animal, or vehicle. A person who deposits [or] permits to be deposited upon a highway any destructive, injurious, material **must immediately remove** [or] **cause to be removed the material**. . . .

Id. (emphasis added)(internal formatting omitted).

[84] The District Court's determination of potential liability is also supported by this Court's holding in Houser, 389 N.W.2d 626, 630 – 31 (N.D. 1986). The Houser Court found that the "loss was not caused solely by the 'use, maintenance or operation' of the trucks, but **was also caused by the risks involved** in [the] failure to remove the mud from the road . . . There was also a failure to warn." Id. This Court determined that these acts of negligence were "**clearly nonvehicle-related**" and, consequently, that there is a potential for liability. Id. (emphasis added). As a result, the District Court did not err in determining that Ackerman had potential liability for alleged non-vehicle related acts of negligence that this Court has previously stated are "clearly nonvehicle-related." Id.

[85] North Star makes numerous fault arguments about the difficulty of Ackerman meeting this duty, but fails to cite or address any authority that this duty does not exist under the law. North Star ignores this Court's previous holding in Houser and fails to acknowledge that duty and breach are separate elements in a negligence claim. Houser, 389 N.W.2d at 630 – 31; Chegwidden v. Evenson, 2015 ND 131, ¶ 18, 863 N.W.2d 843.

[86] Put simply, North Star's arguments are nothing more than comparative fault considerations. These comparative fault considerations are outside the scope of this coverage action and are not necessary to establish Ackerman's potential liability in this situation. The District Court, as appropriate, was only ruling on the issue of whether the Policy provides coverage for Ackerman's alleged non-vehicle related acts of negligence.

[87] **CONCLUSION**

[88] For the reasons set forth above, Lantz, respectfully, requests that this Court affirm the District Court's Order Reversing Decision for Evidentiary Hearing and Ruling Upon Motions for Summary Judgment determining that North Star Commercial General Liability Policy CM43504 provides coverage for Lantz's injuries and issue a declaration that North Star is required to provide coverage for and defend Ackerman related to Lantz's claims for negligence against Ackerman Homes.

Dated: October 11, 2019.

MARING WILLIAMS LAW OFFICE, P.C.

By: /s/ Jared J. Wall

David S. Maring (ID 03175)
Jared J. Wall (ID 07906)
1661 Capitol Way, Suite 103LL
Bismarck, ND 58501
(701) 224-0430
Attorneys for Defendant/Appellee,
Kyle Lantz

[89] **CERTIFICATE OF COMPLIANCE**

[90] I, Jared J. Wall, hereby certify pursuant to N.D.R.App.P. 32(e) that the above Brief of Appellee 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 Appellee contains thirty-six (36) pages.

Dated: October 11, 2019.

MARING WILLIAMS LAW OFFICE, P.C.

By: /s/ Jared J. Wall

David S. Maring (ID 03175)
Jared J. Wall (ID 07906)
1661 Capitol Way, Suite 103LL
Bismarck, ND 58501
(701) 224-0430
Attorneys for Defendant/Appellee,
Kyle Lantz

STATEMENT ON REQUEST FOR ORAL ARGUMENT

[1] Appellee, Kyle Lantz, respectfully requests that Oral Argument be scheduled in this matter. Oral Argument will be helpful to assist the Court in examining the complex insurance policy questions involved in this case which include the interpretation of coverage provisions and exclusions from coverage.

Dated: October 18, 2019.

MARING WILLIAMS LAW OFFICE, P.C.

By: /s/ Jared J. Wall

Jared J. Wall (07906)
1661 Capitol Way, Suite 103LL
Bismarck, ND 58501
(701) 224-0430
jwall@maringlaw.com
Attorneys for Defendant/Appellee, Kyle Lantz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

North Star Mutual Insurance, Plaintiffs/Appellants vs. Jayme Ackerman d/b/a Ackerman Homes, Kyle Lantz, Levi Chase, Progressive Insurance Company, and State Farm Mutual, Defendants/Appellees	)	**Supreme Court No. 20190135** **Stark County No. 45-2017-CV-959** **CERTIFICATE OF SERVICE**

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

I hereby certify that on October 11, 2019, a true and correct copy of the **Brief of Appellee** was filed electronically with the North Dakota Supreme Court through the North Dakota Supreme Court E-Filing Portal and the following attorneys will be sent a Notification of Service by e-mail:

Daniel M. Traynor
Jonathon Yunker
Traynor Law Firm, P.C.
dantraynor@traynorlaw.com
jackyunker@traynorlaw.com

Briana L. Rummel
Vogel Law Firm
brummel@vogellaw.com

Jerry W. Evenson
Evenson Sanderson, PC
jevenson@esattorneys.com

William P. Harrie
Nilles Law Firm
wharrie@nilleslaw.com

Dated: October 11, 2019.

MARING WILLIAMS LAW OFFICE, P.C.

By: /s/ Jared J. Wall
Jared J. Wall (07906)
1661 Capitol Way, Suite 103LL
Bismarck, ND 58501
(701) 224-0430
jwall@maringlaw.com
Attorneys for Defendant/Appellee, Kyle Lantz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

North Star Mutual Insurance, Plaintiffs/Appellants vs. Jayme Ackerman d/b/a Ackerman Homes, Kyle Lantz, Levi Chase, Progressive Insurance Company, and State Farm Mutual, Defendants/Appellees	)	**Supreme Court No. 20190135** **Stark County No. 45-2017-CV-959** **CERTIFICATE OF SERVICE**

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

I hereby certify that on October 18, 2019, a true and correct copy of the **Statement on Request for Oral Argument** was filed electronically with the North Dakota Supreme Court through the North Dakota Supreme Court E-Filing Portal and the following attorneys will be sent a Notification of Service by e-mail:

Daniel M. Traynor
Jonathon Yunker
Traynor Law Firm, P.C.
dantraynor@traynorlaw.com
jackyunker@traynorlaw.com

Briana L. Rummel
Vogel Law Firm
brummel@vogellaw.com

Jerry W. Evenson
Evenson Sanderson, PC
jevenson@esattorneys.com

William P. Harrie
Nilles Law Firm
wharrie@nilleslaw.com

Dated: October 18, 2019.

MARING WILLIAMS LAW OFFICE, P.C.

By: /s/ Jared J. Wall
Jared J. Wall (07906)
1661 Capitol Way, Suite 103LL
Bismarck, ND 58501
(701) 224-0430
jwall@maringlaw.com
Attorneys for Defendant/Appellee, Kyle Lantz