

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

**Supreme Court No.: 20130091
Cass County District Court No. 09-2011-CV-02778**

**Nodak Mutual Insurance Company,
Plaintiff/Appellee,**

vs.

**Eric Bahr-Renner, Sara Daede,
Ashley Collins, Billie Rauser,
Kenneth McCoy, Con-Way Freight,
Inc., Emily Young, J.C., a minor
child, and Peggy Gwyther, deceased,**

Defendants/Appellants.

++++
BRIEF OF APPELLEE NODAK MUTUAL INSURANCE COMPANY
++++

**Appeal from Judgment/Amended Judgment
Cass County District Court, The Honorable Wickham Corwin,
District Judge**

++++
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STATEMENT OF THE ISSUES

[1] Whether the District Court correctly ruled that Mary Joan Gwyther was not a “resident” of her mother’s Bismarck household on the day of the accident.

[2] Whether Nodak Mutual’s step-down policy provision, which is contained in a separate endorsement, complies with North Dakota law and is enforceable.

[3] Whether North Dakota law requires that a restrictive endorsement reducing the limits of liability be signed by the named insured.

[4] Whether the Nodak Mutual policy is ambiguous with respect to the limits of liability.

STATEMENT OF THE CASE

[5] This insurance coverage action was tried on stipulated facts to the Honorable Wickham Corwin in Cass County District Court on December 13, 2012 (A, 32-35). The District Court ruled in favor of Nodak Mutual Insurance Company (Nodak Mutual). There are three issues on appeal that were decided by the District Court. First, the Court ruled as matter of law that the Nodak Mutual policy issued to Peggy Gwyther, and the step-down policy provision contained in a separate endorsement, comply with North Dakota law, specifically N.D.Cent.Code §26.1-40-16, and are enforceable, and are not required to be signed by the named insured. (S.A., 10-11; A, 47-48). Second, the Court ruled that Mary Joan Gwyther was not a “resident” of the named insured’s household within the meaning of the Nodak Mutual policy. (S.A., 15; A, 47-48). This ruling appears to be a finding of fact, as the Court reasoned that “I simply can’t find any factual support for the conclusion that Margaret’s house in Bismarck was Mary Joan Gwyther’s residence. And voting on an absentee basis from the country of Switzerland

to me doesn't change that conclusion at all." (S.A., 15). Finally, the Court ruled that the Nodak Mutual policy is not ambiguous with respect to the limits of liability (S.A., 20-21; A, 47-48).

[6] As a result of these findings, the District Court held that the available limits to Defendants under the step-down provision are the minimum bodily injury limits of \$25,000 each person/\$50,000 each occurrence and \$25,000 for property damage liability each accident or occurrence. (S.A., 21). An amended judgment was entered on the Court's request (A, 46-48). This appeal followed (A, 49-50).

STATEMENT OF FACTS

A. Accident Facts

[7] On January 14, 2010, Mary Joan Gwyther, a resident of Switzerland for the past twelve years, was involved in an automobile accident while driving her mother Margaret Gwyther's (Peggy) vehicle. (Gwyther Depo., pp. 5-20; A, 87-90). A multi-vehicle accident occurred on I-94, near the Buffalo/Alice exit in Cass County, North Dakota. (A, 6). Mary Joan Gwyther was driving a 2002 Dodge Dakota pickup owned by her mother, Peggy Gwyther, and traveling west on I-94 when she lost control of the pickup, and the vehicle crossed the center median and rolled, ending up in the eastbound lane of travel where a multi-vehicle accident occurred in which three cars and a semi-tractor with double trailers collided. (A, 6). Peggy Gwyther, the mother of Mary Joan Gwyther and a passenger in the vehicle, died as a result of injuries received in the accident. (A, 6).

B. The Insurance Policy

[8] Nodak Mutual is the automobile liability insurer of the 2002 Dodge Dakota pickup driven by Mary Joan Gwyther at the time of the accident on January 14,

2010. The Nodak Mutual policy for the 2002 Dodge Dakota pickup was issued to Peggy Gwyther as the named insured and the rated driver. Because Mary Joan Gwyther is a resident of Switzerland, she does not have car insurance or a driver's license in the United States. (Gwyther Depo., pp. 5-20; S.A., 26-29). Rather, Mary Joan Gwyther maintains a license and car insurance in Switzerland, where she lives and owns a business. (Gwyther Depo., pp. 5-12; S.A., 26-27).

[9] The Nodak policy issued to Peggy Gwyther provided step-down limits or split limits of \$25,000 each person/\$50,000 each accident/\$25,000 property damage for a non-resident of the household of the insured driver, such as Mary Joan Gwyther, pursuant to a separate Endorsement.

C. The Endorsement and Step-Down Provision

[10] The Nodak policy issued to Peggy Gwyther provided step-down limits or split limits of \$25,000 each person/\$50,000 each accident/\$25,000 property damage for the above-described claims arising out of the accident of January 14, 2010 pursuant to an Endorsement providing as follows:

LIMIT OF LIABILITY

- A.** The following limits of liability apply:
 - 1.** With respect to you or any "family member":

The limit of liability show in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of "bodily injury" sustained by any one person in any one auto accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Bodily Injury Liability is our maximum limit of liability for all damages for "bodily injury" resulting from any one auto accident.

The limit of liability shown in the Declarations for each accident for Property Damage Liability is our maximum limit of liability for all "property damage" resulting from any one auto accident.

2. With respect to any other person who is insured under this policy:

The amount of coverage for damages due to "bodily injury" to one person is limited to the Statutory Financial Responsibility Bodily Injury Limit for one person.

The total amount of coverage for all damages due to "bodily injury" to two or more persons in the same occurrence is limited to the Statutory Financial Responsibility Bodily Injury Limit for two or more persons.

The maximum for all damages to all property in any one occurrence is limited to the Statutory Financial Responsibility Property Damage Limit for any one accident.

See Endorsement PP ND 01 88 98, p. 2. (A, 69). Section 2 above deals with insureds who are not "family members."

[11] Mary Joan Gwyther is not a "family member" of Peggy Gwyther within the meaning of Nodak's policy. The policy defines "family member" as follows:

F. "Family member" means a person related to you by blood, marriage or adoption, including a ward or foster child, **who is a resident of your household.**

[12] The Nodak policy provides "family members", i.e., residents of the household, the same amount of coverage as the named insured (Peggy). (A, 56). Because Mary Joan Gwyther is not a "family member" for purposes of the Nodak insurance policy, the statutory minimum policy applied.

D. Undisputed Facts Regarding Residency

[13] Mary Joan Gwyther has never lived in her parent's current residence in Bismarck. (Gwyther Depo., p. 13, S.A., 28). Mary Joan Gwyther has lived in Switzerland since December of 2000, or over 12 years. (Id. p. 15, S.A., 28). She currently lives at Hauptstrasse 26 44632; Buus, Switzerland where she has lived since 2009. Prior to Buus, she lived in Anwil, another village in Switzerland, from 2001-2009.

(Id., p. 5, S.A., 26). Mary Joan Gwyther first moved to Switzerland in 1990 and lived there from 1990-1996. She then went to New Jersey for one year before moving to Singapore from 1997-2000. In December of 2000, she moved back to Switzerland and has lived there since. (Id., p. 15, S.A., 28).

[14] Mary Joan Gwyther's parents lived at 1300 North 26th Street, Bismarck, North Dakota. They purchased that home in 1997 or 1998. Her parents have always put her name on everything since she was one or two years old. (Id., pp. 11-12, S.A., 27).

[15] Mary Joan Gwyther has never lived in her parent's house in Bismarck. The last time that she lived in the United States was 1996-1997 in New Jersey. (Id., p. 13, S.A., 28). The last time she lived with her parents was in 1972. (Id., p. 14, S.A., 28).

[16] Mary Joan Gwyther has been self-sufficient since approximately 1970-1972 (Id., p. 16, S.A., 28). Mary Joan Gwyther receives all of her mail in Switzerland (Id., p. 6, S.A., 26). Mary Joan Gwyther has owned a business in Switzerland since 2001 (Id., p. 7, S.A., 26). Mary Joan Gwyther pays taxes for her business and general income taxes in Switzerland (Id., p. 7, S.A., 26). Mary Joan Gwyther has not paid any United States taxes since living in Switzerland from 2001 to present. She has only paid North Dakota taxes in 2006 because they sold some property (Id., p. 17, S.A., 29).

[17] Mary Joan Gwyther owns a vehicle in Switzerland and insures it in Switzerland. (Id., pp. 9-10, S.A., 27). Mary Joan Gwyther has a current Swiss driver's license (Id., p. 8, S.A., 27). Her vehicle is licensed and registered in Switzerland (Id., p. 15-16, S.A., 28). Mary Joan Gwyther does not have a North Dakota driver's license, and the last time that she had one was in the late 1970's or early 1980's (Id., p. 9, S.A., 27).

Mary Joan Gwyther considers herself a resident of Switzerland. She has a Swiss residence permit (Id., p. 10, S.A., 27).

[18] Mary Joan Gwyther does not consider herself to be a resident of her mother's household in Bismarck, North Dakota. (Id., p. 20, S.A., 29). When Mary Joan Gwyther saw her mother, she was only visiting and it was usually once a year, sometimes twice (Id., p. 21, S.A., 30).

[19] On the date of the accident of January 14, 2010, Mary Joan Gwyther was driving a 2002 Dodge Dakota pickup. This was originally her father's truck. When he passed away in 2006, they changed the name to her mother's name and Mary Joan Gwyther's name. (Id., p. 18, S.A., 29). The 2002 Dodge Dakota pickup was purchased by her father, who also paid for the title and registration and paid for the insurance. (Id., p. 18, S.A., 29). Mary Joan Gwyther never paid for insurance on the 2002 Dodge Dakota pickup or the title and registration, and never paid for service and maintenance of the vehicle. (Id., p. 18, S.A., 29). The 2002 Dodge Dakota pickup was insured with Nodak Mutual originally by her father. When he passed away, it was changed to her mother, Peggy Gwyther.

[20] The declaration sheet and policy lists her mother, Margaret Gwyther, as the only named insured, and does not list Mary Joan Gwyther as either an insured or a principal driver. That change happened in 2006 or 2007 (Id., pp. 19-20, S.A., 29). The registration card for the 2002 Dodge Dakota pickup dated July 10, 2009, lists Mary Jo Gwyther as well as her mother. Mary Joan Gwyther is also listed on a quit claim deed because she is the only surviving child of her parents. (Id., p. 22, S.A., 30).

[21] Mary Joan Gwyther is a United States citizen and has a U.S. Passport. (Id., p. 25, 27, S.A., 31). Mary Joan Gwyther did vote in North Dakota for the presidential election by absentee ballot in 2008 and again in 2012. (Id., p. 23, 28, S.A., 30-31). It is Mary Joan Gwyther's understanding that when you are an American citizen, it does not matter where you live overseas. You are allowed to vote in the presidential election, and you can either do it in the state you were born if the state allows you or you can do it directly with the federal government (Id., p. 24, S.A., 30). Mary Joan Gwyther did not have to certify as part the submission of her ballots in that process that she resided at 1300 26th Street North in Bismarck, North Dakota to complete her voting. When she went to the registrar's office in 2008 they asked her if she owned property in North Dakota and she indicated that she was a partial owner but did not live there and was informed that was no problem. She was advised just to list her parent's address as her residence. When you are an ex-patriate living outside of the United States, you have to provide the government with a permanent home address and she always used her parent's address (Id., p. 32, S.A., 32). To the best of Mary Joan Gwyther's knowledge, she never maintained to any official or anyone else that she is a resident of North Dakota for any purposes other than for voting (Id., p. 42, S.A., 35).

LAW AND ARGUMENT

1. STANDARD OF REVIEW

[22] As noted above, the District Court ruled as a matter of law that Nodak Mutual's step-down policy provision complies with North Dakota law and is enforceable and is not required to be signed by the named insured. The District Court also ruled as a matter of law that the Nodak Mutual policy is not ambiguous. These rulings are the

equivalent of granting summary judgment. Under Rule 56 N.D.R.Civ.P., “summary judgment should be granted only if it appears there are no genuine issues of material fact or any conflicting inferences which may be drawn from those facts.” Ellingson v. Knudson, 498 N.W.2d 814, 817 (N.D. 1993) (citation omitted). “The court must view the evidence in a 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 evidence.” Id., (citation omitted). Although the moving party must demonstrate there is no genuine issue of material fact, “the party resisting the motion may not simply rely upon the pleadings or upon unsupported, conclusory allegations.” Kummer v. City of Fargo, 516 N.W.2d 294, 297 (N.D. 1994) citing Peterson v. Zerr, 477 N.W.2d 230, 234 (N.D. 1991). “The opposing party “must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.” Kummer, 516 N.W.2d at 297. “Even if a factual dispute exists, summary judgment is appropriate when resolution of those factual disputes would not change the result.” Fibelstad v. Grant Cty., 474 N.W.2d 54, 57 (N.D. 1991).

[23] The District Court also made the finding of fact that Mary Joan Gwyther was not a “resident” of the named insured’s household within the meaning of the Nodak Mutual policy. (A, 39, 47-48). The Supreme Court must give great weight to the findings made and inferences drawn by the trial court. Rettig v. Taylor Public School Dist. No. 3, 211 N.W.2d 743 (N.D. 1973). The Supreme Court will not retry the case; if there is reasonable evidence in the record to support the District Court’s decision, the Supreme Court will affirm. Ramstad v. Biwer, 1999 ND 23, 589 N.W.2d 905. In an appeal from a bench trial, the trial court’s findings of fact are reviewed under the clearly erroneous standard and its conclusions of law are fully reviewable. Fladeland v. Gudbranson, 2004 ND 118, 681

N.W.2d 431. A finding of fact is “clearly erroneous” if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all of the evidence, the Supreme Court is left with a definite and firm conviction a mistake has been made. Id. In this case, the District Court was in the best position to review the evidence, including the deposition transcript of Mary Joan Gwyther, so the District Court’s findings should be given deference.

[24] Interpretation of an insurance contract is a question of law, fully reviewable on appeal. Farmer’s Union Mut. Ins. Co. v. Decker, 2005 ND 173, ¶ 3, 704 N.W.2d 857, 860. This court will “independently examine and construe the pertinent policy provisions to determine whether the trial court erred in its interpretation of the policy.” Link v. Federated Mut. Ins. Co., 386 N.W.2d 897, 899 (N.D. 1986). The “goal when interpreting insurance policies . . . is to give effect to the mutual intentions of the parties as it existed at the time of contracting.” Ziegelmann v. TMG Life Ins. Co., 2005 ND 55, ¶ 6, 607 N.W.2d 898, 900. If the policy language is clear on its face, “there is no room for construction.” Id. “If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract.” Id., (citation omitted). The court “will not rewrite a policy to impose liability on an insurer if the policy unambiguously precludes coverage.” Id., see also Link, 386 N.W.2d at 900 (indicating clear and explicit language will not be strained to impose liability on insurer).

2. THE DISTRICT COURT CORRECTLY RULED THAT MARY JOAN GWYTHER WAS NOT A “RESIDENT” OF HER MOTHER’S BISMARCK HOUSEHOLD ON THE DAY OF THE ACCIDENT.

[25] Nodak’s step-down policy applies to Mary Joan Gwyther. The policy provides a limitation on liability for those unnamed on the policy that are not a “family

member” (i.e., resident of the household) of the insured. (A, 69). The policy applies to Mary Joan Gwyther because she was not a “resident” of her mother’s Bismarck “household” on the day of the accident. Thus, Mary Joan Gwyther’s coverage is limited to a maximum of \$50,000 for bodily injury claims and \$25,000 for property damage claims.

[A] Mary Joan Gwyther Was A Legal Resident Of Switzerland, Not Bismarck, At The Time Of The accident.

[26] The District Court correctly ruled that Mary Joan Gwyther was a legal resident of Switzerland, and was not a “resident” of her mother’s Bismarck “household” on the day of the accident. The District Court ruled that “I simply can’t find any factual support for the conclusion that Margaret’s house in Bismarck was Mary Joan Gwyther’s residence.” (S.A., 15). The Court correctly noted that Mary Joan Gwyther was 60 years old at the time of the accident and was a fully emancipated, very adult person who had been living on her own independently for decades. (S.A., 12). The Court noted that at most, Mary Joan Gwyther was only physically present at her parent’s household in Bismarck when she would come to visit her parents. (S.A., 13). The Court referenced Dietz v. City of Medora, 333 N.W.2d 702 (N.D. 1983), which held that “a legal residence is the place where an individual has established his home, where he is habitually present, and which he intends to return to when he is away for business or pleasure.” Id., 705. The District Court correctly noted that Switzerland was the place where Mary Joan Gwyther had established her home, where she was habitually present, and where she intended to return when she was away for business or pleasure. (S.A., 14-15).

[27] Thus, Mary Joan Gwyther was clearly not a “resident” of Peggy Gwyther’s household at the time of the accident on January 14, 2010. Rather, Mary Joan Gwyther was

at all material times a legal resident of Switzerland. On January 14, 2010, Mary Joan Gwyther's resident address was in Buus, Switzerland. She obtained her residence permit in June or July of 2001, so she had been a resident of Switzerland for 8 ½ years at the time of the January 14, 2010 accident. This is verified by her driver's license and work permits from Switzerland. The last time that Mary Joan Gwyther resided in the same household as her mother Margaret or Peggy Gwyther was 1987 in Athens, Georgia. Thus, Mary Joan Gwyther has not lived with or been a member of her mother's household for 23 years at the time of the accident on January 14, 2010. Mary Joan Gwyther is 62 years old and has been self-sufficient since no later than 1972. She has never resided in her parents' home in Bismarck, North Dakota, and considers herself to be a resident of Switzerland. All of the facts point to Mary Joan Gwyther being a resident of Switzerland and not North Dakota at the time of the accident.

[28] Thus, under North Dakota law, Mary Joan Gwyther was a legal resident of her household in Switzerland at the time of the accident. A legal residence "is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose." N.D. Cent.Code §54-01-26 (1). "All of the facts and circumstances in the life of an individual may be used when considering the factual issue of whether or not there has been a change of legal residence." Dietz, 333 N.W.2d at 705; see also American Standard Ins. Co. of Wisconsin v. Forsythe, 915 F.2d 1212, 1215-16 (8th Cir. 1990) (indicating the determination of residency is a fact determination influenced by whether the arrangement is temporary and whether the house acts as a unified unit).

[29] In Dietz, the Court noted evidence of legal residence includes declarations, payment of taxes, licenses, business connections, property ownership, maintenance of a dwelling, and intent to stay at the residence. Id. In Dietz, the Court found an individual continued to be a legal resident of a particular location because he belonged to clubs, supported a church, had his address listed at that location on numerous documents, and had a home in the location where his personal possessions are kept. Id. at 705.

[30] Showing residency in the household requires that, on balance, the subjective or declared intent of the individual, the formality of the relationship between the individual and the other members of the household, the existence of another place of lodging by the alleged resident, and the relative permanence of the individual's stay each point to permanent residence at that household. See Farmer's Ins. Co. v Plunkett, 687 P.2d 470, 472 (Colo. App. 1984). In Plunkett, the court determined two individuals were residents of the same household. Id. The court noted the two individuals voluntarily moved in together, split bills together, and shared day-to-day household maintenance. Id. The court also emphasized that neither individual had another place of residence. Id.

[31] In North Dakota, a person can only have one *legal residence*. N.D. Cent.Code §54-01-26 (2) ("There can only be one residence."); Dietz, 333 N.W.2d at 705 (emphasis added). In Dietz, the court held "a legal residence is the place where an individual has established his home, where he is habitually present, and which he intends to return to when he is away for business or pleasure." Id. In Dietz, the court indicated it was possible to maintain multiple residencies, with only one being the legal residency, which is similar to domicile. Id. At 704.

[32] North Dakota law provides a number of definitions of “residency,” none of which are necessarily determinative of “residency in the household.” See N.D. Cent.Code §§54-01-26 (defining “legal residence”), 57-38-01 (defining resident for tax purposes differently than “legal residence”); see also N.D. Cent. Code. Const. 2, §1 (implying residency will not be lost for voting purposes solely by leaving the state, but it may be lost for other purposes).

[33] Here, Mary Joan Gwyther remained in Switzerland when not called elsewhere for business or pleasure. All of the facts and circumstances point to Mary Joan Gwyther meeting North Dakota’s statutory definition of “legal residence” only in Switzerland. This is all very clear considering that while living in Switzerland, Mary Joan Gwyther paid taxes, obtained a driver’s license, owned a business, and rented a house in Switzerland. Conversely, Mary Joan Gwyther has not lived in the United States since 1996, when she lived in New Jersey. She has never lived at her parent’s house in Bismarck. She does not have a driver’s license or insurance in this country nor does she pay taxes or rent an abode. Additionally, Mary Joan Gwyther considers herself a resident of Switzerland. Therefore, Mary Joan Gwyther cannot be considered a resident of the household at her parent’s home in Bismarck under Nodak’s policy provision.

[34] Additionally, Mary Joan Gwyther’s one legal residence is in Switzerland because that is where she is habitually present. She has lived there for over a decade and only returns to Bismarck for short visits. Switzerland is where she lives and owns a business, and where she intended to return after her trip to North Dakota. This is evidenced by the fact that Mary Joan Gwyther would visit her parents once or twice a year, only to immediately return to her legal residence in Switzerland. While Mary Joan Gwyther retains

her status as a “resident” solely for voting purposes, she is clearly not a resident of the household of her parents. Surely an emancipated adult, living in Switzerland for over a decade (but never at her parents’ current address) is not a resident of the household of her parent’s residence. Thus, the argument that an adult woman, living away from her parents in another country for over a decade, would be a legal resident of her parent’s home, rather than her own, is unpersuasive.

[B] Voting By Absentee Ballot Does Not Make Mary Joan Gwyther A Legal Resident Of Her Mother’s Household In Bismarck, North Dakota.

[35] The Defendants’ erroneously argue that Mary Joan Gwyther was a resident of her mother’s household in Bismarck because she voted by absentee ballot in the presidential elections in 2008 and 2012 using her mother’s address in Bismarck, North Dakota. First, Defendants’ argument is based upon an erroneous interpretation of North Dakota law regarding absentee voting. Second, even if Defendants’ argument were correct, Defendants are placing too much emphasis on the fact that Mary Joan Gwyther voted by absentee ballot while a resident of Switzerland, which was done with the express permission of the State of North Dakota.

[36] The District Court stated that “I am having a great deal of difficulty equating voting, casting an absentee ballot with being a resident of a specific house where you’ve never lived.” (S.A., 13). Thus, the District Court concluded that “I simply can’t find any factual support for the conclusion that Margaret’s house in Bismarck was Mary Joan Gwyther’s residence. And voting on an absentee basis from the country of Switzerland to me does not change that conclusion at all.” (S.A., 16).

[37] Defendants rely upon several statutes, and quote N.D.Cent.Code §16.1-07-01. Contrary to Defendants arguments, however, N.D.Cent.Code §16.1-07-01 actually *supports* Nodak Mutual's position that Mary Joan Gwyther was permitted to vote in the presidential election by absentee ballot.

[38] Subdivision 1 of N.D.Cent.Code §16.1-07-01 requires that a person may vote by absentee ballot if they are "a United States citizen living outside the United States who resided in North Dakota immediately prior to that person's departure from the United States." Mary Joan Gwyther was a resident of North Dakota immediately prior to her departure from the United States. Although she lived briefly in New Jersey and Georgia, she was never a "resident" of either of those states. As Mary Joan Gwyther testified in her deposition, she has been a resident of Switzerland for many, many years. However, her last known residence in the United States that she used for voting in the presidential election only in 2008 and 2012 would be her parents' home address in North Dakota. Mary Joan Gwyther has not registered to vote in either New Jersey or Georgia, so the only place that she could vote is in North Dakota.

[39] Subdivision 2 of N.D.Cent.Code §16.1-07-01 provides that even if a person has "never lived in the United States", that person is eligible to vote by absentee ballot in North Dakota if that person meets four requirements: (1) does not maintain a domicile; (2) is not registered to vote in any other state, territory, or possession of the United States; (3) is not voting in any other state, territory, or possession of the United States; and (4) possesses a valid passport or card of identity and registration issued under the authority of the Secretary of State of the United States. Mary Joan Gwyther would meet the criteria for this statute but for the fact that she previously did live in the United

States. She did previously live in the United States, however, so she clearly qualifies under subdivision 1 as a “United States citizen living outside the United States who resided in this state immediately prior to the individual’s departure from the United States.”

[40] This is reinforced by North Dakota’s voter information website. (S.A., 41-42). Under “Voter Qualifications”, it provides:

NOTE: A citizen of the United States who is eighteen or older and whose parent is an elector in North Dakota is a qualified voter provided this individual *has not registered to vote in any other state or territory of the U.S.* These voters use the same North Dakota residential address as their parents and may vote the entire absentee ballot for the residential address.

(S.A., 41). This appears to support Nodak Mutual’s position that Mary Joan Gwyther can be considered a resident for voting in North Dakota even though she is not a resident for any other purpose. This is also consistent with Mary Joan Gwyther’s testimony to the effect that when you are an American citizen, it does not matter where you live overseas, and you are allowed to vote in the presidential election (Gwyther Depo., p. 24, 32, S.A., 30, 32).

[41] Furthermore, even if Defendants argument regarding voting were correct, which it is not, it is simply one factor regarding residency. Defendants ignore the fact that under North Dakota law, a person can only have one residence. N.D.Cent.Code §54-01-26(2). Defendants also ignore the actual undisputed facts that were set forth in Mary Joan Gwyther’s deposition, including that: she has lived in Switzerland since December of 2000; that she has never lived in her parents’ house in Bismarck; that she has been self-sufficient since approximately 1970-1972; that she receives all of her mail in Switzerland, that she has owned her own business in Switzerland since 2001; that she

pays all of her taxes in Switzerland; that she owns and insures a vehicle in Switzerland and has a current Swiss driver's license; that she does not have a North Dakota driver's license and has not since the late 1970's or early 1980's; that she considers herself a resident of Switzerland and has a Swiss residence permit; that she does not consider herself a resident of her mother's household in Bismarck, North Dakota; that the insurance policy in question was not in her name and she never paid for insurance on the 2002 Dodge Dakota pickup or the title and registration; that the declaration sheet and policy lists her mother Margaret Gwyther as the only named insured and does not list Mary Joan Gwyther as either an insured or principal driver; that she has bank accounts in Switzerland and none in the United States; and that she has never maintained to any official or anyone else that she is a resident of North Dakota for purposes of voting.

[42] These are the *undisputed* facts and clearly show that Mary Joan Gwyther was a resident of Switzerland at the time of this accident, and was not a resident of her mother's household. Therefore, the District Court correctly ruled that Mary Joan Gwyther was not a "resident" of Peggy Gwyther's "household" in Bismarck, North Dakota at the time of the accident on January 14, 2010.

3. THE DISTRICT COURT CORRECTLY RULED THAT NODAK MUTUAL'S STEP-DOWN POLICY PROVISION COMPLIES WITH NORTH DAKOTA LAW AND IS ENFORCEABLE, AND IS NOT REQUIRED TO BE SIGNED BY THE NAMED INSURED.

[A] Nodak Mutual's Step-Down Policy Provision Is Authorized By North Dakota Law And Is Enforceable.

[43] Nodak Mutual Insurance Company's policy is not ambiguous and should therefore be enforced as written. A policy that makes a designation based on the term "resident of the household" is not ambiguous. See State Farm Mut. Auto. Ins. Co. v.

LaRoque, 486 N.W.2d 235, 238 (N.D. 1992), citing Plunkett, 687 P.2d at 472 (Co. Ct. App. 1984) (indicating term “resident of the same household” is unambiguous), Dairyland Ins. Co. v. Beekman, 118 Ariz. 294, 576 P.2d 153 (Ariz. Ct. App. 1978) (concluding “member of the same household” is not ambiguous). In LaRoque the court determined the term “resident of the same household” was unambiguous. LaRoque, 486 N.W.2d at 238. In LaRoque, the court was analyzing a claim that completely excluded coverage for a non-owned car driven by another resident of the household. Id. at 237. The court agreed with Plunkett that “resident of the same household” was not ambiguous within the definition of a non-owned car. Id. at 238.

[44] An insurance policy is only “ambiguous when two reasonable arguments can be made in support of contrary positions as to its meaning.” Id. In LaRoque, the court concluded the term “non-owned car” was unambiguous, despite being defined as a non-owner resident of the household. Id. at 238. The court went on to note the individual was a resident of the household largely because she lived at the same household. Id. Specifically, the court said the individuals in question “began living” together indicated they were “residents of the same household.” Id. at 236-38.

[45] Here, Nodak’s policy is explicit in saying an individual must be a “resident of the household.” For Mary Joan Gwyther to meet this very clear and unambiguous definition she would, unsurprisingly, have to actually live at her parent’s home. Although it is possible to conflate the terms “residence,” “legal residence,” and “domicile,” for some purposes, “resident of the household” clearly stands for a person who lives in the named house. It is nearly irrelevant for the purpose of Nodak’s insurance policy that North Dakota law provides different definitions of “residence” for income tax purposes, license purposes,

and voting purposes or that Mary Joan Gwyther may meet one or more of them. Rather, Mary Joan Gwyther must meet the very clear and unambiguous definition of “resident of the household”, i.e., someone who lives in the house, which is akin to legal residency or domicile as defined under North Dakota law. It takes a highly imaginative interpretation of the term “resident of the household” to find an emancipated adult living and working in Switzerland to be a resident of her parent’s household. Because Nodak’s policy explicitly indicates it will preclude non-residents of the household, the policy is clear and unambiguous.

[46] Additionally, two reasonable arguments cannot be made as to the meaning of the term, so “resident of the household” is not ambiguous. A resident of the household is quite clearly someone who actually lives at the house in question. Unlike LaRoque, Mary Joan Gwyther does not and has not lived at her parent’s place of residence. Visiting a location once or twice a year obviously does not qualify as a residence of the household as indicated in LaRoque. If that were the accurate construction of the term, it would render North Dakota’s statutory definition of the term “legal residence” contradictory. This is certainly not a reasonable construction of the term. Because two reasonable arguments cannot be made as to a contrary meaning of the term, the contract is unambiguous and should be interpreted as written. In essence, there is only one reasonable definition of “resident of the household.”

[47] Section 26.1-40-16 explicitly allows for the provision of step-down policy limits. N.D.Cent.Code §26.1-40-16 provides:

26.14-40-16. Exclusion of named persons – Restrictive endorsements. By written agreement with the named insured, a private passenger automobile insurance policy covering an automobile or other motor vehicle registered or principally garaged in this state may exclude a named individual, individuals, or

class of individuals from coverage. The policy may contain a restrictive endorsement reducing the limits of liability, uninsured motorist coverage, underinsured motorist coverage, basic no-fault benefits coverage, or collision coverage while the vehicle is operated by a named individual or class of individuals. However, if the policy does not provide liability coverage to a person named in a restrictive endorsement, the coverage may not be less than the minimum provided under section 26.1-40-15.2, section 26.140-15.3, subsection 2 of section 26.1-41-01, and section 39-16.1-11. If the policy excludes a named individual, individuals, or class of individuals from all coverage and the named insured expressly or impliedly consents to the operation of a secured motor vehicle by the excluded party, the named insured is not relieved of personal liability as provided by subsection 5 of section 26.1-40-02.

[48] Furthermore, N.D.Cent.Code §26.1-40-16.1 provides that “a relative may be excluded from coverage under Section 26.1-40-16” by written agreement. The North Dakota Statute does not require a written agreement for a restrictive endorsement containing a step-down provision.

[49] The primary objective of statutory construction is to ascertain the intent of the legislature. Jones v. Pringle & Herigstad, P.C., 547 N.W.2d 837, 840 (N.D. 1996). If the plain language of a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute. Lawrence v. North Dakota Workers Comp. Bureau, 2000 ND 60, ¶ 19, 608 N.W.2d 254. In ascertaining legislative intent, the Court must first look at the words used in the statute, and give such words their ordinary, plain language meaning. Shiek v. North Dakota Workers Comp. Bureau, 1998 ND 139, ¶ 16, 582 N.W.2d 639. Statutes must be construed as a whole to determine the legislative intent and the intent must be derived from the whole statute. State v. Johnson, 1997 ND 235, ¶ 8, 571 N.W.2d 372. Statutes must be interpreted to avoid absurd or ludicrous results. Ohnstad Twichell, P.C. v. Treitline, 1998 ND 10, ¶ 20, 574 N.W.2d 194.

[50] Under this clear statutory language, Nodak may restrict the policy limits available in situations such as this to the minimum limits required by the financial responsibility laws. This is the very clear public policy in North Dakota as expressed by its Legislature.

[51] In this case, Nodak Mutual's provision is on a separate piece of paper and states in bold, capital letters **“THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. AMENDMENT TO POLICY PROVISIONS – NORTH DAKOTA.”** (A, 68). Therefore, the amendment satisfies the statutory requirement of a “restrictive endorsement,” and the step-down provision complies with the applicable statute by being included on a separate page. The provision also instructs the insured that it changes the policy and should be read carefully. There are currently no North Dakota appellate decisions interpreting this statute, but in Kemper Insurance Co. v. Nodak Mut. Ins. Co., Cass Co. D.Ct., Civil No. 09-09-C-01650 (June 15, 2009), Judge Wade Webb ruled that an identical step-down provision contained in the Nodak Mutual policy was valid and enforceable. (S.A., 46-60).

[52] Additionally, other courts have generally accepted step-down provisions which limit coverage to the amount of the statutory financial responsibility laws. For example, Kansas has held that a “step-down exclusion that limits coverage under specific circumstances to the minimum liability coverage required by [the financial responsibility laws] is permissible.” Brooks v. Bennett, 26 P.3d 73, 75 (Kan. App. 2001) (argument that such clause is ambiguous held to be “without merit”). Many other jurisdictions have also determined such step-down provisions are valid and enforceable. See Rocky Mountain Fire & Cas. Co. v. Allstate Ins. Co., 485 P.2d 552, 556 (Ariz. 1971); Guardian Ins. Co. of

Canada v. Liberty Mut. Ins. Co., 742 F.Supp. 626 (M.D. Fla. 1990); Harden v. Monroe Guar. Ins. Co., 626 N.E.2d 814 (Ind. App. 1 Dist. 1993); Stearman v. State Farm Mut. Auto. Ins. Co., 849 A.2d 539, 541 (Md. 2004); Guaranty Nat'l Ins. Co. v. Kemper Financial Services, 667 F.Supp. 714 (D.C. Mont. 1987); Trantham v. Old Republic Ins. Co., 797 S.W.2d 771 (Mo. App. 1990); Shelter Mut. Ins. Co. v. American Fam. Mut. Ins. Co., 210 S.W.3d 338 (Mo. Ct. App. E.D. 2006); Rao v. Universal Underwriters Ins. Co., 549 A.2d 1259, 1262 (N.J. 1988); Liberty Mut. Ins. Co. v. Aetna Cas. & Sur. Co., 168 A.D.2d 121, 571 NYS2d 735 (2d Dept. 1991); Bowers v. Estate of Feathers, 448 Pa. Super. 263, 671 A.2d 695 (1995) (listing of cases); Universal Underwriters Ins. Co. v. Metropolitan Prop. & Life Ins. Co., 298 S.C. 404, 380 S.E.2d 858 (App. 1989); Cullum v. Farmers Ins. Exch., 857 P.2d 922 (Utah 1993); American Nat. Fire Ins. Co. v. Farmers Ins. Exch., 927 P.2d 186, 191-92 (Utah 1996) (upholding validity of step-down liability limits provision under Idaho law); State Farm Mut. Auto. Ins. Co. v. Illinois Farmers Ins. Co., 368 Ill. App.3d 914, 858 N.E.2d 519 (2006).

[53] Nodak Mutual's policy provision complies with North Dakota law and is supported by cases from other jurisdictions. Therefore, the District Court correctly granted summary judgment in favor of Nodak Mutual, declaring that its bodily injury liability limits applicable to Defendants' claims is \$50,000 per accident or occurrence and \$25,000 for property damage liability per accident or occurrence.

[B] North Dakota law has no signature requirement for Nodak's step-down policy provision to be legally enforceable.

[54] The Defendants argued to the District Court that the endorsement has to be on a separate sheet of paper, signed by the insured, agreeing to the reduction in coverage in order to comply with the statutory requirement. (Defendants' Trial Brief, p. 6, 7; S.A.,

44-45). The Defendants rely on the South Dakota decision in Mid-Century Ins. Co. v. Lyon, 1997 SD 50, 562 N.W.2d 888 to support their proposition. Lyon does not stand for this proposition for which it is cited by Defendants. Specifically, the Lyon decision does not require that the endorsement be “signed.” Rather, Lyon stands for the proposition that a step-down provision is invalid if it is contained in the body of an insurance policy, because South Dakota law requires it to be in a separate endorsement. Id. at ¶5, 8, 13. South Dakota’s law with respect to step-down provisions is similar to North Dakota’s law, i.e., requiring a restrictive endorsement. The South Dakota Supreme Court in Lyon affirmed the District Court’s holding that “in accordance with common industry usage, the endorsement must be on a separate page or piece of paper apart from the body of the policy.” Id. ¶5.

[55] Therefore, Lyon actually supports the position of Nodak Mutual. Nodak’s provisions are on a separate piece paper and states in bold, capital letters **“THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. AMENDMENT TO POLICY PROVISIONS-NORTH DAKOTA.”** The amendment satisfies the statutory requirement of a “restrictive endorsement”, and the step-down provision complies with the applicable statute by being included on a separate page rather than the body of the policy and by specifically instructing the insured it changes the policy and should be read carefully.

[56] Furthermore, Defendants’ argument violates the North Dakota rules of statutory construction. N.D.Cent.Code §1-02-02 provides:

1-02-02. Words to be understood in their ordinary sense.

Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.

[57] Similarly, N.D.Cent.Code §1-02-05 provides:

1-02-05. Construction of unambiguous statute.

When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

[58] Therefore, according, to North Dakota statutory law, Nodak Mutual did comply by having the endorsement on a separate piece of paper in large, bold, capital letters. There is no requirement that the writing be signed by the named insured, nor should there be. An insurance policy is also a written agreement, and it is certainly not “signed” by the named insured. There is no requirement in North Dakota or elsewhere that an endorsement be signed in order to change the policy. As a result, this Court should affirm the District Court’s ruling that Nodak Mutual’s step-down policy provision complies with North Dakota law and is fully enforceable and is not required to be signed by the named insured. .

4. THE NODAK MUTUAL POLICY IS NOT AMBIGUOUS WITH RESPECT TO THE LIMITS OF LIABILITY.

[59] The District Court correctly ruled as a matter of law that the Nodak Mutual policy and the endorsement containing the step-down provision are not ambiguous as a matter of law. (S.A., 20-21).

[60] Judge Webb considered similar arguments and rejected them in Kemper Insurance Company v. Nodak Mutual Insurance Company, Cass Co. D.Ct. Civil No. 09-09-C-01650 (June 15, 2009), in which he ruled that an identical step-down provision contained in the Nodak policy was valid and enforceable. (S.A., 46-60). Similarly, in Brooks v. Bennett, 26 P.3d 73 (Kan. App. 2001), the Court held that a step-down provision is valid and enforceable without specifying the actual amount of limits in the endorsement, and rejected the argument that such clause is ambiguous to be “without

merit.” Id. at 75. In that case, Judge Webb expressly rejected arguments that the policy was ambiguous because it failed to state the amount of the reduction in the limits.

[61] The argument that the step-down provision is ambiguous because it does not state a precise dollar amount is misplaced. First, N.D.Cent.Code §26.1-40-16 specifically allows such provision to include coverage which is “not less than” what the statutory financial responsibility laws require. This is exactly what the Nodak Mutual policy provision states. Second, Defendants’ claims that a specific dollar amount be referenced ignores the reality of automobile insurance. Automobiles are mobile and by their nature are inherently bound to be used in different states. In American National Fire Ins. Co., , 927 P.2d 186 (Utah 1996), the Court stated:

An automobile is by its very nature mobile and can be expected to cross state lines frequently. Reforming an automobile liability insurance policy every time the automobile crosses state lines would invalidate the expectations of the parties and destroy predictability both for the insurance company in adjusting its policies, fees, income, and expense projections and for the party purchasing liability insurance.

Id. at 192 (upholding validity of step-down liability limits provision under Idaho law). The law of almost all states requires automobiles operated in states other than those where there are principally garaged to comply with the financial responsibility laws of the state in which the vehicle is operated. See e.g., N.D.Cent.Code §39-19-01. In other words, the minimum limits of any policy could change depending upon which jurisdiction in which an accident occurs. Therefore, the only way for Nodak Mutual to comply with the law in all jurisdictions in which its automobiles can be operated is to reference that it will provide at least the limits of the statutory financial responsibility laws for any given accident, which is exactly what has happened in this case. Other courts have reached similar conclusions. Rocky Mountain Fire & Cas. Co. v. Allstate

Ins. Co., 485 P.2d 552, 556 (Ariz. 1971); Stearman, 849 A.2d at 541 (evaluating a provision which provided limits would not exceed “the limits of liability required by law” and holding a household exclusion that reduced the limit of liability in an auto insurance policy to the statutory minimum amount when the policy provided liability coverage in excess to be valid); Rao v.,549 A.2d at 1262 (step-down clause which provides higher coverage limits for an owner, but decreases coverage limits available to permissive users to the “minimum limits provision of such law in the jurisdiction” is valid and not inconsistent with public policy).

[62] Nodak Mutual’s policy provision complies with North Dakota law, is not ambiguous and is supported by cases from other jurisdictions, as well as the holding of Judge Webb. Therefore, the District Court properly granted summary judgment to Nodak Mutual, declaring that its liability limits applicable to Defendants’ claims are \$25,000/\$50,000, the minimum limits as provided by North Dakota law.

CONCLUSION

[63] For the reasons stated above, Appellee Nodak Mutual respectfully requests that the District Court’s Judgment and Amended Judgment be affirmed.

DATED this 22nd day of July, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, Nodak Mutual Insurance Company, and the author of the Brief of Appellee Nodak Mutual Insurance Company hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 7,910 words from the portion of the brief entitled "Statement of the Issue" through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

DATED this 22nd day of July, 2013.

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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

**Supreme Court No.: 20130091
Cass County District Court No. 09-2011-CV-02778**

**Nodak Mutual Insurance Company,
Plaintiff/Appellee,**

vs.

**Eric Bahr-Renner, Sara Daede,
Ashley Collins, Billie Rauser,
Kenneth McCoy, Con-Way Freight,
Inc., Emily Young, J.C., a minor
child, and Peggy Gwyther, deceased,**

Defendants/Appellants.

STATE OF NORTH DAKOTA)

)ss.

AFFIDAVIT OF SERVICE

COUNTY OF CASS)

RACHEL D. HENRY, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Cass County, North Dakota, not a party to nor interested in the action; that she served the attached:

- 1. BRIEF OF APPELLEE NODAK MUTUAL INSURANCE COMPANY**
- 2. SUPPLEMENTAL APPENDIX OF APPELLEE**

on the following person by electronic mail only on July 22, 2013:

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Tatum O. Lindbo
Kennelly & O'Keeffe, Ltd.
P.O. Box 2105
Fargo, ND 58107

and on the following by U.S. Mail only on July 13, 2013:

None

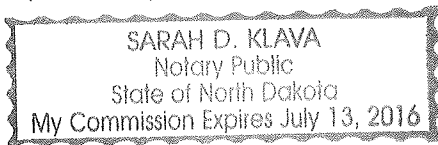
To the best of Affiant's knowledge, the e-mail and post office addresses above given are the actual electronic mail and U.S. Mail addresses of the parties intended to be so served. The above documents are e-mailed and mailed by U.S. Mail in accordance with the provisions of the North Dakota Rules of Civil Procedure.

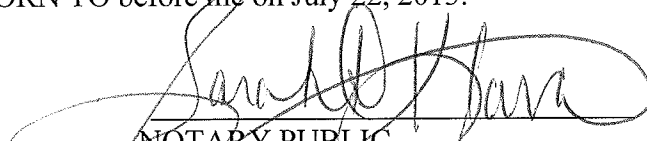


RACHEL D. HENRY

SUBSCRIBED AND SWORN TO before me on July 22, 2013.

(SEAL)





NOTARY PUBLIC

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

**Supreme Court No.: 20130091
Cass County District Court No. 09-2011-CV-02778**

**Nodak Mutual Insurance Company,
Plaintiff/Appellee,**

vs.

**Eric Bahr-Renner, Sara Daede,
Ashley Collins, Billie Rauser,
Kenneth McCoy, Con-Way Freight,
Inc., Emily Young, J.C., a minor
child, and Peggy Gwyther, deceased,**

Defendants/Appellants.

STATE OF NORTH DAKOTA)

)ss.

AFFIDAVIT OF SERVICE

COUNTY OF CASS)

RACHEL D. HENRY, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Cass County, North Dakota, not a party to nor interested in the action; that she served the attached:

- 1. BRIEF OF APPELLEE NODAK MUTUAL INSURANCE COMPANY**
- 2. SUPPLEMENTAL APPENDIX OF APPELLEE**

on the following person by electronic mail only on July 25, 2013:

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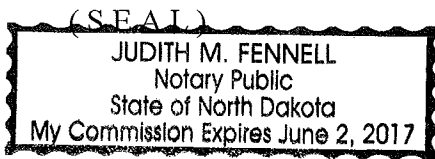
and on the following by U.S. Mail only on July 25, 2013:

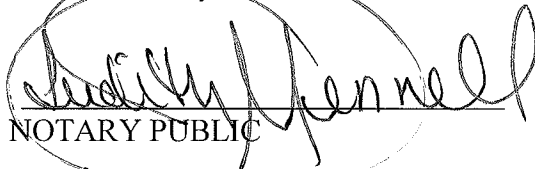
None

To the best of Affiant's knowledge, the e-mail and post office addresses above given are the actual electronic mail and U.S. Mail addresses of the parties intended to be so served. The above documents are e-mailed and mailed by U.S. Mail in accordance with the provisions of the North Dakota Rules of Civil Procedure.


RACHEL D. HENRY

SUBSCRIBED AND SWORN TO before me on July 25, 2013.




NOTARY PUBLIC