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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Supreme Court No. 20130413
District Case No. 29-2012-CV-00087

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

*Plaintiff and Appellee*

v.

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

*Defendants,*

JOHN ALLMER,

*Appellant*

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APPEAL FROM THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT, MERCER COUNTY, STATE OF NORTH DAKOTA

THE HONORABLE THOMAS J. SCHNEIDER, PRESIDING

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# BRIEF OF PLAINTIFF/APPELLEE

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Jason R. Vendsel (ID #04912)
Erich M. Grant (ID #07593)
McGee, Hankla, Backes & Dobrovolny, P.C.
P. O. Box 998
Minot, ND 58702-0998
Attorneys for Plaintiff/Appellee

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I. Did the District Court properly grant summary judgment to State Farm after determining that the vehicle driven by S.G. on May 15, 2011, is not included in the coverage provided by State Farm to Sandy Gruebele a.k.a. Sandy Goetz?

A. The clear language of the policy dictates that the Oldsmobile is not covered.

B. The District Court correctly determined that Sandy Goetz's State Farm insurance policy is an owner's policy, not an operator's policy, and as such covers only vehicles named in the policy.

C. Even accepting the Appellant's erroneous argument that Sandy's policy is an operator's policy, coverage would not be afforded to the accident between S.G. and Mr. Allmer.

D. There is no statutory obligation for State Farm to extend coverage.

## STATEMENT OF THE CASE

[¶1] Defendant John Allmer appeals the Order for Judgment ("Order") issued by the District Court on November 5, 2013. In its Order, the District Court held as a matter of law that State Farm policy No. 20 0282-E04-34A provides no coverage for the accident that occurred on May 15, 2011 between S.G. and John Allmer.

## STATEMENT OF FACTS

[¶2] S.G. is the daughter of Sandy and Steve Goetz. Sandy and Steve were divorced when S.G. was still an infant. (Sandy Goetz Deposition, pg. 9, Appellant's Appendix (hereafter "App.") at 42). For the seven years leading up to this action, S.G. lived with her mother, full time, in Beulah, North Dakota. (Sandy Goetz Deposition, pg. 10, App. at 43).

[¶3] On May 15, 2011, S.G. was involved in an automobile/motorcycle accident with John Allmer. (Doc ID# 22, S.G. Deposition, pg. 9). The vehicle driven by S.G. was a 1990 Oldsmobile, owned and provided to her by her father, Steve Goetz. (Doc ID# 22, S.G. Deposition, pg. 15-16). S.G. obtained her driver's license approximately 6 months prior to the accident. Id. On the same date she got her license, S.G. and her mother traveled to her father's house and picked up the Oldsmobile. Id. S.G. drove the vehicle to her Beulah home and operated it, exclusively, up until the date of the accident. (Doc ID# 22, S.G. Deposition, pg. 19, 24).

[¶4] At the time of the accident, Sandy had automobile insurance for herself and her 2002 Pontiac Grand Prix, through State Farm. (App. at 79; see also Doc ID# 23, Declaration Page, pg. 1-2). When S.G.'s father gave her the Oldsmobile, he told S.G. and Sandy that he intended to insure the car himself. (Sandy Goetz Deposition, pg. 15,

App. at 48; Doc ID# 22, S.G. Deposition, pg. 15). At no point did Sandy contact her agent about S.G. having a license nor did she make an effort to insure S.G. or the Oldsmobile under her policy. (Sandy Goetz Deposition, pg. 15, App. at 48). In fact, Sandy testified, definitively, that she did not want to cover S.G. on her own insurance policy because she knew the Oldsmobile was covered by S.G.'s father's policy. (Sandy Goetz Deposition, pg. 15-16, 23, 37-39; App. at 48-49, 56, 70-72).

[¶5] As a result of the accident with S.G., John Allmer suffered severe injuries. S.G.'s father did, in fact, have insurance on the vehicle at the time of the collision, including a $250,000 primary liability policy and a $1 million umbrella policy. Mr. Allmer reached an agreement for resolution of the underlying tort action against S.G.'s father's carrier for the entire policy limits.

[¶6] On April 30, 2013, State Farm filed a motion for summary judgment in this action, arguing that, as a matter of law, the Oldsmobile is not covered under Sandy's policy. (Doc. ID# 19-20). Defendant Allmer resisted and filed a cross motion for summary judgment in his favor. (Doc ID# 27-29). After consideration of the cross motions, the District Court granted State Farm's motion and determined that the Oldsmobile was not covered under the State Farm policy. (Doc ID# 44). The Court held, specifically, that the Oldsmobile does not meet the definition of a covered "non-owned" automobile under the policy. The Court also found that the policy, as a whole, falls under the classification of "owner's policy", rather than an "operator's policy", because the Declarations page specifically lists the vehicle covered by the policy. Id. The Court noted that the Declarations Page lists only Sandy Goetz and her 2002 Pontiac Grand

Prix. Id. Therefore, the Court held the policy does not insure liability incurred by S.G. while driving her father's 1990 Oldsmobile. Id.

[¶7] Five days before the Court issued its Order, State Farm agent Kathy Kelsch was deposed, at the request of counsel for Mr. Allmer. (Doc ID# 57). Ms. Kelsch is the agent who sold Sandy Goetz her State Farm auto insurance policy, well before S.G. was a licensed driver. (Kelsch Deposition, pg. 14-15, App. at 26). At the deposition, Ms. Kelsch was asked numerous questions regarding whether Sandy Goetz's policy was classified as an owner's policy or an operator's policy. (Kelsch Deposition, pg. 10-14, App. at 25-26). Ms. Kelsch stated, at the outset of the questioning, that she was not familiar with the difference between the two forms of policies. (Kelsch Deposition, pg. 13, App. at 26). She stated that she had not represented the policy as either an owner's or operator's policy to Sandy Goetz. (Kelsch Deposition 15-17, App. at 27). Counsel for Mr. Allmer introduced a deposition exhibit printed from "carinsurance.com", which purported to describe the difference between an owner's and operator's policy. (Kelsch Deposition pg. 11-12, App. at 26). When asked what category the policy sold to Sandy Goetz would fall under, Ms. Kelsch opined that it would be an "owner-operator" policy. (Kelsch Deposition pg. 10-11, App. at 25-26). She stated, though, that she was attempting to use the vernacular presented by Mr. Allmer's attorney, and did not intend her statement to have any legal meaning. (Kelsch Deposition pg. 34, App. at 31). After the deposition, Mr. Allmer presented a Motion for Relief to the District Court, arguing that Ms. Kelsch's testimony should be determinative as to what classification of auto policy Sandy had with State Farm. Doc ID# 52. The District Court rejected the argument and denied the motion. Doc ID# 58.

## LAW AND ARGUMENT

**I. Did the District Court properly grant summary judgment to State Farm after determining that the vehicle driven by S.G. on May 15, 2011, is not included in the coverage provided by State Farm to Sandy Gruebele a.k.a. Sandy Goetz?**

[¶8] Summary judgment is a procedural device for promptly disposing of a lawsuit, without a trial, if there are no genuine issues of material fact, no inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Riemers v. State, 2007 ND 3 ¶ 4, 738 N.W.2d 906. The party seeking summary judgment has the burden of showing there are no genuine issues of material fact, and the moving party is therefore entitled to judgment as a matter of law. Good Bird v. Twin Butte School Dist., 2007 ND 103 ¶ 5, 733 N.W.2d 601. A resisting party must present competent admissible evidence which raises an issue of material fact. Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2007 ND 36 ¶ 9, 729 N.W.2d 101. Mere allegations, references to pleadings, and conclusory allegations are not adequate to defeat a properly supported Motion for Summary Judgment. Id.

[¶9] The interpretation of an insurance policy is a question of law. Close v. Ebertz, 1998 ND 167, ¶ 12, 583 N.W.2d 794. The Court's purpose in analyzing a contract is to ascertain the parties' intent by examining the language of the insurance contract. Hanneman v. Continental Western Ins. Co., 1998 ND 46, ¶ 28, 575 N.W.2d 445 (citations omitted). Any terms that are unambiguous and clearly defined in the policy are interpreted consistent with that direction. Id. This Court has stated, specifically, that "a definition or a term in an insurance contract may exclude coverage if the language of the contract, as a whole, is clear." Id. This Court has also instructed that a trial court should not re-write an insurance contract to create or impose liability if

coverage is not provide, or is excluded, under the clear terms of the contract. Id.; Northwest G.F. Mut. Ins. V. Norgard, 518 N.W.2d 179, 181 (N.D. 1994).

**A. The clear language of the policy dictates that the Oldsmobile is not covered.**

[¶10] Sandy's policy affords coverage for use by the named insured (Sandy) or resident relatives (S.G.) for the following vehicles:

1) Your car (the named vehicle - Sandy's Grand Prix);
2) A newly acquired car;
3) A trailer;
4) A non-owned car;
5) A temporary substitute car.

[¶11] Sandy's declarations page lists only her 2002 Pontiac Grand Prix, therefore the only category that could provide coverage in this situation is the fourth category, the non-owned car. (See Declarations Page, Doc ID# 23 at 1; State Farm Policy Booklet, App. at 82-83). According to the Policy, a "non-owned car" does not include a car in the possession of, or operated by, the named insured or a resident relative during the 31 days immediately prior to the date of accident or loss. (App. at 82.) Here, Sandy and S.G. admitted that S.G. had sole and exclusive possession of the car for months prior to the accident. (Sandy Goetz Deposition, pg. 15, App. at 48; S.G. Deposition, pg. 19, 24). Therefore, under the clear language of the policy, the Oldsmobile is not a non-owned car, and coverage is not afforded under the policy.

[¶12] This Court has stated that "[t]he purpose of a 'non-owned' clause is prevent an insured from purchasing an automobile liability policy for only one designated vehicle at a premium charged for one vehicle and thereafter claiming coverage under that policy for

the regular use of other vehicles without paying an additional premium for the added risk." State Farm Mut. Auto Ins. Co. v. LaRoque, 486 N.W.2d 235, 241 (N.D. 1992). The definition of non-owned car is "unambiguous and excludes coverage when the insured drives a car owned by a person residing in the same household." Id. at 238. This ruling is directly on point and controls this outcome. Sandy paid no premium for the Oldsmobile, and in fact never intended for it to be insured under her policy. The arrangement between S.G.'s parents, which is not factually disputed, was that S.G.'s father would pay to insure S.G.'s operation of the Oldsmobile. There is no coverage under the clear terms of Sandy's policy.

[¶13] In 2008, the North Dakota federal district court, applying North Dakota substantive law, reviewed a similar case involving a "non-owned" car provision, where the minor driver was involved in an accident using his father's car. Am. Fam. Mut. Ins. Co. v. Jones, CIV.A 3:05-CV-93, 2008 WL 4457696 (D.N.D. Sept. 30, 2008). The minor's parents were divorced, and the minor lived with his mother. Id. The father's insurance assumed liability for the minor's accident; however, the injured party demanded that the mother's insurer cover the accident as well, since the minor was a resident of the mother's household. Id. The mother's policy included a provision excluding coverage for liability arising out of the use of any vehicle, other than the insured vehicle, which was furnished or available for regular use by residents of the household. The Court found that because the minor was not driving the mother's insured car, the mother's insurance did not provide coverage for the minor's accident. Id. The facts in this case are nearly identical, and the result should be as well.

### B. The District Court correctly determined that Sandy Goetz's State Farm insurance policy is an owner's policy, not an operator's policy, and as such covers only vehicles named in the policy.

[¶14] NDCC § 39-16.1-11(1) states that there are two types of insurance policies that comply with the statutory requirements for insurance coverage. There are owner's policies and operator's policies. Owners policies are governed by NDCC § 39-16.1-11(2) and operator's policies are governed by NDCC § 39-16.1-11(3). The basic difference between an owner's policy and an operator's policy is that an owner's policy protects the named insured, as well as permissive users of the vehicle(s) named in the policy. It does not protect against liability resulting from the use of a motor vehicle not named in the policy. An operator's policy, on the other hand, protects the named insured against liability arising from the use of *any* motor vehicle (emphasis added). In other words, with an operator's policy, the driver would be insured no matter what vehicle was driven.

[¶15] Sandy Goetz's policy, as the District Court properly held, is an owner's policy, in that it complies with the statutory requirement to provide an explicit reference to all motor vehicles covered under the policy. (See Declarations Page, Doc ID# 23). NDCC § 39-16.1-11(2) does not require that an owner's policy insure the individual against all collisions in which he or she is involved. Rather, it only requires coverage for accidents involving the explicitly covered car, which in this case is Sandy's Grand Prix, not the Oldsmobile. The Court in LaRoque held that these types of policies are, entirely, appropriate and enforceable.

[¶16] On appeal, Mr. Allmer has suggested the District Court's holding that Sandy's Goetz's policy falls under the category of owner's policy is invalid, based primarily upon the deposition testimony of State Farm agent Mary Kelsch. Mr. Allmer's

characterization of that testimony, however, is inaccurate. Ms. Kelsch testified, specifically, that she did not understand the difference between an owner's policy and an operator's policy. (Kelsch Deposition at 13; App. at 26). She further testified that she did not intend any legal meaning with the use of her terms. (Kelsch Deposition 34; App. at 31). Instead, she was simply attempting to utilize the vernacular being used by Mr. Allmer's attorney in his questioning and in the documents he presented to her. Id.

[¶17] Furthermore, the argument that Ms. Kelsch's testimony, somehow, changes the policy language or the governing statute is baseless. The insurance contract speaks for itself. This Court has stated: "[w]hen a contract is written, the intention of the parties is to be determined from the writing alone, if possible." City of Bismarck v. Mariner Const., Inc., 2006 ND 108, ¶ 13, 714 N.W.2d 484. "[I]f the policy language is clear on its face, there is no room for construction." Schleuter v. N. Plains Ins. Co., Inc., 2009 ND 171, ¶ 8, 772 N.W.2d 879. It is not reasonable to argue that the legal definition which applies to a policy under controlling North Dakota law should be subject to the speculation of an insurance agent with no legal training, and who by her own admission, had no understanding of the difference between such policies.

[¶18] Ms. Kelsch's testimony was considered in Mr. Allmer's Motion for Relief from the District Court's order granting summary judgment in favor of State Farm. (Doc. ID #52). Finding nothing persuasive about her testimony, the District Court denied Mr. Allmer's motion. (Doc. ID # 58).

### C. Even accepting the Appellant's erroneous argument that Sandy's policy is an operator's policy, coverage would not be afforded to the accident between S.G. and Mr. Allmer.

[¶19] The Appellant suggests on page 2 of his brief that State Farm has conceded that if Sandy's insurance policy were an operator's policy, coverage would be afforded for the accident involving S.G. and Mr. Allmer. This statement is entirely incorrect as to both the alleged admission as well as the underlying statement of law. State Farm has made no such admission. Furthermore, even if the policy were an operator's-type of policy, the named insured on the policy is Sandy Goetz, not S.G. The policy would afford no coverage for S.G. because she is not listed in the policy as an insured. In any event, this argument is purely hypothetical. The policy is clearly an owner's policy because it specifically lists the vehicle covered on the Declarations Page.

### D. There is no statutory obligation for State Farm to extend coverage.

[¶20] It has been suggested, by Mr. Allmer, that because NDCC § 39-06-09 statutorily imposes liability on Sandy for the negligent acts of S.G., this somehow creates coverage for S.G. on Sandy's State Farm policy. That argument is flawed. It is categorically incorrect to argue that liability creates coverage under an insurance contract.

[¶21] Financial Responsibility Laws require plans within the state to provide a certain amount of coverage in specific situations. The requirements imposed on owner's policies, which would include Sandy's policy with State Farm, obligate the following:

> a. Must designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and
>
> b. Must insure the person named therein and any other person, as insured, using such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss

> from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicles…

NDCC § 39-16.1-11(2).

[¶22] In the case at hand, the Oldsmobile was not a designated vehicle, and, therefore, State Farm was not required to cover it under NDCC § 39-16.1-11(2). In fact, as she indicated in her deposition, Sandy knew the Oldsmobile was not covered under her policy and did not want it to be covered under her policy. The agreed upon arrangement was that S.G.'s father would insure the Oldsmobile.

[¶23] Mr. Allmer's argument on this topic is based primarily upon Rogers v. MFA Mut. Ins. Co., 262 Ark. 55, 554 S.W.2d 327 (Ark. 1977), a case which has been specifically considered and rejected by this Court. The Rogers court found that Arkansas' vicarious liability statute imposed liability on a father when his minor daughter was involved in an accident while driving her mother's car. The Court determined the father was insured for his "actual use" of the automobile involved in the accident. Id. at 59-60. Considering the definition of "actual use", the Court found it to be an ambiguous term, and extended its meaning to include use by both the named insured (the father) and his minor daughter. Id. The Court also determined the vehicle involved fell under the definition of "non-owned vehicle", a category of vehicle covered under the father's policy, and therefore extended coverage to the accident. Id.

[¶24] Rogers is easily distinguishable for two separate and distinct reasons. First, Sandy's State Farm policy does not include the potentially ambiguous term "actual use". Rather, it uses the simpler term "use" throughout the contract. In McPhee v. Tufty, this Court specifically rejected application of Rogers to an insurance contract similar to

Sandy's, which contained the term "use" rather than "actual use". The Court stated: "The term 'use' is not ambiguous." McPhee v. Tufty, 2001 ND 51, ¶ 32, 623 N.W.2d 390. "Liability [under the family car doctrine] does not ipso facto establish a "use" of a vehicle under the terms of an insurance policy." Id. ¶ 31. "We will not strain the definition of an undefined term to provide coverage for an insured. Id. at ¶ 6. Mr. Allmer's argument here is nothing more than an effort to strain a definition, despite the fact that the policy language is clear, as is the intent of the parties to the contract.

[¶25] The Second critical distinction between Rogers and the present case is that in Rogers, the father had insurance coverage for his "actual use" of "non-owned" automobiles. In that case, it was determined that the vehicle driven by Roger's daughter fell under the policy definition of "non-owned" automobile, and was thus covered under his policy. In Sandy Goetz's case, the Oldsmobile does not meet the definition of "non-owned" car under her policy. Thus, even if the Court were to physically put Sandy in the place of her daughter, in the Oldsmobile, the State Farm policy would not afford coverage for the accident with Mr. Allmer. The Oldsmobile was not named in her policy and did not meet the definition of "non-owned" car or any other definition of vehicle afforded coverage.

[¶26] In summation, the Appellant's argument requires the Court to make multiple holdings that are radically out of line with statute and established precedent. First, it would require the Court to ignore the governing statute. Next, it would require the Court to overturn LaRoque, and the proposition that insurers may cover specific vehicles, rather than every vehicle their insured might drive. LaRoque, 486 N.W.2d at 240 ("we believe our financial responsibility laws demonstrate a legislative intent to allow insurance

companies to insure fewer than all vehicles driven by an insured."). Finally, the Appellant's argument would require this Court to overturn McPhee and its holding that the term "use" should not be stretched beyond its common meaning. McPhee, 623 N.W.2d ("[w]e will not strain the definition of an undefined term to provide coverage for an insured."

## CONCLUSION

[¶27] The underlying accident was tragic and caused Mr. Allmer significant injuries. However, that does not justify the illogical approach he now asks the Court to take. The Oldsmobile was not covered by Sandy's insurance policy, and, in fact, was never intended to be covered. For the reasons set forth above, the Appellee respectfully requests that the Supreme Court affirm the judgment of the District Court.

Dated this 11th day of March, 2014.

BY: /s/ Erich M. Grant
Erich M. Grant (ID No. 07593)
Jason R. Vendsel (ID No. 04912)
OF: McGEE, HANKLA, BACKES & DOBROVOLNY, P.C.
Suite 305, Wells Fargo Bank Center
15 2nd Ave. SW
P.O. Box 998
Minot, ND 58702-0998
ATTORNEYS FOR THE APPELLEE
Telephone No: (701) 852-2544

## CERTIFICATE OF SERVICE

[¶28] I hereby certify that, on March 11, 2014, I served the foregoing document on the following by electronic mail transmission, pursuant to N.D. Sup. Ct. Admin. Order 14(D):

Robert M. Albrecht
brinklaw@brinklawyers.com

Denise A. Sollund
denise.sollund@brinklawyers.com

/s/ Erich M. Grant
Erich M. Grant