

SUPREME COURT NO. 20130413
FILE CASE NO. 29-2012-CV-00087

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CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA
IN SUPREME COURT

MAR 25 2014

STATE OF NORTH DAKOTA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff and Appellee,

vs.

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

Defendants,

JOHN ALLMER,

Appellant.

REPLY BRIEF OF APPELLANT JOHN ALLMER

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State Farm Mutual Automobile)	
Insurance Company,)	
)	
Plaintiff/Appellee,)	
)	Supreme Court No. 20130413
vs.)	District Court No. 29-2012-CV-
00087)	
)	
Sandy Gruebele, a.k.a. Sandy Goetz)	
and S.G., and John Allmer,)	
)	
Defendants,)	
)	
John Allmer,)	
)	
Appellant.)	

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this Brief was produced with Times New Roman typeface, 13 point. The length of the Brief, exclusive of pages containing the table of contents, table of citations, any addendum containing statutes, rules, regulations, etc., and the appendix, is 10 pages. Furthermore, the Brief contains 1,972 words. This Brief was prepared using WordPerfect X3.

Dated this 24th day of March, 2014.

BRINK, SOBOLIK, SEVERSON,
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STATEMENT OF FACTS

State Farm Agent Kathy Kelsch testified that the policy of automobile insurance she sold to Sandy Goetz is an owner-operator policy. Kathy Kelsch testified that she has been a State Farm agent for 22 years. (DOC ID #56, Appellant's Appendix, hereinafter APP, p. 25, Deposition of Kathy Kelsch, hereinafter depo p. 9). Kathy Kelsch was trained by State Farm and sells automobile coverage, homeowners, life insurance, health insurance, State Farm Bank products, mutual funds. (DOC ID #56, APP 25, depo p. 10).

- Q. And the reason we're here today is with regard to an automobile insurance policy. To your knowledge what type of automobile insurance policies does State Farm sell through your agency?
- A. Owner-operator.
- Q. Okay.
- A. That's typically what we sell.
- Q. Are they two different types of policies or is it one policy.
- A. One policy.

DOC ID #56, APP 25-16, depo, p. 10.

Kathy Kelsch testified that the policy sold to Sandy Goetz is an owner-operator policy.

- Q. . . . *Is deposition exhibit 2 a copy of the insurance policy that would have been sent to Sandy Goetz?*
- A. *Yes.*
- Q. *And I think you testified that this is a combination owner-operator's policy?*
- A. Can I just back up one minute.
- Q. Okay.
- A. *I say yes, but we really should clarify. If this is a newer version this may not be the exact policy that Sandy would have gotten. State Farm changes versions periodically. (italics mine).*

DOC ID #56, APP 28, depo, p. 19-20.

State Farm agrees this is the policy in effect at the time of the accident.

DOC ID #56, APP 28, depo. p. 20.

State Farm argues this Court should ignore its own agent's testimony as to the type of policy she sold to Sandy Goetz. "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, has no understanding of the difference between such policies." See State Farm Appellee Brief, p. 8.

State Farm also suggests that Kathy Kelsch may have been induced by counsel for John Allmer to describe the type of policy as an owner-operator policy. See State Farm Brief, p. 3. This is not a fair or accurate analysis of the facts. We would refer the Court to Kathy Kelsch's deposition testimony, specifically page 10. The agent volunteered the type of policy she sold to Sandy Goetz as an owner-operator policy. (DOC ID #56, APP 25, depo p. 10). This testimony is uncontroverted by any actual proof or evidence presented by State Farm.

ARGUMENT

The standard definition of an owner policy and an operator policy as those terms are commonly used can be found in exhibit 1 attached to the deposition of Kathy Kelsch. (Doc ID #56, exhibit 1).

Exhibit 1 states:

- Owner-Operator SR22 filing - Provides coverage to the vehicle listed on the policy and to the vehicles you drive that are not owned by you or a member of your household.
- Operator SR22 filing - Provides coverage when you do not own a vehicle. It covers you when you drive any car or truck not owned by you or a member of your household. Sometimes referred to as a non-owners policy.
- Owner SR22 filing: Provides coverage when you own a car. Coverage is limited to only the car listed on the policy.

An operator policy must cover the statutory liability of Sandy Goetz for this accident pursuant to N.D.C.C. 39-16.1-11, Subd. 3.

The North Dakota Supreme Court in Hughes v. State Farm, 236 N.W.2d 870 (N.D. 1975) stated,

The terms of a motor vehicle liability policy issued and delivered in this state must provide at least the minimum coverage outlined in 39-16.1-11. Such provisions are express declarations by the legislature of the public policy of this state and as such are implicit in the contract of insurance. . . In interpreting the terms of a policy of insurance we are guided by the familiar rule that, as an adhesion contract drawn by the company, it must be construed most strongly against the insurance company. . . If the insurer uses language which is uncertain any reasonable doubt will be resolved against it, if the doubt relates to the extent or fact of coverage, whether as to peril insured against . . ., the amount of liability . . ., or the person or persons protected . . ., the language will be understood in its most inclusive sense, for the benefit of the insured.

Id at p. 884, 885.

THE STATE FARM POLICY PROVIDES COVERAGE REQUIRED BY LAW.

Financial Responsibility Certification. When this policy is certified under any law as proof of future financial responsibility and while

required during the policy period this policy will comply with such law to the extent required. (APP 87, P. 9)

At the time Sandy Goetz signed her daughter's sponsorship form and assumed financial responsibility for any negligence of her daughter, this is the policy that Sandy Goetz had in force and effect. This was her insurance to protect Sandy Goetz and innocent victims if S.G. was involved in an accident. State Farm should not be allowed to avoid coverage for Sandy Goetz when that liability is imposed on Sandy Goetz by virtue of North Dakota law.

In this case it is undisputed that Sandy Goetz has assumed statutory liability for her minor daughter S.G. pursuant to North Dakota law, specifically N.D.C.C. 39-06-9 and pursuant to documents Sandy Goetz signed for S.G. to receive her driver's license. (APP 111, sponsorship form).

N.D.C.C. 39-06-09 imputes not only the damages caused by the minor but also the actual negligence of the minor S.G. to Sandy Goetz. This is pursuant to the language of N.D.C.C. 39-06-09 and also pursuant to North Dakota case law, specifically Anderson v. Anderson, 1999 N.D. 57, ¶9, 591 N.W.2d 138, 140 (N.D. 1999). This court has held that the signing driver is liable for the minor's negligence as if she were the driver.

This is why State Farm attempts to impeach its own agent's testimony. If this is in fact an owner-operator policy Sandy Goetz must be afforded coverage for her statutory liability.

The only evidence presented in this case as to the issue of whether this is an operator's policy, owner's policy or a combination thereof, is the testimony of Kathy Kelsch. It strains credibility to believe that if the State Farm agent was truly mistaken as to the type of policy that State Farm has issued that State Farm would not have submitted an affidavit from underwriting or a document filed with the state of North Dakota proving that the agent was incorrect in her analysis of the type of policy she sold.

It strains credibility for State Farm to argue its policy is clear and unambiguous and then argue its own trained agent isn't qualified to explain the type of policy she has sold.

State Farm claims that the policy it sold is an owner's policy. It offers no witnesses, no affidavit, no documents, just State Farm's argument that the type of policy sold was an owner's policy. Arguments are not evidence. (North Dakota Jury Instructions Civil 85.01).

THE TRIAL COURT NEVER ADDRESSED THE ISSUE OF KATHY KELSCH'S TESTIMONY.

The trial court issued its initial decision in spite of the fact that the parties had stipulated continuance of the trial date was necessary since discovery was still ongoing (the deposition of State Farm's agent needed to be taken). (DOC ID #43). The agent testified that the policy sold was an owner-operator policy.

After Kathy Kelsch's deposition the trial court never addressed the issue of her testimony or how this affected his grant of summary judgment to State Farm. It simply said the previous order was confirmed. (DOC ID #58).

STATE FARM CLAIMS EVEN IF THIS WERE AN OPERATOR POLICY THERE WOULD NOT BE COVERAGE.

State Farm argues even if this were an operator policy coverage would not be afforded for the accident. "Even if the policy were an operator 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 on the policy as an insured." Appellee Brief, Page 9.

This argument is flawed for two reasons. (1) It does not address coverage for Sandy Goetz, who is clearly the named insured, who State Farm concedes has statutory liability for this accident, and who State Farm concedes has coverage for non-owned automobiles. Sandy Goetz clearly did not own the automobile involved in the accident and she did not have a set of keys, or possession of the automobile involved in the accident. As applied to Sandy Goetz there is nothing in the policy which excludes coverage for this accident. (2) Taking State Farm's argument at face value that there never was an intention to insure S.G. under Sandy Goetz' policy, how can State Farm then use S.G.'s conduct to void Sandy Goetz's insurance coverage. State Farm argues that S.G. has no coverage under the policy because she is not listed on the policy as an insured. Then, State Farm turns

around and argues S.G.'s conduct in operating her father's automobile should be used to void coverage to Sandy Goetz for her statutory liability.

NOTHING IN THE POLICY ITSELF EXCLUDES COVERAGE FOR SANDY GOETZ' STATUTORY LIABILITY.

Kathy Kelsch, the agent who sold the policy, testified:

Q. To your knowledge is there any specific exclusion in the policy, exhibit 2, that states there would be no coverage for liability that Sandy Goetz would have assumed when she would have signed the form at the state of North Dakota allowing her daughter to get a license? . . .

The witness: Not to my knowledge.

DOC ID #56, depo p. 31-32.

There is no public policy reason why the exclusion in this policy should be applied to void coverage to Sandy Goetz. No one was trying to avoid paying a premium for their automobile liability coverage.

Divorce is common in the state of North Dakota as it is elsewhere through the entire country. There are many children of split households. In this case, Sandy Goetz assumed statutory liability as a requirement of North Dakota law to allow her daughter to be able to obtain a driver's license. There is nothing in the policy which identifies it as an owner or operator policy and there is nothing in the policy indicating there is an exclusion for statutory liability.

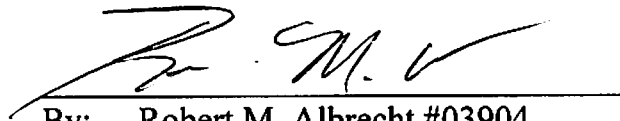
Sandy Goetz did not have the option to insure the vehicle which her husband allowed S.G. to use. Sandy Goetz did not have any type of an insurable interest, she did not own the vehicle, she did not use the vehicle and she had no connection to the vehicle herself. Now an accident has occurred which potentially

could have left Sandy Goetz bankrupt, an innocent victim uncompensated. State Farm concedes that Sandy Goetz is liable and claims that the fact that she is liable does not mean that there should be coverage under the policy.

There is no dispute that State Farm did not intend to insure S.G. under the terms of this policy and there is no dispute that it is only S.G.'s conduct which triggers the language of this exclusion. This exclusion would not apply to Sandy Goetz because she did not have possession of Steven Goetz' vehicle at any time in the 31 days prior to this accident. For State Farm to represent that S.G. was never intended to be covered by State Farm policy but then to rely on S.G.'s "possession" as a basis to deny coverage to Sandy Goetz is simply unconscionable.

Dated this 25th day of March, 2014.

BRINK, SOBOLIK, SEVERSON,
MALM & ALBRECHT, P.A.



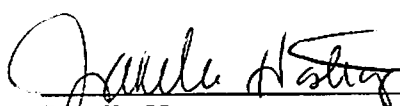
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STATE OF MINNESOTA)
) ss.
COUNTY OF KITTSON)

AFFIDAVIT OF SERVICE BY MAIL


Janelle Hostrup, of the City of Lancaster, County of Kittson and State of Minnesota, being first duly sworn, says that on the 25th day of March, 2014, she served the annexed **REPLY BRIEF OF APPELLANT** on the following attorney for the following party in this action, by mailing to him a copy thereof, enclosed in an envelope, postage prepaid and by depositing the same in the post office at Hallock, Minnesota, directed to said attorney at his last known address as follows:

Jason R. Vendsel
Attorney for State Farm
P.O. Box 998
Minot, ND 58702-0998



Janelle Hostrup

Subscribed and sworn to before me
this 25th day of March, 2014.



Notary Public

