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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kory Clark, Plaintiff/Appellant v. Farmers Union Mutual Insurance Company and QBE Americas, Inc. Defendants/Appellee.	)	SUPREME COURT NO. 20150199 BURLEIGH COUNTY NO. 08-2014-CV-00854

APPEAL FROM THE DISTRICT COURT'S ORDER FOR SUMMARY JUDGMENT, DATED APRIL 20, 2015, AND THE COURT'S JUDGMENT, DATED MAY 11, 2015, DISMISSING ALL OF PLAINTIFF'S CAUSES OF ACTION AGAINST THE DEFENDANTS

DISTRICT COURT FOR THE COUNTY OF BURLEIGH, NORTH DAKOTA

HONORABLE BRUCE B. HASKELL, PRESIDING

BRIEF OF APPELLANT KORY CLARK

AND ADDENDUM

Respectfully submitted this 24th day of August, 2015.

/s/ Marianne O. Knudson
Marianne O. Knudson, ND ID #06308
PEARSON CHRISTENSEN, PLLP
P.O. Box 5758 / 24 N. Fourth Street
Grand Forks, ND 58206-5758
Phone: 701.775.0521 / Fax: 701.775.0524
marianne@grandforkslaw.com
ATTORNEY FOR PLAINTIFF Kory Clark

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[¶0]STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in holding that as a matter of law Plaintiff Kory Clark ("Kory") is not entitled to coverage as an insured under the Farmers Union Mutual Insurance Company's ("Farmers") policy provision extending coverage to "any person using a vehicle on the insured location with your consent, provided this insurance applies to the vehicle."

II. Whether the District Court erred in holding that the evidence, when viewed in the light most favorable to Kory, cannot lead a reasonable jury to find that Kory is entitled to coverage as an employee under the Farmers insurance policy.

III. Whether the District Court erred in dismissing Plaintiff's claim for breach of the duty to defend without making any findings relative to this claim.

STATEMENT OF THE CASE

[¶1] This is an appeal from a Summary Judgment dismissal pursuant to N.D.R.Civ.P., Rules 56 and 57 of an action by Kory for breach of contract and insurance bad faith arising out of Farmers failure to provide a defense and for denying coverage for a motor vehicle accident that occurred on January 14, 2010. Kory filed his Complaint against Farmers on April 11, 2014. (Appendix ("A") 9). Farmers filed its Answer and Counterclaim on July 23, 2014. (A61). Kory filed an Answer to Farmers' Counterclaim on August 13, 2014. (A79). QBE Americas, Inc., ("QBE") who was the third-party administrator handling the claim for Farmers, was joined by amended complaint on November 26, 2014, and filed its Answer on December 12, 2014. (A124; A143)

[¶2] The breach of contract and bad faith claims were bifurcated, and all discovery relating to issues other than coverage was stayed, by the District Court's Order on

December 12, 2014. (Docket ("Dkt") 150). Farmers and QBE filed their motions for summary judgment on coverage issues on February 2 and 3, 2015, respectively. (Dkt. 173; Dkt. 187). Kory filed his response on March, 4, 2015. (Dkt. 194). Replies were filed on March 16, 2015. (Dkt. 214; Dkt. 215). On April 21, 2015, the District Court issued its order finding that neither the farm policy nor the homeowner's policy provided coverage for Kory for the claims brought in the underlying action. (A231). The order did not include any discussion or determination of Kory's claim for breach of the duty to defend. The District Court's judgment dismissing all of Kory's claims, and awarding costs and disbursements to Defendants was entered on May 11, 2015. (A239). Kory filed his Notice of Appeal on July 14, 2015. (A242).

STATEMENT OF THE FACTS

I. The Accident

[¶3] The motor vehicle accident from which the underlying action arose occurred early on the morning of January 14, 2010. (A177). At approximately three o'clock a.m., nineteen-year-old Kory received a telephone call from his brother Wade who was stuck in a snowdrift on a low maintenance road a short distance from Kory's home in Maxbass, and asked that Kory come and help pull him out of the drift. (A178;A165). When Kory arrived where Wade was stuck, he was unable to get the vehicle out. (A180). Wade, therefore, asked Kory to drive to their grandfather Herbert's farm to get one of Herbert's tractors to pull him out. (A180). Kory arrived at Herbert's farm around four o'clock in the morning. (A181). He did not wake Herbert up to tell him that he was borrowing the tractor as he has always had standing permission to use it. (A182; A120). Kory drove the tractor off the farmstead and onto 85th Street which is a gravel road running directly

adjacent to Herbert's farm. (A182, A166). After driving down 85th Street for only a few minutes, the tractor stopped. (A182). Kory estimates that he was no more than a quarter mile west of the farmstead on 85th Street. (A197). Kory was unable to get the tractor running again and, therefore, called Wade who asked Kory to come pick him up. (A183). After having picked up Wade, Wade told Kory to go home and get some sleep and that he would take care of the tractor since Kory had school in a few hours. (A183). Before being able to move the tractor, Rita Fred, a neighbor of Herbert's collided with it. (A11). Ms. Fred commenced an action against Kory and his grandfather, Herbert. (A11).

II. 85th Street as an Integrated Part of the Farm

[¶4] Herbert had a farm policy with Farmers which he had first applied for in 1988. (A199). In the initial application for the policy, Herbert listed the farm locations as sections 25, 26, 34, 19, 29, and 28 in the Lewis Township. (A199). The total farm acreage was listed as 1,280. (A199). This is the same total as listed in the declarations for the 2009-2010 policy. (A31). There are, therefore, no indications that the farm locations were ever changed.

[¶5] As can be seen on the attached map, Section 26 is located next to section 25 where the farmstead is and is also immediately adjacent to the part of 85th Street where the accident occurred. (A201). In addition, most of the sections of the farm are not located next to each other. (A201). 85th Street, including the part of it where the accident occurred was, therefore, routinely used by the Clark farm to travel between the farm sections. (A205-206). In order to get from the farmstead to the pastures on section 34, one would have to travel west along 85th Street, and then proceed south along the section line road. (A203; A187). This route includes the part of 85th Street where the accident

occurred. 85th Street also served as the only means of egress or ingress to the farmstead. (A205-206). Herbert had some of his land in CRP and would routinely spray this land. (A203-205). In order to get to the CRP land he would have to drive down 85th Street. (A201)

[¶6] Kory and Wade would use the tractors and other farm machinery to mow the ditches along nearby roads, as depicted on the attached map, including the ditches on 85th Street where the accident occurred, for hay to feed cattle. (A205-206; A207). 85th Street, including the part of it where the accident occurred, was also the only way to get to the pasture land in section 34 and was therefore used regularly when feeding and checking on the cattle. (A203). It was also used for moving the cattle between the farmstead and the pasture in spring and fall. (A204-205). The part of 85th Street where the accident occurred was routinely used by Herbert, Kory, Wade, Randy, and anyone else doing work at the farm and a large number of the farm operations would be impossible without the use of this road.

III. Farm Operations at the Clark Farm

[¶7] Both Kory and his brother Wade worked at Herbert's Farm with their father Randy Clark. (A203). By the time of the accident, Herbert was mostly retired from performing daily farm work and Randy was managing the day-to-day operations. (A203) However, although Herbert had reduced his involvement he continued to be in charge, as he owned the land and the majority of the equipment. (A203).

[¶8] Kory believes he first started working at Herbert's farm when he was about nine to ten years old. (A195). In 2009-2010, Kory's duties included cutting, raking, and bailing hay, feeding and giving water to animals during summer and winter, opening and

closing gates, rounding up cattle, inspecting and fixing fences, transporting and stacking bales of hay, assisting with farm vehicle maintenance, and other miscellaneous jobs. (A174-175). Like Kory, Wade also began working on the farm at an early age. (A229). During the winter of 2009-2010, Wade and Kory would have generally rotated feeding the cattle and other related farm chores on a weekly basis. (A229). Herbert would pay Kory by providing him with food and fuel. (A188). On at least one occasion, Kory was also paid money for helping shear sheep. (A188). Kory was allowed to fill his vehicle with fuel from the fuel tank on the farm several times a year. (A188). Kory always understood that the fuel was in exchange for him working on the farm. (A188). Kory's other cousins who lived in the area but did not work on the farm did not receive such benefits from Herbert. (A195-196). Randy also paid Kory informally for his labor by providing him with a vehicle, fuel, insurance, auto maintenance costs, food, clothing, shelter and cash. (A196). Kory always understood that being provided with items such as a vehicle and fuel was in exchange for his work on the farm. (A196). Even though Randy expected Kory to help work on the family farm it was never mandatory. (A204). However, in Randy's view, Kory being provided with a vehicle, fuel, and insurance, was more than an allowance and was instead in compensation of Kory's involvement in the farm. (A204). Had Kory elected not to work on the farm, he would have had to find a job to pay for these items. (A204).

IV. Farmers' Denial of Coverage and Duty to Defend

[¶9] At the time of the accident, Farmers was obligated to indemnify and defend Kory Clark under the Farm policy. (A10). Herbert notified Farmers of the accident on the day it occurred. (A92). Rod Walth with QBE sent a letter to Kory only eight days after the

accident denying Kory coverage. (A103). The only investigation performed at this point was a phone call to Fred, a phone call to Herbert, and a recorded statement of Kory. (A209). Although Walth did cut and paste the policy provisions defining who is an insured into his letter, he did not explain any rationale for his decision. (A103). Nowhere in Walth's letter did he state that coverage was being denied as a result of Kory not being an employee, his use being outside the scope of employment, his use being non-permissive, or because the accident did not take place on the insured location. (A103).

[¶10] Although Farmers provided a defense to Herbert, Kory was left to fend for himself. Fred subsequently commenced suit against both Herbert and Kory. In her Complaint, Fred specifically alleges: "That the tractor had been wrongfully left on the roadway through the operation therefore by Defendant Kory Clark, such use having been occasioned by the express or constructive permission of Defendant Herbert Clark, for a purpose associated with family business." (A28). A default judgment was entered against Kory. Litigation remains pending in the action commenced by Fred in Bottineau County, although the default judgment has been temporarily vacated.

LAW AND ARGUMENT

I. Standard of Review.

[¶11] The standard of review for summary judgment is a question of law which is reviewed de novo on the entire record. *Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc.*, 2006 ND 183, ¶ 17, 721 N.W.2d 43.

II. The District Court Erred in Holding That as a Matter of Law Kory is Not Entitled to Coverage as an Insured Under the Farmers Insurance Policy Provision Extending Coverage to Use on the "Insured Location"

A. Standard for Determining Insurance Coverage.

[¶12] The interpretation of an insurance contract is a question of law for the court to determine, *Grinnell Mut. Reinsurance Co. v. Thies*, 2008 ND 164, ¶ 10, 755 N.W.2d 852. The goal when interpreting insurance policies is to give effect to the mutual intention of the parties as it existed at the time of contracting. *Landis v. CNA Ins.*, 1999 ND 35, ¶ 6, 589 N.W.2d 590. If the policy is clear on its face, no further inquiry is necessary. *Martin v. Allianz Life Ins. Co.*, 1998 ND 8, ¶ 9, 573 N.W.2d 823. However, where coverage hinges on an undefined term, courts "principally look to the plain, ordinary meaning of the undefined term" to guide any interpretation. *Hanneman v. Continental Western Ins. Co.*, 1998 ND 46, ¶ 28, 575 N.W.2d 445. Finally, the court is also to consider the type of policy at issue in order to determine whether or not coverage is provided. *Hanneman*, ¶ 23. Any ambiguity or reasonable doubt as to the meaning of a policy term is strictly construed in favor of the insured. *Fisher v. American Family Mut. Ins. Co.*, 1998 ND 109, ¶ 5, 579 N.W.2d 599.

B. The Accident Occurred on an "Insured Location".

[¶13] The Farm policy extends coverage for "any person using a vehicle on the insured location with your consent, provided this insurance applies to the vehicle." While Herbert is the only named insured under the policy, Kory qualifies as an additional insured. Farmers has a duty to defend and indemnify an additional insured to the same extent as a named insured. *Nodak Mut. Ins. Co. v. Wacker*, 154 N.W.2d 776, 779 (N.D. 1967).

[¶14] The policy defines the term "insured location" as the "farm premises (including grounds and private approaches) and **residences premises** shown in the declarations …" and "[p]remises used by you in conjunction with …" those premises. (A37). Kory's use of the tractor on 85th Street was done with Herbert's permission on "[p]remises used in connection with the …" farm premises and residence premises. While the District Court held that the term "premises" does not include a public road, there is ample authority establishing otherwise. A number of courts adressing the issue have held that the term "premises" include a public road. In *Farm Bureau Mutual Ins. Co. Inc. v. Kurtenbach*, 961 P.2d 53 (Kan. 1998), the Supreme Court of Kansas held that a public highway separating two tracts of land was considered part of the insured "premises." In *Kurtenbach,* Scott Kurtenbach was involved in a motorcycle accident while trying to cross U.S. Highway 56. *Id*. at 55. Scott's parents owned the land on both sides of the highway and frequently crossed the road as part of their farming operation. *Id*. The policy provided coverage for damage that "occurs on the insured premises" resulting from use of motor vehicles not subject to registration. *Id*. "[I]nsured premises" was defined as "farming premises which you own, rent, or operate" *Id*. at 56. The court held that the accident occurred on the insured "premises" thereby establishing that the term "premises" includes a public highway. *Id*. at 57.

[¶15] In *McLaughlin v. Midrox Ins. Co.*, 894 N.Y.S.2d 648, 1464 (N.Y. App. Div. 2010), McLaughlin was injured when his motorcycle collided with a pickup truck operated by Blodgett on a public road. Blodgett's farm policy covered "[i]nsured premises" along with "any premises used … in connection with the described location." *Id*. The court held that the public road fell within the term "premises" and stated that "[t]here is . . . no merit

to the contention of [the insurer] that the term 'premises' within the meaning of the policy is not intended to encompass public roadways. That restrictive interpretation is not supported by the language of the policy, which neither defines 'premises' nor excludes public roadways from its purview." *Id.* at 1466. *See also, Nationwide Mut. Ins. Co. v. Erie and Niagara Ins. Ass'n*, 672 N.Y.S.2d 596, 597 (N.Y. App. Div. 1998) (public roadways can be considered to be a part of "premises."); *Employers Liability Assurance Corp. v. Enos Coal Corp*., 457 F.2d 402 (7th Cir. 1972) (the term "premises" includes a public road).

[¶16] The decisions in *Dreiman*, and *Gardner*, which the District Court relied upon in holding that a public road does not fall within the term "premises", is not controlling in this matter. In *Gardner*, the Court of Common Pleas of Pennsylvania held that the definition of "insured location" in the homeowner's policy was not broad enough to include a public road. *Nationwide Mut. Ins. Co. v. Gardner*, 79 Pa. D. & C. 4th 150, 162-64 (Com. Pl. 2006). *Gardner*, is distinguishable from the present matter. The *Gardner*, court found that interpreting "premises" to include a public road, which lead to a private road, which led to the insured premises, would ignore a policy exclusion for motor vehicles and would call upon the court to find coverage for the unlawful use of an ATV on a public road. *Gardner*, 79 Pa. D. & C. 4th at 162-64. The current case involves different policy language, a different type of policy, involves farm machinery instead of a recreational vehicle, does not involve the exclusion relied upon in *Gardner*, and does not call upon this court to extend coverage to unlawful actions.

[¶17] In *Dreiman*, the second case relied upon by the District Court, the Indiana Court of Appeals found that pursuant to the dictionary definition of the term "premises", the

term required the presence of buildings on the land, thereby excluding public roads. *Indiana Ins. Co., v. Dreiman*, 804 N.E.2d 815 (Ind.Ct.App. 2004). In addition, in *Dreiman,* the court relied on the reasoning in the Arizona case *Hudnell*, holding that "the purpose of the vehicle exclusion in a homeowner's policy is to require the insured to obtain specific liability insurance on motor vehicles" *Id*. at 820. However, the *Dreiman*, court chose to ignore the fact that *Hudnell*, had explicitly held that the language "premises used … in connection with the residence premises" did not categorically exclude public roads. *Hudnell v. Allstate Ins. Co.*, 190 Ariz. 52, 945 P.2d 363, 366 (Ct. App. 1997). In addition, the issue of whether the term "premises", as defined in dictionaries, requires buildings on the land was also discussed and rejected in the Supreme Court of Michigan case, *Fremont Ins. Co. v. Izenbaard*, 493 Mich. 859, 820 N.W.2d 902, 903 (2012). In *Izenbaard*, the court explained that the term "premises" "is an elastic and inclusive term, and it does not have one definite and fixed meaning; its meaning is to be determined by its context and is dependent on the circumstances in which used …]. *Id*. The court also examined the dictionary definitions of the term, including those definitions examined by the *Dreiman*, court, and found that these definitions in no way required the presence of buildings on land. *Id*. *Dreiman*, does not appear to be well thought through and should not be found instructive for the current case. The policy in this case is not a homeowner's policy. The tractor **is** a vehicle covered under the policy. The purpose of the motor vehicle exclusion in a homeowner's policy is irrelevant in this case. The *Dreiman*, case is, therefore, not applicable to this case.

[¶18] Interpreting the term "premises" to require land with buildings also conflicts the purpose and design of the farm policy. The "insured location" is defined in the policy as

"farm premises", "residence premises", various other forms for "premises", "vacant land", land on which dwellings, buildings or structures are being constructed, and cemetery plots. The term "vacant land" is not defined in the policy. Couch on Insurance, however, defines it as "unoccupied, unused, and in its natural state". 9 Couch on Insurance, § 126:11. Black's Law Dictionary defines it as "absolutely free, unclaimed, and unoccupied". Black's Law Dictionary, *Vacant* (10th ed. 2014), Webster's Dictionary defines it as "being without content or occupant" or "not occupied or put to use." Webster's Third New International Dictionary 2527 (1993). The term is synonymous with the word "empty." *Id*. In *Lewis*, the U.S. District Court for Kansas held that a pasture for cattle was not "vacant land" since it was not empty and deprived of its content but rather had substantial utility, was not in its natural state, and had been improved by permanent fencing and a steel gate. *State Auto Property & Cas. v. Lewis*, 8 f.Supp.3d 1303, 1308 (D. Kan. 2014). If the term "premises" can only mean land with buildings, and the term "vacant land" does not include pastures or used land, the result is that the term "insured location" does not include Herbert's farm land. Only Section 25 of Herbert's land, the farmstead, has buildings on it. It should be assumed that the policy covers all farm land which was listed in the policy and for which Herbert paid a premium, not just land with buildings on it. If the policy covers all the land listed in the application, then the term "premises" must include land without buildings as such land fall outside the term "vacant land" and "cemetery plot". The interpretation of the term "farm premises" to include land without buildings on it is also supported by the fact that the term, while not being defined in the policy, has been held to denote tracts of land used wholly or principally for

agricultural purposes. *Connolly v. Standard Cas. Co.*, 76 S.D. 95, 99, 73 N.W.2d 119, 121 (1955), (*citations omitted*).

[¶19] While there are numerous cases discussing coverage for use of recreational vehicles on the "insured premises" under homeowner's insurance policies, there does not appear to be any case law directly on point involving coverage for farm machinery on the "insured location" under a farm policy. The U.S. District Court of Arizona case *Jones,* however, provides a comprehensive discussion of whether the term premises may include a public road. *Nationwide Mut. Fire Ins. Co., v. Jones*, 695 F.Supp.2d 978 (D.Ariz. 2010). In *Jones*, a guest of the insured was injured while driving the insureds ATV on a public street and a cul-de-sac in front of the insured's house. *Id*. at 979-80. The homeowner's insurance excluded coverage for vehicles unless designed for use off public roads and used on the insured location. *Id*. at 980. The insured location was defined as "the residence premises … [and] premises used with [the residence premises]". *Id*. at 980-81. The court in *Jones*, found that ***Hudnell v. Allstate Ins. Co.***, 190 Ariz. 52, (***supra***), was directly on point. *Id*. at 982. In *Hudnell*, it had been pointed out that other jurisdictions, when determining whether the accident had occurred on the insured premises, would generally focus on the location of the accident rather than whether it was a "public" area. *Id*. at 983. In addition, the court in *Hudnell*, had explicitly stated that none of the cases considered by it had "denied coverage solely because the accident occurred on a public street, nor did they hold that premises "used in connection with" residence premises could not include a public street". *Id*. Rather, the reason why the accident on the public street was not covered was not "because the street was public in nature, but because "the purpose of a vehicle exclusion in a homeowners policy is to require the insured to obtain

… liability insurance on motor vehicles." *Id*. The court in *Jones*, explained that based on this reasoning, it was not surprising "that there appear to be no cases in which an accident occurred on a public road or on a private road accessible to the general public that have found coverage under a homeowner's policy with an exclusion similar to the one here." *Id*. at 984. As examples of such cases, the *Jones*, court cited a number of cases involving homeowner's policies with motor vehicle exclusions, including *Gardner,* and *Dreiman,* which were the cases relied on by the District Court in the current case. *Id*. *Jones*, held that the use of the ATV on the public road and the cul-de-sac was not covered because finding coverage would "blur the distinction between the homeowner's and automobile insurance", not because premises may not include a public road. *Id*. The motor vehicle exclusion in a homeowner's policy is not relevant or applicable to this case.

[¶20] As discussed, the term premises has been found to include a public road. The term has also been found to include "water adjacent to structures designed to service boats using the lake". *St. Paul Fire and Marine Ins. Co. v. Coleman*, 204 F.Supp. 713, 721 (W.D. Ark. 1962) *aff'd* 316 F.2d 77 (8th Cir. 1963). In *State Farm Fire and Casualty Co. v. MacDonald*, 850 A.2d 707, 708 (Pa. Super. 2004), the court held that a nearby field owned by a third party was considered "premises" under the insurance policy.

[¶21] It is evident that the term "premises" is not limited to land with buildings on it and that it does not exclude public roads. The District Court's interpretation of the term to exclude a public road also conflicts with the design and purpose of the farm policy as it would exclude agricultural land. The term should therefore be found to include a public road and thereby the part of 85th Street on which the accident occurred. In light of the several other jurisdictions holding that the term "premises" encompass a public roadway,

the term is at the very minimum ambiguous and should be construed in favor of the insured.

C. The Part of 85th Street Where the Accident Occurred was "Used in Conjunction" with the Farm Premises and Residence Premises

[¶22] In order to fall within the policy's definition of "insured location" the accident must have occurred on the farm premises, residences premises, or premises used in conjunction with these premises. 85th Street was routinely used in conjunction with the residence premises and was an integral part of the farm. In interpreting the term "used in conjunction with", courts have focused on whether the insured used the area where the accident occurred repeatedly, and whether the use was foreseeable to the insurer. For example, in *MacDonald*, 850 A.2d at 708, the court held that a nearby field owned by a third party and used frequently by the insured for driving his ATV was considered part of the "insured location" as premises used "in connection" with the insured premises. *Id*. at 207. Similarly, in *Nationwide Mut. Ins. Co. v. Prevatte*, 423 S.E.2d 90, 92 (N.C. 1992), the court found that where an accident occurred on the neighbors part of a trail which began on the insureds property and ended on the neighbor's property, and which was frequently used by the insured for driving ATVs and for walking, was an insured location. *Id*. at 91. The Massachusetts Court of Appeals in *Utica Mut. Ins. Co. v. Fontneau*, 875 N.E.2d 508 (Mass. App. Ct. 2007), upheld a finding of coverage based largely on whether use of a dirt track between two parcels of land was foreseeable to the insurer. It was held that in determining whether an area is covered by reason of its use in connection with the insured premises, "courts should examine (1) the character of the use as a residentially related activity, (2) the distance between the residence and the site, and (3) the

foreseeability of the risk of the connected activity on the site to the insurer." *Id*. at 514. The court reasoned that the probability of coverage will decline as the activity becomes more unusual, more remote from the residence, and therefore less foreseeable to the insurer. *Id*. at 514. The court found in favor of coverage concluding that the use of the dirt track was a regular residential activity, that it was only a short distance away from the property and that it was foreseeable for the insurer. *Id*.

[¶23] 85th Street, where the accident occurred, is a gravel road with little traffic, mostly limited to the few persons who live along the road. (A202-203). 85th Street is routinely used by the Clark farm. It is an integral part of the farm as it is impossible to travel between most of the sections of land without utilizing 85th Street. The road is the only ingress and egress to the farmstead. (A201). It is the only way to get to the pastures from the farmstead. (A201). 85th Street is used when moving the cattle between the farmstead and the pastures. It is also used when driving to the pasture to feed the cattle, to inspect and fix the fences, to assist with calving, and when generally checking up on the cattle. 85th Street is used when spraying CRP fields and when cutting, raking, bailing, and transporting hay from the field and ditches to the farmstead. It is apparent from Herbert's application for insurance that the sections, which were all listed, have been used by the farm since at least 1988. A quick glance of the map showing the different sections of farm premises indicate that the farm has no choice but to use 85th Street in its farm operations. (A201). It also shows the close proximity of 85th Street and the farm Sections. Farmers was made aware of the location of all the sections comprising the farm at the time of the application and had full knowledge of the fact that 85th Street was integral and necessary

for the farm operations, and that the road was being used consistently as a connection between the premises. The use was, therefore, foreseeable for Farmers.

[¶24] The policy language extends coverage to a person using a vehicle with consent on the "insured location". The "insured location" is defined as premises used in conjunction with the farm premises and residence premises. Kory's consensual use of the tractor, on the part of the road which connects the farm premises with each other and with the residence premises falls within the natural meaning of this policy language. As such, the Farm policy should be found to extend coverage to Kory in the underlying action as an additional insured.

D. The Farm Liability Insurance Policy does not Require Ownership of Land Adjacent to the Location of an Occurrence and does not Contain any Provision Limiting Coverage Depending on the Purpose of the use on the "Insured Location"

[¶25] The District Court applied weight to its conclusion that Kory was not performing any farm related tasks at the time of the accident. This issue was also extensively argued by Defendants in support of their position that Kory was not an insured under the use on the "insured location" provision of the policy. However, coverage pursuant to use of a vehicle on the "insured location" does not require any particular purpose for the use. It does not matter where Kory was headed. It does not matter that it was early in the morning. It does not matter that Kory intended to drive to the road where his brother was stuck. The only thing that matters is whether the tractor was used with permission on the farm premises, residence premises or premises used in conjunction with these premises.

Interpreting the policy to include a limitation for type of use or purpose would require this Court to re-write the policy.

[¶26] If Farmers intended to limit coverage to the purpose of the use of the vehicle, they could have done so by drafting the policy to that effect. They did not include any such limiting language. In comparison, the policy provision extending coverage to farm employees limits coverage to "use within the scope of employment". It has been held that insurance contracts are construed as a whole to give meaning and effect to each clause. *North Dakota State Univ. v. Hartford Steam Boiler Inspection and Ins. Co.*, 2005 ND 75, ¶12, 694 N.W.2d 225. The fact that Farmers did include language limiting coverage to acts within the scope of employment, but did not do so with regard to coverage for use on "insured location", should be interpreted to mean that no limitation was intended for coverage for use on the insured location.

[¶27] The District Court also applied weight to its assertion that the part of 85th Street where the accident occurred was not bounded by land owned by Herbert. While there is no requirement in the farm policy that premises used in conjunction with the farm and residence premises is bounded, section 26, which is the property immediately adjacent to the part of the road where the accident occurred, was listed on Herbert's application as an insured location. Under N.D.C.C. § 47-01-16, "[a]n owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown." Thus, it is legally presumed that the land on Section 26 extends to the center of the roadway. Because the accident took place on a portion of the roadway that was adjacent to land covered by the insurance policy and included as part of the farm premises the accident occurred on the insured farm location. In other words, it occurred on "farm

premises". Therefore, not only was the District Court's reliance on the issue of whether the road was bounded irrelevant, but its conclusion that it was not bounded was also an incorrect statement of the facts of the case. Instead the District Court should have found coverage due to this part of 85th Street being part of the "farm premises".

E. The Policy Applies to Liability Arising From the Accident Because Kory Used a Vehicle on the Insured Location

[¶28] A court must consider the type of policy at issue in order to determine whether or not coverage is provided. *Hanneman*, ¶ 23. The District Court, in its Order held that "[i]t needs to be remembered that the farm liability policy, exists to protect farm property and employees". (A236). It is uncertain where the District Court obtained this fact from as it was not argued by any party. While a farm policy may exist to protect farm property and employees, this is only part of its purpose. Instead, it has been explained that farm policies are essentially homeowners' policies tailored to the special needs and requirements of persons who live in rural areas and engage in those activities of a generally agricultural nature which are normally carried on in such areas. 93 A.L.R.3d 472 (Originally published in 1979). In North Dakota, family farms and ranches are the norm. In *Center Mut. Ins. Co. v. Thompson*, 2000 ND 192, 618 N.W.2d 505, this Court held that a son who lived on, and occasionally worked at his father's farm was not considered a farm employee because family routinely help out and work on family farms. This is true whether they live on the farm or not. Farmers have publicly advocated against corporate farming, and sought to preserve laws favoring the operation of small family farms in North Dakota. (A228). Farmers should, therefore, be well versed in how family farms operate. However, if the farm policy is interpreted as suggested by QBE and

Farmers, the result is that family members, who do not live on the farm but who help out or work on a family farm to a large extent would be excluded from coverage.

[¶29] The Farmers policy provides coverage for more than the farm property and farm employees. It also provides coverage for the named insured, family members of the household, and certain individuals under the age of 24 which are former members of the household, certain members of various business ventures, employees for acts within the scope of employment, and persons using a vehicle on the insured location. QBE and Farmers argued to the District Court that *Thompson*, excludes family working on a farm from the definition of employee, that Kory cannot therefore be an employee, and that the definition of 'insured location' does not include public roads but requires land with buildings on it. If one is to follow the interpretation suggested by the District Court, QBE, and Farmers, the result is extremely limited coverage for Kory, Wade, Randy, and all other family members who do not live on a farm, while working or helping out on the farm. Kory, for example, would never be covered when driving the tractor on 85th Street in order to help cut, rake, bail, or transport hay. Kory, Wade, Randy and any other family or friends of Herbert, not living at the farm, also would not be covered when driving any farm machinery to spray the CRP fields, or when driving to the pastures to inspect or fix fences, round up cows, check on cows, feed cows or help with calving. If Kory had Herbert drive the tractor from the farmstead to the pasture, Kory would, however, be considered an insured once on the pasture, but never on the road used to get to the pasture. The interpretation of the farm policy as suggested by QBE and Farmers is nonsensical as it would leave large groups of people who are known to commonly work or help on family farms in North Dakota without insurance coverage. This interpretation

should, therefore, be rejected and this Court should find that the policy extends coverage to Kory for the underlying occurrence.

III. The District Court Erred in Granting Summary Judgment and Holding That the Evidence, When Viewed in the Light Most Favorable to Kory, Cannot Lead a Reasonable Jury to Find That Kory is Entitled to Coverage as an Employee Under the Farmers Policy.

A. There is Sufficient Evidence to Find That Kory was an Employee.

[¶30] The policy covers employees for acts within the scope of employment. (A36; A39). In *Thompson*, this Court held that the existence of an employment relationship is usually a question of fact and that no single factor can be determinative. *Thompson,* 2000 ND 192. The factors applied in *Thompson*, in determining whether an individual is an employee included: (1) the employer's control, (2) the employer's ability to discharge, (3) whether the employer furnished materials, tools, or equipment, (4) the regularity of work, (5) and if the employer compensated the individual. *Id*. ¶ 21. The District Court, held that the evidence showed that Kory only occasionally did work at the farm and only occasionally received gas from Herbert in exchange for his work, but that there was no evidence as to degree of control, ability to discharge, furnishing materials, tools or equipment, or the regularity of the work. (A234). In addition, the District Court held that there was only an assertion of employment without any support in the records and that, therefore, there was no question of fact. (A235)

[¶31] The record, however, contains ample evidence establishing that Kory was an employee. Kory testified that his duties included cutting, raking, and bailing hay, feeding animals, opening and closing gates, rounding up cattle, inspecting and fixing fences,

transporting and stacking bales of hay, assisting with farm vehicle maintenance, and other miscellaneous jobs. (A174-175). Wade, testified that he and Kory would have generally rotated feeding the cattle and other related farm chores on a weekly basis. (A229). Although Herbert appears to be somewhat confused in his deposition, he did testify that Randy, Wade, and Kory all worked on the farm. (A113-114). Herbert's deposition was taken in the underlying action prior to the current action being commenced. Herbert, therefore, who is now deceased, never gave a deposition in the current case. Randy, Herbert's son, testified that he and his sons Kory and Wade, assisted Herbert in running the farm. (A203). Herbert generally provided all of the equipment and owned the land. (A203). Furthermore, it was always understood that Kory being provided with items such as a vehicle and fuel were in exchange for his work on the farm. (A196). Randy also stated that had Kory chosen not to help out on the farm, he would have to find employment elsewhere to buy items such as his own vehicle. (A204). Certainly, the testimony by Herbert, Kory, Randy and Wade is evidence of Kory being an employee and their testimony must be regarded as more than "a mere assertion with no support in the record".

[¶32] As was emphasized in *Thompson,* the existence of an employment relationship is usually a question of fact and no single factor can be determinative. *Thompson,* at 511. As such, there is a genuine issue of fact as to whether Kory was an employee of Herbert. This issue should, therefore, be for the jury to determine.

B. A Genuine Issue of Fact Exists as to Whether the Injuries Arose out of Acts within the Scope of Employment.

[¶33] Questions as to whether the operator of a vehicle is acting within the scope of his employment is generally a question for the jury. *Hedline v. Meyer*, 224 N.W. 906 (N.D. 1929). Although Kory was not performing any act directly related to farming, his ability to use the tractor was the result of his employment on the farm. In addition, Kory's use at the time can have conferred a benefit upon Herbert by helping Wade. Wade may have been responsible for feeding cattle that week. (A229). Had Kory not helped Wade, Wade could have been prevented from performing his duties at the farm. The District Court held that no evidence was presented to support this argument. However, Wade testified in his affidavit that he believes it could have been his turn to work the day after the accident. (A229). Wade's testimony is evidence supporting the argument and the question should, therefore, for the jury to decide.

IV. The District Court Erred in Dismissing Plaintiff's Claim for Breach of the Duty to Defend without Making Any Determination Relative to This Claim.

[¶34] An insurer's duty to defend is broader than the duty to indemnify, and is generally determined by the allegations of the underlying claim. *Farmers Union Mut. Ins. Co. v. Decker,* 2005 ND 173, ¶ 13, 704 N.W.2d 857. Because the duty to defend is broader, it is possible for a duty to defend to exist even if the insurer is ultimately not responsible for indemnifying its insured for any losses. *Tibert v. Nodak Mut. Ins. Co.,* 2012 ND 81, ¶45, 816 N.W.2d 31 (holding that insurer still had a duty to defend even though it was not obligated to indemnify an insured for losses under the intentional acts exclusion). The insurer's duty to defend is set by the allegations in the complaint "as of the time the

complaint was served". *Tibert,* 2012 ND 81, ¶ 34. Thus, when there is doubt about whether the injured party's complaint states facts sufficient to bring the injury within the coverage of the insurance policy, and the claim "may or may not be covered by the policy," the insurer has a duty to defend. *Kyllo v. Northland Chem. Co.*, 209 N.W.2d 629, 634 (N.D. 1973). Any doubt about whether a duty to defend exists must be resolved in favor of the insured. *Schultze v. Cont'l Ins. Co.,* 2000 ND 209, ¶ 8, 619 N.W.2d 510. Only if there is no possibility of coverage is the insurer relieved of its duty to defend. *Tibert,* ¶ 31. "Where a claim potentially may become one which is within the scope of the policy," and the insurer does not avail itself of its right to seek an immediate declaratory judgment under N.D.C.C. § 32–23–06, "the insurance company's refusal to defend at the outset of the controversy is a decision it makes at its own peril." *Tibert,* 2012 ND 81, ¶ 36. Here, there is a duty to defend.

[¶35] There are several ways that one may qualify as an insured under the farm policy. Among those who qualify as an "insured" are employees acting within the scope of the employment and persons using a vehicle on the "insured location". Eight days after the accident, when Farmers sent its letter to Kory denying coverage, the only investigation done was a phone call to Fred, a request for the accident report, a short recorded statement of Kory, and a phone call to Herbert. (A208-209). At no time prior to denying coverage did Farmers obtain any information relative to whether Kory or Wade were employees at the farm, whether Wade was on his way to work, whether 85th Street was on or adjacent to farm premises, or whether it was used in conjunction with the farm and residence premises. The claim log notes that Kory "does not appear to be an insured" and that "seemingly" Farmers does not owe Kory coverage for the loss. (A209). The log does

not state the basis for this conclusion and neither does the denial letter. (A209; A103) However, almost half a year after denying the claim, the claim log indicates that Walth, the OBE claims adjuster on this claim, is having second thoughts. (A210). At this time, Walth noted that he has reviewed the policy more closely and that it is possible that Kory could be considered an insured depending on where he was headed to. (A210). If this was the insured's land or somewhere on the way to insured land, Walth reasoned, Kory could be covered. (A210). After determining that Herbert did not own land in the area where Wade had been stuck, Walth again concluded that Kory was not an insured. (A210). Of course, whether Herbert owned land where Wade was stuck and where Kory was headed, is irrelevant because Kory never got there with the tractor. What it is clear, however, is that Farmers never made any proper determination of whether Kory qualified as an insured.

[¶36] Kory's claims against Farmers and QBE included a claim for breach of the duty to defend and indemnify under the homeowner's policy Kory's father, Randy, held with Farmers. This claim was not pursued on this appeal. When the claim was made, it was noted in the claims log that Walth would look into coverage under this policy. (A209). It was then noted that the motor vehicle exclusion prevented coverage under the policy. (A210). However, more than two years after the accident, and after the underlying action against Kory's grandfather Herbert was dismissed, Walth noted in the claims log that he told Herbert's attorney that he "was a little nervous about allowing Isakson to get a default judgment against Kory because we did have a HO policy with his father Randy at the time of the loss. Understand the Motor Vehicle exclusion would apply anyway. Also we would be prejudiced if they never made a claim on it." (A225). Farmers more than

two years after denying the claim, was still unsure of whether Kory was covered under this policy.

[¶37] Based on the facts as alleged in the Complaint, it was possible that Fred's injury was caused by Kory's acts which fell within the coverage extended by the farm policy and/or the homeowner's policy and Farmers knew or should have known this. When there is doubt about whether the injured party's complaint states facts sufficient to bring the injury within coverage, and the claim "may or may not be covered," the insurer has a duty to defend. *Kyllo*, 209 N.W.2d at 634. Any doubt about whether a duty to defend exists must be resolved in favor of the insured. *Schultze*, 2000 ND 209, ¶ 13. As is evident from the claims log in this matter, Farmers never made a proper determination or obtained the facts necessary to determine coverage under either the farm policy or the homeowner's policy. Farmers had doubts with regard to coverage under the farm policy half a year after already having denied coverage, and had doubts with regard to coverage under the homeowner's policy more than two years after the denial, yet failed to defend Kory. This doubt should have been resolved in favor of Kory and Farmers should have provided Kory with a defense in the underlying action. Farmers' failure to do so constitutes a breach of the duty to defend. The District Court's failure to make any determinations whatsoever with regard to the claim for breach of the duty to defend before dismissing the claim altogether should be reversed.

CONCLUSION

[¶38] Based upon the foregoing, Kory Clark should have been provided both a defense to the underlying action as well as indemnity for any damages that may be awarded against him. Kory Clark, therefore, respectfully requests that this Court reverse the

decision of the District Court and find both indemnity and defense coverage for Kory Clark under Farmers' policies of insurance.

Respectfully submitted this 24th day of August, 2015.

/s/ Marianne O. Knudson
Marianne O. Knudson, ND ID #06308
PEARSON CHRISTENSEN, PLLP
P.O. Box 5758 / 24 N. Fourth Street
Grand Forks, ND 58206-5758
Phone: 701.775.0521 / Fax: 701.775.0524
marianne@grandforkslaw.com
ATTORNEY FOR PLAINTIFF Kory Clark

ADDENDUM

Relevant language in the Farmers Union Farm Liability policy bearing policy number 32-006308-11-002-4-23

COVERAGES

COVERAGE H – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

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

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

(2) Our right and duty to defend end when we have used up the applicable Limit or Insurance in the payment of judgments ore settlements under Coverage H or I or medical expenses under Coverage J.

(3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under the Additional Coverages.

DEFINITIONS

***

4. **Bodily Injury** means bodily injury, sickness or disease sustained by a person, and includes death resulting from any of these at any time.

***

8. **Farm employee** means any **insured's** employee whose duties are principally in connection with the maintenance or use of the **insured location** as a farm. These duties include the maintenance or use of the **insured's** farm equipment.

But **farm employee** does not mean any employee while engaged in an **insured's business**.

***

13. **Insured**

a. **Insured** means you, and if you are:

(1) An individual, **insured** also means the following members of your household:

(a) Your relatives;

(b) Any other person under the age of 21 who is in the care of any person specified above;

(c) A student enrolled full time, as defined by the school, who was a member of your household before moving out to attend school, provided the student is under the age of:

(i) 24 and your relative

(ii) 21 and in your care or the care of a person specifically in **(1)(a)**.

(2) A partnership or joint venture, insured also means your members and your partners and their spouses, but only with respect to the conduct of your **farming** operations.

(3) A limited liability company, **insured** also means:

(a) Your members, but only with respect to the conduct of your **farming** operations; and

(b) Your managers, but only with respect to their duties as your managers.

(4) An organization other than a partnership, joint venture, or limited liability company, **insured** also means:

(a) Your executive officers and directors, but only with respect to their duties as your officers and directors; and

(b) Your stockholders, but only with respect to their liability as stockholders.

No person or organization is an **insured** with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

b. **Insured** also means any of your employees other than either your executive officers (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited company), but only for acts that:

(1) Cause **bodily injury** or **personal injury** to someone other than you, your partners or members (if you are a partnership or joint venture), your members (if you are a limited liability company) or a co-employee; and

(2) Are within the scope of the employee's employment by you. The providing of professional health care services or the failure to provide them will not be considered to be within the scope of any employee's employment by you.

c. **Insured** also means any person (other than your employee), or any organization while acting as your real estate manager.

d. **Insured** also means any person or organization:

(1) Legally responsible for animals or watercraft owned by an **insured** as defined in Paragraph **a**. above, but only insofar as:
   (a) The insurance under this Coverage Form applies to **occurrences** involving animals or watercraft;
   (b) That person's or organization's custody or use of the animals or watercraft does not involve **business**; and
   (c) That person or organization has the custody or use of the animals or watercraft with the owner's permission.

e. **Insured** also means any person using a vehicle on the **insured location** with your consent, provided this insurance applies to the vehicle.

***

15. **Insured location** means:

a. The farm premises (including grounds and private approaches) and **residences premises** shown in the declarations;
b. The part of other premises, or other structures and grounds, that is used by you as a residence and;
   (2) Shown in the Declarations; or
   (3) Acquired by you during the present annual policy period for your use as a residence.
c. Premises used by you in conjunction with the premises included in **a.** or **b.** above;
d. Any part of premises not owned by any **insured** where an **insured** is temporarily residing;
e. Vacant land owned by or rented to any **insured**;
f. Land, owned by or rented to any **insured**, on which;
   (1) A dwelling is being construed for occupancy by an **insured**, or by an **insured's farm employees** or **residence employees**; or
   (2) A building or structure is being construed for the use of an **insured** in **farming** operations.
g. Individual or family cemetery plots or burial vaults of an **insured**;
h. Any part of premises occasionally rented to any **insured** for other than **business** purposes; and
i. Any farm premises (including its grounds and private approaches) that you or your spouse acquire during the present policy period.

The **insured location** does not include farm premises owned, rented to, or controlled by an **insured** if located outside the state of North Dakota unless it is shown in the Declarations.

***

17. **Mobile Equipment** means the following, including any attached machinery equipment:
a. Bulldozers, forklifts and tractors designed for use principally off public roads:
Other farm machinery designed for use:

(1) Principally off public roads; and
(2) As implements for cultivating or harvesting;

b. Vehicles designed for road use that are:
(1) Exempt from motor vehicle registration and used exclusively for **farming**:
(a) On the **insured location**; or
(b) Ways and means immediately adjoining;
(2) In dead storage on the **insured location**.

***

18. **Motor Vehicle**

a. As used in this Coverage Form, the term motor vehicle means:
(1) A motorized land vehicle, trailer or semi-trailer
(a) Designed for travel on public roads; or
(b) Used on public roads; unless it qualifies as **mobile equipment**;
(2) Any machinery or equipment attached to a vehicle, trailer, or semitrailer include in (1) above;

***

24. **Residence premises** means your principal residence and the grounds and structures appurtenant to it.
Residence premises does not include any part or parts of a building or structure that are used for **business**.

(A31-60)

20150199
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 24, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kory Clark, Plaintiff-Appellant v. Farmers Union Mutual Insurance Company, Defendant-Appellee	Burleigh County Civil No.: 08-2014-CV-00854 Supreme Court Case No. 20150199 **AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

STATE OF NORTH DAKOTA)
(SS.
COUNTY OF GRAND FORKS)

LYNN M. PYNN, being first duly sworn, deposes and states: that she is of legal age, a citizen of the United States, and is not a party to, nor has she an interest in the above entitled action; that on August 24, 2015 she sent be Electronic Mail, in the City of Grand Forks, North Dakota, a true and correct copy of the following documents in the above-entitled action:

1. **Brief of Appellant Kory Clark; and**
2. **Appendix of Appellant Kory Clark**

That said e-mail(s) was/were addressed as follows:

JEANNE UNGER
junger@bassford.com

DAVID SCHWEIGERT
dschweigert@bkmpc.com

To the best of affiant's knowledge, information, and belief, such address(es) as given above was/were the actual address(es) of the party(ies) intended to be so served. That the above document(s) was/were duly served in accordance with the provisions of the North Dakota Rules of Court.

Lynn M. Pynn

Subscribed and sworn to before me on Monday, August 24, 2015 in the State of North Dakota, County of Grand Forks.

Joni Kay Riske
Notary Public

JONI KAY RISKE
Notary Public
State of North Dakota
My Commission Expires April 3, 2019

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kory Clark, Plaintiff-Appellant v. Farmers Union Mutual Insurance Company, Defendant-Appellee	)	Burleigh County Civil No.: 08-2014-CV-00854 Supreme Court Case No. 20150199 **AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

STATE OF NORTH DAKOTA)
(SS.
COUNTY OF GRAND FORKS)

DAVID GORDON, being first duly sworn, deposes and states: that he is of legal age, a citizen of the United States, and is not a party to, nor has he an interest in the above entitled action; that on August 18, 2015 he sent be Electronic Mail, in the City of Grand Forks, North Dakota, a true and correct copy of the following documents in the above-entitled action:

1. **Brief of Appellant Kory Clark; and**
2. **Appendix of Appellant Kory Clark**

That said envelope(s) was/were addressed as follows:

JEANNE UNGER
33 SOUTH SIXTH STREET
SUITE 3800
MINNEAPOLIS, MN 55402-3707
junger@bassford.com

DAVID SCHWEIGERT
116 NORTH 2ND STREET
P.O. BOX 955
BISMARCK, ND 58502-0955
dschweigert@bkmpc.com

To the best of affiant's knowledge, information, and belief, such address(es) as given above was/were the actual address(es) of the party(ies) intended to be so served. That the above document(s) was/were duly served in accordance with the provisions of the North Dakota Rules of Court.

David Gordon

Subscribed and sworn to before me on Tuesday, August 18, 2015 in the State of North Dakota, County of Grand Forks.

MARIANNE O KNUDSON
Notary Public
State of North Dakota
My Commission Expires July 31, 2021

Notary Public

20150199
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 21, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kory Clark, Plaintiff-Appellant v. Farmers Union Mutual Insurance Company, Defendant-Appellee	Burleigh County Civil No.: 08-2014-CV-00854 Supreme Court Case No. 20150199 **AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

STATE OF NORTH DAKOTA)
(SS.
COUNTY OF GRAND FORKS)

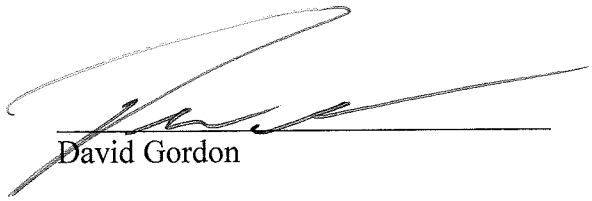
David Gordon, being first duly sworn, deposes and states: that he is of legal age, a citizen of the United States, and is not a party to, nor has he an interest in the above entitled action; that on September 21, 2015 he sent an Electronic Mail, in the City of Grand Forks, North Dakota, with a true and correct copy of the following documents in the above-entitled action:

Redacted Appendix of Appellant Kory Clark

That said e-mail(s) was/were addressed as follows:

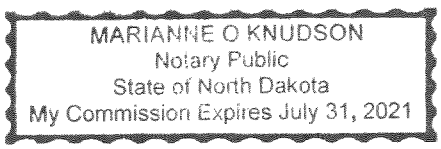
JEANNE UNGER	**DAVID SCHWEIGERT**	**TYLER SIEWERT**
junger@bassford.com	**dschweigert@bkmpc.com**	**Tsiewert@bkmpc.com**

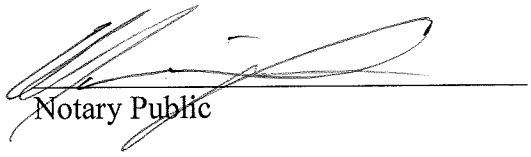
To the best of affiant's knowledge, information, and belief, such address(es) as given above was/were the actual address(es) of the party(ies) intended to be so served. That the above document(s) was/were duly served in accordance with the provisions of the North Dakota Rules of Court.



David Gordon

Subscribed and sworn to before me on Monday, September 21, 2015 in the State of North Dakota, County of Grand Forks.





Notary Public