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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
NO. 20150199

Kory Clark, Plaintiff/Appellant vs. Farmers Union Mutual Insurance Company and QBE Americas, Inc., Defendants/Appellee.	**Burleigh County Civil No. 08-2014-CV-00854**

Appeal from Order for Summary Judgment Dated April 20, 2015
and Judgment Dated May 11, 2015

District Court, South Central Judicial District
Burleigh County, North Dakota
The Honorable Bruce B. Haskell, Presiding

BRIEF OF APPELLEE QBE AMERICAS, INC.

Jeanne H. Unger, ND PHV #P01484
Steven M. Sitek, ND ID #06457
BASSFORD REMELE, *A Professional Association*
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
Phone: (612) 333-3000 | Fax (612) 333-8829
ssitek@bassford.com
junger@bassford.com
Attorneys for Appellee
QBE Americas, Inc.

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[¶0] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the trial court err in concluding that a public road on which Kory Clark was traveling, in the middle of the night, and in route to pull his brother's truck out of a ditch, was not a "premises used in connection" with his grandfather's farm, and thus not an "insured location" under Farmers Union's policy?

II. Did the trial court err in concluding that Kory Clark was not his grandfather's employee, and was not acting within the scope of any alleged employment, when he borrowed a tractor in the middle of the night to pull his brother's truck out of a ditch?

III. Did the trial court err in dismissing Plaintiff's claim for breach of the duty to defend once it determined that Kory Clark was not an insured?

STATEMENT OF THE CASE

[¶1] This case is a declaratory judgment action arising out of a motor vehicle accident that occurred when a vehicle driven by Rita Fred collided with a John Deere tractor that had been abandoned by Appellant, Kory Clark, in the middle of 85th Street, a public street in Bottineau County. Kory had borrowed the tractor from his grandfather's, Herbert Clark's, farm around 4:00 that morning, to pull his brother's truck out of a ditch several miles away.

[¶2] Kory Clark commenced this action seeking insurance coverage for Rita Fred's claims under two policies of insurance issued by Appellee Farmers Union Mutual Insurance Company ("FUMIC") – a Farm Liability Policy issued to Herbert Clark, and a Homeowners Policy issued to Kory's parents. Appellee QBE Americas, Inc., which acted as a third-party administrator for FUMIC, was later joined in the action.

[¶3] FUMIC and QBE brought Motions for Summary Judgment. The motions sought a declaration that there was no coverage under the Farm Liability Policy on the grounds that Kory was not an "insured" because: 1) he was not a resident of Herbert Clark's household; 2) he was neither Herbert's employee, nor was his use of the tractor within the scope of any employment; and, 3) the accident did not occur on the "insured location," as defined in the policy. FUMIC and QBE also sought summary judgment under the Homeowners Policy based on a motor vehicle exclusion.

[¶4] The district court agreed with FUMIC and QBE, and by Order dated April 20, 2015, granted their motions in all respects, declaring that they owed Kory no duty to defend or indemnify. Judgement was entered on May 11, 2015. Kory Clark appeals from that judgment.

STATEMENT OF RELEVANT FACTS

I. The Accident.

[¶5] At approximately 3:00 a.m. on January 14, 2010, Kory Clark got a call from his brother Wade asking for help because Wade's truck was stuck in a snowdrift on a road approximately 15 miles from Maxbass, North Dakota. (*See* Appellant's Appendix ("App.") at 160). Kory, who lived with his parents in Maxbass, got out of bed and drove to where his brother was stuck. (App. 178-79, pp. 30-32). They attempted to pull Wade's truck out of the snowdrift, but the truck slid into a ditch. (App. 180, p. 36).

[¶6] Herbert Clark, Kory's grandfather, owned a farm eight miles from Maxbass. (App. 180, p. 37). At approximately 4:00 a.m., Kory went to the farm to get a tractor to pull Wade's truck out of the ditch. (App. 180, pp. 36-37). Kory drove his grandfather's John Deere 4430 out the driveway and approach, and turned west onto 85th Street, a two-lane street that runs to the south of Herbert's farm. (App. 182, p. 46). After proceeding a little more than half a mile on 85th Street, and having passed the point where Herbert's land ran alongside the street, the tractor "just quit." (App. 182, p. 47; App. 156-57). Kory tried, but was unable, to get over to the shoulder. (App. 182-83, pp. 47-48).

[¶7] Kory left the tractor in the roadway, walked back to his grandfather's farm to get his truck, and drove to pick up Wade. On their way back to the farm, Wade told Kory to go home and get some sleep (Kory had school the next day) and that he would take care of the tractor. (App. 183, p. 50; App. 163). Wade instead drove to Newburg to put gas in Kory's truck. (App. 185, p. 56).

[¶8] At approximately 7:00 a.m., Rita Fred was driving on 85th Street, on her way to work, when she struck the tractor that had been left in the roadway. Because it was a foggy morning, and because there were no flashers or lights on the tractor, Fred did not see the tractor until it was too late. (App. 156-57).

II. Herbert Clark's Farm Liability Policy.

[¶9] At the time of the accident Herbert Clark had a Farm Liability Policy with FUMIC. (App. 31).

[¶10] The insuring agreement for Coverage H – Bodily Injury and Property Damage Liability provides in relevant part as follows:

> 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 and duty to defend any **insured** against any **suit** seeking those damages. ...We may at our discretion investigate any **occurrence** and settle any claim or **suit** that may result.

(App. 39)(original emphasis for specifically defined terms).

[¶11] The policy defines "Insured" to include:

> 13. **Insured**
>
> * * *
>
> b. **Insured** also means any of your employees …, but only for acts that:
>
> * * *
>
> (2) Are within the scope of the employee's employment by you.
>
> * * *
>
> e. **Insured** also means any person using a vehicle on the **insured location** with your consent, provided this insurance applies to the vehicle.

(App. 36).

[¶12] "Insured Location," in turn, is defined, in relevant part, as:

> 15. **Insured location** means:
>
> a. The farm premises (including grounds and private approaches) and residence premises shown in the Declarations;

b. That part of other premises, or of other structures and grounds, that is used by you as a residence and:

(1) Shown in the Declarations; or
(2) 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;

* * *

(App. 37).

III. Kory Clark's "Employment"

[¶13] Kory was questioned about working on his grandfather's farm. He testified that he did not have any agreement with his grandfather about what work he was supposed to do. (App. 188, p. 69). Although he once received $35 for helping shear sheep, and was permitted a few times a year to fill his truck with gas from a tank at the farm, he had no contract with his grandfather regarding payment and had no expectation that his grandfather would compensate him for his work. (App. 188, pp. 70-71). In addition to the absence of any agreement about what kind of work Kory would do at the farm, or any expectation that he would be compensated by his grandfather, there were no set hours he was expected to work. (App. 189, p. 72).

[¶14] Kory did not refer to his grandfather as his employer, and no one ever told him he was an employee of his grandfather's farm. (App. 188-89, pp. 71-72).

Rather, Kory testified that he helped out on the farm because that was what grandchildren do – help out their grandparents:

> Q. You were doing the work out there because you had horses out there and because you were doing what kids and grandkids do, is help their grandparents with farming operations; right?
>
> A. Yes.
>
> * * *
>
> Q. Okay. So the kind of things you were doing out there to help, you did those because kind of what was expected of you and because you were asked to do those things; is that right?
>
> A. It was kind of like a family farm. Everybody helps out.

(*Id.*).

[¶15] Kory's deposition testimony was confirmed by his grandfather. Specifically, Herbert testified that he had retired from farming some months before Rita Fred's accident. (App. 113, p. 16). Kory would visit him fairly regularly, but not to work. (App. 121, p. 47). Herbert also testified that he owned 15 head of cattle that were kept on the farm with cattle owned by Wade and the boys' father, Randy Clark. (App. 121, pp. 47-48). Wade and Randy were the primary caregivers for the cattle; Kory did not to his knowledge help with the cattle except, possibly, when no one else was available. (*Id.*).

IV. Appellant's Declaratory Judgment Action.

[¶16] In April 2011, more than a year after the accident, Rita Fred commenced a personal injury action against Herbert and Kory Clark in Bottineau County District Court. (App. 28). FUMIC defended Herbert, but declined to defend Kory on the

bases that he was not an insured under the Farm Liability Policy issued to Herbert and, with respect to the Homeowners Policy issued to his parents, Fred's claim was excluded. Herbert was eventually dismissed from the underlying action.

[¶17] Kory Clark commenced this action seeking a declaratory judgment that FUMIC had a duty to defend or indemnify him under either or both policies. Kory also sought damages for bad faith refusal to defend. He later joined QBE, which served as a third-party claims administrator for FUMIC.

[¶18] FUMIC denied liability and counterclaimed for a declaratory judgment of no coverage under the policies. It then moved to bifurcate the insurance coverage and bad faith issues and to stay discovery into bad faith until coverage was determined. The district granted FUMIC's motion and ordered defendants to file summary judgment motions, which it ultimately granted.

ARGUMENT

I. Standard of Review.

[¶19] The interpretation of an insurance contract and whether the district court properly granted summary judgment presents questions of law that are reviewed de novo. *Schleuter v. Northern Plains Ins. Co.*, 2009 ND 171, ¶ 6, 772 N.W.2d 879; *K & L Homes, Inc. v. American Family Mut. Ins. Co.*, 2013 ND 57, ¶ 8, 829 N.W.2d 724. The reviewing court independently examines and construes the insurance policy to determine whether the district court erred in its construction. *Id.*

[¶20] The rules regarding insurance contract interpretation are well-established. The language of the policy controls, and if the language is clear on its face, there is no room for construction. *Ziegelmann v. TMG Life Ins.*, 2000 ND 55, ¶ 6, 607 N.W.2d 898. Undefined terms do not render the policy ambiguous, but instead are given their "ordinary, usual and commonly accepted meaning." *Center Mut. Ins. Co. v. Thompson*, 2000 ND 192, ¶ 14, 618 N.W.2d 505.

[¶21] "When the language of an insurance policy is unambiguous it should not be strained to impose liability on the insurer." *Bjornson v. Guar. Nat'l. Ins. Co.*, 539 N.W.2d 46, 49 (N.D. 1995); *Ziegelmann*, 2000 ND 55, ¶ 6, 607 N.W.2d 898. Finally, "[t]he whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others." *Ziegelmann*, ¶ 6.

II. The District Court Properly Granted Summary Judgment To Farmers Union And QBE Because Kory Clark Is Not An "Insured" Under The Farm Liability Policy.

[¶22] To be entitled to coverage under the Farm Liability Policy, Kory has the burden of establishing he is an "insured" under that policy.[1] *Grzadzielewski v. Walsh County Mut. Ins. Co.*, 297 N.W.2d 780, 781 (N.D. 1980) (citing, *Boedigheimer v. Taylor*, 178 N.W.2d 610, 614 (Minn. 1970)). The policy extends insured status to: 1) anyone using a vehicle on the "insured location" with the named insured's (Herbert's) consent and, 2) employees of the named insured

[1] Although Kory originally also sought coverage under the Homeowners Policy issued to his parents, he has not appealed the district court's denial of coverage under that policy. (App. Br. 24). Accordingly, QBE's argument is limited to coverage under the Farm Liability Policy.

(Herbert), but only for acts that are within the scope of employment by the named insured. The district court correctly concluded that Kory met neither of these definitions.

[¶23] First, the court held that Kory was not an insured under the Farm Liability Policy because a public street is not a "premises;" and thus, Kory was not using the tractor on the "insured location." This conclusion is amply supported by the weight of authority, and by basic principles of insurance law and common sense. The trial court's conclusions that Kory was not Herbert's employee, and that he was not acting within the scope of any conceivable employment when he retrieved the tractor at 4:00 in the morning for the purpose of pulling his brother's truck out of a ditch several miles away, is also well supported both factually and legally. The district court's conclusion that FUMIC and QBE neither owed, nor breached, any duty to defend or indemnify Kory should be affirmed.

A. Kory Clark is not an insured because his use of the tractor, and Rita Fred's accident, were not on an "insured location."

[¶24] Kory Clark could have qualified as an insured under the Farm Liability Policy if he had been using the tractor "on the 'insured location."' As the district court properly found, however, Kory was not using the tractor on the "insured location" while driving on 85th Street, a public street.

[¶25] The Farm Policy defines "insured location" to mean:

> a. The farm premises (including grounds and private approaches) and residence premises shown in the Declarations;
>
> * * *
>
> c. Premises used by you in conjunction with the premises included in a. or b. above

(App. 37). It is undisputed that Rita Fred's accident did not occur on the residence or farm premises. Rather, the dispute centers on whether the accident location – a public street over half a mile from the private approach to Herbert Clark's farmstead and at a spot that was no longer adjacent to the property – can be deemed "premises" used by Herbert in conjunction with the farm and residence premises. Court that have addressed this issue have consistently concluded that the term "premises" does not include a public street.

1. The overwhelming weight of authority holds that a public street is not a "premises" used in connection with a farm or residence premises, and thus, is not an "insured location."

[¶26] The district court found the authority cited by FUMIC and QBE, particularly, *Indiana Ins. Co. v. Dreiman*, 804 N.E.2d 815 (Ind. App. 2004), to be convincing. *Dreiman* concerned insurance coverage for a dirt bike accident on a county road that separated the insureds' farmland. Indiana issued a farm liability policy that excluded coverage for recreational vehicles unless the accident occurred on the "insured location," which, as in FUMIC's policy, was defined to include "premises used by you in conjunction with the [farm and residence]

premises." Athough the trial court in *Dreiman* concluded that the county road, which had to be crossed in order to get from one farm to the other, was used in conjunction with the farming of the two farms, the Indiana Court of Appeals disagreed for three reasons.

[¶27] First, applying the universal rule that undefined terms in a policy must be given their plain and ordinary meaning, the Indiana Court of Appeals, found the term "premises" to be unambiguous. *Dreiman,* 804 N.E.2d at 820. The court looked to the dictionary definition of "premises" and concluded that those definitions were consistent with the use of the term throughout the policy. Notably, the dictionaries defined "premises" in relevant part as "[a] house or building, along with its grounds" and "land and the buildings on it;" and the references to "premises" in the policy included related references to "structures and grounds," "places rented," and places where an insured resides. *Id.* The Indiana Court of Appeals concluded that neither the definitions nor the context of the policy supported a determination that a public roadway constitutes "premises." *Id.*

[¶28] Second, *Dreiman* relied upon an Arizona Court of Appeals decision in which the court construed the same definition and concluded that public roadways cannot be considered "premises" used "in connection" with covered premises. *Dreiman,* 804 N.E.2d at 820 (citing *Hudnell v. Allstate Ins. Co.*, 945 P.2d 363 (Ariz. App. 1997)). *Hudnell*, which Kory cites favorably, also addressed coverage for a dirt bike accident that occurred on a public street. The insurance policy

excluded coverage for vehicle accidents, but had an exception for vehicles not intended for use on public roads while on the "insured location." The trial court in *Hudnell* concluded that because the insured was test driving the vehicle after making repairs to it in his driveway, he was using the public road as part of that repair activity and, thus, the road was used "in connection" with the insured premises. *Hudnell*, 945 P.2d at 366. On appeal, however, the court reversed on the grounds that to hold that an insured premises includes pubic roads when the policy specifically limits coverage to vehicles not intended for use on public roads would render the exclusion and its exception meaningless. *Id.* at 367. The *Dreiman* court adopted this reasoning. *Dreiman*, 804 N.E.2d at 820.

[¶29] Finally, the *Dreiman* court examined general principles of premises liability to determine the scope of the insurance provided. *Dreiman*, 804 N.E.2d at 820-21. Noting that the "thread through the law" is control, the court commented that only the party who controls the land has the exclusive ability to prevent injury from occurring. Because the Dreimans did not exercise control over the county road, the court concluded the road was not covered by their farm liability policy. *Id.*

[¶30] *Dreiman* is consistent with the majority of cases from across the nation, which has concluded that the "premises" or "insured location" does not extend to a public (or in some cases, even a private) street. *See Jones v. Horace Mann Ins. Co.*, 937 P.2d 1360 (Alaska 1997) (accident on public road .4 miles from insured residence was not on the "insured premises," and to hold otherwise would be contrary to the intent and reasonable expectations of the parties); *Hudnell*, 945

P.2d 363 (Ariz. App. 1997) (public street was not part of the insured premises even though used in furtherance of an activity started on the premises); *Nationwide Mut. Ins. Co. v. Gardner*, 79 Pa. D. & C. 4th 150, 164 (C.P. Huntingdon County 2006) (Pa. 2006) ("the definition of 'Insured Location' in the policy is not broad enough to include a public road."); *Shelter Mut. Ins. Co. v. Davis*, 2006 WL 929239 at *6 (Iowa App. 2006) (grounds used in connection with residence premises did not extend to roadway where accident occurred); *Nationwide Mutual Fire Ins. Co. v. Jones*, 695 F. Supp. 2d 978 (D. Ariz. 2010) (public cul-de-sac directly in front of insured's home was not "premises used in connection with" the residence premises); *Allstate Ins. Co. v. Shofner*, 573 So. 2d 47 (Fla. 1990) (operation of vehicle on public street one block away is use "away from an insured premises."); *Arrowood Indem. Co. v. King*, 39 A.3d 712 (Conn. 2012) (insured lacked sufficient interest in a private road within a residential community to render it an "insured location."); *Sheldon v. Zimmerman*, 2004 WL 1636575 (Mich. App. 2004) ("Under the common meaning of the term 'premises,' a public road does not fall within the definition of 'premises' and is not an 'insured location.'").[2]

[2] Appellees anticipate that Kory will argue *Zimmerman* is no longer good law in light of *Fremont Ins. Co. v. Izenbaard*, 820 N.W.2d 902 (Mich. 2012), in which the Michigan Supreme Court summarily reversed a lower court finding that the situs of an accident -- private property owned by an energy company, and on which no buildings were erected – was not a "premises" used in "connection with" the insured residence premises. *Izenbaard* merely rejected the argument that the property had to have a building on it to be a premises. *Id.* Significantly, the court did not consider whether a public street could be considered a "premises" or "insured location."

[¶31] Despite the overwhelming weight of authority finding that a public street does not fall within the commonly understood meaning of the term "premises" and cannot, therefore, be deemed an "insured location," Kory contends there is "ample authority establishing otherwise." This "ample authority," however, consists of just four cases from three jurisdictions. Those cases interpreted policies that included critical language not found in FUMIC's policy, and in the context of markedly different facts.

[¶32] The most inapposite of Kory's proffered cases is *Employers Liability Assurance Corp. v. Enos Coal Corp.*, 457 F.2d 402 (7th Cir. 1972). The issue there was whether an accident on a detour roadway, used almost exclusively as a means of ingress/egress to the insured's and its neighbors' properties, was subject to a policy exclusion that barred coverage for injury arising out of the use of an automobile "if the accident occurs away from premises owned by, rented to or controlled by the named insured, ..." The court concluded that the term "premises" could be held to include the detour roadway because the roadway was actually rented to the policyholder. *Enos,* 457 F.2d at 407. In this case, Herbert Clark did not rent or control 85th Street. Therefore, *Enos* is inapt.

[¶33] Kory also relies on two New York cases that concerned insurance coverage for accidents that occurred while the insured was **actually engaged in farm operations**. In the earlier of the two, *Nationwide Mutual Insurance Company v. Erie and Niagara Insurance Association,* 672 N.Y.S.2d 596 (N.Y.A.D. 1998), the insured was transporting workers and materials between farms over a public

roadway. The policy at issue defined "insured premises" to mean the farm described in the policy, premises used in connection with the described location, "approaches and access ways immediately adjoining the insured premises" **and** "other land used for farming purposes." *Id.*, 672 N.Y.S.2d at 597. "Farming" was defined to include the "use of premises for the production of crops or the raising or care of livestock, **including all necessary operations.**" *Id.* at 598 (emphasis added). Citing no authority whatsoever, and in just a three paragraph decision, the court concluded that the definitions were broad enough to include public roadways used to transport workers and equipment. *Id.* The language of the policy, as well as an admission by the insurer in *Erie*, presented facts that are markedly different from this case. First, the definition of "insured location" was tied to "land" used for farming purposes and all necessary farm operations performed by the insured. That language is absent from the FUMIC definition. Moreover, the insurer in *Erie* had previously admitted the accident was covered under its policy. *Id.* at 598. Obviously, no such admission has been made in this case.

[¶34] The second of the two New York cases, *McLaughlin v. Midrox Ins. Co.*, 894 N.Y.S.2d 648 (N.Y.A.D. 2010) also interpreted a policy that broadly defined "premises" to include "approaches and access ways immediately adjoining the insured premises" and "other land used for farming purposes." As in *Erie*, the insured was involved in an accident while driving his truck between farms over what was described by the court as "the most direct route" between the two parcels. Relying solely upon *Erie*, the *McLaughlin* court found that the accident

occurred on the "insured premises" within one of the policy's alternative definitions. *Id.* at 651. The court's conclusion that an accident on a roadway may fall within one of the definitions is unsurprising - a public road may constitute "other land" used for farming purposes and certainly could be deemed an "approach" or "access way." These phrases, however, are not included in the FUMIC definition of "insured location." And again, it is significant that the insured was actually engaged in farming activities when the accident occurred.

[¶35] Finally, not only is the fourth case upon which Kory relies inapposite, but the court's comments made clear that had it been presented with the facts of this case, the result would have been different. Specifically, in *Farm Bureau Mutual Insurance Company, Inc. v. Kurtenbach,* 961 P.2d 53 (Kan. 1998), the insured was involved in an accident while crossing a highway that bisected two pieces of the insured's farm property. Farm Bureau's policy defined "insured premises" as "the farming premises which you own, rent, or operate," and "farming" was defined as "the maintenance or use of premises for the production of crops or the raising or care of livestock, **including all necessary operations**." *Id.*, 961 P.2d at 57 (emphasis added). Because crossing the highway was necessary to reach the insured's property used in his farming operation, the court concluded that it fell within "all necessary operations" and therefore the accident occurred "on the insured premises" within the meaning of Farm Bureau's policy. *Id.* at 57-58.

[¶36] While finding coverage based on the facts before it, the Kansas Supreme Court stated that, if presented with the facts of this case, the result would have been different:

> Arguably, it would be unreasonable for Kurtenbach to assume that … his Farm Master policy provided coverage for an accident that might occur as he was operating his motorcycle on a road to reach a tract of land several miles away. In that case, he would be utilizing a public road much as any registered, licensed vehicle to travel from one destination to another.
>
> * * *
>
> It is important to our holding that the highway in question split the insured property, and it was necessary to cross it rather than travel upon it… **Had this accident occurred while the motorcycle was being operated on any highway instead of simply crossing Highway 56, no coverage would have existed under the policy**.

Kurtenbach, 961 P.2d at 57, 61 (emphasis added). Of course, the accident in this case occurred because Kory attempted to use 85th Street to travel from one destination to another, and not because he was crossing the street to get from one parcel of insured property to another.

[¶37] Given the more expansive definitions in the cases relied upon by Kory, and the Kansas Supreme Court's pronouncement in *Kurtenbach* that its decision would have been entirely different had the insured been traveling on, as opposed to merely crossing, the highway, it is not surprising that the district court found *Dreiman* and the numerous other cases cited by National Union and QBE to be the more convincing.

2. The conclusion that a policy street is not an "insured location" under FUMIC's policy is compelled by the established rules of contract construction.

[¶38] Moreover, the district court's interpretation, and the result reached, is consistent with established rules of insurance contract interpretation.

[¶39] First, the district court's decision gives effect to the well-settled rule that when a term in an insurance policy is undefined, the court must give it its "ordinary, usual and commonly accepted meaning." *Center Mut. Ins. Co.*, *supra*, 2000 ND 192, ¶ 14, 618 N.W.2d 505. And like Indiana courts, North Dakota courts generally look to the dictionary definition of an undefined term to determine its meaning and "will not strain the definition" in order to provide coverage." *Dundee Mut. Ins. Co. v. Marifjeren*, 1998 ND 222, ¶ 14, 587 N.W.2d 191; *Ziegelmann*, *supra*, 2000 ND 55, ¶ 6, 607 N.W.2d 898. In interpreting whether "premises used in connection with" the farm and residence premises could include a public street, the district court, like the court in *Dreiman*, simply refused to strain the dictionary definitions of "premises," which consistently referenced buildings and structures. *See, e.g.*, Black's Law Dictionary 1199 (7th ed.1999) and American Heritage Dictionary 1429 (3d ed. 1992), cited in *Dreiman*.

[¶40] Kory's attempt to distinguish *Dreiman* on the grounds that "premises used in connection" with the residence premises does not "categorically exclude public roads" fails. Significantly, Kory has not placed before the Court any dictionary definition of "premises" that includes a public roadway. This is, of course, because the ordinary meaning of premises does not include a public highway. Moreover, in

virtually every case cited, the court ultimately concluded that the road was not "premises used in connection" with the residence premises.

[¶41] Second, the district court's decision gives effect to another well-established interpretative rule; namely, that insurance policy terms must be interpreted consistently throughout the policy. *See, e.g., Maryland Cas. Co. v. W.R. Grace Co.*, 128 F.3d 794, 799 (2d Cir. 1992). In this case, Kory attempts to distinguish *Dreiman*, *Hudnell*, and the overwhelming authority cited by FUMIC and QBE on the basis that those cases interpreted motor vehicle exclusions, and did so in a manner consistent with the insuring intent of a homeowner's policy, making them irrelevant. (App. Br., p. 12-13). Nothing could be further from the truth. In making this argument, Kory overlooks his own concession that "farm policies are essentially homeowners' policies." (App. Br., p. 18). And like a homeowners policy, FUMIC's policy incorporates the very same motor vehicle exclusion. The policy states that it does not apply to injury arising out of the ownership, maintenance or use of any motor vehicle, but then excepts from the exclusion a "motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration" while "on an insured location." (*See* Exclusion e. at App.41). As the *Hudnell* court concluded, because the exception applies to vehicles designed for use "off public roads" and while on an "insured location," the only logical interpretation is that "insured location" does not include public roads. *Hudnell*, 945 P.2d at 367.

[¶42] General rules of contract interpretation require that identical terms be read and applied consistently throughout the policy. *See, e.g., W.R. Grace Co.*, 128 F.3d at 799 (terms in a contract normally have the same meaning throughout the contract in the absence of a clear indication that the parties intended different meanings); *Montana Petrol. Tank Release Comp. Bd. v. Crumleys, Inc.*, 2008 MT 2, ¶ 36, 174 P.3d 948 ("The definition of 'pollutant' must either include diesel or exclude diesel, and must be read consistently throughout the policy.") Kory's argument that the vehicle exclusion cases have no relevance is simply incorrect, because "insured location" cannot be defined one way with respect to that exclusion and yet defined another way for purposes of determining whether someone is an insured. Thus, because the exception to the motor vehicle exclusion establishes that "insured location" does not include a public road, that same interpretation must apply to the definition of who is an insured. Because Kory was on a public road, which is not included in the definition of "insured location," he does not qualify as an "insured" under the FUMIC policy.

[¶43] Finally, North Dakota, like every other state, requires the contract to be read as a whole:

> The whole of the contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others.

N.D. Cent. Code §9-07-06. *See also Ziegelmann, supra.*, 2000 ND 55, ¶ 6. This interpretive rule compels the conclusion that 85th Street, a public street, is not an insured location.

[¶44] *Arrowood Indemnity Co. v. King*, 39 A.3d 712 (Conn. 2012), for instance, concerned an ATV accident on a private road within a private residential community, and a policy that excluded accidents involving motor vehicles. That exclusion had an exception for recreational vehicles on an insured location, and defined "insured location" to include premises used in connection with the residence premises. Noting that the term "insured location" appeared in several related provisions of the policy, the Connecticut Supreme Court looked to another section of the policy – the medical payments coverage – in order to discern whether the "insured location" could encompass the private road where the accident occurred. *King*, 39 A.3d at 194. The policy provisions, which are identical to provisions found in FUMIC's policy (*See* App. 45 - COVERAGE J – MEDICAL PAYMENTS), committed the insurer to pay certain medical expenses to persons "on the Insured location with the permission of the Insured," and to persons "off the Insured location" if the bodily injury arose out of a condition on the Insured location or the ways immediately adjoining. *Id.*

[¶45] The Connecticut Supreme Court noted that the language "with the permission of the insured," implied that the insured must have a sufficient legal interest in the insured location such that the insured has the right to grant permission to a noninsured to enter. From this, the court inferred that "insured location" "plainly may not be construed so broadly as to include public spaces, access to which cannot be contingent on the permission of any individual property owner." *King*, 39 A.3d at 194-95.

[¶46] The rule that policies be read as a whole so as to give effect to all provisions compels a finding that Kory was not using the tractor on the insured location because the policy, in a number of places, distinguishes between the insured location and "ways and means immediately adjoining" the insured location. (App. 37 (defining "mobile equipment" to include certain vehicles on the insured location **or** ways and means immediately adjoining), App. 45 (extending medical payments coverage to persons off the insured location whose bodily injury arise out of a condition on the insured location **or** the ways immediately adjoining it)).[3] The policy defines "ways and means immediately adjoining" to mean "the shortest and most direct reasonable route between insured locations." (App. 38). In this case, 85th Street, where the accident occurred, falls within the "ways and means immediately adjoining" the insured location, but "ways and means" are distinct from the insured location itself. *See State v. FreeEats.com, Inc.*, 2006 ND 84, ¶ 14, 712 N.W.2d 828 ("Terms or phrases that are separated by 'or' have separate and independent significance."). In light of the fact that the FUMIC policy specifically distinguishes between "insured location" and "ways and means," it is clear that "ways and means" is not included in the

[3] This argument was first raised during the summary judgment hearing, after which the court invited additional briefing. The parties' letter briefs are in the record under Docket Items 218, 219 and 221.

definition of "insured location."[4] Thus, because Kory was on the ways and means, he was **not** on the "insured location." If any public street on which one travels to access the farm can be deemed "premises" used in connection with the farm and residence premises, and thus an "insured location," then the separately defined term "ways and means immediately adjoining," is rendered wholly superfluous, contrary to rules of interpretation.

3. Common sense compels the conclusion that a public highway is not part of the "insured location."

[¶47] Finally, Kory's position is illogical. He essentially argues that *any* land used in connection with Herbert Clark's farming operation falls within the definition of "insured location." Under this reasoning, if Herbert regularly drove the tractor to Minot as part of his farming operation (to transport heavy equipment, for instance), the highway travelled on that trip would constitute "premises used in connection with the farm premises" and an accident involving the tractor just outside Minot would fall within the FUMIC policy. As the trial court recognized, under this logic, "there would be virtually no limit on what roadways would be considered part of the premises." (App. 236). Common sense dictates that the farm policy was never intended to extend coverage so broadly.

[¶48] In summary, the collision between Rita Fred and the tractor occurred on a public street more than half a mile from the entrance to Herbert Clark's farm.

[4] This is in stark contrast to the definitions at issue in the New York cases upon which Kory relies. Both defined "insured location" to include "approaches and access ways immediately adjoining the insured premises." *Erie*, 672 N.Y.S.2d at 597; *McLaughlin*, 894 N.Y.S.2d 648.

Consistent with the overwhelming weight of authority, established rules of insurance policy interpretation, and common sense, the collision did not occur on the "insured location" as defined in the Farm Liability Policy. The trial court, therefore, properly concluded that Kory was not an insured under subsection e of the definition of "insured."

B. The district court properly concluded that Kory was not insured under the provision relating to farm employees because he was neither Herbert Clark's employee, nor using the tractor in the scope of any claimed employment.

[¶49] The Farm Liability Policy also defines "Insured" to include any of the named insured's (Herbert's) employees, but only for acts that are within the scope of that employee's employment. (App. 36) The district court properly concluded that Kory did not fall within this category of insureds. Kory was not Herbert's employee; and even if he was, his use of the tractor in the middle of the night to pull his brother out of a ditch several miles away from the farmstead cannot be deemed to have been within the scope of any such employment.

1. Kory was not his Grandfather's Employee

[¶50] The undisputed facts of this case, even when viewed in the light most favorable to Kory, are simply not enough to present a genuine issue of fact concerning his claimed employment status. In *Center Mutual Insurance Co. v. Thompson*, 2000 ND 192, 618 N.W.2d 505, this Court evaluated whether there was coverage for claims against a father for injuries suffered by his eighteen-year-old son whose arms got caught in an auger on the family's farm. Center Mutual

insured the father under a policy that provided liability coverage for "bodily injury to a farm employee while performing duties in connection with the farming operations of an insured." *Id*., 2000 ND 192, ¶ 5. The issue before the court was whether the son was a farm "employee."

[¶51] Because the policy did not define the term "employee," the Court turned to the dictionary to determine the plain, ordinary meaning of the word. *Thompson*, 2000 ND 192, ¶ 16. Noting that "[a]n employer-employee relationship is based on a contract," the Court found that, "absent an indication of a different meaning in an insurance contract, the word 'employee,' understood in its common and usual sense, signifies one who is a party to an employment contract, express or implied," *Id*. (citation omitted). Significantly, the Court observed: "Ordinarily, a family relationship does not achieve the status of an employment relationship without characteristics peculiar to employment, such as compensation, regularly scheduled hours, and continuity of service." *Id*., ¶ 15.

[¶52] On the basis of testimony that: 1) the son was expected, like other farm boys, to help out on the farm by doing chores; 2) there was no formal contractual arrangement about what the son was supposed to do for his father or about a salary or wage; and 3) the son was never given a W-2 by his father, the Court affirmed the trial court's finding that the son was not an "employee." *Thompson*, 2000 ND 192, ¶¶ 22-24.

[¶53] Just as the eighteen-year-old was not his father's "employee" in *Thompson*, Kory was not his grandfather's employee in this case. The uncontroverted evidence establishes:

- Herbert Clark was retired at the time of the accident
- There was no contractual relationship, either oral or written, between Kory and his grandfather regarding work to be done by Kory on Herbert's farm;
- There was no contractual relationship, either oral or written, between Kory and his grandfather regarding payment of a salary or wage to Kory for the occasional chores he did;
- There were no specific tasks Kory performed for his grandfather;
- There were no specific days that Kory was expected to be at his grandfather's farm;
- Kory did not receive any specific compensation from his grandfather when he performed chores on the farm;
- Kory did not refer to his grandfather as his "employer" and did not refer to himself as his grandfather's "employee;"
- Herbert did not provide a W-2 to Kory and Kory did not declare any income from Herbert on his tax returns.

Rather, as Kory testified in his deposition, he occasionally "helped his grandfather out" because that is what "kids and grandkids do." (App. 188-89, pp. 71-72). And although Herbert permitted Kory to put gas in his car from a tank on the farm a few times a year, there was no agreement that Kory would receive gas in return for specific tasks he performed.

[¶54] Although the existence or an employment relationship is ordinarily a question of fact, this Court has recognized that in the absence of indicia of employment the mere assertion of employment is not sufficient to raise a jury question. *Pratt v. Heartview Foundation*, 512 N.W.2d 675, 677 (N.D. 1994). The clear and unequivocal deposition testimony given by Kory and Herbert establish that Kory was not Herbert's employee. And Kory's affidavit submitted to oppose the underlying summary judgment does not indicate otherwise—it does not allege that he was a farm employee at the time of Fred's accident, or contradict his grandfather's testimony that he was not. Based on the evidence, the district court reached the only proper conclusion – that Kory was *not* an employee of his grandfather's at the time of the accident.

2. Kory's operation of the tractor at 4:00 a.m. for the purpose of pulling his brother's truck out of a ditch was not within the scope of any claimed employment.

[¶55] Ultimately, whether Kory was his grandfather's "employee" on January 14, 2010 is irrelevant because the accident did not happen while Kory was in the scope of that alleged employment relationship as required under the definition of "insured." Kory was using the tractor at 4:00 a.m. to pull his brother's truck out of a ditch several miles away. This had nothing to do with work at Herbert's farm.

[¶56] Significantly, Kory has at all times conceded that he was not performing any act directly related to farming. App. Brief., p. 22. Kory's contention that his actions should be deemed within the scope of his employment because he was helping his brother who **might** have been responsible for feeding cattle that week,

and who **might** have been prevented in from performing his duties at the farm had Kory not helped him is simply legally insufficient to withstand summary judgment. *See Iglehart v. Iglehart*, 2003 ND 154, ¶ 10, 670 N.W.2d 343 ("Mere speculation is not enough to defeat a motion for summary judgment."). The district court, therefore, appropriately granted summary judgment to defendants.

III. In Light Of Its Finding That Kory Clark Was Not An Insured, The District Court Properly Dismissed The Claim For Breach Of The Duty To Defend.

[¶57] Finally, Kory makes the curious argument that the district court erred in dismissing his claim for breach of the duty to defend "without making any determinations relative to this claim." But the district court did make a determination – it determined that Kory was not an insured. Given this determination, FUMIC and QBE could have no duty to defend him, and the claim appropriately was dismissed. *See Midwest Cas. Ins. Co. v. Whitetail*, 1999 ND 133, ¶ 11, 596 N.W.2d 341.

[¶58] Apparently ignoring the district court's determination of no coverage, Kory argues that because FUMIC and QBE had "doubts" in June 2010 – some 10 months before Fred sued – FUMIC should have provided him a defense once the lawsuit was actually brought nearly a year later. While this argument was not made in the trial court and is not, therefore, properly before this Court,[5] it is meritless.

[5] With respect to the duty to defend, Kory argued in the trial court only that FUMIC and QBE should be estopped from denying a duty to defend based on a claimed inadequacy

[¶59] The insuring agreement to FUMIC's policy states, with respect to the duty to defend, that FUMIC "will have the right and duty to defend any **insured** against any **suit**" seeking damages for bodily injury. (App. 39) This quoted language places two conditions precedent on FUMIC's duty to defend. *See Hart Const. Co. v. American Family Mut. Ins. Co.*, 514 N.W.2d 384, 389 (N.D. 1994). First, there must be a "suit," and second, the suit must be against an "insured." *Id.* And therein lies a fundamental flaw in Kory's argument – the "doubts" he refers to, and the criticisms he has, relate to FUMIC and QBE's investigation of the claim, which was completed some 10 months before Rita Fred filed suit.[6] By the time Fred sued, FUMIC and QBE had completed their investigation and had determined that Kory was not an insured under the Farm Liability Policy.

[¶60] Because Kory was not an insured under the Farm Liability Policy, FUMIC had no duty to defend.[7]

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in the denial letter issued by FUMIC, and that, under the "four corners rule" the duty was triggered by an allegation in the Fred complaint that Kory was using the tractor "for purposes associated with family business." Kory did not argue that FUMIC was obligated to defend based on alleged "self-doubts" or failure to make a "proper determination."

[6] In contrast to the duty to defend suits, the policy confers upon FUMIC the discretion to investigate claims: "We may at our discretion investigate any occurrence and settle any claim …" (App. 39)

[7] Kory expressly states at page 24 of his brief that his claims under his parents' homeowner's policy are not being pursued on appeal. Nevertheless, he proceeds to argue that FUMIC breached its duty to defend under the homeowners policy because the claims handler was nervous about allowing a default judgment to be entered. In light of Kory's decision to abandon his claim under the homeowners policy, this argument should not be considered.

CONCLUSION

[¶61] The district court's decision in this case is supported by the overwhelming weight of authority, and is in accordance with all interpretive rules that govern the construction of an insurance policy. Because the district court correctly applied the law and properly refused to strain the common meaning of the policy's terms in order to provide coverage that was never intended, its decision should be affirmed in all respects.

Dated this 28th day of September, 2015.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

By /s/Jeanne H. Unger
Jeanne H. Unger (ND PHV #P01484)
Steven M. Sitek (ND #6457)
Attorneys for Defendant/Appellee
QBE Americas, Inc.
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
Telephone: (612) 333-3000
Facsimile: (612) 333-8829
junger@bassford.com
ssitek@bassford.com

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
NO. 20150199

Kory Clark, Plaintiff/Appellant vs. Farmers Union Mutual Insurance Company and QBE Americas, Inc., Defendants/Appellee.	**Burleigh County Civil No. 08-2014-CV-00854** **AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

STATE OF MINNESOTA)
(SS.
COUNTY OF HENNEPIN)

Laurie A. Bachynsky, 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 he an interest in the above-entitled action; that on September 30, 2015, she sent an Electronic Mail, in the City of Minneapolis, Minnesota, with a true and correct copy of the following document(s) in the above-entitled action: **corrected Brief of Appellee QBE Americas, Inc.**

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

MARIANNE O. KNUDSON	**DAVID SCHWEIGERT**	**TYLER SIEWERT**
marianne@grandforkslaw.com	**dschweigert@bkmpc.com**	**tsiewert@bkmpc.com**

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

Laurie Bachynsky

Subscribed and sworn to before me on ~~Monday~~ Wednesday, September 30, 2015 in the State of Minnesota, County of Hennepin.

Notary Public

Kerri J. Nelson
Notary Public
Minnesota
My Commission Expires
January 31, 2016

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STATE OF MINNESOTA)
(SS.
COUNTY OF HENNEPIN)

Nancy M. Sinard, 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 he an interest in the above-entitled action; that on September 28, 2015, she sent an Electronic Mail, in the City of Minneapolis, Minnesota, with a true and correct copy of the following document(s) in the above-entitled action: **Brief of Appellee QBE Americas, Inc.**

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

MARIANNE O. KNUDSON
marianne@grandforkslaw.com

DAVID SCHWEIGERT
dschweigert@bkmpc.com

TYLER SIEWERT
tsiewert@bkmpc.com

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

Nancy M. Sinard

Subscribed and sworn to before me on Monday, September 28, 2015 in the State of Minnesota, County of Hennepin.

Notary Public

MARGARET L. RAUSCH
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES 01/31/2020