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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/Appellees.	)	**Supreme Court No. 20150199** **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 FARMERS UNION MUTUAL INSURANCE COMPANY

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[0] STATEMENT OF THE ISSUES

I. Whether the district court correctly held that Kory was not an insured because he was off the insured location while traveling on 85th Street, which is a public road and not a premises.

II. Whether the district court correctly held that Kory was not an insured because he was neither a farm employee nor acting within the scope of any alleged employment at 4:00 a.m. on January 14, 2010.

III. Whether the district court correctly held that Farmers was absolved of any duty to defend Kory, who was not an insured under the clear language of Herbert's Policy.

STATEMENT OF THE CASE

[1] Farmers Union Mutual Insurance Company ("Farmers") adopts Kory Clark's statement of the case but offers the following two clarifications. First, Farmers provided coverage and a defense for its named insured, Herbert Clark. (Appx. 167, ¶ 22.) Second, the district court determined that "Farmer's Union does not have a duty to defend or indemnify Kory Clark" because Kory had "not sustained his burden of proving that he is an insured." (*Id*. 236.)

STATEMENT OF THE FACTS

[2] At 3:00 a.m. on January 14, 2010, Kory was sleeping at his parents' home and awoke to a phone call from his brother, Wade. (*Id.* 178, 29:04–15.) Wade asked Kory to drive his pickup to a rural road fifteen miles from their parents' home. (*Id.* 178, 30–31.) Wade had been out drinking with some friends and got his vehicle stuck in a snow drift. (*Id.* 179, 33:06–25; 180, 36:04–05.) Kory was unable to extricate Wade's vehicle with his pickup and two rope. (*Id.* 180, 36:09–20.) Wade told Kory to travel thirteen miles to

their grandfather, Herbert's, farmstead to take one of Herbert's tractors to pull out Wade's vehicle. (*Id.* 180, 36:21–37:05; 181, 42:11–18.) Herbert's farmstead is located in the southwest corner of Section 25, Township 160 North, Range 81 West, in Lewis Township, Bottineau County, North Dakota. (*Id.* 158.)

[3] Kory had experience using his Herbert's tractor. Although Herbert stated that the Clark family were "[n]ot really" close, (see *id.* 121, 45:24–25), Wade and Kory would sometimes perform "farm chores", (see *id.* 229, at ¶ 4), simply to help out their grandfather. (*Id.* 188–189.) Kory never had an agreement with Herbert for what farm chores he needed to accomplish. (*Id.* 188, 69:18–21.) Likewise, Kory did not expect nor was he ever "paid cash" for his chores. (*Id.* 174, 14:03; 188, 71:17–20.) Herbert did allow Kory to fill up his pickup a few times a year from a gas tank on Herbert's farm, but Kory is not certain if he received the free gas on account of helping Herbert. (*Id.* 188:01–11.) To be certain, Kory never received a w-2 for the free gas fill ups, and no one ever told Kory that he was an employee at Herbert's farm. (*Id.* 174, 14:01–13; 189, 72:01–10.)

[4] At 4:00 a.m., Kory arrived at Herbert's farmstead and started Herbert's tractor with the intention to return to Wade's stranded vehicle. (*Id.* 181, 43:14–17; 182, 45:10–15.) Kory did not tell Herbert. (*Id.* 182, 45:16–18.) After leaving Herbert's private property, the tractor stalled in the middle of 85th Street Northwest ("85th Street"). (*Id.* 182, 47:18–24.) Kory left the tractor on that public road, walked back to Herbert's farmstead, and then drove his pickup back to Wade's vehicle. (*Id.* 183, 49:04–15.) Wade then told Kory, a high school senior, to go back home because Kory had school the next morning. (*Id.* 183, 50:01–08.)

[5] At 7:15 a.m., Rita Fred was driving west on 85th Street. (*Id.* 28, ¶ 2.) Rita drove into Herbert's abandoned tractor and sustained personal injuries. (*Id.*) The North Dakota Highway Patrol conducted an investigation and acquired GPS coordinates for the location of the accident, which occurred .57 miles from Herbert's farmstead. (*Id.* 156.) The GPS coordinates put the site of the accident on 85th Street between property owned by Jane Martin and Myron and Shirley Faale. (*Id.* 158.)

[6] Rita commenced a lawsuit against Kory and Herbert with the assumption that the tractor was abandoned "for a purpose associated with family business." (*Id.* 28, ¶ 3.) Farmers provided a defense for Herbert under the terms of farm liability policy no. 32-006308-11-002-4-23 ("Herbert's Policy"). (*Id.* 31–60.) Herbert's application for farm liability insurance listed 1,280 acres of property in Bottineau County and requested additional coverage for one employee for one month a year. (*Id.* 199.) Accordingly, Herbert's Policy's Declarations page included the same 1,280 acres and "1 man months" for an employee. (*Id.* 31–32.)

[7] Farmers conducted an immediate investigation of the accident. Farmers obtained a copy of the DOT accident report. (*Id.* 156.) Including phone calls to both Herbert and Kory's father, Randy, Farmers also called Rita, who confirmed that the accident occurred on 85th Street one-half mile from Herbert's farmstead. (*Id.* 208.) Farmers also recorded a statement from Kory, who informed Farmers that he was using the tractor at 3:00 a.m. to help extricate his brother's car and that the tractor stalled a half-mile from Herbert's farmstead. (*Id.* 159–164.) Farmers also asked Kory to provide any further, important information, but Kory could not think of anything. (*Id.* 164.) As a result, Farmers sent a notice of denial of coverage letter to Kory explaining that "there is no coverage for you

under your grandfather's farm liability policy" because "you do not qualify as an insured." (*Id.* 103–05.)

LAW AND ARGUMENT

[8] The gravamen of this appeal is whether Herbert's Policy provides liability coverage for Kory as an additional insured. "It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy." *Grzadzielewski v. Walsh Cnty. Mut. Ins. Co.*, 297 N.W.2d 780, 784 (N.D. 1980). Kory failed to fulfill this burden on both of his claims for coverage. First, Kory is not an insured because he was not on the insured location with Herbert's consent at the time the tractor stalled. Second, Kory is not an insured because he was neither a farm employee nor was he acting within the scope of any alleged employment when the tractor stalled. Therefore, Farmers had no duty to defend Kory.

[9] The North Dakota Supreme Court's de novo "standard for reviewing summary judgments is well-established" in appeals involving no genuine issues of material fact or questions of law. *Pifer Grp., Inc. v. Liebelt*, 2015 ND 150, ¶ 5, 864 N.W.2d 759.

> Interpretation of an insurance contract presents a question of law, fully reviewable on appeal. This Court independently examines and construes the insurance contract to decide whether there is coverage.
>
> > 'Our goal when interpreting insurance policies, as when construing other contracts, is to give effect to the mutual intention of the parties as it existed at the time of contracting. We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract. While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage. We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a

> contract is to be taken together to give effect to every part, and each clause is to help interpret the others.'

K & L Homes, Inc. v. Am. Family Mut. Ins. Co., 2013 ND 57, ¶ 8, 829 N.W.2d 724 (internal citations omitted and emphasis added).

I. THE CLEAR LANGUAGE OF HERBERT'S POLICY CONFIRMS THAT 85TH STREET IS NOT A PREMISES USED IN CONJUNCTION WITH FARM OR RESIDENCE PREMISES.

[10] The first issue for this Court to affirm is that Kory is not an insured because he was not on the insured location with Herbert's consent. The "insuring agreement" in Herbert's Policy provides that Farmers "will pay those sums that the insured becomes legally obligated to pay [and] will have the right and duty to defend any insured against any suit seeking those damages." (Appx. 39, 1.a.) Liability coverage is limited to suits against insureds.

[11] Under Herbert's Policy, an insured can be "any person using a vehicle on the insured location with your consent." (*Id.* 36, 13.e.) Therefore, it is necessary to consider the definition of "insured location", which provides, in relevant part, as follows:

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

(*Id.* 15.a.–c.) Kory contends that he was "on the insured location with [Herbert's] consent" when the tractor stalled because 85th Street is a "premises used by [Hebert] in conjunction with" Herbert's farm and residence premises.

A. The Plain, Ordinary Meaning of "Premises" Does Not Include 85th Street, Which Is A Ways and Means Immediately Adjoining the Insured Location.

[12] 85th Street is not a "premises" nor part of the insured location but rather a ways and means immediately adjoining the insured location. Herbert's Policy does not define premises. "If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract", *K & L Homes, Inc.*, 2013 ND 57, at ¶ 8, and "[w]e often turn to the dictionary definition to determine the plain, ordinary meaning of that term." *Dundee Mut. Ins. Co. v. Marifjeren*, 1998 ND 222, ¶ 14, 587 N.W.2d 191. When previously interpreting "insured location", this Court refused to "strain the dictionary definition of an undefined term to provide coverage." *See Farmers Union Mut. Ins. Co. v. Decker*, 2005 ND 173, ¶ 10, 704 N.W.2d 857.

[13] According to the same dictionary that Kory relied upon in paragraph 18 of his brief, the definition of "premises" is "[a] house or building, along with its grounds." Black's Law Dictionary 1199 (7th ed. 1999). Herbert's Policy similarly defines "residence premises" as "your principal residence and the grounds and structures appurtenant to it." (Appx. 38, 24) (emphasis added). Likewise, "insured location" also includes "part of other premises, or of *other* structures and grounds, that is used by you as a residence." (*Id.* 37, 15.b.) (emphasis added). Reference to "other" types of "structures and grounds" logically suggests that the preceding use of "premises" also refers to structures and grounds. Public roads are not structures and grounds.

[14] Moreover, when construing Herbert's Policy as a whole to give meaning and effect to each clause, it is entirely clear that 85th Street is not part of the insured location. Recall that the definition of "insured also means any person using a vehicle on the

insured location with your consent." (*Id.* 36, 13.e.) A vehicle operator does not require Herbert's consent to be on 85th Street. Similarly, med-pay coverage is limited to those who are "on the insured location with the permission of an insured." (*Id.* 45, 1.b.(1)). Like any other vehicle operator, Rita did not need anyone's "permission" to be on 85th Street.

[15] Further, Herbert's Policy contains a motor vehicle exclusion with an exception for "motorized land conveyance[s] designed for recreational use off public roads" used "on an insured location". (*Id.* 41, 2.e.(c)). A case championed by Kory, *Hudnell v. Allstate Insurance Company*, 945 P.2d 363, 365–67 (Ariz. Ct. App. 1997), interpreted the same exception in light of whether a public road was "premises used in connection with the residence premises." *Hudnell* recognized that "to hold, as the trial court did, that 'insured premises' includes public roads when the policy specifically limits coverage to vehicles not intended for use on public roads renders the exception meaningless." 945 P.2d at 367.

[16] Consequently, Kory is unable to offer substantive arguments regarding the clear language of Herbert's Policy. Yet, he does suggest that "premises" does not require the presence of any structures because "vacant land" necessarily cannot have buildings on it. Vacant land is not the same as premises, however. Farmers has not argued that vacant land require the presence of buildings; it merely explained that the definition of "premises" means grounds and structures. Kory's other textual argument is that only section 25 would be included in the insured location if "premises" required the presence of buildings. This is also incorrect. "Insured location means farm premises (including grounds and private approaches) and residence premises shown in the Declarations."

(Appx. 37, 15.a.) The word "farm" modifies "premises", and the Declarations clearly lists all of the 1,280 total farm acres. (*Id.* 31.)

[17] In reality, 85th Street is a ways and means immediately adjoining the insured location. Herbert's Policy separately defines "insured location" and "ways and means immediately adjoining" so as to make the terms mutually exclusive.

> Ways and means immediately adjoining means the shortest or most direct reasonable **route *between insured locations***.

(*Id.* 38, 26) (emphasis added). This definition limits ways and means immediately adjoining to only those "route[s] *between* insured locations." Kory even agrees that 85th Street was used "to travel *between* most of the sections of land" because it "connects the farm premises with each other and with the residence premises." (Kory's Br. at ¶¶ 23–24.) In other words, 85th Street is a ways and means because it is a "direct reasonable route between insured locations". If Kory was merely "between insured locations" when the tractor stalled, he could not also "be on the insured location" at the same time. *See Floyd v. Pilot Life Ins. Co.*, 135 So. 2d 546, 548 (La. Ct. App. 1961) (holding that coverage location "between home and school" in insurance policy referred to "space that separates home and school"). This relationship also necessarily indicates that if 85th Street *is not* an "insured location" it *is not* "premises used in conjunction with" the farm or residence premises.

[18] To be certain, Herbert's Policy's definition of "mobile equipment" provides proper context. In relevant part:

> 17. **Mobile equipment** means . . .
> 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**.

(Appx. 37, 17.b.(1)). The definition uses a semicolon before the disjunctive "or" to separate insured location from ways and means immediately adjoining. This punctuation "clearly creates two distinct and independent phrases." *State* ex rel. *Stenehjem* v. *FreeEats.com, Inc.*, 2006 ND 84, ¶ 14, 712 N.W.2d 828. Thus, this definition contemplates two distinct and independent locations: the insured location and the most direct reasonable route between insured locations.

[19] In fact, Herbert's Policy's distinction between "insured location" and "ways and means immediately adjoining" fits comfortably within the custom and usage of farm liability policies in the insurance industry. "[T]he phrase 'ways immediately adjoining' in a policy contemplates . . . the public roads and highways which immediately adjoin the policyowner's private premises." *Ins. Co. of N.A. v. Greene*, 373 F.2d 526, 526 (9th Cir. 1967) (per curiam). For example, in *Dundee Mutual Insurance Company v. Balvitsch*, this Court analyzed a farm liability policy's exclusion for "'use of automobiles while away from the insured premises or the ways immediately adjoining' the premises." 540 N.W.2d at 610, 611 (N.D. 1995). In *Balvitsch*, an accident occurred "at the intersection of State Highway 200 and a township road adjoining the Balvitsches' farm." *Id.* at 610. This Court "agree[d]" that the accident occurred "at the intersection of ways immediately adjoining Balvitsches' farm" rather than on the insured premises. *Id.* at 611.

[20] Therefore, the clear language of Herbert's Policy did not intend to include 85th Street within the definition of insured location. If it did, Herbert's Policy could have simply included "Ways and means immediately adjoining" along with the nine other subparts in the definition of "insured location". The definition of insured location also

could have included "public roads used in conjunction with" the farm or residence premises. That is not what Herbert's Policy says, however, and this Court "will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage." *K & L Homes, Inc.*, 2013 ND 57, at ¶ 8. Herbert's Policy is unambiguous and the inquiry can stop here.

B. Persuasive Authority Confirms that Premises Generally Refer to A Privately Owned, Geographically Defined Area Rather than Public Roads.

[21] Consideration of persuasive authority confirms Farmers' interpretation of the clear language of Herbert's Policy. In fact, one other case previously held that public roads are not "premises" under an identical farm liability policy. Other courts generally conclude that "premises used in conjunction with" implies the presence of a privately owned, geographically defined area. Despite those cases, and the clear language of Herbert's Policy, Kory relies on inapposite cases with markedly dissimilar policy language.

[22] Initially, there fortunately is one case involving substantially similar facts that construed policy language identical to Herbert's Policy. *See Ind. Ins. Co. v. Dreiman*, 804 N.E.2d 815 (Ind. Ct. App. 2004). In *Dreiman*, a farmer's grandson was operating a vehicle not licensed for public roads but was used for farm-related work. 804 N.E.2d at 817. Not engaged in farm work, the grandson was traveling on a public road "between the two farm" premises and caused an accident. *Id.* The grandson argued that the public road fell within the definition of "insured location" because it was "premises used by you in *conjunction with* the farm and residence premises." *Id.* at 819 (emphasis in original). After quoting multiple dictionary definitions of "premises", the court held that "[n]either

the definitions nor the context of the policy supports a determination that a public roadway constitutes '*premises* used in conjunction' with the Dreimans' farming operation." *Id.* at 820 (emphasis in original).

[23] In his attempt to distinguish the only apposite case before this Court, Kory argues at length that *Dreiman* improperly relied on *Hudnell v. Allstate Insurance Company*. A case involving coverage under a homeowner's policy, *Hudnell* reasoned that "premises used in connection with the residence premises" did not include public roads under homeowner's policies because coverage on public roads would blend the distinction between homeowner's and auto policies. 945 P.2d 363, 366–67. Kory, therefore, argues that because Herbert's Policy is not a homeowner's policy, the reasoning of the *Hudnell* decision, as adopted by *Dreiman*, is not instructive. (Kory's Br. at ¶ 19.)

[24] Yet, Kory's attempt to distinguish *Dreiman* is unsound for two reasons. First, Kory even admits "that farm liability policies are essentially homeowners' policies." (*Id.* at ¶ 28.) Just like the policies in *Hudnell* and *Dreiman*, Herbert's Policy contains a motor vehicle exclusion with the same exception. (*See supra*, ¶ 15.) Thus, the logic that informed *Hudnell*'s and *Dreiman*'s interpretation of "premises used in conjunction with" applies just as equally to Herbert's Policy.

[25] Second, Kory also neglected to point out that *Dreiman* placed emphasis on the fact that the insured had no right to "exercise control over the country road" so "there would be no reason to include the road in their farm liability insurance coverage." 804 N.E.2d at 820–21. "The plain ordinary meaning of the term 'premises' does not encompass a public roadway." *Id.* at 821. "Insurance companies issuing farm liability

policies wish to avoid insuring the risks attendant to motor vehicles driven on public roads." *Decker*, 2005 ND 173, at ¶ 24 (Maring, J., dissenting).

[26] Like *Dreiman*, a common theme amongst courts considering the location of "premises used in conjunction with" is the concept of control or private ownership. *See, e.g.*, *Erie Ins. Exchange v. Szamatowicz*, 597 S.E.2d 136, 138–39 (N.C. Ct. App. 2004) (warehouse for hosting birthday parties); *Daire v. S. Farm. Bureau Cas. Ins. Co.*, 143 So. 2d 389, 391 (La. Ct. App. 1962), superseded by La. Stat. 9:2791 (building for fishing camp); *see also Employers' Liab. Assur. Corp. v. Enos Coal Corp.*, 457 F.2d 402, 403 (7th Cir. 1972) (detour roadway "rented or controlled by" insured but "leav[ing] open the question of whether a public highway may be controlled by a private person"). "It is not surprising, therefore, 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." *Nationwide Mut. Fire Ins. Co. v. Jones*, 695 F. Supp. 2d 978, 981–85 (D. Ariz. 2010).

[27] Yet, Kory offers a potpourri of inapposite cases to suggest that 85th Street is a "premises". His case law is inapposite because it involved coverage actions that construed markedly dissimilar policy language. *See, e.g.*, *Tri-State Ins. Co. of Minn. v. Commercial Group W., LLC*, 2005 ND 114, ¶ 19, 698 N.W.2d 483 (ignoring proffered case law if the "operative language" of the other insurance policy "is different from the language" in the policy before this Court); *Hoff v. Minn. Mut. Fire & Cas.*, 398 N.W.2d 123, 126 n.1 (N.D. 1986).

[28] First, among other reasons,[1] Kory's citations to two cases from the same New York court are unavailing because the policies contained different operative language. *See McLaughlin v. Midrox Ins. Co*, 894 N.Y.S2d 648 (App. Div. 2010); *Nationwide Mut. Ins. Co. v. Erie & Niagara Ins. Assoc.*, 672 N.Y.S.2d 596 (App. Div. 1998). The definition of "insured premises" in *Nationwide* and *McLaughlin* included "premises used by you in connection with the described location", the "ways immediately adjoining", and "other land you use for farming purposes." 894 N.Y.S2d at 650; 672 N.Y.S.2d at 597. The New York cases involved accidents that occurred when insureds were traveling between two separate tracts of farm premises during the course of farming operations. *See McLaughlin*, 672 N.Y.S.2d at 650; *Nationwide*, 672 N.Y.S.2d at 597. After quoting the policies' definition of farming that included "all necessary operations", the courts reasoned that traveling on the public road from one farm premises to another was a "necessary operation" for farming. *McLaughlin*, 672 N.Y.S.2d at 650; *Nationwide*, 672 N.Y.S2d at 597–98

[29] Here, as pointed out in paragraph 17, Herbert's Policy did not include ways immediately adjoining within the definition of insured location. Likewise, Herbert's Policy does not include "other land" for "necessary operations" in its definition of insured location. What is most damaging to Kory's position, however, is that when confronted with whether the accident occurred on the "insured premises" under the "premises used in connection with" language, the *McLaughlin* court cited *Nationwide* and "conclude[d] that the accident occurred on the 'insured premises' within the meaning of one or more of the policy's alternative definitions of that phrase." 894 N.Y.S.2d at 651.

[1] The *Nationwide* decision was also based on the fact that the insurer's underwriting manager "admitted that the accident was a covered occurrence." 672 N.Y.S.2d at 598.

[30] For the same reason, Kory's reliance on *Kurtenbach* is also misplaced. *See Farm Bureau Mut. Ins. Co., Inc. v. Kurtenbach* ex rel. *Kurtenbach*, 961 P.2d 53 (Kan. 1998). *Kurtenbach* addressed whether there was coverage under a farm liability policy for a motorcycle accident on a public road when the insured "was using the motorcycle for farming operations at the time of the accident" and when "it was a necessary part of farming operations to drive the motorcycle across the highway to access that part of his farm on the other side." 961 P.2d at 55. Unlike Herbert's Policy, Kurtenbach's policy's definition of farming included "all necessary operations." *Id.* at 57. Therefore, *Kurtenbach* found coverage because "traveling across" the public road "was a necessary operation to access rented property of the insured in his farming operation." *Id.* at 57–58. Yet, even the *Kurtenbach* Court agreed that "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." *Id.* at 57.

[31] Additionally, Kory cites two other cases to suggest that "premises" does not require the presence of structures. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Coleman*, 204 F. Supp. 713, 721 (W.D. Ark. 1962) (marina with "structures designed to service boats"); *State Farm Fire & Cas. Co. v. MacDonald*, 850 A.2d 707, 711 (Pa. Super. Ct. 2004) (trail starting and ending on residence but crossing into neighbor's property). Kory's reliance on these cases is questionable considering that *Coleman* recognized the presence of "structures" that serviced boats next to the marina and that *MacDonald* considered an ATV trail that started and ended on premises where the insured's home was located.

[32] In summary, other jurisdictions generally conclude that "premises" contemplates a privately owned and geographically defined area rather than public roads.

C. The Accident Did Not Occur on the Farm Premises.

[33] After arguing at length that 85th Street is premises used in conjunction with the farm premises, Kory later amends his position to assert that the accident occurred on the "farm premises". (Kory's Br. at ¶ 27.) In doing so, he incorrectly implies that Herbert owned section 26 and the part of 85th Street that was located on the section line between sections 26 and 35. According to multiple statements of Kory, the accident occurred a half mile west of Herbert's residence. (Appx. 159; 166, ¶ 14.) The GPS coordinates in the NDHP crash report also confirm that the location of the accident was 0.57 miles west of Herbert's residence. (*Id.* 156.) Herbert did not own the land on either side of 85th Street at this point, the accident occurred between property owned by Jane Martin and Myron and Shirley Faale. (*Id.* 158.)

D. The Purpose and Design of Farm Liability Policies Do Not Support Coverage for a Non-Insured's Use of A Tractor off of the Insured Location.

[34] Kory also contends that this Court should consider the type of policy at issue when ruling on coverage because the dictionary definition of premises "conflicts the purpose and design of the farm policy." (Kory's Br. at ¶¶ 18, 28–29.) In doing so, Kory explains that family farms are the norm in North Dakota by referencing a case where this Court held that a son who was working on his father's farm was not a farm employee. *See Ctr. Mut. Ins. Co. v. Thompson*, 2000 ND 192, 618 N.W.2d 505. Kory also cites to an article explaining that North Dakota Farmers Union, which is a separate corporation from Farmers, has advocated against corporate farming. (Appx. 228.) North Dakota

Farmers Union is part of a national organization that advocates on behalf of non-corporate farmers, and its advocacy has no relationship with the clear language of Herbert's Policy.

[35] Thereafter, Kory incorrectly extrapolates Farmers' interpretation of the clear language of Herbert's Policy by suggesting that it would "result in extremely limited coverage" for Kory. (Kory's Br. at ¶¶ 28–29.) This is not true. Farmers has never taken the position that family members cannot be farm employees as a matter of law. Instead, as explained in paragraphs 42–44, Kory failed to fulfill his burden to show that he was a farm employee on January 14, 2010. Additionally, had Kory actually been bailing hay, fixing fences, spraying CRP fields, or feeding cows, he would have been on the insured location. Family members working on farms are necessarily acting within the scope of employment and, most often times, are on the insured location while working. Had Kory been using the tractor in pursuit of any of these activities, the circumstances before this Court obviously would be different. "Courts should not, however, give advisory opinions or answer moot, abstract, theoretical, academic, hypothetical, or speculative questions." *Wilhite v. Cent. Inv. Props.*, 409 N.W.2d 348, 355 (N.D. 1987).

[36] In reality, Kory's case is unique. Kory admits that he "was not performing any act directly related to farming." (Kory's Br. at ¶ 33.) Instead, Kory took someone else's tractor at 4:00 a.m. in the dead of winter to assist his brother whose vehicle was standard over a dozen miles away from the insured's farmstead.

[37] Simply put, Kory's belief that a farm liability policy provides amorphous coverage over an indefinite amount of public roads is the ultimate shortcoming in his argument. Other jurisdictions routinely dismiss arguments that "premises used in

conjunction with" can include indefinite areas without regard for concrete geographical scope. *See, e.g., Jones v. Horace Mann Ins. Co.*, 937 P.2d 1360, 1364 (Alaska 1997) (excluding "public road four-tenths of mile from their residence" because of "no logical geographical limit"); *Mass. Prop. Ins. Underwriting Assoc. v. Wynn*, 806 N.E.2d 447, 451 (Mass. Ct. App. 2004) (excluding beach 500 feet from residence because it "would render the definition of 'insured location' meaningless and provide no discernable geographical limit to coverage'). In fact, the one paragraph Supreme Court of Michigan order upon which Kory relies to suggest that "premises" is an "elastic and inclusive term" that is "dependent on the circumstances", noted that premises "may mean a room, shop, building, *or a definite area*." *Fremont Ins. Co. v. Izenbaard*, 820 N.W.2d 903, 903 (Mich. 2012) (emphasis added).

[38] Kory attempts to resolve this shortcoming by suggesting that the probability of coverage will decline as the occurrence becomes more remote from the residence. (Kory's Br. at ¶ 22.) This interpretation is a patent attempt to "strain the dictionary definition of an undefined term to provide coverage." *Decker*, 2005 ND 173, at ¶ 10. Kory's strained interpretation of Herbert's Policy creates more questions than answers. For example, if Herbert regularly drove his tractor to Minot for servicing at a tractor equipment store, is all of Highway 83 included within insured location? Likewise is 85th Street's inclusion in the definition of insured location limited to Lewis Township, Bottineau County, or the entire state of North Dakota? At some point, 85th Street is no longer "premises used in conjunction with", but where—one, two, or maybe two-and-a-half miles from the farmstead?

[39] Confronted with a similar liability coverage issue, the Supreme Court of Iowa denied coverage and stated that:

> [t]he fact that Wendell Sandbulte was traveling *between two separate tracts of the insured premises in connection with farm business* does not change the result. If we were to hold that, in effect, the entire *farming operation* is a single, monolithic unit, so as to include the *roadways between* . . . the practical effect would be to make such a policy virtually open-ended in view of the extensive travel in modern farming practices.

Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 109 (Iowa 1981) (emphasis added). "To hold that the policy covered all accidents caused by insured's automobiles while *used in connection with the farm* on all highways necessarily traveled in going from one part of the farm to another would give to it a meaning clearly not intended." *Connolly v. Standard Cas. Co.*, 73 N.W.2d 119, 121 (S.D. 1955) (emphasis added).

[40] In conclusion, this Court should affirm the district court's correct interpretation of the clear language of Herbert's Policy. The clear language, aided with persuasive authority, confirms that 85th Street cannot be part of the insured location because it is a ways and means immediately adjoining the insured location.

II. KORY WAS NOT A FARM EMPLOYEE NOR WAS HE ACTING WITHIN THE SCOPE OF ANY ALLEGED EMPLOYMENT AT THE TIME OF THE ACCIDENT.

[41] The second issue for this Court to affirm is that Kory is not an insured because he was not a farm employee nor was he acting within the scope of any alleged employment when the tractor stalled. Herbert's Policy explains that his employees are "insureds" under the following limited circumstances:

> 13. **Insured** . . . .

> b. **Insured** also means any of your employees . . . but only for acts that:
> (1) Cause **bodily injury** or **personal injury** . . . ; and
> (2) Are within the scope of the employee's employment by you . . . .

(Appx. 36, 13.b.) Kory is not an additional insured as a farm employee because he failed to meet his burden of proving that he had an employment contract with Herbert and that he was acting within the scope of any alleged employment at 4:00 a.m. on January 14, 2010.

A. Even When Viewed in A Light Most Favorable to Kory, the Undisputed Facts Confirm that Kory Was Not A Farm Employee.

[42] Herbert's Policy does not define employee. This Court has held that that a farm employee "relationship is based on a contract" requiring consideration. *See Thompson*, 2000 ND 192, at ¶ 17. In *Thompson*, this Court affirmed a trial court's finding that a farmer's son was not a farm employee when the son was merely "expected" to work without a "contractual arrangement" or w-2 even though the son received "spending money" and had access to family vehicles. *Thompson*, 2000 ND 192, at ¶¶ 22–23.

[43] Thus, from a preliminary standpoint, Kory has the burden to show that he had an employment contract with his grandfather. Yet, Herbert retired long before January 14, 2010. (Appx. 113, 16:15–18; 203, ¶ 13.) Herbert further testified that Kory was not working at the farm during January 2010. (*Id.* 121, 47:07–10.) Kory concedes that he "never had an official agreement with [his] grandfather", but that Kory performed various "farm chores" to help out his grandfather. (*Id.* 188, 69:18–21; 195–198; 202–206; 229, ¶ 4.) Kory's father testified that "it was not mandatory" for Kory to work at the farm. (*Id.* 204, ¶ 16.) On the balance, Kory never expected to be paid for the chores he performed at Herbert's farm. (*Id.* 188, 71:17–21.) Indeed, Kory "never got paid cash" nor did he

receive a W-2. (*Id.* 174, 14:01–13.) There is no evidence of a contract for consideration, and this matter is no different than the facts in *Thompson*.

[44] At most, there was a non-binding illusory contract. *See Harrington v. Harrington*, 365 N.W.2d 552, 555 (N.D. 1985). It is also immaterial that Kory's father allegedly provided "food, clothing, and shelter" to Kory for doing chores at Herbert's farm because the material question is whether Kory was *Herbert's* farm employee under *Herbert's* Policy. (Appx. 196, ¶ 6.) In response to mere assertions of employment, "a court may conclude that a contract does not exist as a matter of law where the evidence does not support a reasonable inference that the requisites for a contract have been met." *Pratt v. Heartview Found.*, 512 N.W.2d 675, 677 (N.D. 1994).

B. Even if He Was A Farm Employee, Kory's Use of the Tractor Was Not Within the Scope of Any Alleged Employment.

[45] The district court's holding that Kory was not a farm employee necessarily implies that Kory was not acting within the scope of any alleged farm employment at 4:00 a.m. on January 14, 2010. Therefore, even if this Court could find that Kory was a "farm employee", Kory still has the burden to show that he was acting within the scope of that employment when the tractor stalled on 85th Street. "When the evidence concerning the question of whether or not an employee was in the course of his employment at the time of the accident is such that reasonable minds could draw but one conclusion therefrom then it becomes a matter of law for the court to pass on." *Hoffer v. Burd*, 49 N.W.2d 282, 285 (N.D. 1951).

[46] Here, Kory's concession that he "was not performing any act directly related to farming" on January 14, 2010 should end the inquiry. (Kory's Br. at ¶ 33.) Kory's single argument that he was acting within the scope of employment was that he "conferred a

benefit upon Herbert" based upon speculation that Wade "*may* have been feeding cattle that week" and that Wade "*could* have been prevented from performing his duties at the farm" had Kory not tried to assist him. (*Id.*) Kory's actions did not confer a benefit upon Herbert, they resulted in a lawsuit against Herbert. (Appx. 167, ¶ 21.)

[47] More importantly, "mere speculation is not enough to defeat a motion for summary judgment", *Iglehart v. Iglehart*, 2003 ND 154, ¶ 10, 670 N.W.2d 343, and "conclusory allegations, speculation or a scintilla of evidence are not enough to preclude summary judgment." *Riverside Park Condominiums Unit Owners Ass'n v. Lucas*, 2005 ND 26, ¶ 23, 691 N.W.2d 862. To the extent Kory's speculation is true, Herbert's Policy's coverage for one employee, in this case Wade, belies any assertion that Kory was also his employee. (Appx. 32.)

[48] In conclusion, this Court should affirm the district court because no juror would ever conclude that Kory was acting within the scope of any employment with his retired grandfather at 4:00 a.m. on a school night when Kory was simply helping pull his brother's car out of a ditch.

III. FARMERS DOES NOT HAVE A DUTY TO DEFEND KORY, WHO WAS NOT AN INSURED UNDER HERBERT'S POLICY.

[49] The third issue for this Court to affirm is that Farmers did not have a duty to defend a non-insured under Herbert's Policy. On summary judgment, district courts are not required to make any determination other than its order for judgment. The district court's determination that Kory was not an insured absolved Farmers from any duty to defend. *See Midwest Cas. Ins. Co. v. Whitetail*, 1999 ND 133, ¶ 14, 596 N.W.2d 341 (holding that a determination that the defendant is not an insured "would absolve" the insurer "from any duty to defend").

A. District Courts Are Not Required to Make Factual Determinations When Ruling on A Motion for Summary Judgment.

[50] Kory incorrectly argues that the district court erred due to its "failure to make any determinations whatsoever with regard to the claim for breach of the duty to defend." (Kory's Br. at ¶ 37.) A district "court is not required to state findings of fact or conclusions when ruling on a motion under Rule 12 or 56." N.D.R.Civ.P. 52(a)(3); *see also Anderson v. Zimbelman*, 2014 ND 34, ¶¶ 23–24, 842 N.W.2d 852. After explaining that "[n]o findings of fact are required for a summary judgment", this Court clarified that "making of findings for summary disposition implies disputed facts that would compel a trial or hearing." In re *T.H.*, 482 N.W.2d 615, 620–21 (N.D. 1992).

B. Farmers Does Not Have A Duty to Defend Strangers to Herbert's Policy.

[51] An insurance carrier's duty to defend only applies to its insureds. This Court "has outlined the parameters of an insurer's duty to defend:

> A liability insurer's obligation to defend its **insured** is ordinarily measured by the terms of the insurance policy and the pleading of the claimant who sues the **insured**. If the allegations of the claimant's complaint could support recovery upon a risk covered under the insurer's policy, a liability insurer has a duty to defend its **insured**. We have formulated the duty to defend to require a liability insurer to defend an underlying action against its **insured** if the allegations in the complaint give rise to potential liability or a possibility of coverage under the insurance policy.

Tibert v. Nodak Mut. Ins. Co., 2012 ND 81, ¶ 30, 816 N.W.2d 31 (emphasis added).

[52] Accordingly, "a duty to defend arises only if the conditions precedent to the policy . . . are met." *Employers Reinsurance Corp. v. Landmark*, 547 N.W.2d 527, 533 (N.D. 1996). A universal "condition precedent" is that "there must be a 'suit' against the insured." *Hart Const. Co. v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 384, 389 (N.D.

1994). A liability insurer "has neither a duty to defend nor to indemnify" a defendant who "is not an insured under the policy." *Whitetail*, 1999 ND 133, at ¶ 11.

[53] Therefore, "[i]t is axiomatic that 'before the general principle regarding the duty to defend applies, it must be shown that the person claiming coverage is, in fact, an *insured*.'" *U.S. Exp., Inc. v. Intercargo Ins. Co.*, 841 F. Supp. 1328, 1335 (E.D.N.Y. 1994). One treatise has explained as follows:

> [a]n insurer has imposed on itself a contractual duty to defend its insureds against suits alleging facts that, if proved, would constitute a risk insured against under the provisions of the policy. It has not imposed on itself a duty to defend a complete stranger to the contract. Several courts, therefore, have held that the insurer is not obligated to provide a defense for a stranger merely because the plaintiff alleges facts that, if true, would make the stranger an additional insured as defined in the policy. They have instead allowed the insurer to avoid providing a defense, if extrinsic evidence demonstrates that the plaintiff's allegations are untrue, and that the defendant is not an insured.

Alan D. Windt, 1 *Ins. Claims & Disputes* § 4.5 (4th ed. 2003). "The status of 'insured' is to be determined by the true facts, not false, fraudulent or otherwise incorrect facts that might be alleged by a personal injury claimant." *Blue Ridge Ins. Co. v. Hanover Ins. Co.*, 748 F. Supp. 470, 473 (N.D. Tex. 1990); *see also, e.g., Butler v. Maryland Cas. Co.*, 147 F. Supp. 391, 395 (E.D. La. 1956); *Keithan v. Mass. Bonding & Ins. Co.*, 267 A.2d 660, 667 (Conn. 1970); *Nateman v. Hartford Cas. Ins. Co.*, 544 So. 2d 1026, 1027 (Fla. Ct. App. 1989). "It is the insured who is entitled to trust that his insurer will defend him against all covered claims, meritorious or not. A stranger to the policy neither needs nor should expect this benefit." *Weingarten Realty Mgmt. Co. v. Lib. Mut. Fire Ins. Co.*, 343 S.W.2d 859, 865 (Tex. Ct. App. 2011).

[54] For example, the sufficiently analogous case of *Randi v. General Insurance Company of America*, 995 F. Supp. 601 (D. Md. 1998) explains a liability insurer's

obligation with respect to a stranger to the policy. In *Randi*, a plaintiff sued Randi and an organization alleging defamation by Randi while Randi was acting "as a duly authorized actual and/or apparent agent, servant, employee, and/or representative" of the organization. 955 F. Supp. at 601–02. In reality, Randi was not acting within the scope of his employment, and the organization's liability insurer denied coverage for Randi. *See id.* at 603. Although Randi commenced a coverage action against the organization's liability insurer, the federal court held that an insurance policy could not be reasonably construed in a manner that forces a liability insurer's "acceptance of the fact that false or groundless allegations might suffice to turn a stranger to the Policy into an insured." *Id.* at 604.

[55] Here, extrinsic evidence demonstrated that Rita's allegation that the tractor was abandoned "for a purpose associated with family business" was untrue, and that Kory was not an insured. (Appx. 28, ¶ 3.) Farmers obtained a copy of the DOT accident report, which provided GPS coordinates confirming that the accident occurred away from the insured location. (*Id.* 156.) Including phone calls to both Herbert and Kory's father, Randy, Farmers also called Rita, who confirmed that the accident occurred on 85th Street one-half mile from Herbert's farm. (*Id.* 208.) In his recorded statement to Farmers, Kory stated he was using the tractor at 3:00 a.m. to help extricate his brother's car. (*Id.* 159–164.) Kory obviously did not imply that he was within the scope of any alleged employment because that would not have been true. When given the opportunity to inform Farmers of any other important information, Kory could not think of anything. (*Id.* 164.) The extrinsic evidence clearly established that Kory was not on the insured

location nor was he acting within the scope of any employment at the time of the accident.

[56] Here, the use of extrinsic evidence to confirm whether a defendant is an "insured" under a liability policy appears to be an issue of first impression before this Court. However, an insurance carrier's effort to investigate a claim before making a determination on its duty to defend fits within this Court's jurisprudence. Our district courts "do not operate in a vacuum." *Oh. Cas. Ins. Co. v. Clark*, 1998 ND 153, ¶¶ 8–10, 583 N.W.2d 377 (N.D. 1998) ("conclud[ing] that trial court did not err in looking beyond the face of the complaint to determine . . . duty to defend"). "[T]he duty to defend does not depend on the nomenclature of the claim" because "relabeling" a defendant's conduct "does not alter its true nature." *Nodak Mut. Ins. Co. v. Heim*, 1997 ND 36, ¶ 31, 559 N.W.2d 846; *see also*, *Oh. Cas. Ins. Co. v. Horner*, 1998 ND 168, ¶ 13, 583 N.W.2d 804 (stating that "[r]egardless of how" a plaintiff's "lawyer characterized" an defendant's "conduct in the complaint, the underlying nature of that conduct would be the same").

[57] However, Kory raises two general arguments to suggest that Farmers had a duty to defend Kory based upon a notice of denial of coverage letter and two notations in a claims log. (Kory's Br. at ¶ 35.) The denial of cover letter is crystal clear: "there is no coverage for you under your grandfather's farm liability policy" because "you do not qualify as an insured under this policy." (Appx. 103–105.) Herbert's Policy's language speaks for itself. It simply follows that if Kory was not an insured then he was neither on the insured location nor acting within the scope of any employment. No further explanation is necessary.

[58] Thereafter, Kory references two notations in the claim log were an adjuster further mentioned the coverage issue, but even those notations reached the conclusion that "we have no coverage" under Herbert's Policy and that the "motor vehicle exclusion would apply" to preclude coverage under Kory's father's homeowner's policy. (Appx. 210, 225.) Kory even concedes that coverage under his father's policy "was not pursued on this appeal." (Kory's Br. at ¶ 36.) This Court "do[es] not decide issues which are not appealed." *Buegel v. City of Grand Forks*, 475 N.W.2d 133 (N.D. 1991).

[59] Here, the district court clearly determined Farmer's duty to defend when it provided as follows:

> Kory Clark has not sustained his burden of proving that he is an insured under the farm liability policy owned by Herbert Clark. The Court declares as a matter of law that Farmer's Union does not have a duty to defend or indemnify Kory Clark in the action maintained by Rita Fred under the farm liability policy.

(Appx. 236.)

[60] In summary, this Court should affirm the district court's aforementioned order. Issues I and II are dispositive of Issue III. Kory was neither on the insured location nor was he acting within the scope of any alleged employment when Herbert's tractor stalled. Kory is not an additional insured, he is a stranger to Herbert's Policy. Therefore, Farmers does not have a duty to defend or indemnify Kory.

CONCLUSION

[61] For all the foregoing reasons, Farmers respectfully requests that this Court affirm the district court's order for summary judgment and entry of judgment.

Dated this 28th day of September, 2015

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

STATE OF NORTH DAKOTA)
:SS
COUNTY OF BURLEIGH)

Kelsey Schaaf, being first duly sworn upon oath, deposes and says that she is a legal assistant in the office of Schweigert, Klemin & McBride, P.C., Attorneys at Law, 116 North 2nd Street, P.O. Box 955, Bismarck, North Dakota, 58502-0955; that on the 28th day of September, 2015, she served the attached:

Brief of Appellee Farmers Union Mutual Insurance Company; Affidavit of Service; and Check No. 22320 for $25.00 (U.S. Mail only)

on the following person by placing a copy thereof in envelopes properly addressed as follows:

Penny L. Miller
Clerk of the Supreme Court
State Capitol
600 East Boulevard Avenue
Bismarck, ND 5805-0530

which address is the last address of said party known to her, and the envelope with postage prepaid was deposited by her in the United States Mail at Bismarck, North Dakota, for delivery by the United States Post Office Department as directed by said envelope, and by sending true and correct copy of the same via e-mail transmission from the offices of Schweigert, Klemin & McBride, PC to the following e-mail address(es):

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Kelsey Schaaf

Subscribed and sworn to before me this 28th day of September, 2015.

(SEAL)

TYLER J. SIEWERT
Notary Public
State of North Dakota
My Commission Expires Nov. 7, 2017

Notary Public
State of North Dakota