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OCTOBER 15, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

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

DISTRICT COURT FOR THE COUNTY OF BURLEIGH, NORTH DAKOTA

HONORABLE BRUCE B. HASKELL, PRESIDING

REPLY BRIEF OF APPELLANT KORY CLARK

Respectfully submitted this 15th day of October, 2015.

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

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LAW AND ARGUMENT

I. Introduction.

[¶1] Appellant Kory Clark ("Kory") submits this Reply Brief in response to some of the arguments presented by Appellees Farmers Union Mutual Insurance Company ("Farmers") and QBE Americas, Inc. ("QBE")

II. The Term "Premises" Includes the Part of 85th Street Where the Accident Occurred.

[¶2] The Farm Liability insurance policy extends coverage for "any person using a vehicle on the insured location with your consent, provided this insurance applies to the vehicle." The term "insured location" is defined in pertinent part as the "farm premises (including grounds and private approaches) and **residences premises** …" and "[p]remises used by you in conjunction with …" those premises. (*emphasis in original*) (A37). It is undisputed that the tractor is a vehicle to which the policy applies and that Kory used the tractor with Herbert's permission. Therefore, the two relevant issues with regard to whether or not the policy provides coverage under this provision are; does the part of 85th Street where the accident occurred fall within the term "premises" and, if it does, was it used in conjunction with the farm and residence premises.

[¶3] The cases cited in Kory's Appeal Brief demonstrate that contrary to what is argued by QBE and Farmers, the term "premises" may include areas without buildings and structures and that it encompass areas such as a public road. While QBE and Farmers submit that an overwhelming weight of authority has found that a public street does not fall within the meaning of the term premises, they cite a number of cases that do not state this conclusion. (QBE's Br. ¶ 30). In *Jones v. Horace Mann. Ins. Co.*, 937 P.2d 1360

(Alaska 1997), the court held that the accident did not occur on the "ways immediately adjoining" and therefore did not fall within the coverage of the homeowners policy. The Court did not discuss whether the public road could be considered "premises". In *Hudnell v. Allstate Ins. Co.*, 190 Ariz. 52, 945 P.2d 363 (Ct. App. 1997), that court denied coverage based on the motor vehicle exclusion and explicitly stated that none of the cases reviewed had "denied coverage solely because the accident occurred on a public street, nor did they hold that premises used "in connection with" could not include a public street". *Id*. at. 366. In *Nationwide Mut. Ins. Co. v. Gardner*, 79 Pa. D. & C. 4th 150, 162-64 (Com. Pl. 2006) the court found that interpreting "premises" to include a public road, that lead to a private road that led to the insured premises, would ignore an exclusion in the policy intended to exclude motor vehicles and that it would call upon the court to find coverage for the unlawful use of an ATV on a public road. *Id*. at 162-64. In *Shelter Mut. Ins. Co., v. Davis*, 715 N.W.2d 769 (Iowa App. 2006) the court did not discuss whether the term premises may include a public road. *Id*. at ¶ 6. *Nationwide Mut. Fire Ins. Co. v. Jones*, 695 F.Supp.2d 978 (D.Ariz. 2010) discussed at length the lack of support for the interpretation that a public road cannot be considered premises and indicated that a public road may indeed fall within the term "premises". *Id*. at 983. *Allstate Ins. Co. v. Shofner*, 573 So.2d 47 (Fla. 1990) held that the accident with an ATV was excluded under the motor vehicle exclusion of the homeowners policy. It did not discuss whether a public road falls within the term "premises". *Arrowood Indemn. Co. v. King*, 39 A.3d 713 (Conn. 2012) held that an accident with an ATV was not covered under the homeowners policy because the policy language implied that the insured needs sufficient legal interest in the insured location so that the insured has the right to grant permission to a

noninsured to enter the location. *Id*. at 194. As will be discussed further below, this holding is flawed. The court in *King* also did not hold that a public road does not fall within the term "premises". *Id*. In *Sheldon v. Zimmerman*, 2004 WL 1636575, the Michigan appellate court did hold that a public roadway did not fall within the term premises. *Id*. However, this conclusion was based solely on the dictionary definition of the word premises. *Id*. The Michigan Supreme Court overruled this type of reasoning in *Freemont Ins. Co. v. Izenbaard*, 820 N.W.2d 902 (Mich. 2012). The only case cited by QBE and Farmers involving a farm policy in which the court held that a public road could not be considered premises was *Indiana Ins. Co., v. Dreiman*, 804 N.E.2d 815 (Ind.Ct.App. 2004). This case is thoroughly discussed and distinguished in the Appeal Brief.

[¶4] The fact that the above-cited cases found that an accident which occurred on a public street was not covered under the homeowner's policy does not automatically lead to the conclusion that a public street cannot be considered to fall within the term "premises". Correlation does not equal causation. A discerning reading of the cases cited by QBE and Farmers reveals that the vast majority of those cases did not find that the term "premises" cannot include a public road. Rather, the common denominator for these cases is that the motor vehicle exclusion applied to the motor vehicles involved in the accident and that there was not a sufficient connection between the residence premises and the area where the accident occurred to fall within the definition of "insured location" in the homeowner's policy. The motor vehicle exclusion is not applicable in this case. The tractor does not fall within the motor vehicle exclusion. This case, as opposed to all cases cited by QBE and Farmers, does not require this Court to find coverage for a motor

vehicle upon which separate motor vehicle insurance should have been obtained. On the contrary, the issue to be determined in this case is the interpretation of a coverage clause, not an exclusionary clause. "Coverage clauses are construed differently than exclusionary clauses." *Grinnell Mut. Reinsurance Co. v. Employers Mut. Cas. Co.*, 494 N.W.2d 690, 693 (Iowa 1993). "When construing coverage clauses, the words … are given a broad, general and comprehensive meaning." *Id*. "Exclusionary clauses, however, require a narrow or restrictive construction." *Id*. "Therefore, it is possible for the same language to be encompassed in the coverage of an automobile policy, yet not in the exclusion of a general liability policy." *Id*. The rules of interpretation are different in this case than in the cases cited by QBE and Farmers.

[¶5] Furthermore, all but one of the cases involve homeowner's policies and find that the public road does not fall within "premises used in connection with the residence premises" or "ways immediately adjoining". The determination of what falls within these terms under the farm policy is different than under a homeowner's policy because the definition of "insured location" and the purpose of the policies are different. The cited cases, therefore, are not dispositive to the facts of the current case.

III. The Farm Policy Does not Require that the Insured Has a Legal Interest in All "Insured Locations".

[¶6] QBE and Farmers cites to *Arrowood Indemn. Co. v. King*, 39 A.3d 713 (Conn. 2012) in support of their argument that public spaces do not fall within the term "insured location" *King* concerned an accident with an ATV on a private road in a private community. The court in *King* held that the policy language "on the insured location with the permission of the insured" implied that the insured needs to have sufficient legal

interest in the insured location to have the right to grant permission to a noninsured to enter the location. *Id*. at 194. In *King* the court found that the insured did not have sufficient legal interest in the private road where the accident occurred. *Id*. QBE and Farmers argue that this reasoning should be applied to the current case and that 85th Street therefore is excluded from the "insured location". Such an interpretation does not fit the definition of "insured location" in the farm policy. The insured location is defined to include farm premises, residence premises, vacant land owned or rented, any premises not owned where the insured temporarily resides, cemetery plots, premises occasionally rented to an insured, and premises acquired during the policy period. In other words, premises owned or rented by the insured are included in the definition of "insured location". In addition, "premises used in conjunction with" farm premises and residence premises are defined as the "insured location". If the premises owned or rented by the insured already fall within the definition of "insured location" the question then becomes what "premises used in conjunction with" could possibly refer to. "Premises used in conjunction with" cannot refer to premises owned or rented, because such premises already fall within the definition of "insured location". If "premises used in conjunction with" cannot refer to premises owned or rented, then what area could possibly remain that the insured has a legal interest in sufficient to grant permission to a noninsured to enter? The reasoning in *King* does not fit the farm policy in this case and it is contrary to other cases where neighboring fields, public roads, and private tracks were held to be insured locations. *King* should therefore not be applied to the current case.

IV. "Insured Location" and "Ways and Means Immediately Adjoining" are not Mutually Exclusive.

[¶7] QBE and Farmers assert that the definition of "mobile equipment" which include certain vehicles on the "insured location" **or** "ways and means immediately adjoining" must be interpreted to mean that roads used to travel between the farm premises and residence premises do not fall within the definition of "insured location" because the terms are mutually exclusive. "Ways and means immediately adjoining" is defined in the policy as "the shortest most direct reasonable route between insured locations" (A38).

[¶8] The interpretation suggested by QBE and Farmers does not fit the design of the policy. For instance, in Paragraph 17(c), "mobile equipment" is defined to include "[v]ehicles that travel on crawler threads, except that snowmobiles are mobile equipment only while on an insured location" **or** "any premises you own or rent." (A37) "Insured location" includes premises owned or rented by the insured. To interpret this definition to say that "insured location" and "premises you own or rent" are mutually exclusive because they are separated by the word "or" would be nonsensical.

[¶9] Similarly, the definition of "motor vehicle" includes certain vehicles "[d]esigned for travel on public roads" **or** "[u]sed on public roads". According to QBE and Farmers' interpretation of the policy, this definition would mean that if the vehicle is "used on public roads" it cannot also be "designed for travel on public roads" because the terms are separated by the word "or". This interpretation of the policy does not make sense. What makes sense is that the terms overlap each other but also have different meanings. For example, the terms "used in conjunction with" in the definition of "insured location" and "ways and means immediately adjoining" may both cover the same area but may also

cover areas that do not fall within the other term. A road used in conjunction with the farm and residence premises is not necessarily the "shortest most direct route" and the shortest most direct route is not necessarily a "road" and not necessarily "used in conjunction with". This interpretation of policy suggested by QBE and Farmers should, therefore, be rejected.

CONCLUSION

[¶10] Based upon all the forgoing, Kory Clark respectfully requests that this Court reverse the decision of the District Court and find both indemnity and defense coverage for Kory Clark under Farmers' policies of insurance.

Respectfully submitted this 15th day of October, 2015.

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

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

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

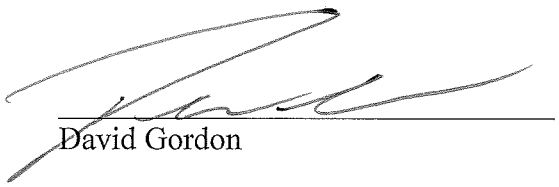
David Gordon, being first duly sworn, deposes and states: that he is of legal age, a citizen of the United States, and is not a party to, nor has he an interest in the above entitled action; that on October 15, 2015 he sent an Electronic Mail, in the City of Grand Forks, North Dakota, with a true and correct copy of the following documents in the above-entitled action:

Reply Brief of Appellant Kory Clark

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

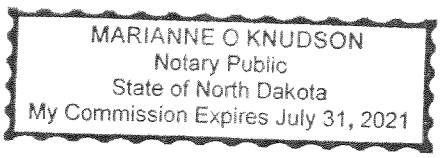
JEANNE UNGER	**DAVID SCHWEIGERT**	**TYLER SIEWERT**
junger@bassford.com	**dschweigert@bkmpc.com**	**Tsiewert@bkmpc.com**

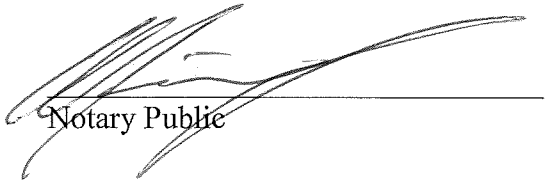
To the best of affiant's knowledge, information, and belief, such address(es) as given above was/were the actual address(es) of the party(ies) intended to be so served. That the above document(s) was/were duly served in accordance with the provisions of the North Dakota Rules of Court.



David Gordon

Subscribed and sworn to before me on Thursday, October 15, 2015 in the State of North Dakota, County of Grand Forks.





Notary Public