IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27020

BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY,

Plaintiff and Appellee,

vs.

DOWLING SPRAY SERVICE; TROY DOWLING; SCOTT DOWLING; GREAT WEST CASUALTY COMPANY; and FARM BUREAU MUTUAL INSURANCE COMPANY

Defendants and Appellees,

and

JAMES SEILER and KIMBERLY SEILER,

Defendants and Appellants.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

THE HONORABLE JON R. ERICKSON

APPELLANTS' BRIEF

NOTICE OF APPEAL FILED MARCH 10, 2014

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JURISDICTIONAL STATEMENT[1]

The Seilers appeal from a *Judgment* of the Third Judicial Circuit Court. *SR at 1689.* The *Judgment* was signed on February 6, 2014, and filed on February 12, 2014. *Id.* The Seilers served a *Notice of Entry of Judgment* on February 14, 2014. *SR at 1705.* The Seilers filed a *Notice of Appeal* on March 10, 2014. *SR at 1780.* Jurisdiction in this Court is proper under SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER THE INSURANCE POLICY ISSUED BY GREAT WEST CASUALTY COMPANY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010 COLLISION.

The trial court held that there is no coverage under the insurance policy issued by Great West Casualty Company for any claims arising from the July 11, 2010 collision, and entered judgment in favor of Great West Casualty Company.

Hanson Farm Mutual Ins. Co. of S.D. v. Degen, 2013 S.D. 29, 829 N.W.2d 474.

Canal Ins. Co. v. Coleman, 625 F.3d 244 (5th Cir. 2010).

Carolina Casualty Ins. Co. v. Yeates, 584 F.3d 868 (10th Cir. 2009).

Baker v. Catlin Specialty Ins. Co. 769 F.Supp.2d 1157 (N.D. Iowa 2011)

SDCL 32-5-1.

SDCL 32-5-1.3.

SDCL 35-5-5.

[1] Throughout this brief, the documents indexed and transmitted by the Beadle County Clerk of Courts, the settled record, will be referenced by using "SR" followed by the appropriate page number(s). The transcript from the court trial will be referenced by using "TT" followed by the appropriate page number(s). Exhibits offered and received during the court trial will be referenced by using "Exhibit" followed by the appropriate number(s).

SDCL 32-35-2.

II. WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER THE INSURANCE POLICY ISSUED BY BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010 COLLISION, AND GRANTED SUMMARY JUDGMENT IN FAVOR OF BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY.

Hanson Farm Mutual Ins. Co. of S.D. v. Degen, 2013 S.D. 29, 829 N.W.2d 474.

Western Nat. Mut. Ins. Co. v. Decker, 2010 S.D. 93, 791 N.W.2d 799 (S.D. 2010)

SDCL 32-5-1.

SDCL 32-5-1.3.

SDCL 35-5-5.

SDCL 32-35-2.

The trial court held that there is no coverage under the insurance policy issued by Berkley Regional Specialty Insurance Company for any claims arising from the July 11, 2010 collision, and granted summary judgment in favor of Berkley Regional Specialty Insurance Company.

STATEMENT OF THE CASE

On July 11, 2010, the Seilers, who were riding a motorcycle, were involved in a collision with a John Deere 4720 self-propelled sprayer. *TT at 10-11.* The sprayer was owned by Dowling Brothers Partnership, and was being operated by Troy Dowling at the time of the collision. *TT at 10, 12.* The collision resulted in serious injuries to the Seilers. *SR at 1222.*

Berkley, an insurer of Troy Dowling through a commercial general liability policy, commenced this action seeking a declaration that it has no coverage for any claims arising from the collision. *SR at 264-200.* Berkley further sought a declaration

that coverage for the collision existed instead under (1) Troy Dowling's commercial auto insurance policy issued by Great West Casualty Company ("Great West") and (2) Dowling Brothers Partnership's insurance policy issued by Farm Bureau Mutual Insurance Company ("Farm Bureau"). *Id.* Great West subsequently asserted a counterclaim and cross-claims wherein Great West denied coverage, and alleged that Berkley and Farm Bureau must provide coverage for claims arising from the collision. *SR at 82-75.*

Berkley filed a motion seeking summary judgment on the issue of coverage under its policy. *SR at 805.* The trial court granted summary judgment in favor of Berkley's motion, holding that the sprayer is "clearly exclude[d]" from coverage. *SR at 1397.* The trial court's holding was based upon the fundamental premise that the sprayer "is subject to the insurance laws of South Dakota." *Id.*

In September of 2013, a court trial was held to resolve the issues of coverage under the remaining two policies issued by Great West and Farm Bureau. *TT at 1.* With regard to the policy issued by Great West, the trial court ruled that there is no coverage for the collision under that policy. *SR at 1689-1688.* The trial court's ruling was based in part on its conclusion that the sprayer "was not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the State of South Dakota . . . ." *SR at 1713.* Notably, this ruling was the precise opposite of <u>two</u> earlier rulings on this issue by the trial court. Specifically, in a May 8, 2012 letter decision granting Berkley's motion for summary judgment, the trial court held that the Sprayer "is subject to the insurance laws of South Dakota." *SR at 1397.* Then, in a May 22, 2013 letter decision denying Great West's motion for summary judgment, the trial court held that

"[r]egardless of whether the sprayer is defined as 'mobile equipment' or not, it is subject to South Dakota's financial responsibility law." *SR at 1596.*

As for the policy issued by Farm Bureau, the trial court concluded that coverage for the collision exists under that policy. *SR at 1689-1688.*

STATEMENT OF THE FACTS

Troy Dowling resides in Beadle County, South Dakota. *TT at 9.* In addition to being a farmer, he has operated a commercial crop spraying business since 2007. *TT at 9, 14.* When crop spraying, he did business as "Dowling Spray Service." *Id.* In connection with his crop spraying business, Troy Dowling owned and operated a John Deere 4830 self-propelled sprayer. *TT at 14.*

Separately, Troy Dowling's uncles (Scott Dowling and Tracy Dowling) operated a large-scale farming operation near Draper, South Dakota via a partnership of which the uncles were members called "Dowling Brothers Partnership." *TT at 9-10.* Troy Dowling was not a member of Dowling Brothers Partnership. *TT at 10.* In connection with their farming operations, the Dowling Brothers Partnership owned three self-propelled sprayers. *Exhibit A.* One of the self-propelled sprayers was a John Deere 4720 self-propelled sprayer ("Sprayer"). *TT at 12.*

In the summer of 2010, Troy Dowling hauled his personal sprayer to Jones County, South Dakota to assist his uncles with spraying. *TT at 14, 16.* Around July 1, 2010, Troy Dowling needed to return to Beadle County to perform some spraying in that area. *TT at 29.* Troy Dowling recognized that the Sprayer was better suited for a row-crop spraying job that he needed to perform in Beadle County because it had narrower tires. *TT at 10, 23, 29.* After discussing the matter with Scott Dowling of the Dowling

Brothers Partnership, it was agreed that the parties would temporarily "swap" sprayers; Troy Dowling would use the Sprayer while Dowling Brothers Partnership would use Troy Dowling's personal sprayer. *TT at 10, 16, 22-23.* Troy Dowling subsequently transported the Sprayer to where he resided in Beadle County. *TT at 16.*

As a self-propelled sprayer, the Sprayer does not need to be towed to operate, and is designed for operation on public roads to facilitate travel to/from fields. *TT at 19.* The Sprayer has a number of components found in any highway-ready car, pickup, or semi, including headlights, taillights, turn signals, four-way flashers; side-view mirrors, a horn, a seatbelt, windshield wipers, a heater, an air conditioner, and a radio. *TT at 20-21.* The Sprayer can travel at speeds up to 29 m.p.h., but also has a slow-moving vehicle emblem affixed to the rear of the vehicle. *TT at 21.*

On the morning of July 11, 2010, Troy Dowling left his home in the Sprayer and began traveling to one of his customer's (the Losing Brothers') field to perform a crop spraying job. *TT at 10, 19.* While en route, he proceeded east on 218th Street, an east/west gravel road in Beadle County. *TT at 10.* At the same time, the Seilers were traveling south out of Huron, South Dakota on SD Highway 37 on a motorcycle; James was driving, Kimberly was the passenger. *TT at 11.*

At approximately 9:10 a.m., at the intersection of 218th Street and SD Highway 37, the Sprayer operated by Troy Dowling collided with the motorcycle ridden by the Seilers, resulting in claims alleging severe injuries to the Seilers and medical expenses in excess of $2,000,000. *TT at 10-11; SR at 1222.*

At the time of the collision, the operator of the Sprayer, Troy Dowling, had a commercial auto policy (Policy No. GWP46623D) in place with Great West ("Great

West Policy"), and a commercial general liability policy (Policy No. BPK 0004086 - 24) in place with Berkley Regional Specialty Insurance Company ("Berkley Policy"). *Exhibits C, H.* Separately, the owner of the Sprayer, Dowling Brothers Partnership, had a multi-module insurance policy (Policy No. 7217789) in place with Farm Bureau ("Farm Bureau Policy"). *Exhibit A.* This action followed.

STANDARD OF REVIEW

This Court "'reviews declaratory judgments as [it] would any other order, judgment, or decree.'" *Hanson Farm Mutual Ins. Co. of S.D. v. Degen, 2013 S.D. 29, ¶ 14, 829 N.W.2d 474, 477-78 (quoting Mid-Century Ins. Co. v. Lyon, 1997 S.D. 50, ¶ 4, 562 N.W.2d 888, 890).* A trial court's conclusions of law are reviewed de novo, meaning that this Court gives no deference to the trial court's conclusions. *All Star Constr. Co., Inc. v. Koehn, 2007 S.D. 111, ¶ 13, 741 N.W.2d 736, 740 (citing City of Deadwood v. Summit, Inc., 2000 S.D. 29, ¶9, 607 N.W.2d 22, 25).* In contrast, a trial court's findings of fact are reviewed under a clearly erroneous standard. *Boyer v. Dennis, 2007 S.D. 121, ¶ 8, 742 N.W.2d 518, 520 (quoting Graves v. Dennis, 2004 S.D. 137, ¶ 9, 691 N.W.2d 315, 317).* The interpretation of an insurance contract is a question of law, reviewable de novo by this Court. *Hanson Farm Mutual Ins. Co. of S.D., 2013 S.D. 29, ¶ 14 (quoting Ass Kickin Ranch, LLC v. North Star Mut. Ins. Co., 2012 S.D. 73, ¶ 7, 822 N.W.2d 724, 726).*

In this case, an additional form of review is triggered due to the trial court granting summary judgment to Berkley.

> [This Court] must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be

> resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. [This Court's] task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

De Smet Farm Mut. Ins. Co. of South Dakota v. Busskohl, 2013 S.D. 52, ¶ 11, 834 N.W.2d 826, 831 (quoting Brandt v. County of Pennington, 2013 S.D. 22 ¶ 7, 827, N.W.2d 871, 874).

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER THE INSURANCE POLICY ISSUED BY GREAT WEST CASUALTY COMPANY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010 COLLISION.

A. Interpretation of an insurance contract.

This Court summarized the law governing the interpretation of an insurance contract in Hanson Farm Mutual Ins. Co. of S.D. v. Degen, 2013 S.D. 29, 829 N.W.2d 474:

> The scope of coverage of an insurance policy is determined from the contractual intent and the objectives of the parties as expressed in the contract. When an insurer seeks to invoke a policy exclusion as a means of avoiding coverage, the insurer has the burden of proving that the exclusion applies. Where the provisions of an insurance policy are fairly susceptible to different interpretations, the interpretation most favorable to the insured should be adopted. However, this rule of liberal construction in favor of the insured and strictly against the insurer applies only where the language of the insurance contract is ambiguous and susceptible of more than one interpretation . . . . The fact that the parties differ as to the contract's interpretation does not create an ambiguity.
>
> Further, a court may not seek out a strained or unusual meaning for the benefit of the insured. Instead, an insurance contract's language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties. Essentially, this means that when the terms of an insurance policy are unambiguous, these terms cannot be enlarged or diminished by judicial construction.

> Finally, insurance policies must be subject to a reasonable interpretation and not one that amounts to an absurdity.

Hanson Farm Mutual Ins. Co. of S.D., 2013 S.D. 29, ¶ 17 (quoting Ass Kickin Ranch, LLC, 2012 S.D. 73, ¶¶ 9-10).

B. The trial court's ruling concerning the Great West Policy.

The trial court's determination that there is no coverage under the Great West Policy, a commercial auto policy, was based upon three fundamental conclusions.

First, the trial court concluded that the Sprayer is not an "auto" under the Great West Policy because (1) the Sprayer is not a "motor vehicle" as defined in an Endorsement to the Great West Policy, (2) the Sprayer is not subject to a compulsory or financial responsibility law, and (3) the Sprayer is "mobile equipment". *SR at 1713.*

Second, working from its conclusion that the Sprayer is "mobile equipment" and not subject to a compulsory or financial responsibility law, the trial court concluded that there is no coverage due to an exclusion which excludes injuries arising out of the operation of "a land vehicle that would qualify under the definition of 'mobile equipment' if it were not subject to a compulsory or financial responsibility law of other motor vehicle insurance law . . . ." *SR at 1716.*

Third, the trial court concluded that the Sprayer does not "fit within the business scheme of Great West." *SR at 1714.*

As will be explained, the trial court's interpretation of the Great West Policy is erroneous. Further, the trial court erred when it considered – and based its decision in part on – evidence of "the business scheme of Great West."

C. A review of the Great West Policy makes clear that coverage exists under the terms of the policy.

With regard to liability coverage, the Great West Policy issued to Troy Dowling provides, in pertinent part, as follows:

> SECTION II – LIABILITY COVERAGE
>
> A. COVERAGE
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> * * *
>
> We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend an "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

Exhibit C (Commercial Auto Coverage Part at p. 3 of 16) (bold emphasis removed).

With regard to who is an "insured," the Great West Policy provides, in pertinent part as follows:

> 1. WHO IS AN INSURED
>
> The following are "insureds":
>
> a. You for any covered "auto".

Id. (bold emphasis removed). Thus, Troy Dowling is insured "for any covered 'auto'" that he operates.

The Great West Policy identifies several groups/categories of autos which may be

covered under the policy, each of which is assigned a numeric symbol. *Id. at p. 1 of 16.* The groups/categories of autos which are covered for a particular insured is determined by reviewing the declarations pages.

In this case, the declarations pages of the Great West Policy provide that Troy Dowling had liability insurance for the following groups/categories of vehicles: 46 (Specifically Described Autos); 47 (Hired Autos Only); and 48 (Nonowned Autos Only). *Truckers Coverage Form Declarations at p. 1 of 3.*

"Hired Autos Only" is defined in the Great West Policy as follows:

> Only those "autos" you lease, hire, rent or borrow. This does not include any "private passenger type" "auto" you lease, hire, rent or borrow from any member of your household, any of your "employees", partners (if you are a partnership) members (if you are a limited liability company) or agents or members of their households.

Exhibit C (Commercial Auto Coverage Part at p. 1 of 16).

From the preceding, it is clear that in order for Troy Dowling to qualify as an "insured," the Sprayer must be a "covered 'auto'". Under the Great West Policy, "covered 'auto'" includes "autos" that Troy Dowling "lease[d], hire[d], rent[ed] or borrow[ed]." *Id.* Because there is no question that Troy Dowling "borrow[ed]" the Sprayer, the determination of whether there is coverage under the Great West Policy turns squarely on whether the Sprayer falls within the definition of "auto". *TT at 10, 16, 22-23.*

The Great West Policy defines "auto" as follows:

C. "Auto" means:

1. A land motor vehicle, "trailer" or semitrailer designed for travel on public road; or

2. Any other land vehicle that is subject to a compulsory or

> financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.
>
> However, "auto" does not include "mobile equipment".

Exhibit C (Commercial Auto Coverage Part at p. 14 of 16) (underlined emphasis added).

In this case, the Sprayer falls within either definition of "auto" and is not "mobile equipment."

1. The Sprayer is "[a] land motor vehicle . . . designed for travel on public road" under subpart (1).

The Great West Policy's definition of "auto" includes "[a] land motor vehicle . . . designed for travel on public road," is an "auto". *Exhibit C (Commercial Auto Coverage Part at p. 14 of 16).* "Motor vehicle" is not defined in the main body of the Great West Policy; however, the Sprayer would unquestionably fall within any plain and ordinary meaning of the term. *Hanson Farm Mutual Ins. Co. of S.D., 2013 S.D. 29, ¶ 17 ("Instead, an insurance contract's language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties.").*

The Sprayer is likewise designed for travel on public roads. This is evident from the fact that the manufacturer incorporated numerous highway travel components into the vehicle, including: headlights; turn signals; driver mirrors; four-way flashers; a horn; heating and air conditioning; a radio; a seat belt; and windshield wipers. *TT at 20-21.* Further, the Sprayer can travel at speeds up to 29 m.p.h. *TT at 21.* According to Troy Dowling, the Sprayer could be driven "as far as you want to . . . ." *TT at 25-26.* As such, the Sprayer clearly falls within this definition and is an "auto".

The trial court reached a different conclusion by employing a definition of "motor

vehicle" not found in the main body of the Great West Policy, but in an Endorsement that was added to ensure compliance with Sections 29 and 30 of the Motor Carrier Act of 1980 – often referred to as an "MCS-90 Endorsement".[2] The MCS-90 Endorsement defines "motor vehicle" as "a land vehicle, machine, truck, tractor, 'trailer', or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof." *Exhibit C (Great West MCS-90 Endorsement at 1).* According to the trial court, the Sprayer did not fall within this definition. *SR at 1713.* Although the trial court did not specifiy how it reached that conclusion, it is presumed that the trial court concluded that the Sprayer is not used "for transporting property."

The trial court erred as a matter of law when it employed the definition of "motor vehicle" in the MCS-90 Endorsement to determine whether the Sprayer met the definition of "auto" as defined in the main body of the Great West Policy.

Many courts have observed that the purpose of the MCS-90 Endorsement is to "protect[] the public from vehicles while they are being used for the transportation of property in interstate commerce." *Canal Ins. Co. v. Coleman, 625 F.3d 244, 254 (5th Cir. 2010) (emphasis in original removed).* "[T]he cases describe the insurer's obligation under the MCS-90 endorsement as one of a surety rather than a modification of the underlying policy." *Carolina Casualty Ins. Co. v. Yeates, 584 F.3d 868, 878 (10th Cir. 2009) (emphasis added).* "The endorsement is a safety net in the event other insurance is lacking. *Id.* Consistent with this approach, the majority of courts hold that the MCS-90

[2] *See Exhibit C (Endorsement for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980) ("Great West MCS-90 Endorsement").*

Endorsement "only applies where: (1) the underlying insurance policy to which the endorsement is attached does not provide coverage for the motor carrier's accident, *and* (2) the motor carrier's insurance coverage is either not sufficient to satisfy the federally-prescribed minimum levels of financial responsibility or is non-existent." *Id. at 871*.[3] In other words, the MCS-90 Endorsement served to potentially expand coverage under the underlying insurance policy, but not restrict coverage.

At the outset, the MCS-90 Endorsement – and its separate definition of "motor vehicle" – is inapplicable in this case because the underlying insurance policy to which the Endorsement is attached, the Great West Policy, provides coverage. *Id.*

The language of MCS-90 Endorsement itself also makes clear that it is inapplicable in this case. The MCS-90 Endorsement provides, in pertinent part, as follows:

> The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the "insured", within the limits stated herein, as a motor carrier or property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration.
>
> In consideration of the premium stated in the policy to which this amendment is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the "insured" for "public liability" <u>resulting from negligence in the operation, maintenance or use of "motor vehicles" subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980</u> regardless of whether or not each "motor vehicle" is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the "insured" or

[3] *See also McComb v. National Casualty Company, 2013 WL 5874562, *2 (N.D. Ill 2013) ("A majority of courts interpreting the MCS–90 Endorsement have held that the Endorsement only applies where: '(1) the underlying insurance policy to which the endorsement is attached does not provide coverage for the motor carrier's accident, and (2) the motor carrier's insurance coverage is either not sufficient to satisfy the federally-prescribed minimum levels of financial responsibility or is non-existent.').*

> elsewhere. * * * It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from payment of any final judgment, within the limits of liability here described, irrespective of the financial condition, insolvency or bankruptcy of the "insured." However, all terms, conditions and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the "insured" and the company.

Exhibit C (Great West Motor Carrier Endorsement 1-2) (emphasis added).

By adding the MCS-90 Endorsement, Great West agreed to pay any final judgment recovered against Troy Dowling "resulting from negligence in the operation, maintenance or use of 'motor vehicles' subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980." *Id. (emphasis added).* As just noted, the MCS-90 Endorsement defines "motor vehicle" as "a land vehicle, machine, truck, tractor, "trailer", or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof." *Exhibit C (Great West MCS-90 Endorsement at 1) (emphasis added).* Because the Sprayer is not a vehicle used "for tranporting property," and certainly was not being used for that purpose at the time of the collision, it is not a "motor vehicle" under the MCS-90 Endorsement. Since the MCS-90 Endorsment only provides coverage for "motor vehicles" subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980, the MCS-90 Endorsement simply does not apply here. *Compare Century Indem. Co. v. Carlson, 133 F.3d 591, 600 (8th Cir. 1998) ("The transportation of Kuenzel's corn by J & T at the time of the accident constituted interstate commerce. The DOT regulations require the use of the MCS–90 endorsement by trucks carrying 10,000 pounds or more, regardless of the type of commodity. Therefore the accident is covered by Century's MCS–90 endorsement and the district court's order*

*granting summary judgment in favor of Century is reversed.") (emphasis added); Canal Ins. Co. v. J. Perchak Trucking, Inc. 2009 WL 959596, *1 (M.D. Pa. 2009) ("If the tractor trailer was not operating in interstate commerce, then there may be no need to consider the effect of MCS–90.").*

The MCS-90 Endorsement further expressly provides that "no condition, provision, stipulation, or limitation contained in . . . this endorsement . . . shall relieve the company from liability," and that "all terms, conditions and limitations in the policy to which the endorsement is attached shall remain in full force and effect . . . ." *Great West Motor Carrier Endorsement 1-2.* Applying the definition of "motor vehicle" to "overwrite" the Great West Policy is at odds with both of these provisions as it could "relieve the company from liability," and would prevent the terms defining "auto" "in the policy to which the endorsement is attached . . . [from] remain[ing] in full force and effect." *Id.*

Apart from the preceding, another reason makes clear that it would be inappropriate to allow the definition of "motor vehicle" found in the MCS-90 Endorsement to overwrite the main body of the Great West Policy.

> Congress passed the [Motor Carrier Act of 1980 ("MCS] '[a]s part of its push to deregulate the trucking industry, increase competition, reduce entry barriers, and improve quality of service.' The purpose of the requirement that motor carriers demonstrate minimum financial responsibility is to address the concerns of legislators who '"fear[ed] that increased safety problems [would] result from the expanded entry provided in [the MCA]" and that "increased entry [would] open the highways to truckers who might have little concern for the safe operation and maintenance of their vehicles, thereby posing a threat to those who share the highways with them." The MCA, therefore, included provisions addressing these concerns as well as the "abuses that had arisen in the interstate trucking industry which threatened public safety, including the use by motor carriers of leased or borrowed vehicles to avoid financial responsibility for accidents that occurred while goods were being

transported in interstate commerce.""""

* * *

> The MFCSA mandates that every liability insurance policy covering a motor carrier contain a MCS–90 endorsement. That endorsement requires the insurer to pay any final judgment "recovered against the insured for public liability," as a result of the negligent operation of any vehicle, regardless of whether the vehicle is specifically described in the policy and despite the insured's failure to comply with policy conditions. As described in the leading California insurance treatise:
>
> > "In effect, the endorsement shifts the risk of loss for accidents occurring in the course of interstate commerce away from the public by guaranteeing that an injured party will be compensated even if the insurer has a valid defense based on a condition in the policy."

Global Hawk Ins. Co. v. Le, 170 Cal.Rptr.3d 403, 411 (Cal. Ct. App. 2014) (internal citations omitted).

In this case, the Sprayer clearly constitutes an "auto" as defined in the main body of the Great West Policy. Employing the definition of "motor vehicle" in the MCS-90 Endorsement to effectively overwrite that definition – and thereby defeat coverage that might otherwise exist – would wholly undermine one of the fundmental purposes of MCS-90 Endorsements, to protect the public by ensuring that insurance coverage will be in place to compensate them when they are injured.

2. The Sprayer is "subject to a compulsory or financial responsibility law or other motor vehicle insurance law" under subpart (2).

The Sprayer separately qualifies an "auto" under subpart (2) of the Great West Policy because it is a land vehicle that "is subject to a compulsory or financial responsibility law or other motor vehicle insurance law" in South Dakota. *Exhibit C*

(Commercial Auto Coverage Part at p. 14 of 16).

In South Dakota, financial responsibility for motor vehicles is addressed in SDCL Chapter 32-35. SDCL 32-35-2 requires proof of financial responsibility on account of accidents "arising out of the ownership, maintenance, or use of a vehicle of a type subject to registration under the laws of this state . . . ." *SDCL 32-35-2.*

The registration of vehicles, in turn, is addressed in SDCL Chapter 32-5. SDCL 32-5-5 requires registration of the following: "a motor vehicle, motorcycle, truck tractor, road tractor, trailer or semitrailer, or recreational vehicle or trailer, which is operated or driven upon the public highways of this state . . . ." *SDCL 32-5-5.* The Legislature broadly defined the term "motor vehicle" and stated that it "includes all vehicles or machines, trailers, semitrailers, recreational vehicles, truck tractors, road tractors, and motorcycles propelled by any power other than muscular and used upon the public highways for the transportation of persons or property, or both." *SDCL 32-5-1.*

SDCL 32-5-1.3 exempts the following farm vehicles from registration:

> Any farm wagon, farm implement drawn by another vehicle, or farm vehicle which is designed and used primarily for tillage, harvesting, or transportation of agricultural products or farm property by or for agricultural producers is exempt from the provisions of this chapter unless the farm vehicle is a stock trailer, gooseneck trailer, or semitrailer towed by a licensed motor vehicle on any public highway or a passenger vehicle, two- or three-axle truck, or semitractor.

SDCL 32-5-1.3.

The Sprayer is not a farm wagon; nor is it a farm implement drawn by another vehicle. Further, the Sprayer is not a "farm vehicle designed and used primarily for tillage, harvesting, or transportation of agricultural products or farm property by or for agricultural producers." *Id. (emphasis added).* The Sprayer is not used primarily for

"tillage" because it is not primarily used to "till" or "cultivate" land, such as by plowing or harrowing;[4] it is not primarily used for "harvesting" because it is not primarily used for "gathering crops;"[5] and it is not primarily used for the "transportation" of agricultural products because it is not primarily used for the "movement of goods or persons from one place to another."[6]

The conclusion that the Sprayer is required to be registered is further made clear by the Legislature's inclusion of the final clause in SDCL 32-5-1.3. In that clause, the Legislature provided that the exemption does not apply, and the vehicle or implement must be registered, if "[1] the farm vehicle is a stock trailer, gooseneck trailer, or semitrailer towed by a licensed motor vehicle on any public highway or [2] a passenger vehicle, two- or three-axle truck, or semitractor." *SDCL 32-5-1.3.* By adding this clause, the Legislature expressed its intent that vehicles and implements that are going to be on South Dakota's "public highways" must be registered. This is evident from two key facts.

First, even though they are obviously not self-propelled, the mere towing of a "stock trailer, gooseneck trailer, or semitrailer" with a licensed motor vehicle "on a public highway" renders the trailer subject to registration. *SDCL 32-5-1.3.* In other words, a party could tow such a trailer for years with a licensed motor vehicle without having any legal obligation to register it; however, once that party towed the trailer "on a public highway" with a licensed motor vehicle, it would become subject to registration.

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[4] *See Black's Law Dictionary 1482 (6th Ed 1990) (defining "tillage" as "[a] place tilled or cultivated; land under cultivation, as opposed to lands lying fallow or in pasture.").*
[5] *See Black's Law Dictionary 718 (6th Ed 1990) (defining "harvesting" as "[t]he act or process of gathering of crops of any kind.").*
[6] *See Black's Law Dictionary 1499 (6th Ed 1990) (defining "transportation" as [t]he movement of goods or persons from one place to another, by a carrier.").*

Second, because the Legislature recognized that "passenger vehicle[s], two- or three-axle truck[s], [and] semitractor[s]," are routinely operated on public highways, the Legislature reaffirmed that such vehicles do not get the benefit of the exemption. Presumably, the Legislature did so to prevent an unscrupulous party from misusing the exemption by, for example, claiming that his/her four-door sedan is exempt because it is used for "transportation of agricultural products or farm property" when a few bags of feed are picked up in town.[7]

From the preceding, it is clear that the Sprayer "is subject to a compulsory or financial responsibility law or other motor vehicle insurance law" in South Dakota. Thus, the Sprayer is an "auto" under subpart (2).

3. The Sprayer is not "mobile equipment".

The Great West Policy provides that, for purposes of coverage under its policy, "'auto' does not include 'mobile equipment'". *Exhibit C (Commercial Auto Coverage Part at p. 14 of 16).* "Mobile equipment" is defined in the Great West Policy as follows:

> 0. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

[7] Incidentally, another statute also demonstrates that the Legislature views farm vehicles differently when they are going to be operated on public highways. SDCL 32-12-12 addresses restricted driver's permits for minors, and provides that such a permit allows a minor to operate vehicles alone between 6:00 a.m. and 10:00 p.m., and from 10:00 p.m. to 6:00 a.m. under the direction of a parent or guardian sitting beside the minor. *SDCL 32-12-12.* Interestingly, the Legislature carved out an exception for minors operating farm equipment. The statute concludes by providing that "[t]he restrictions as to time of operation and operation under the direction of a parent or guardian do not apply to the holder of a valid restricted minor's permit operating a self-propelled agricultural machine which is not subject to registration under chapter 32-5." *Id.* Clearly, the Legislature recognized that if a farm vehicle was not subject to registration under SDCL Chapter 32-5, it is going to be operated in the field, not on public highways. And, since the farm vehicle is going to be operated in the field – where there is no danger of encounters with highway travelers, the Legislature saw fit to allow the minor to operate the farm vehicle any time of the day without a parent or guardian alongside.

1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

2. Vehicles maintained for use solely on or next to premises you own, rent or lease. You may take this vehicle off the premises temporarily if it is not licensed and the sole purpose is one of the following:

    a. The unlicensed vehicle is being taken for maintenance or repair; or

    b. The unlicensed vehicle is being used to pick up or deliver your owned, leased or rented trailers requiring maintenance or repair.

3. Vehicles that travel on crawler treads;

4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

    a. Power cranes, shovels, loaders, diggers or drills; or

    b. Road construction or resurfacing equipment such as graders, scrapers or rollers;

5. Vehicles not described in Paragraph 1., 2., 3., or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

    a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

    b. Cherry pickers and similar devices used to raise or lower workers;

6. Vehicles not described in Paragraph 1., 2., 3., or 4. above maintained primarily for purposes other than the transportation of persons or cargo. <u>However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos"</u>:

    a. Equipment designed primarily for:

(1) Snow removal;

(2) Road maintenance, but not construction or resurfacing; or

(3) Street cleaning;

b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

c. Air compressors, pumps and generators, including spraying, welding, building, cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

Exhibit C (Commercial Auto Coverage Part at p. 15 of 16) (bold emphasis removed) (underlined emphasis added).

As is readily apparent, the final paragraph of the definition of "mobile equipment" preempts any analysis under the various definitions of "mobile equipment". A vehicle is not "mobile equipment" if it is subject to a "compulsory or financial responsibility law or other motor vehicle insurance law." *Id. Accord Baker v. Catlin Specialty Ins. Co. 769 F.Supp.2d 1157, 1167-68 (N.D. Iowa 2011) (holding that a pickup that had been modified for use as refueling truck was subject to Iowa's financial liability law and was therefore an "auto" under policy language identical to the Great West Policy).* It was previously explained that the Sprayer is subject to South Dakota's financial responsibility law. For that reason, the Sprayer cannot be "mobile equipment". Because this conclusion trumps the other forms of "mobile equipment," no further analysis of whether

the Sprayer can be "mobile equipment" is appropriate.

Even if this Court disagrees, however, and concludes that the final paragraph does not end the analysis, the result is the same – the Sprayer is not "mobile equipment" as defined by Great West. Because subparts (2) – (5) of the definition of "mobile equipment" are clearly inapplicable, only subparts (1) and (6) merit discussion.

Subpart (1) provides that "[b]ulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads," are "mobile equipment". *Exhibit C (Commercial Auto Coverage Part at p. 15 of 16).* Even if the Sprayer may be deemed "farm machinery" under subpart (1), a premise with which the Seilers do not agree, it is of no import given the more specific language contained in subpart (6). Subpart (6) unequivocally provides that "self-propelled vehicles with . . . permanently attached [spraying] equipment are not 'mobile equipment' but will be considered 'autos'". Here, the Sprayer is precisely that – it is a self-propelled vehicle with permanently attached spraying equipment.

Basic maxims of contract interpretation confirm that subpart (1) must give way to subpart (6). First, "[c]onventional principles of contract interpretation require agreements to be construed in their entirety giving contextual meaning to each term;" however, "'[w]hen provisions conflict, 'the more specific clauses are deemed to reflect the parties' intentions – a specific provision controls a general one.'" *Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., 2007 S.D. 31, ¶ 21, 730 N.W.2d 638, 645 (quoting* **Bunkers v.** *Jacobson, 2002 S.D. 135, ¶ 15, 653 N.W.2d 732, 738).* Here, the "specific provision" in subpart (6) providing that "self-propelled vehicles with . . . permanently attached [spraying] equipment are not 'mobile equipment' but will be considered 'autos'" controls

over the general and vague reference to "farm machinery" in subpart (1).[8]

Second, if the definition of "mobile equipment" in the policy is "fairly susceptible to different interpretations," due to existence of subparts (1) and (6), "the interpretation most favorable to the insured should be adopted." *Hanson Farm Mutual Ins. Co. of S.D., 2013 S.D. 29, ¶ 17 (quoting Ass Kickin Ranch, LLC, 2012 S.D. 73, ¶¶ 9-10).*

In the end, a conclusion that the Sprayer is "mobile equipment" can only be reached by wholly ignoring two other components of the definition of "mobile equipment." First, it requires disregarding of the final paragraph of the definition which provides that – a vehicle is not "mobile equipment" if it is subject to a "compulsory or financial responsibility law or other motor vehicle insurance law." *Exhibit C (Commercial Auto Coverage Part at p. 15 of 16).* Second, it requires looking past the direct language in subpart (6) providing that "self-propelled vehicles with . . . permanently attached [spraying] equipment are not 'mobile equipment' but will be considered 'autos'". *Id.*

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[8] Great West elected to not define "farm machinery" in the policy. *Exhibit C.* Notably, ARSD 64:06:03:15 (Farm Machinery) provides the following definition:

> A farm machine is a mechanical unit purchased and used directly and principally for agricultural purposes and includes those items commonly and usually referred to as farm machinery and attachment units. Farm machinery does not include motor vehicles or equipment otherwise licensed or taxed by the state of South Dakota.
>
> Tools, shop equipment, grain bins, feed bunks, fencing materials, snowmobiles, and lawn mowers are not farm machines. Grain storage facilities, barn cleaners, milking systems, and automatic feeding systems which are installed and become part of real property are not farm machines and the installation of these systems is subject to contractors' excise tax under 10-46A.

ARSD 64:06:03:15 (emphasis added).

4. The exclusion for "Operations" does not preclude coverage.

The Great West Policy contains the following exclusion:

> 9. OPERATIONS
>
> "Bodily injury", "property damage" or "covered pollutions cost or expense" arising out of the operation of:
>
> * * *
>
> c. Machinery or equipment that is on, attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

Exhibit C (Commercial Auto Coverage Part at p. 6 of 16) (bold emphasis removed).

The "Operations" exclusion does not preclude coverage. Subpart (c) purports to exclude coverage for bodily injury, etc. "arising out of the operation of" "[m]achinery or equipment that is on, attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged." *Exhibit C (Commercial Auto Coverage Part at p. 6 of 16).* However, subpart (c) does not preclude coverage for two reasons. First, as discussed above, even if the Sprayer is not subject to a compulsory or financial responsibility law, it is nevertheless not "mobile equipment" under the Great West Policy. The policy's definition of "mobile equipment" specifically provides that "self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos" * * * spraying . . . equipment."

> [S]elf-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
>
> * * *

c. Air compressors, pumps and generators, including spraying, welding, building, cleaning, geophysical exploration, lighting and well servicing equipment.

Exhibit C (Commercial Auto Coverage Part at p. 15 of 16).

Based upon the foregoing, the Seilers would submit that the Sprayer falls within the Great West Policy's definition of "auto", and no exclusion precludes coverage. For these reasons, and because any provisions which are fairly susceptible to different interpretations must be interpreted in favor of the insured, the Seilers would submit that the trial court erred when it held that there is no coverage for the collision under the Great West Policy.

D. The trial court erred when it based its decision in part on its finding that the Sprayer "fit within the business scheme of Great West."

At trial, Great West called twenty-one year employee Sarah Ann Hansen, a Vice President in Underwriting for Great West's Midwestern Region, as a witness. *TT at 49-50.* Among other things, Ms. Hansen testified that Great West is not "in the business of insuring agricultural farm machinery. *TT at 53.* Later, the trial court based its decision in part on its conclusion that the Sprayer does not "fit within the business scheme of Great West." *SR at 1714.*

The trial court erred when it admitted this evidence, and further erred when it based its decision as to coverage on such evidence. The law is clear that "[t]he scope of coverage of an insurance policy is determined from the contractual intent and the objectives of the parties as expressed in the contract." *Id. Hanson Farm Mutual Ins. Co. of S.D., 2013 S.D. 29, ¶ 17 (quoting Ass Kickin Ranch, LLC, 2012 S.D. 73, ¶¶ 9-10) (emphasis added).* The policy dictates where there is coverage for a given "accident;"

not the insurance company's post-claim description of its business scheme.[9]

II. WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER THE INSURANCE POLICY ISSUED BY BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010 COLLISION, AND GRANTED SUMMARY JUDGMENT IN FAVOR OF BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY.

A. The trial court's summary judgment ruling concerning the Berkley Policy.

The trial court's determination that there is no coverage under the commercial general liability policy issued by Berkley was based upon its conclusion that the Sprayer fell within the definition of an "auto" under the Berkley Policy, and not "mobile equipment." *SR at 1398-1397.* More specifically, the trial court noted that the Berkley Policy provides that a self-propelled sprayer is not "mobile equipment" if it is subject to "'compulsory or financial responsibility law[s]." *SR at 1397.* And, according to the trial court, "[the Sprayer] is subject to the insurance laws of South Dakota." *Id.*

B. A review of the Berkley Policy makes clear that coverage exists under the terms of the policy.

With regard to liability coverage, the Berkley Policy provides, in pertinent part, as follows:

> SECTION I – COVERAGES
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

---

[9] *Cf. Bickett v. Borah, 87 N.W.2d 552, (S.D. 1958) ("However, custom or usage is not binding on the parties to a lease if it is in conflict with the express provisions of their agreement."); Haney v. USAA Casualty Ins. Co., 2009 WL 1360994, *4 (4th Cir. 2009) ("Evidence of a usage or custom is never admitted to make a new contract or to add a new element to one previously made. It may explain what is ambiguous but it cannot vary or contradict what is manifest and plain, or be received to give to plain and unambiguous words or phrases a meaning different from their natural import."); Crown Life Ins. Co. v. O'Dell, 373 So.2d 1115, 1118 (Ala. Civ. App. 1979) ("Evidence of a custom cannot be received to alter, contradict or vary the express terms of a contract.").*

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 the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damge" to which is insurance does not apply. We may, at our discretion, investgate any "occurrence" and settle any claim or "suit that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit or insurance in the payment or judgments or settlement under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicity provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy; and * * *

Exhibit H (Commercial General Liability Coverage Form at p. 1 of 15) (bold emphasis removed).

With regard to who is an "insured," the Berkley Policy provides that "insured" "means any person or organization qualifying as such under Section II – Who Is An Insured." *Id.* Section II, in turn, provides that "[i]f you are designated in the

Declarations as . . . [a]n individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner." *Id. at p. 8 of 15.* In the Declarations for the Berkley Policy, the Form of Business for "Dowling Spray Service" is identified as "Individual". *Exhibit H (Commerical General Liability Declarations at 1).*

The Berkley Policy contains the following exclusion that is relevant to the instant case:

> 2. Exclusions
>
> This insurance does not apply to:
>
> * * *
>
> g. Aircraft, Auto or Watercraft
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unleoding".
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintanence, use, or entrustment to others of any aircraft, "auto" or watercraft this is owned or operated by or rented or loaned to any insured.
>
> This exclusion does not apply to:
>
> (1) A watercraft while ashore on premises you own or rent;
>
> (2) A watercraft you do not own that is:
>
> (a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state were it is licensed or prinicipally garaged; or

(b) the operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

Exhibit H (Commercial General Liability Coverage Form at p. 4 of 15) (bold emphasis removed).

Given the preceding provisions, the discussion of coverage under the Berkley Policy requires two analyses: (1) whether the Sprayer is an "auto" and therefore initially falls under the "Aircraft, Auto Or Watercraft" exclusion; and (2) whether the Sprayer falls within the exception to the "Aircraft, Auto Or Watercraft" exclusion contained in subparagraph (5)(b).

1. Whether the Sprayer is an "auto".

The "Aircraft, Auto Or Watercraft" exclusion contained in the Berkley Policy generally excludes coverage for bodily injury or property damages arising out of the

ownership, maintenance, use or entrustment to others of an "auto". *Exhibit H (Commercial General Liability Coverage Form at p. 4 of 15).* The Berkley Policy defines "auto" as follows:

> 2. "Auto" means:
>
> a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
>
> b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.
>
> However, "auto" does not include "mobile equipment".

Exhibit H (Commercial General Liability Coverage Form) at p. 12 of 15 (emphasis added).

"Mobile equipment" is defined in the Berkley Policy as follows:

> 12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
>
> a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
>
> b. Vehicles maintained for use solely on or next to premises you own or rent;
>
> c. Vehicles that travel on crawler treads;
>
> d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
>
> (1) Power cranes, shovels, loaders, diggers or drills; or
>
> (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
>
> e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide

mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building, cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

Exhibit H (Commercial General Liability Coverage Form at p. 13-14 of 15) (emphasis

added).

As is readily apparent, the Berkley Policy's definitions of "auto" and "mobile equipment" are nearly identical to the definitions employed in the Great West Policy.

In connection with their analysis of the Great West Policy, the Seilers submitted that the Sprayer is an "auto" because it meets both definitions of "auto": (1) it is a land motor vehicle designed for travel on public roads, and (2) it is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in South Dakota.[10] *See p. 11, 16, supra.* The Seilers further asserted that the Sprayer does not constitute "farm machinery" under the definition of "mobile equipment". The Seilers do not back away from these positions. Therefore, if this Court agrees with the Seilers, it follows that the Sprayer is an "auto" under the Berkley Policy and is not "mobile equipment". However, the opposite is also true.

If this Court disagrees with the Seilers, and holds that the Sprayer is not "subject to a compulsory or financial responsibility law or other motor vehicle insurance law" in South Dakota, and also holds that the Sprayer is not "[a] land motor vehicle . . . designed for travel on public roads, then the Sprayer does not meet the definition of "auto" under the Berkley Policy and is therefore not excluded under the "Aircraft, Auto Or Watercraft"

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[10] Notably, before the trial court, in support of its motion for summary judgment, Berkley pointed out that the 2007 *South Dakota Commerical & Agricultural Vehicle Handbook* provided as follows:

> **Self-Propelled Application Equipment**
> Self-propelled fertilizer or pesticide applicators, if used by a farmer for his own farming operation, are exempt from licensing and titling. However, if these units are used by a commercial entity, they must be titled and licensed under the non-commercial vehicle fee schedule listed in Table 4. Licensed fertilizer or pesticide applicators may use dyed (untaxed) diesel fuel. All other licensed vehicles are prohibited under South Dakota law from using dyed diesel fuel.

SR at 1154 (emphasis in original).

exclusion. Similarly, if this Court holds that the Sprayer is not "subject to a compulsory or financial responsibility law or other motor vehicle insurance law" in South Dakota, and also holds that the Sprayer is "farm machinery", then the Sprayer meets the definition of "mobile equipment" and is therefore not excluded from coverage.[11] Under either scenario, coverage for the collision would exist under the Berkley Policy and the trial court's grant of summary judgment in favor of Berkley was erroneous.

2. Regardless of whether the Sprayer is an "auto", the Sprayer falls within the exception to the "Aircraft, Auto Or Watercraft" exclusion contained in subparagraph (5)(b).

The existence or nonexistence of coverage under the Berkley Policy does not turn solely on whether the Sprayer is an "auto". This is due to the fact that the "Aircraft, Auto Or Watercraft" exclusion contains a multi-paragraph exception to the exclusion. *Exhibit H (Commercial General Liability Coverage Form at p. 4 of 15).* Specifically, subparagraph (5)(b) of the "Aircraft, Auto Or Watercraft" exclusion provides the exlusion does not apply to "'bodily injury' or 'property damage' arising out of . . . the operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment". *Id.* Thus, there is coverage under the Berkley Policy if the Sprayer qualifies as any of the "machinery or equipment listed in Paragraph f.(2) or f.(3)."

The pertinent portion of Paragraph f provides as follows:

> f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

[11] This would be true because "mobile equipment" includes "farm machinery" so long as it is not "subject to a compulsory or financial responsibility law or other motor vehicle insurance law . . . ." *Exhibit H (Commercial General Liability Coverage Form at pp. 14 of 15).*

> However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
>
> * * *
>
> (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
>
> (3) Air compressors, pumps and generators, including spraying, welding, building, cleaning, geophysical exploration, lighting and well servicing equipment.
>
> * * *

Exhibit H (Commercial General Liability Coverage Form at p. 13-14 of 15) (emphasis added).

Here it cannot be disputed that the Sprayer is a "self-propelled vehicle[] with . . . permanently attached . . . spraying . . . equipment." *Id.* As such, it falls within "the machinery or equipment listed in Paragraph . . . f.(3)." *Id.* Likewise, it cannot be disputed that the claims against Troy Dowling "aris[e] out of" his "operation" of the Sprayer. Therefore, there is coverage for the collision under the Berkley Policy.[12]

Before the trial court, Berkley disagreed, and argued an extremely narrow interpretation of this exception to the exclusion. According to Berkley, the exception to the exclusion contemplates accidents such as a "malfunction" of the described equipment. This Court should reject such a strained interpretation.

"In construing the provisions of an insurance contract, [this Court] does not seek strained interpretations." *Western Nat. Mut. Ins. Co. v. Decker, 2010 S.D. 93, ¶ 11, 791*

[12] Although the trial court quoted the exception to the exclusion contained in subparagraph (5)(b), it did not specifically address the Seilers' argument that the Sprayer fell within "the machinery or equipment listed in Paragraph . . . f.(3)." *SR at 1398-1397.*

N.W.2d 799, 802 (S.D. 2010) (citing Nat'l Sun Industries, Inc. v. S.D. Farm Bureau Ins. Co., 1999 S.D. 63, ¶ 18, 596 N.W.2d 45, 48). This Court should refrain from straining to adopt narrow interpretations of "arising out of . . . the operation" and the term "equipment". This is particularly true in this case where the spraying equipment is literally intergrated into the vehicle. Ultimately, if this provision is fairly susceptible to different interpretations, it must be interpreted in favor of the insured.

Based upon the foregoing, the Seilers would submit that there is coverage for the Sprayer under the Berkley Policy, and that the trial court erred when it granted summary judgment in favor of Berkley Policy.

CONCLUSION

For all the foregoing reasons, the Seilers respectfully request that this Court hold that coverage for the collision exists under the Great West Policy and the Berkley Policy and, accordingly, (1) reverse that portion of the *Judgment* wherein the trial court ruled that there is no coverage for the collision under the Great West Policy, and (2) reverse the trial court's *Order Granting Berkley Regional Specialty Insurance Company's Motion for Summary Judgment* wherein the trial court ruled that there is no coverage for the collision under the Berkely Policy.

Dated this 16th day of June, 2014.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The Seilers, by and through their counsel, respectfully request the opportunity to present oral argument before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellants' Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellants' Brief* contains 9,976 words. I have relied on the word and character count of our word processing system used to prepare *Appellants' Brief*. The original *Appellants' Brief* and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I, John W. Burke, do hereby certify that on the 16th day of June, 2014, I caused a true and correct copy of the foregoing *Appellants' Brief* to be served upon:

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/s/ John W. Burke .
John W. Burke

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27020, 27023

BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY

Plaintiff and Appellee,

vs.

DOWLING SPRAY SERVICE; TROY DOWLING; SCOTT DOWLING; JAMES SEILER; KIMBERLY SEILER; GREAT WEST CASUALTY COMPANY,

Defendants and Appellees,

and

FARM BUREAU MUTUAL INSURANCE COMPANY,

Defendant and Appellant.

APPEAL FROM THE THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

THE HONORABLE JON R. ERICKSON, CIRCUIT JUDGE

BRIEF OF APPELLEE FARM BUREAU MUTUAL INS. CO.

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TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are designated as "R." References to the Appendix to this brief are designated as "App." There are three transcripts in this appeal. References to the transcript of the summary judgment hearing held on March 19, 2012 are designated as "SJ1." References to the transcript of the summary judgment hearing held on February 22, 2013 are designated as "SJ2." References to the transcript of the September 20, 2013 court trial are designated as "T." References to the trial exhibits are designated as "Ex." The Farm Bureau Member's Choice Policy at issue in Farm Bureau's notice of review was received as Exhibit A at the court trial. References to that policy are designated as "Ex. A" and include the policy section, module, and page number. In addition, the deposition of Scott Dowling was accepted into evidence at trial as Exhibit B.

REQUEST FOR ORAL ARGUMENT

Farm Bureau Mutual Insurance Company respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUE

I. Under the insurance contract that it sold to Dowling Brothers Partnership, does Farm Bureau have a duty to defend or indemnify Troy Dowling or his crop spraying business for claims arising from the accident?

The trial court denied Farm Bureau's motion for summary judgment and then issued a declaratory judgment holding that Farm Bureau had a duty to defend and indemnify Troy Dowling and Dowling Spray Service for the claims brought against them.

- *Hanson Farm Mut. Ins. Co. of South Dakota v. Degen*, 2013 S.D. 29, 829 N.W.2d 474
- *Dakota Fire Ins. Co. v. J&J McMeil, LLC*, 2014 S.D. 37
- *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, 621 N.W.2d 592

STATEMENT OF THE CASE

This is a declaratory judgment action in which James and Kimberly Seiler are seeking coverage under multiple insurance policies for an accident that occurred between their motorcycle and a John Deere 4720 crop sprayer being operated by Troy Dowling in the course of his crop spraying business, Dowling Spray Service (hereinafter collectively, "Troy Dowling"). Farm Bureau's notice of review concerns the trial court's denial of Farm Bureau Mutual Insurance Company's ("Farm Bureau") motion for summary judgment and subsequent determination following a court trial that Farm Bureau is responsible for defending and indemnifying any damages caused by any negligence of Troy Dowling in the course of conducting his business. A separate appeal, docketed as Appeal No. 27021, was filed by Farm Bureau on this same issue.

The action was initiated on February 24, 2011 in Beadle County of the Third Judicial Circuit by Berkley Regional Specialty Insurance Company ("Berkley"), which insured Troy Dowling, operator of the crop sprayer, through his commercial general liability policy. (R. 63). Berkley sought a declaration that it had no duty to defend or indemnify its insured and that instead coverage existed either under Troy Dowling's commercial auto insurance policy with Great West Casualty Company ("Great West") or else a policy issued by Farm Bureau to Dowling Brothers Partnership, a separate entity not affiliated with Troy Dowling or his spraying business, but which owned the crop sprayer that it had loaned to Troy Dowling. (R. 63). The parties filed various cross-claims, answers, replies and amended pleadings.

On December 2, 2011, Farm Bureau filed a motion for summary judgment seeking a declaration that it had no duty to defend or indemnify any claims arising from the accident involving Troy Dowling. (R. 443). A hearing was held before the Hon. Jon R. Erickson, Circuit Judge, in Huron on March 19, 2012. (SJ1 3). On May 8, 2012, the trial court issued its memorandum decision denying Farm Bureau's motion, holding that "there is a genuine issue of material fact as to whether or not the John Deere 4720 sprayer is an 'auto' under the Farm Bureau policy." (R. 1401) (App. 48). On July 31, 2012, the trial court signed its order denying Farm Bureau's motion for summary judgment, although it was not filed until August 15, 2013. (R. 1604).

On February 22, 2013, the trial court held a hearing on a motion for summary judgment brought by Great West. (SJ2 3). On May 22, 2013, the trial court issued its memorandum decision denying Great West's motion for summary judgment. (R. 1598). The order denying the motion was entered on July 24, 2013. (R. 1600).

James and Kimberly Seiler subsequently commenced a tort action against Troy Dowling, Dowling Spray Service, and John Deere for damages arising from their accident. Great West, Troy Dowling's commercial auto insurer, assumed the defense under a reservation of rights. (T 4).

A court trial was held before Judge Erickson in Huron on September 20, 2013. (T 4). That same day, the trial court issued its memorandum decision ruling that Farm Bureau had a duty to defend and indemnify Troy Dowling. (R. 1611) (App. 26). "It is the opinion of this Court," the decision explained, "that the John Deere 4720 self-propelled sprayer was designed so that it **could** be used 'mainly on

public roads' if the owner and circumstances required it to be so used. Therefore, it fits the definition of 'auto' as found in the policy." (App. 26) (emphasis in original). In the same decision, the trial court held that Great West did not have a duty to defend or indemnify its insured, Troy Dowling. (App. 26).

Both the Seilers and Great West proposed separate findings of fact and conclusions of law that incorporated the trial court's ruling concerning the Farm Bureau policy. Farm Bureau filed its objections to those proposals and proposed its own findings of fact and conclusions of law, which were rejected by the trial court. (R. 1653, 1656, 1658, 1663) (App. 27).

On February 12, 2014, the trial court entered its "Findings of Fact and Conclusions of Law Concerning Defendant Farm Bureau Mutual Insurance Company." (R. 1687) (App. 3). On February 12, 2014, the trial court entered its judgment holding that Farm Bureau had a duty to defend and indemnify Troy Dowling and Great West did not. (R. 1689). On February 27, 2014, the trial court then entered an additional set of "Findings of Fact and Conclusions of Law" that also included findings and conclusions regarding the Farm Bureau policy. (R. 1720).

This appeal followed.

STATEMENT OF THE FACTS

Troy Dowling is a farmer in Beadle County. (T 9). He also operated Dowling Spray Service, a sole proprietorship by which he was paid by farmers to spray the crops in their fields. (T 9, 33; Ex. B at 19). On July 1, 2010, Troy Dowling borrowed a John Deere 4720 sprayer from Dowling Brothers Partnership because it was more suitable than his regular sprayer for a particular job near Alpena. (T 10; Ex. B at 9). Specifically, Troy wanted to borrow that particular crop sprayer because it had skinnier tires designed to fit between rows of crops in agricultural fields. (T 23).

Troy Dowling is not a member of, employed by, or involved in the Dowling Brothers Partnership. (T 10). He is a nephew of its owners, Scott Dowling and Tracy Dowling. (T 9, 28; Ex. B at 5, 10). Dowling Brothers Partnership owned the Jon Deere 4720 self-propelled sprayer that Troy Dowling had borrowed to use in his crop spraying business. (T 9). It purchased the crop sprayer new in 2005 or 2006 from Moodie Implement in Pierre. (Ex. B at 7). Unlike Troy Dowling, Dowling Brothers Partnership was not in the spraying business, but rather used the sprayer in its farming operation to spray the crops in its own fields. (T 10).

Ten days later, on July 11, 2010, Troy Dowling was driving the sprayer to another job to spray an agricultural field in Beadle County. (T 10). On the way to the field, unfortunately, Troy was involved in a collision with a motorcycle being driven by James Seiler, who was accompanied by his wife, Kimberly. (T 11). The collision occurred at the intersection of Highway 37 and 218th Street outside of Huron. (T 11). The Seilers were both seriously injured.

When he was in possession of the field sprayer, Troy Dowling never used it for any purpose other than spraying crops in agricultural fields. (T 11). That is also the sole use to which Dowling Brothers Partnership put the sprayer. (T 12).

The John Deer 4720 self-propelled sprayer is designed and intended to be used for spraying crops in agricultural fields. (T 24; Ex. B at 17). It is self-propelled and designed with crop spraying equipment mounted on the back. (T 19). It comes equipped with taillights, turn signals, four-way flashers, a horn, heating and air conditioning, a radio, a seatbelt for the driver, side-view mirrors, windshield wipers, and has a "Slow Moving Vehicle" emblem on the back. (T 20-21). The sprayer can reach a top speed of thirty miles per hour, but can only drive ten miles an hour uphill. (Ex. B at 15). Here is a photograph of an example of this piece of farm machinery:

(App. 34; *see also* Exs. D, E, F, G).

Although capable of being driven for short distances on roads between fields, the crop sprayer is not designed or intended to be used mainly on public roads, but

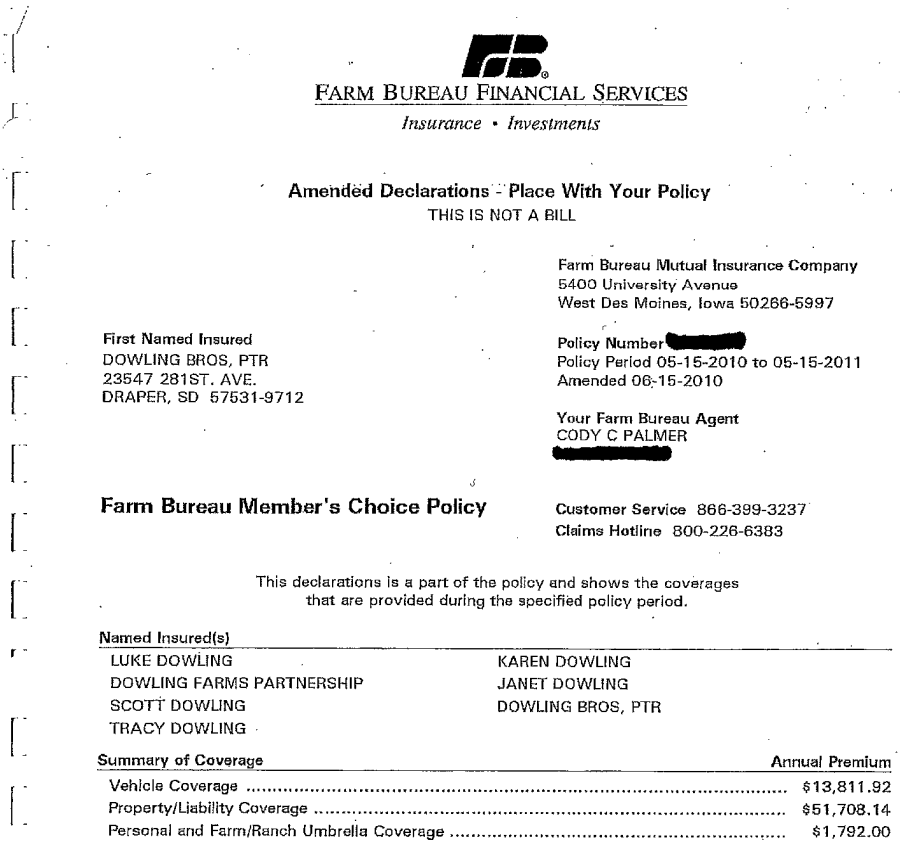
rather was designed for use mainly off of public roads in agricultural fields to spray crops. (T 20, 24, 31-32, 44). The sprayer was trailered if driven anything other than a fairly short distance. (T 24, 31-32; Ex. B at 14-15). Troy Dowling would trailer the sprayer if the distance between fields was more than five miles. (T 20, 24-25).

Troy Dowling's insurance

When the accident occurred, Troy Dowling and Dowling Spray Service were named insureds under two separate policies that he had purchased. The first insurance policy was a commercial general liability policy that Troy purchased from Berkley when he went into the crop spraying business in May of 2007. (T 13-14; Ex. H). The second was a commercial auto insurance policy that Troy purchased from Great West. (T 15, 51; Ex. C). Troy Dowling owned a John Deere 4830 crop sprayer that was listed and insured for liability coverage under his Berkley insurance policy. (T 14). *After* the accident, Troy also listed and insured the John Deere 4720 sprayer involved in the accident for liability coverage under his Berkley policy. (T 14).

Dowling Brothers Partnership's insurance

Dowling Brothers Partnership is insured by Farm Bureau. (T 36). The Farm Bureau Member's Choice Policy issued to the Dowling Brothers Partnership is what is known as a modular policy, with separate sections and modules that delineate the different forms of coverage provided by the policy. (T 36-38). As indicated on the first page of the Declarations, the named insureds under the Farm Bureau policy are Dowling Brothers Partnership, Luke Dowling, Karen Dowling, Dowling Farms Partnership, Janet Dowling, and Tracy Dowling:



FARM BUREAU FINANCIAL SERVICES

Insurance • Investments

Amended Declarations - Place With Your Policy

THIS IS NOT A BILL

Farm Bureau Mutual Insurance Company
5400 University Avenue
West Des Moines, Iowa 50266-5997

First Named Insured
DOWLING BROS, PTR
23547 281ST. AVE.
DRAPER, SD 57531-9712

Policy Number [redacted]
Policy Period 05-15-2010 to 05-15-2011
Amended 06-15-2010

Your Farm Bureau Agent
CODY C PALMER
[redacted]

Farm Bureau Member's Choice Policy

Customer Service 866-399-3237
Claims Hotline 800-226-6383

This declarations is a part of the policy and shows the coverages that are provided during the specified policy period.

Named Insured(s)

LUKE DOWLING	KAREN DOWLING
DOWLING FARMS PARTNERSHIP	JANET DOWLING
SCOTT DOWLING	DOWLING BROS, PTR
TRACY DOWLING	

Summary of Coverage	Annual Premium
Vehicle Coverage	$13,811.92
Property/Liability Coverage	$51,708.14
Personal and Farm/Ranch Umbrella Coverage	$1,792.00

(Ex. A – Amended Declarations, Page 1 of 30).

As further explained below, neither Troy Dowling nor his crop spraying business fall under the definition of an insured under any of the individual sections or modules of the Farm Bureau policy. The John Deere 4720 field sprayer, moreover, is not an auto or vehicle covered for any liability under the policy and it is not listed among the vehicles indicated in the Declarations. Rather, the sprayer is included as "Blanket Farm/Ranch Personal Property" in the Declarations and listed for additional coverage for "Cab Glass Breakage." Moreover, the Farm Bureau policy expressly excludes any coverage for *any* liability arising out of any business or commercial operation other than the farming and ranch operation in which the Dowling Brothers Partnership is engaged.

STANDARD OF REVIEW

In this appeal from a declaratory judgment, this Court reviews the trial court's findings of fact under the clearly erroneous standard and its conclusions of law under a de novo standard. *See Dakota Fire Ins. Co. v. J&J McMeil, LLC*, 2014 S.D. 37, ¶ 14, 6; *Hanson Farm Mut. Ins. Co. of South Dakota v. Degen*, 2013 S.D. 29, ¶ 14, 829 N.W.2d 474, 477-78. The interpretation of an insurance policy presents a question of law reviewed de novo. *See Swenson v. Auto-Owners Ins. Co.*, 2013 S.D. 38, ¶ 13, 831 N.W.2d 402, 407. This Court also reviews de novo whether the moving party was entitled to summary judgment as a matter of law. *See AMCO Insurance Co. v. Employers Mut. Cas. Co.*, 2014 S.D. 20, ¶ 6, 845 N.W.2d 918, 920 n.2.

ARGUMENT

I. THE TRIAL COURT'S DETERMINATION THAT FARM BUREAU HAS A DUTY TO DEFEND AND INDEMNIFY TROY DOWLING AND DOWLING SPRAY SERVICE FOR CLAIMS ARISING FROM THE ACCIDENT SHOULD BE REVERSED.

Farm Bureau takes no position on whether or not there is any coverage or duty to defend under the Berkley or Great West insurance policies. Instead, Farm Bureau has filed a notice of review regarding the trial court's denial of its summary judgment motion and subsequent entry of findings of fact and conclusions of law (both sets) and judgments against Farm Bureau on the issue of whether it has a duty to defend or indemnify Troy Dowling or Dowling Spray Service for the accident in which Troy was involved while using the John Deere 4720 sprayer. Because there is no coverage for Troy Dowling or his business for this accident under the Farm

Bureau Member's Choice Policy issued to the Dowling Brothers Partnership, the judgments, findings of fact, conclusions of law, and order denying Farm Bureau's motion for summary judgment should be reversed with instructions to grant judgment to Farm Bureau.

A. Principles of insurance contract interpretation.

The existence of rights and obligations of parties to an insurance policy "are determined by the language of the contract, which must be construed according to the plain meaning of its terms." *AMCO Insurance Co.*, 2014 S.D. 20, ¶ 9, 845 N.W.2d at 921 (quoting *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, ¶ 20, 621 N.W.2d 592, 598-99). This Court recently summarized insurance contract interpretation:

> The scope of coverage of an insurance policy is determined from the contractual intent and the objectives of the parties as expressed in the contract.
>
> When an insurer seeks to invoke a policy exclusion as a means of avoiding coverage, the insurer has the burden of proving that the exclusion applies.
>
> Where the provisions of an insurance policy are fairly susceptible to different interpretations, the interpretation most favorable to the insured should be adopted.
>
> However, this rule of liberal construction in favor of the insured and strictly against the insurer applies only where the language of the insurance contract is ambiguous and susceptible of more than one interpretation. . . .
>
> The fact that the parties differ as to the contract's interpretation does not create an ambiguity.
>
> Further, a court may not seek out a strained or unusual meaning for the benefit of the insured.

> Instead, an insurance contract's language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties.
>
> Essentially, this means that when the terms of an insurance policy are unambiguous, these terms cannot be enlarged or diminished by judicial construction.
>
> Finally, insurance policies must be subject to a reasonable interpretation and not one that amounts to an absurdity.

Hanson Farm, 2013 S.D. 29, ¶ 17, 829 N.W.2d at 478 (citation omitted); *see also Dakota Fire Ins.*, 2014 S.D. 37, ¶ 17.

B. The Farm Bureau Policy Does Not Provide Any Coverage For Troy Dowling or His Business for the Accident.

The Farm Bureau Member's Choice Policy issued to Dowling Brothers Partnership is made up of Declarations, Sections, and Modules. (T 37-39). It contains a General Section, a Vehicle Section, a Liability Section, and an Umbrella Section. (T 38-39). In denying Farm Bureau's motion for summary judgment and later holding that Farm Bureau had a duty to defend and indemnify Troy Dowling in these circumstances, the trial court held that there was coverage for the accident under the Vehicle Section of the Farm Bureau policy, specifically the Vehicle Liability Module. This conclusion was incorrect as a matter of law for several reasons and there is no coverage for these claims under any section of the policy for either Troy Dowling or his business.

1. There is no coverage in the Vehicle Section of the policy and any coverage said to exist is subject to multiple exclusions.

As explained in the General Section of the policy, the Vehicle Section "contains the liability, damage to your vehicle, uninsured motorist vehicle, medical,

and death/indemnity/disability income coverage modules you purchased for your autos, motorcycles, recreational motor vehicles, snowmobiles and watercraft." (Ex. A – General Section, Page 1 of 10). At the beginning, the Vehicle Section makes clear that "[f]or each 'owned' 'personal vehicle' you need specific vehicle insurance coverage." (Ex. A – Vehicle Section, Page 1 of 4). The vehicles covered by the Vehicle Section of the policy and the specific types of coverage, limits of coverage, and the premiums charged for each are listed in the "Vehicle" section of the Declarations for each covered vehicle:

Vehicle

Vehicle Coverage for Household of TRACY DOWLING

2008 Dodge RAM 2500 QUAD ST/SLT [redacted]

Coverage	Limits	Deductible	Premium
Bodily Injury Liability/ Property Damage Liability	$1,000,000 CSL each occurrence		$99.00
Auto Uninsured Motor Vehicle	$1,000,000 CSL each accident		$22.00
Auto Underinsured Motor Vehicle	$1,000,000 CSL each accident		$50.00
Auto Medical Payments	$25,000 each person		$18.00
Collision	Repair or Replacement Cost	$500	$166.00
Comprehensive	Repair or Replacement Cost	$500	$238.00
Loss Payee 0142389594 GATE CITY BANK PO BOX 398018 EDINA, MN 55439			
Annual Vehicle Premium			**$596.19**

2005 Dodge RAM 2500 QUAD ST/SLT [redacted]

Coverage	Limits	Deductible	Premium
Bodily Injury Liability/ Property Damage Liability	$1,000,000 CSL each occurrence		$99.00
Auto Uninsured Motor Vehicle	$1,000,000 CSL each accident		$22.00
Auto Underinsured Motor Vehicle	$1,000,000 CSL each accident		$50.00
Auto Medical Payments	$25,000 each person		$18.00
Collision	Actual Cash Value	$500	$134.00
Comprehensive	Actual Cash Value	$500	$195.00
Annual Vehicle Premium			**$521.34**

(Ex. A – Declarations, Page 2 of 30). There are twenty-seven vehicles owned by the Dowling Brothers Partnership and other named insureds listed for vehicle coverage in the Declarations. The premiums for each type of coverage charged for the various vehicles depend upon the type of vehicle, its use, and assessed risks. The scope of

the coverages under the Vehicle Section of the policy "are determined by combining the terms and provisions of the General Section and Vehicle Section with one or more of the following vehicle *modules* for your 'personal vehicle' indicated in the Declarations[.]" (Ex. A – Vehicle Section, Page 1 of 4) (emphasis supplied).

The Vehicle Liability Module – the only module applicable to liability claims arising from the use of vehicles – "provides Bodily Injury Liability and Property Damage Liability Coverage plus other extra coverages for 'personal vehicles.'" Ex. A – Vehicle Section, Page 1 of 4). Under the Vehicle Liability Module, the "Liability Coverages" subsection defines the scope of coverage. It provides: "You have the following coverages for a particular vehicle only to the extent they are indicated in the Declarations for that vehicle." (Ex. A – Vehicle Section, Vehicle Liability Module, Page 1 of 5). Thus, each vehicle is only covered by the policy to the amount and extent that it is listed in the declarations for bodily injury liability, property damage liability, uninsured motorist coverage, medical payments, collision, and the like.

The liability coverage for indemnification is provided in the following section:

> **Bodily Injury Liability Coverage and Property Damage Liability Coverage**
>
> We cover "damages" that result from "bodily injury" or "property damage" "caused by" an "occurrence" to which these coverages apply involving the ownership, operation, maintenance, use, loading, unloading or negligent entrustment of "your personal vehicle."

(Ex. A – Vehicle Section, Vehicle Liability Module, Page 1 of 5) (emphasis supplied). "Your Personal Vehicle" is defined in the definitions section of the Vehicle Section:

> "**Your Personal Vehicle**"
> Any of the following:

A. "Your Auto;"
B. "Your Farm Truck;"
C. "Your Farm Truck Tractor;"
D. "Your Motorcycle;"
E. "Your Motorhome;"
F. "Your Recreational Motor Vehicle;"
G. "Your Snowmobile;"
H. "Your Watercraft;" or
I. The vehicle indicated in the Declarations.

(Ex. A - Vehicle Section, Glossary, Page 4 of 4). The trial court held that the John Deere 4720 sprayer was covered as "Your Personal Vehicle" by the Vehicle Liability Module either under Subsection A - "Your Auto" or Subsection I - "The vehicle indicated in the Declarations." But the crop sprayer clearly does not meet either of those two definitions of "Your Personal Vehicle" under the Farm Bureau policy.

a. The crop sprayer does not meet the definition of "Your Auto."

The John Deere 4720 sprayer clearly does not meet the definition of "Your Auto" so as to satisfy Subsection A of the definition of "Your Personal Vehicle." (Ex. A - Vehicle Section, Glossary, Page 4 of 4). The term "Your Auto" is defined in the policy as:

> **"Your Auto"**
>
> The "auto" or vehicle indicated in the Declarations and designated as an "auto."

(Ex. A - Vehicle Section, Glossary, Page 4 of 4). The definition of "auto" is then defined as follows:

> "**Auto**"
>
> A land motor vehicle with at least four wheels designed for use <u>mainly</u> on public roads.

(Ex A - Vehicle Section, Glossary, Page 1 of 4) (emphasis supplied).

First, the crop sprayer was not an "'auto' or vehicle indicated in the Declarations and designated as an 'auto.'" (Ex. A - Vehicle Section, Glossary, Page 4 of 4). The section of the declarations for "vehicles" or autos lists twenty-seven different vehicles and sets forth the coverage for each. (Ex. A – Declarations, Pages 2 through 8 of 30). The crop sprayer is not designated in the declarations either as an "auto" or "vehicle." Rather, it is included as "Blanket Farm/Ranch Personal Property," along with all of the farm machinery and equipment owned by Dowling Brothers Partnership, and is listed there for "Cab Glass Breakage" coverage.

METAL BIN 16 X 18 Metal Building Rates Replacement Cost Special	$8,900	$2,500
FRAME SHOP 38 X 30 Other Building Rates Actual Cash Value Named (1-10)	$9,200	$2,500
POLE CATTLE SHED 144 X 40 Other Building Rates Replacement Cost Special	$43,300	$2,500
POLE MACHINE SHED 144 X 54 Other Building Rates Replacement Cost Special	$85,000	$2,500
POLE CATTLE SHED 105 X 54 Other Building Rates Replacement Cost Special	$42,000	$2,500
Blanket Farm/Ranch Personal Property Special Cab Glass Breakage	$9,895,936	$2,500
Row-Crop Tractor - 0 JD [redacted]		
Row-Crop Tractor - 0 JD [redacted]		
JD SPRAY - 2009 JD 4930 [redacted]		
Combine/JD CREDIT - 2007 JD [redacted] 9760 STS		
Combine/JD CREDIT - 2007 JD [redacted] 9760 STS		
Combine/JD CREDIT - 2007 JD [redacted] 9760 STS		
Tractor - 2006 JD 9520 [redacted]		
Tractor - 2006 JD 9520 [redacted]		
JD COMBINE/JD HEADER - 2007 JD 7500/688		
Combine/JD CREDIT - 2005 JD STS [redacted] 9760		
Combine - 2006 JD STS [redacted] 9760		
Tractor/Crawler - 2001 JD 8400T [redacted]		
Field Sprayer - 2006 JD 4920 [redacted]		
Tractor - 0 CAT 85 D WITH DOZER		
Swather - 0 JD 4895		
Swather - 0 JD 4895		
Sprayer - 0 JD 4720		
Tractor/Loader - 2003 JD 7810/741		

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(Ex. A – Declarations, Page 13 of 30) ("Field Sprayer – 2006 JD 4920).

Second, the trial court clearly erred in finding that the John Deere 4720 sprayer was an "auto" that was "designed for use mainly on public roads." The plain and ordinary meaning of the term "mainly" is "For the most part: CHIEFLY." *Webster's New Collegiate Dictionary* (1974). A more current dictionary's most pertinent definition of "mainly" is "in the principal respect: for the most part: CHIEFLY." *Webster's Third New International Dictionary*, *Unabridged* (2002). The definition of "Chiefly" is "1: Most importantly: above all: PRINCIPALLY, PREEMINENTLY, ESPECIALLY 2: for the most part: MOSTLY, MAINLY." *Id.*

Under the plain and unambiguous meaning of the policy definition, a vehicle cannot be designed for use "*mainly* on public roads" and "*mainly* in agricultural fields." The use for which it was mainly, chiefly, principally, preeminently, especially, and mostly designed must prevail. The policy definition is not ambiguous. The crop sprayer either was designed for use *mainly* on public roads or it was not. If the crop sprayer was designed for use mainly in agricultural fields to spray crops, it cannot meet the definition for coverage.

The John Deere 4720 sprayer clearly was not designed to be used "mainly" on public roads, but rather was designed mainly for use *off* public roads in farm fields to spray crops. (T 20, 31-32, 44). Although, like a tractor or combine, the sprayer has the added utility of being able to be used on public roads for short distances, that it is not what it was mainly designed to do. No one at trial testified that the John Deere 4720 sprayer was designed for use mainly on public roads. If someone had testified to that effect, it would not have been true.

For example, if the relevant coverage term in an insurance policy defined "farm machinery" as a vehicle "designed for use mainly in agricultural fields," the fact that a Dodge Caravan is *capable* of being driven in a farm field, or even that in a particular situation some individual actually happened to drive it mainly in farm fields, would not qualify the minivan as farm machinery under the policy definition.

The same is true here. The John Deere 4720 sprayer owned by Dowling Brothers Partnership is farm machinery intended to be used for spraying crops located on farms.[1] Its cab stands very high off the ground so that it can pass over crops growing in the fields and it comes equipped with slender tires so as to be able to fit between narrow rows of crops. In fact, that is the precise reason that Troy Dowling asked to borrow this particular sprayer to use to spray crops in a particular farm field. (T 23). Simply because the sprayer is *capable* of being driven on public roads, or even that it occasionally is taken on roadways when moving between farm fields to spray crops, does not mean, under any stretch of the imagination, common sense, or the plain and ordinary meaning of the policy language, that the sprayer was "designed for use mainly on public roads." It clearly was not.

As this Court has held, "a court may not seek out a strained or unusual meaning for the benefit of the insured. Instead, an insurance contract's language must be construed according to its plain and ordinary meaning and a court cannot

[1] Indeed, the trial court also entered findings of fact that the John Deere field sprayer was "farm machinery" and "mobile equipment" and *not* an "auto" under the Great West policy. (App. 16, FOF # 12-14).

make a forced construction or a new contract for the parties." *Hanson Farm*, 2013 S.D. 29, ¶ 17, 829 N.W.2d at 478 (citation omitted). In concluding that a John Deere 4720 sprayer – farm machinery intended to be used for spraying crops in fields – was designed for use mainly on public roads, the trial court stretched the insurance contract well beyond its terms and ratified a strained or unusual meaning of the policy language to the benefit of Troy Dowling and the persons unfortunately injured in the collision in which he was involved. The trial court's findings and conclusions that the John Deere sprayer meets the definition of an "Auto" under the Farm Bureau policy are incorrect, clearly erroneous, and should be reversed.

b. The crop sprayer is not "[t]he vehicle indicated in the Declarations."

The John Deere sprayer also clearly does not meet the other definition of "Your Personal Vehicle" in Subsection I - "The vehicle indicated in the Declarations." (Ex. A - Vehicle Section, Glossary, Page 4 of 4). As discussed above, there are twenty-seven different vehicles listed in the declarations that are plainly indicated as "Vehicles" and list the coverages, limits, and premiums for each as required in order for a vehicle to be covered under the policy. (Ex. A – Declarations, Pages 2 through 8 of 30). Under the Vehicle Liability Module, there are coverages "for a particular vehicle only to the extent they are indicated in the Declarations for that vehicle." (Ex. A – Vehicle Liability Module, Page 1 of 5).

The crop sprayer is *not* a vehicle indicated in the Declarations. Rather, the sprayer is farm machinery and the only place that it is listed in the Declarations is for "Cab Glass Breakage" as farm and ranch personal property under the "Blanket

Farm/Ranch Personal Property" section. (Ex. A – Declarations, Page 13 of 30) ("Field Sprayer – 2006 JD 4920"). The blanket personal property coverage under which the crop sprayer was listed in the Declarations relates to the Property Section of the Farm Bureau policy and insures it for "property damage," defined as "[p]hysical injury to or destruction of tangible property," to the sprayer itself. (Ex. A – General Section, Page 3 of 10). There is no liability coverage for the crop sprayer under the Vehicle Liability Module.

In sum, because the John Deere 4720 sprayer does not meet any of the definitions of "Your Personal Vehicle" in the Vehicle Section of the policy, the trial court committed clear error in holding that Farm Bureau had a duty to indemnify Troy Dowling and his business for the accident in which he was involved.

c. Even if the crop sprayer could meet the definition of "Your Personal Vehicle" so as to implicate coverage, any damages resulting from its use are clearly excluded.

Even if the crop sprayer could somehow be said to meet the definition of "Your Personal Vehicle" under the Vehicle Liability Module, the question of coverage would not end there. That module also contains two exclusions that bar any coverage for Troy Dowling and his business for this accident. Although Farm Bureau placed the trial court on notice of these exclusions and contended that they barred coverage (App. 32-33), the trial court's memorandum decisions, findings of fact, and conclusions of law simply ignored them. This was clear error.

The Vehicle Liability Module of the Farm Bureau Policy provides for the following additional exclusions:

Additional Exclusions

Under the Vehicle Liability Module, the Exclusions in the General Section apply and are expanded as follows:

. . .

Other Damages

There is no coverage for any "damages":

. . .

B. "Arising out of" the ownership, maintenance, use or operation of farm machinery;

. . .

D. "Arising out of" the ownership, maintenance or use of any vehicle "owned" by you which is not "your personal vehicle" or a "newly owned vehicle."

(Ex A - Vehicle Liability Module, Additional Exclusions, Page 4 of 5) (emphasis supplied). Even if Troy Dowling had been insured under the Dowling Brothers Partnership's policy, Subsections B and D would each operate to exclude coverage for any damages assessed against him or his business under the Vehicle Section.

First, under the plain meaning of the phrase, the John Deere 4720 sprayer clearly was "farm machinery" and the damages claimed against Troy Dowling clearly arose out of the crop sprayer's operation and use. (T 20, 24, 31-32, 44; Ex. B at 17). Under any common sense interpretation of the phrase, farm machinery consists of machines used primarily in farming.[2] The sprayer is listed as personal property along

[2] *See, e.g.,* http://dictionary.reference.com/browse/farm+machine.

with all of the other farm machinery and equipment owned by Dowling Brothers Partnership. (Ex. A – Declarations, Page 13 of 30). Thus, coverage for any damages arising from Troy Dowling's of the sprayer is clearly excluded under Subsection B of the "Other Damages" exclusion. (Ex A - Vehicle Liability Module, Additional Exclusions, Page 4 of 5).

And second, Subsection D of the "Other Damages" exclusion expressly excludes any damages arising out of the use of any vehicle owned by Dowling Brothers Partnership that does not meet the definition of "Your Personal Vehicle" or a "newly owned vehicle." (Ex A - Vehicle Liability Module, Additional Exclusions, Page 4 of 5). As discussed above, the crop sprayer does not meet the definition of "Your Personal Vehicle." (Ex. A - Vehicle Section, Glossary, Page 4 of 4). And it further does not meet the definition of a "newly owned vehicle." (Ex. A – Vehicle Section, Glossary, Page 2 of 4).

The trial court committed legal error in ignoring these exclusions contained in the policy, each of which independently precludes coverage for any damages arising out of Troy Dowling's use or operation of the crop sprayer.

d. Because they do not meet the definition of an insured, the trial court erred in holding that Farm Bureau owed a duty to defend Troy Dowling and his business under the policy issued to Dowling Brothers Partnership under the Vehicle Liability Module.

The trial court further committed legal error in holding that Farm Bureau had a duty to defend Troy Dowling and his business in the underlying action, because they do not meet the definition of an "insured" under the policy as defined for

purposes of the Vehicle Liability Module (or any other section or module). Like every section and module, the Vehicle Liability Module limits the duty to defend to those who qualify as an "insured" under its terms. As the policy provides, a defense will be provided only for a "suit" for covered "damages" that is "brought against an 'insured.'" (Ex A - Vehicle Liability Module, Defense Obligations, Page 1 of 5). As already discussed, there are no coverage under this section and no covered "damages" present here as the result of the policy definitions and exclusions set forth above.

But even in the absence of those definitions and exclusions, neither Troy Dowling nor his business qualifies as an "insured" under the policy definition so as to trigger a duty to defend. The trial court held that Troy Dowling met the definition of "insured" in Subsection A.3 of the "Who Is An Insured" section of the Vehicle Liability Module. That definition includes as an insured "Any other 'person' <u>while using 'your personal vehicle,' a 'newly owned vehicle' or a 'temporary substitute vehicle'</u> if its use is within the scope of your consent[.]" (Ex A - Vehicle Liability Module, Who Is An Insured, Page 1 of 5) (emphasis supplied). That was clear error.

Although it is true that Troy Dowling was using the crop sprayer with the consent of the Dowling Brothers Partnership, the sprayer crop clearly does not meet the definition of "Your Personal Vehicle," as discussed above, nor, does it meet the policy definitions of a "newly owned vehicle" or a "temporary substitute vehicle." As a result, for the same reasons as discussed above, Troy Dowling cannot qualify as an insured under the Vehicle Liability Module and, as such, Farm Bureau is not obligated to defend him under the policy that it issued to Dowling Brothers Partnership.

The policy further makes clear, in each and every section and module, that "We have no duty to defend any "suit" to which this insurance does not apply." (Ex A - Vehicle Liability Module, Defense Obligations, Page 1 of 5). Because the Farm Bureau policy does not apply to cover damages claimed in the suit brought against Troy Dowling, and because he is not an insured under the policy, the trial court committed clear error in holding otherwise in contravention of the policy terms.

2. There is no coverage or duty to defend under any other sections of the policy.

The Vehicle Liability Module of the Vehicles Section is the only section of the Farm Bureau policy under which the trial court held there was a duty to defend or indemnify Troy Dowling, who is not an insured under the policy, for damages arising from the accident. As discussed above, that conclusion is clearly incorrect. Furthermore, none of the other sections of the Farm Bureau policy provide any basis for coverage or a duty to defend Troy Dowling for the accident.

a. There is no coverage in the Liability Section.

After the Vehicles Section, the next section of the Farm Bureau policy is the "Liability Section." This section "contains the liability and medical coverage modules you chose to protect you from the potential liability exposures created by the occupancy or use of your insured property and your personal activities." (Ex. A – General Section, Page 1 of 10). Coverage under the Liability Section is "determined by combining the terms and provisions of the General Section and Liability Section with one or more of the" liability modules selected by the insured. (Ex. A - Liability Section, Page 4 of 8). Dowling Brothers Partnership selected three modules under

the Liability Section: (1) Farm/Ranch and Personal Liability Module; (2) Farm/Ranch Employer Liability Module; and (3) Business Liability Module.

As an initial matter, the entire Liability Section, in clear terms, expressly excludes any coverage for any damages arising from the use of any vehicle for any business purpose unrelated to the farming operation itself:

> There is no coverage for any "damages" or "medical expenses" if at the time of an "occurrence" the involved vehicle or watercraft is rented to others, used to carry "persons" or cargo for a charge, or used for any "business" purpose, except for a golf cart while within the legal boundaries of a golfing facility."

(Ex. A - Liability Section, Page 4 of 8) (emphasis supplied). It is undisputed that when the accident occurred, Troy Dowling was using the crop sprayer for a business purpose in his commercial spraying business. As a result, there is no coverage or duty to defend under any module contained the Liability Section of the Farm Bureau policy. But even if that exclusion did not apply, coverage is not available under the specific terms of any of the three modules within the Liability Section.

First, there is no coverage under the Farm/Ranch and Personal Liability Module for multiple reasons. Troy Dowling and his business do not meet the definition of an "insured" under this section. The only persons covered are the named insureds, household residents, the farming partnership's members, partners, and their spouses, "but only for the conduct of your 'farming/ranching' operations," employees acting in the scope of employment, and other persons using certain motorized equipment with permission and "on an 'insured location.'" (Ex. A – Liability Section, Farm/Ranch And Personal Liability Module, Who Is An Insured, 2

and 3 of 8) (emphasis supplied). It is undisputed that Troy Dowling was not using the crop sprayer on an "insured location" as defined by the Liability Section of the policy and no one has argued otherwise. (Ex. A – Liability Section, Glossary, Page 6 of 8). Rather, he was using it in the scope of his crop spraying business on private farmland owned by his customers and was at a highway intersection between two of those farms when the accident occurred. (T 10-11).

And even if that were not so, that module contains an additional exclusion for damages arising out of or in connection with a "business" with the exception of the "farming/ranching" operation itself. (Ex. A – Liability Section, Farm/Ranch And Personal Liability Module, Additional Exclusions, Page 5 of 8). Troy Dowling's use of the crop sprayer in his commercial spraying business clearly invokes this exclusion, precluding any coverage for him under this module under any circumstances.

Second, there is no coverage or duty to defend under the Farm/Ranch Employer Liability Module. That module is limited to damages that Dowling Brothers Partnership is legally obligated to pay as the result of injuries incurred by its farm and ranch employees within the scope of their employment. (Ex. A – Liability Section, Farm/Ranch Employer Liability Module, Page 1 and 2 of 4).

Finally, there is no coverage or duty to defend under the Business Liability Module. This coverage is applicable only to the "'business' indicated by class in the Declarations which is conducted at or from the 'insured location.'" (Ex. A – Liability Section, Business Liability Module, Page 1 of 19). The business for which this

module provides coverage is Dowling Brothers Partnership. It is not under any circumstances applicable to Troy Dowling or his business.

b. There is no coverage in the Property Section.

Clearly, there is also no coverage or duty to defend in the Property Section, which only provides coverage to Dowling Brothers Partnership for damage to its own property. (Ex. A – Property Section, page 1 of 13).

c. There is no coverage in the Personal and Farm/Ranch Umbrella Liability Section.

Finally, there is no coverage or duty to defend under the Personal and Farm/Ranch Umbrella Liability Section which requires "underlying insurance" in order to ever be invoked. (Ex. A – Personal and Farm/Ranch Umbrella Liability Section, Page 1 of 16). The section is divided into two parts. Part I describes "the excess liability coverages provided for your 'personal vehicle' and/or home-based business." (Ex. A – Personal and Farm/Ranch Umbrella Liability Section, Page 1 of 16). Part I of the umbrella coverage does not apply both because Troy Dowling and his business have no underlying insurance and, as discussed above, the sprayer was not a "personal vehicle" as defined in the policy and neither Troy Dowling nor his business is an "insured" under any of the underlying coverages. (Ex. A – Personal and Farm/Ranch Umbrella Liability Section, Who Is An Insured, Page 2 of 16).

Part II of this section also does not apply both because Troy Dowling and his business have no "underlying insurance" and because they cannot meet any of the definitions of an "insured" (Subsections A – K) in this section. (Ex. A – Personal and Farm/Ranch Liability Section, Who Is An Insured, Part II, Page 3 of 16).

Neither Troy Dowling nor his business qualifies as an "insured" under any of the definitions of the Umbrella coverage of the Farm Bureau Policy. They are not (A) named insureds (B); resident relatives (C); members of the Dowling Brothers Partnership (D); trustees; (E) limited liability members; (F) officers or directors; (G) persons responsible for animals or watercraft. (Ex. A – Personal and Farm/Ranch Liability Section, Who Is An Insured, Part II, Page 3 of 16).

In addition, (H) Troy Dowling was not an employee operating the sprayer within the scope of employment or a person using the sprayer with permission "on a location insured under 'underlying insurance.'" (Ex. A – Personal and Farm/Ranch Umbrella Liability Section, Who Is An Insured, Part II, Page 3 of 16). Although Troy Dowling had permission to borrow the sprayer, he was operating or using it in his own business on property owned by other farmers that obviously was not insured by Dowling Brothers Partnership. (T 10-11).

Further, Troy Dowling was not (I) a farm or ranch employee in the course of employment by an insured; (J) a person or organization insured by any underlying insurance of Dowling Brothers Partnership; or (K) any person for whom Dowling Brothers Partnership agreed to provide insurance. (Ex. A – Personal and Farm/Ranch Umbrella Liability Section, Who Is An Insured, Part II, Page 3 of 16).

But even if all of the above were to be ignored, there is also an express exclusion for coverage for any damages arising out of the operation of a separate "business" in this section. (Ex. A – Personal and Farm/Ranch Umbrella Liability Section, Additional Exclusion, Business, Page 6 of 16). It is undisputed that Troy

Dowling was using the crop sprayer in the operation of his commercial crop spraying business when the accident occurred. As a result, there also is no coverage under the "umbrella" section of the Farm Bureau policy.

CONCLUSION

The trial court committed clear error in holding that the claims against Troy Dowling and his business arising out of the accident in question are covered in any way by the policy purchased by Dowling Brothers Partnership. The Farm Bureau policy simply does not cover any of the claims against Troy Dowling or his business. Rather, Troy Dowling must look to his own insurance for any such coverage.

WHEREFORE, Appellee Farm Bureau Mutual Insurance Company respectfully requests that this Honorable Court *reverse* the judgments, findings of fact, conclusions of law, and order denying Farm Bureau's motion for summary judgment and remand this case with instructions to enter judgment for Farm Bureau declaring that it has no duty to defend or indemnify Troy Dowling or Dowling Spray Service for the underling accident and that neither Troy Dowling nor his business are insureds or have any coverage under the policy sold to Dowling Brothers Partnership.

Dated this 4th day of August, 2014.

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BY */s/ Ronald A. Parsons, Jr.* .

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CERTIFICATE OF SERVICE

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Dated this 4th day of August, 2014.

/s/ Ronald A. Parsons, Jr.
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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 6754 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27020

Berkley Regional Specialty Insurance Company,

Plaintiff and Appellee,

vs.

Dowling Spray Service; Troy Dowling; Scott Dowling; Great West Casualty Company; and Farm Bureau Mutual Insurance Company,

Defendants and Appellees,

And

James Seiler and Kimberly Seiler,

Defendants and Appellants.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

The Honorable Jon R. Erickson

BRIEF OF APPELLEE BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY

NOTICE OF APPEAL FILED MARCH 10, 2014

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PRELIMINARY STATEMENT

The Appellants, James and Kimberly Seiler, will be referred to as Seilers. The Appellee, Berkley Regional Specialty Insurance Company, will be referred to as BRSIC. Great West Casualty Company will be referred to as Great West. Farm Bureau Mutual Insurance Company will be referred to as Farm Bureau. To avoid confusion, each Dowling Defendant will be referred to by full name.

The settled record will be cited as "SR." The Appendix will be cited as "App." The relevant provisions at issue of both the BRISC CGL policy and the Great West Auto policy taken from the settled record are provided in the Appendix for the Court's immediate reference, along with the other relevant documents from the settled record.

JURISDICTIONAL STATEMENT

The Seilers appeal from a September 13, 2013 Order Granting BRSIC's Motion for Summary Judgment signed by the Honorable Jon R. Erickson, Third Circuit Court Judge. (SR at 1607). The Order was filed on September 20, 2013, with Notice of Entry served on February 19, 2014. (SR at 1607, 1708). The Seilers also appeal a February 6, 2014 Judgment signed by Judge Erickson. (SR at 1688-89). The Judgment was filed on February 12, 2014. Id. On February 14, 2014, the Seilers served a Notice of Entry of Judgment. (SR at 1705). On March 10, 2014, the Seilers filed a Notice of Appeal. (SR at 1780). This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT CORRECTLY CONCLUDED THAT BRSIC's COMMERCIAL GENERAL LIABILITY POLICY DOES NOT PROVIDE COVERAGE FOR THE AUTO ACCIDENT.

The trial court issued an Order declaring that BRSIC's commercial general liability policy does not provide coverage for the Seilers' claim against Troy Dowling and Dowling Spray Service as a result of the auto accident on July 11, 2010. (SR at 1607).

SDCL 32-35-2; SDCL 32-5-2

Demaray v. De Smet Farm Mut. Ins. Co.,
2011 SD 39, 801 N.W.2d 284.

Rakestraw v. Southern Guar. Ins. Co. of Georgia,
262 Fed.Appx. 180, 2008 WL 101742 (11th Cir. 2008).

Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co.,
130 Cal.App.4th 890, 30 Cal.Rptr.3d 606 (Cal. Ct. App. 2005).

II. WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER THE GREAT WEST AUTO POLICY FOR THE AUTO ACCIDENT.

The trial court ruled there was no coverage under Great West's commercial auto policy as a result of the auto accident on July 11, 2010. (SR at 1688).

Ass Kickin Ranch, LLC v. North Star Mut. Ins. Co.,
2012 SD 3, 822 N.W.2d 724

Fedderson v. Columbia Ins. Group,
2012 SD 90, 824 N.W.2d 793

Northern Ins. Co. of New York v. Ekstrom,
784 P.2d 320 (Colo. 1989).

STATEMENT OF THE CASE

This appeal arises out of orders and judgments issued by the Honorable Jon R. Erickson, Third Circuit Court Judge for the County of Beadle. BRSIC filed a Declaratory Judgment action seeking a declaration that its commercial general liability policy issued to Troy Dowling did not provide coverage for a July 11, 2010 auto accident. The accident happened at the intersection of Highway 37 and 218th Street outside of Huron when the Seilers' motorcycle crashed into a John Deere 4720 self-propelled sprayer driven by Troy Dowling. As a result of the accident involving the use of the vehicle on a public road, the Seilers were injured.

BRSIC issued a commercial general liability (CGL) policy to Dowling Spray Service for the policy period May 1, 2010 to May 1, 2011. The BRSIC policy excludes coverage for "bodily injury" or "property damage" arising out of the use of an "auto," a term defined to include a self-propelled vehicle with permanently attached spraying equipment, like the John Deere 4720 self-propelled sprayer Troy Dowling was driving at the time of the accident.

Here, the Seilers do not dispute that the vehicle driven by Troy Dowling qualifies as an "auto" or that the BRSIC CGL policy expressly *excludes* coverage for liability arising out of the use of an "auto." (Seilers' Appeal Brief, p. 32) The Seilers did not dispute BRSIC's Statement of Material Facts filed in support of its Motion for Summary Judgment, stating: "All facts, Nos. 1-30 are undisputed." (SR at 1224). Rather, the Seilers claim that an exception to the auto exclusion applies. That exception is inapplicable here.

The exception to the auto exclusion in (5)(b) applies only to "bodily injury" arising out of the "operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of 'mobile equipment.'" The referenced paragraphs f.(2) and f.(3) describe the following machinery and equipment: cherry pickers, air compressors, pumps, generators, and spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment. Under the plain language of the exception to the exclusion, if an injury is caused by the operation of the described equipment, the auto exclusion would not apply. The exception to the exclusion does not broadly apply to injuries arising out of the use of the vehicle used to transport the equipment. Rather, it specifically applies to the operation of the particular *machinery or equipment* that is permanently attached to that vehicle.

Here, the Seilers' injuries did not arise out of the operation of the attached spraying equipment. The Seilers' injuries arose out of the operation of the vehicle while it was transporting the spraying equipment to another location. The exception to the auto exclusion does not apply.

STATEMENT OF FACTS

On July 11, 2010, Troy Dowling was driving a self-propelled John Deere 4720 with permanently attached spraying equipment on his way to a commercial spraying job. (SR 1175, Troy Dowling depo., 24:12-13; SR 1173, Troy Dowling depo., 30:6-7). At approximately 9:10 a.m., James Seiler crashed into the sprayer at the intersection of Highway 37 and 218th Street outside of Huron, South

Dakota. (Id.). Mr. Seiler and his wife and passenger, Kim Seiler, were injured as a result of the motor vehicle accident. (SR 289, Seilers' Answer to Complaint, ¶ 2).

The John Deere 4720 involved in the accident was not owned by Troy Dowling or Dowling Spray Service. (See SR 1196, Scott Dowling depo., 7:13-22; SR 1175, Troy Dowling depo., 23:24-25). The vehicle was owned by the Dowling Brothers, a company owned by Troy's uncles, Scott and Tracy Dowling. (SR 1188, 1194-95, 1198, Scott Dowling depo., 15:21-23, 9:4-10:5, 5:14-15). Troy Dowling had borrowed the sprayer because it was more suitable for the spraying job he had agreed to perform near Alpena. (SR 1177, Troy Dowling depo., 13:6-13).

The John Deere 4720 was designed so that it could be driven on public roads and was equipped with headlights and turn signals. (SR 1171, Troy Dowling depo., 37:6-15). Troy Dowling testified that when he used the John Deere 4720, he would typically drive it to jobs within 10 miles. (See SR 1189, Scott Dowling depo., 14:17-15:8). According to the South Dakota Department of Transportation, self-propelled sprayers like the John Deere 4720 were required to be licensed for use on public roads. (See SR 1150-1163; SDCL § 32-35-2).

The BRSIC Policy.

BRSIC issued policy number BPK 0004086 – 24 to Dowling Spray Service for the policy period May 1, 2010 to May 1, 2011. (SR 886-1148). The policy provides a $1,000,000 "each occurrence" limit of liability subject to a $2,500

deductible. (SR 1138, 1148). The general liability coverage was provided through form number CG 00 01 12 04. (SR 1118).

The BRSIC policy's insuring agreement provides:

> 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 the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any suit seeking damages for **bodily injury** or **property damage** to which this insurance does not apply. We may at our discretion investigate any **occurrence** and settle any claim or **suit** that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section III - Limits of Insurance; and
>
> (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.
>
> b. This insurance applies to **bodily injury** and **property damage** only if:
>
> (1) The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**;
>
> (2) The **bodily injury** or **property damage** occurs during the policy period; and
>
> (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is an

> Insured and no **employee** authorized by you to give or receive notice of an **occurrence** or claim, knew that the **bodily injury** or **property damage** had occurred, in whole or in part. If such a listed insured or authorized **employee** knew, prior to the policy period, that the **bodily injury** or **property damage** occurred, then any continuation, change or resumption of such **bodily injury** or **property damage** during or after the policy period will be deemed to have been known prior to the policy period.

(SR 1118). To fall within the insuring agreement the insured must be legally obligated to pay damages as a result of "bodily injury" or "property damage" caused by an "occurrence," a term defined as an accident. (Id.).

The BRSIC policy incorporates the following exclusion:

> This insurance does not apply to:
>
> g. Aircraft, Auto or watercraft
>
> **Bodily injury** or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **loading** or **unloading**.
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by or rented or loaned to any insured.
>
> This exclusion does not apply to:
>
> (1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an **auto** on, or on the ways next to, premises you own or rent, provided the **auto** is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any **insured contract** for the ownership, maintenance or use of aircraft or watercraft; or

(5) **Bodily injury** or **property damage** arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of **mobile equipment** if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or

(b) The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of **mobile equipment**.

(SR 1115).

Subject to the exceptions listed in g.(1)-(5), coverage under the BRSIC policy is excluded for "bodily injury" or "property damage" arising out of the use of an "auto," a term defined as follows:

2. **Auto** means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, **auto** does not include **mobile equipment**.

(SR 1108). The vehicle was designed to travel on public roads and was equipped with turn signals, lights and mirrors. (SR 1171, Troy Dowling depo., 37:6-15). In addition, according to the South Dakota Department of Transportation, vehicles like the one driven by Mr. Dowling were required to be licensed and would be subject to the compulsory financial and vehicle insurance laws in South Dakota. (See SR 1150-1163; SDCL § 32-35-2). The vehicle was not "mobile equipment", a term defined as follows:

12. **Mobile equipment** means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not mobile equipment but will be considered autos:

. . .

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, **mobile equipment** does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered **autos**.

(SR 1106-07) (emphasis added). A self-propelled vehicle with permanently attached spraying equipment like the one involved here is expressly excluded from the definition of "mobile equipment."

Subsection f. of the BRSIC policy also provides that even if a vehicle has been described in subsections a., b., c. or d. (such as farm machinery), any self-propelled vehicle with permanently attached spraying equipment will be deemed an "auto." (Id.). Accordingly, any resulting injury or damage from the use of the auto would be subject to exclusion g, excluding coverage for bodily injury or property damage resulting from the use of an auto. So, for example, if a vehicle fell within the general description of mobile equipment, it would be excluded from the definition of mobile equipment if it is self-propelled and incorporated a permanently attached sprayer. The self-propelled vehicle with permanently attached spraying equipment involved in the accident qualifies as an "auto" under the BRSIC policy. All damages sustained by the Seilers as a result of the accident are excluded by the BRSIC policy.

In addition, under the BRSIC policy, any vehicle that is subject to compulsory financial laws or vehicle insurance law in the state where it is principally garaged is an auto for purposes of the exclusion. It cannot be disputed that under South Dakota law, the vehicle was subject to South Dakota's motor vehicle registration and insurance requirements. (See SR 1150-1163; SDCL § 32-35-2). The South Dakota Department of Transportation requires self-propelled sprayers to be titled and licensed when used by a commercial entity, such as Dowling Spray Service. Under SDCL 32-35-2, "proof of ability to respond in damages for liability, on account of accidents occurring after the effective date of the proof, arising out of the ownership, maintenance, or use of a vehicle of a type

subject to registration under the laws of this state" is required in the amount of $25,000 for bodily injury or death of one person in any one accident; $50,000 for bodily injury to or death of two or more persons in any one accident; and $25,000 for injury to or destruction of property of others in any one accident. (Id.). The sprayer was required to be registered when used in a commercial capacity and is therefore subject to South Dakota's compulsory financial responsibility law. The vehicle also qualifies as an "auto" under this provision.

BRSIC filed its required Statement of Material Facts in support of its Motion for Summary Judgment containing clear statements that this self-propelled sprayer was designed to be driven on public roads, was required to be licensed, and subject to South Dakota's compulsory financial responsibility law in Statements 11-13. (SR at 815-816; App. at 3-4). Troy Dowling, the Seilers, and Great West did not dispute these statements in their required responsive statements. (SR at 1224, 1376, 1268-69; App. at 15, 28, 24-25). The trial court concluded in its May 8, 2012 Letter Decision granting BRSIC's Motion for Summary Judgment[1] that:

> The opponents agree that the John Deere 4720 sprayer would be mobile equipment if it were not subject to a financial responsibility law or other motor vehicle insurance law where licensed or principally garaged.

[1] The trial court also later concluded in its May 22, 2013 Letter Decision denying Great West's Motion for Summary Judgment: "Seilers are correct. Regardless of whether the sprayer is defined as 'mobile equipment' or not, it is subject to South Dakota's financial responsibility law." (SR at 1596).

> The John Deere 4720 sprayer is farm equipment, or rather mobile farm equipment. However, it is subject to the insurance laws of South Dakota. As such, the Berkeley policy clearly excludes it from coverage under the Berkeley policy.

(SR 1397). Clearly, on the record before the Court, the trial court correctly granted BRSIC's Motion.

After the trial court granted BRSIC's Motion, a later court trial was held on September 20, 2013, involving the remaining parties (Troy Dowling, the Seilers, Farm Bureau and Great West) and their coverage issues. (SR 1720). Following the trial, Judge Erickson signed a set of Findings of Fact and Conclusions of Law, apparently proposed by Great West, containing the demonstrably incorrect statement that the sprayer was not subject to South Dakota's financial responsibility law. (SR 1716, 1713, Finding of Fact No. 21 and Conclusion of Law No. 7, 8). Significantly, Great West did not dispute BRSIC's Statements of Fact concerning this issue as required by SDCL 15-6-56(c) prior to entry of summary judgment in favor of BRSIC.

STANDARD OF REVIEW

This Court reviews declaratory judgments as it would any other order, judgment, or decree. Dakota Fire Ins. Co. v. J & J McNeil, LLC, 2014 SD 37, ¶6, 849 N.W.2d 648, 649. "Findings of fact are reviewed for clear error and conclusions of law, including the interpretation of insurance contracts, are reviewed de novo." Id. See also North Star Mut. Ins. Co. v. Peterson, 2008 SD 36, ¶ 8, 749 N.W.2d 528, 531 ("When interpreting insurance contracts, we have

uniformly held them reviewable as a matter of law under the de novo standard.") (quoting Opperman v. Heritage Mut. Ins. Co., 1997 SD 85, ¶ 3, 566 N.W.2d 487, 489). The Supreme Court also reviews "de novo" whether a moving party was entitled to summary judgment as a matter of law. AMCO Insurance Co. v. Employers Mut. Cas. Co., 2014 SD 20, ¶ 6, fn.2, 845 N.W.2d 918, 920 fn.2.

"If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." BAC Home Loans Servicing, LP v. Trancynger, 2014 SD 22, ¶ 18, 847 N.W.2d 137, 140 (quoting De Smet Farm Mut. Ins. Co. of S.D. v. Busskohl, 2013 SD 52, ¶ 11, 834 N.W.2d 826, 831). See also Swenson v. Auto Owners Ins. Co., 2013 SD 38, ¶ 12, 831 N.W.2d 402, 407 ("Summary judgment will be affirmed if there exists *any* basis which would support the circuit court's ruling.").

Finally, the Order granting BRSIC's Motion for Summary Judgment was entered based on the established undisputed fact that the self-propelled sprayer was subject to South Dakota's financial responsibility law. The Seilers have never disputed this critical fact. Because the vehicle was indisputably subject to South Dakota' vehicle financial responsibility laws, the auto exclusion must apply.

The facts necessary to establish that the vehicle falls within the definition of "auto" have all been admitted under SDCL 15-6-56(c)(3). "With the material facts undisputed, [this Court's] review is limited to whether the trial court correctly applied the law." Ass Kickin Ranch, LLC v. North Star Mut. Ins. Co., 2012 SD 73, ¶ 6, 822 N.W.2d 724, 726 (quoting DeSmet Ins. Co. of S.D. v. Gibson, 1996

SD 102, ¶ 5, 552 N.W.2d 98, 99). In addition, this Court's review of the trial court's Order granting BRSIC's Motion for Summary Judgment is "restricted to facts contained within the settled record." Toben v. Jeske, 2006 SD 57, ¶ 11, 718 N.W.2d 32, 35.

ARGUMENT

ISSUE I:

WHETHER THE TRIAL COURT CORRECTLY CONCLUDED THAT BRSIC'S COMMERCIAL GENERAL LIABILITY POLICY DOES NOT PROVIDE COVERAGE FOR THE AUTO ACCIDENT.

A. The interpretation of insurance contracts under South Dakota law.

"The existence of the rights and obligations of parties to an insurance [contract] are determined by the language of the contract, which must be construed according to the plain meaning of its terms." AMCO Insurance Co., 2014 SD 20, ¶ 9, 845 N.W.2d at 921 (quoting Biegler v. Am. Family Mut. Ins. Co., 2001 S.D. 13, ¶ 20, 621 N.W.2d 592, 598–99). "Insurance contracts warrant reasonable interpretation, in the context of the risks insured, without stretching terminology." Opperman, 1997 SD 85, ¶ 4, 566 N.W.2d at 490. In this action, when considering the Seilers' claim that coverage applies due to an exception to an exclusion, "the insured bears the burden of proving that coverage exists through the exception." Demaray v. De Smet Farm Mut. Ins. Co., 2011 SD 39, ¶ 9, 801 N.W.2d 284, 287.

B. BRSIC's general liability policy does not provide coverage for the injuries resulting from the motor vehicle accident.

BRSIC issued a general liability policy to Dowling Spray Service. Liability insurance is generally written for a specific hazard, which enables the underwriter to calculate premiums on some equitable as well as predictable basis. Liability arising out of the ownership, maintenance or use of an automobile owned by an insured is generally excluded from a general liability policy. 7A J. Appleman, Insurance Law and Practice § 4500.04 (W. Berdal ed. 1979). It is also the general rule that the coverage provision in an automobile liability policy and an exclusionary clause in a general liability policy should be construed the same. Farmers Fire Ins. Co. v. Kingsbury, 461 N.Y.S.2d 226, 227 (N.Y. Sup. Ct. 1983), aff'd., 481 N.Y. S.2d 469 (N.Y. App. Div. 1984).

The operative definitions that apply to the auto exclusion in the BRSIC general liability policy and the coverage grant in the Great West policy are virtually identical. Both policies provide that self-propelled vehicles with permanently attached spraying equipment will be considered "autos." Both policies provide that vehicles subject to applicable state financial and insurance laws will be considered autos. (SR 847, 849; SR 1108, SR 1106). In Travelers Indem. Co. v. Citgo Petroleum Corp., 166 F.3d 761, 769 (5th Cir. 1999), the court observed that based on this mirror image approach "[a] single accident could not be covered by both [policies]."

Coverage under the BRSIC policy is expressly excluded for "bodily injury" or "property damage" arising out of the use of an "auto." (SR 1115). The term "auto" is defined as "[a] land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment" or "[a]ny other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged." (SR 1108). The vehicle involved in the accident was designed so that it could travel on public roads. The accident happened on a public road. The damages sustained by the Seilers were of the exact type underwriters of a CGL policy intend to exclude. The vehicle involved in the accident qualifies as an "auto" under the BRSIC policy.

Numerous decisions recognize that similar vehicles are considered an "auto" under a CGL policy. In National American Ins. Co. v. W & G, Inc., 439 F.3d 943, 946 (8th Cir. 2006), the Eighth Circuit concluded that a grain truck was an "auto" and not "farm machinery" under a National American CGL policy:

> Howard testified he drove the truck to haul grain from the edge of a field being harvested to a grain elevator, and the accident occurred on a public roadway. The use of the vehicle at the time of the collision, hauling grain on a public road leading to a grain elevator, is strong evidence demonstrating the vehicle was being used as an "auto" and not as "farm machinery."

See also Indiana Lumbermens Mut. Ins. Co. v. Timberland Pallet and Lumber Co., Inc., 195 F.3d 368, 379 (8th Cir. 1999) (CGL policy did not provide coverage because dump truck was not "mobile equipment" and liability resulting from

accident on public highway was excluded from coverage under the auto exclusion); American Safety Indem. Co. v. Stollings Trucking Co., Inc., 450 F.Supp.2d 639, 646 (S.D.W.Va. 2006) (truck with attached tank and sprayer is equipment designed primarily for either road maintenance or street cleaning and is not "mobile equipment" but is instead an "auto" excluded from coverage under CGL policy); Alligator Enterprises, Inc. v. General Agent's Ins. Co., 773 So.2d 94, 96 (Fla. Ct. App. 2000) (concluding no coverage under CGL policy for injury arising out of the ownership, maintenance or use of Alligator's tractor and trailer).

The term "auto" is also defined in the BRSIC policy to include any land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state of South Dakota. The John Deere 4720 involved in the accident is a land motor vehicle subject to South Dakota's motor vehicle registration requirements. According to the South Dakota Department of Transportation, commercial self-propelled sprayers are required to be licensed. Chapter 3 of South Dakota's Commercial & Agricultural Vehicle Handbook provides as follows:

> **Self-Propelled Application Equipment**
>
> Self-propelled fertilizer or pesticide applicators, if used by a farmer for his own farming operation, are exempt from licensing and titling. However, if these units are used by a commercial entity, they must be titled and licensed under the noncommercial vehicle fee schedule listed in Table 4.

(See SR 1150-1163; SDCL § 32-35-2) (emphasis added).

The South Dakota Department of Transportation's interpretation of South Dakota law is correct. SDCL 32-5-1 broadly defines motor vehicle to include essentially any motor vehicle or machine that is propelled by any power other than muscle. SDCL 32-5-1. SDCL 32-5-2 then requires the registration of any "motor vehicle, motorcycle, truck tractor, road tractor, trailer or semitrailer . . . which is operated or driven upon the public highways of this state." SDCL 32-5-2. The farm exemption to vehicle registration found in SDCL 32-5-1.3 would not apply where, as here, the vehicle is being used by a commercial entity. The Department of Transportation correctly concludes that when a vehicle is being used by a commercial entity, the farm exemption to vehicle registration does not apply.

Here, the sprayer was being used by Dowling Spray Service, a commercial entity providing commercial spraying services. (SR 1175, Troy Dowling depo., 24:12-13; SR 1173, Troy Dowling depo., 30:6-7). The John Deere 4720 was therefore subject to South Dakota's compulsory financial and motor vehicle insurance laws. SDCL 32-35-2 requires proof of financial responsibility "on account of accidents . . . arising out of the ownership, maintenance, or use of a vehicle of a type subject to registration under the laws of this state." SDCL 32-35-2. In fact, this was never an issue before the trial court when it granted BRSIC's Motion because Troy Dowling, the Seilers, and Great West did not dispute BRSIC's Statement of Undisputed Facts establishing that the vehicle was subject to the South Dakota financial responsibility law. (SR at 1224, 1376, 1268-69;

App. at 15, 28, 24-25). The significance of this undisputed fact was recognized by Judge Erickson in granting BRSIC's Motion. (SR at 1397).

The BRSIC policy specifically provides that: "Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered **autos**." (SR 1106-07). The vehicle here was subject to financial responsibility law and, therefore, qualifies as an "auto" under the BRSIC policy, and is subject to the auto exclusion.

C. The exception to the "auto" exclusion for liability arising out of the operation of the attached spraying equipment does not apply.

The Seilers rely on an exception to the "auto exclusion" to attempt to claim BRSIC's CGL policy provides coverage for the auto accident. The Seilers, however, do not dispute that the vehicle driven by Mr. Dowling qualifies as an "auto" or that the BRSIC CGL policy expressly *excludes* coverage for liability arising out of the use of an "auto." The Seilers also did not dispute the facts contained within BRSIC's Statement of Material Fact filed in support of its Motion for Summary Judgement establishing that the "auto" exclusion applied. Here, the Seilers carry the burden of establishing that "coverage exists through the exception." Demaray, 2011 SD 39, ¶9, 801 N.W.2d at 287. The exception does not apply here.

The auto liability exclusion in the BRSIC policy is subject to an exception for "bodily injury" arising out of the operation of the *spraying equipment* that is permanently attached to the vehicle. The policy provides in relevant part:

This [auto] exclusion does not apply to:

> ...
>
> (5) **Bodily injury** or **property damage** arising out of:
>
> ...
>
> (b) The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of **mobile equipment**.

The referenced paragraphs f.(2) and (3) describe cherry pickers, air compressors, pumps, generators, and spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment. Accordingly, if an injury is caused by the operation of the described equipment, the auto exclusion would not apply.

The exception to the exclusion is directed to injury or damage caused by the operation of the equipment attached to the vehicle and not to the use of the vehicle as a vehicle. The Seilers cite no legal authority to support their strained interpretation. At least two courts that have addressed this exception to the auto exclusion have recognized that the exception unambiguously refers to an injury or damage caused by the operation of the particular equipment attached to the vehicle - and not the operation of the vehicle itself.

In Rakestraw v. Southern Guar. Ins. Co. of Georgia, 262 Fed.Appx. 180, 181-182, 2008 WL 101742 (11th Cir. 2008), the Eleventh Circuit found that exception (g)(5) to the auto exclusion applied to injury arising from the operation

of the attached equipment and not the operation of the vehicle itself. Id. at *2. In the Rakestraw decision, Rakestraw was injured when a 2001 Dodge Ram pickup owned by Darrell Blankenship and driven by his son, Dustin, struck Rakestraw's vehicle. Id. Blankenship had permanently attached a fuel tank, air compressor, and tool box to the truck bed. Id. Blankenship carried an auto liability policy with Georgia Farm Bureau with bodily injury liability limits of $250,000 and a CGL policy with Southern Guaranty with bodily injury liability limits of $2,000,000. Rakestraw ultimately obtained a judgment against Blankenship that exceeded one million dollars. The auto policy paid $250,000, the limit of coverage, but Southern Guaranty denied coverage under its CGL policy. Rakestraw took an assignment of rights from Blankenship and commenced suit against the CGL insurer, Southern Guaranty.

Like the BRSIC policy, the Southern Guaranty CGL expressly excluded from coverage liability arising out of the use of any "auto":

> This insurance does not apply to ... "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any ... "auto" ... owned or operated by or rented or loaned to any insured.

Id. The Southern Guaranty policy also, similar to the BRSIC policy here, contained the same exception that, under paragraph (2)(g)(5), the auto exclusion did "not apply to ... 'Bodily injury' or 'property damage' arising out of the operation of any of the equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of 'mobile equipment.'" Id. Paragraph f. of the definition of "mobile equipment"

stated that "self-propelled vehicles with the following types of permanently attached equipment are not 'mobile equipment' but will be considered 'autos': ... **(3)** Air compressors...." Id.

Rakestraw argued that the exception to the auto exclusion applied because the truck was equipped with an air compressor. Id. The Eleventh Circuit rejected Rakestraw's argument, observing as follows:

> The district court correctly concluded that the exception to the auto exclusion applied to injury arising from the operation of the air compressor, and not to injury arising from the operation of "self-propelled vehicles ... with permanently attached [air compressors]." The policy is unambiguous. The exception to the auto exclusion included air compressors but not the self-propelled vehicles to which an air compressor was attached. The transportation of the air compressor did not constitute its "operation."
>
> Because Rakestraw's injuries arose from the use of an "auto," they were excluded from coverage under the Southern Guaranty policy. Because the injuries did not arise from the operation of the air compressor, the exception to the auto exclusion did not apply.

Id. at *2.

The decision in Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co., 130 Cal.App.4th 890, 893-894, 30 Cal.Rptr.3d 606, 608-09 (Cal. Ct. App. 2005) also provides guidance here. Scottsdale Insurance Company sought a declaration that its CGL policy did not provide coverage for injuries sustained by Miguel Llamas when the bucket of a "cherry picker" in which he was riding fell. State Farm issued an automobile liability insurance policy to the owner of the cherry picker. Id.

Like the BRSIC policy, the Scottsdale CGL policy excluded liability for "[b]odily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any ... 'auto'...." Id. at 616. The exclusion, also contained an exception providing that it "does not apply to" " '[b]odily injury' or 'property damage' arising out of the operation of any of the equipment listed in paragraph **f.(2)** or **f.(3)** of the 'definition of mobile equipment.'" Id. The Scottsdale court noted: 'Paragraph f.(2) lists "[c]herry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers."' Id. The court then concluded that "these provisions make it clear that the Scottsdale policy does not provide liability insurance for the truck involved in the incident." Id. The court found that the Scottsdale policy provided coverage for injury caused by the operation of the equipment. Id.

The John Deere self-propelled sprayer is an "auto" under the BRSIC policy. The Seilers' injuries arise from Mr. Dowling's use of the vehicle on a public road. The attached spraying equipment was not in use and the injuries sustained did not result from the operation of the sprayer. The transportation of the sprayer does not constitute operation of the attached spraying equipment.

Vehicles with permanently attached equipment, such as the self-propelled sprayer here, are likely to be used on public roads resulting in a risk of injury attributable to the use of a vehicle as a mode of transportation. This is a risk contemplated by an auto liability policy – not a CGL policy. See McQuirter v. Rotolo, 77 So.3d 76, 83 (La. App. 2011) (the risk associated with the operation of

automobiles is a risk that was not intended to be covered by a CGL policy). In Great Central Ins. Co. v. Roemmich, 291 N.W.2d 772, 774 (S.D. 1980), this Court recognized that the purpose of an auto liability exclusion is to make it clear that the policy does not cover liability resulting from motor vehicle use. See also Hays v. Georgia Farm Bureau Mutual Ins. Co., 772 S.E.2d 923 (Ga. Ct. App. 2012); U.S. Specialty Ins. Co. v. LeBeau, Inc., 847 F.Supp.2d 500 (W.D.N.Y. 2012); Wells v. Auto Owners Ins. Co., 864 N.E.2d 356 (Ind. Ct. App. 2007); Fillmore v. Iowa National Mut. Ins. Co., 344 N.W.2d 875 (Minn. Ct. App. 1984); Shelter Mut. Ins. Co. v. Politte, 663 S.W.2d 777 (Mo. Ct. App. 1983); Iorio ex rel. Iorio v. Simme, 340 N.J. Super. 19, 773 A.2d 722 (App. Div. 2001).

The general liability and auto liability coverages are intended to "dovetail" and "fit together into a coordinated and unified whole." Northern Ins. Co. of New York v. Ekstrom, 784 P.2d 320, 324 (Colo. 1989) (quoting Webster's Third New International Dictionary 681). Liability insurance is generally written for a specific hazard in order to enable the underwriter to calculate premiums on some equitable as well as predictable basis. Id. As a result, the hazard to be covered under each policy is carefully defined and other hazards are excluded. Id. To avoid an overlap in coverage which the policyholder did not pay for, the general liability coverage expressly excludes "bodily injury" that results from the maintenance, operation or use of an auto that is owned, operated, hired or borrowed by an insured. The insuring agreement in the auto policy applies to liability that results from the ownership, maintenance, or use of a covered auto.

The coverage under the automobile policy is then "dovetailed" into the exclusion under the CGL policy to provide for uniform, non-duplicative liability coverage. Id.

The interpretation urged by the Seilers is not a reasonable interpretation of the insurance contract. If the Court were to accept the Seilers' interpretation, any motor vehicle accident involving vehicles with the attached equipment listed in paragraphs f.(2) or f.(3) would never be covered by an auto policy. This Court considers the provisions of an insurance policy "as a whole." Culhane v. Western Nat. Mut. Ins. Co., 2005 SD 97, ¶19, 704 N.W.2d 287, 293. See also Rumpza v. Donalar Enterprises, Inc., 1998 SD 79, ¶11, 581 N.W.2d 517, 520 ("An insurance policy must be examined as a whole."). In addition, under South Dakota law, a "court may not 'seek out a strained or unusual meaning for the benefit of the insured.'" Ass Kickin Ranch, LLC, 2012 SD 73, ¶10, 822 N.W.2d at 727. In addition, "insurance policies must be subject to a reasonable interpretation and not one that amounts to an absurdity." Id. See also Fedderson v. Columbia Ins. Group, 2012 SD 90, ¶15, fn. 3, 824 N.W.2d 793, 798, fn. 3 (court must avoid absurd result when interpreting an insurance policy).

The BRSIC CGL policy was never intended to and does not provide coverage for a motor vehicle accident. Similarly, the auto policy would not provide coverage for an injury caused by the operation or use of the spraying equipment. Reading the auto exclusion in the BRSIC CGL together with the coverage grant in the Great West auto policy establishes that the Great West auto

policy provides coverage for this accident and that the BRSIC CGL policy does not provide coverage.

ISSUE II:

WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER THE GREAT WEST AUTO POLICY FOR THE AUTO ACCIDENT.

Troy Dowling purchased a commercial auto policy from Great West and a CGL policy from BRSIC. Although this accident occurred when the self-propelled sprayer was being driven down a public road, Great West denied coverage. Both the BRSIC CGL policy and the Great West auto policy provide that even if a vehicle might otherwise fall within the definition of "mobile equipment" it will be deemed to be an "auto" and not "mobile equipment" if it is a self-propelled vehicle with permanently attached spraying equipment or is subject to a compulsory financial responsibility law. This, in short, means that the auto policy takes over coverage for a self-propelled sprayer while in transport on the highway. The Great West policy provides in relevant part:

> 6. Vehicles not described in Paragraph 1., 2., 3., or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
>
> . . .
>
> b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

(SR 847) (emphasis added).

The John Deere 4720 self-propelled sprayer is an "auto" and subject to coverage under Great West's auto policy. It is undisputed that the John Deere 4720 is a self-propelled vehicle with permanently attached spraying equipment. It is also a land vehicle subject to South Dakota's financial responsibility law. The vehicle qualifies as an "auto" under Great West's auto policy. Great West is obligated to provide coverage for the injuries resulting from the auto accident.

Apparently, Great West claims that its "operations" exclusion precludes coverage. However, this exclusion applies to an injury or damages that results from the operation of the equipment that is attached to the vehicle. The Great West auto policy provides:

B. EXCLUSIONS

THIS INSURANCE DOES NOT APPLY TO ANY OF THE FOLLOWING:

9. OPERATIONS

"Bodily injury," "property damage," or "covered pollution cost or expense" arising out of the operation of:

a. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers;

b. Air compressors, pumps and generators including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

c. Machinery or equipment that is on, attached to, or part of a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

(SR 857).

The exclusion was clearly intended to apply to the operation of the attached equipment and not from the use of the vehicle transporting the equipment.[2] The injury here was not caused by the operation of the attached spraying equipment.

Accepting Great West's interpretation would render its coverage illusory for any motor vehicle collision that happened while any of the listed equipment was being transported. This interpretation is absurd. Under South Dakota law, insurance policies may not be subjected to an interpretation that results in absurdity. See Ass Kickin Ranch, LLC, 2012 SD 73, ¶10, 822 N.W.2d at 727; Fedderson, 2012 SD 90, ¶15, fn. 3, 824 N.W.2d at 798, fn. 3.

[2] If the Court considers the exception to the auto exclusion discussed in BRSIC's Argument 1(C), there is CGL coverage for damage arising out of operation of the actual equipment attached to the vehicle, but not when the vehicle is being used as a vehicle. Instead, the auto policy provides coverage when the vehicle is being used on a public highway with the sprayer folded in for transport, as it was here.

Troy Dowling purchased both a CGL policy and commercial auto policy that are intended to mirror each other. See Northern Ins. Co. of New York, 784 P.2d at 324 (recognizing general liability and auto liability coverages are intended to "fit together into a coordinated and unified whole."). The commercial auto policy will provide coverage for certain defined losses that are specifically excluded by the CGL policy and *vice versa*. Reading the BRSIC auto exclusion and the Great West coverage grant for its auto coverage together to create a coordinated and unified whole, this specific accident falls under the coverage provided by Great West's auto policy and is excluded by BRSIC's CGL policy.

CONCLUSION

The CGL policy issued by BRSIC to Dowling Spray Service excludes coverage for "bodily injury" or "property damage" arising out of the use of an "auto," a term defined to encompass the vehicle involved in the collision. The commercial auto policy issued by Great West to Mr. Dowling and Dowling Spray Service defines the term "auto" to encompass the vehicle involved in the collision. The accident occurred when the John Deere 4720 was being used as a vehicle on a public road to get to the field where the spraying equipment was then going to be used in a commercial spraying operation. The Seilers' injuries were not caused by the operation of the spraying equipment, but by the operation of the vehicle on a public highway. The Great West auto policy covers the Seilers' injuries arising out of the use of the "auto." The BRSIC CGL policy excludes coverage for the

Seilers' injuries arising out of the use of the "auto." The trial court's Order granting summary judgment in favor of BRSIC should be affirmed.

REQUEST FOR ORAL ARGUMENT

BRSIC, by and through counsel, respectfully requests the opportunity to present oral argument before the Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellee's Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellee's Brief* contains 7235 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare *Appellee's Brief*. The original *Appellee's Brief* and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Brief were provide by email service to the following attorneys or firms in PDF format with attached Appendix on August 19, 2014 before 11:59 a.m. on that date:

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Papers copies of the foregoing brief and appendix were also provided by U.S. Mail, first class, postage prepaid on August 19, 2014 to the following parties:

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APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27020

BERKLEY REGIONAL SPECIALTY
INSURANCE COMPANY,
Plaintiff and Appellee,

-vs-

DOWLING SPRAY SERVICES; TROY DOWLING;
SCOTT DOWLING; GREAT WEST CASUALTY COMPANY;
and FARM BUREAU MUTUAL INSURANCE COMPANY,
Defendants and Appellees.

and

JAMES SEILER and KIMBERLY SEILER,
Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

THE HONORABLE JON R. ERICKSON CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF APPELLEE
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NOTICE OF APPEAL FILED MARCH 10, 2014

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PRELIMINARY STATEMENT AND ABBREVIATIONS

In compliance with SDCL 15-26A-63, Appellee Great West Casualty Company will utilize the following references throughout this brief:

- Appellants will be referred to as "Seilers."
- Appellee Farm Bureau Mutual Insurance Company will be referred to as "Farm Bureau."
- Appellee Berkley Regional Specialty Insurance Company will be referred to as "Berkley."
- Great West Casualty Company will be referred to as "Great West."
- Consistent with Appellants' Brief, documents indexed by the Beadle County Clerk of Courts will be referenced by utilizing "SR" followed by the corresponding page number.
- Consistent with Appellants' Brief, the trial transcript will be referenced by utilizing "TT" followed by the corresponding page number.

JURISDICTIONAL STATEMENT

The Seilers' appeal arises from a judgment entered pursuant to a court trial before the Honorable Judge Jon Erickson. Judge Erickson had previously granted summary judgment in favor of Berkley and entered judgment in favor of Great West after a court trial held on September 20, 2013. The court further found coverage existed for the collision under the policy issued by Farm Bureau and that no coverage existed under the Great West policy and that Great West had no duty to defend and indemnify Troy Dowling or Troy Dowling d/b/a Dowling Spray Service.

Following entry of the Judgment and Findings of Fact and Conclusions of Law, a Notice of Entry of Judgment was served and a timely notice of appeal to this Court was filed by Seilers. Farm Bureau also appeals and such appeal has been docketed as Appeal No. 27021.

This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THERE WAS NO COVERAGE UNDER THE INSURANCE POLICY ISSUED BY GREAT WEST CASUALTY COMPANY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010, COLLISION?

Most relevant statutes: None cited.

Most relevant cases:

American Star Insurance Company v. Insurance Company of the West, 232 Cal. App.3d 1320, 284 Cal. Rptr. 45 (Cal. App.4th Dist. 1991)

Rogers v. Allied Mut. Ins. Co., 520 N.W.2d 614 (S.D. 1994)

Opperman v. Heritage Mut. Ins. Co., 1997 SD 85, 566 N.W.2d 487

The circuit court held that no coverage existed for the collision under the policy issued by Great West and that Great West had no duty to defend and indemnify Troy Dowling, individually, or Troy Dowling d/b/a Dowling Spray Service in regard to the claims arising in the July 11, 2010, collision. Findings of Fact and Conclusions of Law as well as a judgment consistent with this holding were entered in favor of Great West.

II. WHETHER THE TRIAL COURT ERRED IN DETERMINING THERE WAS NO COVERAGE UNDER THE INSURANCE POLICY ISSUED BY BERKELEY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010, COLLISION?

Most relevant statutes: None cited.

Most relevant cases: None cited.

STATEMENT OF THE CASE

In July of 2010, Troy Dowling was a resident of rural Beadle County, South Dakota. *See* SR 1720-2. Troy Dowling engaged in farming and also had a business where he conducted agricultural spraying for hire. *Id.* On July 11, 2010, Troy Dowling and the Seilers were involved in an accident in which a John Deere 4720 agricultural sprayer operated by Troy Dowling collided with a motorcycle ridden by the Seilers. *See* TT at 10-11.

The John Deere 4720 sprayer operated by Troy Dowling at the time of the collision was owned by Dowling Brothers Partnership. *See* TT at 10. Troy Dowling conducted his agricultural spraying enterprise in the business name of Dowling Spray Service and had no ownership interest in Dowling Brothers Partnership. *See* TT at 10.

At the time of the collision, Troy Dowling had a commercial general liability (CGL) insurance policy through Berkley. Troy Dowling also had in place a commercial auto insurance policy issued by Great West while the Dowling Brothers Partnership was insured under a policy issued by Farm Bureau. Berkley commenced an action for seeking declaratory judgment that it had no coverage for any claims arising from the collision and had no duty to defend pursuant to its policy of insurance. Great West and Farm Bureau answered, denied coverage and asserted counter and cross-claims seeking judgment that the other insurers must provide coverage for claims arising from the collision.

Berkley, Great West and Farm Bureau all filed competing motions for summary judgment. Each insurer sought judgment declaring a lack of coverage under their respective policies of insurance. The trial court granted Berkley's motion and determined

there were genuine issues of material fact to be determined at a court trial as to Great West and Farm Bureau.

A trial to the court was held on September 20, 2013, before the Honorable Jon Erickson. The court held that the Great West policy provided no coverage for the collision as the subject sprayer, among other things, was subject to policy exclusion. *See* Findings of Fact and Conclusions of Law entered by the Court - SR 1720-9. The trial court also concluded that coverage for the collision existed under Farm Bureau's policy of insurance for Dowling Brothers Partnership. SR at 1720-10.

STATEMENT OF THE FACTS

On July 11, 2010, Troy Dowling was operating a John Deere 4720 sprayer on 218th Street near Huron, South Dakota. As Dowling was crossing the intersection of Highway 37 and 218th Street, the John Deere 4720 sprayer he was operating collided with a motorcycle driven by James Seiler. The motorcycle was also occupied by his wife, Kim Seiler.

The sprayer operated by Troy Dowling at the time of the accident was owned by the Dowling Brothers Partnership. On the date of the accident, Troy Dowling was driving the 4720 John Deere sprayer to spray a quarter of land on the Losing Brothers Farm as part of his commercial agricultural spraying operation. The John Deere 4720 sprayer was being operated in a commercial capacity in furtherance of Dowling Spray Service's business. Dowling Spray Service was a d/b/a of which Troy Dowling was the sole proprietor.

At the time of the accident, Troy Dowling had a commercial auto policy issued by Great West in effect. He also had a commercial general liability policy in place with

Berkley. Dowling Brothers Partnership, the owner of the sprayer, had a multi-module insurance policy in place with Farm Bureau.

The commercial auto coverage provided by Great West to Troy Dowling d/b/a Dowling Spray Service contained a schedule of autos that listed a 2000 Kenworth tractor, a 1999 Great Dane flatbed trailer and a 2009 Timpte grain hopper trailer. The John Deere 4720 sprayer was not listed as a scheduled auto on the policy Great West issued to Troy Dowling d/b/a Dowling Spray Service. The present declaratory action was commenced to determine whether any of the aforementioned insurance policies provided coverage for the subject accident and if so, whether any applicable exclusions operated to limit or bar coverage.

STANDARD OF REVIEW

The South Dakota Supreme Court reviews "declaratory judgments as we would any other order, judgment, or decree." *Dakota Fire Ins. Co. v. J&J McNeil, LLC*, 2014 SD 37, ¶ 6 (*quoting Hanson Farm Mut. Ins. Co. of S.D. v. Degen*, 2013 SD 29, ¶ 14, 829 N.W.2d 474, 477-78). "Findings of fact are reviewed for clear error and conclusions of law, including the interpretation of insurance contracts, are reviewed de novo. *Id.* (*citing Degen*, 829 N.W.2d at 478).

Further, this Court has repeatedly held:

> In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly

> applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Paint Brush Corp. v. Neu, 1999 SD 120, ¶ 12, 599 N.W.2d 384, 389 (*citing Coffee Cup Fuel Stops & Convenience Stores, Inc. v. Donnelly et al.*, 1999 SD 46, ¶ 17, 592 N.W.2d 924 (*citing Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 SD 78, ¶ 14, 581 N.W.2d 527, 531)).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THERE WAS NO COVERAGE IN THE INSURANCE POLICY ISSUED BY GREAT WEST CASUALTY COMPANY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010, COLLISION

"Affirmance is suitable if any legal basis exists to support the court's decision." *Horne v. Crozier*, 1997 SD 65, ¶ 5, 565 N.W.2d 50 (*citing St. Paul Fire & Marine Ins. v. Schilling*, 520 N.W.2d 884, 886 (SD 1994)).

A. Interpretation of Insurance Contracts

"A court may not 'seek out a strained or unusual meaning for the benefit of the insured.'" *Ass Kickin Ranch, LLC v. N. Star Mut. Ins. Co.*, 2012 SD 73, P10 (S.D. 2012) quoting *Rumpza v. Donalar Enters., Inc.*, 1998 S.D. 79, ¶ 12, 581 N.W.2d 517, 521. "An insurance contract's language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties." *Id*. quoting *Stene v. State Farm Mut. Auto. Ins. Co.*, 1998 S.D. 95, ¶ 14, 583 N.W.2d 399, 402. "Essentially, this means that when the terms of an insurance policy are unambiguous, these terms 'cannot be enlarged or diminished by judicial construction.'" *Am. Family Mut. Ins. v. Elliot*, 523 N.W.2d 100, 102 (S.D. 1994). "When contract language is unambiguous, extrinsic evidence is not considered because

the intent of the parties can be derived from within the four corners of the contract." *Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69, P37 (S.D. 2007).

B. Coverage is excluded pursuant to the express provisions of the Great West policy.

The Great West Commercial Auto Policy issued to Dowling Spray Service excludes coverage under the facts found by the trial court as to the John Deere 4720 Sprayer in question. The facts supporting this determination are clearly and unequivocally supported by the record. Whether the sprayer is subject to South Dakota's compulsory financial responsibility laws is immaterial to determining the applicability of Great West's policy. The sprayer is excluded as "mobile equipment" whether subject to compulsory financial responsibility laws or not.

The sprayer is "farm machinery" and would be deemed "mobile equipment" under the Great West policy if the sprayer was not subject to compulsory financial responsibility laws. The Great West policy clearly sets forth exclusions to its Commercial Auto Liability Policy. *See* Great West Commercial Auto Coverage Policy at App. A, page 5(B). That subsection states:

> **B. EXCLUSIONS.**
>
> This insurance does not apply to any of the following:
> . . .
>
> **9. OPERATIONS**
>
> "Bodily injury," "property damage," or "covered pollution cost or expense" *arising out of the operation of*:
>
> a. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers;

b. Air compressors, pumps and generators including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

c. *Machinery* or equipment that is on, attached to, or part of, a land vehicle *that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.*

See Great West Commercial Auto Coverage Policy at App. A, pp. 5-6 (emphasis added).

If this Court determines the subject sprayer is subject to a compulsory financial responsibility law the dispositive inquiry turns on whether the John Deere 4720 sprayer in question would be considered mobile equipment if it were not "subject to a financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged". The Great West Commercial Auto policy defines "mobile equipment" as follows:

O. "MOBILE EQUIPMENT" means any of the following types of land vehicles, including any attached machinery or equipment:

1. Bulldozers, *farm machinery*, forklifts and other vehicles designed for use principally off public roads;

2. Vehicles maintained for use solely on or next to premises you own, rent or lease. You may take this vehicle off the premises temporarily if it is not licensed and the sole purpose is one of the following:

   a. The unlicensed vehicle is being taken for maintenance or repair; or
   b. The unlicensed vehicle is being used to pick up or deliver your owned, leased or rented trailers requiring maintenance or repair.

3. Vehicles that travel on crawler treads;

4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

a. Power cranes, shovels, loaders, diggers or drills; or
b. Road construction or resurfacing equipment such as graders, scrapers or rollers;

5. Vehicles not described in paragraph 1, 2, 3 or 4 above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of following types:

   a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
   b. Cherry pickers and similar devices used to raise or lower workers;

6. *Vehicles not described in paragraph 1, 2, 3 or 4 above maintained primarily for purposes other than the transportation of persons or cargo.* However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

   a. Equipment designed primarily for:

      (1) Snow removal;
      (2) Road maintenance, but not construction or resurfacing; or
      (3) Street cleaning;

   b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
   c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos."

See Great West Commercial Auto Coverage Policy at App. A,, pp. 15-16,¶ O (emphasis added).

Thus, the first step in the analysis is to determine whether the John Deere 4720 sprayer fits within any of the mobile equipment exceptions from the Commercial Auto Liability Policy. It is apparent that the John Deere 4720 Sprayer would fit the subparagraph 1 definition of "mobile equipment" which specifically includes all "farm machinery". *See* Great West Commercial Auto Coverage Policy at App. A, p. 15 ¶(O)(1). "Farm machinery" is not defined by the policy. Absent a definition contained in the policy, South Dakota precedent provides that the plain, ordinary meaning of the term is applied. *See Opperman v. Heritage Mut. Ins. Co.*, 1997 SD 85, ¶ 4, *O'Neill v. Blue Cross of Western Iowa & S.D.*, 366 N.W.2d 816, 818 (SD 1985). In determining the plain, ordinary meaning of terms, the South Dakota Supreme Court has frequently looked to the dictionary definition of terms. *See Opperman*, 1999 S.D. 85, ¶ 6; *National Farmers Union Property Casualty Co. v. Universal Underwriters Ins. Co.*, 534 N.W.2d 63, 65 (S.D. 1995); *Fort Pierre v. United Fire & Casualty Co.*, 463 N.W.2d 845, 849 (S.D. 1990).

Merriam-Webster's Online Dictionary, in relevant part, defines farm as "a tract of land devoted to agricultural purposes." *See* Merriam-Webster.com (last accessed March 13, 2012). Additionally, Merriam-Webster's Online Dictionary also defines machinery as "1 a: machines in general or as a functioning unit, *b* **:** the working parts of a machine." *See* Merriam-Webster.com (last accessed March 13, 2012). Thus, if the two definitions are combined we have a machine in general or as a functioning unit to be used on a tract of land devoted to agricultural purposes. To go further, Merriam-Webster's

Online Dictionary defines agriculture as "the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products." *See* Merriam-Webster.com (last accessed March 13, 2012).

Scott Dowling repeatedly testified that the John Deere 4720 that was involved in the accident was "used exclusively for spraying agricultural crops fields" and the Circuit Court found the same. *See* SR 1621-4, ¶17. John Deere lists the 4700 series sprayer as an agriculture product on its website. *See* www.deere.com (last accessed March 14, 2012). Common sense deems the John Deere 4720 sprayer farm machinery, the sprayer falls within the plain meaning definition of farm machinery, and the manufacturer classifies the sprayer as farm machinery. Clearly, the John Deere 4720 sprayer is farm machinery for purposes of the Great West commercial auto insurance policy.

The next inquiry entertains whether the bodily injury and property damage arose out of one of the operations identified in paragraph 9. Operations. *Supra.* As is discussed in greater detail below, the injury arose out of the operation of farm machinery.

Here, we do not have a conventional auto with aftermarket mounted equipment. The John Deere 4720 sprayer is a piece of farm machinery and this loss occurred due to the operation of that machinery. The entire John Deere 4720 is machinery as a whole for purposes of the mobile equipment section O(1)(farm machinery) and the operations section 9(c) of the Great West policy. *See* Great Commercial Auto Policy, pp. 5-6, 15-16; *see also* "machinery" definition, *supra*.

The John Deere 4720 is a piece of farm machinery and the operation thereof invokes the 9(c) exception to auto coverage irrespective of whether it is spraying

chemical. Even if the booms, pump, and tank were removed from the John Deere 4720, what remained would be farm machinery under O(1) and machinery under 9(c) and therefore the movement thereof would constitute its operation.

It is clear from the plain language of the exclusion that a loss arising out of the operation of machinery that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law is excluded from coverage under Great West's Commercial Auto Policy. Thus, even if the John Deere 4720 sprayer in question is found to be an auto under the Great West policy it is excluded from coverage because it is only deemed an auto due to a compulsory or financial responsibility law and absent such law the John Deere 4720 sprayer would fall under the definition of "mobile equipment." *See Id.*

Seilers have incorrectly argued the language in paragraph 6 makes the John Deere 4720 sprayer an "auto" as it has permanently attached spraying equipment pursuant to paragraph 6(c). That argument fails as the second line of paragraph 6 clearly only applies to vehicles that are not described in paragraphs 1 through 4. The second line of paragraph 6 only modifies paragraph 6 as the first line of paragraph 6 clearly excludes vehicles that are described in paragraphs 1 through 4 for the modification of the second line of paragraph 6. This very analysis was relied upon by the California Court of Appeals in interpreting a virtually identical policy in *American Star Insurance Company v. Insurance Company of the West*, 232 Cal. App.3d 1320, 284 Cal. Rptr. 45.

As in the present action, *American Star Insurance Company* involved a coverage dispute. *See Id.* at 1325-27. The insured owned a water truck which was normally used off road and not licensed for road use. *Id.* It was hauled on a trailer to job sites. *Id.* Its

maximum speed was 25 miles per hour and it was used to spray down construction sites during grading operations. The Insurance Company of the West policy provided coverage which excluded liability arising from the use of an "auto." *Id*. at 1324-25. In that policy, auto was defined as land motor vehicle designed for travel on public roads, but excluding "mobile equipment." *See Id*. at 1326. Similarly, the Great West policy defines an "auto" as:

> C. "Auto" means:
>
> 1. A land motor vehicle, "trailer" or semitrailer designed for travel on public road; or
>
> 2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.
>
> However, "auto" does not include "mobile equipment".

Exhibit C, p.14. The *American Star Insurance Company* court discussed the initial exclusion inquiry and explained:

> The policy's auto exclusion clearly excludes coverage for bodily injury arising out of the use of autos, but does not tell the reader what an "auto" is. For that the reader must turn to the definitions section. There the reader learns an "auto" is a "land motor vehicle" but is *not* "'mobile equipment.'" A water truck certainly is a "land motor vehicle." But this does not end the inquiry. The definition of "mobile equipment" tells the reader "mobile equipment" is *any one* of certain types of "land vehicles." Obviously, then, land vehicles of a certain type are "mobile equipment," and not "autos," for purposes of the auto exclusion. The only way for the reader to ascertain whether a water truck is an "auto" or "mobile equipment" is to examine the types of land vehicles described as "mobile equipment" to see whether "any" of them fit.

Id. at 1326.

The Insurance Company of the West policy defined "mobile equipment" in the same or substantially the same manner as the Great West casualty policy in the present case. *See American Star Insurance Company*, 232 Cal. App.3d at 1324. Subparagraph (a) of the policy defined, as mobile equipment, "bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads." Section (a) mirrors paragraph 1 of the Great West policy. Subsection (f) of the "mobile equipment" definition section included the following provision:

> Vehicles not described in a., b., c., or d. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos" . . . (3) air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

See Id. Section (f) mirrors paragraph 6 of the Great West policy.

The court went on to describe there were six equal categories of mobile equipment and that the water truck clearly fell within the first category. Similarly, the John Deere 4720 sprayer in the present case clearly falls within the first category as well under "farm machinery" in Great West's policy. The California court in the aforementioned case went on to explain:

> In this case, both the outline format of the policy and the typographical indentation of the language relied on by ICW compel the conclusion the language within category "f." relied on by ICW has no application to category "a." That language, rather, could only be construed by the reader as a subtopic within category "f.," affecting only the "mobile equipment" otherwise set forth in category "f." ("Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.") Within outlines, subtopics are divisions of the topic above them. (Warriner & Griffith, English Grammar and Composition: Complete Course (1957) p. 383.) If the drafters of the CGL form in question had wanted the text designating certain vehicles with permanently attached spraying equipment to *always* be classified as

> "autos" for purposes of the auto exclusion, they should have set the text in such a way that it would control *all* categories "a." through "f.," not just category "f."
>
> For the same general reason, the language next to item (5) in the auto exclusion restricting the exclusion from reaching the operation of equipment listed in two subcategories of category "f." has no bearing on this case. That language has nothing to do with category "a." It only affects category "f." and category "f." cannot undo a classification made by category "a."
>
> The policy therefore *unambiguously* characterizes the water truck in this case as "mobile equipment."

See Id. at 1327. South Dakota case law concerning the Doctrine of the Last Antecedent cements this position. *Rogers v. Allied Mut. Ins. Co.*, 520 N.W.2d 614, 617 (S.D. 1994) ("it is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation"). Seilers misapprehend the application of the rules of construction in an effort to force a judicial redrafting of the policy exclusions. Seilers' argument fails as the provisions referenced do not conflict. *See American Star Insurance Company*, 232 Cal. App.3d at 1327.

The same logic applied in *American Star Insurance Company* applies here. The John Deere 4720 sprayer is clearly within the definition of mobile equipment. Absent the section applying to compulsory or financial responsibility laws the John Deere 4720 sprayer is "mobile equipment." And, when the exclusion set forth in paragraph (B)(9)(c) is applied, the John Deere 4720 sprayer is excluded from coverage under Great West's Commercial Auto Policy as it would fall under the definition of mobile equipment if it were not subject to a compulsory or financial responsibility law. Seilers have offered no contrary authority concerning the exclusion contained within subparagraph (B)(9)(c).

Therefore, in applying the applicable precedent and rules of construction it is clear that no coverage exists under the Great West commercial auto liability policy.

C. Great West does not customarily insure farm machinery.

Seilers argue the Circuit Court's determination that the sprayer does not fit within Great West's business scheme was erroneously admitted and is irrelevant to the interpretation of the insurance contract at hand. But, Seilers are mistaken. Great West agrees that the policy provisions in question are unambiguous such that this Court need not look outside the "four corners of the contract". *See Vander Heide*, 2007 SD 69 at P37. However, Seilers may only succeed if this Court finds ambiguity in Great West's policy. *See Appellants' Brief* p. 23 (arguing policy is "fairly susceptible to different interpretations"). Should this Court determine extrinsic evidence is necessary to interpret the contract provisions the Circuit Court's determination as to this point is dispositive. *See Haney v. USAA Casualty Ins. Co.*, 331 Fed. Appx. 223, 229-230 (4th Cir. 2009) ("Evidence of a usage or custom is never admitted to make a new contract or to add a new element to one previously made. It may explain what is ambiguous…"). As found by the Circuit Court:

> Sarah Hanson, Vice President of Great West's Midwestern underwriting testified that Great West's insurance program is for over-the-road semi-tractor and trailer businesses. They do not insure farm equipment. No sprayer was ever added to the policy and they would have declined to do so if requested. This evidence was not contested.

Memorandum Decision, SR 1611-4. In the unlikely event this Court determines the policy is ambiguous, the extrinsic findings of the Circuit Court informs as to the intent of the parties.

The Circuit Court in its memorandum opinion stated: "The John Deere 4720 self-propelled sprayer does not meet the definition of "motor vehicle" as defined by the policy, nor does it fit within the business scheme of Great West." Memorandum Decision SR 1720-4. This conclusion by the Circuit Court is confirmed by finding of fact 16 which correctly determine that had Troy Dowling attempted to schedule the sprayer on this Great West policy, Great West would have declined to provide coverage. Also see finding of fact 20 – SR 1720-4.

Lest Appellants contend that this is simply a situation where all insurers claim that no coverage could ever have been available for the sprayer, the court should note finding of fact 26 – SR 1720-6. The evidence that after the accident of July 11, 2010, Troy Dowling successfully schedule the John Deere 4720 self-propelled sprayer on the Berkley policy is undisputed. Therefore, this is not a situation where coverage was simply unavailable because of gaps in policies. This is a situation where the sprayer should have and could have been scheduled with Berkley prior to the accident in question. If that had been done, coverage would have existed.

II. WHETHER THE TRIAL COURT ERRED IN DETERMINING THERE WAS NO COVERAGE UNDER THE INSURANCE POLICY ISSUED BY BERKELEY FOR ANY CLAIMS ARISING FROM THE JULY 11, 2010, COLLISION?

Great West takes no position concerning Berkeley's coverage but offers the following. Insurance policies are contracts. Troy Dowling purchased a hodge-podge of insurance policies from multiple companies that contain inconsistent provisions which ultimately result in no coverage existing for him. The parties are bound by their independent policies and the bearing of one does not affect the other where each policy contains fundamental differences as in the present circumstances.

CONCLUSION

The only reasonable interpretation of the Great West policy is that the John Deere 4720 Sprayer is farm machinery. To hold otherwise would result in an absurdity. The express provisions of the contract exclude coverage for farm machinery as mobile equipment whether subject to compulsory financial responsibility laws (under 9(c)) or not (under O(1)). The policy provisions are unambiguous. Prior courts have held the subject provisions to be unambiguous. Thus, Great West respectfully requests this Court Affirm the Circuit Court's decision and enter its' decision congruent therewith.

Dated this 19th day of August, 2014.

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CERTIFICATE OF SERVICE

I, Robert B. Anderson, do hereby certify that on the 19th day of August, 2014, I caused a true and correct copy of the foregoing *Appellee's Brief* to be served upon:

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The undersigned further certifies that two copies of the Appellee's Brief in the above-captioned action were hand delivered to Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 E. Capitol Avenue, Pierre, South Dakota, 57501, on the date above written. On that same date a copy of the Appellee's Brief in Word format was filed electronically by e-mail attachment to SCClerkBriefs@ujs.state.sd.us.

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CERTIFICATE OF COMPLIANCE

Robert B. Anderson, attorney for Appellee, hereby certifies that the foregoing Brief of Appellee complies with the type volume limitation imposed by the Court by Order dated March 15, 1999. Proportionally spaced typeface Times New Roman has

been used. Brief of Appellee contains 4,897 words and does not exceed 40 pages. Microsoft Word processing software has been used.

Dated this 19th day of August, 2014.

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APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal Nos. 27020, 27023

BERKLEY REGIONAL SPECIALTY INSURANCE COMPANY,

Plaintiff and Appellee,

vs.

DOWLING SPRAY SERVICE; TROY DOWLING; SCOTT DOWLING; GREAT WEST CASUALTY COMPANY; and FARM BUREAU MUTUAL INSURANCE COMPANY

Defendants and Appellees,

and

JAMES SEILER and KIMBERLY SEILER,

Defendants and Appellants.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

THE HONORABLE JON R. ERICKSON

APPELLANTS' REPLY BRIEF

NOTICE OF APPEAL FILED MARCH 10, 2014

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I. WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER A COMMERCIAL AUTO POLICY ISSUED BY GREAT WEST TO THE OPERATOR OF THE SPRAYER (TROY DOWLING).

The Seilers' initial brief contains the following arguments: (1) the Sprayer falls within both the alternative definitions of "auto" in the Great West Policy; (2) the exclusion for "Operations" does not preclude coverage; and (3) whether the Sprayer "fit within the business scheme of Great West" is irrelevant. Great West's responses to these arguments will be addressed seriatim.

A. The Sprayer falls within both definitions of "auto" in the Great West Policy.

The Great West Policy defines "auto" as follows:

> C. "**Auto**" means:
>
> 1. A land motor vehicle, "trailer" or semitrailer designed for travel on public road; or
>
> 2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.
>
> However, "auto" does not include "mobile equipment".

Exhibit C (Commercial Auto Coverage Part at p. 14 of 16) (underlined emphasis added).

1. The Sprayer is "[a] land motor vehicle . . . designed for travel on public road" under subpart (1).

In their initial brief, the Seilers explained that the Sprayer meets the definition under subpart (1) because the Sprayer falls within any plain and ordinary definition of "motor vehicle" and was clearly designed for travel on public roads given the Sprayer's long list of roadworthy features (e.g. headlights; turn signals; driver mirrors; four-way

flashers; a horn; heating and air conditioning; a radio; a seat belt; and windshield wipers). The Seilers further explained that the trial court erred when, to find otherwise, it employed a restrictive definition of "motor vehicle" located in a MCS-90 Endorsement (that ensures compliance with Sections 29 and 30 of the Motor Carrier Act of 1980).

Great West does not counter this argument in its brief. This is notable since "[s]ome courts will reverse a trial court's decision if appellant raises a 'debatable issue' which is unanswered by brief of appellee on the supposition that appellee, by not answering, had made a 'confession of error' as to the trial court's decision." *Drier v. Great American Ins. Co., 409 N.W.2d 357 (S.D. 1987) (citing Liberty Mut. Ins. Co. v. MacLeod, 498 P.2d 523, 524 (Ariz. Ct. App. 1972)).*[1] In any event, no reply from the Seilers is required.

2. The Sprayer is "subject to a compulsory or financial responsibility law or other motor vehicle insurance law" under subpart (2).

The Seilers also submitted that the Sprayer meets the definition under subpart (2) because it is a land vehicle that "is subject to a compulsory or financial responsibility law or other motor vehicle insurance law" in South Dakota. *Exhibit C (Commercial Auto Coverage Part at p. 14 of 16).* Great West also does not counter this argument. Instead, Great West argues that "[w]hether the sprayer is subject to South Dakota's compulsory financial responsibility laws is immaterial to determining the applicability of Great West's policy," since, according to Great West, "[t]he sprayer is excluded as 'mobile equipment' whether subject to compulsory financial responsibility laws or not." *Id. at 8.* Although the inapplicability of the "Operations" exclusion is discussed below, it is

[1] *See also SDCL 15-26A-60 ("[t]he argument shall contain the contentions of the party with respect to the issues presented, the reasons therefore, and the citations to the authorities relied on.").*

incorrect to state that whether the Sprayer is subject to South Dakota's compulsory financial responsibility law is "immaterial". Any coverage analysis must begin with determining whether the vehicle in question is, in the first instance, insured. Because the definition of "auto" includes a "land vehicle that is subject to a compulsory or financial responsibility law," whether the Sprayer is subject to South Dakota's compulsory financial responsibility law is clearly material. *Exhibit C (Commercial Auto Coverage Part at p. 14 of 16).* In any case, Great West's lack of response should be viewed as a "confession of error", and no further reply is warranted.[2]

3. The Sprayer is not "mobile equipment".

The Great West Policy's definition of "auto" expressly provides that "'auto' does not include 'mobile equipment.'" *Exhibit C (Commercial Auto Coverage Part at p. 14 of 16).* The policy's definition of "mobile equipment", in turn, specifies numerous types of vehicles and equipment that are "mobile equipment". However, the definition concludes with the following preemptive statement:

> However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

Id. at 15 of 16). Thus, the policy's rule is this: If a vehicle is subject to a "compulsory or financial responsibility law or other motor vehicle insurance law" it is not "mobile equipment". *Id.* Because the Sprayer is subject to South Dakota's compulsory financial

[2] Berkley agrees that the Sprayer is subject to South Dakota's compulsory financial responsibility law, and points out that the 2007 *South Dakota Commercial & Agricultural Vehicle Handbook* provided that if self-propelled fertilizer or pesticide applicators "are used by a commercial entity, they must be titled and licensed under the non-commercial vehicle fee schedule . . . ." *Brief of Appellee Berkley Regional Specialty Insurance Company at 11-12 ("Berkley's Brief"); SR at 1154.*

responsibility law – which Great West does not challenge – then the Sprayer is not "mobile equipment" and is an "auto".

B. The exclusion for "Operations" does not preclude coverage.

Great West has elected to defend the trial court's decision by placing the great weight of its argument on the following exclusion:

> This insurance does not apply to any of the following:
>
> * * *
>
> **9. OPERATIONS**
>
> "Bodily injury", "property damage" or "covered pollutions cost or expense" arising out of the operation of:
>
> * * *
>
> c. Machinery or equipment that is on, attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

Exhibit C (Commercial Auto Coverage Part at p. 6 of 16) (emphasis in original).

Broken down to facilitate discussion, this exclusion requires the presence of all of the following to bar coverage:

(1) There must be "bodily injury", "property damage" or "covered pollutions costs or expense";

(2) The "bodily injury", "property damage" or "covered pollutions costs or expense" must arise out of the operation of machinery or equipment that is on, attached to, or part of, a land vehicle; and

(3) The land vehicle would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial

responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

Id. Since there is no dispute that the Seilers' sustained significant "bodily injury", the applicability of the "Operations" exclusion turns on elements (2) and (3).

With regard to element (2), Great West argues that the Seilers' bodily injuries arose out of the operation of "[m]achinery or equipment that is on, attached to, or part of, a land vehicle . . . ." According to Great West, this exception applies "irrespective of whether [the Sprayer] is spraying chemical," and "[e]ven if the booms, pump, and tank were removed from the John Deere 4720." *Brief of Appellee Great West Casualty Company at 13 ("Great West's Brief").*

Great West's argument ignores key language in the exclusion. The exclusion does not exclude coverage for bodily injury simply *arising out of the operation of machinery or equipment*, as Great West suggests; rather, it excludes coverage for bodily injury *arising out of the operation of machinery or equipment* <u>*that is on, attached to, or part of, a land vehicle*</u>." *Exhibit C (Commercial Auto Coverage Part at p. 6 of 16) (emphasis added).* Great West does not get to ignore the requirement that the machinery or equipment being operated must be "on, attached to, or part of" the vehicle. Here, the machinery or equipment "that is on, attached to, or part of [the Sprayer]" is the spraying equipment, such as the booms. The Seilers' injuries did not result from the operation of spraying equipment "that is on, attached to, or part of" the Sprayer; rather, they were injured due to Troy Dowling's negligent driving of the Sprayer. This exclusion is best suited for those occasions where someone is injured as a result of the operation *of the spraying equipment*, not as a result of simply driving the Sprayer when none of the

spraying equipment "that is on, attached to, or part of" the Sprayer is being used.

Great West also claims that element (3) is satisfied because, in its opinion, the Sprayer is "farm machinery" and would therefore qualify as "mobile equipment" were it not for the preemptive provision discussed above (which expressly provides that "'mobile equipment' does not include any land vehicles that are subject to a compulsory or financial responsibility law."). *Great West's Brief at 8; Exhibit C (Commercial Auto Coverage Part at p. 15 of 16).* Great West is incorrect.

Even if the Sprayer "were not subject to a compulsory or financial responsibility law," it would still not "qualify under the definition of 'mobile equipment,'" because the Sprayer is not "farm machinery". As conceded by Great West, the term "farm machinery" is not defined in the policy. Thus, this Court looks to the "plain and ordinary meaning" of the term. *Hanson Farm Mutual Ins. Co. of S.D. v. Degen, 2013 S.D. 29, ¶ 17, 829 N.W.2d 474, 478 ("Hanson") (quoting Ass Kickin Ranch, LLC v. North Star Mut. Ins. Co, 2012 S.D. 73, ¶¶ 9-10, 822 N.W.2d 724, 727).*

As pointed out in the Seilers' initial brief, ARSD 64:06:03:15 defines "farm machinery" and provides that "[f]arm machinery does not include motor vehicles or equipment otherwise licensed or taxed by the state of South Dakota." *ARSD 64:06:03:15.* Clearly, the Sprayer is not "farm machinery" under this definition.

Great West makes no reference to ARSD 64:06:03:15. Instead, Great West references Merriam-Webster's Online Dictionary. However, because "farm machinery" is not defined on the website, Great West gathered the separate definitions of "farm" and "machinery", and then "combine[s]" the two definitions to yield its desired definition of "farm machinery" *Great West's Brief at 11.*

Great West's home-grown definition should be rejected. First, Great West added language when it assembled its "combined" definition. *Id.* Second, Great West's definition is so broad that it would result in almost any vehicle being deemed "farm machinery". A pickup is "a machine in general" that is often "used on a tract of land devoted to agricultural purposes." Therefore, under Great West's definition a pickup would be "farm machinery" – and therefore not an "auto" – which is nonsensical. Third, if Great West desired that definition of "farm machinery", it should have included that definition in its policy, wherein it elected to define a term as basic as "Trailer".

Great West also claims that "the manufacturer classifies the sprayer as farm machinery." *Great West's Brief at 12.* Conspicuously, however, Great West provides no cite to the record for this claim and the Seilers are unaware of any such record evidence.

Finally, Great West submits that its position is supported by a California Court of Appeals decision in American Star Insurance Company v. Insurance Company of the West, 284 Cal.Rptr. 45 (Cal. Ct. App. 1991), in which that court considered whether a water truck was "mobile equipment". Great West's reliance upon American Star is misplaced. First, although Great West submits that the court in American Star "interpret[ed] a virtually identical policy," that is incorrect. A review of the Appendix to the court's decision reveals that the policy's definition of "mobile equipment" in that case did not contain the preemptive clause found in Great West's policy (which expressly provides that "'mobile equipment' does not include any land vehicles that are subject to a compulsory or financial responsibility law."). *Id. at 53.* Further, and equally important, in American Star the parties' stipulated that "[t]he water truck was normally used off road, not licensed for road use, and trailered to job sites." *Id. at 46.* Here, the Sprayer

was required to be licensed, and was often driven on public roads to get to fields.[3]

C. It is irrelevant whether the Sprayer "fits within the business scheme of Great West".

The Seilers contend that the trial court erred by basing its decision in part on its conclusion that the Sprayer does not "fit within the business scheme of Great West." *SR at 1714.* This is because coverage "is determined from the contractual intent and the objectives of the parties as expressed in the contract." *Hanson, 2013 S.D. 29, ¶ 17 (quoting Ass Kickin Ranch, LLC, 2012 S.D. 73, ¶¶ 9-10).* Great West's response is that this Court should consider such evidence if this Court "determines the policy is ambiguous." *Great West's Brief at 17.* That is not the law. If the policy is "fairly susceptible to different interpretations, the interpretation most favorable to the insured should be adopted." *Hanson, 2013 S.D. 29, ¶ 17 (quoting Ass Kickin Ranch, LLC, 2012 S.D. 73, ¶¶ 9-10).*[4]

II. WHETHER THE TRIAL COURT ERRED WHEN IT HELD THAT THERE IS NO COVERAGE UNDER A COMMERCIAL GENERAL LIABILITY POLICY ISSUED BY BERKLEY TO THE OPERATOR OF THE SPRAYER (TROY DOWLING).

In the Seilers' initial brief, they explained that the discussion of coverage under the Berkley Policy ultimately turns on two analyses: (1) whether the Sprayer is an "auto"

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[3] Great West comments that the Sprayer was not listed as a scheduled auto on its policy. *Great West's Brief at 6.* The irrelevance of this fact should be apparent as coverage under its policy is not limited to "scheduled" autos or, for that matter, to autos owned by Troy Dowling.

[4] Great West intimates that Troy Dowling had a "a hodge-podge of insurance policies from multiple companies that contain inconsistent provisions . . . ." *Great West's Brief at 17.* Such a statement could not be farther from the truth. Troy Dowling has a commercial auto policy (Great West) and a commercial general liability policy (Berkley) that, rather than "contain inconsistent provisions," contain nearly identical provisions. As correctly pointed out by Berkley, the policies are specifically designed to dovetail, or interlock, and thereby provide comprehensive coverage.

and therefore falls under the "Aircraft, Auto Or Watercraft" exclusion; and (2) whether the Sprayer falls within the exception to the "Aircraft, Auto Or Watercraft" exclusion contained in subparagraph (5)(b).

With regard to the first question, whether the Sprayer is an "auto", the Berkley Policy mirrors the Great West Policy and employs virtually the same definitions for "auto" and "mobile equipment". Because the Seilers submit that the Sprayer is an "auto" (and not "mobile equipment"), the Seilers acknowledged in their initial brief that if this Court agreed, it followed that the Sprayer would necessarily fall within the Berkley Policy's "auto" exclusion. Importantly, however, the Seilers also made clear that if this Court concluded that the Sprayer is "mobile equipment", then coverage would clearly exist under the Berkley Policy and require reversal of the trial court's grant of summary judgment in favor of Berkley. Berkely agrees that the Sprayer is an "auto", and does not appear to disagree with the Seilers' position that if this Court concludes otherwise, there is coverage under the Berkley Policy. *Berkley's Brief at 18-20.* Thus, no further discussion is necessary.

Turning to the second inquiry, the "Aircraft, Auto Or Watercraft" exclusion in the Berkley Policy includes an exception. That exception provides that the "auto" exclusion does not apply to "'bodily injury' or 'property damage' arising out of . . . the operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of 'mobile equipment'". *Exhibit H (Commercial General Liability Coverage Form at p. 4 of 15).* The "machinery or equipment listed in Paragraph f.(2) or f.(3)" are as follows:

> (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
>
> (3) Air compressors, pumps and generators, including spraying,

> welding, building, cleaning, geophysical exploration, lighting and well servicing equipment.

Exhibit H (Commercial General Liability Coverage Form at p. 13-14 of 15) (emphasis added). Thus, this exception to the exclusion provides that there is coverage for bodily injury arising out of the operation of spraying equipment.

Clearly, the Sprayer in this case is "spraying equipment". To counter this argument, Berkley argues that this "exception to the exclusion is directed to injury or damage caused by operation of the equipment attached to the vehicle and not to the use of the vehicle as a vehicle." *Berkley's Brief at 18-20.* While Berkley may feel that the exception is so "directed", that is not how the policy is worded. The policy language contains no such distinction nor does it state that the "use of the vehicle as a vehicle" removes the machinery or equipment from the exception to the exclusion. In this case, Berkley's argument is further undermined by the nature of the Sprayer itself – the spraying equipment is integrated into the machine. Given its nature, and the fact that the Berkley Policy does not limit "spraying equipment" to, for example, the operation of "equipment that is on, attached to, or part of,"[5] a vehicle, the operation of the Sprayer itself meets Berkley's broader definition.

The cases relied upon by Berkley are not as helpful as Berkley suggests. Rakestraw v. Southern Guaranty. Ins. Co. of Georgia, 262 Fed.Appx. 180 (11th Cir. 2008), involved a pickup that had an air compressor permanently attached to it. *Id. at 182.* That is hardly comparable to the Sprayer at issue in this case, where the spraying equipment is fully integrated into the vehicle. As for Scottsdale Ins. Co. v. State Farm

[5] Needless to say, Berkley could have easily included such language in its exception to the exclusion to achieve what it now claims was intended; it did not.

Mut. Ins. Co., 30 Cal.Rptr.3d 606 (Cal. Ct. App. 2005), the employee in that case was riding in the bucket of a "cherry picker" that had been "mounted on" a truck, and could therefore be operated independent of the truck. *Id. at 616.* Here, the spraying equipment is not operated independent of the Sprayer; it is fully integrated into the Sprayer.

Berkley also claims that "[i]f the Court were to accept the Seilers' interpretation, any motor vehicle accident involving vehicles with the attached equipment listed in paragraphs f.(2) or f.(3) would never be covered by an auto policy." *Berkley's Brief at 26.* That is not true. For example, due to the preemptive final clause in Great West's commercial auto policy, regardless of any such attached equipment a vehicle is an "auto" if it is "subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged." *Exhibit C (Commercial Auto Coverage Part at p. 15 of 16).*

III. WHETHER AN INSURANCE POLICY ISSUED BY FARM BUREAU TO THE OWNER OF THE SPRAYER PROVIDES COVERAGE TO TROY DOWLING, A PERMISSIVE OPERATOR.

By way of notice of review, Farm Bureau seeks to overturn the trial court's ruling that there is coverage under the Farm Bureau Policy. The trial court was correct when it ruled that there is coverage under the Farm Bureau Policy.

A. There is coverage under the "Vehicle Section".

The Vehicle Section provides coverage for damages caused by an occurrence "involving the ownership, operation, maintenance, use, loading, unloading, or negligent entrustment of 'your personal vehicle.'" *App at A-5 (emphasis added).* Among other, "Your Personal Vehicle" includes the following two categories of vehicles:

A. "Your Auto";

* * *

I. The vehicle indicated in the Declarations.

App at A-4. "Your Auto", in turn, refers to "[t]he 'auto' or vehicle indicated in the Declarations and designated as an 'auto'". *Id.* Finally, "Auto" is defined as:

> A land motor vehicle with at least four wheels designed for use mainly on public roads. It does not include any vehicle while located for use as a dwelling or other premises.

App at A-1.

1. The Sprayer is a "vehicle indicated in the Declarations."

Under the policy, "Your Personal Vehicle" includes a "vehicle indicated in the Declarations." *App at A-4.* In this case, the Sprayer was specifically identified in the Declarations. *Brief of Appellee Farm Bureau Mutual Ins. Co. at 16, 19 ("Farm Bureau's Brief").* Farm Bureau argues, however, that although the Sprayer is "listed in the Declarations," there is no coverage because it is not "a vehicle indicated in the Declarations." *Id. at 19 (emphasis added).* According to Farm Bureau, the fact that the Sprayer is identified in the "Property/Liability" Section of the Declarations does not constitute the Sprayer being "indicated". *Id. at 16.* Farm Bureau's argument lacks merit and contravenes this Court's rules of interpretation.

First, subpart (I) of the Farm Bureau Policy's definition of "Your Personal Vehicle" requires only that the vehicle be a "vehicle indicated in the Declarations." *App at A-4.* It does not require that the vehicle be "indicated" or shown in any particular section or area of the Declarations. *Id.*

Second, Farm Bureau's argument that subpart (I) only includes vehicles shown in the "Vehicle" Section of the Declarations requires this Court to effectively rewrite the Farm Bureau Policy and add the condition to subpart (I) that, to fall within the definition

of "Your Personal Vehicle", the vehicle must not only be indicated in the Declarations, *but also be "indicated" only in the "Vehicle" Section of the Declarations*. This Court has often advised that it will not "make a forced construction or a new contract for the parties," and that the terms of an insurance policy "cannot be enlarged or diminished by judicial construction." *Hanson, 2013 S.D. 29, ¶ 17 (quoting Ass Kickin Ranch, LLC, 2012 S.D. 73, ¶¶ 9-10).*[6]

2. The Sprayer is "[a] land motor vehicle with at least four wheels designed for use mainly on public roads."

Farm Bureau argues that the Sprayer cannot fall within the definition of "Auto" because, in its opinion, the Sprayer was not "designed for use mainly on public roads." The Seilers disagree.

Farm Bureau improperly focuses almost exclusively on the word "mainly", while ignoring the term "designed". The Farm Bureau Policy provides that an "Auto" is "[a] land motor vehicle with at least four wheels designed for use mainly on public roads." *App at A-1 (emphasis added).* The question is not whether the Sprayer (or other similar sprayers) are often – or even "mainly" – used on public roads; rather, the question is whether the Sprayer was "designed," or engineered, for use mainly on public roads.

This interpretation is supported by the definition of "designed" as set forth in Black's Law Dictionary:

> Contrived or taken to be employed for a particular purpose. Fit, adapted, prepared, suitable, appropriate. Intended, adapted, or designated. The term may be employed as indicating a bad purpose with evil intent.

Black's Law Dictionary 447 (6th Ed 1990) (emphasis added). Given the Sprayer's

[6] Notably, not one of the twenty-seven vehicles that Farm Bureau references are designated in the Declarations as an "auto".

numerous highway-worthy components and features, it is clearly fit, prepared, suitable, or appropriate (designed) for use mainly on public roads. As such, the Sprayer is an "auto" under the Farm Bureau Policy.

Notably, in its memorandum decision, the trial court specifically noted that the ultimate focus is not on a given individual's use of a sprayer, but rather "what it was designed to be able to do":

> The John Deere 4720 sprayer is designed to be able to be driven on public highways. It has multiple uses. The case is not resolved on how the Dowling family used the sprayer, but rather what it was designed to be able to do. * * *
>
> It is the opinion of this Court that the John Deere 4720 self-propelled sprayer was designed so that it **could** be used "mainly on public roads" if the owner and circumstances required it to be so used. Therefore, it fits the definition of 'auto' as found in the policy.

SR at 1609-08 (emphasis in original).

Although this Court has not previously considered this precise issue, this Court's decision in Olson v. United States Fidelity and Guaranty Company, 1996 S.D. 66, 549 N.W.2d 1999, is helpful. In that case, this Court discussed whether a forklift "satisfie[d] the definition of a motorized land conveyance or a motorized land vehicle." *Id. at ¶14.* This Court's ruling included the following:

> [I]t is clear from the record that this forklift is intended and designed for operation on the highway. The operations manual for the forklift states: "When in use in 'HI' range on roads or highways, ONLY use two wheel steering." The manual also advises owners to observe local traffic laws during highway use: "Before operating the [forklift] on roads or highways, check local laws on the use of lights, flags, licensing, slow moving vehicle EMBLEM (SMV), etc."

Id. at ¶¶13-14.

This Court's discussion in Olson is informative for two reasons. First, it makes

clear that a vehicle's attributes, etc. provide important guidance in ascertaining whether it falls within a given policy definition. Second, this Court's observation that the forklift "was intended and designed for operation on the highway," based upon certain facts supports the conclusion that "designed for use" contemplates whether the manufacturer designed the product to be "fit," or "suitable," for a given use.

3. No exclusion contained in the Vehicle Liability Module precludes coverage.

The Vehicle Liability Module excludes coverage for damages:

> B. "Arising out of" the ownership, maintenance, use or operation of farm machinery.
>
> * * *
>
> D. "Arising out of" the ownership, maintenances or use of any vehicle "owned" by you which is not "your personal vehicle" or a "newly owned vehicle."

App at A-8, A-9. According to Farm Bureau, either of these exclusions operate to bar coverage. The Seilers disagree.

The applicability of the exclusion for damages "'[a]rising out of' the ownership, maintenance, use or operation of farm machinery" turns on the definition of "farm machinery". As was the case with the Great West Policy, the term "farm machinery" is not defined in the Farm Bureau Policy. With regard to the plain meaning of "farm machinery", Farm Bureau offers very little analysis. Instead, relying upon a definition found on Dictionary.com, Farm Bureau simply pronounces that the Sprayer "clearly was 'farm machinery.'"[7] *Farm Bureau's Brief at 21.*

As before, the Seilers would direct the Court to ARSD 64:06:03:15, which provides that "[f]arm machinery does not include motor vehicles or equipment otherwise

[7] The undersigned visited the website, but no definition could be observed.

licensed or taxed by the state of South Dakota." *ARSD 64:06:03:15.* Under this straightforward definition, the Sprayer would not constitute "farm machinery" since it is required to be licensed or taxed. Farm Bureau has not met its burden. At a minimum, the term "farm machinery" is susceptible to different interpretations, requiring the adoption of the interpretation most favorable to the insured.

Separately, Farm Bureau argues that there is no coverage due to the exclusion for damages "[a]rising out of" the ownership, maintenances or use of any vehicle "owned" by you which is not "your personal vehicle" or a "newly owned vehicle." As is readily apparent, this exclusion does not apply if the vehicle in question is "Your Personal Vehicle". As just explained, the Sprayer falls within the definition of "Your Personal Vehicle"; therefore, this exclusion is also inapplicable.

4. Troy Dowling was an "insured".

Farm Bureau claims that the trial court erred when it held that Troy Dowling, a permissive operator, was an "insured". However, its policy defines "insured" to include, "[a]ny other "person" while using "your personal vehicle" . . . if its use is within the scope of your consent." *App at A-5.* Farm Bureau concedes that Troy Dowling was using the Sprayer with consent, and, as previously explained, the Sprayer falls within the definition of "Your Personal Vehicle". As such, Troy Dowling is an "insured".

B. Alternatively, there is coverage under the "Liability Section".

The Business Liability Module's definition of "insured" includes the following:

> H. With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any "person" is an "insured" while driving such equipment on or along a public highway with your permission. * * *

App at A-19 (emphasis in original).

As previously explained, the Sprayer was required to be registered and licensed. Also, there is no question that Troy Dowling was a permissive user and was operating the Sprayer along a public highway. Further, the Business Liability Module's definition of "mobile equipment" includes "farm machinery". *App at A-34, A-35.*

Although the Seilers maintain that the Sprayer is not "farm machinery", Farm Bureau has repeatedly taken the position that the Sprayer is "farm machinery". *Farm Bureau's Brief at 18, 21.* If this Court agrees with Farm Bureau and rules that the Sprayer is "farm machinery", there is coverage under the Business Liability Module.[8]

CONCLUSION

For all the foregoing reasons, the Seilers respectfully request that this Court hold that coverage for the collision exists under the Great West Policy, the Berkley Policy and the Farm Bureau Policy.

Dated this 18th day of September, 2014.

Respectfully submitted,

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[8] Farm Bureau may point out that the Business Liability Module excludes coverage if the involved vehicle was "used for any 'business' purpose . . . ." *App at A-24.* As the Seilers explained more detail in the separate appeal filed by Farm Bureau (Appeal No. 27021), this Court should not allow that provision to deny coverage in this instance since, to do so, would render the coverage meaningless and illusory.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellants' Reply Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellants' Reply Brief* contains 4,976 words. I have relied on the word and character count of our word processing system used to prepare *Appellants' Reply Brief*. The original *Appellants' Reply Brief* and all copies are in compliance with this rule.

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