

Case No. 09-102,469-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ESTATE OF ZOE DUTKIEWICZ,
Plaintiff/Appellee

v.

BENCHMARK INSURANCE COMPANY
Defendant/Appellant

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BRIEF OF APPELLANT

Appeal from the District Court of Reno County, Kansas

Honorable Timothy Chambers

District Court Case No. 06-CV-622

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NATURE OF THE CASE

This is an un-insured motorist case involving a claim for personal injuries that arose out of a late-night, rear-end collision on Highway 50 outside of Hutchinson, Kansas, between a stolen golf cart driven by a drunken prison escapee and a Buick automobile driven by the Zoe Dutkiewicz. The accident occurred on July 23, 2005, she suffered a broken arm, and she died later of un-related causes.

A question of insurance coverage is the only issue, and that issue is whether the golf cart that was stolen from its rightful owner and driven on a public highway in the middle of the night and which Plaintiff's deceased rear-ended qualified as a "motor vehicle" under Defendant's policy of insurance for uninsured motorist purposes. The golf cart was neither registered nor capable of being registered as a motor vehicle under the laws of the state of Kansas. It was not manufactured for use on public highways. It was a non-highway vehicle which was not required to be registered under our No Fault Act. It was not intended to be operated on any public highway.

Nonetheless, the trial court, on competing summary judgment motions, found there was coverage under Defendant's policy. The sole case relied upon by the trial court, *Kresyman v. State Farm Mutual Insurance Company*, 5 Kan. App. 2d 666, 623 P.2d 524 (1981), involved a small "mini-bike" incapable of registration which was involved in a county road accident with an automobile; there, in a questionable decision, the Court of Appeals found that it should have been insured at the time of the accident only because it was being operated on a public road at the time of the accident. The trial court saw no difference between a mini-bike and the golf cart in question as they were both incapable of registration under Kansas statutes. The trial court erred in this regard.

ISSUES ON APPEAL

- I. Does the policy definition of “motor vehicle” (“...a self propelled vehicle designed for use on public roads...”) exclude a golf-cart since it was not designed for use on public roads?
- II. Do the provisions of K.S.A. 40-3103(m) defining “motor vehicle” for liability insurance purposes and which define the term to mean a self-propelled vehicle of a kind “required to be registered” exclude a golf-cart since golf carts are not required to be registered?
- III. Was *Kresyman v. State Farm Mutual Insurance Company*, 5 Kan. App. 2d 666, 623 P.2d 524 (1981) correctly decided?
- IV. Does the theft of the vehicle and its operation by the thief at the time of the collision separate it factually from *Kresyman* so as to result in a different judgment?

STATEMENT OF FACTS

The critical facts dealing with this case are all found in the summary judgment motion and supplemental memorandum of Defendant. Those facts are as follows:

1. The motor vehicle accident report reflects that the collision occurred on July 23, 2005, in Reno County, Kansas, about 5:40 a.m. on a Saturday. It was dark with no street lights on. Both vehicles were going straight and in the same direction. Zoe Dutkiewicz rear-ended the golf cart driven by Raymond Rhames II. (Vol. 2, p. 204).

2. Mr. Claude Bishop, the owner of the golf cart (Vol. 2, p. 113), testified in his deposition that the golf cart was stolen from his rural property, that he never had a reason to put the golf cart on a highway (Vol. 2, p. 139), that he used it only to get to his outbuildings on his rural property (Vol. 2, p. 149), and he identified photographs of the golf cart showing it did not have equipment required by Kansas statutes for vehicles to be registered (Vol. 2, p. 134-151).

3. Plaintiff answered many requests for admissions (Vol. 2, p. 192), they formed the basis for Defendant's summary judgment motion (Vol. 2, p. 111), and they are found in the statement of uncontroverted facts in Defendant's motion:

a. The object Zoe Dutkiewicz hit the night of the accident in question was an E-Z Go Golf Cart (hereinafter "golf cart") owned by Claude Bishop.

b. The golf cart was not intended to be operated on public highways.

c. The gold cart was not manufactured for use on public highways.

d. The golf cart was not designed to be operated on the public highways.

e. The golf cart was stolen from Claude Bishop's residence on Highway 50 shortly before the collision described in the second amended petition.

f. The golf cart was not manufactured with any of the following: (1) at least two headlamps; (2) at least two tail lamps; (3) two or more reflectors; (4) two or more stop lamps; (5) a horn; (6) an outside left mirror and an inside rear-view mirror; (7) seat belts and (8) turn signals.

g. The golf cart was not equipped at the time of the accident with any of the following: (1) at least two headlamps; (2) at least two tail lamps; (3) two or more reflectors; (4) two or more stop lamps; (5) a horn; (6) an outside left mirror and an inside rear-view mirror; (7) seat belts and (8) turn signals.

h. The golf cart was not designed for use on public roads.

i. The golf cart was not required to be registered in the State of Kansas as a motor vehicle.

j. The golf cart had no windshield.

k. The golf cart had no doors.

l. The golf cart was never registered by Claude Bishop as a motor vehicle with the State of Kansas.

m. The golf cart was never driven on public roads in the State of Kansas since Claude Bishop acquired it prior to this accident.

n. The cart was never licensed by Claude Bishop as a motor vehicle in the State of Kansas.

o. The golf cart, at the time of the collision, was not equipped for use on Kansas highways.

p. The golf cart was never intended to be used to transport persons on public highways of the State of Kansas.

q. The golf cart did not have a speedometer at the time of manufacture and at the collision.

r. Claude Bishop was given the golf cart about four or five years prior to the collision.

s. During the time Claude Bishop owned the golf cart he used it primarily to carry himself from his house to his out-buildings on his private property due to his crippled condition.

4. The Benchmark Insurance policy, in part, states:

a. "Motor vehicle" is defined as a self-propelled vehicle designed for use on public roads (Page 1 – Definitions used throughout the policy). (Vol. 2, p. 176)

b. "Uninsured motor vehicle" is defined as a land **motor vehicle** or trailer of any type: (1) to which there is no bodily injury liability policy applying, (2) which is a hit-and-run vehicle with details, and (3) to which a liability policy applies but the company denies coverage or is insolvent. (Page 11 – Part V, Uninsured Motorists Coverage). (Vol. 2, p. 186).

4. During oral arguments on the summary judgment motions dealing with the coverage issue, both the trial court and Plaintiff's counsel agreed the golf cart had been stolen (Vol. 3, p.2), and Plaintiff's counsel agreed that if application had been made to register the golf cart with DMV that it could not have been because it was not equipped as required by K.S.A. 8-1801 (Vol. 3, p. 5).

5. During oral arguments on the summary judgment motions, the trial court observed that had he been faced with the *Kresyman* decision [*Kresyman v. State Farm Mutual Insurance Company*, 5 Kan. App. 2d 666, 623 P.2d 524 (1981)], he may not

have come to the same conclusions, but, nonetheless, he felt compelled to apply it to our facts, and the trial court could not distinguish between an off-road motor bike (like the one in *Kresyman*) that was being operated on a street at the time of the accident and a golf cart (like ours) that was being operated on a public street for the first time at the time of our accident (Vol. 3, pp. 15-16).

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

The appropriate standard of review from an order granting judgment when the court treated the motion as one for summary judgment is most recently described in the syllabus of *Estate of Draper v. Bank of Am., N.A.*, 2009 Kan. LEXIS 77:

“1. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.

2. To the extent there is no factual dispute, appellate review of an order granting summary judgment is unlimited.

4. A de novo standard of review applies to the construction of written instruments and, regardless of the construction given a written contract by the district court, an appellate court may construe a written contract and determine its legal effect.”

To the extent the statutes in our No Fault Act and our motor vehicle registration scheme are to be construed, issues based on statutory interpretation present questions of law over which appellate courts exercise unlimited review (*State v. Valladarez*, 206 P.3d 879, 2009 Kan. LEXIS 88).

I. Does the policy definition of “motor vehicle” (“...a self propelled vehicle designed for use on public roads...”) exclude a golf-cart since it was not designed for use on public roads?

The Benchmark Insurance policy contains the following definitions:

“Motor vehicle” is defined as a self-propelled vehicle designed for use on public roads.” (Page 1 – Definitions used throughout the policy).

“Uninsured motor vehicle” is defined as a land **motor vehicle** or trailer of any type: (1) to which there is no bodily injury liability policy applying, (2) which is a hit-and-run vehicle with details, and (3) to which a liability policy applies but the company denies coverage or is insolvent.” (Page 11 – Part V, Uninsured Motorists Coverage).

Here, Plaintiff admitted that the golf cart was not designed for use on public roads. There is no claim that the policy provisions are unclear and ambiguous. There is no claim that the policy provisions are void or unenforceable. Therefore, by contract, there is no coverage.

II. Do the provisions of K.S.A. 40-3103(m) defining “motor vehicle” for liability insurance purposes and which define the term to mean a self-propelled vehicle of a kind “required to be registered” exclude a golf-cart since golf carts are not required to be registered?

The definitions in our no-fault act (K.S.A. 40-3103) provide:

“(m) "Motor vehicle" means every self-propelled vehicle of a kind **required to be registered in this state**, including any trailer, semi trailer or pole trailer designed for use with such vehicle, but such term does not include a motorized bicycle.”

Golf carts are not required to be registered in Kansas, and Plaintiff has admitted this fact.

Therefore, based on the specific statute applicable to this controversy, there is no coverage. This same conclusion can also be reached by examining several other non-specific statutory provisions. K.S.A. 8-197 defines “non-highway vehicle” as follows:

“(1) "Nonhighway vehicle" means:

(A) Any motor vehicle which cannot be registered because it is not manufactured for the purpose of using the same on the highways of this state and is not provided with the equipment required by state statute for vehicles of such type which are used on the highways of this state;...” (Emphasis added)

Here it was admitted by Plaintiff that the golf cart was not manufactured for the purpose of using the same on the highways of Kansas, and it was admitted by Plaintiff the golf cart did not have the equipment to meet statutory requirements.

K.S.A. 8-198 provides a non-highway vehicle shall not be required to be registered and, even if it is, it is still not a “motor vehicle” for insurance purposes under the No Fault Act:

“8-198. Nonhighway and salvage vehicles exempt from registration; nonhighway certificates of title and salvage titles; permit for temporary operation; rebuilt or restored salvage vehicle; rebuilt salvage title; notice attached to rebuilt vehicle; penalties; all-terrain vehicles; work-site utility vehicles; no-fault insurance law inapplicable, exception.

(a) A nonhighway or salvage vehicle shall not be required to be registered in this state, as provided in K.S.A. 8-135, and amendments thereto, but nothing in this section shall be construed as abrogating, limiting or otherwise affecting the provisions of K.S.A. 8-142, and amendments thereto, which make it unlawful for any person to operate or knowingly permit the operation in this state of a vehicle required to be registered in this state (Emphasis added). ...

(h) A nonhighway vehicle or salvage vehicle for which a nonhighway certificate of title or salvage title has been issued pursuant to this section shall not be deemed a motor vehicle for the purposes of K.S.A. 40-3101 to 40-3121, inclusive, and amendments thereto, except when such vehicle is being operated pursuant to subsection (g). Any person who knowingly makes a false statement concerning financial security in obtaining a permit pursuant to subsection (g), or who fails to obtain a permit when required by law to do so is guilty of a class C misdemeanor.” (Emphasis added)

The golf cart in question admittedly cannot be registered in the State of Kansas for the purpose of using the same on the highways because (1) it was not manufactured for that purpose and (2) it does not have the equipment required by Kansas law for such registration (See, K.S.A. 8-1705 for at least two headlamps; 8-1706 for at least two tail

lamps; 8-1707 for two or more reflectors; 8-1708 for two or more stop lamps and turn signals; 8-1738 for horn; 8-1740 for outside left mirror and inside rear-view mirror; and 8-1749 for seat belts).

Additionally, K.S.A. 8-127 provides that only vehicles intended for use on public roads be registered:

“8-127. Registration of vehicles operated in this state; exceptions; temporary operation of certain vehicles without registration, when.

(a) Every owner of a motor vehicle... **intended to be operated upon any highway in this state**, ...shall, before any such vehicle is operated in this state, apply for and obtain registration in this state under the provisions of K.S.A. 8-126 to 8-149, inclusive, and acts amendatory thereof or supplemental thereto, except as otherwise provided by law or by any interstate contract, agreement, arrangement or declaration made by the director of vehicles.”

Therefore, since it was admitted that the golf cart was not intended to be operated on the highways of Kansas and since it did not have to be registered, this golf cart does not fall within the scope of the No Fault Act and did not have to have liability insurance coverage in force. The owner of the golf cart had no obligation to apply for or obtain registration of the golf cart as the owner never intended to operate the cart on the public roads. The thief’s intervention did nothing to change the owner’s intent or actual use. Both the policy and the statutory schemes clearly and unambiguously did not require liability insurance coverage in this golf cart.

III. Was *Kresyman v. State Farm Mutual Insurance Company*, 5 Kan. App. 2d 666, 623 P.2d 524 (1981) correctly decided?

The trial court relied exclusively on this case to justify its ruling. An examination of that case reveals its fatally flawed reasoning. First, that Court, when dealing with the provisions of K.S.A. 8-127(a) that required registration by every owner of every vehicle

intended to be operated on public streets, simply ignored the same based on improper considerations of criminal culpability under K.S.A. 8-142:

“Regarding registration, the following appears in K.S.A. 8-127(a):

"Every owner of a motor vehicle . . . intended to be operated upon any highway in this state . . . shall, before any such vehicle is operated in this state, apply for and obtain registration"

It is with respect to this statutory direction that plaintiff makes his material argument. He argues the mini-bike was not "of a kind required to be registered in this state" because the mini-bike was not intended to be operated upon any highway in this state.

In our view, plaintiff mistakenly fails to take into account the K.S.A. 8-142 provision that "[i]t [is] unlawful for any person . . . [t]o operate, or for the owner thereof knowingly to permit the operation, upon a highway of any vehicle, as defined in K.S.A. 8-126, which is not registered"

Reading K.S.A. 8-127(a) and K.S.A. 8-142 together and giving them both effect, as must be done, it is clear to us that the essence of their direction is that a motor vehicle operated upon a highway is to be registered, with the registration to be obtained before such operation. Various other statutory provisions within the motor vehicle laws and the act provide exceptions and exemptions but they play no role in this case. The "intended to be" wording of K.S.A. 8-127(a) is not an element in the definition of a motor vehicle "of a kind required to be registered in this state."

By operation of K.S.A. 8-127(a) and K.S.A. 8-142, the mini-bike, a self-propelled device transporting a person while being operated on a highway in this state, was a vehicle with respect to which a motor vehicle liability insurance policy was required by the act. This being so, plaintiff's injury was beyond the scope of defendant's obligation to pay PIP medical benefits.

We caution that our decision must not be read too broadly. In this case, the accident occurred at a time when the mini-bike was operated on a public highway and the extent of our holding is that at that time it was a motor vehicle with respect to which a motor vehicle liability insurance policy was statutorily required.” (*Kresyman*, supra, p. 68-669; emphasis added)

This analysis is flawed in many ways: (1) it uses the possibility of criminal consequences against an owner of a vehicle to impose clearly unintended coverage on an insurance company; (2) it ignores the fact that, by statute, off-road vehicles that are not properly equipped cannot even become registered in the State of Kansas; (3) the non-highway

vehicle statutes clearly contemplate no registration along with the imposition of criminal penalties if that non-highway vehicle is then operated on public streets; (4) by claiming that the intended use of a vehicle is not an element in the definition of motor vehicle of a kind required to be registered in Kansas, that court ignored the Legislature's clear directives in 8-127(a) and, also, ignored the provisions of our non-highway statutes; (5) by saying liability insurance was statutorily required only because the accident occurred at a time when the mini-bike just happened to be on a public highway, that court ignored all of the Legislature's directives in all the statutes previously discussed; (6) by saying liability insurance was statutorily required only because the accident occurred at a time when the mini-bike just happened to be on a public highway, that court imposed contractual liability insurance coverage where none was intended nor included in any liability insurance policy; i.e., it was a risk not contemplated by either contracting party; and (7) that court modified an insurance contract without any statutory or constitutional right to do so. This improper fiction compelling coverage only because of the geographical location where the accident took place was clearly an attempt to stick a "deep pocket" with a loss instead of letting the loss rest on the shoulders of an owner of a vehicle who violated the laws of Kansas. That owner should have been held responsible for his own actions, the statutes should not have been ignored, and the insurance policy should not have been so liberally construed to result in a clearly unintended coverage.

IV. Are there sufficient factual differences to distinguish this case from *Kresyman*?

First, the mini-bike in *Kresyman* was being operated by its owner in an intended use while the golf cart was not operated by its owner but, instead, by a thief and in a

manner not intended by the owner. Therefore, the consideration of the criminal provisions of K.S.A. 8-142 (unlawful for any person to operate or for the owner to knowingly permit the operation of any vehicle on a highway any vehicle which is not registered) found in *Kresyman* is inappropriate in this case as the owner is not exposed to penalties as he did not knowingly permit its operation by anyone anywhere.

Additionally, the failure to consider K.S.A. 8-127(a) in *Kresyman* (every owner of a vehicle intended to be operated on any highway shall register the same) is inappropriate as, here, the owner never intended to operate it on the public roads.

In a later criminal case, *State v. Peimann*, No. 60,552, 763 P.2d 21 (1987) this Court upheld a conviction for operating a motor vehicle without registration and relied upon both the design and the use of the vehicle. The design of the pickup was not exclusively for agricultural purposes, and the actual prior use of the pickup had been for general all-purpose use instead of exclusively related to agricultural purposes. Here, the design of this golf cart is clearly not for use on public roads, and the actual use by the owner had been only around his private property and not on public roads. The penal considerations of K.S.A. 8-142 in *Kresyman* apparently is what led that court, in part, to inappropriately find that it should have been registered when operated on the highway and, therefore, should have been insured. *Peimann* shows that this court can and should impose criminal penalties for failure to register vehicles, and the fact that a policy of insurance may be available or not is not a proper consideration. The *Kresyman* court, apparently abhorring the thought of an insured having to pay a fine for failure to register a vehicle, seemed to bend over backwards to find a fund to pay an injured person and, in

so doing, placed a risk on an insurance company that clearly was not intended nor covered by that policy. Benchmark requests that this court not do the same thing.

Third, while the *Kresyman* court disregarded the “intended to be” operated wording of K.S.A. 8-127(a), a later decision of the Kansas Supreme Court in *Farm Bureau v. Kurtenbach*, 265 Kan. 465, 961 P.2d 53 (1998) made it clear that the intended use upon public streets could be a deciding factor (*Kurtenbach*, p. 472-474). Therefore, in this case, the owner’s intended use only on his private property for hauling compressors or for use by his grandchildren must not be ignored in this case; the *Kresyman* court apparently ignored the intended use even though the statute made it a clearly relevant consideration.

Fourth, one of the keys in this analysis in *Kresyman* is the effect of K.S.A. 8-142 which in pertinent part states:

“8-142. Unlawful acts.

It shall be unlawful for any person to commit any of the following acts and except as otherwise provided, violation is subject to penalties provided in K.S.A. 8-149, and amendments thereto:

First: To operate, or for the owner thereof knowingly to permit the operation, upon a highway of any vehicle, as defined in K.S.A. 8-126, and amendments thereto, which is not registered, or for which a certificate of title has not been issued or which does not have attached thereto and displayed thereon the license plate or plates assigned thereto by the division for the current registration year, including any registration decal required to be affixed to any such license plate pursuant to K.S.A. 8-134, and amendments thereto, subject to the exemptions allowed in K.S.A. 8-135, 8-198 and 8-1751a, and amendments thereto. A violation of this First by a person unlawfully claiming that a motor vehicle is exempt from registration as a self-propelled crane under subsection (b) of K.S.A. 8-128, and amendments thereto, shall constitute an unclassified misdemeanor punishable by a fine of not less than \$ 500.”

Here, the owner of the golf cart did not know it was stolen from his yard, and he did not “knowingly permit the operation” of the golf cart on the public highway where the

accident occurred; on the other hand, the owner of the motor bike in *Kresyman* was operating it at the time of the accident and he intended to drive it to where the accident took place. This author does not believe the *Kresyman* opinion was correctly decided, but, even if one applies it to our facts, the entire factual basis fails as our owner did not “knowingly permit” the golf cart’s operation on the road, and the provisions of K.S.A. 8-142 (crucial to the *Kresyman* opinion) do not affect our case. Our owner faced no criminal penalties as the thief was the only one operating the vehicle on the road. The phrase in the criminal statute about the owner “knowingly permitting” can only relate to situations where the vehicle is stolen from its owner (like our case); otherwise, the broader “any person” would cover all situations. That is, the legislature clearly intended that, if not intentionally operated by the owner, the owner would have to “knowingly permit” some other person to operate the vehicle on the public roads. We simply do not have those facts here.

V. Does the theft of the vehicle and its operation by the thief at the time of the collision separate it factually from *Kresyman* so as to result in a different judgment?

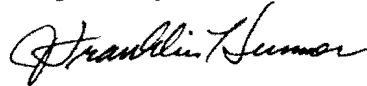
The short answer is yes. The reason why is because *Kresyman*’s improper reliance on K.S.A. 8-142 and the imposition of criminal penalties. Here, the owner was not operating the vehicle and did not intend to operate it on the public roads; instead, a thief took it without the owner’s prior knowledge or permission. Any criminal penalties will fall on the thief and not on the owner of the vehicle. Therefore, there is no factual basis for the improper consideration of the criminal penalties.

Additionally, since a thief was operating the vehicle in a manner not intended by its owner, the considerations of K.S.A. 8-127(a) should be considered instead of ignored as was done by the *Kresyman* court. The owner's intent was not to operate the golf cart on the public roads, that intent was exhibited in its actual use up to the time of the theft, and that intent should be considered as at least a factor in registration of the vehicle. The vehicle's use on a public road at the time of the accident by a thief and in a manner not intended by the owner should not be the deciding factor as it was in *Kresyman*. The intervention and consequences of a criminal act by a thief should never be considered acts of the innocent owner.

CONCLUSION

The *Kresyman* decision should be disapproved for application in this case and all future cases, and the trial court should be reversed. If the court does not go that far, then the facts and circumstances distinguishing our case from the *Kresyman* case should still call for a reversal of the trial court's decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

COMES NOW Defendant/Appellant Benchmark Insurance Company, by and through their attorney of record, J. Franklin Hummer, and states that on the 24th day of July, 2009, two (2) true and correct copies of the above and foregoing Brief of Appellant were mailed postage prepaid and properly addressed to:

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Attorney for Plaintiff

and the original and 16 copies of the Brief of Appellant were filed via UPS overnight delivery with:

Clerk of the Appellate Courts
Kansas Judicial Center
301 SW 10th Street, Room 374
Topeka, Kansas 66612-1507
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