No. 09-102, 469-A

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IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

ESTATE OF ZOE DUTKIEWICZ,
Plaintiff/Appellee

v.

BENCHMARK INSURANCE COMPANY
Defendant/Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Reno County, Kansas
The Honorable Timothy Chambers, Judge
District Court Case Numbers 06-CV-622

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ISSUES ON APPEAL

I. Is the golf cart an uninsured motor vehicle since it was being operated on the roadway at the time of the collision?

II. Was *Kresyman v. State Farm Mutual Insurance Co.* decided correctly since it supports the objectives of the Kansas Legislature in requiring liability insurance and uninsured motorist coverage for all vehicles actually operated on public roads, even where the particular vehicle is not designed for such use?

III. Does *Kresyman* support the decision of the district court despite factual distinctions that have no impact and would not change the outcome of either case?

IV. Is the Benchmark policy definition void since it is more narrow than allowed by Kansas law and is an attempt to diminish the uninsured coverage required by Kansas law?

STATEMENTS OF FACTS

Appellee acknowledges the correctness of Appellant's Statement of Facts with the following corrections and additions:

1. Appellant claims that Plaintiff admitted that the golf cart had never been driving on public roads. Obviously Plaintiff did not admit that the golf cart was never driven on public roads as the accident giving rise to this lawsuit occurred on a public roadway. (Vol. 2, p. 195.)
2. At the time of the collision, the golf cart was being driven on a public road. (Vol. 2, p. 196.)
3. No bodily injury liability policy applied to the golf cart at the time of the accident. (Vol. 2, p. 196.)

ARGUMENTS AND AUTHORITIES

Appellee agrees that the proper standard of review of the district court's order is de novo. The interpretation and legal effect of written instruments are matters of law over which an appellate court exercises unlimited review. An insurance policy is a written instrument subject to appellate interpretation de novo. *See Miller v. Westport Ins. Corp.*, 288 Kan. 27; 200 P.3d 419 (2009).

I. **Under Kansas Law, The Subject Golf Cart Is An Uninsured Motor Vehicle Because It Was Being Operated On The Roadway At The Time Of The Collision.**

Appellant's argue no uninsured motorist coverage is available under the policy because the insured collided with a golf cart and a golf cart is not a motor vehicle within the meaning of the insurance policy. Kansas law provides, however, that when a vehicle, even one not normally designed or expected to be on the roadway, is operated on the roadway, it is a motor vehicle. As such, the insured here was involved in an accident with a motor vehicle and uninsured motorist coverage applies.

The Benchmark policy defines a "motor vehicle" as "a self-propelled vehicle designed for use on public roads." (Vol. 2, p. 176.) An "uninsured motor vehicle" is further defined in pertinent part as "a land motor vehicle . . . to which there is no bodily injury liability policy applying." (Vol. 2, p. 186.)

Benchmark argues that because the golf cart was not originally "designed for use on public roads," no uninsured motorist coverage exists. *See* Br. of Appellant 7-8. Kansas Courts, however, have consistently held that a vehicle operated on a public road, whether designed for such use or not, is a motor vehicle at that time for uninsured

motorist coverage.

The Kansas Court of Appeals held in *Kresyman v. State Farm Mutual Automobile Insurance Co.* a vehicle that was operated on a public roadway was a motor vehicle with respect to insurance coverage despite the fact that the vehicle was not technically one that could be registered with the state as a motor vehicle or properly equipped for use on a public road way. *Kresyman v. State Farm Mut. Auto. Ins. Co.*, 5 Kan. App. 2d 666, 669, 623 P.2d 524 (1981). The plaintiff in *Kresyman* sought PIP coverage for an accident the plaintiff had with an automobile while driving a mini-bike on the public roadway. *Id.* at 666-67. The mini bike was not manufactured for use on public streets, roads or highways and the plaintiff could not have registered the bike with the state for use on public roadways had he wanted to. *Id.* The Court held, however, that the bike was a motor vehicle for insurance coverage purposes stating:

> 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.
> . . .
> 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.

Id. at 669.

Likewise, the Kansas Supreme Court held in *Farm Bureau Mutual Insurance Co. v. Kurtenbach* that a motorcycle that was not registered because it was used primarily in farming operations was not a motor vehicle for insurance coverage purposes because the

motorcycle was not being operated on the public roadway at the time of the accident. *Farm Bureau Mut. Ins. Co. v. Kurtenbach,* 265 Kan. 465, 477; 961 P.2d 53 (1998). The question in *Kurtenbach* was whether the motorcycle was covered under a Farm Master policy that provided coverage for injuries caused by "incidental motorized vehicles" (as opposed to motor vehicles that would necessitate their own liability insurance policies) which were defined as motor vehicles "not subject to motor vehicle registration because of their type or use." *Id.* at 467. The accident in *Kurtenbach* occurred as the motorcycle was being driven across a public roadway to pass from one part of the farm to another. *Id.* at 466. The Court held that even though the motorcycle was technically on the public roadway at the time of the accident, it was not being operated on the roadway because it was simply crossing from one side of the farm to the other. *Id.* at 476. The evidence established that the motorcycle had been operated on the roadway some ten to fifteen times prior to the accident and had an accident occurred during one of those times, the motorcycle would be a motor vehicle subject to motor vehicle registration because of its type and use. *Id.* at 467. Considering the Court of Appeals ruling in *Kresyman*, the Court held:

> We agree with *Kresyman* . . . . However, we must observe a crucial difference between *Kresyman* and the accident in this case. In *Kresyman*, the accident occurred on a county road, which is a public highway. The decision in *Kresyman* is dependent upon the fact that the mini-bike was, at the time of the accident, being operated upon a highway of this State:
>
> "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."

> Unlike *Kresyman*, the accident in this case occurred on Kurtenbach's premises within the meaning of Farm Bureau's policy while Scott was crossing Highway 56. As we noted above, this type of crossing under the particular facts of this case would not subject the motorcycle to the provisions of K.S.A. 8-127(a). Had this accident occurred at one of the 10 to 15 times since 1979 that Scott operated the motorcycle on the county road, no coverage would exist under the policy because the motorcycle at that time would be "subject to motor vehicle registration because of its use."

Id. at 476 (*quoting Kresyman*, 5 Kan. App. 2d at 669) (internal citations omitted).

Also, particularly instructive on the issue presented in this appeal is this Court's decision in *Shumaker v. Farm Bureau Mutual Insurance Co.* The Kansas Court of Appeals held in *Shumaker* that a dune buggy that was operated off-road was not a motor vehicle because it was operated off-road. *Shumaker v. Farm Bureau Mut. Ins. Co.*, 14 Kan. App. 2d 155, 157, 785 P.2d 180 (1990). The Court indicated, however, that had the dune buggy been operated on a public road way, PIP and uninsured motorist coverage would have been afforded. *Id.* Relying on an Arizona decision involving a golf cart, the Court stated: "The Arizona court held that automobile insurance does not cover injuries caused by equipment designed primarily for off-road use *while actually being operated off road.*" *Id.* (emphasis added). The Court in *Shumaker* held the insured was not entitled to PIP and uninsured coverage because the Kansas no-fault and uninsured motorist law did not require coverage for *off-road* accidents caused by the *off-road* operation of a device designed primarily for use *off-road. Id.*

Taking all Kansas decisions together, it is clear that a vehicle is a "motor vehicle" for insurance coverage purposes when it is being operated on a public roadway without regard to whether the vehicle was designed or intended for use on public roads. Here, it

is agreed that the golf cart was being operated on a public roadway at the time of the collision and that no liability insurance policy applied to the golf cart at that time. (Vol. 2, p. 196.) Like the mini bike in *Kresyman*, the golf cart was not designed or intended for use on public roads, but because it was being operated on a public road at the time of the collision, it is an uninsured motor vehicle. If the vehicles in *Kurtenbach* and *Shumaker* had been operated on the public roadway at the time of the collision, it is clear Kansas Courts would also consider those vehicles subject to motor vehicle registration and a motor vehicle liability insurance policy would be required. Since the golf cart was being operated on a public road at the time of the collision, and since no liability insurance policy applies to the subject golf cart, the golf cart is an uninsured motor vehicle and the Benchmark policy should provide uninsured coverage.

II ***Kresyman v. State Farm Mutual Insurance Company* Was Correctly Decided Because It Supports The Objectives Of The Kansas Legislature In Requiring Liability Insurance And Uninsured Motorist Coverage For All Vehicles Actually Operated On Public Roads, Even When The Particular Vehicle Is Not Designed For Such Use.**

The Kansas Court of Appeals correctly held that when a vehicle is being operated on a public roadway, registration is required, and therefore, a motor vehicle liability insurance policy is required. The purpose of requiring registration and liability insurance "is to provide a means of compensating persons promptly for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages . . . ." K.S.A. § 40-3102 (2008). In other words, the purpose of the requirement is protect the person injured by another's operation of a vehicle on the roadway. If a person was not required to obtain liability insurance simply because he

chose to operate a vehicle that was not designed to be operated on a public roadway, the injured person suffers the loss.

Benchmark argues that *Kresyman* was incorrectly decided stating: "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." *See* Br. of Appellant 12. *Kresyman*, however, did not "stick a deep pocket with a loss." The operator/plaintiff in *Kresyman* sought PIP coverage through his father's liability policies because he did not have a liability policy of his own. *Kresyman*, 5 Kan. App. 2d at 666-67. This Court held that since the plaintiff was operating a mini bike on a public roadway, he should have had his own liability policy even though the mini bike was not designed for use on public roads. *Kresyman*, 5 Kan. App. 2d at 669. The "deep pocket" in *Kresyman* did not have to pay the PIP coverage and the insurance policy was not liberally construed as argued by Benchmark. *See Kresyman*, 5 Kan. App. 2d at 669; Br. of Appellant 12. Instead, the Kansas statutes were relied upon and the operator of the mini bike was held responsible for his actions. *See Kresyman*, 5 Kan. App. 2d at 669; Br. of Appellant 12.

The decisions in both *Kurtenbach* and *Shumaker* support the *Kresyman* decision. The Court in *Kurtenbach* found coverage for the operator under a farm liability policy that excluded registered motor vehicles because the motorcycle was not being operated on a public roadway. *Kurtenbach*, 265 Kan. at 669. The Court in *Shumaker* found no coverage for the operator/plaintiff because the dune buggy was being operated off-road

which was excluded under the policy. *Shumaker*, 14 Kan. App. 2d at 157. None of these decisions have "so liberally construed [the policy] to result in a clearly unintended coverage" as argued by Benchmark. Br. of Appellant 12. The only decision that found in favor of coverage was *Kurtenbach* because the policy provided coverage when the vehicle was not subject to registration, and because of the motorcycle's use entirely on the farm, it was not subject to registration.

And a finding in favor of coverage in the present case would not "so liberally construe [the policy] to result in a clearly unintended coverage." Kansas law requires uninsured motorist coverage for all automobile liability insurance policies. *See* K.S.A. § 40-284 (2008). The Kansas Supreme Court has stated:

> The purpose of legislation mandating the offer of uninsured and underinsured motorist coverage is to fill the gap inherent in motor vehicle financial responsibility and compulsory insurance legislation. This coverage is intended to provide recompense to innocent persons who are damaged through the wrongful conduct of motorists who, because they are uninsured or underinsured and not financially responsible, cannot be made to respond to damages.

Rich v. Farm Bur. Mut. Ins. Co., 250 Kan. 209, 824 P.2d 955 (1992). The Plaintiff here is the owner of a registered motor vehicle and has a liability policy with uninsured coverage on that vehicle through Benchmark. (Vol. 2, p. 186.) The Plaintiff here was operating her registered and insured motor vehicle at the time of the collision. (Vol. 2, p. 204.) The tortfeasor was operating an unlit golf cart on a highway in the dark at the time of the collision. (Vol. 2, p. 204.) The tortfeasor had stolen the golf cart from a homeowner in the vicinity. (Vol. 2, p. 139.) The tortfeasor did not have a liability policy on the golf cart, and likewise, the owner of the golf cart did not have a liability

policy on the golf cart as he never operated it on the public roadway. (Vol. 2, p. 196.) Accordingly, no bodily injury liability policy applied making the golf cart an uninsured motor vehicle at the time of the accident.

The decision in *Kresyman* and the district court's determination that the golf cart was an uninsured motor vehicle supports the Kansas legislature's purpose in requiring liability insurance for vehicles operated on a public roadway and its purpose in requiring all liability policies to include uninsured insurance coverage with all liability policies - to protect the innocent driver who is damaged through the wrongful conduct of uninsured motorists. A finding that the golf cart is an uninsured motor vehicle does nothing but enforce uninsured coverage for which the insured bargained and is entitled pursuant to the contract with Benchmark and Kansas law. A finding that the golf cart is not an uninsured motor vehicle undermines the Kansas legislature's purpose, placing the burden, not on the wrongful driver or the insurer that has accepted premiums for uninsured coverage, but on the Benchmark insured.

III ***Kresyman* Supports A Decision That The Golf Cart Is An Uninsured Motor Vehicle Despite Any Factual Differences.**

Benchmark attempts to distinguish *Kresyman* from the current case because of various factual differences to the present case. None of the factual differences change the analysis presented. In fact, the factual differences cited by Brenchmark only further support a finding that the golf cart was an uninsured motor vehicle at the time of the accident.

Benchmark argues that the present case can be distinguished from *Kresyman*

because of various factual distinctions: the mini bike in *Kresyman* was being operated by its owner and the golf cart here was being operated by a thief; the owner of the golf cart did not intend the golf cart to be operated on a public roadway; and the owner of the golf cart did not know it had been stolen from his yard. Br. of Appellant 11-16. Benchmark, however, incorrectly focuses on the owner of the golf cart instead of the operator. The owner of the golf cart did not carry the required liability insurance policy required by statute, but no one has argued he should have. Everyone agrees that the owner of the golf cart apparently used the golf cart in and around his own property and not on a public roadway. (Vol. 2, p. 149.) Such use would not require a liability policy. But the operator of the golf cart, the thief, was operating the golf cart on a public roadway at the time of the accident. (Vol. 2, p. 196.) *Kresyman*, *Kurtenbach*, and *Shumaker* all focused on the operation of the vehicle at the time of the accident, not the owner of the vehicle. The operator of the golf cart here operated the golf cart on the public roadway. (Vol. 2, p. 196.) No doubt the thief's operation of the golf cart was prohibited by Kansas statute and the operator should have had a liability policy on the golf cart at the time he operated it in on the public roadway. Since he did not have a liability policy, he was an uninsured motorist.

Furthermore, the fact that the golf cart was stolen does nothing to distinguish the *Kresyman* decision from the present case. Again, the question is whether the golf cart is a motor vehicle requiring a liability insurance policy at the time of its operation. Whether it was operated by its owner or a thief does nothing to change the fact that the golf cart was being operated on a public roadway at the time of the collision and the operator did

not have liability coverage. *Kresyman* is controlling and the golf cart was an uninsured motor vehicle at the time of the collision.

IV The Benchmark Policy Definition Of "Motor Vehicle" Is More Narrow Than Allowed By Kansas Law And Is An Attempt To Diminish The Uninsured Coverage Required By Kansas Law. Policy Provisions Limiting Uninsured Motorist Coverage Are Void.

As discussed, Kansas statutes require liability insurance for all motor vehicles operated on public roadways. Kansas Statute section 40-3104 requires liability insurance for all motor vehicles which are defined as:

> (m) . . . every self-propelled vehicle of a kind required to be registered in this state . . . .

K.S.A. § 40-3104 (2008).

Kansas Statute section 8-127 requires registration of every "motor vehicle . . . intended to be operated upon any highway in this state . . . ," and defines motor vehicles as:

> (b) . . . every vehicle . . . which is self-propelled.

K.S.A. § 8-126(b) (2008).

Kansas Statute section 8-142 makes is unlawful for any person:

> To operate . . . upon a highway of any vehicle, as defined in K.S.A. 8-126, . . . which is not registered . . . .

K.S.A. § 8-142 (2008).

Taking all statutes together, *Kresyman* held that Kansas requires registration of any vehicle operated on the highway, and every vehicle registered requires liability insurance. *Kresyman*, 5 Kan. App. 2d at 669. And as previously discussed, every

liability policy is required to contain uninsured motorist coverage. *See* K.S.A. § 40-284 (2008). Benchmark, however, limits uninsured motorist coverage to accidents involving uninsured vehicles that are "designed for use on public roads." (Vol. 2, p. 176.) The Benchmark definition is more narrow than allowed by Kansas law and is an attempt to diminish the uninsured motorist coverage required by Kansas law.

Kansas Courts have declared any exclusion or definition which diminishes uninsured motorist coverage void and contrary to public policy. The provisions of the Kansas Uninsured Motorist Statutes, K.S.A. 40-284 et seq., are mandatory and must be considered to be a part of every insurance policy written in this state. Any attempt by an insurer to diminish the statutorily mandated uninsured motorist protection provided by the statute is void and contrary to public policy. *See State Farm v. Cummings*, 13 Kan. App. 2d 630, 778 P.2d 370 (1989) (deciding whether uninsured motorist coverage is available when the driver of an offending vehicle is insured and the owner is not).

The Kansas Supreme Court in *Clayton v. Alliance Mutual Casualty Co.* denied an insurance companies attempt to limit uninsured motorist coverage by restricting the amount recoverable to one policy. The Court relied on a Minnesota opinion which stated:

> It seems to us that, in spite of the attempt by the insurer to limit its liability to one policy or to the amount recoverable under one policy, the fact that the legislature required an uninsured-motorist provision in all policies, added to the fact that a premium has been collected on each of the policies involved, should result in the policyholder's receiving what he paid for on each policy, up to the full amount of his damages. It is true that such holding results in permissible recovery exceeding what he would have received if the uninsured motorist had been insured for the minimum amount required under our Safety Responsibility Act. But if the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who has paid a premium should get all he paid for rather

> than that the insurer should escape liability for that for which it collected a premium.

Clayton v. Alliance Mut. Cas. Co., 212 Kan. 640, 650, 512 P.2d 507 (1973) (*quoting Van Tassel v. Horace Mann Ins. Co.*, 207 N.W.2d 348 (Minn. 1973)).

Determining whether an insurer's definition of a "hit and run," requiring actual physical contact with the insured vehicle too narrowly restricted the uninsured motorist coverage under the policy, the Kansas Supreme Court in *Simpson v. Farmers Insurance Co.* held that the definition was too restrictive. *Simpson v. Farmers Ins. Co.*, 225 Kan. 508, 512, 592 P.2d 445 (1979). Relying on the *Clayton* decision and a similar decision in *Van Hoozer v. Farmers Insurance Exchange*, 219 Kan. 595, 549 P.2d 1354 (1976), the Court took exception with the insurers attempt to diminish the uninsured motorist coverage stating:

> In all of the cases just discussed this court has made it crystal clear that the uninsured motorist statute is remedial in nature and should be liberally construed to provide a broad protection to the insured against all damages resulting from bodily injuries sustained by the insured, caused by an automobile accident, and arising out of the ownership, maintenance, or use of the insured motor vehicle, where those damages are caused by the acts of an uninsured motorist. A provision placed in the policy by an insurance company which denies protection to an insured for damages and injuries caused by a "hit and run" vehicle unless there is actual physical contact between the vehicles, like the various policy restrictions discussed in *Clayton* and *Van Hoozer*, is an attempt to limit or dilute the unqualified uninsured motorist coverage mandated by K.S.A. 40-284 and is therefore void and unenforceable.

Id. at 512.

In the present case, the Benchmark policy attempts to diminish uninsured motorist coverage by limiting coverage to accidents with a motor vehicles that was "designed for

use on public roads," instead of providing uninsured motorist coverage to accidents involving motor vehicles "intended to be operated upon any highway." A vehicle can be intended to be operated upon a highway and therefore require liability insurance, without being specifically designed for such use. *See* Op. Kan. Att'y Gen. 97-78 (1997) ("Charter Ordinance No. 7 defines a golf cart as 'any motorized vehicle which is manufactured for use on a golf course and is capable of carrying one or two persons together with golf bags and equipment.' This charter ordinance purports to authorize operation of golf carts on public highways. It is our opinion that a golf cart, as defined by Charter Ordinance No. 7, is a motor vehicle and must be registered pursuant to state statute unless the motor vehicle registration statutes are not uniformly applicable to all cities and a city has enacted a valid charter ordinance). The Benchmark provision limiting coverage to only those vehicles "designed for use on public roads" is an attempt to limit or dilute the unqualified uninsured motorist coverage mandated by K.S.A. 40-284 and is therefore void and unenforceable.

CONCLUSION

The district court's decision that the golf cart was an uninsured motor vehicle at the time of the collision was correct and should be affirmed. Under Kansas law, the subject golf cart is an uninsured motor vehicle because it was being operated on the roadway at the time of the collision. Additionally, *Kresyman v. State Farm Mutual Insurance Company* was correctly decided because it supports the objectives of the Kansas Legislature in requiring liability insurance and uninsured motorist coverage for all vehicles actually operated on public roads, even when the particular vehicle is not

designed for such use. Furthermore, the fact that *Kresyman* and the present case contain some factual differences, the rule of law that a vehicle operated on a public roadway is required to be registered and covered by liability insurance is good and properly applied to this case. Finally, the Benchmark policy definition of "motor vehicle" is more narrow than allowed by Kansas law and is an attempt to diminish the uninsured coverage required by Kansas law. Policy provisions limiting uninsured motorist coverage are void.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2009, two (2) true and correct copies of the above and foregoing Brief of Appellee were mailed postage prepaid and properly addressed to:

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and the original and 16 copies of the Brief of Appellee were filed via Fed Ex overnight delivery with:

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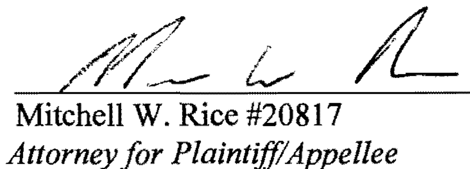

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