

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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REPLY 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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REPLY ARGUMENTS AND AUTHORITIES

Plaintiff takes the position that “every vehicle” when operated on the roadways is a “motor vehicle” for uninsured motorist coverage purposes. This theme permeates Plaintiff’s entire brief. There is no prior case involving UM coverage, just like there is no similar case involving operation of the vehicle by anyone other than an owner. This simplistic approach necessarily means every court must ignore the provisions of multiple registration statutes originally passed in 1929 that were on the books when the No-Fault Act was passed in 1974 and which are still on the books. No rule of law or public policy allows a court to ignore the provisions of statutes passed by the Legislature that are directly applicable to the facts of a case on review. The Kresyman court did so, and that error has never been corrected. It should be corrected now. Our trial judge, Judge Chambers, in his comments when ruling on the summary judgment motions, made it clear that he would have decided Kresyman differently if given the chance, and this court should do the same.

Plaintiff cites Kresyman, Kurtenbach and Shoemaker for the proposition that any vehicle when operated on the public roads must have liability insurance “without regard to design or intended use.” (Appellee’s brief, p. 6) In other words, the provisions of Chapter 8 dealing with required equipment and design and the provisions of K.S.A. 8-127 and 8-167 which makes the owner’s intent a determining material fact of registration should all be ignored and treated as if they had not been passed by the Legislature. No rule of law or public policy is cited by Appellee to support this argument as there is none. The provisions of K.S.A. 8-142 dealing with criminal penalties for violation of the registration statutes was the only one relied up by the Kresyman court, but nothing in that

statute addresses how or under what circumstances the other registration statutes can be ignored by the court. Any sympathy for a violator of registration law subject to penalties under K.S.A. 8-142 should not and does not allow a court to ignore the clear language of other applicable statutes intended by the Legislature to be considered and applied in this factual situation.

In all three of these cases relied upon by Plaintiff, the owner thereof was the operator at the time of the accident. Since the owner was the operator when the vehicle was operated on public roads, it may be concluded that the owner “intended” to operate the vehicle on the public road such that the provisions of K.S.A. 8-127 and K.S.A. 8-167 do not apply. When they do not apply, then registration is required. Here, the owner of the golf cart was not the operator at the time. The owner’s intent remained that the golf cart was not to be operated on the public road; therefore, registration and accompanying liability insurance were not required. The golf cart in this case continually was not a “motor vehicle” as defined by statute and by policy. Therefore, the UM coverage of this policy never came into play.

More importantly, not all vehicles operated on roadways are “subject to motor vehicle registration and a motor vehicle liability insurance policy” as suggested by Plaintiff at page 6 of Plaintiff’s brief. Our registration statutes (K.S.A. 8-128) clearly exempt many vehicles from such registration (those not designed, those not intended, implements of husbandry, ATV’S, etc.) “Non-repairable” motor vehicles cannot be registered in Kansas (K.S.A. 8-135), and those not equipped with the statutorily required equipment cannot be registered in Kansas (K.S.A. 8-197(b)(1)(A) and K.S.A. 8-198). While operation of the same on public roads may subject the owner to penalties under 8-

142, there is still no statutory requirement that such vehicles be insured.

The No-Fault Act itself limits its application to only those vehicles that are “required to be registered” in Kansas [K.S.A. 40-3103(m)]; nothing in the No-Fault Act or the registration statutes recognize the fortuitous location of an accident as a material fact related to required registration or to necessary liability insurance. Since the Legislature has spoken exhaustively in the No-Fault Act about insurance coverage on vehicles in Kansas, this Court should recognize that the Legislature did not make that fortuitous location of an accident any factor to consider when determining the need for liability insurance coverage. Likewise, our registration statutes do not consider the “after the fact” location of an accident as a material factor for registration or insurance.

By limiting the required liability insurance to only those vehicles required to be registered in Kansas, the Legislature necessarily did so with knowledge and recognition of the limitations on registration found in Chapter 8 of the Kansas Statutes Annotated. In effect, those limitations in Chapter 8 should be treated as being incorporated by reference into K.S.A. 40-3103. Instead, the Kresyman court and now Plaintiff suggest that they should be ignored and treated as if they did not exist just because of the location of an accident. No logical analysis and no public policy can result in such an approach.

CONCLUSION

As expected, Plaintiff paints the issues with the broadest brush possible, and asserts that every vehicle when driven on the public roads must be required to be registered in Kansas and, therefore, must have liability insurance. To reach this conclusion, this court, just like the Kresyman court, would have to ignore the clear statements of our Legislature describing those motor vehicles which are not subject to

registration. This Court cannot ignore those statutory pronouncements. When considered and applied to this case, the conclusion is that the golf cart in question was not a “motor vehicle” as it was not required to be registered in the State of Kansas.

While all other reported cases involved an owner operating the vehicle at the time of the accident so that the owner’s “intent” could be easily construed to be operating the vehicle on the public road, here the owner was not operating the vehicle and his “intent” could never be questioned or challenged. There was never a change in the owner’s intent contemplated in K.S.A. 8-127. Just as clearly, this golf cart was not designed for use on public roads and, therefore, was not required to be registered. For both reasons, this golf cart was not required to be registered, was not a “motor vehicle” and, therefore, the UM provisions of Benchmark’s policy do not apply.

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 22nd day of October, 2009, two (2) true and correct copies of the above and foregoing Reply Brief of Appellant were mailed postage prepaid and properly addressed to:

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

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