

Case No. A120584

**State of Minnesota
In Court of Appeals**

Bruce and Deloris Kastning,

Appellants,

vs.

State Farm Insurance Companies,

Respondents.

APPELLANT'S REPLY BRIEF

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Introduction

Respondent, State Farm Insurance Companies, submitted a Brief and Appendix in response to Appellants' Brief. Appellant now submits the following brief, in reply to Respondent's brief, addressing only new issues and points of law addressed by Respondents.

I. Is the Trial Court's determination that the John Deere Model 3020 tractor is not a motor vehicle a material issue of fact?

Respondent repeatedly refers to the John Deere Model 3020 tractor as a "Farm Tractor" throughout its brief. "Farm Tractor" is of significant legal meaning pursuant to Minnesota Statutes. Despite the Trial Court determination that the John Deere Model 3020 tractor fit into that category, Appellant strongly believes that the Trial Court supplanted its own opinion and weighed factual issues at the Summary Judgment proceeding, in direct contradiction of the opinion of the only expert testimony available in this case about the design, use and utility of a John Deere Model 3020 tractor.

Respondent now attempts to convince this Court to ignore the factual issues surrounding the issue of whether the John Deere Model 3020 tractor is a "Farm Tractor" by simply referring to it as such numerous times in its brief.

In reality, the Trial Court's determination that the John Deere Model 3020 tractor fits under the statutory provisions relating to "Farm Tractor" remains a legitimate issue on appeal as to whether a material issue of fact exists. Appellant continues to assert that this determination should have been one for the finder of fact, and not for the Trial Court to summarily determine, when there appears to be no factual basis for the Trial Court's

decision.

II. Does Respondent's expert's opinion raise a material issue of fact as to the John Deere Model 3020 tractor's design, use and utility?

Lanny Berke submitted an expert report outlining the design, utility and use of a John Deere Model 3020 tractor. This report was submitted into evidence at the Trial Court level. Respondent, State Farm Insurance, never objected to this report, nor did they provide testimony against or in opposition to the expert report. Lanny Berke's expert report was, and is, the only credible testimony submitted in this case regarding the design, use and utility of a John Deere Model 3020 tractor.

Despite the absolute fact that there is no contradicting evidence or testimony about the design, use and utility of a John Deere Model 3020 tractor, and the fact that Respondent never raised an issue regarding the validity of Lanny Berke's report, Respondent blatantly disregards and disrespects Lanny Berke's expert report in its Response Brief in this appeal. As a matter of fact, Respondent goes as far as to discredit and denounce Lanny Berke's report and opinion, without any support for its position, stating:

“The Kastnings cannot recast the Farm Tractor into something it is not by citing to the affidavit of Lanny Berke, a mechanical engineer. Mr. Berke's affidavit does not create a material issue of fact.

Mr. Berke does not and could not state that this Farm Tractor was designed to operate on public highways. Nor does Mr. Berke state how based on his review of the Farm Tractor's specifications and owner/operator's manual, he reaches his conclusion that this Farm Tractor was 'not designed or adapted exclusively for agricultural, horticultural, or livestock operations. He states, without explanation, for example, that the Farm Tractor "was designed and commonly used for snow plowing...."

Respondents' attack on the credibility of Lanny Berke's expert opinion is unfounded, absent any facts or testimony to the contrary. Despite Respondent's assertion otherwise, Lanny Berke's expert opinion does, in and of itself, raise a material issue of fact as to the John Deere Model 3020 tractor's design, use and utility. The question of the qualification of a witness as an expert is for the court, and the weight to be given his testimony is for the jury. U.S. v. Percansky, 298 F. 991 (D.C. Minn. 1923). Where an expert is qualified and the opinion has relevant basis, the credibility and weight of the testimony are to be decided by jury. Behlke v. Conwed Corp., 474 N.W.2d 351 (Minn. App. 1991). Here, Respondent is asking the Court to disregard the weight of the opinion of the expert witness, based on nothing more than Respondent's own unqualified opinion that Lanny Berke's expert opinion is flawed. This is in spite of the Trial Court's acceptance of Berke's report and notwithstanding Respondent's own failure to produce a qualified expert to provide an opinion in opposition to Berke or to object to Berke's qualifications.

III. Should the doctrine of reasonable expectations be applied in this case.

Appellants assert that the doctrine of reasonable expectations should be applied in this case, and that uninsured motorist coverage should provide benefits to Appellants. Certainly if an insurance company found it reasonable that uninsured motorist coverage applied in an accident with an uninsured tractor on a highway, Appellants would be reasonable in expecting their insurance to provide coverage in similar circumstances when the policy is vague as to exclusions and no reasonable person would expect their

insurance not to deny coverage stemming from an accident with an uninsured motorized vehicle traveling down a major state highway.

Conclusion

The bottom line in this case is that Raymond Schenk was driving a motorized vehicle on a major public roadway as a means of transportation without insurance. Something he had done on numerous occasions in the past. While driving this motorized vehicle, Raymond Schenk caused an accident inflicting great bodily injury to the Appellants in the process. The Appellants, pursuant to State law, and with regard for personal responsibility, carried auto insurance that was supposed to protect them in the event they were involved in an accident with an uninsured motorist. When an unfortunate accident with an uninsured vehicle occurred on a major public roadway, causing serious injuries to the Appellants, their auto insurer denied coverage for the accident based upon a latent technicality they determined existed in the policy. They deemed Raymond Schenk was not driving an uninsured “motor vehicle”, but rather that he was driving a motorized tractor with four wheels for farm purposes, that it did not need to be registered pursuant to Minnesota law and was, therefore, excepted from coverage under the policy.

In defense of its decision to deny the Appellant uninsured motorist benefits under their policy, Respondent emphasized the Minnesota case of Great American Ins. Co. v. Golla, 493 N.W.2d 602 (Minn. App. 1992). **Ironically, Golla was actually a case in which the injured party’s own insurer (Great American) paid uninsured motorist benefits to its insured – exactly what the Appellants are asking Respondent to do in**

this case. In Golla, it wasn't until the owner of the disabled farm tractor fought Great American's attempt to obtain damages pursuant to subrogation rights that the case ever made it to the Court. At the same time, the factual circumstances in Golla were fundamentally different than those in the case at hand. In Golla, the tractor was not operating at the time of the accident, the tractor was not being used as a means of transportation – nor had it been commonly used as such - and the tractor was not the same make and model as the one in the case at hand. Furthermore, in Golla there was no indication that the tractor was designed for use on a public roadway as is the case of the John Deere model 3020 tractor as elaborated in the expert testimony of Lanny Berke. This is a fact that was never contested by Respondent prior to its appellate response brief and a fact for which Respondent failed to provide any expert rebuttal testimony, despite ample opportunity to do so, in effect assenting to this fact by their own silence.

Accordingly, Appellants believe insurance benefits were contractually available to them in this case, or that at a minimum, there exists a question of fact appropriate for a jury to determine whether a John Deere Model 3020 tractor used for transportation on a public roadway is a motorized vehicle and required to be registered pursuant to Minnesota law.

Dated at Bemidji, Minnesota this 7th day of June, 2012.

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