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after the first accident on October 21, 2006. Accordingly, we find no error.

CONCLUSION

We conclude that the district court properly entered summary judgment in favor of the City, because the Gards did not meet the time requirements set forth in § 13-919(1) and the doctrines of continuing tort and equitable estoppel do not excuse their failure to file their lawsuit before the statute of limitations had expired.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

JOHN F. BECKMAN AND FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLANTS, V. FEDERATED MUTUAL INSURANCE COMPANY, ALSO KNOWN AS AND DOING BUSINESS AS FEDERATED INSURANCE, ET AL., APPELLEES.

788 N.W.2d 806

Filed August 10, 2010. No. A-09-975.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Insurance: Contracts: Motor Vehicles: Liability.** Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess.
5. **Insurance: Contracts.** If the terms of an insurance policy are clear and unambiguous, then those terms will be enforced.
6. **Summary Judgment: Appeal and Error.** When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an

order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just.

7. **Insurance: Contracts.** An insurer may limit its liability and impose restrictions and conditions upon its obligations under an insurance contract as long as the restrictions and conditions are not inconsistent with public policy or statute.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded with direction.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Michael G. Mullin and Amy L. Van Horne, of Kutak Rock, L.L.P., for appellees Federated Mutual Insurance Company and Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc.

MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This case is an insurance coverage dispute arising out of an accident in which the driver was operating a temporary substitute vehicle provided by a car dealership. Because both the policy insuring the driver and the dealership's policy insuring the vehicle purport to transfer liability to the other insurance policy, we conclude that the policies contain mutually repugnant language. We therefore apply the rule that in such situations, the policy covering the vehicle provides primary coverage and the policy covering the driver is excess. We reverse the district court's decision to the contrary and remand the cause with direction.

BACKGROUND

The facts in this case are not disputed. On July 31, 2006, John F. Beckman took his stepdaughter's vehicle to Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. (Sid Dillon), to have repairs performed on the vehicle. Sid Dillon provided Beckman with a substitute vehicle, a 2005 Chevrolet Malibu owned by Sid Dillon, and gave him permission to operate the vehicle. On that same day, Beckman was involved in an accident with a bicyclist, Clinton R. Sedivy, while operating the Malibu.

At the time of the accident, Beckman was insured by Farmers Mutual Insurance Company of Nebraska (Farmers Mutual). At that time, Sid Dillon and the Malibu were insured by Federated Mutual Insurance Company (Federated).

As is pertinent to the instant case, Beckman's Farmers Mutual policy provided as follows regarding coverage:

> **COVERAGE FOR THE USE OF OTHER AUTOMOBILES**
>
> This liability coverage extends to the use, by an **insured**, of a **newly acquired automobile**, a **temporary substitute automobile**, or a **non-owned automobile**. . . .
>
> . . . .
>
> **IF THERE IS OTHER LIABILITY COVERAGE**
>
> . . . .
>
> 3. **Temporary Substitute Automobile, Non-Owned Automobile**, Trailer.
>
> If a **temporary substitute automobile** . . . has other vehicle liability coverage on it, then this coverage is excess.
>
> If a **temporary substitute automobile** . . . has other vehicle liability coverage on it, or is self-insured under any motor vehicle financial responsibility law, a motor carrier law or any similar law, then this coverage is excess over such insurance or self-insurance.

The Malibu fits Farmers Mutual's definition of a temporary substitute automobile.

In pertinent part, Sid Dillon's Federated policy covering the Malibu provides as follows regarding who is an insured under the policy:

> **3. Who Is An Insured**
>
> **a.** The following are "insureds" for covered "autos":
>
> **(1)** You for any covered "auto".
>
> **(2)** Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> . . . .
>
> **(d)** Your customers, if your business is shown in the Declarations as an "auto" dealership. However, if a customer of yours:

> **(i)** Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.
>
> **(ii)** Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limit of their other insurance.

On two occasions, Farmers Mutual tendered coverage for the accident to Federated. In letters dated October 17, 2007, and February 21, 2008, Federated denied tender.

For purposes of simplification, from this point forward, we refer to the appellants collectively as "Farmers Mutual" and we refer to the appellees collectively as "Federated."

On October 24, 2008, Farmers Mutual filed a complaint for declaratory judgment. Farmers Mutual requested that the court enter a judgment declaring the following:

> a. That the Federated policy provides the primary coverage as to the Sedivy claim;
>
> b. That Federated owes a defense to . . . Beckman herein;
>
> c. That the Farmers Mutual coverage is excess;
>
> d. That the defense costs incurred to date by Farmers Mutual in defending Beckman [in the case Sedivy filed against Beckman] shall be reimbursed by Federated; and
>
> e. That Federated owes indemnification to . . . Beckman herein, in the event that any judgment is entered against . . . Beckman in the [case Sedivy filed against Beckman].

Federated filed a motion to dismiss which alleged that Farmers Mutual had failed to state a valid claim for recovery under Nebraska law, and Farmers Mutual filed a motion for summary judgment. The court treated the motion filed by Federated as a summary judgment motion, because evidence was offered in support of the motion. Based upon the evidentiary record—which included both insurance policies, the complaint Sedivy had filed against Beckman, and a

stipulation of facts—the court granted summary judgment in favor of Federated.

Farmers Mutual timely appeals.

ASSIGNMENTS OF ERROR

Farmers Mutual makes five assignments of error, which we consolidate to the central question presented by this appeal: whether the district court erred in determining that Farmers Mutual's policy, rather than Federated's policy, afforded primary coverage under the undisputed facts.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

ANALYSIS

The question before this court is whether the Farmers Mutual insurance policy or the Federated insurance policy provided primary coverage. The resolution of this question depends upon the effect of the clause in Federated's insurance policy that excludes as an insured all customers of an automobile repair shop, except those without sufficient liability insurance, and in that case, only to the extent required by law.

The district court concluded, and Federated now asserts in its appellate brief, that because Beckman had his own liability insurance policy sufficient to comply with financial

responsibility requirements, Beckman did not fit the definition of an insured under Federated's policy.

On appeal, Farmers Mutual argues that the district court erred in interpreting the Federated policy. Farmers Mutual asserts that the above-described term in the Federated policy is mutually repugnant with the term in the Farmers Mutual policy which provides that where the policyholder is driving a "non-owned" vehicle, the Farmers Mutual policy is excess coverage. If the two automobile insurance policies are mutually repugnant, longstanding Nebraska law places the responsibility for primary coverage on the insurance policy covering the vehicle, which in this case would be the Federated policy. See *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 265 Neb. 549, 657 N.W.2d 905 (2003).

Therefore, we must determine whether the doctrine of mutual repugnancy applies to the instant case. To better understand the purpose of this doctrine, we recount two distinct lines of Nebraska Supreme Court decisions. We first discuss the line of cases in which the Nebraska Supreme Court adopted and applied the principle of mutual repugnancy. Second, we discuss a line of cases in which the court determined that a permissive driver was not an insured under an insurance policy covering a loaned vehicle. Finally, we discuss *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co., supra*, in which the Nebraska Supreme Court discussed both lines of cases.

[4] The Nebraska Supreme Court first explicitly adopted the principle later termed mutual repugnancy in *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969). Although previous Nebraska Supreme Court cases on the same issue had reached a result consistent with the rule announced in *Bituminous Cas. Corp.*, they had not elucidated this rule in precise terms. See, *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966); *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963); *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959). In *Bituminous Cas. Corp.*, a driver whose automobile was in a repair shop was driving a vehicle loaned by the repair shop when he was involved in an accident. The driver's insurance policy provided that "'the insurance under

this policy with respect to loss arising out of . . . the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance.'" *Id*. at 671, 171 N.W.2d at 176. The policy covering the automobile defined an insured as

> "'any other person, but only if no other valid and collectible automobile liability insurance, either primary or excess, with limits of liability at least equal to the minimum limits specified by the financial responsibility law of the state in which the automobile is principally garaged, is available to such person; . . . .'"

Id. at 672, 171 N.W.2d at 176. The court discussed the fact that in other jurisdictions, where one policy contained an excess clause and the other policy contained a no-liability clause, courts had not treated such situations in a uniform manner. The court adopted the following rule to resolve such conflicts: "Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess." *Id*. at 673, 171 N.W.2d at 176. The court's stated rationale for adopting this rule was that "[n]eed exists for certainty, simplicity, and inexpensive administration in connection with these business relations among insurers." *Id*.

The Nebraska Supreme Court applied this rule to resolve a similar situation in *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981). In *Jensen*, a driver who had an automobile liability insurance policy through his employer was involved in an accident while driving a car temporarily loaned to him by an automobile repair shop. The repair shop had a separate policy covering the loaner vehicle. The driver's policy stated that "'[w]ith respect to a temporary substitute automobile, this insurance shall be excess insurance over any other valid and collectible insurance available to the insured.'" *Id*. at 491-92, 304 N.W.2d at 54 (emphasis omitted). The repair shop's policy covering the vehicle provided as follows regarding who was an insured:

> "Each of the following is an INSURED under this insurance to the extent set forth below: . . . (3) with respect

> to the AUTOMOBILE HAZARD; . . . (b) any other person while actually using an AUTOMOBILE covered by this Coverage part with the permission of the NAMED INSURED, provided that such other person (i) *has no automobile liability insurance policy of his (her) own, either primary or excess . . .*" (Emphasis supplied.)

Id. at 491, 304 N.W.2d at 54. The court observed that this posed a conflict similar to the one in *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969), recited the above-quoted rule from *Bituminous Cas. Corp.*, and determined that the policy issued to the repair shop that covered the vehicle provided primary coverage.

The Nebraska Supreme Court reached a similar conclusion in *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000), under somewhat different circumstances. In *Cheeper's Rent-A-Car*, a driver, who was insured under her own policy, was involved in an accident while driving a rental car, which was covered by a separate rental policy. The driver's own policy "provided that when [the driver] was driving a rental vehicle covered by liability insurance, the [driver's own] coverage was 'excess over such insurance.'" *Id*. at 1011, 614 N.W.2d at 309. The rental car contract stated that the rental car was covered by insurance which was "'[i]n all cases . . . secondary'" to the driver's own liability insurance. *Id*. The court noted that each policy contained "language which purports to place the primary responsibility in terms of liability on the issuer of the opposing contract." *Id*. The court then applied the same rule regarding mutually repugnant language as was applied in *Jensen v. Universal Underwriters Ins. Co., supra*, and *Bituminous Cas. Corp. v. Andersen, supra.*

In a separate line of cases, the Nebraska Supreme Court explained when a policy covering a loaned vehicle may exclude a permissive driver from coverage. In *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993), the Nebraska Supreme Court determined that an insurance policy covering a vehicle owned by an automobile repair shop and loaned to a customer did not cover a customer

when she was involved in an accident. The policy covering the vehicle defined an insured as "'[a]ny other person or organization *required by law* to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.' (Emphasis supplied.)" *Id.* at 199, 498 N.W.2d at 337. The court concluded that the policy on the vehicle did not cover the customer who had been loaned the vehicle, because Nebraska law did not require that such a driver be insured.

In *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), the Nebraska Supreme Court cited to *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co., supra*, to support its determination that a policy insuring a loaned vehicle specifically excluded a driver who had borrowed the vehicle as an insured. In *Leader Nat. Ins.*, a driver who was covered under his own insurance policy was involved in an accident while test-driving an automobile owned by a dealership. The dealership had a policy which covered its vehicle. The driver's insurance company filed a petition seeking subrogation from the dealership's insurer. The dealership's insurance policy covering the vehicle was attached to the petition, but the driver's insurance policy was not attached. The dealership's insurance policy defined who was an insured as follows:

> "(2) Anyone else while using with your permission a covered 'auto' you own, hire or borrow *except*:
>
> . . . .
>
> "(d) Your customers, if your business is shown in the Declarations as an 'auto' dealership. However, if a customer of yours:
>
> "(i) Has no other available insurance (whether primary, excess or contingent), they are an 'insured' but only up to the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged.
>
> "(ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged, they are an 'insured' only for the amount by which the compulsory or financial

> responsibility law limits exceed the limits of their other insurance." (Emphasis supplied.)

Id. at 786, 545 N.W.2d at 454. We digress to note that, in all material respects, this language is the same as that contained in Federated's policy in the instant case. In addition, the petition in *Leader Nat. Ins.* alleged that the driver's insurance company insured the driver, defended the driver, and compensated third parties for damages. The court cited to *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co., supra*, in explaining that the dealership's insurance policy that insured only customers who had less vehicle liability insurance than the amount required by law was not inconsistent with "public policy or statute." *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. at 788, 545 N.W.2d at 455. The court decided that based on the allegations of the petition, the driver was sufficiently insured, and that therefore, the dealership's insurer had no duty to cover the driver. The court's discussion of this specific issue was as follows:

> [The driver's insurance company's] amended petition alleges that [the driver's insurance company] insured [the driver], defended [the driver], and paid third parties for damages they suffered. It is evident that [the driver] was sufficiently insured as required by law and, in any event, was sufficiently insured to cover the damages he caused while driving [the dealership's] vehicle. [The dealership's policy covering the vehicle], which [policy] was attached to the amended petition, conclusively contradicts the amended petition's allegation that [the dealership's insurer] had the primary duty to defend [the driver]. Under [the dealership's policy covering the vehicle, the dealership's insurer] had no duty to defend [the driver].

Leader Nat. Ins. v. American Hardware Ins., 249 Neb. 783, 788, 545 N.W.2d 451, 455 (1996).

We now turn to the only Nebraska Supreme Court decision which discusses both lines of cases, which is *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 265 Neb. 549, 657 N.W.2d 905 (2003). In *Allied Mut. Ins. Co.*, a driver, who had his own automobile insurance policy, was involved in an

accident while driving a loaner vehicle covered by a dealership's separate insurance policy. The driver's policy provided that "'any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.'" *Id.* at 553, 657 N.W.2d at 908. The dealership's policy provided as follows regarding who was an insured:

> "WHO IS AN INSURED, With respect to the AUTO HAZARD — the following insureds are added:
>
> "(5) any driver of a . . . SERVICE LOANER AUTO, but only within the scope of YOUR permission.
>
> ". . . THE MOST WE WILL PAY, item (1) — the following paragraph is added:
>
> "With respect to the AUTO HAZARD part (5) of WHO IS AN INSURED:
>
> "(a) If the permissive driver has no other insurance, the most WE will pay is the minimum financial responsibility law limits in the jurisdiction where the OCCURRENCE took pla[c]e.
>
> "(b) If the permissive driver has other insurance (whether primary, excess or contingent) that is less than the minimum financial responsibility law limits where the OCCURRENCE took place, the most WE will pay is the amount by which the minimum financial responsibility law limits exceed the limit of their other insurance."

Id. at 552, 657 N.W.2d at 907-08. The court concluded that the policies contained mutually repugnant language because "[b]oth transfer liability to the other existing policy of insurance." *Id.* at 553, 657 N.W.2d at 908. The court then applied the rule that in such circumstances, the vehicle owner's policy provides primary coverage and the driver's policy provides excess coverage. Later in the *Allied Mut. Ins. Co.* opinion, the court discussed the similarities between *Allied Mut. Ins. Co.* and *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000); *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981); and *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966).

The court also distinguished *Allied Mut. Ins. Co.* from *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783,

545 N.W.2d 451 (1996), and *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993). The court approved of the district court's decision, which distinguished *Leader Nat. Ins.* from *Allied Mut. Ins. Co.* Apparently, the district court had distinguished *Leader Nat. Ins.* on the basis that the vehicle owner's policy in *Allied Mut. Ins. Co.* covered an automobile loaned to a customer while the customer's vehicle was in the repair shop, but that the policy in *Leader Nat. Ins.* did not. The Nebraska Supreme Court's summation of its reasoning in the *Leader Nat. Ins.* decision was as follows:

> This court concluded that customers of [the dealership] who with permission borrowed a vehicle owned by [the dealership] were insured only if the customers carried vehicle liability insurance less than that required by law. Since [the driver] was sufficiently insured as required by law to cover the damages he caused while driving the dealership's vehicle, [the driver] was not an insured under the policy issued by [the dealership's insurance company]. We concluded that [the dealership's insurance company] provided no coverage to [the driver] and that [the driver's insurance company] had the primary duty to defend him.

Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co., 265 Neb. 549, 556, 657 N.W.2d 905, 910 (2003).

Farmers Mutual argues that *Leader Nat. Ins.* is entirely distinguishable from the instant case and that this case is controlled by *Jensen v. Universal Underwriters Ins. Co., supra*, and *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969). Federated argues that because the language in its policy is the same as the language in the policy in *Leader Nat. Ins.*, this case is controlled by *Leader Nat. Ins.* and the Nebraska Supreme Court's subsequent interpretation of *Leader Nat. Ins.* in *Allied Mut. Ins. Co.* Although none of these decisions have been overruled, we find no inconsistency in these decisions.

We acknowledge that the language in Federated's policy is the same as the language contained in the policy in *Leader Nat. Ins.* which the court determined excluded the driver as an

insured. However, this similarity does not control the outcome of the instant case for two reasons.

First, the court in *Leader Nat. Ins. v. American Hardware Ins., supra*, could not have addressed the issue of mutually repugnant language, because only one insurance policy was available. In *Leader Nat. Ins.*, only the policy covering the vehicle was attached to the petition. From the pleadings, it was clear that the driver had his own vehicle liability insurance policy and that this policy had paid damages to the extent required by motor vehicle responsibility law. There was no allegation that this policy contained a term which had the effect of transferring liability to any other policy. We do not speculate what the court's decision would have been had the driver's policy been attached to the complaint and contained a clause which served the purpose of transferring liability to another insurance policy. In the *Leader Nat. Ins.* opinion, the court did not have any opportunity to consider whether the two policies contained mutually repugnant language.

Second, *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), requires us to consider the coverage provided by the driver's policy, which in this case is different from that in *Leader Nat. Ins.* We recount that in *Leader Nat. Ins.*, the driver's policy, which was not attached to the petition filed by the driver's insurer, was alleged to have covered the damages and was not alleged to contain any applicable exclusion to coverage. Based on this information about the driver's policy, the *Leader Nat. Ins.* court determined that the policy covering the vehicle, which excluded the driver as an insured if he had adequate insurance, did not provide coverage. In the instant case, the driver's policy specifically stated that in the case of a loaned vehicle, its coverage was "excess" if the vehicle had other liability coverage. Because the *Leader Nat. Ins.* court determined that a term in the policy covering the vehicle, which was materially identical to the term in the instant case, required it to consider the extent of coverage provided by the driver's policy, we must consider the fact that the driver's policy in the instant case provided substantially different coverage than the driver's policy in *Leader Nat. Ins*.

Federated also argues that the court's discussion of *Leader Nat. Ins.* in *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 265 Neb. 549, 657 N.W.2d 905 (2003), requires that we conclude that Federated's policy, standing alone, excludes from coverage the driver of a loaner vehicle where the policy covering the vehicle is like the one in *Leader Nat. Ins*. Federated advances two arguments to support its position.

Federated first focuses its argument on the sentence in which the *Allied Mut. Ins. Co.* court stated that the *Leader Nat. Ins.* court's conclusion that the vehicle policy did not provide coverage was based on the fact that the driver "was sufficiently insured as required by law to cover the damages he caused." *Allied Mut. Ins. Co.*, 265 Neb. at 556, 657 N.W.2d at 910. This statement is true, but not a full explanation of what occurred in *Leader Nat. Ins*. In *Leader Nat. Ins.*, the driver was insured as required by law because his own insurer simply provided coverage and did not allege any applicable exclusions from coverage. The instant case is different because the driver's policy contains an exclusion which serves the explicit purpose of transferring primary liability to any other insurer when the driver is operating a temporary substitute vehicle. In the instant case, while the driver's policy would ultimately provide coverage if no other policy did so, there is a question as to whether this policy will actually be the one that provides the insurance coverage required by law.

Federated's focus then turns to the language from *Allied Mut. Ins. Co.* in which the Nebraska Supreme Court noted that the district court distinguished *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), from *Allied Mut. Ins. Co.* because the policy covering the vehicle in *Allied Mut. Ins. Co.* covered an automobile loaned for a customer's use while the customer's automobile was being repaired. Federated argues that this means the policy in *Leader Nat. Ins.*, which is materially the same as Federated's policy, excludes customers from coverage under the vehicle's policy. Again, the court's statement was true, but not a full explanation of what occurred in *Leader Nat. Ins*. In *Leader Nat. Ins.*, as we have already explained, the exclusion of the driver from coverage under the policy covering the vehicle was based in part

on the coverage provided by the driver's own insurance—not exclusively on the policy covering the vehicle. As we have stated above, the coverage provided by the driver's policy in the instant case is demonstrably different from that in *Leader Nat. Ins*.

We conclude that the instant case is controlled by the Nebraska Supreme Court's decisions in *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969), and *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981). In *Bituminous Cas. Corp.*, *Jensen*, and the instant case, the policy insuring the driver provided that its coverage of a "non-owned" vehicle was "excess" where there was other coverage. In *Bituminous Cas. Corp.*, *Jensen*, and the instant case, the policy covering the vehicle also excluded from the definition of an insured someone who otherwise had a specified form of vehicle liability insurance.

[5] The only notable difference between *Bituminous Cas. Corp.* and *Jensen* on one hand and the instant case on the other hand is the design of the clause which specifies who is an insured under the policy covering the vehicle. In *Bituminous Cas. Corp.* and *Jensen*, the policy covering the vehicle includes permissive drivers, except those that have a specified form of automobile liability insurance policy. In contrast, in the instant case, the policy excludes from coverage customers of a dealership, except those who do not otherwise have an insurance policy sufficient to comply with motor vehicle responsibility law. Federated argues this difference requires that we decide the instant case differently from *Jensen*. We disagree. This particular argument elevates form over substance. In all three cases, the plain language of the insurance contract covering the vehicle separates those drivers who have the specified extent of insurance coverage under another contract from those who do not. If the terms of an insurance policy are clear and unambiguous, then those terms will be enforced. *State ex rel. Wagner v. United Nat. Ins. Co.*, 277 Neb. 308, 761 N.W.2d 916 (2009). We can find no reason why provisions which serve the same purpose should arbitrarily be assigned different meanings only because they use different language to reach the same result.

[6] We therefore conclude that the insurance contracts of Farmers Mutual and Federated contain mutually repugnant language and that in this instance, the policy covering the vehicle—the Federated policy—provides primary coverage. We reverse the district court's decision to grant summary judgment to Federated and direct the district court to enter summary judgment for Farmers Mutual. When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just. *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008).

[7] In making this decision, we acknowledge that Federated has the freedom of contract to exclude coverage where public policy and statute permit. An insurer may limit its liability and impose restrictions and conditions upon its obligations under an insurance contract as long as the restrictions and conditions are not inconsistent with public policy or statute. *Kruid v. Farm Bureau Mut. Ins. Co.*, 17 Neb. App. 687, 770 N.W.2d 652 (2009). We recognize that pursuant to *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993), Federated may not have been obligated to issue an insurance policy that covered the driver of a loaner vehicle in the context of the instant case. However, Federated did issue a policy which required it to cover the drivers of loaner vehicles in the instances specified by its policy, and the principle of mutual repugnancy mandated that the Federated policy cover Beckman in this instance.

Further, adopting the position advocated by Federated—that we must reconcile conflicting clauses—would create unnecessary uncertainty regarding the meaning of such contracts. We quote from a treatise which sets forth the detrimental results of failing to apply the doctrine of mutual repugnancy:

> By allowing one clause to govern over another, the court may be allowing one insurer to profit at the expense of another insurer solely because the former insurer drafted a more clever other insurance clause. "[C]ourts which have permitted one of the litigants to emerge victorious

> in this 'battle of semantics' have done little to advance the cause of effective insurance coverage and have merely encouraged the insurance companies to continue their duel of legal specificity."

1 Allan D. Windt, Insurance Claims & Disputes § 7.01 at 526-27 (3d ed. 1995). Thus, sound policy reasons support the long-standing approach of the Nebraska Supreme Court in applying the doctrine of mutual repugnancy.

CONCLUSION

Because the Farmers Mutual policy and the Federated policy contain mutually repugnant language and Nebraska law requires that the vehicle's insurer, which is Federated, assume primary liability in this situation, we reverse the district court's entry of summary judgment in favor of Federated and remand the cause with direction to enter summary judgment in favor of Farmers Mutual.

REVERSED AND REMANDED WITH DIRECTION.

INBODY, Chief Judge, participating on briefs.

IN RE INTEREST OF EMMA J., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. GENEO J., APPELLANT.

789 N.W.2d 528

Filed August 10, 2010. No. A-09-1031.

SUPPLEMENTAL OPINION

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Laura A. Lowe, P.C., for appellant.

Gary Lacey, Lancaster County Attorney, Barbara J. Armstead, Alicia B. Henderson, and Christopher Reid, Senior Certified Law Student, for appellee.