

IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA-12-0484

LARRY COLEMAN

Plaintiff/Appellant,

v.

THE STATE OF MONTANA, acting by and
through THE MONTANA DEPARTMENT
OF TRANSPORTATION

Defendant/Appellee.

APPELLEE'S BRIEF

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY
THE HONORABLE KATHY SEELEY, PRESIDING

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STATEMENT OF THE ISSUES

- I. CORRECTLY STATED IN APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE

The Department of Transportation hereby adopts the Statement of the Case as stated in Appellant's Opening brief.

STATEMENT OF THE FACTS

1. On November 14, 2008, Larry Coleman was operating a 1999 International Harvester, on U.S. Highway 212 near Charlo, MT. (see Larry Coleman's Responses to MDT's First Discovery Requests, Response to Request for Admission No. 1) (attached as Exhibit A to MDT's Opening Brief, filed in District Court on December 6, 2010) (hereinafter referred to as "Discovery Responses")

2. The 1999 International Harvester Mr. Coleman was operating on November 14, 2008, on U.S. Highway 12, was burning diesel fuel. (*Id.*, Answer to Interrogatory No. 3).

3. The 1999 International Harvester, driven by Mr. Coleman, was a truck, with a feed box and hoist attached to it. (*Id.*, Response to Interrogatory No. 3).

4. According to the VIN number taken from the truck, it was a truck, and appeared to be a vehicle designed to carry loads and passengers. Findings of Fact,

Conclusions of Law, Case No. MF-09-00008, before the Department of Transportation of the State of Montana, Findings of Fact, p.4, and Finding No. 5 (Feb. 16, 2010) (hereafter referred to as “Findings/Conclusions”).

5. The International Harvester’s only modifications were a feedbox, hoist and tailgate. (Discovery Responses, Response to Interrogatory No. 8)

6. An analysis of a sample of the fuel taken from Larry Coleman’s vehicle done at the Montana Department of Transportation Chemistry Laboratory indicated a dyed fuel concentration of 17.2 ppm. (Analysis for Sample Number 057MT20080007) (attached as Exhibit B to MDT’s Opening Brief, filed in District Court on December 6, 2010).

7. Larry Coleman placed dyed diesel in the 1999 International Harvester he was operating on November 14, 2008, and was aware the he was burning dyed fuel when he was pulled over. (Discovery Responses, Reponses to Request for Admission 3 and 4).

8. Larry Coleman was issued Citation # DFS 5640522 on November 14, 2008. (attached as Exhibit C to MDT’s Opening Brief, filed in District Court on December 6, 2010).

9. Larry Coleman, requested a Formal Review which MDT received on April 10, 2009.

10. Larry Coleman admits to using the vehicle to transfer dirt (property) to and from parts of his ranch. (Coleman's Closing Brief, p.1-2) (attached as Exhibit D to MDT's Opening Brief, filed in District Court on December 6, 2010).

11. On the day Larry Coleman was stopped, he was driving on the public road with the express purposes of picking up a load of corn (property) from Charlo to bring to his ranch.¹ (Findings/Conclusions at p.5, Finding No. 12).

12. Larry Coleman claims that his vehicle was specifically designed for hauling feed (property). (*Id.* at p.2).

13. Larry Coleman admits that his vehicle was a truck originally designed for use on the highway. (Findings/Conclusions, p. 5, Finding No. 11.)

14. The State Tax Appeal Board agreed with the Department of Transportation's decision in an Order issued on September 13, 2010. (attached as Exhibit E to MDT's Opening Brief, filed in District Court on December 6, 2010).

STATEMENT OF THE STANDARD OF REVIEW

The Department hereby adopts the Appellant's Standard of Review.

SUMMARY OF THE ARGUMENT

¹ In Mr. Coleman's Appellant's Brief it improperly states on page 16 that "It is an uncontested fact that Mr. Coleman operated this truck exclusively off public roads and highways and on his ranch for purposes of feeding cattle with the exception of either crossing a road or highway to reach a noncontiguous portion of his ranch or following a road or highway to reach a noncontiguous portion of his ranch." On the day in question Mr. Coleman was driving "for the express purpose of picking up a load of corn at the railroad tracks." Therefore, he was not merely traveling from one part of his ranch to another, but traveling to obtain property (silage), with the purpose of moving it on the public highways of Montana.

This appeal concerns the proper application of Montana Dyed Diesel laws to a truck moving property on a public highway. The focus of this case is the design of the vehicle in question, and whether it was designed to move persons or property upon the public roads and highways of the state. As stated by the Hearings Examiner from Agency Legal Services, “[t]he truck in this case was used to transport property on the public highway . . . when fueled with non-taxed dyed diesel fuel, a use that is prohibited by law.” Findings/Conclusions, pg. 8.

Larry Coleman is a rancher near Charlo, Montana. On November 14, 2008, Mr. Coleman was operating an International Harvester on U.S. Highway 212. At the time he was stopped, Mr. Coleman was moving property (silage) from Charlo to his ranch on a public road. Mr. Coleman was stopped while burning untaxed diesel in the International Harvester.

The Montana Legislature and the Montana Department of Transportation have provided clear guidelines on the legal use of untaxed diesel fuel. Montana Code Annotated § 15-70-330(3)(a) which states:

A special fuel user may not use dyed special fuel to operate a motor vehicle upon the public roads and highways of this state unless the use is permitted pursuant to rules adopted under subsection (3)(b).

The Montana Department of Transportation then provided an exception as directed by the adoption of Administrative Rule of Montana 18.10.110(1). This rule allows the use of untaxed diesel in an “off highway or off-road-vehicle”

occasionally for purposes such as movement between job sites or repair. In this case we are dealing with a truck that has a box and a hoist, which was used to transport property on the highway. Clearly, the International Harvester is designed to move property on the highway. Accordingly, Mr. Coleman was correctly cited for violation of Montana Code Annotated § 15-70-330(3)(a).

ARGUMENT

II. THE MONTANA DEPARTMENT OF TRANSPORTATION, AS RECOGNIZED BY THE DISTRICT COURT AND THE PRIOR ADMINISTRATIVE BODIES, PROPERLY APPLIED MONTANA LAW TO THE FACTS OF THIS CASE.

As a starting point, a reviewing court must defer to the findings of the trier of fact. In *Benjamin v. Anderson*, 2005 MT 123, ¶ 37, 327 Mont. 173, 112 P.3d 1039 (2005), the Montana Supreme Court stated the rule as follows:

However, under § 2-4-704(2), MCA, a court reviewing an agency decision may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. As long as we determine that substantial credible evidence exists to support the findings of the trier of fact, we may not re-weigh the evidence, but must instead defer to the Hearing Examiner. “A hearing examiner, when one is used, is in the unique position of hearing and observing all testimony entered in the case.... The findings of the hearing examiner, especially as to witness credibility, are therefore entitled to great deference.

In this situation, the Agency Legal Services Hearing Examiner, the State Tax Appeal Board, and the District Court have all upheld the

determination that the truck driven by Mr. Coleman was not an “off highway or off road vehicle.”

This matter involves a citation and imposition of penalty for violation of Montana Code Annotated § 15-70-330(3)(a) which states:

A special fuel user may not use dyed special fuel to operate a motor vehicle upon the public roads and highways of this state unless the use is permitted pursuant to rules adopted under subsection (3)(b). The purposeful or knowing use of dyed special fuel in a motor vehicle operating upon the public roads and highways of this state in violation of this subsection is subject to the civil penalty imposed under 15-70-372(2). Each use is a separate offense.

The Montana Department of Transportation has adopted the following rule pursuant to subsection (3)(b):

- (1) For the purpose of this rule, an “off-highway or off-road vehicle” is defined as a vehicle not designed to transport persons or property upon the public roads and highways of this State, including special mobile (SM) plated vehicles and vehicles with physical characteristics intended for primary use in an off-road manner which may or may not be licensed as special equipment. These vehicles may occasionally move on the public road for purposes such as movement between job sites or repair.

Administrative Rule of Montana 18.10.110(1).

In order for a vehicle to be considered an “off-highway or off-road vehicle,” thereby allowing it to be driven occasionally on public roads while burning dyed-fuel, it must not be “designed to transport persons or property upon the public roads and highways of this state.” *Id.* In this case, we have a vehicle that is clearly designed to move property on the public roads, and, on the day Mr. Coleman was

stopped, was used in this very fashion. The Appellant's Brief, tries to correlate farm use with off road in order to argue that the truck driven by Mr. Coleman meets the exception as an off-highway or off-road vehicle. This attempt provides no support to Mr. Coleman as nowhere in Montana Code or Administrative Rules does it say that because a vehicle is used on a farm or designed for a farm does it meet the definition of an off-highway or off-road vehicle.

The 1999 International Harvester, driven by Mr. Coleman, was a truck, with a feed box and hoist attached to it. (Discovery Responses, Response to Interrogatory No. 3). In response to Interrogatory No. 8: Please state each and every basis for your contention that the International Harvester driven by Mr. Coleman on November 14, 2008 is an "off-highway vehicle/equipment" as defined in Administrative Rule of Montana 18.10.110, Mr. Coleman provided the following response: As previously noted the International Harvester bore the characteristics of a vehicle not intended for primary use on the highway. It was fitted with a feedbox, hoist and tailgate and was not primarily designed to carry property or persons on the highway."(Discovery Responses, Response to Interrogatory No. 8) The fact that a truck is fitted with a box, with the capability of dumping the contents of the box, does not mean that it is not designed to transfer persons or property on the public roads. The truck was still designed for use on roads, and the transfer of property on those roads. No special design

characteristics affected the chassis, the shocks, the tires, the transmission, or any other item which would make this vehicle not be “designed to transport persons or property.” In fact, the truck box and hoist enhanced the vehicle's capability to transport property on public roads.

Additionally, the Administrative Rule says that vehicles with physical characteristics intended for primary use in an off-road manner are considered to be off-road vehicles. As noted above, nothing about this vehicle demonstrates it is designed for off-road use. Mr. Coleman argues that because he uses the vehicle for agricultural purposes it is an off-road vehicle. The end use of the vehicle is not considered in the application of this law, as any pick-up truck could be used to perform the functions Mr. Coleman used his truck for, but that does not make a pick-up truck an off-road vehicle. As demonstrated by the plain text of the law, the design is the important aspect to be examined in this case.

Although it does not matter the manner in which the vehicle is being used, in this case, the owner's use of the vehicle demonstrates that the truck was designed to transport property on the highway. Mr. Coleman has admitted to using the vehicle to transfer dirt to and from parts of his ranch, he was driving on the public road with the express purposes of picking up a load of corn on the day in question, and, he argues, his vehicle was specifically designed for hauling feed. Statement of Facts # 10, 11, 12. Therefore, he has admitted that his vehicle was specifically

designed to haul feed, *i.e.* transport property, from a location in town to his ranch by way of a public road.

CONCLUSION

The District Court's decision should be affirmed.

A handwritten signature in black ink, appearing to read 'Eli Z. Clarkson', written over a horizontal line.

Eli Z. Clarkson,
Special Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word 2010, is not more than 10,000 words and does not average more than 280 words per page, excluding table of contents, table of authorities, certificate of service and certificate of compliance.


Eli Z. Clarkson,
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2012, I mailed a true and accurate copy of Appellee's Brief, postage prepaid, by U.S. mail, to the following:

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