IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA-12-0484

LARRY COLEMAN,

Plaintiff/Appellant,

vs.

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

Defendant/Appellee.

APPELLANT'S REPLY BRIEF

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

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Filed: _____, 2012
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ARGUMENT

The Montana Department of Transportation does not dispute the accuracy of Mr. Coleman's arguments squarely placing the vehicle at issue within the definition of an implement of husbandry. However, the Montana Department of Transportation does argue that the fact that Mr. Coleman's specially modified truck meets implement of husbandry definitions does not support its off-road or off-highway status. (Appellee's Brief, p. 7 (Nov. 21, 2012).) This assertion ignores the special status granted by Montana's legislature to such farm vehicles. Mr. Coleman's specially modified truck was not required to be registered (Mont. Code Ann. § 61-3-431(5)) or insured for use upon the public roads or highways of the state of Montana (Mont. Code Ann. § 61-6-303(4)). Nor was the operator of this specially modified vehicle required to be licensed (Mont. Code Ann. § 61-5-104(1)(d)). The clear policy behind these exemptions is special treatment for farm vehicles not intended for primary use on the roads and highways of Montana.

The Montana Department of Transportation contends that a vehicle meeting the definition of an "implement of husbandry" does not categorize that vehicle as an off-highway or off-road vehicle. While these statutes and the regulations addressing dyed fuel use are not directly connected, a failure to consider the special treatment given farmers and ranchers with use of implements of husbandry would lead to a clearly inconsistent application of law. Can a cogent argument be

made that vehicles statutorily exempt from registration, licensure and liability insurance requirements are not primarily intended for off-road or off-highway operation? The Montana Department of Transportation makes that attempt but does not dwell on that position because the inconsistency of that argument is so obvious.

The issue here could not be framed more clearly. The Montana Department of Transportation states, "[t]he end use of the vehicle is not considered in the application of this law [meaning regulation adopted by the Montana Department of Transportation], 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." (Appellee's Brief, p. 8 (Nov. 21, 2012).) By its own assertion, the Montana Department of Transportation emphasizes its insertion of the term "original" before the word "design". It is patently absurd to look only at the original design of the vehicle in determining whether that vehicle holds "physical characteristics intended for primary use in an off-road manner . . .." (Admin. R. Mont. 18.10.110(1).) The Montana Department of Transportation does not dispute the fact that in two parallel cases it looked past the original vehicle design and evaluated the current modified design and intended end use in order to avoid the application of this rule. (*See* App. pp. 18 and 19.)

This inconsistent interpretation and application of law is at the heart of this appeal. The inquiry should be whether or not the vehicle is imbued with physical characteristics intended for primary use in an off-road manner. If this is not the inquiry then the exception in subsection (1) of Admin R. Mont. 18.10.110 is meaningless and without effect. "This Court generally applies the same principles in construing administrative rules as are applicable to our interpretation of statutes." *Glendive Medical Center, Inc. v. Montana Dept. of Public Health and Human Services,* 2002 MT 131, ¶ 15, 310 Mont. 156, 49 P.3d 560. "When the Court interprets a statute, 'our goal is to ascertain and give effect to the legislative intent.' . . . We read all parts of a statute as a whole and strive to give effect to all of its provisions. . . . Our task is 'simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.'" *Barnard v. Liberty Northwest Ins. Corp.*, 2008 MT 254, ¶ 17, 345 Mont. 81, 189 P.3d 1196 (emphasis added). Here, the Montana Department of Transportation's interpretation requires both an insertion into the rule of what has been omitted ("original") and omission of the exception legislatively inserted ("intended for primary use in an off-road manner"). (Admin. R. Mont. 18.10.110.)

What Mr. Coleman testified to and what occurred in this case is on parallel with what occurred in the two fuel penalty cases cited by Mr. Coleman and

provided for this Court at App. pp. 18 and 19. Farmers and ranchers such as Mr. Colman purchase specially modified[1] International Harvester truck chassis designed with oversized boxes and other specialized equipment to allow the former road truck to operate off-road in their farming and ranching operations. The Hearing Examiner generally noted these modifications in Findings/Conclusions, Finding Nos. 9, 10, and 13 (App. pp. 12-14). However, the Hearing Examiner's focus—like the Montana Department of Transportation—was on the "original design", not current design or primary use. (App. pp. 7-8.)

The fact that this vehicle was used "primarily" off the public roads and highways was not contested. (App. p. 7.) But because of the "original design" insertion, this fact was not deemed conclusive by the Hearing Examiner in applying the rule. This interpretation, of course, begs the question of the effect or purpose of exceptions in Admin. R. Mont. 18.10.110(1) including allowing these excepted vehicles to "occasionally move on the public road for purposes such as movement between job sites or repair."

Both the Montana Department of Transportation and the Hearing Examiner seem to take the position that a vehicle that "could" be used on the public roads or highways (Findings/Conclusions, Finding No. 11 (App. p. 13) and Appellee's

[1] Mr. Coleman testified to the significant cost and extensive modifications to this vehicle including box, tailgate, transmission, tandem locking axels, and changes designed to make the vehicle operate efficiently in fields but simultaneously making it unfit for general highway use.

Brief, p. 8 (Nov. 21, 2012).) immediately takes the vehicle out of the exceptions granted by rule. Such an interpretation is patently at odds with the plain language of the rule that looks to "characteristics intended for primary use in an off-road manner" and which "may occasionally move on the public road" to move between job sites. (Admin. R. Mont. 18.10.110(1).) Precisely what Mr. Coleman was doing at the time of his citation.

To the Montana Department of Transportation's point that a common pickup truck could be used to perform feed hauling functions, Mr. Coleman asserts that with proper modifications, perhaps a pickup truck could serve the purpose of an implement of husbandry or off-road vehicle. However, by being so modified, it would necessarily be required to meet the definition of a vehicle with physical characteristics intended for primary use in an off-road manner and, if met, would be and should be exempt. Without these modifications, the pickup is merely a pickup and is clearly a vehicle designed for use on public roads and highways. To emphasize the absurdity of the Montana Department of Transportation's interpretation, an off-road vehicle converted to over the road capabilities would arguably be exempt because of its original design even though it was now used primarily on public roads and highways of the State.

Mr. Coleman's arguments concerning the effect of vehicle design modifications from the original design is not a distinction without a difference. As

a farm feeder truck, Mr. Coleman testified that this vehicle sat idle for an estimated 320 days per year (*see* reference to such testimony in Mr. Coleman's Closing Brief, p. 1 (Dec. 24, 2012) filed before the Hearing Examiner) and that its use upon public roads or highways was incidental only to its primary purpose of feeding cattle off-road (Findings/Conclusions, Finding No. 8 (App. p. 12)). If the goal is to impress highway taxes upon users of highways, then elimination by exception of off-road implements of husbandry accomplishes that goal. If the goal is to capture taxes from any vehicle that might come upon the public road or highways of the state of Montana, then the exceptions demanded by the legislature and implemented by the Montana Department of Transportation have no meaning or application.

The testimony relating to the primary use of this vehicle is unrefuted[2] and the decision of the administrative body and the district court below must be reversed based upon the current design and primary use of the Coleman vehicle. Failing that, this matter should be remanded for a determination of whether or not the current design of the Coleman vehicle meets the administrative exception of a vehicle "with physical characteristics intended for primary use in an off-road

[2] The Montana Department of Transportation makes the point in footnote 1 of its response brief that Mr. Coleman's assertion that he operated his vehicle exclusively off public roads is inaccurate. For clarification, Mr. Coleman asserts that it is uncontested that the vehicle's primary use was as an off-road feed truck but occasionally utilized public roads or highways to transport feed or move his equipment from one part of his ranch to another. (Findings/Conclusions, Finding No. 8 (App. p. 12).) Mr. Coleman asserts this occasional use was anticipated by the exceptions allowed by law for off-road or off-highway vehicle movement.

manner" with specific instructions that the current design and primary use must be evaluated by the Hearing Examiner and given proper application. Given the Montana Department of Transportation's own prior actions in excepting vehicles that had been redesigned for off-road farm and ranch use, rehearing should not be necessary.

DATED this 4th day of December, 2012.

REEP, BELL & LAIRD, P.C.

By: _____
Richard A. Reep
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that Appellant's Reply Brief is printed in a proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and word count calculated by Word 2010 is 1,565 words, excluding the Table of Contents, the Table of Authorities, the Certificate of Service, and this Certificate of Compliance.

DATED this 4th day of December, 2012.

REEP, BELL & LAIRD, P.C.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 4th day of December, 2012, a true and correct copy of the foregoing was served upon the following as indicated:

[X] **U.S. Mail**
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