STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Plaintiff-Appellee,

v

WILLIAM SMITH and SHERI HARRIS,

Defendants,

and

SCOTT MIHELSIC and ANDREA MIHELSIC,

Defendants-Appellants,

and

PIONEER STATE MUTUAL INSURANCE COMPANY,

Intervening Defendant.

FOR PUBLICATION
March 16, 2010
9:05 a.m.

No. 287505
Kent Circuit Court
LC No. 07-003903-CK

Before: MARKEY, P.J., and BANDSTRA and MURRAY, JJ.

BANDSTRA, J.

In this matter of first impression, we conclude that the warning notice requirement of MCL 500.3009(2) must be enforced as written. Thus, the named driver exclusion in the policy of insurance at issue here is invalid because it does not strictly comply with the statute.

BACKGROUND FACTS AND PROCEEDINGS BELOW

Appellants were injured in an automobile accident when a truck driven by William Smith crossed the centerline and struck their vehicle. When Smith had purchased the truck, he did not have a driver's license because he had too many points on his record. In order to obtain license plates and insurance, he added his friend, Sheri Harris, to the title. Harris obtained insurance with appellee, and Smith paid for it. A form signed by Harris lists Smith as an excluded driver. The declaration page of the insurance policy also lists him as an excluded driver, as does the certificate of insurance.

Appellants brought an action against Smith, and a default was entered against him on October 4, 2006. Appellee brought this declaratory action to determine its liability to indemnify Smith and moved for summary disposition pursuant to MCR 2.116(C)(10) on the basis of the named driver exclusion. Appellants responded and filed a counter-motion for summary disposition. They argued, in part, that appellee had failed to use the required statutory language for exclusion of a named driver on the documents evidencing insurance coverage. Disagreeing, the trial court granted appellee's motion for summary disposition and denied appellants' cross-motion, leading to this appeal.

ANALYSIS

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Further, statutory interpretation is a question of law which is also reviewed de novo. *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 12; ___ NW2d ___ (2009).

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature. Fundamentally, '[t]his task begins by examining the language of the statute itself.'" *United States Fidelity & Guaranty Co*, 484 Mich at 13 (citations omitted). Clear and unambiguous statutory language must be enforced as written. *Id*. at 12.

MCL 500.3009(2) states:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning – when a named excluded person operates a vehicle all liability coverage is void – no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

In this case, the warning on the declaration page of plaintiff's policy is identical to the portion of this statutory provision following the colon. However, in the warning provided both on the face of the policy and on the certificate of insurance, the last word is "responsible" instead of "liable."[1]

Appellee argues, first, that the warning on the declaration page alone is adequate. According to appellee, the "and" in the second sentence of MCL 500.3009(2) links the "certificate of the policy" and the "certificate of insurance," meaning that placing the warning on

[1] The parties do not mention on appeal what warning, if any, appeared on the certificate of the policy.

both of these documents is an alternative to placing it on either "the face of the policy or the declaration page." Thus, appellee argues that, because warning language identical to the statute is found on the declaration page, the statutory notice provision was satisfied notwithstanding any failure of the language used on the other documents.

We disagree. Appellee's argument disregards the grammatical structure of the statute. The sentence, "Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance," contains two parallel clauses after the verb "is": "on the face . . ." and "on the certificate of insurance . . . ." The first clause contains three alternatives, separated from each other by "or." The first and second clauses are joined by "and." Therefore, to satisfy the statute, the warning must appear on at least one of the three alternatives mentioned in the first clause *and* on the certificate of insurance. Plaintiff's interpretation that a correctly worded warning on the declaration page alone satisfies the statute is inconsistent with the grammatical structure of the statute. The trial court correctly concluded that the requirements of § 3009(2) were not satisfied merely by the warning on the declaration page.

Nonetheless, the trial court determined that the excluded driver provision was valid under the statute, explaining:

> The fact that the warning on the certificate of insurance contained the word "responsible" rather than the word "liable" does not defeat the named driver exclusion election. If the Legislature intended that the warning must be taken verbatim from the statute and placed on the enumerated documents in order to be effective, it would have been simple to indicate as much in the statute itself. Absent such a requirement, this Court finds that Plaintiff complied with the mandates of MCL 500.3009(2) in that it received authorization from the insured; placed a suitable warning on the declaration page of the policy and on the certificate of insurance.

In essence, the trial court concluded that substantial compliance with the statute was sufficient; it was enough that a "suitable" warning was provided. We disagree.

Although there is no binding authority that states that "strict compliance" with § 3009(2) is necessary,[2] the statute itself indicates that failure to follow its requirements results in the invalidity of the exclusion. Again § 3009(2) provides:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning – when a named excluded person operates a vehicle all liability coverage is void – no one is insured. Owners of the vehicle and others

[2] But see *DAIIE v Felder*, 94 Mich App 40, 44: 287 NW2d 364 (1979).

> legally responsible for the acts of the named excluded person remain fully personally liable.

The Legislature did not merely set forth the substance of the required warning. Instead, the statute mandates use of "the following notice," which notice is provided verbatim for insurers to use.[3] Further, the Legislature did not merely state that this notice is required, without specifying the effect of noncompliance. If the required warning notice is not provided, the named person exclusion "shall not be valid." The statute could not be clearer.

In this case, the warning notice does not appear, as required, on the certificate of insurance.[4] Accordingly, the mandate of the statute is clear: the named driver exclusion "shall not be valid." The trial court erred in granting appellee's motion for summary disposition and in denying appellants' cross-motion.[5] We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Having fully prevailed on appeal, appellants may tax costs. MCR 7.219.

/s/ Richard A. Bandstra

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[3] As noted earlier, appellee did use the prescribed language on the policy's declaration page.

[4] Whether the meaning of the language used by plaintiff conveys the same meaning as the statutorily mandated warning is immaterial. The statute does not require "the following notice or a notice of similar effect" or otherwise allow for any deviation from its terms.

[5] In light of this determination, we need not consider appellants' other arguments on appeal.

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MURRAY, J. (*concurring*).

Both the majority opinion and Judge Markey's dissent, though coming to opposite conclusions, are thoughtful and well-written. The only disagreement between the majority and dissenting opinions is whether we enforce MCL 500.3009(2) as it was written, regardless of the fact that the result in this case is no doubt unfortunate. As briefly explained below, in my view our judicial duty is to enforce that indisputably unambiguous statute as written, and we cannot under Michigan law make exceptions to that rule. Thus, I join both the reasoning and result of the majority opinion.

The essence of the dissent is that although our judicial duty is to *almost always* apply the statute's unambiguous words to the facts presented, "on rare occasion[s]" like this case, "where following this philosophy with myopic rigidity effects not only a complete thwarting of the Legislature's intent but also a profoundly unfair and inequitable result", we should disregard that

judicial duty. With all due respect, for several reasons I do not believe we can apply this rationale, which is essentially the "absurd result" doctrine of statutory construction, to this case.

First, the "absurd result" doctrine cannot be used to essentially modify an unambiguous statute, and no one has argued that MCL 500.3009(2) is anything but unambiguous. See *People v McIntire*, 461 Mich 147, 155-156 n 2; 599 NW2d 102 (1999) and *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008), citing *Cairns v East Lansing*, 275 Mich App 102, 118; 738 NW2d 246 (2007).[1] Second, even if the Supreme Court recognized that doctrine, there is no reason to invoke it in this case. It is certainly reasonable to conclude that a rationale legislator would have believed that, when an insurance contract did not contain the *exact* words the legislature actually mandated be used in those contracts, a court would rule the contract was invalid, just as the legislature mandated. See *Cameron*, 476 Mich at 80-82 (MARKMAN, J., concurring). Proof positive of this conclusion is the clear directive in the language, the lack of *any* "wiggle room" in the language, and the Legislature's explicit remedy of invalidation if the statutory notice language is not used. Indeed, I would posit that any insurance company attorney reading this statute–just like the legislators who passed the statute–would expect a court to invalidate an insurance provision that did not contain the required language.

Finally, it is difficult to discern *when* a court should ignore language to avoid "unfair and unjust" results. The dissent reasonably believes that "responsible" and "liable" are close enough to ignore the lack of compliance in this case, but what about the *next* case inevitably coming down the appellate pipeline? Are we left to pure judicial discretion as to which words must be enforced, with the answer coming down to the palatability of the result attained under the facts? I do not believe that is how the judicial branch should function when addressing unambiguous statutes. And, although enforcement of these "strict rules . . . can unfortunately . . . produce some [outrageous] outcomes[,]" *Id*. at 64, that is a product of the overall legislation chosen by the Legislature, and we must enforce the unambiguous commands of that legislation.

/s/ Christopher M. Murray

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[1] *Detroit International Bridge Co v Commodities Export Co*, 279 Mich App 662, 674-675; 760 NW2d 565 (2008), decided just three weeks after *Toaz*, concluded that a majority of the Supreme Court (in separate opinions) in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006) had rejected *McIntire's* rejection of the absurd result doctrine. However, as the majority opinion in *Cameron* recognizes, Chief Justice Taylor and Justices Corrigan, Young and Markman all agreed that any discussion of the "absurd result" doctrine would be dicta because the doctrine was not implicated in that case. *Cameron*, 476 Mich at 66, 80-82 (MARKMAN, J., concurring). Thus, *Cameron* cannot be read as overturning *McIntire's* rejection of the absurd result doctrine.

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MARKEY, P.J., (*dissenting*).

I respectfully dissent because I disagree with the majority's analysis of whether plaintiff complied with the statutory warning notice requirement of MCL 500.3009(2). I believe it did; consequently, I would affirm the trial court.

Before I proceed further, I must note that I do agree with the majority's rendition of the facts of this case and of the existing case law, including that this is a case of first impression. I also note that, like my colleagues, I too strongly adhere to the philosophy that it is this Court's function to apply the law as plainly written. It is not our job to modify, amend, or read into a statute something that is not there; such legislating from the bench is simply improper. Legislating belongs to the Legislature.

Nonetheless, on rare occasion there may arise a situation where following this philosophy with myopic rigidity effects not only a complete thwarting of the Legislature's intent but also a profoundly unfair and inequitable result. I believe that the narrow facts of this case and the majority's treatment of them creates precisely that situation.

The purpose of MCL 500.3009(2) is to allow an insurer to exclude certain drivers from liability coverage. Clearly, that was the case here, and both defendants the named insured, Ms. Harris, and the excluded driver, Mr. Smith, as well as the insurer, Progressive, all understood and accepted that William Smith was an excluded driver under the insurance policy issued to Ms. Harris.[1] This point is particularly important because Mr. Smith had such an atrocious driving record that he was no longer able to legally drive. Still, he purchased a vehicle, and in order to obtain license plates and insurance, he added his friend and the named insured, Ms. Harris, to the title. Insurance documents list them as part of the same household. Harris obtained the insurance with plaintiff, and Smith paid for it. A form with Ms. Harris' signature lists Mr. Smith as an excluded driver. Plaintiff's declarations page and its insurance policy list him as an excluded driver, as do the certificates of insurance. So, defendants had four separate insurance documents explicitly advising and warning that Smith was an excluded driver.

Moreover, there appears to be *no dispute* that both Mr. Smith and Ms. Harris knew that Mr. Smith was a named excluded driver under this insurance policy. In fact, one cannot read this record and not completely recognize that both Mr. Smith and Ms. Harris knew that Mr. Smith was not insurable even before he purchased the truck he was driving when the accident occurred. And, Smith and Harris knew what they needed to do to obtain insurance covering the vehicle. Together, they set about to accomplish that task. Indeed, considering it was Smith's truck, and that he obviously drove it, one can only conclude that Smith and Harris colluded to obtain insurance from Progressive without concern that Smith was not supposed to drive the vehicle. So, under these facts there is not the slightest concern that the *intent* that the Legislature had for enacting § 3009(2) was completely accomplished.

It is also true that Progressive would never have issued an insurance policy to Ms. Harris covering the vehicle if Mr. Smith were allowed to drive it. Progressive, in taking the application for insurance from Ms. Harris and obtaining the driver exclusion form from her pertaining to Mr. Smith, required that information and her implicit promise that Mr. Smith would not drive the vehicle when it calculated the fair and appropriate insurance premiums for the vehicle. Insurance companies must have some knowledge in order to compute premiums, and it is neither fair, nor practical, nor reasonable to expect insurance companies to either act in the dark or be required to assume their named insured's are lying. Quite the contrary, an insurance company must be allowed to generally accept as true and accurate whatever information its named insured gives to it when completing an insurance application.

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[1] In his deposition, Mr. Smith stated that he "definitely" knew he should not have been driving on the day of the accident. Ironically, Ms. Harris was a passenger in the truck at the time of the accident.

MCL 500.3009(2) mandates that its warning notice of the effect of the named driver exclusion be placed on various documents. Here, again, no one disputes that Progressive placed the required warning notice on the declaration page, the insurance policy itself and on the certificates of insurance. There is only one very narrow issue: whether Progressive's substitution of one word, "liable," for another word, "responsible," in one sentence renders the notice requirement completely null and void and thereby vitiates the named driver exclusion. The majority believes that Progressive's substitution of "responsible" for the word "liable" does just that. Consequently, under the majority's analysis, Progressive bears the full responsibility for an accident caused by a driver that everyone involved, i.e. the insurance company, the named insured, and the excluded driver, knew that the consequence of his driving and causing an accident would be no insurance coverage.

The specific language of MCL 500.3009(2) is, again:

> Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

In this case, the warning on the declarations page of plaintiff's policy is verbatim to the statutory language; however, the warning on both the face of the policy itself and on the certificate of insurance contains the word "responsible" instead of "liable" as the very last word in the warning. But the certificates of insurance themselves go above and beyond providing the statutory notice. On their reverse sides, they also state:

Named Excluded Driver:
If this vehicle is driven by the person named below, residual liability insurance does not apply and the vehicle will be considered uninsured.
WILLIAM SMITH

According to Black's Law dictionary (8th ed), the word "liable" means both "[r]esponsible and answerable in law; legally obligated," and "subject to or likely to incur (a fine, penalty, etc.)." The word "responsible" means "[l]iable legally accountable or answerable." Black's Law dictionary (6th ed.).

Patently, the words "liable" and "responsible" are completely and totally synonymous. See *In re Beck Minors*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293138, March 4, 2010), slip op 2, wherein this Court determined that "[a] "responsibility" . . . is a "liability."" Indeed, it could even be surmised or argued that Progressive used the word "responsible" instead of "liable" in one of its notice requirements because it is more readily comprehendible. The average lay person is very unlikely to misunderstand what it means to be "fully personally responsible." On the other hand, the word "liable" has more legal sounding connotations. So, should even those of us who strongly believe that statutes must be strictly complied with go so far as to vitiate a named driver exclusion because of the use of one synonym under the unequivocal facts of this case? Must we as strict constructionists abandon "common sense" and render a decision not only remarkably hyper-technical legally but also profoundly unjust and

jarring to what I will presume to say is the average person's sense of justice and fair play. I think not.

I believe that Progressive Insurance Company compiled with the mandate of § 3009(2) and the named driver exclusion of Progressive's policy remained fully effective. It is our responsibility to give effect to the interpretation that accomplishes the statute's purpose. *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996). The choice of "liable" versus "responsible" does not in any way frustrate the Legislature's intent to ensure that strong warning be provided as to the import of an excluded driver provision. The primary goal of judicial interpretation of statute is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Here, upholding the exclusion where the warning notice substitutes one word for its synonym fulfills the Legislature's intent. It is also fair to assume that the Progressive policy

> was approved by the Commissioner of Insurance. MCL 500.2236 requires that basic insurance policy forms be filed with the Commissioner's office and be approved by the Commissioner before the policy may be issued by the insurance company. See also, *Rory v Continental Insurance Company*, 473 Mich 457, 474; 703 NW2d 23 (2005). Subparagraph (5) of this statute provides:
>
> > (5) Upon written notice to the insurer, the commissioner may disapprove, withdraw approval or prohibit the issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy. The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately. (Emphasis added.)
>
> By implication the Commissioner of Insurance has determined that Progressive's notice language does not unreasonably or deceptively affect the risk assumed by the coverage. This is somewhat persuasive that the policy's notice complies with the legislative intent of MCL 500.3009(2). *Cruz v State Farm Mutual Auto Insurance Company*, 241 Mich App 159, 167; 614 NW2d 689 (2000). I.e., "responsible" is a synonymous with "liable."[2]

Consequently, since Mr. Smith was driving the vehicle in knowing defiance of that exclusion and was the cause of the accident at issue, there is no insurance coverage under

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[2] Letter from Attorney Kerr L. Moyer to trial court dated August 4, 2008.

Progressive's policy. So, although, my analysis is somewhat different from that of the trial court, I believe the trial court reached the correct conclusion and properly granted Progressive's motion for summary disposition.

I would affirm the trial court.

/s/ Jane E. Markey