

STATE OF MICHIGAN
COURT OF APPEALS

INSURANCE INSTITUTE OF MICHIGAN,
HASTINGS MUTUAL INSURANCE
COMPANY, FARM BUREAU GENERAL
INSURANCE COMPANY, FRANKENMUTH
CASUALTY INSURANCE, WALTER
STAFFORD, JR., and MICHAEL FLOHR,

FOR PUBLICATION
August 21, 2008

Plaintiffs-Appellees,

and

MICHIGAN INSURANCE COALITION and
CITIZENS INSURANCE COMPANY OF
AMERICA,

Intervening Plaintiffs-Appellees,

v

COMMISSIONER, FINANCIAL & INSURANCE
SERVICES, DEPARTMENT OF LABOR &
ECONOMIC GROWTH,

No. 262385
Barry Circuit Court
LC No. 05-000156-CZ

Defendant-Appellant.

Advance Sheets Version

Before: White, P.J., and Zahra and Kelly, JJ.

KELLY, J. (*concurring in part and dissenting in part.*)

I concur with Judge White's conclusion that the trial court erred in failing to limit its review to the administrative record, *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Director*, 481 Mich 496 ; 750 NW2d 593 (2008), and that the trial court's opinion and order granting a permanent injunction must be vacated for that reason alone. However, I respectfully dissent from the conclusion of Judge White and Judge Zahra that this matter was properly before the trial court. The circuit court erred by permitting plaintiffs to proceed by way of an original action. Finding this issue dispositive, I would not reach the remaining issues.

Issues of statutory interpretation present questions of law that are reviewed de novo. *Michigan Basic Prop Ins Ass'n v Ware*, 230 Mich App 44, 48; 583 NW2d 240 (1998). “The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature.” *Id.* at 49. Where the statutory language is clear and unambiguous, a court must apply it as written. *Howard v Clinton Charter Twp*, 230 Mich App 692, 695; 584 NW2d 644 (1998). In addition to these basic principles, we keep in mind that the wisdom of a statute is for the Legislature to determine and the law must be enforced as written. *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 430; 617 NW2d 536 (2000); *In re Worker's Compensation Lien*, 231 Mich App 556, 562-563; 591 NW2d 221 (1998). This Court “may not inquire into the knowledge, motives, or methods of the Legislature, and may not impose a construction on a statute based on a policy decision different from that chosen by the Legislature.” *Fowler v Doan*, 261 Mich App 595, 599; 683 NW2d 682 (2004) (citations omitted).

Section 244(1) of the Insurance Code, MCL 500.244(1), provides:

A person aggrieved by a final order, decision, finding, ruling, opinion, rule, action, or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306. [Emphasis added.]

“MCL 24.264 [§ 64 chapter 3 of the Administrative Procedures Act] allows a plaintiff to challenge the validity of a rule in an action for a declaratory judgment.” *Michigan Ass'n of Home Builders, supra* at 499. MCL 24.264 provides:

Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

In *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483; 586 NW2d 563 (1998), two insurance companies challenged an administrative decision of the insurance commissioner by filing both a petition for review under § 244 of the Insurance Code, MCL 500.244, and a complaint in the circuit court. The circuit court dismissed the original action, concluding that the insurance companies were limited to a petition for review. This Court affirmed, holding that § 244(1) establishes *the exclusive procedure* for challenging the commissioner's decisions:

We also reject appellants' argument that the trial court improperly dismissed their attempt to start an original action.

The commissioner's decisions may be challenged only as provided in the Insurance Code, i.e., "in the manner provided for in chapter 6 of the administrative procedures act" MCL 500.244(1); MSA 24.1244(1). Under the APA, administrative decisions are "subject to *direct review* by the courts as provided by law." MCL 24.301; MSA 3.560(201) (emphasis added). *Review is to be sought by filing a petition for review*, MCL 24.302; MSA 3.560(202), in the circuit court, MCL 24.303(1); MSA 3.560(203)(1), within sixty days of the date when the agency's decision was mailed, MCL 24.304(1); MSA 3.560(204)(1). *Clearly, an independent action attacking the agency's decision is not contemplated.* [*Northwestern Nat'l Cas, supra* at 495-496 (emphasis added in part).]

Plaintiffs argue that *Northwestern Nat'l Cas*, is distinguishable because it involved an "adjudicatory" action, whereas this case involves a "legislative" action. This argument fails for two reasons. First, the *Northwestern* Court made no such distinction. And second, § 244(1), applied by the *Northwestern* Court, expressly applies to a "rule" of an agency, i.e., to "legislative" actions, because it provides: "A person aggrieved by a final order, decision, finding, ruling, opinion, *rule*, action, or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act" MCL 500.244(1).

The circuit court's determination that § 244(1) does not provide an exclusive remedy because it uses permissive, not mandatory, language (an aggrieved party "*may* seek judicial review") was unsupported by authority, and is contrary to *Northwestern Nat'l Cas*. Plaintiffs cite no authority in support of such a reading of § 244(1). The circuit court erroneously allowed plaintiffs' original action to proceed.

Thus, I would vacate the circuit court's opinion and order granting a permanent injunction and declaring defendant's rules illegal, unenforceable, and void, and dismiss plaintiffs' case without prejudice to plaintiffs' filing a petition for review under MCL 500.244.

/s/ Kirsten Frank Kelly