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

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

Advance Sheets Version

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

MURRAY, J. (*concurring*).

Both the lead opinion and Judge MARKEY's dissent, though coming to opposite conclusions, are thoughtful and well-written. The only disagreement between the lead opinion and the dissenting opinion 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 the result of the lead 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 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 rational 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 v Auto Club Ins Ass'n*, 476 Mich 55, 80-82; 718 NW2d 784 (2006) (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 Int'l 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 by Chief Justice TAYLOR 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 (opinion of the Court), 80-82 (MARKMAN, J., concurring). Thus, *Cameron* cannot be read as overturning *McIntire*'s rejection of the absurd result doctrine.