STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellant, v STEVEN JAMES SMITH, VALERIE L. SMITH, LINDA VAITAS and RIMANTAS VAITAS, Defendants-Appellees.	UNPUBLISHED March 6, 2001 No. 216918 Oakland Circuit Court LC No. 96-532475-CZ

Before: Markey, P.J., and Whitbeck and J. L. Martlew*, JJ.

PER CURIAM.

Plaintiff State Farm Mutual Automobile Insurance Company appeals as of right from a circuit court order granting defendants' motion for a directed verdict and dismissing State Farm's complaint. We reverse and remand. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

State Farm sought a declaration that it did not have a duty to defend or indemnify defendants Smith in an underlying automobile negligence action brought against them by defendants Vaitas because Steven Smith, who was involved in the accident, was a named excluded driver on Valerie Smith's policy and therefore coverage was not available pursuant to MCL 500.3009(2); MSA 24.13009(2).

The case was tried before the court without a jury. Mark Wagenschutz, a State Farm representative, provided the key testimony, explaining that Valerie Smith applied for insurance on October 24, 1994, seeking coverage for herself and Steven Smith as the drivers. The company discovered that Steven Smith had sixteen points on his driving record and refused to insure him. The Smiths then signed a driver exclusion agreement, which stated that various forms of coverage provided under the policy did not apply while Steven Smith was driving the car. The company then issued a policy for the period October 24, 1994, through April 24, 1995. The declarations page identified Valerie Smith as the named insured and the vehicle as a 1992

* Circuit judge, sitting on the Court of Appeals by assignment.

LeBaron. At the bottom of the page and continuing onto the second page were the applicable exceptions and endorsements, one of which provided:

> 6023FF.1 DRIVER EXCLUSION—STEVEN SMITH.
>
> 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.

Wagenschutz testified that the declarations page is issued with and is part of the initial policy. A new declarations page is not created when the policy is renewed unless and until there is a significant change in the policy. There was such a change in 1995 when the policy was renewed. A 1995 Camaro was substituted for the LeBaron and the driver exclusion endorsement was updated and thus a new declarations page was issued for the policy period April 24, 1995 through October 24, 1995. It contained the same driver exclusion warning as the original declarations page.

Wagenschutz testified that on September 19, 1995, State Farm sent Valerie Smith a renewal notice for the policy. It gave the standard information contained in such notices: the vehicle, the types of coverages and premiums, the amount due, the due date, etc. Under the "Additional Information" section, it stated, "DRIVER EXCLUDED: STEVEN SMITH." Because there were no significant changes since the last renewal, a new declarations page was not issued. Valerie Smith renewed the policy, which was in effect at the time of the accident. A new declarations page was issued for the policy period September 25, 1996, through April 24, 1997, because of an update to the lease endorsement. Like the prior declarations pages, it contained the driver exclusion warning.

Wagenschutz testified that whenever a renewal notice is sent out, it is accompanied by a certificate of insurance. The certificate, as most drivers know, comes with two parts: one for the secretary of state and one to keep in the vehicle. Because the company only maintains copies of those certificates for one year, according to Wagenschutz a copy of the certificate for the October 1995/April 1996 policy period was not available. The most recent copy in the company records was for the period from September 25, 1996, through April 24, 1997. Both parts of the certificate issued for that period stated on the face "DR EXCL—STEVEN SMITH." The declarations page warning was reprinted, along with other information, on the reverse side of Valerie Smith's copy; it was not reprinted on the secretary of state's copy. Wagenschutz stated that because the certificate of insurance "basically mirrors what would be on the declarations page" in effect for the policy period, the same driver exclusion would have been noted on earlier certificates. He admitted that at the time State Farm filed this action, the certificate of insurance for the October 1995/April 1996 policy period would have been available in the company's records and a copy could have been obtained if someone had thought to print it.

State Farm moved for a directed verdict. It argued that subsection 3009(2) requires the driver exclusion warning to appear on the face of the declarations page and on the certificate of insurance. State Farm asserted that the driver exclusion warning appeared as required on each

declarations page that was issued and also appeared on the most recent certificate. According to State Farm, given Wagenschutz's testimony, there was no reason to believe that driver exclusion warning did not appear on previous certificates. Moreover, according to State Farm, the statute did not say the warning had to be on the certificate in effect at the time of the accident, only that it had to appear on the certificate and it did appear on the most recent certificate. Given that plus the fact that the Smiths admitted in their answers to the complaint that Steven Smith was a named excluded driver on the policy, State Farm argued that coverage was not available.

Valerie Smith also moved for a directed verdict. She argued that State Farm had failed to prove that it complied with the statute by writing the excluded driver notice on the certificate of insurance. Because State Farm could have obtained the relevant certificate at the time it filed this action but did not do so, according to Valerie Smith, the failure to produce the certificate created a presumption against the company. Defendants Vaitas joined in Valerie Smith's motion.

The trial court ruled in favor of defendants. It reasoned that because State Farm filed this action, it had the burden of proof. According to the trial court, State Farm knew at the time it filed this action that it was required to prove that the excluded driver notice was on the certificate of insurance, but failed to maintain a copy of the relevant certificate in order to prove its claim. Therefore, the trial court concluded that State Farm had failed to meet its burden of proof.

II. Legal Standard and Standard Of Review

A motion for a directed verdict in a bench trial is treated as a motion for an involuntary dismissal.[1] Granting such a motion is appropriate when the trial court determines that, given the facts and the law, the plaintiff failed to show a right to relief.[2] We review the trial court's rulings on questions of law de novo,[3] while we review its factual findings for clear error.[4]

III. Statutory Provisions

Subsection 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 legally responsible for the acts of the named excluded person remain fully personally liable. [MCL 500.3009(2); MSA 24.13009(2).]

---

[1] MCR 2.504(B)(2); *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

[2] *Samuel D Begola Services, Inc*, *supra* at 639.

[3] *Stajos v City of Lansing*, 221 Mich App 223, 226; 561 NW2d 116 (1997).

[4] *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996).

This "Court has explicitly held that subsection 3009(2) presents 'no room for judicial construction or interpretation.'"[5] The purpose of the prescribed warning is to notify the insured owner of the vehicle of the consequences of allowing the named excluded driver to operate the insured vehicle.[6] Subsection 3009(2) "sets out the Legislature's approved method of excluding a person from a policy's coverage, and must be deemed the only way in which such an exclusion may be accomplished."[7]

IV. The Best Evidence Rule

Under the best evidence rule, the original document or a duplicate thereof is necessary to prove the content of a writing.[8] Secondary evidence, such as parol evidence, is admissible if all originals have been lost or destroyed unless they were lost or destroyed in bad faith.[9] In this case, the trial court admitted secondary evidence in the form of the Wagenschutz's testimony. Therefore, to the extent the trial court ruled that, absent the document itself, State Farm could not prove its case as a matter of law, the trial court was incorrect. The evidence showed that the statutory warning was on the declarations page of the policy. Wagenschutz testified that the same language also appeared on the insured's copy of the certificate of insurance. Although State Farm did not have the certificate for the policy period in issue, Wagenschutz testified that the certificates were basically form documents that contained the same language as found on the declarations page, which was demonstrated by the fact that the requisite language appeared on the most recently issued certificate. Therefore, we conclude the trial court erred in finding that the absence of the certificate was fatal to State Farm's case.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew

---

[5] *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 640; 506 NW2d 920 (1993), quoting *Allstate Ins Co v DAIIE*, 142 Mich App 436, 442; 369 NW2d 908 (1985).

[6] *Allstate Ins Co v DAIIE*, 73 Mich App 112, 115; 251 NW2d 266 (1976).

[7] *DAIIE v Felder*, 94 Mich App 40, 44; 287 NW2d 364 (1979).

[8] MRE 1002; MRE 1003.

[9] MRE 1004(1).