

STATE OF MICHIGAN  
COURT OF APPEALS

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SANDRA LEE HAWKER,

OCT 28 1987

Plaintiff-Appellee,

v

No. 92403

MICHIGAN MUTUAL INSURANCE COMPANY,  
a Michigan Insurance Company, and  
FRANKLIN BAILEY, JR.,

Defendants-Appellees,

and

CRYSTAL BAILEY,

Defendant and Third Party  
Plaintiff-Appellee,

and

AUTO CLUB INSURANCE ASSOCIATION, a  
Michigan Reciprocal Insurance  
Company,

Defendant and Third Party  
Defendant-Appellant.

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BEFORE: J.H. Shepherd, P.J., M.J. Kelly and C.M. Forster\*, JJ.

PER CURIAM

Plaintiff Sandra Lee Hawker was injured in an automobile accident on September 18, 1979. Her car was struck by a pick-up truck owned by defendant Chrystal Bailey. The driver at the time of the accident was Franklin L. Bailey, Jr., Chrystal's grandson. Plaintiff filed her complaint on October 23, 1981, seeking no fault benefits and tort damages. Plaintiff's complaint also contained a count for declaratory relief concerning the insurance coverage provided by the various defendant insurers. Defendant Automobile Club Insurance Association (ACIA) insured Chrystal Bailey's automobile. This appeal concerns only plaintiff's declaratory action against ACIA seeking a determination that the

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

policy covered Franklin Bailey. ACIA maintains that Franklin Bailey was a named excluded driver who was not covered by the policy.

ACIA moved for summary judgment under GCR 1963 1963, 117.2(3) on February 11, 1983. ACIA argued that both Franklin and Chrystal Bailey were well aware that Franklin was a named excluded driver. No affidavits accompanied the motion. The trial court denied ACIA's motion on April 25, 1983. In an opinion dated April 5, 1984, the trial court explained that the exclusion was invalid because ACIA had not complied with MCL 500.3009(2); MSA 24.13009(2) (§ 3009(2)) regarding notice. Specifically, the court found that the statutorily required notice did not appear on the policy's renewal declaration certificate.

ACIA moved for rehearing on May 7, 1984, arguing that it had complied with the statutory notice requirements by placing the required notice on the face of the policy and the certificate of insurance. A copy of an "insurance bureau notice and authorization form" designating Franklin as an excluded driver and signed by Chrystal accompanied the motion. Also included were copies of a standard policy including a policy face sheet, prepared at a time when ACIA was known as Detroit Automobile Inter-Insurance Exchange (DAIIE), and a blank and apparently standard form certificate of no-fault insurance bearing the required statutory warning. No affidavits accompanied the motion. The court granted rehearing but again denied summary judgment on May 21, 1984.

This Court subsequently denied ACIA's delayed application for leave to appeal, as did the Supreme Court. Ultimately the trial court entered a final order of summary disposition on April 17, 1986, from which ACIA now appeals. The court adopted the reasons given in its earlier opinion.

It appears that if ACIA is found not to have covered Franklin Bailey's operation of the automobile, plaintiff faces a dispute over uninsured motorist coverage between the remaining defendant insurers. Chrystal Bailey stated in his deposition that he knew Franklin was an excluded driver under the policy and that Franklin was forbidden to drive the vehicle. Franklin Bailey also stated at his deposition that he knew he was an excluded driver and had no permission to drive the vehicle. The question is whether the exclusion is valid. Plaintiff asserts that ACIA failed to comply with § 3009(2), which provides:

"When 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 referred to in subsection (3) of section 4 of Act No. 198 of the Public Acts of 1965, as amended, being section 257.1104 of the Compiled Laws of 1948: 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." (Emphasis added.)

The problem in the instant case is that defendant submitted a standard form insurance policy and a standard form certificate of insurance with its motion for rehearing and not the specific policy and certificate issued to Bailey, or copies thereof, in this case. Nor did defendant submit an affidavit affirming that Bailey's policy and certificate were identical to these standard documents. We note that the face sheet of the policy and the certificate contained the appropriate statutory language, and, if Bailey had, in fact, received documents identical to these, we would rule that defendant had complied with the statute. MCL 500.3009(2); MSA 24.13009(2). This, however, is a fact question.

We also believe the trial court erred when it based its decision, in part, on the fact that the statutory language was not on the renewal declaration. The statute itself says nothing about requiring a warning on the renewal.

We remand the case for a new hearing on defendant's summary disposition motion. If further discovery is required the trial court may allow it. Defendant should submit copies of the policy and certificate actually issued to Bailey. If defendant is unable to produce copies of those documents, defendant should be prepared to submit an affidavit verifying that the blank policy and the blank certificate submitted with its motion for rehearing were standard documents and of the type issued to Bailey.

We note that the Baileys, in deposition, openly acknowledged their awareness of the exclusion. Whether they acquired this knowledge as a result of receiving proper forms from ACIA does not appear in the present record. Further discovery may be instituted from which the trial court can determine whether the policy and certificate issued to Bailey contained the statutory language. Once any needed discovery has been completed defendant's motion should be reheard to determine whether it has complied with the statute.

Remanded.

/s/ John H. Shepherd  
/s/ Charles M. Forster

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Before: J.H. Shepherd, P.J., M.J. Kelly and C.M. Forster\*, JJ.  
M. J. Kelly, J. (Dissenting).

The complaint in this matter was filed on October 23, 1981. ACIA, on February 11, 1983, filed a motion for summary judgment pursuant to GCR 1963, 117.2(3) [now MCR 2.116(C)(10)], claiming that there was no genuine issue of material fact, that the driver of the vehicle insured by them was a named excluded driver, and that ACIA was entitled to judgment as a matter of law. However, plaintiffs argued that the exclusion was invalid since ACIA failed to comply with MCL 500.3009(2); MSA 24.13009(2) (see majority opinion). The trial court agreed and denied the motion stating that Deposition Exhibit No. 1 (evidently part of the supporting documentation submitted by ACIA), the Renewal Declaration Certificate did not contain the required notice and ACIA had failed to present any evidence that the required notice appeared on either the face of the policy or the declaration page or the certificate of the policy as required by §3009(2).

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ACIA subsequently moved for rehearing on May 7, 1984. However, upon rehearing ACIA again failed to present any evidence that the required §3009(2) warning appeared on the face of Crystal Bailey's policy or the declaration page or certificate of the policy. ACIA merely presented copies of some of its commonly used insurance documents, that did contain §3009(2) warnings. However, no affidavits accompanied these copies to indicate what documents Crystal Bailey actually received and whether the documents received by Crystal Bailey carried the necessary notice.

Section 3009(2) gives "highly specific and detailed requirements [that] must be met before a named individual is deemed excluded". DAIE v Felder, 94 Mich App 40, 42; 287 NW2d 364 (1979). Plaintiffs and Bailey contested whether ACIA had complied with §3009(2) requirements in the policy issued to Bailey. ACIA failed to present any evidence that it had complied with the requirements of §3009(2), insofar as Bailey's policy was concerned. The trial court allowed ACIA a second opportunity to provide the necessary documentation. ACIA failed to present any such evidence upon rehearing. On these facts, I find no error in the ruling of the trial court and no reason to grant ACIA further discovery. On the contrary, appellant had better than two and one-half years to do its discovery and to give it more time is uncalled for. I would affirm.

/s/ Michael J. Kelly