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STATE OF MICHIGAN
IN THE SUPREME COURT

ADORA WILMORE-MOODY, Individually,

Plaintiff/Counter-Defendant/Appellee,

and ADORA WILMORE-MOODY
as Next Friend of DAIMLER AAKU, a Minor,

Plaintiff,

MSC No. 163116
Court of Appeals No. 352411
Lower Court Case No. Case No.
18-002518-NI

v.

MOHAMMED ZAKIR,

Defendant-Appellant,

and

EVEREST NATIONAL INSURANCE COMPANY,

Defendant/Counter-Plaintiff,

and

PDB INVESTMENTS & INSURANCE AGENCY,
INC. and MICHIGAN ASSIGNED CLAIMS PLAN
and/or MICHIGAN AUTOMOBILE
INSURANCE PLACEMENT FACILITY,

Defendants.

PLAINTIFF-APELLEE ADORA WILMORE-MOODY'S RESPONSE TO DEFENDANT-APPELLANT MOHAMMED ZAKIR'S SUPPLEMENTAL BRIEF IN SUPPORT OF APLICATION FOR LEAVE TO APPEAL

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LAW AND ARGUMENT

PLAINTIFF-APPELLEE HAD THE SECURITY REQUIRED BY MCL 500.3101 ON HER VEHICLE AT THE TIME OF HER INJURIES AND NO EQUITABLE PRINCIPLES ALLOW DEFENDANT-APPELLANT TO AVAIL HIMSELF OF ANY EQUITABLE RELIEF RELATIVE TO ANY ALLEGED FRAUD IN THE PROCUREMENT OF PLAINTIFF-APPELLEE'S NO-FAULT POLCY.

Despite Defendant-Appellant's attempt to shift the focus of this Court to equitable considerations governing contracts, the present case should be resolved purely on principles of statutory construction. Ms. Wilmore-Moody's right to seek noneconomic automobile negligence damages from Defendant-Appellant arises solely from MCL 500.3135. The statutory language Defendant-Appellant currently relies on in an effort to bar her from recovering those damages reads:

> Damages must not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101(1) at the time the injury occurred.

MCL 500.3135(2)(c). This is the only legal authority allowing Defendant-Appellant to escape liability for failing to exercise due care under the circumstances. No other statutes, common law, or equitable principles protect him from the consequences of negligently injuring Ms. Wilmore-Moody because of her no-fault insurance status.

When interpreting statutory language, it is this Court's duty to ascertain the legislative intent though the words expressed in the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). When the Legislature conveys its intent through unambiguous language, the statute speaks for itself, and judicial construction is not permitted. *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001). Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the

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unambiguous text of a statute. *Koontz v. Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002). This Court "must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id*. (citing *Wickens*, *supra* at 60).

Here, MCL 500.3135(2)(c) uses the phrase "at the time the injury occurred" **twice** in the single sentence subsection. This conveys a legislative intent to limit the insurance analysis to the discrete moment of injury. That is, if a no-fault insurance policy was in effect at the moment of impact, the injured party can seek damages pursuant to MCL 500.3135, regardless of any subsequent developments. To read the statute otherwise renders the second use of "at the time the injury occurred," as it relates to "the security required by section 3101(1)," nugatory and surplusage.

It is the explicit reference to the time of injury that prevents the doomsday scenario envisioned in Defendant-Appellant's brief. MCL 500.3113(b) bars an individual from recovering PIP benefits if he or she "was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect." Because the statutory language does not freeze the analysis at the time of injury, subsequent developments can be considered when determining lack of eligibility under the statute. As such, a rescission will not allow an uninsured owner to subsequently seek assigned claims benefits.

The case law regarding rescission does not alter the conclusion that MCL 500.3135(2)(c) does not bar Ms. Wilmore-Moody from holding Defendant-Appellant accountable for his negligence. While rescission does void a contract ab initio, it "annul[s] the contract and restore[s] the parties to their **relative** positions which they would have occupied if no such contract had ever been made." *Lash v Allstate Insurance Company*, 210 Mich App 98; 532 NW2d 869 (1995)

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(emphasis added). The implication is that the status quo is restored with respect to the parties to the contract, but not necessarily to outside third parties. Here, Defendant-Appellant was not a party to the insurance contract, did not incur any obligation because of the insurance contract, and did not benefit in any way from the insurance contract. As such, the "legal fiction" or rescission cannot affect Defendant-Appellant's legal duties to Ms. Wilmore-Moody.

This Court's recent decision in *Esurance Property & Casualty Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498; 968 NW2d 482 (2021) is distinguishable from the present case. In it, the plaintiff insurer paid a significant amount of PIP benefits on behalf of an individual injured in a motor vehicle collision. However, through no fault of the injured individual, the insurer voided the applicable policy on the grounds of fraud in the procurement. The insurer then sought equitable subrogation from the assigned claims plan arguing that, since its policy was deemed void ab initio because of the rescission, the assigned claims plan was always the proper first priority source for PIP benefits. This Court held that the insurer had a right to equitable subrogation because it could step into the shoes of the insurance contract's beneficiary to pursue payment from the assigned claim plan. This promoted equity because it "compel[led] the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it." *Id*. at 511 (cleaned up). Importantly, the right to equitable subrogation did not arise because of circumstances related to the rescission, but because the defendant insurer would not have been in the line of priority once the true circumstances were known, **regardless of the rescission**. *Id*. at 515-516.

Here, there is no equitable or other legal principle that conveys Defendant-Appellants the right to avail itself of the remedies available to the parties to the insurance contract at issue or its beneficiaries. To the contrary, Defendant-Appellant must rely solely on the language contained in MCL 500.3135(2)(c). The plain language of the statute limits the analysis to the time of the injury.

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Because, at the time of the injury, Ms. Wilmore-Moody had a no-fault policy in effect, she is not barred from recovering noneconomic damages from Defendant-Appellant.

It must also be noted that, in *Esurance Property & Casualty Ins Co*, the aggrieved party was the defrauded insurer that paid benefits because of a fraudulently procured policy. This Court properly held that such an insurer did not have to cover an event it was not contractually or statutorily required to when the no-fault act mandated that the assigned claims plan provide benefits under the circumstances. The Court based its decision primarily on the principle that a party who mistakenly pays the debt of another because of reasonable uncertainty should be able to recover from the truly responsible party once the full facts are known. *Id.* at 519-520.

Here, the alleged fraud that led to rescission had absolutely no bearing on Defendant-Appellant's obligations under the law. Regardless of Ms. Wilmore-Moody's insurance status, Defendant-Appellant had a duty to operate his vehicle in a safe and prudent manner. His failure to do so caused injury to Ms. Wilmore-Moody. Unlike the insurer in *Esurance Property & Casualty Ins Co*, Defendant-Appellant is not seeking restitution for benefits paid as a result of fraud, Defendant-Appellant is seeking to use a legal fiction to insulate itself from liability because of a completely unrelated issue between Ms. Wilmore-Moody and her no-fault insurer. Because Defendant-Appellant is not an innocent party and was not obligated to undertake any additional duty because of the alleged fraud, there is no equitable reason to allow it to escape liability for its negligence under the circumstances.

Esurance Property & Casualty Ins Co also reinforces the idea that a party looking to avail itself of the rescission of a no-fault policy must do so in equity. This follows from the Court's application of the equitable subrogation doctrine in determining the insurer's right to reimbursement from the assigned claims plan. Because the law of equity governs Defendant-

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Appellant's ability to rely on the rescission, the "clean hands" doctrine likewise applies. "The clean-hands doctrine closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he or she seeks relief, regardless of the improper behavior of the [other party]." *Richards v Tibaldi*, 272 Mich App 522, 537; 726 NW2d 770 (2006). Here, Defendant-Appellant lacks the requisite clean hands. His negligence set in motion the acts giving rise to the present lawsuit. His negligence led to the insurance claim that prompted Ms. Wilmore-Moody's insurer to rescind its policy. Because Defendant-Appellant's bad acts gave rise to the present circumstances, he should not be able to hide behind equity to escape liability.

Allowing Ms. Wilmore-Moody to maintain her negligence action against Defendant-Appellant does not encourage or reward fraud nor does not subvert the purpose of the no-fault act or the MCL 500.3135(2)(c) bar. With respect to the former argument, Ms. Wilmore-Moody will still experience severe consequences because of the rescission. She cannot recover any economic damages resulting from her injuries and any tort recovery is not shielded from collection actions by her providers or subrogation/reimbursement claims from insurers who have paid benefits on her behalf. So, while she cannot recover economic damages from Defendant-Appellant, Ms. Wilmore-Moody will be required to use the proceeds of any recovery to cover economic loss resulting from the collision. Likewise, Ms. Wilmore-Moody remains responsible to the assigned claims plan for any payments it makes on her behalf to occupants of her vehicle who lack no-fault coverage of their own. MCL 500.3177. These consequences certainly do not encourage or reward Ms. Wilmore-Moody's failure to disclose an unlicensed individual in her household when purchasing a no-fault policy.

Defendant-Appellant's argument with respect to the no-fault act's purpose also fails to withstand scrutiny. "The specific purpose of subsection 3135(2)(c) was to correct the injustice of

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allowing drivers who do not contribute to the no-fault system to recover damages from persons that do contribute to the system." *Stevenson v Reese*, 239 Mich App 513, 519; 609 NW2d 195 (2000). Here, **at the time of injury**, Ms. Wilmore-Moody was a contributor to the no-fault system. She paid her premiums, her insurer accepted those premiums, and she possessed a valid insurance policy at the moment Defendant-Appellant crashed into her. Allowing Ms. Wilmore-Moody to recover damages for Defendant-Appellant's negligence when she was actively paying into the system at the time of injury, does not subvert the intent of MCL 500.3135(2)(c), especially in light of the specific statutory language confining the analysis to the time of injury.

Defendant-Appellant also disingenuously places weight on the Court of Appeals' finding that Ms. Wilmore-Moody's acts were intentional. However, this was subject to a dissent that found the insurer failed to prove the requisite intent necessary to establish a fraudulent misrepresentation as a matter of law. The argument also ignores the nuances of the case. The alleged fraud was Ms. Wilmore-Moody's failure to disclose a household member over the age of 14 when she purchased the policy. Her insurer, Everest, routinely uses this **same exact** fraud defense relative to unnamed household members in an effort to deny injured individuals PIP benefits. See, *Estate of Audisho v Everest Nat'l Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2021 (Docket No. 352391); *Enriquez v Rios-Carranza*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2018 (Docket No. 336128); *Allstate Ins Co v Everest Nat'l Ins Co*, No. 16-CV-12473, 2018 WL 3915335 (E.D. Mich. Aug. 16, 2018); *McCarty v Akins*, unpublished per curiam opinion of the Court of Appeals, issued Jan. 21, 2021 (Docket No. 350052); *Petrous v Everest Nat'l Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued July 26, 2018 (Docket No. 337310); *Graham v Everest Nat'l Ins Co*, No. CV 17-13468, 2019 WL 265183 (E.D. Mich. Jan. 18, 2019); *Duker v Everest Nat'l Ins Co*, unpublished per curiam

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opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344229). This is not a case where Ms. Wilmore-Moody clearly intended to commit fraud to obtain a no-fault policy. This is a situation where Ms. Wilmore-Moody fell victim to an insurance company whose business model is seemingly predicated on inducing fraud in its insurance applications while staying within the technical bounds of Michigan law.

Allowing Defendant-Appellant to escape liability does not advance any principle of equity intended by the remedy of rescission. Instead, Defendant-Appellant will receive am unjust windfall should this Court reverse the Court of Appeals. It is undisputed that Ms. Wilmore-Moody possessed a valid no-fault policy at the moment she was injured. However, by negligently striking Ms. Wilmore-Moody, Defendant-Appellant set in motion the events that ultimately led to the rescission of that policy. The rescission did not affect Defendant-Appellant's duties in operating a motor vehicle and did not impose any obligations on him that he otherwise did not already have. He should not now be able to benefit from his own negligence, especially when that negligence ultimately led to the rescission he now seeks to use to shield himself from liability.

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CONCLUSION AND RELIEF REQUESTED

Six Court of Appeals judges have recently considered the issues of whether a post-collision rescission allows a negligent driver to escape liability for noneconomic damages under the no-fault act. All six found that such rescissions do not shield those operating their vehicles negligently on Michigan highways from the consequences of their actions. The six judges agreed that rescission did not allow the negligent driver to invoke MCL 500.3135(2)(c) even though the respective panels disagreed as to whether the policy was properly rescinded in the first place. This Court should not disturb these decision in light of the plain statutory language limiting the analysis to the time of injury and the lack of any equitable remedy available to Defendant-Appellant.

WHEREFORE, Plaintiff-Appellee respectfully requests that this Honorable Court affirm the Court of Appeals May 6, 2021, opinion reversing the Wayne County Circuit Court's order granting Defendant-Appellant's motion for summary disposition.

Respectfully submitted,

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Dated: May 24, 2022

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CERTIFICATE OF SERVICE

Keith M. Banka being duly sworn, deposes and says that he is employed by the Mike Morse Law Firm, attorneys for Plaintiff-Appellee and that on May 24, 2022, he served a copy of the foregoing document upon all counsel of record, via MiFile.

/s/Keith M. Banka