STATE OF MICHIGAN

COURT OF APPEALS

MARIA C. ABAY, Personal Representative of the Estate of MIRA E. ABAY,

Plaintiff/Counter-Defendant-Appellee,

v

DAIMLERCHRYSLER INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff/Third-Party-Appellant,

and

DAIMLERCHRYSLER CORPORATION, a/k/a CHRYSLER LLC,

Defendant,

and

JAMES E. TRENT and KELLY ROSE BROOKS,

Defendants/Cross-Defendants,

and

AUTO CLUB GROUP INSURANCE COMPANY, d/b/a AAA MICHIGAN, and ALVIN JEROME TAYLOR,

Third-Parties.

UNPUBLISHED
August 13, 2009

No. 283624
Oakland Circuit Court
LC No. 2006-75016-ck

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant DaimlerChrysler Insurance Company (DCIC) appeals as of right the order denying its motion for summary disposition and granting summary disposition in plaintiff's favor in this action for a declaratory judgment regarding coverage under a DCIC insurance policy. We reverse.

This civil action arises from an automobile accident in which Mira E. Abay died from fatal injuries she suffered when a vehicle driven by defendant Kelly Rose Brooks collided with a vehicle driven by Abay. In the underlying action, plaintiff pleaded claims against Brooks and Deborah Jean Lee, the owner of the vehicle Brooks was driving. Plaintiff filed this declaratory judgment action seeking a declaration regarding the responsibilities of various insurers.

Lee owned a vehicle that she insured through AAA. Lee loaned her car to defendant Alvin Jerome Taylor, a friend with whom she lived. Taylor, who was uninsured, used the car with Lee's permission to drive to work. At lunch, Taylor ran an errand, and picked up Brooks on the way. The two returned to Taylor's place of employment. Brooks took Lee's car and drove it while intoxicated. Brooks was involved in the crash that led to Abay's death.[1]

Plaintiff first filed the negligence action against Brooks, Lee, and Taylor. Plaintiff accepted AAA's settlement offer of the $100,000 policy limit with regard to plaintiff's claims against Lee. The court entered a default against Brooks.

Plaintiff filed this declaratory judgment action against defendants DCIC, DaimlerChrysler Corporation, Brooks, and Brooks' father, James E. Trent (Trent). Brooks allegedly lived with Trent at the time of the accident. Trent, as a DaimlerChrysler retiree, leased a car from DaimlerChrysler,[2] and that car was insured by an insurance policy issued by DCIC. Plaintiff asserted that the insurance policy issued by DCIC covered Brooks because the language of the policy provided liability coverage for any automobile used by a family member of an insured and therefore extended to Brooks as a family member of her father.

DCIC moved for summary disposition of plaintiff's complaint.[3] It argued that Brooks was not insured under the DCIC policy. It noted that DaimlerChrysler is the named insured under the policy and therefore the endorsement under which plaintiff sought to include Brooks,

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[1] A jury convicted Brooks of operating a motor vehicle was under the influence of intoxicants, causing death, MCL 257.625(4), and manslaughter with a motor vehicle, MCL 750.321. The trial court sentenced Brooks to a prison term of 86 months to 15 years.

[2] The DaimlerChrysler Company Car Programs Terms, Instructions and Conditions Manual provides with regard to cars leased under the Executive Lease Program that "all lease vehicles must be titled" to DaimlerChrysler Corporation. However, the evidence in the record reveals that the cars are titled to GELCO, which purchases the vehicles from DaimlerChrysler and then leases them back to DaimlerChrysler. DaimlerChrysler then leases the cars to its retirees under the DaimlerChrysler Company Car Program.

[3] Although defendants DaimlerChrysler and Trent also moved for summary disposition, only defendant DCIC is involved in this appeal and, therefore, use of the term defendant refers to DCIC.

as a family member of an individual insured, does not apply because "individual insured" refers to the "named insured."

Plaintiff opposed defendant's motion for summary disposition. She argued that the policy is a "fronting policy," and that its language is ambiguous and therefore must be construed in favor of coverage. Plaintiff filed a motion for summary disposition arguing that Brooks was a resident of her parents' home at the time of the accident and, therefore, an insured under the policy.

In response, DCIC and DaimlerChrysler conceded that the policy is a "fronting policy," but challenged plaintiff's assertion that it is illegal or against public policy. Defendant further asserted that there existed evidence indicating that Brooks was not living with her parents at the time of the accident.

Following a hearing on the matter, the trial court granted summary disposition in favor of plaintiff. The trial court found that a plain reading of the insurance policy precluded coverage because "under the terms of the policy 'you' only refers to the 'named insured' and that is [DaimlerChrysler]. There is no mention in the policy of any individual." The court concluded, however, that "there is a patent ambiguity in the language of the policy which contains both an 'individual named insured' endorsement and a listed named insured business entity as the sole 'named insured." The court construed this ambiguity "liberally in favor of the insured and strictly against the insurer" and concluded that "Endorsement No. 19 applies in this case and extends liability coverage to non-owned autos operated by Trent or his resident family members." The court concluded:

> Under the policy, a family member includes a blood relative of Trent who resides in his household. The Court finds that after applying all of the relevant factors that determine residence to the facts and evidence presented in this case, Defendant Brooks was a resident of the Trent household at the time of the accident. Therefore, the Court finds that Plaintiff is entitled to summary disposition because on December 10, 2003, Brooks was operating a non-owned automobile that was not available for her regular use and is a blood relative of Trent and was a resident relative of his household at the time of the accident.

I

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). Also, the construction of a contract, and whether contract language is ambiguous, are questions of law that this Court reviews de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498; 503; 741 NW2d 539 (2007); *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

II

The rules of contract interpretation are applied to the construction of insurance contracts. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007). Where the language of a contract is unambiguous, as determined by the plain and ordinary meanings of the words used, it reflects the parties' intent as a matter of law and must be construed as written.

Id. An ambiguity exists when the insurance contract is "capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). If the contract is ambiguous, its meaning must be determined by the fact finder. *Id*. at 469. The courts should not create an ambiguity where one does not exist. *Henderson, supra*. That the policy does not define a certain term does not render the policy ambiguous; the words used must be construed according to their plain meanings. *Id*.

The dispute at issue in this appeal involves the automobile insurance policy insuring vehicles leased by Trent from his former employer, DaimlerChrysler. The policy is a business auto coverage form. The policy provides in part, "Throughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations. The words 'we', 'us' and 'our' refer to the Company providing this insurance." The "named insured" shown on the declarations page is "DaimlerChrysler Corporation and/or Chrysler Corporation and its U.S. Subsidiaries."

Section II of the policy defines "Who is an insured." The definition of "insureds" includes: (a) "you" as defined by the policy; (b) with exceptions, "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow . . . ."; and (c) persons liable for the conduct of an insured. It appears from a reading of this provision that Trent falls within option (b) because he leased a car from DaimlerChrysler and thereby used with DaimlerChrysler's permission a covered vehicle DaimlerChrysler owned, hired, or borrowed. Thus, Trent was an insured under the policy.

Endorsement No. 19 of the policy, titled "individual named insured," modifies the business auto coverage form. It states:

> *If you are an individual*, the policy is changed as follows:
>
> A. Changes in Liability Coverage
>
> * * *
>
> 2. Personal Auto Coverage
>
> While any "auto" you own of the "private passenger type" is a covered "auto" under Liability Coverage:
>
> a. The following is added to Who Is An Insured:
>
> "Family members" are "insureds" for any covered "auto" you own of the "private passenger type" and any other "auto" described in Paragraph 2.b. of this endorsement.
>
> b. Any "auto" you don't own is a covered "auto" while being used by you or by any "family member" except:
>
> (1) Any "auto" owned by any "family members."
>
> (2) Any "auto" furnished or available for your or any "family member's" regular use.

> (3) Any "auto" used by you or by any of your "family members" while working in a business of selling, servicing, repairing or parking "autos."
>
> (4) Any "auto" other than an "auto" of the "private passenger type" used by you or any of your "family members" while working in any other business or occupation.

The endorsement defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household . . . ."

Plaintiff argues that, pursuant to these provisions, Brooks is an insured because she is a family member of an insured, Trent, and was using an automobile that was not owned by Trent and did not fall within one of the exceptions to such coverage. Defendants argue, however, that Brooks is not an insured under this endorsement because her father, Trent, was not the "named insured" and therefore she was not a family member of a "named insured."

Defendants are correct that the policy references to "you" are references to the named insured, which is stated as DaimlerChrysler. The endorsement specifically states that the changes provided within it apply "If *you* are an individual." The term "you" as used in the policy refers to the named insured: DaimlerChrysler. Thus, because the "you" in this policy is not an individual, the endorsement does not apply.

The trial court went beyond the plain language of the policy and noted the entangled relationship between DaimlerChrysler and DCIC and the fact that the policy refers to no individual insureds. It found "a patent ambiguity in the language of the policy which contains both an 'individual named insured' endorsement and a listed named insured business entity as the sole 'named insured.'" The court appears to have been troubled because of its interpretation of the policy as failing to provide any coverage to any individual. As a result of this it looked outside the policy language. However, the court failed to consider the fact that the policy defines who is insured, and that definition appears to include Trent himself or persons while using with DaimlerChrysler's permission a covered auto owned, hired or borrowed by DCC. The policy language describes unambiguously who is insured under the policy. The policy does not extend to Trent or his family members when such persons use an automobile not owned by DaimlerChrysler, as provided in the endorsement.[4] Therefore, coverage does not extend to Brooks under the circumstances of this case. This interpretation is based on the clear language of the policy. The court was required to apply the policy as written. It erred in creating an ambiguity where none exists and looking outside the policy language in determining its meaning.

The parties dispute the applicability of *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 384; 591 NW2d 325 (1998). Defendant argues that it is controlling, and plaintiff argues that it is factually distinguishable because the present case involves a privately leased

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[4] It is important to emphasize that Brooks was not driving one of her father's vehicles that he leased under the DaimlerChrysler Company Car program.

vehicle. This distinction is not relevant, however, to the present case. What is relevant is the legal analysis provided by the Court with regard to the language of the insurance policy at issue.

Pavolich was employed as a police officer with the Village of Lake Linden ("Village"). He stopped to question a suspect and when he reached into the suspect's vehicle, the suspect attempted to drive away with Pavolich caught on the vehicle. The suspect's insurance company paid the policy limits under his insurance policy and Pavolich made a claim for underinsurance benefits under the Village's contract with Michigan Township Participating Plan. This underinsurance plan identified the Village as the named insured and indicated that damages would be paid to an "insured," which was defined as:

> a. You or any family member.
>
> b. Any other person occupying "your covered auto."
>
> c. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in a. or b. above. [*Id.* at 381.]

The policy also indicated that "you" and "your" meant the person or organization identified as the named insured. *See id.* Pavolich argued that he as an employee of the Village, the named insured, was covered under the Village's policy as "you" and "your" were ambiguously defined and a plain interpretation of the policy language rendered portions of the policy meaningless as it meant that no one was entitled to underinsurance benefits as the Village had no family members and could not sustain bodily injury.

In rendering its decision, this Court noted that no reported decision of the Court had addressed the issue presented before it. *See Pavolich, supra* at 380-381. The Court cited the following portion of its decision in *Royce v Citizens Insurance Company*, 219 Mich App 537, 542-543; 557 NW2d 144 91996), for guidance in reviewing and interpreting insurance policies:

> When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all terms contained within the policy. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. However, if the contract is unambiguous, the trial court must enforce it as written.

Based upon these contract principles, the *Pavolich* court held that a plain and ordinary reading of the policy before it barred coverage for employees of the Village as the policy language "you" specifically referred only to the Village and not to its employees. *Id.* at 328.

The *Pavolich* court found that the policy before it was a sloppy and inartfully drafted standard form not tailored to the Village's needs, and it contained surplusage as it provided coverage to the Village and its family members when the Village could not have family members

or sustain bodily injury. *Id.* at 383. The Court also noted that this portion of the policy was rendered meaningless if the plain interpretation was used. *Id.* at 388. Nevertheless, the Court held that surplusage did not equate to ambiguity and in reviewing the word "you," along with the rest of the policy language taken in its entirety, the court found that

> there is only one interpretation that can be made when looking at the language as written. Any casual reader, giving ordinary and plain meanings to the language as written, would realize that the insured "YOU" does not refer to individual employees, but refers only to the village itself. Where the policy language describes unambiguously who is insured under the policy, there is no basis for finding an ambiguity. Because the policy is clear as written, we are bound by the specific language, and will not construe the policy to cover defendant simply to avoid a finding that there is surplus language in the contract. [*Id.* at 388-389.]

In making this decision, the court reviewed, discussed and relied upon the majority view of jurisdictions that a policy like the one before it was "not ambiguous and should be construed as written, even if certain provisions are rendered meaningless by a plain reading of the language." *Id.* at 384-388.

Plaintiff argues that the policy should be declared contrary to public policy if Endorsement No. 19 does not apply. However,

> The no-fault act does not require residual liability insurance covering all vehicles a person may drive. Residual liability insurance is required for residual tort liability arising out of the ownership, maintenance or use of the vehicle in respect to which a policy is required to be maintained and in effect. *An insurer is not required by the no-fault act to provide portable coverage when the owner drives another insured vehicle.* * * * Residual liability coverage, to be sure, must be in force with respect to the vehicle for which it is purchased and without regard to whether the owner or some other driver uses it. *It does not follow that the act requires residual liability coverage when the owner uses a vehicle owned by someone else.* [*State Farm Mut Auto Ins Co v Ruuska*, 412 Mich 321, 342-343, 344; 314 NW2d 184 (1982) (Emphasis added).]

Because residual liability coverage for another vehicle is optional, "*the extent of an insurer's obligation is governed by the terms of the insurance policy.*" *Geller v Farmers Ins Exchange,* 253 Mich App 664, 667; 659 NW2d 646 (2002) [Emphasis added].

III

Given our conclusion that the DCIC insurance policy does not extend to Trent or his family members when such persons use an automobile not owned by DaimlerChrysler, we need not address plaintiff's argument that she was a resident of the household where her parents resided at the time of the accident.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. Jurisdiction is not retained. Defendant DCIC, being the prevailing party, may tax

costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

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UNPUBLISHED
August 13, 2009

No. 283624
Oakland Circuit Court
LC No. 2006-75016-ck

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully disagree with the majority's interpretation of the policy at issue in this case and would affirm the trial court's conclusion that "Endorsement No. 19 applies in this case and extends liability coverage to non-owned autos operated by Trent or his resident family members." I reach this conclusion because the policy's definition of "you" as the "named insured" when applied in this policy results in violations of the no-fault act. Rather than approving these violations, I believe this Court must reform the definition so that the policy complies with the no-fault act. Such a reformation of the policy language mandates the coverage in question.

This insurance coverage dispute stems from the December 10, 2003 accident that caused the death of Mira Abay. The other vehicle involved in the accident was driven by Kelly Brooks, daughter of James E. Trent. Neither Brooks nor Trent owned the vehicle Brooks was driving at the time of the accident. Abay's estate asserted that Brooks was entitled to "non-owned" vehicle liability coverage under Endorsement No. 19 to Trent's DaimlerChrysler Insurance Company (DCIC) policy which provides liability coverage to "you," defined as "the named insured" and also to any "person[s] related to you" while driving a non-owned vehicle.[1]

The sole named insured in the policy is DaimlerChrysler Corporation (DCC). Since by definition DCC, an entity, cannot operate a vehicle and cannot have family members, DCIC maintains that although Endorsement No. 19 is part of the subject policy, the entire endorsement is nugatory. The majority opinion agrees. In my view, that position rests on an analysis that unmoors the endorsement in question from the policy and favors a piecemeal and disconnected approach to policy interpretation rather than one that treats the policy as a whole.

> [A]n insurance contract should be read as a whole and meaning should be given to all terms. The policy application, declarations page of the policy, and the policy itself construed together constitute the contract. . . . An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. [*Royal Prop Group, LLC v Prime Ins Syndicate Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005) (internal citations omitted).]

The majority's conclusion that it can resolve this case simply by a "plain and ordinary reading" of the policy provision ignores the reality that this policy is anything but "plain and ordinary" and that both the policy and the relationship of the insurer and the insured are highly complex and out of the ordinary. When considering the entire policy, defining "you" to mean only DCC violates the PIP priority scheme mandated under the no-fault act, places the lessee—who by terms of the lease may not purchase any policy but this one—in violation of his duties under the

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[1] The endorsement contains several exclusions, namely no coverage: if the non-owned vehicle is furnished or available for regular use by the insured or a family member; if the vehicle is being used while working in an auto-related business; or if the vehicle is not a private passenger vehicle being used in a business or occupation. These exclusions are not at issue in this case.

no-fault act and renders meaningless multiple policy provisions dealing with relations between the insured and the insurer as well as the entirety of Endorsement No. 19. These real conflicts with the no-fault act should not be ignored.

I. Additional Relevant Facts

Trent, a retired GM executive, leased two vehicles (the Trent vehicles) through the DaimlerChrysler Lease Car Program (the Car Program). This lease program and its insurance scheme involve multiple entities and opaque relationships. The fundamental reality, however, is that DCC is not only the sole named insured on the policy, but is also the de facto insurer of the vehicle.

The policy indicates that it was issued to DCC by DCIC, a property/casualty insurance company licensed to write auto insurance. However, DCIC does not charge or collect any premiums. Instead, it simply provides the license under which DCC acts as its own self-insurer. The DCIC policy is what is referred to as a "fronted" policy. Fronting is "[t]he use of an insurer to issue paper, i.e., an insurance policy, on behalf of a self-insured organization . . . without the intention of bearing any of the risk. The risk of loss is transferred back to the self-insured . . . with an indemnity or reinsurance agreement."[2] Here, for example, although the liability limits set forth in the policy are $5 million, the deductible against which the limits are set-off is also $5 million. Under this arrangement, even though DCIC is the issuer of the policy, it bears no risk; all the risk is carried by DCC. DCIC performs no insurer functions. In effect, it merely "rents" its license to DCC which performs all of the insurer functions, including drafting and interpreting the policy, collecting premiums and deductibles from individuals participating in the Car Program, administering all policy claims, defending all policy-related lawsuits, paying for all policy-related losses, handling all policy claim appeals, and engaging all vendors who perform-related duties. The reality is that DCC is the insurer.

II. Policy Interpretations

As noted, the policy defines "you" as the "named insured" and, although this is a private vehicle policy rather than a commercial policy, the "named insured" is DCC, not its lessee. This results in a policy that unlawfully shifts the order of priority for insurers for PIP benefits, leaves all lessees in violation of the no-fault act, and renders multiple provisions either meaningless or nugatory.

A. Improper Priority Shifting

Michigan's statutory PIP priority provisions reflect the Legislature's decision to make a person's personal insurance first in line to pay PIP benefits.[3] The DCIC policy functions as the

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[2] Glossary of Insurance & Risk Management Terms by Int'l Risk Mgmt Institute, Inc, located at www.irmi.com/online.insurance-glossary/terms/f/fronting.aspx.

[3] Priority of PIP coverage for vehicle occupants is set forth in MCL 500.3114, and provides in subsection (1) that "a personal protection insurance policy . . . applies to accidental bodily injury
(continued…)

personal insurance of Car Program lessees who pay premiums in return for PIP coverage. Yet, allowing DCC to define itself, rather than its employee, as the "named insured" results in its avoidance of primary PIP responsibility and requires other insurers to pay benefits that they never contemplated assuming because they properly relied on the fact that the lessee owner was required to provide insurance that would be primary. This is at best an aberration that should be corrected rather than approved and may, in fact, be a calculated deception.

The DCIC policy provides for Michigan personal injury protection in Endorsement No. 10. This endorsement provides that personal injury protection benefits will be paid "to or for an insured who sustains bodily injury caused by an accident." Of course DCC, the named insured, cannot sustain a bodily injury. The endorsement goes on to define "insured" as including a "family member" of the named insured, which again, has no meaning where the named insured is a business entity.

While the policy also defines a PIP "insured" as anyone else occupying the covered auto, it excludes from coverage "anyone entitled to Michigan no-fault benefits as a named insured under another policy." This shifts the burden of PIP coverage from this policy to the policy on any other vehicle in the same household. For example, A is a DCC employee with a Car Program vehicle. B is A's wife. Together, they own a second vehicle primarily for B's use which they insure with company C. Under the DCIC policy, if A or B or any other resident relative is involved in an accident in the Car Program vehicle, they are excluded from PIP coverage under the Car Program policy because they are named insureds under the policy issued by company C for B's car.[4]

The reality is that DCC never has to pay PIP benefits where there is a second policy in the household. The lessee cannot receive PIP benefits as a named insured under the policy as he is not a named insured. He cannot receive PIP benefits as a family member of the named insured as no one can be a family member of an entity. Finally, his rights under the policy to PIP coverage simply as an occupant do not apply if either he is a named insured or a family member of a named insured on any other policy on any other vehicle. When a lessee or any member of his family is injured while occupying the Car Program vehicle, the Car Program insurance company does not pay as the primary PIP provider if there is another insured car in the household.

Thus, although DCC purports to be providing the required no-fault insurance, its policy actually results in insurers who should be secondary under the no-fault act becoming primary and

(…continued)

to the person named in the policy, the person's spouse and a relative of either domiciled in the same household." MCL 500.3114(3) provides that where the motor vehicle is registered in the name of a person's employer, the policy shall provide primary PIP coverage for the "employee, his or her spouse [and] a relative of either domiciled in the same household."

[4] Indeed, even if A were not a named insured under C's policy on B's car, the same result occurs, as B's policy is a household policy, making A a family member, who is excluded under section (C)(7) of the DCC policy.

DCC never has to pay any claims under the policy for PIP benefits anytime the lessee or his family member owns and insures another vehicle. By making itself the sole named insured, DCC avoids its duty to provide PIP benefits required by law.

B. No-Fault Violations by the Lessee

Although DCC is the lessor, it is not the "owner" of the car for purposes of the no-fault act.[5] Pursuant to MCL 500.3101 and this Court's holding in *Ball v Chrysler Corp*, 225 Mich App 284, 290; 570 NW2d 481 (1997), it is Trent, as lessee, who is the owner. Accordingly, it is Trent who is required to provide no-fault insurance for the vehicle. Despite his statutory duty to obtain insurance that complied with the no-fault act, however, Trent was not free to choose his insurer or his coverage. Under the Car Program, he was required to purchase the instant policy and his lease payments to DCC included insurance coverage premiums for that coverage even though, as noted, DCC never paid any premiums to DCIC. Finally, even if Trent wanted to purchase insurance that provided him and his family with additional coverage, i.e. coverage that actually complied with the no-fault act, he was barred from doing so under the terms of the Car Program, which prohibited him from securing additional or alternative insurance from other auto insurers. Thus, although Trent is the owner for purposes of the no-fault act and is the person paying for the policy, he is not a named insured.

It is axiomatic that "insurance policies are subject to statutory regulation, and mandatory statutory provisions must be read into them." *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 417-418; 668 NW2d 199 (2003); *Auto-Owners Ins Co v Martin*, __ Mich App __; __ NW2d __ (Docket No. 281482, issued June 16, 2009) slip op at 4. MCL 500.3101(1) provides, "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security of payment of benefits under personal protection insurance, personal property insurance, and residual liability insurance." In *State Farm Mut Automobile Inc Co v Enterprise Leasing Co*, 452 Mich 25, 27; 549 NW2d 345 (1996), our Supreme Court held that "[v]ehicle owners . . . are required to provide *primary* coverage for their vehicles and all permissive users of their vehicles (emphasis added)." Therefore, the Car Program, by barring the purchase of any other policy, forces its lessees to violate the no-fault act in the context of PIP coverage.[6] It may similarly run afoul of the act's requirement of primary residual liability coverage since the policy provides that DCC's employees are excluded from such coverage if they "own" the vehicle, which *Ball*, *supra*, holds that they do.[7]

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[5] DCC is also not the titleholder of the Car Program vehicles. DCC sells the car program vehicles to Gelco Corporation, d/b/a GE Capital Fleet Services, who then leases the vehicles back to DCC. DCC then leases these vehicles to individual employees or retirees.

[6] The policy also directly contradicts the specific representations made by DCC to the Secretary of State that it will, as a "self-insurer" of these non-commercial, privately owned vehicles, comply with all provisions of the Michigan no-fault act.

[7] In the instant case, that issue does not arise as Trent was a retiree, rather than an employee.

C. Meaningless Provisions and Nugatory Endorsement

The policy's definition of "you" also renders many other provisions meaningless, particularly since the policy defines "we" and "our" as "the Company providing this insurance," creating the absurd result that both "you" and "we" are the same entity under the policy. The anomaly of the insured and insurer being the same wreaks havoc with the entire policy and belies any notion that the policy can simply be read as "plain language." The policy is replete with provisions that are meaningless, ambiguous or confusing given the identity of "you" and "we." For example, the policy provides:

> "you must give us or our authorized representative prompt notice" of an accident or loss;
>
> "you must make no payment without our consent;"
>
> "[you must] immediately send us copies of any request, demand . . .;"
>
> [you must] cooperate with us in the investigation, settlement or defense of the claim or suit;" and
>
> [you must] authorize us to obtain medical records or other pertinent information . . . [and] submit to an examination."

These are but a few examples, as the terms "you," "your," "we," and "our" appear repeatedly throughout the policy. And these provisions cannot be rationally understood unless "you" is interpreted to mean the lessee. Indeed, it is difficult to imagine that DCC would excuse the lessee from any of these duties and would voluntarily provide coverage if the lessee violated them. Thus, for purposes of these provisions, DCC would presumably take the position that "you" means the lessee, while it now asserts that "you" does not mean the lessee insofar as it would make DCC the primary PIP or residual bodily injury insurer for the lessee.

Finally, the majority concludes that an entire endorsement, i.e. Endorsement No. 19, that DCC, both as insured and as the de facto insurer, chose to include in the policy, can simply be read out of existence. A "plain language" approach would suggest that if, as DCIC suggests, the endorsement was intended never to apply and to be completely nugatory, then it simply would not have been included in the policy. This is even more so given that the endorsement is captioned by the phrase "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." Under a "plain language" approach to drafting, the endorsement now claimed to be nugatory would never have been included at all, or at least would have been captioned by the phrase "THIS ENDORSEMENT DOES NOT CHANGE THE POLICY AND DOES NOT APPLY. DO NOT BOTHER TO READ IT."

D. *Pavolich*

The majority relies on *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378; 591 NW2d 325 (1998). However, that case presented very different facts and policy provisions than the ones involved in the present case. In *Pavolich*, the insurer was the Michigan Township Participating Plan and the vehicle insured was a township vehicle used for township

purposes. It did not involve a privately leased vehicle for personal use. The named insured was the Township of Linden (the township), not the lessor of the vehicle. No premiums were paid by employees; all premiums were paid by the township and the sole policy provision that was affected was a non-mandatory coverage.[8]

The *Pavolich* policy differed from the instant policy in numerous ways and avoided many, if not all, of the concerns set forth in this opinion. First, the insured and the insurer were distinct and wholly separate entities. Second, the township policy provided for proper PIP priorities under the no-fault act. Third, the vehicle in *Pavolich* was only driven by township employees on township business. Fourth, the policy in *Pavolich* was a true commercial policy and not a hybrid commercial and personal property. Fifth, the township employees in *Pavolich* did not pay any premiums and could not have been under the impression that the policy provided them with coverage when in any other vehicle.

In addition, when the *Pavolich* Court found that the policy definition rendered the uninsured motorist provision surplusage, it examined cases from other jurisdictions for guidance on whether that required interpretation of the policy beyond that language.[9] The Court cited several cases in which other states approved the view that the provision was surplusage and so declined to reform the contract. However, many of these same states have concluded that, where an entire endorsement, rather than an isolated provision, would be rendered surplusage, the contract must be reformed. See *Greenbaum v Travelers Ins Co*, 705 F Supp 1138, 1142 (ED Va, 1989) ("the court must give meaning and effect to the individual named insured endorsement as an integral part of the agreement between the parties. Having appended the endorsement to the policy, Travelers cannot be allowed to now argue it is meaningless."); *Apgar v Commercial Union Ins Co*, 683 A2d 497 (Me, 1996); *Home Folks Mobile Homes, Inc v Meridian Mut Ins Co*, 744 SW2d 749, 750 (Ky App, 1987) (Holding that an "ambiguity [is] created by the inclusion of the endorsement in the policy which by its own terms would never have any effect."); *Purcell v Allstate Ins Co*, 310 SE2d 530, 533 (Ga App, 1983) (Concluding that there was no reason to include an "individual named insured" endorsement if the intent of the policy was to cover only a business auto and not extend any personal coverage); *Kissoondath v Safeco Ins Co*, unpublished opinion of the Minnesota Court of Appeals, issued November 19, 1996 (Docket No. CX-96-1462) (Holding that where a policy lists a company as the named insured, but the policy speaks to the named insured as an individual and includes an endorsement for an individual named insured, "the policy is facially ambiguous" and is construed against the insurance company to provide coverage).

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[8] The majority correctly notes that the non-owned vehicle coverage at issue here is also a non-mandatory coverage. However, since we are to read the policy as a whole, we cannot simply ignore the fact that applying that definition voids coverages that are mandatory.

[9] The Court also noted that if the township was paying premiums for illusory coverage, it could sue the insurer. Thus, in *Pavolich*, there was at least a mechanism by which the illusory coverage could be challenged and the insurer required to at least refund premiums. In the instant case, DCC has designed the policy so that there is no actual "named insured" that would have an interest contrary to the insurer.

E. Conclusion

For these reasons, I conclude that in this factual context, the policy definition of "you" violates the no-fault act and must be rewritten so as to conform with that act. Specifically, under this policy, "you" must be defined as "Daimler Chrysler Corporation and/or the person to whom DCCC leases the vehicle." Thus, I would affirm the trial court's conclusion that endorsement 19 provides coverage to Trent and his "family member[s]" as defined in the policy.

IV. Resident of Household

The finding that Endorsement No. 19 provides for non-owned auto liability coverage to Trent's "family member[s]" is not dispositive of this case as the endorsement's definition of "family member" requires that the family member also be a "resident of your household." The trial court granted summary disposition to plaintiff on this issue finding as a matter of law that Brooks was a resident of Trent's household. Because the majority concluded that Trent was not an insured, it did not address whether the trial court erred in this conclusion. In light of the majority's reversal on the scope of the policy and its entry of judgment for defendant, I also do not reach this issue.

/s/ Douglas B. Shapiro