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JURISDICTIONAL STATEMENT

Jennifer Dimmitt filed a petition for damages against Progressive alleging that she was entitled to coverage under a Progressive Policy covering a 1971 mobile home. (Dimmitt's petition references a mobile home, however, in 1982 the legislature amended all statutory references in Chapter 700 to mobile homes to manufactured homes and accordingly, Progressive uses the term manufactured home throughout the brief.) She alleged that she was the owner of the manufactured home and that it sustained damage on January 1, 1999 after a winter storm suddenly deposited snow and ice on the manufactured home causing damage to the manufactured home and her personal property. Progressive denied coverage and sought summary judgment because Dimmitt did not take title to the manufactured home in compliance with Missouri law and accordingly, she had no insurable interest in the manufactured home at either the time of purchase of the policy or at the time of loss and the therefore the policy was void and her claims for damages were barred.

The trial court granted summary judgment in Progressive's favor and Dimmitt appealed to the Western District Court of Appeals. The case was originally argued to a panel of three judges in January of 2001. Prior to the issuance of any opinion, the court ordered that the case be argued en banc in July of 2001. In July of 2002 the court issued a sharply divided 6-5 split decision with the majority opinion reversing the trial court's judgment. The majority recognized that Dimmitt had not complied with the titling statutes and was not entitled to recovery, however, the court determined that the result was unfair in that the public policies behind the strict construction of titling statutes were unguided and that perhaps Missouri should recognize an equitable insurable interest in certain situations. Progressive sought transfer to this court because the opinion represents a dramatic departure from long-standing Missouri law that strictly construes the titling statutes in this state. Progressive also sought transfer because the

opinion conflicts with many prior opinions in several areas of the law and the opinion creates issues of general interest and importance in the areas of statutory, contract and insurance construction and interpretation. This court granted transfer and accordingly, jurisdiction is proper in this court by virtue of Article V Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Jennifer Dimmitt filed a petition for damages against Progressive alleging that she was entitled to coverage under a Progressive Policy covering a 1971 manufactured home. (L.F. 2.) She alleged that she was the owner of the manufactured home and that it sustained damage on January 1, 1999 after a winter storm suddenly deposited snow and ice on the manufactured home causing damage to the manufactured home and her personal property. (L.F. 2; App. 1-4.)

Progressive denied coverage stating that Jennifer Dimmitt had no insurable interest in the manufactured home and accordingly, the policy was void and her claims for damages to the manufactured home, personal property and living expenses were barred. (L.F. 25, 26.) Progressive filed a motion for summary judgment on the basis that Dimmitt never received proper title to the manufactured home and she had no ownership or insurable interest and therefore could not recover under the Progressive policy for any damages to the manufactured home, personal property or living expenses. (L.F. 27-42.)

Progressive's motion sets forth portions of Dimmitt's deposition wherein she produced and identified a written agreement wherein Wayne Decker agreed to loan her $5,500.00 for the purchase of the manufactured home with minimum monthly payments beginning April 30, 1997 and ending May 30, 1998 and the balance to be paid on or before November 30, 1998 at her convenience. The agreement states that Wayne Decker will hold the title until the loan is paid in full. (L.F. 30; App. A-5.)

She testified in her deposition that she paid $1,000 up front and thereafter made monthly payments. (L.F. 32, 38, 39.) She received the title in April of 1999. (L.F. 32, 39, 41.) After she received the title she put it in her safe. She did not take the title to the Department of Revenue to have a

new title issued in her name. (L.F. 33, 42.) The certificate of title shows Ralph and Shirley Schwartz as owners of the manufactured home. (L.F. 29; App. A-6.)

Jennifer Dimmitt did not admit or deny the numbered paragraphs of Progressive's motion for summary judgment including: that the accident occurred on January 1, 1999; that she did not gain possession of the title of the manufactured home until April of 1999; and that neither her name nor Wayne Decker's name appears anywhere on the certificate of title to the manufactured home. (L.F. 43-48.) Jennifer Dimmitt offered no evidence in opposition to Progressive's motion. (L.F. 43-38.)

The trial court entered judgment in favor of Progressive finding that Jennifer Dimmitt had no ownership or insurable interest in the manufactured home and thus was entitled to no coverage under the Progressive policy. (L.F. 53.55, App. A-7-9.) The trial court found that Missouri's titling statutes require proper and timely application for a certificate of ownership for a manufactured home as is required for motor vehicles, with the same penalties for failure to do so. The court held that Missouri case law holds that the purchaser of a motor vehicle who does not comply with the statutory requirements for titling has no insurable interest in the vehicle even if full payment and delivery was made to the buyer, citing, Faygal v. Shelter Insurance Co., 689 S.W.2d 724 (Mo.App. E.D. 1985). The trial court entered summary judgment in favor of Progressive finding that Dimmitt did not acquire an insurable interest in the manufactured home due to her failure to acquire legal title. (App. A-7-9.)

The court of appeals issued a 6-5 opinion with the majority reversing the trial court's judgment and remanding for a determination of whether Dimmitt had an equitable insurable interest in the manufactured home that may entitle her to recover against Progressive under the owner policy. The majority determined that Dimmitt did not comply with the titling statutes and pursuant to the statutes and prior case law, Dimmitt did not possess an ownership or insurable interest sufficient to allow for

recovery under the Progressive policy. The majority determined, however, that the public policy behind Missouri's titling statutes was "unguided" and that courts had previously taken an absolutist approach in strictly construing the statutes and the court determined equity should override the statutes and prior judicial recognition of the necessity for strict construction of these statutes. The majority decided that the case before it presented unique facts that allowed for a relaxation of the statutory requirements. The dissent issued a strong opinion disagreeing with the reasoning and result of the majority.

Progressive sought transfer because of the importance of the appellate court's analysis and result, in that, the majority ignored the clear statutory language requiring strict compliance with the titling statutes and the majority ignored long-standing precedent recognizing the importance of strict compliance and the public policies behind the legislature's actions. The opinion will affect many areas of the law including issues in the areas of contract, statutory and insurance construction and interpretation. This court accepted transfer and Progressive has filed this substitute brief that addresses not only the actions of the trial court in awarding judgment in favor of Progressive but also the issues and policy concerns raised by virtue of the court of appeal's majority decision.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PROGRESSIVE BECAUSE PROGRESSIVE SHOWED THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT AND SHOWED ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW IN THAT DIMMITT NEVER RECEIVED A PROPERLY ASSIGNED TITLE FOR THE MANUFACTURED HOME IN ACCORDANCE WITH MISSOURI LAW AND THUS SHE ACQUIRED NO OWNERSHIP OR INSURABLE INTEREST IN THE MANUFACTURED HOME AND WAS NOT THEREFORE ENTITLED TO ANY COVERAGE UNDER THE PROGRESSIVE INSURANCE POLICY FOR DAMAGE TO THE MANUFACTURED HOME OR PERSONAL PROPERTY OR FOR ADDITIONAL LIVING EXPENSES.

Kelso v. Kelso,

306 S.W.2d 534 (Mo. 1957).

Faygal v. Shelter Ins. Co.,

689 S.W.2d 724 (Mo.App. E.D. 1985).

Puritan Ins. Co. v. Yarber,

723 S.W.2d 98 (Mo.App. E.D. 1987).

Horton v. State Farm Fire & Casualty Co.,

550 S.W.2d 806, 809 (Mo.App. E.D. 1977)

Section 700.320.1 R.S.Mo

Section 301.210 R.S.Mo.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PROGRESSIVE BECAUSE PROGRESSIVE SHOWED THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT AND SHOWED ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW IN THAT DIMMITT NEVER RECEIVED A PROPERLY ASSIGNED TITLE FOR THE MANUFACTURED HOME IN ACCORDANCE WITH MISSOURI LAW AND THUS SHE ACQUIRED NO OWNERSHIP OR INSURABLE INTEREST IN THE MANUFACTURED HOME AND WAS NOT THEREFORE ENTITLED TO ANY COVERAGE UNDER THE PROGRESSIVE INSURANCE POLICY FOR DAMAGE TO THE MANUFACTURED HOME OR PERSONAL PROPERTY OR FOR ADDITIONAL LIVING EXPENSES.

The issue in this case is whether the trial court correctly granted summary judgment in favor of Progressive finding Dimmitt is not entitled to damages because SHE had no insurable interest in the manufactured home either at the time she purchased the insurance policy or at the time of loss. The trial court determined that Missouri's titling statutes for motor vehicles and manufactured homes are strict in requiring title to be exchanged at the time of purchase and the purchaser is required to obtain proper title from the Department of Revenue and failure to comply with these statutes renders the sale void. The trial court also determined that Missouri courts have uniformly strictly construed these statutes and have determined that if title is not properly obtained, then no ownership or insurable interest exists. The appellate court recognized that the trial court was correct and that under the evidence presented and in

light of existing law, Dimmitt had no insurable interest and was not entitled to damages pursuant to the Progressive policy. The majority determined that perhaps Missouri should relax the strict statutory requirements regarding obtaining title and instead recognize an equitable insurable interest in certain situations. Progressive sought transfer to this court because the appellate court majority opinion ignores proper statutory construction and long-standing public policy recognition of the necessity for strict statutory construction of Missouri's titling statutes.

Previous to the appellate court opinion in this case, Missouri's mandatory titling statutes were judicially strictly construed to require transfer of title at the time of sale and registry of the title in order to show a right of ownership and possession resulting in an insurable interest in the property. The appellate court declared ex mero motu that prior judicial interpretations finding no insurable interest without a valid certificate of title were absolutist and the public policies supporting enforcement were unguided. The opinion conflicts with prior opinions in the areas of statutory, contract and insurance construction and interpretation. The opinion conflicts with prior opinions by holding that the public policy encouraging insurance agreements should override the police-power public policies found in the strict titling statutes. The opinion conflicts with prior opinions by holding that equity should override the statutory titling requirements and courts should be able to recognize, in certain cases, an equitable insurable interest for purchasers of manufactured homes when purchasers fail to properly obtain title. By judicial fiat in conflict with prior opinions, the appellate court strains to allow for recovery under an owner insurance policy by creating a new category of equitable insurable interests relating to a purchase of property deemed void by statute. The appellate court opinion usurps clear legislative intent and conflicts with prior opinions and creates chaos and confusion in the areas of motor vehicle and manufactured home titling cases, legislative interpretation cases and insurance construction cases by

creating a narrow exception for certain mobile home purchasers but not for others or for those buying motor vehicles.

Standard of review

This court in reviewing the grant of summary judgment in favor of Progressive reviews the record in the light most favorable to Dimmitt. This court's review is essentially de novo and the criteria on appeal for testing the propriety of summary judgment is the same as employed by the trial court. The propriety of summary judgment is purely an issue of law and facts set forth by affidavit or otherwise in support of the motion for summary judgment are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. This court will uphold the trial court's grant of summary judgment where there is no genuine dispute of material fact and the movement is entitled to judgment as a matter of law. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

Factual background

On January 1, 1999 a 1971 manufactured home titled to Ralph and Shirley Schwartz was damaged following a large snowstorm. Jennifer Dimmitt had purchased the manufactured home from Wayne Decker by making monthly payments beginning in April of 1997 and ending in May of 1998. She received title from Wayne Decker in April 1999 showing the title owners to be Ralph and Shirley Schwartz. Wayne Decker's name does not appear on the title. Dimmitt did not present the title to the Department of Revenue. Missouri law requires that manufactured home owners make application to the Department of Revenue for title in the same manner as automobile owners and the same penalties apply for failure to comply.

Dimmitt filed suit against Progressive seeking coverage pursuant to the owner policy she had previously purchased. Progressive denied coverage and sought summary judgment because Dimmitt never obtained title to the manufactured home in accordance with Missouri statutes and therefore failed to acquire an ownership or insurable interest. Dimmitt did not contest the facts asserted in the summary judgment motion. Instead, Dimmitt argued that though she had failed to take title in accordance with the relevant statutes, she should not be precluded from recovery because she took constructive delivery of the title and she had a pecuniary interest sufficient to rise to the level of an insurable interest. Both assertions fail in light of the clear statutory language and judicial precedent. Though Dimmitt has three points relied on in her brief, points two and three are not found in the argument portion of the brief and are therefore waived, Bopp v. Spainhower, 519 S.W.2d 281 (Mo. 1975), and even if somehow preserved, the issue of whether she obtained an insurable interest is dispositive in her claims for damages in all three points and accordingly, Progressive has addressed the central issue by responding with a single point relied on.

Missouri's titling statutes

By statute the sale of manufactured homes are governed by the same rules as those involving the sale of motor vehicles. Section 700.320.1 states in part:

> The owner of any new or used manufactured home, as defined in Section 700.010, shall make application to the Director of Revenue for an official certificate of title to such manufactured home in the manner prescribed by law for the acquisition of certificates of title to motor vehicles, and the rules promulgated pursuant thereto. All fees required by Section 301.190, RSMo. for the titling of motor vehicles and all penalties provided by

law for the failure to title motor vehicles shall apply to persons required to make application for an official certificate of title by this subsection.

(App. A-12.) Section 301.190.1 requires that application for a certificate of ownership must be made within 30 days after acquisition. Section 301.210.4 states:

> It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the law of this state, unless, at the time of the delivery thereof, there shall pass between the parties such certificates of ownership with an assignment thereof, as provided in this section and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void.

(App. A-10-11.)

The legislature first enacted statutes regarding manufactured homes in 1972 in Chapter 700. In 1985, the legislature enacted Section 700.320 regarding certificate of title requirements and penalties for manufactured homes and specifically incorporated the motor vehicle titling statutes found in Chapter 301. Contained in the same Senate Bill in 1985 (Senate Bill 152) was some clean-up language for Chapter 301 including removal of manufactured homes from the definition of trailer because the titling statutes for manufactured homes could now be found in Chapter 700.

This legislative history shows that prior to the 1985 amendment of the definition of "trailer" and the enactment of Section 700.320 for which there was no predecessor, manufactured or mobile homes, as defined in Section 700.010(5) were subject to the same titling requirements as were motor vehicles as provided in Section 301.210. By amending the

trailer definition in the same Senate Bill as the enactment of Section 700.320.1 that requires manufactured homes to be titled in accordance with the laws regarding motor vehicles, the legislature was merely cleaning up the motor vehicle definition of "trailer" to allow for specific statutes regarding manufactured homes to be found in Chapter 700. The legislature's specific adoption of motor vehicle titling requirements and penalties within the manufactured homes statutes evidences a clear legislative intent to continue the strict statutory construction and public policy recognition regarding these types of property.

Judicial interpretation of Missouri's titling statutes

Missouri courts have determined that the sales of motor vehicles are in a class of their own with different requirements from those concerning the sales of other chattels. The courts have determined that courts and the public must recognize and be bound by the legislature's action and its effect on the rights of sellers and purchasers. R.T. Moore v. State Farm Mutual Automobile, 381 S.W.2d 161, 167 (Mo.App. S.D. 1964). See, Okello v. Bbeebe, 930 S.W.2d 40 (Mo.App. W.D. 1996)(court again recognizing that a buyer who did not receive certificate of title as part of his sales transaction did not acquire the right to ownership or possession); Rockwood Bank v. Camp, 984 S.W.2d 868, 872 (Mo.App. E.D. 1999)(the court determining that plaintiffs were not entitled to damages for loss of use of their recreational vehicle because they never obtained proper title). Missouri courts have steadfastly determined that without title one does not obtain an ownership or insurable interest in these types of personal property. Kelso v. Kelso, 306 S.W.2d 534 (Mo. 1957)(insurable interest question as it relates to loss coverage is not controlled by the general principles or cases relating to other forms of property), Gorman v. Farm Bureau Town & Country Ins. Co. of Missouri, 877 S.W.2d 519 (Mo.App. W.D. 1998), Faygal v. Shelter Ins. Co., 689 S.W.2d 724 (Mo.App. E.D. 1985), Puritan Ins. Co. v.

Yarber, 723 S.W.2d 98, 100-102 (Mo.App. E.D. 1987)(applying the same analysis with respect to a mobile home trailer). Courts interpreting these statues require strict compliance rigidly enforced due to the unique nature of motor vehicles in our society. Panettiere v. Panettiere, 945 S.W.2d 533, 540, 541 (Mo.App. W.D. 1997).

Dimmitt argues that the Progressive policy definition of insurable interest determines whether she is entitled to prevail. However, this argument has been specifically rejected. Absolute technical compliance with the statute relating to transfer of title is required otherwise the sale is fraudulent and void. Horton v. State Farm Fire & Casualty Co., 550 S.W.2d 806, 809 (Mo.App. E.D. 1977). In Horton, the plaintiff sought recovery under an insurance policy on a vehicle that the plaintiff had not obtained proper title. The plaintiff argued that lack of ownership does not equate to lack of insurable interest. The court rejected this argument and found that a violation of Section 301.210 precludes the purchaser from obtaining ownership of the vehicle and also precludes the individual from having an insurable interest therein. The court determined that the insurable interest question as it relates to loss coverage is not controlled by the general principles or cases relating to other forms of property. Horton, 550 S.W.2d at 810; Kelso v. Kelso, 306 S.W.2d 534 (Mo. 1957), Puritan, 723 S.W.2d at 100-102.

In Kelso, this court determined that under the provisions of Section 301.210, there can be no valid sale of a used automobile unless the holder of the certificate of ownership endorses thereon an assignment and delivers the title to the buyer at the time of possession transfer and the buyer must promptly present the certificate with an application for registration to the Department of Revenue Director. Kelso, 550 S.W.2d at 538. In Kelso, this court determined that one who attempts to purchase a used automobile without obtaining assignment of the certificate of ownership as required by

the statute acquires no title whatsoever and has no insurable interest in the automobile. Kelso, 550 S.W.2d at 538.

Dimmitt did not offer any evidence in opposition to Progressive's motion for summary judgment. She concedes that the manufactured home and her personal property were damaged following a snowstorm on January 1, 1999. She admits though she made monthly payments to Wayne Decker on the manufactured home during 1997 and 1998, she did not receive possession of the title until April of 1999. She admits that the title shows the owners to be Ralph and Shirley Schwartz and that she never presented an application for title to the Department of Revenue. As Dimmitt offered no evidence in opposition to Progressive's motion, there exists no disputed genuine issues of material fact and under the law, Progressive is entitled to judgment as a matter of law as Dimmitt can show no ownership or insurable interest under the Progressive policy and she therefore cannot recover for damage to the manufactured home or her personal property or for claimed additional living expenses.

In Faygal v. Shelter Ins. Co., 689 S.W.2d 724 (Mo.App. E.D. 1985) the court held that the requirements of 301.210 are mandatory police regulations that must be construed to accomplish the legislative purpose of attempting to prevent fraud and deceit in the sale of vehicles and to hamper the traffic of stolen vehicles. Under Missouri law, a policy insuring property against loss or destruction may not be enforced unless the insured has an insurable interest in the property at the time of the insurance policy issuance and at the time of the loss. Faygal, 689 S.W.2d at 726. The question of insurable interest as it relates to loss coverage of a vehicle is not controlled by the general principles or cases related to other forms of property. Faygal, 689 S.W.2d at 726. Cf. DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700 (Mo. banc 1984)(loss was sustained to a house). A purchaser of a vehicle who does not comply with the strict requirements of Section 301.210 obtains no insurable

interest in the vehicle. The court determined that any actions or omissions by the insurer cannot waive a public policy requirement that an insurable interest exists. Faygal, 689 S.W.2d at 727. In Puritan Ins. Co. v. Yarber, 723 S.W.2d 98, 100-102 (Mo.App. E.D. 1987) the same analysis and recognition of public policy was applied to a mobile home trailer.

Summary judgment was properly awarded to Progressive

In order for Dimmitt to prevail under an action to recover under the policy of insurance for loss she must prove that that she had an insurable interest in the property at the time of the contract of insurance and at the time of loss. Gorman v. Farm Bureau Town & County Insurance Company of Missouri, 877 S.W.2d 519, 522 (Mo.App. W.D. 1998). Though Dimmitt paid for and received possession of the manufactured home, she never received properly assigned title to it and therefore she never obtained an ownership or insurable interest. She never received a properly assigned title from Wayne Decker and she never applied for title. The statutes and cases require strict mandatory compliance with the purchase and titling of motor vehicles and manufactured homes. Having failed to follow the law, she is precluded from recovering against Progressive under any theory for damage to the manufactured home or her personal property or for additional living expenses. Kelso v. Kelso, 306 S.W.2d 534 (Mo. 1957), Faygal v. Shelter Insurance Co., 689 S.W.2d 724 (Mo.App. E.D. 1985), Puritan Ins. Co. v. Yarber, 723 S.W.2d 98 (Mo.App. E.D. 1987), R.T. Moore v. State Farm Mutual Automobile Ins. Co., 381 S.W.2d 161, 167 (Mo.App. S.D. 1964).

The dangers and concerns regarding the appellate court decision in this case

The appellate court concedes that Dimmitt is not entitled to relief in her breach of contract action against Progressive if the court follows the clear language of the controlling titling statutes, case law and relevant insurance policy. However, the appellate court decided to "rather than take an

absolutist approach that is consistent neither with equity nor with an efficient public policy, this court explores the possibility of an equitable solution to the public policy aspects" of this case presumably because the court decides in the opinion that the financially needy have fallen victim to "Missouri's unguided public policy against them."

The danger of this case is not only the selective ad hoc result-oriented case, but the wide swath the court's opinion cuts across many long-standing and well-principled areas of the law. In trying to make a result fair to one, the court ignores the voices of many. Our legislature has determined that in the name of our public good and welfare, title shall be passed at the time of purchase for motor vehicles and manufactured homes. Missouri courts have steadfastly determined that without title one does not obtain an ownership or insurable interest in these types of personal property. Kelso v. Kelso, 306 S.W.2d 534 (Mo. 1957)(insurable interest question as it relates to loss coverage is not controlled by the general principles or cases relating to other forms of property), Gorman v. Farm Bureau Town & Country Ins. Co. of Missouri, 877 S.W.2d 519 (Mo.App. W.D. 1998), Faygal, 689 S.W.2d at 726, Puritan, 723 S.W.2d at 100-102.

The opinion conflicts with cases recognizing that where a statute is absolute and makes no exceptions in favor of those laboring under a disability, the appellate court cannot introduce any exceptions into the statute on the ground of inherent equity or because the court determines that under the guise of fairness or reason, application of a statute should not run against a party in a particular case. Fairbanks v. Long, 4 S.W. 499 (Mo. 1887). In the matter of classification for purposes of legislation, the legislature is deemed to have broad discretion that cannot be revised by this court merely because a court may think the legislature's discretion has been unwisely exercised. State Ex Inf. Barrett, Atty. Gen., Ex Rel. Bradshaw v. Hedrick, 241 S.W. 402 (Mo. banc. 1922). The applicable titling statutes

do not create exceptions for those who may not follow the law. A statutory exception cannot be created just because the court feels application of the statute in a particular case is not fair. McPike v. Friedman Loan & Mercantile Co., 227 S.W. 856 (Mo.App. E.D. 1921).

The appellate court labels the legislature's exercise of its lawful police power in enacting strict titling statutes regarding automobiles and manufactured homes as unguided. However, the court violates Article II § 1 (separation of powers prohibiting exercise of power properly belonging to other branch) when it endeavors to find an avenue of recovery for Jennifer Dimmitt when the general assembly has legislated otherwise. The opinion is contrary to prior opinions, in that, the legislature is the final arbiter of propriety, policy and justice of legislative classifications and the wisdom or necessity of legislative classification is not for the appellate court. Arnold v. Hanna, 290 S.W. 416 (Mo. banc. 1926). The legislature provides law and regulations and ordinances for the public good. Rhodes v. Bell, 130 S.W. 465 (Mo. 1910).

The legislature within its constitutional statutory power determines what is for the public good—not the court. Bader Realty & Investment Co. v. St. Louis Housing Authority, 217 S.W.2d 489 (Mo. banc. 1949). Whether a statute is wise or unwise, reasonable or unreasonable, constitutional or unconstitutional is not for the court to decide. This opinion conflicts with other district court opinions. In re: H--S--, 165 S.W.2d 300 (Mo.App. E.D. 1942)(this court is to refrain from expressing individualistic views on matters of public policy), State v. Pilkinton, 310 S.W.2d 304 (Mo.App. S.D. 1958)(the function of this court is to declare, apply and enforce the law as it is written and not to legislate by judicial fiat).

This court has long recognized that courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to the legislative branch. State

ex rel. Crow v. West Side St. Ry. Co., 47 S.W. 959 (Mo. 1898). Courts are not authorized to indulge in judicial legislation even though it may be done under the guise of liberal construction. Where the language of a statute is plain and unambiguous the court must give effect to the statutes as written. State ex rel. Jensen v. Sestric, 216 S.W.2d 152 (Mo.App. E.D. 1948). This court cannot resort to relaxing the titling statutes to recognize an equitable exception for one. If a court thinks the legislature is absolutist or exceedingly paternalistic, the cure is not to ad hoc judicially legislate but instead, the appeal must be left "to the legislature, or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government." Powell v. Pennsylvania, 127 U.S. 678 (1888).

Missouri's titling statutes are enacted in the exercise of the police power of the state and they are to be construed as protecting the economic welfare, peace, health, safety and morals of the inhabitants of this state. Courts must concede and recognize that the legislature and not the court, possesses the power to enact a police power statute with the design of preventing and correcting an evil that the legislature conceives to exist. Blind v. Brockman, 12 S.W.2d 742 (Mo. 1928). Courts cannot interfere with the lawful action of the legislative branch unless the action taken is clearly contrary to some constitutional mandate. State ex rel. Jones v. Atterbury, 300 S.W.2d 806 (Mo. banc. 1957). While the court does guard the constitutional rights of the citizens against mere arbitrary power, statutes should be recognized and enforced as embodying the will of the people unless they are palpably a violation of the fundamental law of the constitution. Heil v. Kauffman, 189 S.W.2d 276 (Mo. 1945). The appellate court did not address any constitutional implications in this case because none exist.

The opinion conflicts with cases recognizing the maxim, ignorantia legis non excusat, so firmly entrenched in our legal system and instead now shifts the burden of knowledge of and compliance with

the law, not on the parties to the purchase and sale of motor vehicles and manufactured homes, but instead to the insurers. However, the opinion conflicts with prior opinions recognizing that all persons who have contact with reference to matters falling under the mantle of police power regulations are deemed to have knowledge or and are presumed to know the provisions of the regulations. Lazare v. Hoffman, 444 S.W.2d 446 (Mo. 1969), Kansas City v. LaRose, 524 S.W.2d 112 (Mo. banc 1975)(ignorance of the law or mistake of law is no excuse since everyone is presumed to know the law of the land, both common and statutory), Walker v. City of St. Louis, 15 Mo. 563 (Mo.1852)(ignorantia legis non excusat so firmly established in this country's jurisprudence).

The appellate court inappropriately and improperly attempts to judicially legislate an exception into Missouri's titling statutes by juxtaposing and preempting the public policy of preventing fraudulent transfers of motor vehicles and manufactured homes with the public policy of encouraging insurance agreements. However, the opinion conflicts with prior opinions recognizing that the legislature's lawful exercise of police power overrides the public policy encouraging insurance agreements as private rights are subject to the valid exercise of police power by this state for the public good and the freedom to contract is subject to the legislature's valid exercise of police power. Borden Co. v. Thomason, 353 S.W.2d 735 (Mo. banc 1962), Ex parte Lockhart, 171 S.W.2d 660 (Mo. banc 1943), Gold Cross Ambulance and Transfer and Standby Serv., Inc. v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983)(there is no absolute right to contract free of state regulation under the police power). The police power extends to conditions that bear a substantial relation to the public health, morality, safety or welfare. Police power, in the broadest sense, encompasses every regulation and hence restriction on the use of private property. State v. McKelvey, 256 S.W. 474 (Mo. banc 1923). There is no precondition that the legislation always protect against a public danger. Ex Parte Williams, 139 S.W.2d

485 (Mo. 1940). Furthermore, the court's duty is to interpret the policy and not remake it to suit the court's or a party's needs. Brugioni v. Maryland Casualty Co., 382 S.W.2d 707 (Mo. 1964), Eagle Star Ins. Co. of America v. Family Fun Inc., 767 S.W.2d 623 (Mo.App. W.D. 1989).

The Missouri legislature enacted clear statutes regarding titling requirements for motor vehicles and manufactured homes. The opinion conflicts with prior opinions recognizing that this court's function is not to legislate but to declare the law as discovered in the statutory texts and courts must leave and interpret the law as written until the legislature amends or alters it. Lemasters v. Willman, 281 S.W.2d 580 (Mo.App. E.D. 1955). State Board of Registration for the Healing Arts v. Boston, 72 S.W.3d 260 (Mo.App. W.D. 2002)(all canons of statutory interpretation are subordinate to the requirement that this court determine if possible the intent of legislature from the language of the provisions and consider the words as used in the plain and ordinary meaning), Brant v. Brant, 273 S.W.2d 734 (Mo.App. E.D. 1955)(this court cannot usurp the legislative function and by construction rewrite a statute), Goodrich Silvertown Stores of B. F. Goodrich Com v. Brashear Freight Lines, Inc., 198 S.W.2d 357 (Mo.App. E.D. 1946)(this court has a duty to enforce the statutes as they are written regardless of this court's own views as to the wisdom of desirability of the statute and this court has no authority to enlarge or restrict scope of statutes by judicial legislation by construction), State of Missouri v. Addington, 12 Mo. App. 214 (Mo.App. E.D. 1882)(this court usurps its jurisdiction by inquiring into wisdom or policy of statute enacted under lawful legislative police power or to undertake to supercede the discretion of the legislature).

If Missouri is to recognize a cause of action for a contract purchaser possessing an equitable but not legal interest in a manufactured home or motor vehicle, this is a matter left for the legislature and not the courts. See Powell v. American Motors Corp., 834 S.W.2d 184 (Mo banc 1992). If the

legislature had intended an exception, the statutes would provide for one. Missouri law does not guarantee relief to every deserving plaintiff. Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 246 (Mo. banc 1984), O'Neill v. Claypool, 341 S.W.2d 129 (Mo. 1960). Any exception to Missouri's titling statutes falls under the legislature's lawful use of police power through enacting statutes. "If it is believed that the one year statute of limitations is too brief, the way to increase the limitations period, as was indicated by the legislature's enactment of section 537.021, is through amendment by the legislature, not by judicial fiat." Johnson v. Akers, 9 S.W.3d 608, 610 (Mo. banc 2000). Courts should not engage in ad hoc judicial legislation that brings this case "into the same class as a restricted railroad ticket, good for this day and train only." Smith v. Allwright, 321 U.S. 649, 669 (1944). Instead courts should recognize caution and judicial restraint and leave any matters of exception to the legislature. "If Missouri were to recognize these additional causes of action, their adoption should be accompanied by a carefully planned and well-though-out scheme for handling the additional separate, but related, questions that will be created and the ensuing legal issues that will develop in connection with those claims. Embarking into a new area of litigation such as this lends itself better to prospective legislative enactment than to the case-by-case, issue-by-issue approach that this Court would be required to undertake if these causes of action were to be recognized by common law decisions." Zafft, 834 S.W.2d at 190.

In this case the appellate court opinion is dangerous in that the recognition of an equitable insurable interest will carry over into the motor vehicle titling and insurable interest analysis. The statutes regarding the titling requirements for motor vehicles and manufactured homes are identical as are the public policies behind the statutory enactments and strict construction. The application of the appellate court's equity arguments can be argued to apply any time the result of strict statutory compliance is

deemed unfair. If this exception is allowed, many more will be argued. Equity cannot preempt, especially when Dimmitt never sought to invoke the equity jurisdiction of the court.

Dimmitt sued seeking damages pursuant to the Progressive insurance policy. A court's judicial power is set in motion by the petition filed by Dimmitt and the court only possesses the jurisdiction or power to decide questions presented by the parties through their pleadings. Riggs v. Moise, 128 S.W.2d 632 (Mo. banc. 1939), State ex rel. McManus v. Muench, 117 S.W.2d 25 (Mo. 1909). A court, ex mero motu, cannot decide issues not presented by the parties in their pleadings. Luethans v. Washington Univ., 894 S.W.2d 169 (Mo. 1995), Clay v. Missouri Highway and Transp. Com'n, 951 S.W.2d 617 (Mo.App. W.D. 1997), Vangundy v. Vangundy, 937 S.W.2d 228 (Mo.App. W.D. 1996). Dimmitt filed an action in law only and never sought any equitable relief. Furthermore, she never asked the trial court to determine "whether a contract purchaser has a special property interest or equitable interest", this question was thought up by this court ex mero motu and noted to be one of first impression. The opinion conflicts with cases finding that a party must recover according to the allegations in proof or not at all. Black v. Early, 106 S.W. 1014 (Mo. 1907), Grimes v. Armstrong, 304 S.W. 793 (Mo. 1957)(plaintiffs who at trial sought only to establish themselves possessing full fee-simple title could not change theory on appeal to advance theory that they had acquired an easement), Huter v. Birk, 439 S.W.2d 741 (Mo. 1969), Morris v. Kansas City, 391 S.W.2d 198 (Mo. 1965)(court will refuse to consider result where to do so would allow presentation of theory for first time on appeal). A judgment given without notice and the opportunity to be heard possesses none of the attributes of a judicial determination and it simply judicial usurpation and oppression, a mere arbitrary edict, and in defiance of audi alteram partem. Troyer v. Wood, 10 S.W. 42 (Mo. 1888).

The opinion conflicts with prior opinions recognizing that neither law nor equity can be invoked to redress a wrong that has resulted from the injured party's own wrongful and illegal conduct. DeMayo v. Lyons, 216 S.W.2d 436 (Mo. 1949). Under the in pari delicto doctrine, Jennifer Dimmitt forfeited her rights to recovery against Progressive because the Missouri legislature deemed her conduct fraudulent and void. Section 700.320.1, Section 301.210, Horton v. State Farm Fire & Casualty Co., 550 S.W.2d 806, 809 (Mo.App. E.D. 1977), Okello v. Beebe, 930 S.W.2d 40 (Mo.App. W.D. 1996), Rockwood Bank v. Camp, 984 S.W.2d 868, 872 (Mo.App. E.D. 1999). If equity applies, Dimmitt's claim fails as her conduct in contravention of the titling statutes cannot form a basis for recovery. Schoene v. Hickam, 397 S.W.2d 596, 602 (Mo. 1966)(no court will lend its aid to a party who founds a cause of action upon an illegal act as this is a principle founded on public policy not for the sake of the defendant but for the law's sake and that only), Kansas City Operating Corp. v. Durwood, 278 F.2d 354, 357 (8th Cir. 1960)(one whose conduct is fraudulent forfeits all rights in law and equity),Sandbothe v. Williams, 552 S.W.2d 251, 255 (Mo.App. E.D. 1977)(court recognized legislature enacted statutes relating to insurance brokers in order to protect the public from fraud and incompetency and no recovery in equity allowed for a sale completed by one not properly licensed).

The opinion is based at least in part and perhaps in great measure on the perceived economic disparity of the parties. This issue was raised by the appellate court on its own and there is no evidentiary support of judicial precedent allowing for the economic situation of a party dictate whether a statutory requirement and penalty should apply. In fact, justice "does not make any distinction between litigants, be they of high or low degree, rich or poor, Jew or Gentile. Justice cannot distinguish one from the other." State v. Ewan, 120 S.W.2d 1098 (Mo. banc 1938), Fowler v. Burris, 171 S.W. 620 (Mo.App. S.D. 1914)(the defendant's liability under the action pleaded is in no way dependent on the

poverty of the plaintiff or the wealth of the defendant). See Missourians For Tax Justice Education Project v. Holden, 959 S.W.2d 100 (Mo. banc 1998)(classifications based on wealth or poverty alone are not suspect classifications under equal protection analysis).

These issues illustrate how devastating the appellate court's opinion can be if left as written. The trial court correctly followed statutory construction and judicial precedent in finding that Dimmitt had no ownership or insurable interest in the manufactured home entitling her to recovery under the Progressive owner policy. The appellate court conceded that pursuant to Missouri law, Dimmitt is not entitled to recovery, however, perhaps the law should change because the result seems unfair. The concerns and conflicts raised by Progressive illustrate how damaging this opinion can be to many well-established areas of the law. The legislature statutorily mandates that the titling laws and penalties pertaining to motor vehicles be directly applicable to manufactured homes. Summary judgment is appropriate in favor of Progressive.

CONCLUSION

For the above set forth reasons, Progressive respectfully requests that this court affirm summary judgment in favor of Progressive. Jennifer Dimmitt never presented evidence in opposition to Progressive's motion for summary judgment. The snowstorm causing damage to the manufactured home occurred on January 1, 1999. She admitted that she made monthly payments to Wayne Decker from April 30, 1997 to May 30, 1998 but that she did not receive any title to the manufactured home until April 1999 and the title shows the owners to be Ralph and Shirley Schwartz. She also admits that she never applied for title to the Department of Revenue. Under these facts and the statutes and cases interpreting the purchase and titling of motor vehicles and manufactured homes, Jennifer Dimmitt obtained no ownership or insurable interest in the manufactured home and she therefore cannot recover against Progressive under any theory for damage to the manufactured home or her personal property or for claimed additional living expenses. In accordance with Missouri's titling requirements and penalties and judicial precedent, summary judgment is appropriate in favor of Progressive.

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APPENDIX

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CERTIFICATE OF SERVICE AND COMPLIANCE

STATE OF MISSOURI)
)SS.
COUNTY OF BOONE)

SUSAN FORD ROBERTSON, of lawful age, first being duly sworn, states upon her oath that on October 7, 2002 she served two (2) copies of the foregoing RESPONDENT'S SUBSTITUTE BRIEF on Appellant's attorney by depositing the same in the United States mail, first class postage prepaid, at Columbia, Missouri in an envelope addressed to: Mr. H. Ralph Gaw, GAW & TEEPLE, P.C., P.O. Box 240, Tipton, Missouri 65081. She also certifies that this brief complies with Rule 84.06(b) and contains 8, 010 words excluding the title page, appendix, certificate of service and compliance and signature and that the brief contains words in 13-point Times New Roman and that a virus-free disk, scanned by Norton Anti-virus, has also been served on counsel and on the court.

_____
SUSAN FORD ROBERTSON, Attorney

Subscribed and sworn to before me this 7th day of October, 2002 here in my office in Columbia, Missouri.

_____

NOTARY PUBLIC

(seal)
My commission expires:_____

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SUPREME COURT No. 84638

IN THE MISSOURI SUPREME COURT

JENNIFER DIMMITT,

Appellant,

v.

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Respondent.

Appeal from the Circuit Court of Morgan County, Missouri
Associate Judge Division, The Honorable Peggy Richardson

SUBSTITUTE BRIEF OF RESPONDENT PROGRESSIVE CASUALTY INSURANCE COMPANY

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