STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellee,

v

LEROY S. HOUGHTALING,

Defendant/Counter-Plaintiff/Cross-Plaintiff/Cross-Defendant,

and

AUTO OWNERS INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Cross-Defendant/Cross-Plaintiff-Appellant.

UNPUBLISHED
January 31, 2006

No. 256815
Bay Circuit Court
LC No. 03-003315-NF

Before: Fitzgerald, PJ. and O'Connell and Kelly, JJ.

PER CURIAM.

This case involves a dispute between two no-fault insurers about responsibility for payment of defendant Leroy Houghtaling's personal injury protection (PIP) benefits. Defendant Auto-Owners Insurance Company (Auto-Owners) appeals as of right, challenging the trial court's ruling that Houghtaling was an employee of Sunrise Motors (Sunrise) at the time of his accident. Following this ruling, the trial court entered a judgment disposing of the final claims between Auto-Owners and plaintiff State Farm Mutual Automobile Insurance Company (State Farm). We reverse and remand for entry of judgment in favor of Auto-Owners.

I. Facts

Houghtaling was in a car accident while driving a car owned by Sunrise and insured by Auto-Owners. Houghtaling "chased cars" for Sunrise, which is a used car dealership. "Chasing cars," in the used car industry, means hiring two or more people to drive to an auction where at least one car has been purchased and driving the car and the purchased car back to the dealers. Houghtaling stated that he had chased cars for five different companies. He typically accepted work from the company which called first. Houghtaling claimed that he did not run a business

and never advertised. Houghtaling said that he would meet salespersons at auctions, who would ask him for his name and number. Houghtaling claimed to be Sunrise's "number one call," after the original number one driver became ill, stating that he would choose the number of people necessary to travel with him to pick up the vehicles. However, he had the option to turn down Sunrise's requests to drive and did so periodically.

The only requirement Sunrise has for those who chase cars for them is that they have a driver's license. The drivers are allowed to use their own vehicles, but usually they drive cars provided by Sunrise. Houghton typically used Sunrise's vehicles to chase cars, but used his vehicle when he first started working for the dealership. The drivers do not have set hours, and Houghtaling was able to pick up vehicles at any time because the auctioning sites are always open. However, there is an understanding that drivers are to pick up cars within a reasonable time. The drivers are paid a flat fee depending on the trip's distance, and all drivers are paid the same fee. Sunrise writes a check to its drivers at the end of each week. Sunrise did not withhold any taxes from Houghtaling's checks, did not provide him with benefits, and gave him a 1099 tax form at the end of each year.

II. Analysis

The issue on appeal is whether the trial court erred in ruling that Houghtaling was an employee of Sunrise for purposes of MCL 500.3114(3), part of the no-fault act, MCL 500.3101 *et seq*. "This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition." *Greene v A P Products, Ltd*, 264 Mich App 391, 397; 691 NW2d 38 (2004). "Generally, one must look to his own no-fault insurer for benefits unless a statutory exception applies." *Citizens Ins Co of America v Auto Club Ins Ass'n*, 179 Mich App 461, 464; 446 NW2d 482 (1989); MCL 500.3114(1). However, "an employee, . . . who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits . . . from the insurer of the furnished vehicle." MCL 500.3114(3). Therefore, if Houghtaling was Sunrise's employee at the time of the accident, Auto-Owners is responsible for payment of PIP benefits. This Court has applied the economic reality test in determining whether the person at issue was an employee in this context. See *Citizens, supra* at 464-465; *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983).

In applying the economic reality test, the following four factors are considered: "([1]) control of the worker's duties, ([2]) payment of wages, ([3]) right to hire, fire and discipline, and ([4]) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Parham, supra* at 623. Auto-Owners contends that Houghtaling was a mere independent contractor of Sunrise. An independent contractor does work for an employer to accomplish a task without being subject to the employer's right of control. *Parham, supra* at 622-623.

After considering the circumstances as a whole, we conclude that the trial court erred in concluding that Houghtaling was Sunrise's employee. While Houghtaling characterized himself as Sunrise's "number one call," he had the option to turn down Sunrise's requests to drive and did so periodically. Moreover, Sunrise allowed Houghtaling to "chase cars" for other dealers. He did not have set hours and was able to pick up vehicles essentially at any reasonable time after receiving a call from Sunrise. These facts indicate a lack of control. Further, the drivers

were paid a flat fee depending on the trip's distance and all drivers were paid the same fee. Sunrise did not withhold any taxes from Houghtaling's checks, did not provide him with benefits, and gave him a 1099 tax form at the end of each year instead of a W-2 tax form. These facts are indicative of the lack of an employer-employee relationship.

State Farm argues that, in accordance with the legislative intent of the section, when an accident occurs in a commercial setting, the business no-fault provider should bear the burden of providing benefits. However, by its clear and unambiguous language, *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005), MCL 500.3114(3) only applies, in pertinent part, to employees. Therefore, we reject State Farm's argument because Houghtaling was not an employee for purposes of the statute.

State Farm finally argues that, even if Houghtaling was an independent contractor, he was still an employee under § 3114(3). State Farm reasons that *Celina Mut Ins Co v Lakes States Ins Co*, 452 Mich 84; 549 NW2d 834 (1996), which did not apply the economic reality test, supports this conclusion. However, in *Celina*, the injured party was the self-employed owner of a sole proprietorship. *Id.* at 87. Under those circumstances, it was unnecessary to apply the economic reality test, which is utilized for determining the existence of an employment *relationship*. In this case, the key question was whether Houghtaling had an employment relationship with Sunrise. Therefore, it was appropriate to apply the economic reality test.

We reverse the trial court's ruling that Houghtaling was an employee of Sunrise and remand for entry of judgment in favor of Auto-Owners. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly