

STATE OF MICHIGAN
COURT OF APPEALS

LEE VANUEL WHITE,
Plaintiff,

UNPUBLISHED
February 6, 2007

v

KIMANI PASHA,
Defendant,

No. 272101
Wayne Circuit Court
LC No. 04-407008-NI

and

EMPIRE FIRE & MARINE INSURANCE
COMPANY,
Defendant-Appellant,

and

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee,

and

BRENDA FRYE and EARLINE CUMMINGS,
Defendants.

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant Empire Fire & Marine Insurance Company (Empire) appeals as of right following the dismissal of plaintiff's last claim against defendants. Empire challenges a circuit court order that granted defendant Allstate Insurance Company's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(10) when “there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law.” This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The trial court did not err in concluding that plaintiff was an employee of Empire’s insured, Gray’s Transportation. The economic reality test is used to determine whether an individual’s status is that of an independent contractor or employee for purposes of MCL 500.3114(3). *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983). “[F]actors to be considered include: (a) control of the worker’s duties, (b) payment of wages, (c) right to hire, fire and discipline, and (d) the performance of the duties as an integral part of the employer’s business towards the accomplishment of a common goal.” *Id.*

Gray’s Transportation exercised extensive control over plaintiff’s duties. On a daily basis, it provided plaintiff with a list of patients to be picked up and transported to medical appointments. The list indicated the order in which the clients were to be chauffeured and the times of their appointments. Gray’s Transportation assigned plaintiff a particular van to use and paid for the fuel. At the end of his shift, plaintiff parked the van in an assigned area and left the keys in the vehicle. Gray’s Transportation paid plaintiff’s wages, which were determined by the number of patients he transported. There is no indication that Gray’s Transportation issued either a W-2 form or a 1099 form for tax purposes. Gray’s Transportation retained the right to hire and fire its drivers, although there was no “formal hiring and firing process.” The performance of the duties of the drivers were essential to Gray’s Transportation’s business, which is transporting clients from their homes to medical appointments and back.¹ The economic reality test supports the trial court’s determination that plaintiff was Gray’s Transportation’s employee.

Empire argues that the trial court erred in determining that plaintiff was not a resident relative of his parents and, accordingly, was not entitled to no-fault benefits under his parents’ policy with defendant Allstate.

In light of our resolution of the previous issue, it is unnecessary to address this issue. Because plaintiff was injured while driving a vehicle furnished by his employer, the employer’s no-fault insurer (Empire) has priority over Allstate, the no-fault insurer of an uninvolved vehicle. See MCL 500.3114. Further, even assuming that plaintiff were a resident of his parents’ household, making Allstate liable under the terms of its policy and § 3114(1), Empire is still primarily liable because § 3114(1) is subordinate to § 3114(3). Only insurers in the same order of priority have a right to partial recoupment from one another. MCL 500.3115(2). Therefore, whether plaintiff was a resident relative for purposes of the Allstate policy has no bearing on Empire’s obligation to provide benefits unless plaintiff were not Gray’s Transportation’s employee. Because the trial court correctly determined that plaintiff was Gray’s

¹ The parties do not address MCL 500.3114(2), which applies “where a person suffers accidental bodily injury while an operator . . . of a motor vehicle operated in the business of transporting passengers”

Transportation's employee, we decline to further examine Empire's arguments concerning plaintiff's status as a resident relative of Allstate's insured.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio