STATE OF MICHIGAN

COURT OF APPEALS

DAIRYLAND INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED April 23, 2013
v	No. 308452 Macomb Circuit Court
AMERISURE INSURANCE COMPANY, Defendant-Appellant.	LC No. 2011-002706-NF

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals of right from an order which granted summary disposition for plaintiff pursuant to MCR 2.116(C)(10) (no genuine issue of material fact), and ordered defendant to reimburse plaintiff for no-fault insurance benefits paid to the claimant. We reverse and remand for proceedings consistent with this opinion.

Earnest Griffin filed a claim with plaintiff, his personal automobile insurance carrier, for no-fault insurance benefits for injuries arising out of an accident that occurred while he was an occupant of a vehicle registered to his employer, Real-Trans, LLC, and insured by defendant. Plaintiff paid the no-fault benefits to Griffin, but filed a claim against defendant in circuit court seeking reimbursement for the benefits paid. Plaintiff asserted that because Griffin was an employee of Real-Trans and occupied a vehicle registered by Real-Trans at the time of the accident, defendant had priority to pay the benefits as the insurer of the furnished vehicle pursuant to MCL 500.3114(3). Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact), arguing that Griffin was an independent contractor and not an employee of Real-Trans for purposes of the no-fault act. Thus, because an employment relationship did not exist, defendant argued that it did not have priority to pay the benefits, so Griffin must seek no-fault benefits from plaintiff, his personal insurer. Plaintiff filed a counter motion for summary disposition, arguing that Griffin was an employee at the time of accident. The trial court applied the economic reality test to determine that Griffin was an employee for purposes of the no-fault act, and consequently, it denied defendant's motion and granted plaintiff's counter motion pursuant to MCR 2.116(C)(10). The trial court also ordered defendant to reimburse plaintiff for the no-fault benefits paid to Griffin, as well as pay any future no-fault benefits arising from the accident. Defendant appeals from that order, arguing that summary disposition should have been granted

for defendant because the facts establish that Griffin was an independent contractor at the time of the accident. We disagree.

We review de novo a trial court's decision regarding a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Although defendant brought its motion pursuant to MCR 2.116(C)(8) and (C)(10), the trial court properly construed the motion as having been brought pursuant to MCR 2.116(C)(10) only, because the parties relied on material outside the pleadings. See *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). When reviewing a motion pursuant to MCR 2.116(C)(10), summary disposition may be granted if the evidence establishes that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). All documentary evidence supporting a motion under (C)(10) must be viewed in a light most favorable to the nonmoving party. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). Further, this Court can only review the record in the same manner as the trial court, and review is limited to the evidence presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

MCL 500.3114 provides, in relevant part,

> (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy . . . if the injury arises from a motor vehicle accident.
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> * * *
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> (3) 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 to which the employee is entitled from the insurer of the furnished vehicle.
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> (4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied.

Accordingly, if an employee is injured while driving an employer-provided vehicle, the insurer of that vehicle has priority to pay the no-fault benefits to that employee. Although "employee" is not defined in the statute, we have noted that an independent contractor is not considered an employee for purposes of the no-fault act. See *Citizens Ins Co of America v Auto Club Ins Ass'n*, 179 Mich App 461, 465; 446 NW2d 482 (1989), *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983). "An independent contractor is one who, carrying on an independent business, contracts to do work without being subject to the right

of control by the employer as to the method of work but only as to the result to be accomplished." *Parham*, 124 Mich App at 622-623. To be an employee, there must be an actual employment relationship. See *id.* at 623-624. We apply the economic reality test to determine whether an employment relationship exists under the no-fault act. *Id.* at 624. "The economic-reality test considers four basic factors: (1) control of a worker's duties, (2) payment of wages, (3) right to hire, fire, and discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal." *Mantei v Mich Pub Sch Employees Retirement Sys*, 256 Mich App 64, 78-79; 663 NW2d 486 (2003). However, this list of factors is non-exclusive. *Id.* Other relevant factors to consider include: (1) whether the individual furnishes his own equipment, (2) whether the individual holds himself out to the public for hire, and (3) whether independent contractors customarily perform the undertaking. See *McKissic v Bodine*, 42 Mich App 203, 208-209; 201 NW2d 333 (1972). "Weight should be given to those factors that most favorably effectuate the objectives of the statute in question." *Mantei*, 256 Mich App at 79. For example, we have noted that, in commercial situations, it was the Legislature's intent to place the burden of providing no-fault benefits on the insurers of those motor vehicles, such as those vehicles owned by or registered to an employer. *State Farm Mut Auto Ins Co v Sentry Ins*, 91 Mich App 109, 114; 283 NW2d 661 (1979). Further, our Supreme Court has stated that the cases interpreting § 3114(3) "have given it a broad reading designed to allocate the cost of injuries resulting from use of business vehicles to the business involved through the premiums it pays for insurance." *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996).

Although it appears that the trial court correctly gave weight to those factors that place the burden on the commercial insurers, *Mantei*, 256 Mich App at 79; *State Farm Mut Auto Ins Co*, 91 Mich App at 114, there were still many inconsistencies and contradictions in the evidence, which create a genuine issue of material fact regarding Griffin's employment status that should be decided by a jury. Specifically, there are factors showing both that Griffin was an employee and was an independent contractor of Real-Trans. For example, Fatmir Shehu, the owner of Real-Trans, had the right to hire and fire Griffin, he paid his wages, and he exercised control over the time and manner in which his duties were performed. However, according to Griffin, he did not have a supervisor to answer to, and Shehu stated that he did not have the right to discipline Griffin if he decided to take a few weeks off. Shehu also stated that Griffin decided which route to take to reach his destination, and could refuse to take loads without consequence. Further, Griffin testified that he did not have to pay for fuel or truck repairs, and Real-Trans provided whatever he needed for the trip. He specifically stated that he used the company card for almost all expenses. However, Shehu stated that Real-Trans was not responsible for truck repairs, and all fuel costs, although initially put on the company card, were deducted from Griffin's pay. Moreover, Griffin stated that he worked exclusively for Real-Trans, and there is no evidence that he held himself out to the public for hire. Yet, Griffin also stated that he worked for another company in between runs for Real-Trans. In addition, the work performed by Griffin, delivery of cargo, was an integral part of Real-Trans' business. Real-Trans also provided Griffin with the truck to drive, which bore Real-Trans' logo and information. On the other hand, although it is not determinative, Griffin and Shehu classified their relationship as an independent contractor relationship. See *Buckley v Prof Plaza Clinic Corp*, 281 Mich App 224, 234; 761 NW2d 284 (2008). Griffin also received a 1099 IRS form, and Shehu stated that he did not withhold taxes or social security from the drivers' paychecks. Thus, the record reveals that

there are facts which could support both a finding that Griffin was an employee and a finding that Griffin was an independent contractor of Real-Trans.

Therefore, we find that questions of fact remain with regard to Griffin's employment status and that summary disposition should not have been granted to either plaintiff or defendant. Accordingly, we find that the trial court erred in granting summary disposition for plaintiff and we reverse and remand to the trial court for the issue to be decided by a jury.

Reversed and remanded.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood