S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DONNA LAMPMAN, Personal Representative of the Estate of LEO J. BANKS,

Plaintiff,

v

DONALD WORKMAN, NATIONAL FLEET LIQUIDATORS OF MICHIGAN, INC., and DALE BAKER OLDSMOBILE, INC.,

Defendants.

UNPUBLISHED
March 22, 2002

No. 225743
LC No. 96-02949-NI

GLEN HARTGER and SHARON HARTGER,

Plaintiffs,

v

DONALD WORKMAN, NATIONAL FLEET LIQUIDATORS OF MICHIGAN, INC., and DALE BAKER OLDSMOBILE, INC.,

Defendants.

No. 225743
LC No. 96-03227-NI

GLEN HARTGER,

Plaintiff,

v

STATE FARM INSURANCE COMPANIES,

Defendant-Appellee/Cross-Appellant,

and

MOTORS INSURANCE CORPORATION,

Defendant-Appellant.

No. 225743
LC No. 96-03236-CK

DIANA COLE,,

Plaintiff,

v

DONALD WORKMAN, NATIONAL FLEET LIQUIDATORS OF MICHIGAN, INC., and DALE BAKER OLDSMOBILE, INC.,,

Defendants.

No. 225743
LC No. 96-03983-NI

EDWIN LAUER and FRANCES LAUER,

Plaintiffs,

v

DONALD WORKMAN, NATIONAL FLEET LIQUIDATORS OF MICHIGAN, INC., and DALE BAKER OLDSMOBILE, INC.,

Defendants.

No. 225743
LC No. 96-03514-NI

DONALD WORKMAN,

Plaintiff-Appellee/Cross-Appellant,

v

CITIZENS INSURANCE COMPANY,

Defendant/Cross-Appellee.

No. 225743
LC Nos. 96-06871-NZ
96-04401-NZ

DONALD WORKMAN,

Plaintiff-Appellee/Cross-Appellant,

v

MOTORS INSURANCE CORPORATION,

Defendant-Appellant,

No. 225743
LC No. 96-06871-NZ

and

CITIZENS INSURANCE COMPANY

Defendant-Appellee/Cross-Appellee,

and

MAXCIS, INC.,

Defendant-Appellee.

MOTORS INSURANCE CORPORATION,

Cross-Plaintiff/Third-Party
Plaintiff-Appellant,

v

No. 225743
LC No. 96-02949-NI

MAXCIS, INC. and CITIZENS INSURANCE COMPANY,

Cross-Defendants/Third-Party
Defendants-Appellees,

and

STATE FARM INSURANCE COMPANIES; AAA; FARMERS INSURANCE COMPANY; AUTO-OWNERS INSURANCE COMPANY; KENNETH B. FIELDS; ROBERT S. RUPE, EDWIN J. LAUER; DONNA LAMPMAN, Personal Representative of the Estate of LEO J. BANKS, Deceased; BARBARA ANN JENSEN; MICHAEL CHAWLEK; JOHN FOWLER,

Third-Party Defendants.

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant National Fleet Liquidators of Michigan, Inc. ("NFL") would buy motor vehicles at an auction and resell them to retailers at tent sales; because it did not have a showroom location, NFL used "drivers" to move the vehicles to the sale location, and a van

would then transport the drivers back home. Several of these drivers, who were injured or killed when the van in which they were riding was involved in an accident, brought suit. Their cases were consolidated. The issue before us now is which of several insurers are liable for benefits due or already paid the injured persons.

In these consolidated civil actions, Motors Insurance Corporation ("MIC") appeals by right from the February 7, 2000 order that determined that MIC was responsible to pay Donald Workman's no-fault benefits, the May 1, 1998 order granting summary disposition to Maxcis, Inc. ("Maxcis"), and from a separate May 1, 1998 order granting summary disposition to State Farm Insurance Companies ("State Farm"), Auto-Owners Insurance Company ("Auto-Owners"), and AAA. State Farm cross-appeals by right from the May 1, 1998 order that adjudged Glen Hartger to be an independent contractor. Donald Workman also cross-appeals. We affirm in part, reverse in part and remand.

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition pursuant to MCR 2.116(C)(8) is appropriate where the opposing party has failed to state a claim on which relief can be granted. A motion under this rule tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

A trial court properly grants a motion for summary disposition pursuant to MCR 2.116(C)(10) where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing such a motion, all affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties is viewed "in the light most favorable to the party opposing the motion." *Id*.

The first issue is whether the van occupants were employees or independent contractors. The court made its determination regarding whether the van occupants were NFL's employees or independent contractors according to MCL 418.161(1)(m) [now MCL 418.161(1)(n)] and the economic realities test, which represented the controlling analysis at the time. *Amerisure Ins Cos v Time Auto Transportation, Inc*, 196 Mich App 569, 573; 493 NW2d 482 (1992). Although the Bureau of Workers' Disability Compensation has exclusive jurisdiction to decide whether an injury occurred in the course of an employee's employment, a trial court has jurisdiction to decide the fundamental issue of whether an employer-employee relationship existed. *Id*. at 572.

Our Supreme Court held in *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 572; 592 NW2d 360 (1999), that the economic realities test was superseded by the Legislature's 1985 amendment to MCL 418.161. The *Hoste* Court stated:

> The common-law based approach was appropriate until the Legislature . . . chose to speak about who was an independent contractor by amending § 161, in 1985, through the addition of subsection d, to define more completely the term "employee." The new language, in superseding the old economic realities test, incorporated some, but not all the factors of the old test. Accordingly, while the common-law economic realities test cannot be used to supersede the statute, i.e.,

> by adding factors not in the legislative formulation of the economic realities test, those factors in the legislative test can be construed by reference to the case law development of those same factors. [*Id*.; citation omitted.]

The *Hoste* Court explained that both subsections 161(1)(b) and (d) [currently §§ 161(1)(l) and (n)] must be satisfied in order for a person to qualify as an "employee." *Id*. at 573. Under the pertinent language of § 161(1)(1), an "employee" is a "person in the service of another, under any contract of hire, express or implied . . . ."

The first inquiry, then, is whether the person is under a "contract of hire." *Hoste, supra;* MCL 418.161(1)(l). The Court in *Hoste*, *supra* at 574, defined "contract" as "an intent by two parties to suffer a detriment to receive a benefit, and . . . an agreement to exchange those detriments and benefits." Because the van occupants agreed to serve as drivers in exchange for hourly wages paid by NFL, we find that a contract existed between the van occupants and NFL.

The contract must also be "of hire," where the benefit received by the individual is payment intended as wages, i.e., "real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer." *Id.* at 575-576. Workman was paid $6 per hour, and the other van occupants were paid $5 per hour. Also, NFL issued each driver a 1099, the federal tax form for reporting non-employee compensation. In *Hoste, supra* at 577-578, the Court held that the plaintiff, who was not issued a 1099 or a paycheck, was a gratuitous worker and not one "of hire."

Workman and Maxcis argue that the van occupants were not "of hire" because the income was only supplemental. However, with regard to the payment of wages, *Hoste* did not require that the wages be one's primary source of income. *Hoste* merely states that the wages be a "regular income source." *Id*. at 577. Here, Workman and the other drivers could and did drive for NFL "regularly." Therefore, we find that the van occupants were "of hire" and thus the definition of "employee" in subsection 161(1)(l) is met.

However, the drivers must also satisfy the requirements of § 161(1)(n), which provides that an "employee" is

> [e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act. [MCL 418.161(1)(n).]

All three conditions must be satisfied in order to find that a person is an employee, i.e., if a person fulfills only one of the three conditions, then the person is an independent contractor. *Blanzy v Brigadier Gen'l Contractors, Inc*, 240 Mich App 632, 641; 613 NW2d 391 (2000).

The drivers would not be employees if the driver maintained a separate business in relation to the service. The van occupants all testified similarly that they worked as individuals, not as businesses, were not incorporated, did not have a d/b/a, nor did any of them formally

advertise their driving services. Regardless, this Court finds that the van occupants did maintain separate businesses because each was self-employed.

In *Blanzy, supra* at 643, this Court held that the plaintiff maintained a separate business, in part, because he reported business income and filed a Schedule C, Profit or Loss from a Business (Sole Proprietorship). In *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 727; 609 NW2d 859 (2000), the Court also held that the plaintiff maintained his own business because the defendant did not withhold any taxes from the plaintiff's check, the defendant issued the plaintiff a 1099, and the plaintiff furnished his own supplies and equipment.

In the present case, NFL considered all of the drivers as independent contractors, issued them 1099s, and did not withhold any taxes from their checks. The drivers had no set schedule as they could choose which days they worked, and the drivers provided all the necessary equipment for their positions as "drivers," namely, drivers' licenses and themselves. Therefore, we hold that the drivers are not "employees" as defined by MCL 418.161(1)(n). Because fulfillment of only one of the conditions of MCL 418.161(1)(n) necessitates that the person be classified as an independent contractor, *Blanzy, supra* at 641, we need not address the other two conditions of MCL 418.161(1)(n).

We note that MIC also asserts that the drivers did not maintain a separate business because of the high level of control NFL had over the drivers. However, we conclude that the level of control NFL exhibited was minimal because most of NFL's instructions were related to safety or payment procedures.

Additionally, Maxcis and Workman argue that regardless of the conditions delineated in § 161(1)(n), the drivers were not employees under § 161(1)(n) because NFL was not an employer. At the time of the accident in this case, MCL 418.151(1)(b)[1] defined "employer" as

> [e]very person, firm, private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written . . . .

There is no dispute that NFL was a corporation, and we have concluded that the drivers were under contracts of hire. Thus, NFL was an "employer." Therefore, we agree with the trial court's May 1, 1998 and February 7, 1998 orders to the extent that the van occupants were determined to be independent contractors.

The second issue is whether NFL was in the business of transporting passengers within the meaning of MCL 500.3114(2). In general, a party seeking first-party no-fault benefits must look to his own insurance carrier. MCL 500.3114(1). However, certain exceptions exist to this general rule. MCL 500.3114(2) provides, in part:

> A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the

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[1] MCL 418.151(1)(b) was amended by 1995 PA 206, § 1, effective November 29, 1995. We note that the amended language would not change our analysis in the instant case.

> personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle.

Under this exception, the motor vehicle's insurer is responsible for payment of no-fault benefits.

The court determined that because Lauer, Cole, and Hartger were passengers and Workman was an operator of "a motor vehicle operated in the business of transporting passengers," MIC was responsible for paying the no-fault benefits. The court's decision was based on its determination that NFL's situation was analogous to canoe liveries. MCL 500.3114(2) further provides:

> This subsection shall not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance under any other policy:
>
> * * *
>
> (f) A bus operated by a canoe or other watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point.

The court reasoned that by specifically enumerating specific business (i.e., canoe liveries, etc.) as exceptions to § 3114(2), the Legislature must have intended similar, but unenumerated, businesses to be included in § 3114(2), i.e., those businesses would be considered to be "in the business of transporting passengers."

However, we believe the court's reasoning is flawed. "In the business of" connotes for-profit. MCL 500.3114(2) provides for six specific exceptions, (a)-(f). These subsections involve both for-profit and non-profit organizations. Specifically, § 3114(2)(a) addresses school buses operated by the department of education, § 3114(2)(d) addresses buses operated by or to non-profit organizations, and §3114(2)(e) addresses taxicabs. Therefore, we conclude that simply because the Legislature excepted a certain type of organization from the general rule of § 3114(2) does not mean that a similar, unexcepted organization is necessarily considered "in the business of transporting passengers."

Only two cases have interpreted the phrase "in the business of transporting passengers" as it is used in MCL 500.3114(2). First, a college student who was paid $25 to drive two fellow students home on a holiday break was held not to be in the business of transporting passengers. *Thomas v Tomczyk*, 142 Mich App 237, 239, 241-242; 369 NW2d 219 (1985). Second, a shuttle service that operated at an airport was deemed to be in the business of transporting passengers. *USAA Ins Co v Houston Gen'l Ins Co*, 220 Mich App 386, 393; 559 NW2d 98 (1996).

"Business" is defined as "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." Black's Law Dictionary (7th ed, 1999), p 192. Dictionaries may be consulted to discern the meaning of statutorily undefined terms. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

NFL's primary business (i.e., that from which it derived profit) was the buying and selling of cars. NFL's transportation of the drivers was merely incidental to its overall business. Although utilizing drivers may have been integral to NFL's chosen method of operation, NFL

could have delivered the cars to their destination in another manner. Therefore, we conclude that NFL was not in the business of transporting passengers within the meaning of MCL 500.3114(2); therefore, the court's May 1, 1998 order granting summary disposition to State Farm, Auto-Owners, and AAA is reversed.

On cross-appeal, Workman argues that if this Court determines that NFL was not in the business of transporting passengers within the meaning of MCL 500.3114(2), then Citizens is liable for payment of his no-fault benefits under MCL 500.3114(1). We agree. There are only two other exceptions, MCL 500.3114(3) and MCL 500.3114(5), that would hold MIC instead of Citizens liable, and neither is applicable. Therefore, the court's February 7, 1998 order is reversed to the extent that it held that Citizens was not liable, and MIC was, for the payment of Workman's no-fault benefits.

The third issue is whether Workman's redemption of his potential workers' compensation benefits operated as a bar to recovery of no-fault benefits. In denying MIC's motion for summary disposition, the court held that it did not have jurisdiction to award money damages against Maxcis. Although the Bureau of Workers' Disability Compensation indeed has exclusive jurisdiction to award workers' compensation, see MCL 418.841; *Jones v General Motors Corp*, 136 Mich App 251, 254; 355 NW2d 646 (1984); *Bush v Detroit*, 129 Mich App 658, 662; 341 NW2d 859 (1983), MIC was only requesting reimbursement from Maxcis, not a determination that any of the van occupants were entitled to workers' compensation. Therefore, we hold that the court did have jurisdiction to decide that issue.

In September 1998, Workman redeemed all possible workers' compensation claims for $21,372. MIC argues that as a result of the redemption, Workman was not entitled to any no-fault benefits. The no-fault act provides for a setoff of like benefits. MCL 500.3109(1). Our Supreme Court has held that this statute applies to cases involving workers' compensation and no-fault benefits. *Mathis v Interstate Motor Freight System*, 408 Mich 164, 187; 289 NW2d 708 (1980). Regarding redemptions, the Supreme Court, in *Gregory v Transamerica Ins Co*, 425 Mich 625, 628; 391 NW2d 312 (1986), held that a redemption agreement "precludes the plaintiff from recovering from the no-fault insurer any amount *for which the workers' compensation carrier was primarily liable*." [Emphasis added.] The purpose was to eliminate double recovery. *Id*. at 635.

Because this Court has concluded that Workman was an independent contractor, not an employee, there was no amount for which the workers' compensation carrier was primarily liable. Furthermore, Workman did not recover twice because of his redemption: he assigned his rights to any no-fault benefits to the Michigan Auto Dealers Self-Insured Fund.

The final issue that this Court addresses is whether MIC is entitled to reimbursement from Workman or Maxcis for any benefits that MIC argues it mistakenly paid to Workman. MIC contends that it is entitled to reimbursement from Workman and Maxcis based on common-law and equitable principles. We disagree. First, because this Court concluded that MIC is not entitled to a setoff because Workman is not an employee, and thus there is no amount for which the workers' compensation carrier is liable, MIC is not entitled to reimbursement. Second, there was no duplication of benefits because Workman assigned his rights to any no-fault benefits to the Michigan Auto Dealers Self-Insured Fund. Third, in any event, Maxcis would not be liable

for reimbursement because it is only the third-party administrator for the Michigan Auto Dealers Self-Insured Fund, NFL's workers' compensation insurance carrier.

Therefore, we affirm the court's May 1, 1998 order that granted Maxcis summary disposition and reverse the court's May 1, 1998 order that granted summary disposition to State Farm, Auto Owners, and AAA. We also affirm in part and reverse in part the court's February 7, 2000 order and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

We affirm in part, reverse in part and remand.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens