STATE OF MICHIGAN

COURT OF APPEALS

GINGER SCHILLER,

Plaintiff,

v

HOME-OWNERS INSURANCE CO., a/k/a AUTO-OWNERS INSURANCE CO.,

Defendant-Appellant,

and

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 24, 2013

No. 310085
Wayne Circuit Court
LC No. 11-002957-NF

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In this no-fault action for personal protection insurance (PIP) benefits, defendant-appellant Home-Owners Insurance Company, a/k/a Auto-Owners Insurance Company (Home-Owners), appeals by leave granted the trial court's order granting summary disposition in favor of defendant-appellee Allstate Insurance Company (Allstate) and denying Home-Owners' motion for summary disposition. The trial court ruled that Home-Owners is highest in priority in regard to the obligation to pay no-fault benefits to plaintiff. We affirm.

In March 2010, plaintiff's flight was redirected to Detroit due to adverse weather conditions. The airline arranged for her to stay at the Howard Johnson hotel in the city of Romulus, Michigan. The following morning, she boarded a courtesy van at the Howard Johnson hotel; the van was provided by the Comfort Inn, which is also in Romulus and near the airport. Upon exiting the van at the airport, plaintiff lost her balance and fell to the ground, sustaining neck and back injuries, which resulted in surgery and rehabilitation. Home-Owners issued an insurance policy to Future Lodging-Airport, Inc. (FLA), and Airport Hospitality Management, Inc. (AHM), which covered the courtesy van. FLA owns and operates the Comfort Inn and AHM manages the Comfort Inn. Plaintiff had no-fault insurance through a personal Allstate policy.

Plaintiff initially contacted Allstate regarding insurance coverage for the injuries she sustained during her fall; however, Allstate advised plaintiff to seek benefits from the insurance company for the courtesy van. Home-Owners began to pay some of plaintiff's claims, but disputes arose over the payments and plaintiff filed a complaint against Home-Owners and Allstate seeking outstanding benefits. Home-Owners moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that Allstate had higher priority under Michigan law. Home-Owners argued that it was not required to cover plaintiff's injuries because the vehicle at issue was not owned or operated by a business that was primarily "in the business of transporting passengers." MCL 500.3114(2). Home-Owners maintained that the businesses that owned and operated the courtesy van were in the "hotel/motel business," and the operation of the courtesy van was merely incidental to their primary business of operating a hotel. Allstate also moved for summary disposition pursuant to MCR 2.116(C)(10). Allstate claimed that the primary use of the courtesy van was transportation of passengers and that the transportation of passengers was a significant part of the Comfort Inn's business because the Comfort Inn is located near an international airport. The trial court granted summary disposition in Allstate's favor, stating,

> If I were to accept homeowner's [sic] position, then it would only be Metro Cars or, you know, X, Y, Z limousine service or whatever, would qualify in terms of being in the business and only in the business of transporting passengers. That's not what the law provides. . . . That's the first prong.
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> The second is whether or not it was small or incidental portion of the business or was it a substantial, one might even say necessary, part of one's business. The van met that prong as well. You can't run or – it would make it very difficult to run a hotel practically anywhere, I know that counsel distinguished at least in part, from a hotel near an airport versus a hotel that might not be near an airport, I don't know that it makes a substantial difference, but the fact of the matter is that the transportation of passengers, customers, is a significant part not just incidental or small . . . .

The only issue raised on appeal is whether the trial court was correct in finding that Home-Owners was the priority insurer under the no-fault act and granting summary disposition in Allstate's favor. We review de novo a ruling on a motion for summary disposition, as well as issues of statutory interpretation. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature." *Karpinsky v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539,

542-543; 606 NW2d 45 (1999). In *Douglas v Allstate Ins Co*, 492 Mich 241, 255-256; 821 NW2d 472 (2012), our Supreme Court stated:

> This case involves the interpretation of the no-fault act. . . . When interpreting a statute, we must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" If the statutory language is unambiguous, "the Legislature's intent is clear and judicial construction is neither necessary nor permitted." [Citations omitted.]

MCL 500.3114(1) provides:

> 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, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident.

"Pursuant to this subsection of the no-fault act, 'the general rule is that one looks to a person's own insurer for no-fault benefits unless one of the statutory exceptions, subsections 2, 3, and 5, applies.'" *Frierson v West American Ins Co*, 261 Mich App 732, 735; 683 NW2d 695 (2004) (citation omitted). Relevant here, subsection 2 of MCL 500.3114 provides that "[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 personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle." (Emphasis added.) With respect to the emphasized phrase in MCL 500.3114(2), "[t]he no-fault act does not define this statutory phrase or the operative terms within it[,]" and it "does not have a clear and unambiguous meaning." *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 697; 671 NW2d 89 (2003). The exception in § 3114(2) relates to commercial situations, and it reflects the Legislature's intent to place the burden of providing PIP benefits on the insurers of vehicles used in commercial situations instead of insurers of injured individuals. *Id.* at 698.

In *Thomas v Tomczyk*, 142 Mich App 237; 369 NW2d 219 (1985), two college students were injured in an automobile accident while passengers in a vehicle driven by a third student, who solicited passengers by placing a notice on a "student ride board" and accepted $25 from the passengers for a round trip during a holiday break. The two passengers were covered by their own no-fault policies, so the priority dispute was between those no-fault insurers and the insurer of the vehicle involved in the accident. *Id.* at 239-240. This Court affirmed the trial court's grant of summary disposition in favor of the insurer that covered the vehicle involved in the accident, stating,

> We are not persuaded that the Legislature intended by its enactment of [MCL 500.3114(2)] of the no-fault act to abandon the general rule of coverage where college students pay other college students for the privilege of carpooling home for school holidays. We agree with the trial court that under the particular

facts of these cases, plaintiffs were not passengers of "a motor vehicle operated in the business of transporting passengers." [*Id.* at 241-242.]

In a footnote in the opinion, the *Thomas* panel quoted the decision of the circuit court, which ruled as follows:

> "Okay. The Court then having the power in this case to make findings of fact, will find that this is not any business. And I'll make a specific statement that, it wasn't the primary function of the driver to carry passengers for hire[] . . . , he's a student, as far as I can tell. And it is not the primary purpose of the vehicle to carry passengers for hire[] . . ., it just happened that incidental to coming home, it was convenient to take on passengers, and I don't really blame him for trying to make a little extra money to cover the cost of gas, that's a long ride up the Upper Peninsula." [*Id.* at 240 n 2.]

In *Farmers Ins Exch*, 256 Mich App at 693, two children were injured while passengers in a vehicle operated by their day-care provider as she was transporting them to school. This Court, relying on *Thomas*, observed:

> The instant case is factually distinguishable from *Thomas* to the extent that, unlike the isolated incident of carpooling during which the accident occurred in *Thomas*, the accident in the instant case took place as the day-care provider drove the children to school, which she routinely did three to five times each week. However, the *Thomas* Court appeared to sanction, without explicitly adopting or restating itself, the circuit court's analysis, which concluded that subsection 3114(2) did not apply because the driver's transportation of passengers for hire did not constitute his *primary* function or purpose in operating his vehicle, but that "incidental[ly] to coming home, it was convenient to take on passengers."
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> We agree with this analysis and believe that it accurately encompasses the intent of the Legislature in enacting subsection 3114(2). Thus, we hold that a primary purpose/incidental nature test is to be applied to determine whether at the time of an accident a motor vehicle was operated in the business of transporting passengers pursuant to subsection 3114(2).
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> Applying that test to the instant case, we conclude that the day-care provider's driving of the children to school would not fall within the scope of subsection 3114(2) because the record indicates, and the parties agree, that (1) her driving of the children to school in her vehicle occurred incidentally to the vehicle's primary use as a personal vehicle, and (2) her transportation of the children to and from school constituted an incidental or small part of her day-care business. Furthermore, a conclusion that the day-care provider's incidental driving of the children to school did not constitute the operation of a vehicle in the business of transporting passengers under subsection 3114(2) is consistent with this Court's observations that the Legislature intended subsection 3114(2) to apply in "commercial" situations. [*Id*. at 700-702 (footnotes and citations omitted).]

Here, we first note that it is beyond reasonable argument that the operation of the courtesy van involved a "commercial" situation; it is in no way comparable to the circumstances in *Thomas* and *Farmers Ins Exch*. Under the first prong of the test, the record supports a conclusion that the primary purpose, if not the exclusive purpose, of the courtesy van was to transport passengers to and from the airport. There is no genuine issue of material fact with regard to this issue and the first prong is easily satisfied. With regard to the second prong, the evidence of record demonstrated that FLA and AHM are in the business of operating a hotel near the airport and, as such, the shuttle service is a significant hotel amenity. Specifically, the hotel's website advertises a "Stay and Fly Package," which includes the shuttle service, as a "very convenient alternative to airport parking," and lists a free "airport shuttle" as a hotel amenity. The Comfort Inn is a "commercial" for-profit business and uses its courtesy van to transport passengers to and from the airport as part of its guest services. The business of providing lodging and a shuttle service go hand in hand in drawing patrons to the hotel. We additionally point out that the courtesy van in which plaintiff traveled was clearly intended for use as a shuttle transportation vehicle. Thus, considering the airport's close proximity and the hotel's advertisement of this service for their guests, we find that the shuttle service is a significant part of the Comfort Inn's business and that the second prong is met. Further, we note that Home-Owners did not supply any documentary evidence to the contrary. With respect to a motion under MCR 2.116(C)(10), if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993). Accordingly, we find that there is no genuine issue of material fact that Home-Owners is the priority insurer and that summary disposition was therefore properly granted in favor of Allstate.

Affirmed. Having fully prevailed on appeal, Allstate is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens