STATE OF MICHIGAN

COURT OF APPEALS

TAYIANISHALAI POTTS,

Plaintiff,

v

RANDALL SOLIS, JOHN DOE, NEW CENTURY AUTO SALES, INC d/b/a RIGHTWAY AUTOMOTIVE CREDIT, and OLUMUYIWA AYANLAMI,

Defendants,

and

TRAVELERS INDEMNITY COMPANY,

Defendant/Cross-Defendant-Appellee,

and

STARR INDEMNITY & LIABILITY COMPANY,

Defendant/Cross-Plaintiff-Appellant.

UNPUBLISHED
September 16, 2014

No. 316142
Wayne Circuit Court
LC No. 11-006405-NI

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Starr Indemnity & Liability Company challenges the trial court's order granting summary disposition in favor of Travelers Indemnity Company in this action for personal protection insurance (PIP) benefits under the Michigan no-fault act.[1] We affirm.

This case involves a priority dispute between two no-fault insurance companies. Tayianishalai Potts was injured while traveling in a vehicle insured by Travelers. Starr is Potts's insurer and claims that Travelers is the priority insurer because the vehicle was operated in the business of transporting passengers at the time of the injury.[2]

As background, New Century Auto Sales, Inc. is a used car dealership that employed Randall Solis as a porter. Solis's duties were to clean cars, prepare them for the lot, and transport customers to and from the dealership when necessary. Approximately 75% of the dealership's business is from customers who walk in, while the other 25% is from customers who are prequalified by telephone, picked up, and transported to the dealership. The dealership did not maintain any cars specifically for transporting customers, and when required to transport a customer, Solis would use a car from the lot.

Potts purchased a used car from New Century on or about February 15, 2012. On February 25, 2012, Potts telephoned the dealership to report that the car would not start. Solis was sent to Potts's home where he unsuccessfully attempted to start her car. The vehicle Solis was driving became inoperable so another employee picked up both Potts and Solis and took them to the dealership. Solis then took Potts to work in a dealership car, which was a 2001 Chevrolet Cavalier that Solis had never driven before. While driving Potts to work, Solis hit an icy area and lost control of the vehicle, resulting in Potts's injury. According to Solis, he had never driven anyone to work before and he was later informed that he should not have done so.

The trial court granted summary disposition in favor of Travelers, determining that Starr was in higher priority for payment under the statute.[3] The trial court found that the primary purpose of any vehicle on the lot was to be sold, not transport people, and dealerships are in the business of selling cars rather than transporting customers. The trial court noted that a person could not access the transportation service without being a customer or a potential customer.

On appeal, Starr contends that the trial court erred in granting Travelers's motion for summary disposition because Potts was injured while a passenger of a motor vehicle operated in the business of transporting passengers. We disagree.

> A trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10) is a question of law reviewed de novo. A motion under MCR 2.116(C)(10) tests the factual underpinnings of a claim, and is properly granted as a matter of law where, viewing the evidence in a light most favorable

[1] MCL 500.3101 *et seq*.

[2] See MCL 500.3114(2).

[3] MCL 500.3114(2).

> to the nonmoving party, there remains no genuine issue regarding any material fact. "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."[4]

The interpretation and application of the no-fault act are also questions of law that we review de novo.[5]

As a general rule, "an injured person is required to seek compensation from his own no-fault insurer, regardless of whether that person's insured vehicle is involved in the accident."[6] However, there are exceptions to this general rule.[7] MCL 500.3114(2) provides, in relevant 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 personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle."[8] The Legislature intended "to place the burden of providing no-fault benefits on the insurers of [commercial] motor vehicles, rather than on the insurers of the injured individual."[9]

This Court applies "a primary purpose/incidental nature test . . . 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)."[10] The application of this test involves a two-part analysis: (1) whether the vehicle was transporting passengers in a manner incidental to the vehicle's primary use; and (2) whether the transportation of the passengers was an incidental or small part of the actual business in question.[11]

Under the first prong of the test, the evidence shows that the primary use of the vehicle in this case was to be displayed for sale.[12] Neither the vehicle in question, nor any other vehicle at the dealership, was designated for use in transporting customers. The fact that only approximately 25% of the dealership's business is gained from customers being transported to

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[4] *Shotwell v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW2d ___ (2014); slip op at 3 (citations omitted).

[5] *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 694; 671 NW2d 89 (2003).

[6] *Id*. at 695, citing MCL 500.3114(1).

[7] *Id*. at 696.

[8] There is no dispute that the exceptions to this exception, MCL 500.3114(2)(a)-(f), do not apply in this case.

[9] *Farmers Ins Exch*, 256 Mich App at 698 (citation and quotation marks omitted).

[10] *Id*. at 701.

[11] *Id.* at 701-702.

[12] See *id*. at 701.

the dealership further supports that the transportation use of the vehicle was merely incidental to its primary use of being on display for sale.[13]

Under the second prong of the test, the evidence shows that the use of the vehicle in this case for transportation was an incidental and relatively small part of the dealership's business.[14] Again, only 25% of the dealership's customers required transportation services to the dealership. While there is no percentage requirement for this prong to be met, 25% is a relatively small part of the dealership's total business. The fact that there was no assigned vehicle for transporting customers is also indicative of the minor significance of the transportation service to the primary business. Accordingly, the facts establish that transportation was not an integral part of the dealership's business.[15]

For these reasons, we conclude that MCL 500.3114(2) does not apply in this case and, thus, Starr is primarily liable as the insurer with higher priority. Therefore, the trial court did not err in granting summary disposition in favor of Travelers.

Affirmed. As the prevailing party, Travelers is awarded taxable costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[13] Even if transporting customers to the dealership to purchase vehicles was considered the primary use of the vehicle, the vehicle in question was not being used for this purpose at the time of the accident because Potts was not being transported to or from the dealership to purchase a vehicle.

[14] See *id*. at 701-702.

[15] We note that, while they may be considered persuasive, the unpublished opinions on which Starr relies are not binding on this Court pursuant to MCR 7.215(C)(1). *Niederhouse v Palmerton*, 300 Mich App 625, 636 n 2; 836 NW2d 176 (2013).