# STATE OF MICHIGAN

# COURT OF APPEALS

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DZEMAL DULIC,

Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY and CLARENDON NATIONAL INSURANCE,

Defendants-Appellees,

and

AMERISURE INSURANCE COMPANY,

Defendant-Appellant.

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UNPUBLISHED
February 15, 2007

No. 271275
Macomb Circuit Court
LC No. 2004-004851-NF

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

Kelly, J. *(dissenting).*

I respectfully dissent. I would conclude that the trial court erred in not applying the economic realities test to determine whether defendant Amerisure Insurance Company is liable for payment of personal protection insurance (PIP) benefits to plaintiff under MCL 500.3114(3). I would reverse and remand for further proceedings.

It is undisputed that, at the time of the accident, plaintiff was under dispatch and hauling freight for Sweet Express, a motor carrier for hire. The tractor-trailer involved in the accident was titled in plaintiff's name. However, it was subject to a contractor-operator agreement between plaintiff and Sweet Express whereby plaintiff's tractor-trailer was leased to Sweet Express for the hauling of commodities made available to plaintiff by Sweet Express. Pursuant to this agreement, plaintiff agreed to operate the tractor-trailer when he would transport commodities on behalf of Sweet Express. The agreement further provided that plaintiff and Sweet Express "deem it essential to their respective interests to establish and maintain and [sic] Independent Contractor relationship in the execution and performance of this agreement." Amerisure Insurance Company issued Sweet Express a no-fault policy that included plaintiff's tractor-trailer.

Generally, a person who sustains an accidental bodily injury in an automobile accident must first look to no-fault insurance policies in his household for no-fault benefits. *Michigan Mut Ins v Farm Bureau*, 183 Mich App 626, 630; 455 NW2d 352 (1990). No-fault policies in the household are first in order of priority of responsibility for no-fault benefits, regardless of whether the injured person was, or was not, an occupant of a motor vehicle at the time of the accident. *Id.* However, an exception, pursuant to MCL 500.3114(1) may apply, which could shift primary liability.

MCL 500.3114(3) provides:

> An employee, his or her spouse, or a relative of either domiciled in the same household, 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.

Clearly, as a part of the policy issued to Sweet Express, defendant agreed to provide, among others, no-fault benefits if any of Sweet Express' employees, their spouses, or relatives of either domiciled in the same household should be injured while occupying a corporate vehicle. The question presented in this appeal is whether MCL 500.3114 requires a corporate insurer to extend coverage under the circumstances presented in this case.

The terms "employee" and "employer" are not defined for purposes of MCL 500.3114(3). This Court has applied the economic realities test in determining whether an employment relationship exists for purposes of applying MCL 500.3114(3). The factors to be considered in applying the economic realities test include: (1) control of the 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 achievement of a common goal. *Parham v Preferred Risk Mutual 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." *Id*. at 622-623. The trial court should have applied these factors to the facts of this case to determine liability.

In contrast to the trial court and majority opinions, I do not find that *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84; 549 NW2d 834 (1996) applies to this case. In *Celina*, Robert Rood was the sole proprietor of an unincorporated business called Rood's Wrecker & Mobile Home Service. Rood was driving a wrecker truck owned by Rood's Wrecker & Mobile Home Service while towing another wrecker owned by that entity. Celina Mutual Insurance Company had issued the policy to Rood's Wrecker & Mobile Home Service while another insurer insured three of Rood's personal vehicles. Our Supreme Court determined that Rood, as a sole proprietor, was an employee for the purposes of MCL 500.3114(3). Thus, because Rood was an employee of the employer covered by Celina's policy, Celina was responsible for payment of Rood's PIP benefits.

In this case, the facts are markedly different. Plaintiff does not appear to be an employee of Sweet Express. Rather, the record demonstrates that he was a self-employed trucker "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*, *supra* at 622-623. In the course of his self-employment, plaintiff contracted with Sweet Express to haul commodities. As noted, although the tractor-trailer was titled in plaintiff's name, it had been leased to Sweet Express. For purposes of MCL 500.3114(3), it is the relationship between Sweet Express and plaintiff that must be examined.

To conclude otherwise would, in essence, rewrite the policy between defendant and Sweet Express to potentially cover non-employees. This was not a risk assumed by defendant nor did the Legislature, in providing limited coverage for corporate vehicles under MCL 500.3114(3), intend such a result.

Accordingly, I would reverse and remand for further proceedings.

/s/ Kirsten Frank Kelly