STATE OF MICHIGAN

COURT OF APPEALS

BRISTOL WEST INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED September 24, 2009
v	No. 286332 Wayne Circuit Court
AMERISURE MUTUAL INSURANCE COMPANY, Defendant-Appellee.	LC No. 07-709904-CK

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In this no-fault insurance priority dispute, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition. We reverse the portion of the trial court's order granting defendant's motion for summary disposition and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff insured the injured truck driver, Bilal Hassan. Defendant insured the company for which he was driving, TJ Truck Company ("TJ Truck"). At issue is whether Hassan was an independent contractor (making plaintiff liable for benefits under MCL 500.3114(1)) or an employee of TJ Truck (making defendant liable for benefits under MCL 500.3114(3)). "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 v Preferred Risk Mut Ins Co*, 124 Mich App 618, 622-623; 335 NW2d 106 (1983), citing *Marchand v Russell*, 257 Mich 96; 241 NW 209 (1932). Although "employee" is not defined by the no-fault act, MCL 500.3101 *et seq*., this Court has determined that the "economic reality" test may be applied to determine whether the injured person is an independent contractor or an employee. *Id*. at 624; *Citizens Ins Co v Automobile Club Ins Ass'n*, 179 Mich App 461, 464-465; 446 NW2d 482 (1989).

> 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. This test considers the totality of the circumstances surrounding the work performed. No single factor is controlling and, indeed, the list of factors is nonexclusive and other factors may

> be considered as each individual case requires . . . Weight should be given to those factors that most favorably effectuate the objectives of the statute in question. [*Mantei v Michigan Pub School Employees Retirement Sys*, 256 Mich App 64, 78-79; 663 NW2d 486 (2003) (citations omitted).]

These common-law factors were characterized as an eight-part test in *McKissic v Bodine*, 42 Mich App 203, 208-209; 201 NW2d 333 (1972):

> First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?
>
> Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?
>
> Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expenses?
>
> Fourth, does the employee furnish his own equipment and materials?
>
> Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?
>
> Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?
>
> Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.
>
> Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute.

In *State Farm Mut Auto Ins Co v Sentry Ins*, 91 Mich App 109, 114-115; 283 NW2d 661 (1979), this Court described the legislative intent behind MCL 500.3114(3) as follows:

> The exceptions in § 3114(2) and (3) relate to "commercial" situations. It was apparently the intent of the Legislature to place the burden of providing no-fault benefits on the insurers of these motor vehicles, rather than on the insurers of the injured individual. This scheme allows for predictability; coverage in the "commercial" setting will not depend on whether the injured individual is covered under another policy. A company issuing insurance covering a motor vehicle to be used in a (2) or (3) situation will know in advance the scope of the risk it is insuring. The benefits will be speedily paid without requiring a suit to determine which of the two companies will pay what is admittedly due by one of them.

See also *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996) ("The cases interpreting [MCL 500.3114(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.").

In the present case, the trial court applied the economic reality test and relied on the following facts:

- Hassan used a 1099 to report his income taxes, not a 1040 or W-2;
- no taxes for social security, Medicare, or anything else were withheld from his check;
- testimony that he was free to reject an assignment was "not . . . contradicted"; and
- Hassan rejected three assignments without penalty.

The court stated, "I also find that Mr. Hassan could accept or reject any cargo or delivery and determine the manner of delivery or route" and that "TJ Truck did not have the right to hire, fire[,] or discipline him." The court discounted the evidence that Hassan completed an employment application before working for TJ Truck, concluding that while this might be enough "without those other factors being considered," it was not enough to overcome the evidence that he was an independent contractor.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party "'must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.'" *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), quoting *Durant v Stahlin*, 375 Mich 628, 640; 135 NW2d 392 (1965) (emphasis added by Skinner and omitted here). The trial court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner, supra*; *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009).

Here, the trial court, in its own words, made findings of fact. It relied on the method by which Hassan was paid and TJ Truck's officer's testimony that Hassan could reject assignments, which was directly contradicted by Hassan's own testimony that he felt if he rejected loads without a good reason (e.g., exceeding his weekly hours), he would be fired. The court also disregarded evidence that supports plaintiff's argument: Hassan completed an "application for employment" when initiating his working relationship with TJ Truck; the work being performed by Hassan, delivery of cargo, was an integral part of TJ Truck's business; TJ Truck leased the truck Hassan used, provided tools, and reimbursed Hassan for all of his expenses related to the assignments, including tolls (although TJ Truck may later have deducted these expenses from its lease arrangement with the truck owner); Hassan did not hold employment with or do work for any other trucking company during his tenure with TJ Truck, nor did he hold himself out to the public for hire; Hassan testified that if someone from TJ Truck told him to take a certain route to a delivery location, he was obligated to take that route; after the accident, the president of TJ Truck completed a Michigan wage, salary and benefits verification form that refers to Hassan as

the employee and TJ Truck as the employer. Finally, the court failed to give weight to those factors that favor the objective of the statute, "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." *State Farm Mut Auto Ins Co, supra* at 114.

Although plaintiff argues that it sufficiently showed there is no question of fact concerning Hassan's employment and that its own motion for summary disposition should have been granted, because the testimony of TJ Truck's president directly contradicts that evidence, we find that Hassan's status is an issue of fact that should be decided by a jury.

We reverse the portion of the trial court's order granting defendant's motion for summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering