# STATE OF MICHIGAN

# COURT OF APPEALS

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LINDA ASHFORD, Personally and as Administratrix of the ESTATE OF J.C. ASHFORD,

Plaintiff,

v

HARTFORD FIRE INSURANCE COMPANY,

Defendant-Appellee,

and

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 25, 1998

No. 192146
Ionia Circuit Court
LC No. 95-016449 NF

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Before: Young, Jr., P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant State Farm Mutual Auto Insurance Company appeals as of right an order granting summary disposition of State Farm's cross-claim for reimbursement and declaratory relief in favor of defendant Hartford Fire Insurance Company. We remand.

This case arises out of a priority dispute among no-fault insurers and concerns whether a labor broker situation created the requisite employment relationship so as to make applicable § 3114(3) of the no-fault act. Generally, a person must seek benefits from his or her own no-fault insurer. MCL 500.3101(1); MSA 24.13101(1); MCL 500.3114(1); MSA 24.13114(1). However, MCL 500.3114(3); MSA 24.13114(3) provides an exception in the commercial context to this general rule, as follows:

> (3) An employee . . . 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. [MCL 500.3114(3); MSA 24.13114(3).]

The terms "employee" and "employer" are not defined for purposes of § 3114(3). However, for the purpose of determining the existence of an employment relationship, this Court has previously applied the common-law "economic reality" test in a variety of contexts, including claims brought under the Worker's Disability Compensation Act, the Whistleblowers' Protection Act, the Civil Rights Act, and the teacher tenure act. *Meridian Mut Ins Co v Wypij*, 226 Mich App 276, 280-281; 573 NW2d 320 (1997); *Hoste v Shanty Creek Management, Inc*, 221 Mich App 144, 147; 561 NW2d 106 (1997), lv gtd 458 Mich 864 (1998). This Court has also applied the economic reality test in determining whether an employment relationship existed for the purpose of the statute at issue in this case, i.e., § 3114(3) of the no-fault act. See *Citizens Ins Co of America v Auto Club Ins Ass'n*, 179 Mich App 461, 464-465; 446 NW2d 482 (1989); *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983). In *Parham*, this Court stated that the factors to be considered in applying the economic reality test include: (1) control of the worker's duties; (2) payment of wages; (3) right to hire, fire and discipline; and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal. *Parham, supra* at 623. No single factor is controlling. *Meridian, supra*. Indeed, the list of factors is nonexclusive and other factors should be considered as each individual case requires. *Id*. at 281-282. In *Farrell v Dearborn Mfg Co*, 416 Mich 267; 330 NW2d 397 (1982), our Supreme Court applied the economic reality test to a labor broker situation and found that the broker and the business using the workers supplied by the broker (the customer) were both employers for the purpose of the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA).[1]

In this case, J.C. Ashford, plaintiff's husband, was killed on February 25, 1994, when the tractor-trailer he was driving was involved in an accident in Ionia County. The tractor-trailer driven by Ashford was owned by National Steel Corporation[2] and insured by Hartford. Ashford was driving the tractor-trailer pursuant to a "labor broker" agreement between National and Preferred Personnel Services, Inc. Under the agreement, National, denominated the "Lessee," and Preferred, denominated the "Lessor," agreed that Preferred would supply National with drivers to drive National's tractor-trailers. The agreement provided that Preferred was the "sole employer" of the drivers and that Preferred would perform the duties of the "sole employer," such as taking care of payroll and taxes, providing worker's compensation insurance, and determining and controlling the drivers' terms and conditions of employment, including hiring, discipline, discharge, wages and hours. However, the agreement also stated that National was required to provide insurance on each vehicle operated by the personnel supplied by Preferred to National. In addition, the agreement also provided that if National sent Preferred a written complaint specifying a driver's reckless, abusive, illegal or other unsatisfactory conduct, then Preferred was required to "take prompt corrective action to see that such conduct [was] eliminated."

Plaintiff brought this suit against State Farm, the insurer of Ashford's personal vehicles, and Hartford to recover personal protection insurance benefits. State Farm moved for summary disposition pursuant to MCR 2.116(C)(10). Relying on *Farrell* and *Parham*, State Farm contended that

application of the economic reality test to the labor broker situation presented by this case yielded the result that Ashford was the employee of both National and Preferred. State Farm contended that therefore Hartford was first in priority for payment of the no-fault benefits pursuant to § 3114(3) of the no-fault act.

In response, Hartford agreed that the economic reality test was the appropriate test for determining the applicability of § 3114(3) in this case. Hartford submitted to the court the agreement between National and Preferred and pointed out that under the agreement Preferred determined and controlled the drivers' terms and conditions of employment, including wages, taxes, worker's compensation insurance, hiring, discipline and firing. Hartford contended that application of the economic reality test to these circumstances demonstrated that only Preferred was Ashford's employer. Hartford argued that therefore State Farm was first in priority for payment of the no-fault benefits pursuant to MCL 500.3114(1); MSA 24.13114(1).

Following oral argument, the trial court issued a written opinion on September 19, 1995, which held, in relevant part as follows:

> The respective briefs referred to the following cases: [*Farrell, supra*] and [*Parham, supra*], with other cited cases. These previous cases set forth the economic reality test which the Court must consider. In looking at that test, the employment situation in the present case regarding wages, hiring and firing and discipline of the employee, rested solely with the broker, [Preferred] Personnel Services. In brief, this Court finds, pursuant to the Economic Reality Test, that Ashford was the employee of Preferred Services and that State Farm, as the insurer of Ashford, was the primary carrier for PIP benefits.
>
> Defendant Hartford is granted summary disposition pursuant to MCR 2.116(C)(10).

On October 16, 1995, the court entered an order in accordance with its written opinion.

State Farm agreed to pay no-fault benefits to plaintiff. In December, 1995, State Farm and Hartford stipulated, in relevant part, (1) that State Farm be permitted to file a cross-claim against Hartford for a declaration that Hartford was first in priority and reimbursement of the no-fault benefits paid by State Farm to plaintiff (2) that summary disposition of State Farm's cross-claim be entered in favor of Hartford in accordance with the trial court's September 19, 1995, written opinion, and; (3) that State Farm be permitted to contend on appeal that the trial court erred in granting summary disposition in favor of Hartford. An order incorporating this stipulation was entered on December 29, 1995. State Farm appeals as of right from this order.

On appeal, State Farm and Hartford reiterate their arguments below. In addition, State Farm cites as supplemental authority the recently decided worker's compensation case of *Kidder v Miller-Davis Co*, 455 Mich 25; 564 NW2d 872 (1997). In that case, our Supreme Court again applied the economic reality test to a labor broker situation and held that the broker's customer was the worker's

employer for the purpose of the exclusive remedy provision of the WDCA. *Id*. at 40. We particularly note that the labor broker agreement in *Kidder* contained provisions analogous to the previously described provisions of the labor broker agreement in this case between National and Preferred. *Id*. at 30, n 2.

However, before we consider the specific issue raised by State Farm, i.e., whether the trial court erred in determining that National was not Ashford's employer, we find that we must first examine a recent case by our Supreme Court that considered whether § 3114(3) of the no-fault act applies to self-employed persons. In *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 87; 549 NW2d 834 (1996), Robert Rood was injured when a wrecker truck owned by him was involved in an accident. At the time of the accident, Rood was the self-employed owner of a wrecker service and was operating his wrecker truck for the wrecker service. *Id*. Celina Mutual insured the wrecker truck while Lake States insured three other motor vehicles jointly owned by Rood and his wife. *Id*.

Celina Mutual paid Rood's no-fault personal protection insurance benefits and then filed suit against Lake States for partial recoupment on the ground that the two insurers were of the same order of priority. *Id*. at 85-86. Lake States contended that Celina Mutual was of higher priority by virtue of § 3114(3) and therefore solely responsible for paying the benefits. *Id*. at 86-87. The trial court ruled that Rood was an "employee" for the purpose of § 3114(3) and that therefore Celina Mutual was solely responsible for paying the benefits. *Id*. at 87.

This Court reversed the trial court. *Id*. at 85. This Court determined that a sole proprietor was not an "employee" for the purpose of § 3114(3). *Id*. In so determining, this Court found that implicit in dictionary definitions of "employee" and "employer" is the assumption that an employer-employee relationship requires more than one person or entity. *Id*. at 88. This Court also relied on worker's compensation cases holding that a sole proprietor could not be an employee of the proprietorship according to the definition of "employee" found within the WDCA. *Id*.

Our Supreme Court reversed this Court and reinstated the trial court's judgment. *Id*. at 91. In so doing, our Supreme Court reasoned as follows:

> We believe that it is most consistent with the purposes of the no-fault statute to apply § 3114(3) in the case of injuries to a self-employed person. The cases interpreting that section 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. *State Farm Mut Automobile Ins Co v Sentry Ins*, 91 Mich App 109, 114-115; 283 NW2d 661 (1979);[3] *Michigan Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 633-634; 455 NW2d 352 (1990).[4] In addition, in cases like the instant one, requiring both insurers to contribute to the payment of benefits would run contrary to the overall goal of the no-fault insurance system, which is designed to provide victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system. *Kitchen v State Farm Ins Co*, 202 Mich App 55; 507 NW2d 781 (1993); *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). Splitting the obligation to

pay would result in duplicative administrative costs, by requiring several insurers to adjust a single claim.

> The Court particularly relied on cases involving worker's compensation statutes which have held that a sole proprietor is not an "employee" for the purpose of those statutes. We believe that reliance on worker's compensation cases is misplaced. First, those cases rely on definitions of the term in worker's compensation statutes or insurance policies. For example, the Michigan statute, which the Court in *Lee v JH Lee & Sons*, [72 Mich App 257; 249 NW2d 380 (1976)], reluctantly held did not apply to sole proprietors, makes the act applicable to "[e]very person in the service of another under any contract of hire, express or implied . . . ." MCL 418.161(k); MSA 17.237(161)(k). Sole proprietors cannot have a contract for hire with themselves. The no-fault statute has no such restrictive definition of "employee."
>
> Second, the Court of Appeals analysis fails to take account of the vastly different purposes of the statutes. Worker's compensation statutes were enacted for the protection of both employees and employers. The system assures employees that they will be compensated for employment-related injuries through worker's compensation benefits without regard to fault. In exchange, the employer is granted immunity from suit and the possibility of excessive damage awards. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 651; 364 NW2d 670 (1984). Sole proprietors cannot sue themselves and so need no protection from excessive damage awards. Because of this, the rational of worker's compensation schemes does not apply in the sole proprietorship context, and it is wholly consistent with the act that they not be included. The opposite is true with respect to the no-fault act, whose goals are promoted by including self-employed persons with the purview of § 3114(3). [*Id*. at 89-90.]

We initially make the following observations with respect to our Supreme Court's opinion in *Celina*. First, in determining that a self-employed person is within the scope of § 3114(3), our Supreme Court did not consider the economic reality test. Moreover, the Court rejected reliance on determinations of employer-employee relationships made using the definitions or purposes found within the scope of the worker's compensation law. Instead, the Court placed great weight on the policy objective behind § 3114(3), finding that "[t]he cases interpreting [§ 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 light of this policy objective, it would appear that the payment of no-fault benefits in this case should be allocated to Hartford pursuant to § 3114(3) because Ashford's death resulted from the use of a business vehicle that National owned and insured with Hartford. Thus, an argument can be made that neither the economic reality test nor the persuasive authority of the worker's compensation "labor broker" cases cited by State Farm applies to this case.

Conversely, *Celina* involves the unique facts of self-employment to which the economic reality test, which is utilized for determining the existence of an employment *relationship*, would appear to have little applicability or relevance. Thus, the argument can be made that the economic reality test and

the persuasive authority of *Kidder* and *Farrell* can be applied to this case. However, consideration of only the factors considered in *Parham* fails to take into account the fundamental policy objective behind § 3114(3) "to allocate the cost of injuries resulting from use of business vehicles to the business involved through the premiums it pays for insurance." *Celina, supra* at 89. Even in *Farrell, supra* at 276, our Supreme Court noted that "[t]he economic reality test looks to the employment situation *in relation to the statutory scheme of workers' compensation law* with the goal of preserving and securing the rights and privileges of all parties (emphasis supplied)."

We believe that the emphasis in *Celina* on the policy behind § 3114(3) can be reconciled with the economic reality test as enunciated in *Parham*. As indicated previously, the list of factors considered under the economic reality is nonexclusive and other factors should be considered as each individual case requires. *Meridian, supra*. For instance, in *Hoste, supra* at 149-153, this Court considered the following factors in applying the economic reality test:

> 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 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.

The factors considered in *Hoste* take into account a broad range of circumstances in determining whether an employment relationship exists, including the policy objectives of the statute at issue. We believe that this approach is better able to assess the many unique and ever changing employment relationships, such as labor-broker situations, that exist in today's marketplace.

Finally, we note that analysis of the totality of circumstances would not be complete in this case without a discussion of the agreement between the parties themselves. We believe that considerable

deference must be given to the parties' own allocations of responsibilities and risks. In this case, Preferred and National designated Preferred as the "sole employer" in their contract. However, ultimately we do not accept the contract designation as dispositive for the following reasons: First, under the economic reality test, no one factor takes primacy over the others; rather, each is viewed within the totality of the circumstances. *Kidder, supra* at 46. Second, the contract also contains a requirement that National provide commercial insurance for each vehicle operated by the personnel provided to National by Preferred. Reading the contract as a whole, this requirement casts some doubt on whether the designation "sole employer" was intended by the parties to apply in this no-fault insurance context. Third, in this case it appears that the clear public policy behind the enactment of the commercial no-fault insurance section, § 3114(3), would be frustrated by the "sole employer" designation in the contract. In the context of § 3114(3), the policy objective is to allocate the risks of insuring commercial vehicles to commercial insurers, who can better assess the risks in the commercial setting, rather than to personal insurers who cannot adequately predict the risks or burdens beyond the personal vehicles that they insure. See *State Farm, supra* at 114-15. The contract here would shift the burden to the personal insurer. Accordingly, while the trial court should accord considerable deference to the language of the contract, ultimately the contract cannot be allowed to prevail over contrary public policy determinations."

In this case, the trial court evaluated the employment relationship between Ashford and National by considering only the factors of wages, hiring, firing and discipline. Significantly, the trial court did consider or give weight to those factors that would most favorably effectuate the objectives of § 3114(3). We thus remand this case to the trial court for the purpose of evaluating the employment relationship between Ashford and National in light of the totality of the circumstances, including, but not necessarily limited to, the factors enunciated in *Hoste*.

Remanded. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

[1] This statute provides in relevant part that "[t]he right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer . . . ." MCL 418.131(1); MSA 17.237(131)(1).

[2] Hartford conceded this point below. Although National Steel Corporation was actually leasing the truck, it is legally considered the "owner" under MCL 257.37(a); MSA 9.1837(a) because it was "renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days."

[3] In *State Farm*, this Court described the legislative intent behind § 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. [*Id* at 114-115.]

[4] In *Michigan Mutual*, *supra* at 634, this Court explained that the legislative intent behind § 3114(2) and (3) is to equitably spread the responsibility for providing benefits among all insurers of motor vehicles.