STATE OF MICHIGAN

COURT OF APPEALS

FARMERS INSURANCE EXCHANGE and STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Plaintiffs-Appellees,	UNPUBLISHED October 18, 2011
v MICHIGAN INSURANCE CO., Defendant-Appellant.	No. 298984 Mason Circuit Court LC No. 09-000035-NF
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Plaintiff-Appellee,	
v MICHIGAN INSURANCE CO., Defendant-Appellant.	No. 298985 Mason Circuit Court LC No. 09-000172-NF

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

This is a consolidated appeal arising out of a motor vehicle accident and an ensuing priority dispute between three insurers. The primary issue on appeal is whether plaintiffs Farmers Insurance Exchange and State Farm Mutual Automobile Insurance Co. or defendant Michigan Insurance Co. is first in priority for payment of automobile insurance benefits under the no-fault insurance act.[1] Michigan Insurance appeals as of right the trial court's orders granting judgments in favor of Farmers Insurance and State Farm. These orders found that Michigan Insurance was the insurer of highest priority. We reverse and remand.

[1] MCL 500.3101 *et seq.*

I. FACTS

On August 5, 2008, a large utility van owned by We Want the Music Company (WWTMC), a for-profit corporation that produces a six-day long music festival in northwest Michigan every year, was involved in a single-vehicle accident. Ann Drucker, her two small children, and Drucker's domestic partner, Carol Dineen, who all traveled to Michigan from Colorado to attend the music festival, were passengers of the van at the time of the accident.

Lisa Vogel, president and sole shareholder of WWTMC, testified in her deposition that the purpose of WWTMC is to produce the Michigan Womyn's Music Festival. The music festival, held on a 650-acre parcel, hosts four stages, presenting about 40 performances; several hundred workshops; a crafts area; and a film festival. The price of a festival ticket is all inclusive for these events. There are also childcare services, facilities for people with disabilities, food, and a community center. A shuttle service, consisting of surreys pulled by tractors, is provided on the grounds for attendees.

Michigan Insurance insured all of the 26 vehicles that WWTMC owned. Three of those vehicles were utility 15-passenger/cargo vans, one of which was involved in the accident. Vogel testified that these utility vans were not intended for use by the music festival attendees, except in certain unusual or emergency circumstances.[2] The vans were instead used to transport performers, staff, volunteers, and equipment on the festival grounds. Although the vans could accommodate 15 passengers, the seats were removable, and were often removed and stored on the festival grounds. Volunteers also often took the vans off-site in order to greet attendees at the airport and direct them to the shuttle buses, to handle luggage overflow from the shuttle buses, and to run errands in Grand Rapids. When the music festival was over, the vans were put in storage and not used.

WWTMC makes transportation available for attendees between the Grand Rapids airport and the music festival, which is about a two-hour drive. To provide this service, WWTMC contracts with Great Lakes Motor Coach, a commercial carrier that provides transportation services on "Greyhound type" buses. WWTMC encourages music festival attendees to take advantage of the airport shuttle service, for a non-refundable fee of $45 a bus ticket. However, WWTMC advertised that it could not provide shuttle times other than certain set scheduled times. WWTMC also advertised that it could not be responsible for an attendee's transportation if he or she missed a scheduled shuttle time. In the event that an attendee missed the last scheduled shuttle time, WWTMC stated the attendee would be responsible for finding alternative transportation, such as renting a car.

Drucker, her children, and Dineen were to arrive at the Grand Rapids airport on August 4, 2008. However, weather caused a significant flight delay. They had purchased tickets for the shuttle bus service, but due to their late arrival, they missed the scheduled 4:00 p.m. bus

[2] There is no dispute that the circumstances that led to Drucker's and Dineen's presence in the van at the time of the accident were not due to these types of unusual or emergency circumstances.

departure on August 4th. As a result, they were rescheduled for the 4:00 p.m. bus departure the following day, August 5, 2008. Instead of waiting for the next bus, however, Drucker, Dineen, and a number of other attendees were able to negotiate a ride on a WWTMC utility van that happened to be at the airport. The van was not sent to the airport to pick up passengers. At the time of the accident, a WWTMC volunteer was driving the utility van. As the van traveled to the music festival, the driver lost control of the van, and it rolled over. Drucker, her children, and Dineen sustained injuries in the accident.

As stated above, the van was one of many vehicles listed on a Michigan commercial, no-fault insurance policy that defendant Michigan Insurance had issued to WWTMC. At the time of the accident, plaintiff State Farm insured Drucker and her children under a Colorado automobile insurance policy, and plaintiff Farmers Insurance insured Dineen under her own Colorado insurance policy.[3] As a result of their injuries sustained in the accident, Drucker submitted a claim to State Farm, which paid personal protection insurance benefits to her and for the benefit of her children. Likewise, Dineen submitted a claim to Farmers Insurance, which paid her personal protection insurance benefits.

After paying out the benefits, State Farm and Farmers Insurance each filed suit against Michigan Insurance, seeking a determination that Michigan Insurance was the insurer first in order of priority to provide personal protection insurance benefits to the insureds under MCL 500.3114(2). State Farm and Farmers Insurance sought reimbursement for the benefits paid out to and on behalf of Drucker and Dineen, a declaration that Michigan Insurance should adjust and pay on any of Drucker's and Dineen's future claims, and reimbursement of the "loss adjustment" expenses that they incurred while handling the claims.

Michigan Insurance moved for summary disposition, arguing that State Farm and Farmers Insurance were the insurers responsible for payment of benefits. Michigan Insurance contended that MCL 500.3114(2) did not apply because the utility van involved in the accident was not "a motor vehicle operated in the business of transporting passengers." Michigan Insurance pointed out that, although it advertised and charged for a shuttle service for its out-of-state attendees, the service referred to was the bus service contracted through Great Lakes Motor Coach. WWTMC purchased the vans, like the one involved in the accident, primarily for use in festival production tasks.

State Farm and Farmers Insurance each filed their own motions for partial summary disposition. They continued to contend that the utility van was "a motor vehicle operated in the business of transporting passengers" at the time of the accident. They argued that the van was intended for business use, was fit to accommodate passengers, and was insured under a business automobile insurance policy. And they argued that the transportation of attendees to the music festival grounds was a significant part of the festival function.

[3] There is no dispute that, for the purposes of this case, Drucker's and Dineen's policies apply as equivalent to Michigan no-fault automobile insurance policies in accordance with MCL 500.3163.

After hearing oral arguments on the motions, the trial court determined that the purpose for which a vehicle is being used at the time of the accident directly related to the finding whether that vehicle was operated in the business of transportation. The trial court disregarded the van's other functions such as being a cargo van at the festival or to transport luggage from the airport. The trial court instead found it significant that WWTMC was using the van to transport passengers at the time of the accident, that the van was designed to accommodate passengers, that the van was insured as a commercial vehicle, and that WWTMC's business was benefitted by transporting people to the music festival. Specifically, the trial court stated,

> In this Court's mind then the controlling factor centers on the fact that that's why the people were in the van in order to be transported to the camper[4] program, that to enable people who come in via airplane, even though the percentage that actually does that is small, it was part of your promotional endeavor to bring in campers to provide such transportation. And the people in this van had taken advantage of that opportunity.

Additionally, the trial court did not consider it controlling that WWTMC had contracted with the motor coach company to transport attendees:

> It's not controlling that a contracted bus otherwise could have been used because the operator of the camp also made available the van itself with the some four rows of seats installed and it served the purpose of the camp program for these campers to get there without their having to somehow find a different way or to wait even longer to travel that distance from Grand Rapids to the Ruby Creek area.
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> * * *
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> That van was used to transport people to the camp and it served a, I'll call it a business function, to get the people to the camp.

Therefore, the trial court concluded that the van that WWTMC owned was "a motor vehicle operated in the business of transporting passengers," such that Drucker and Dineen should recover benefits from Michigan Insurance, as the insurer of the vehicle.

Accordingly, the trial court entered an order granting partial summary disposition in favor of State Farm and Farmers Insurance, and denying Michigan Insurance's motion for summary disposition. The order also stated that Michigan Insurance was the insurer in highest priority for the personal protection insurance benefits owed to Drucker and Dineen. The trial court ordered that the parties calculate the amounts of personal protection insurance benefits owed so that a final order could be entered preceding appeal. However, the parties disagreed on which insurer(s) would be required to adjust Drucker's and Dineen's ongoing claims during Michigan Insurance's planned appeal. The parties also disagreed regarding whether Michigan

[4] The trial court referred to the music festival as a camp. The record reveals that attendees camped on the premises while attending the festival.

Insurance would be responsible for reimbursing State Farm and Farmers Insurance for their loss adjustment expenses associated with their handling of Drucker's and Dineen's claims to date. The parties then moved for entry of judgment addressing those remaining issues.

After hearing oral arguments on the motions, the trial court declined to compel Michigan Insurance to commence handling of the claims pending appeal. The trial court concluded that the parties in that regard should maintain the "status quo" until the appellate proceedings were concluded. But the trial court did hold Michigan Insurance liable for reimbursement to State Farm and Farmer Insurance for the personal protection insurance benefits paid in this matter, and also for State Farm's and Farmer Insurance's loss adjustment expenses incurred in handling Drucker's and Dineen's claims.

Michigan Insurance appealed the judgments entered in favor of State Farm and Farmers Insurance, and this Court consolidated the appeals in the interest of efficient administration of the appellate process.[5]

II. APPLICATION OF MCL 500.3114(2)

A. STANDARD OF REVIEW

Michigan Insurance argues that the trial court erred in holding MCL 500.3114(2) applicable on the ground that the van was "operated in the business of transporting passengers" because WWTMC primarily used the van for production activities at the festival and any shuttling of attendees was merely incidental.

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.[6] The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.[7] The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.[8] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[9] "'[T]he court is not permitted to assess credibility, or to determine facts on a motion for summary judgment.'"[10] We review de novo the trial court's ruling on a motion for summary

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[5] *Farmers Ins Exch v Mich Ins Co*, unpublished order of the Court of Appeals, entered July 21, 2010 (Docket Nos. 298984 and 298985).

[6] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

[7] MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

[8] *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[9] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[10] *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 265; 632 NW2d 126 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

disposition.[11] The proper application and interpretation of a statute is also a question of law subject to this Court's de novo review.[12]

B. APPLICABLE LEGAL PRINCIPLES

Generally, when a claimant has an insurance policy of her own, or is covered as a resident relative of a named insured, the insurer of that policy is responsible for payment of benefits, without regard to what vehicle the claimant might have been occupying at the time of the accident.[13] MCL 500.3114(1) states in pertinent part as follows:

> 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.

An exception to the general rule applies when a person "suffer[s] accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers."[14] In that case, the claimant receives personal protection insurance benefits from the insurer of the subject motor vehicle.[15] Specifically, MCL 500.3114(2) states as follows:

> 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. This subsection does not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance benefits under any other policy:
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> (a) A school bus, as defined by the department of education, providing transportation not prohibited by law.
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> (b) A bus operated by a common carrier of passengers certified by the department of transportation.
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> (c) A bus operating under a government sponsored transportation program.

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[11] *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009).

[12] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

[13] MCL 500.3114(1); *Frierson v West American Ins Co*, 261 Mich App 732, 737-738; 683 NW2d 695 (2004); *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 726-727; 635 NW2d 52 (2001); *Thomas v Tomczyk*, 142 Mich App 237, 241; 369 NW2d 219 (1985).

[14] MCL 500.3114(2).

[15] *Id.*

(d) A bus operated by or providing service to a nonprofit organization.

(e) A taxicab insured as prescribed in section 3101 or 3102.

(f) A bus operated by a canoe or other watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point.

Here, there is no dispute that none of the listed exceptions—(a)-(f)—apply in this case.

This Court has explained that the purpose of the priority rule provided under MCL 500.3114(2) is to account for predictability and accountability for commercial entities:

> The exception[] in [MCL 500.3114(2)] . . . relate[s] 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) . . . 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.[16]

However, because the Legislature did not define the operative terms within the salient phrase of MCL 500.3114(2)—"a motor vehicle operated in the business of transporting passengers"—this Court has adopted a "primary purpose/incidental nature inquiry" to determine whether a particular vehicle falls within the statutory exception.[17]

In *Farmers Ins Exch v AAA of Mich*, two children were injured while passengers in a vehicle operated by their day-care provider while she was transporting them to school.[18] The insurer of the children's family filed a complaint against the day-care's insurer, seeking a declaratory judgment that the day-care's insurer was first in priority for liability for no-fault benefits under MCL 500.3114(2).[19] According to the family's insurer, at the time the accident occurred, the vehicle used to transport the children in the operation of a for-profit day-care center was "a motor vehicle operated in the business of transporting passengers to and from day care/school."[20] The trial court agreed with the family's insurer and granted its claim for reimbursement.

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[16] *Besic v Citizens Ins Co*, 290 Mich App 19, 31-32; ___ NW2d ___ (2010), quoting *State Farm Mut Auto Ins Co v Sentry Ins*, 91 Mich App 109, 114-115; 283 NW2d 661 (1979).

[17] *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 693, 701, 702; 671 NW2d 89 (2003).

[18] *Id.* at 693.

[19] *Id.*

[20] *Id.* at 693-694.

On appeal, the day-care insurer argued that, to qualify under the statutory language, "the business of transporting passengers" must constitute the sole or primary purpose of the motor vehicle.[21] The family's insurer contended that even incidental use of a vehicle to transport passengers fell within the scope of MCL 500.3114(2).[22]

In reviewing the parties' position, this Court noted that there was only one other case that had dealt with the issue to date. In that case, *Thomas v Tomczyk*,[23] two college students, who sustained injuries after they were involved in an automobile accident while passengers in an automobile driven by a third student, filed suit against the driver's insurer, arguing that the subject vehicle was operated in the business of transporting passengers under MCL 500.3114(2). The two passengers had responded to a ride-board notice that the driver had posted and paid him $25 for a round trip to go home for the holidays.[24] This Court apparently agreed with the trial court that, under the particular facts of that case, the plaintiffs were not passengers of "a motor vehicle operated in the business of transporting passengers."[25]

Specifically, the trial court in *Thomas* reasoned as follows:

> The court . . . 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 hirer* [sic], he's a student, as far as I can tell. And *it is not the primary purpose of the vehicle to carry passengers for hirer* [sic], 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. And so the entry of a judgment in favor of MEEMIC [the driver's insurer] is granted in both cases.[26]

Reviewing the *Thomas* Court's decision, this Court in *Farmers Ins Exch* found it significant that

> 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

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[21] *Id.* at 697.

[22] *Id.*

[23] *Thomas v Tomczyk*, 142 Mich App 237, 239-240; 369 NW2d 219 (1985).

[24] *Id.* at 239.

[25] *Id.* at 241-242.

[26] *Farmers Ins Exch*, 256 Mich App at 700, quoting *Thomas*, 142 Mich App at 240, n 2 (emphasis and alterations by *Farmers Ins Exch*).

> constitute his *primary* function or purpose in operating his vehicle, but that "incidental[ly] to coming home, it was convenient to take on passengers."[27]

The *Farmers Ins Exch* Court also noted that a recent unpublished decision had taken a similar view, finding that the term "business" within subsection 3114(2) "signified a for-profit endeavor."[28] In *Lampman v Workman*, a panel of this Court reasoned that the insured company's "'*primary* business (i.e., that from which it derived profit) was the buying and selling of cars. [T]ransportation of the drivers was *merely incidental* to its overall business.'"[29]

Turning back to the facts of *Farmers Ins Exch*, this Court first noted that the facts at hand were factually distinguishable from those presented in *Thomas*: "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."[30]

This Court then applied the primary purpose/incidental nature test to the facts and concluded that the day-care provider's driving of the children to school did not fall within the scope of MCL 500.3114(2).[31] This Court reasoned that "(1) [the day-care provider's] 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."[32] This Court added that "the mere fact that the day-care provider charged a fee for her transportation of the children does not itself mean that she operated a vehicle in the business of transporting passengers."[33] And this Court further added that its conclusion was "consistent with this Court's observations that the Legislature intended [MCL 500.3114(2)] to apply in 'commercial' situations."[34] Accordingly, this Court held that MCL 500.3114(2) did not apply and that the family's insurer was first in priority to pay the no-fault benefits in question.[35]

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[27] *Id.* at 700-701, quoting *Thomas*, 142 Mich App at 240, n 2, 241-242.

[28] *Id.* at 701, n 5, citing *Lampman v Workman*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2002 (Docket No. 225743).

[29] *Id.* at 701, n 5, quoting *Lampman* (emphasis by *Farmers Ins Exch*).

[30] *Id.* at 700.

[31] *Id.* at 701.

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

[33] *Id.* at 702, n 6.

[34] *Id.* at 702, citing *Sentry Ins*, 91 Mich App at 114.

[35] *Id.*

C. APPLYING THE LEGAL PRINCIPLES

Based on the primary purpose/incidental nature test, the salient question in determining whether MCL 500.3114(2) applies in this case is whether transportation of passengers for hire was the primary function or purpose in operating the van. Notably, in applying this test, the *Farmers Ins Exch* Court broke down the test into a two-part analysis.[36] The first part was whether the vehicle was transporting passengers in a manner incidental to the vehicle's primary use.[37] And the second part of the analysis was whether the transportation of the passengers was an incidental or small part of the actual business in question.[38]

With respect to the first part of the analysis—whether the vehicle was transporting passengers in a manner incidental to the vehicle's primary use—unlike in *Farmers Ins Exch* where the vehicle's primary use was personal, there is no dispute that the van's primary use in this case was for business purposes. However, contrary to Farmers Insurance's contentions on appeal, the fact that the van was primarily, if not solely, used for business purposes, is not dispositive of the issue. Accepting that the van's primary use was for business purposes, the gravamen of the question then is whether the van was transporting attendees in a manner incidental to the vehicle's primary business use.

Here, Vogel testified that WWTMC purchased the three vans for, and intended to use them primarily for, business production purposes. WWTMC used the vans to transport performers, staff, volunteers, and equipment on the festival grounds. And to facilitate transportation of equipment, WWTMC often removed the van seats and stored them on the festival grounds. When WWTMC took the vans off site, their use was primarily to take volunteers to greet and direct attendees at the airport, to handle luggage overflow from the shuttle buses, and to run errands in Grand Rapids. Vogel testified that the vans were not intended for use by the music festival attendees, except in certain unusual or emergency circumstances.

The facts of this case are unlike the facts of *State Farm Mut Ins Co v Progressive Mich Ins Co*, in which a panel of this Court held that a van specifically purchased for and equipped to handle transportation of wheelchair-bound and other passengers was a motor vehicle operating in the business of transporting passengers under MCL 500.3114(2) because the transportation component of the adult day care provider's business "was important enough for the business to purchase a vehicle that was used primarily for and insured specifically for transporting" the day care's clients.[39] Here, again, WWTMC did not purchase the vans for the purpose of transporting attendees. WWTMC purchased the vans for their flexibility in assisting in production functions, such as transporting performers, staff, volunteers, equipment, and luggage. And the fact that

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[36] *Id.* at 701-702. See *State Farm Mut Ins Co v Progressive Mich Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 29, 2005 (Docket No. 262833).

[37] *Farmers Ins Exch*, 256 Mich App at 701.

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

[39] *State Farm Mut Ins Co*, unpub op at 3.

WWTMC had a step installed on the van to aid in entry of the vehicle does not change our conclusion. The step does not indicate that WWTMC installed it specifically for the purpose of transporting attendees. The side step merely made access to the vehicle for performers, staff, and volunteers, and the loading and unloading of equipment and luggage, more convenient. Thus, while the transportation of attendees was important enough to WWTMC for it to contract with a commercial carrier for the purpose of providing that transportation, unlike *State Farm Mut Ins* Co, WWTMC's intended use of its utility vans was not for the transportation of attendees.

Indeed, we equate WWTMC's use of its vans for the transportation of attendees in this case as similar to the college student's offer to give his fellow students a ride home in *Thomas*. As in that case, here, it was not the primary function of the vans to carry passengers for hire. It merely happened that *incidental* to returning to the music festival, it was convenient for the volunteer to take the several attendees who were anxious to get to the festival. On the basis of this record, we therefore conclude that the van's use to transport attendees was incidental to the vehicle's primary use for business production purposes.

Turning to the second part of the analysis—whether the transportation of the passengers was an incidental or small part of the actual business in question—we first look to what constituted the actual business in question. Here, the record reveals that WWTMC was created to facilitate the production of the six-day long Michigan Womyn's Music Festival. The music festival hosts four stages, presenting about 40 performances; several hundred workshops; a crafts area; and a film festival. The price of a festival ticket is all inclusive for these events. WWTMC also offered, as a convenient service for out-of-state attendees, shuttle transportation via a commercial carrier to and from the airport for a separate fee. And while State Farm and Farmers Insurance assert that this shuttle service was a significant part of WWTMC's business, the record belies this contention.

Vogel testified that, of the approximately 4,000 attendees to the music festival each year, the vast majority arrived in their own personal vehicles. According to Vogel, out-of-state attendees, who did typically use the shuttle bus service, totaled only 211 out of 3,524, or only about 16-17 percent of the total attendees in 2008. Thus, statistically, the shuttle service was not a significant part of WWTMC's business. Indeed, Vogel testified that most years WWTMC either broke even or lost money by providing the shuttle bus service. For example, in 2008, WWTMC actually lost $3,150 on the shuttle bus service.[40] And Vogel calculated that the shuttle bus income accounted for only .0083 percent of the total gross income for the music festival in 2008. Vogel explained that the principal revenue from the festival came from ticket sales, festival apparel and paraphernalia sales, concession stands, craft fees, and raffles. Thus, the shuttle service was only an incidental or small part of production of the music festival.

More importantly, in arguing the significance of the shuttle service, State Farm and Farmers Insurance conveniently ignore that the van at issue, although sometimes used to

[40] Vogel provided exhibits showing that, in 2008, the cost of the bus was $8,350 and other costs associated with providing the shuttle service totaled $4,665, but the total gross income from the shuttle service was only $9,865, leaving WWTMC at a loss of $3,150.

transport attendees, was not actually intended for use as a shuttle transportation vehicle. Instead, WWTMC specifically contracted with a commercial carrier for the purpose of providing the shuttle service. And to the extent that the shuttle service was only an incidental or small part of production of the music festival, WWTMC's occasional transportation of attendees in its vans was in turn only incidental to the shuttle service. Indeed, in 2008, the year of the accident, only 23 attendees total were transported in a WWTMC van, with 15 of those attendees being those involved in the accident who somehow (initially fortuitously but ultimately lamentably) negotiated their way onto a van that happened to be at the airport.[41] Moreover, we do not find it significant that Drucker and Dineen paid a fee for transportation to the festival.[42] As stated above, the shuttle fees were only a minor portion of the music festivals revenues, and Drucker and Dineen paid the fee for the privilege of seats on one of the shuttle buses, for which they could have waited. Instead, they chose to hitch a ride in a utility van.

WWTMC's primary business (that is, the business from which it derived profit) was the production of the Michigan Womyn's Music Festival. WWTMC's transportation of the attendees by bus, let alone in the vans, was entirely incidental to its overall business. Therefore, we conclude that WWTMC did not use its vans in the business of transporting passengers within the meaning of MCL 500.3114(2).

In sum, we conclude that the trial court erred in finding that Michigan Insurance was the insurer of highest priority on the ground that the van involved in the accident was "a motor vehicle operated in the business of transporting passengers." Therefore, State Farm and Farmers Insurance were the proper agencies responsible to pay personal protection insurance benefits to Drucker and Dineen. Accordingly, we conclude that the trial court erred in granting summary disposition in favor of State Farm and Farmers Insurance.

Because our resolution of this issue is dispositive, we need not address the remaining argument related to reimbursement of loss adjustment expenses.

We reverse and remand for entry of an order in favor of Michigan Insurance. We do not retain jurisdiction. Michigan Insurance, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

[41] The record does not reveal under what circumstances the remaining 8 attendees were provided transportation on one of the WWTMC utility vans.

[42] *Farmers Ins Exch*, 256 Mich App at 702, n 6.