

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hon. Michael J. Kelly, Presiding Judge

FARMERS INSURANCE EXCHANGE,
Plaintiff-Appellant,

v.

MICHIGAN INSURANCE COMPANY,
Defendant-Appellee,

Supreme Court Nos. 144144
144145
144159

and

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellant,

v.

MICHIGAN INSURANCE COMPANY,
Defendant-Appellee.

Court of Appeals Nos. 298984 and 298985

Mason County Circuit Court Nos. 09-035-NF and 09-172-NF

BRIEF OF DEFENDANT-APPELLEE,
MICHIGAN INSURANCE COMPANY

PROOF OF SERVICE

* * * ORAL ARGUMENT REQUESTED * * *



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BASIS OF JURISDICTION

Defendant-Appellee, Michigan Insurance Company, accepts the appellants' statements regarding this Court's jurisdiction as complete and accurate.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Where accident victims insured by Plaintiffs were passengers in an all-purpose utility van primarily used by its owner, WWTMC, for producing a “Womyn’s Music Festival,” and any shuttling of attendees between the airport and the festival campground was incidental to WWTMC’s overall business of producing the festival, was the Court of Appeals correct in holding that MCL 500.3114(2) does not apply since the van was *not* a vehicle “operated in the business of transporting passengers”?

Plaintiffs-Appellants FARMERS and STATE FARM would answer, “No.”

Defendant-Appellee, MIC, answers, “Yes.”

A. Where the Legislature’s intent is best evidenced by the language of its enacted statute, and the terms of §3114(2) plainly allow an accident victim to recover PIP benefits from an insurer other than his or her own personal no-fault insurer only if injured while occupying a vehicle “operated in the business of transporting passengers,” would the appellants’ position erroneously expand the scope of §3114(2) to include *all* business vehicles?

Plaintiffs-Appellants FARMERS and STATE FARM would answer, “No.”

Defendant-Appellee, MIC, answers, “Yes.”

B. Does the primary purpose/incidental nature test adhere to the language of §3114(2), further the purpose of §3114(2), and, when applied in the present case, properly establish that WWTMC’S van was not operated in the business of transporting passengers?

Plaintiffs-Appellants FARMERS and STATE FARM would answer, “No.”

Defendant-Appellee, MIC, answers, “Yes.”

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The question presented in this appeal is whether an all-purpose utility van owned by We Want the Music Company (“WWTMC”) was a motor vehicle “operated in the business of transporting passengers.” MCL 500.3114(2). STATE FARM and FARMERS have gone to great lengths in their appeal briefs to exaggerate the importance of passenger transportation to WWTMC’s business, beyond the scope of what the record facts allow. Indeed, the appellants strain to do so even while advancing arguments that would render immaterial any inquiry into how integral the role of providing transportation to passengers is to a vehicle owner’s overall business enterprise. Yet consideration of the facts actually presented in the record and relied upon by the Court of Appeals establishes that the WWTMC van manifestly was *not* being operated in the business of transporting passengers.

Facts

The single vehicle involved in the accident was a large van owned by WWTMC, a for-profit corporation that produces a week long music festival in northwest Michigan every year. The van was one of several vehicles listed on a Michigan commercial no-fault insurance policy issued to WWTMC by Defendant-Appellee, Michigan Insurance Company (“MIC”). Ann Drucker and her two small children, visitors to Michigan from Colorado, were passengers of the van at the time of the accident. They were insured by Plaintiff-Appellant, State Farm Mutual Automobile Insurance Company (“STATE FARM”) under an automobile insurance policy issued to Ms. Drucker for her personal vehicle in Colorado. Ms. Drucker’s

domestic partner, Carol Dineen, also a passenger in the vehicle, was insured under her own policy issued by Plaintiff-Appellant, Farmers Insurance Exchange (“FARMERS”).¹

Ms. Drucker, her children, and Ms. Dineen sustained injuries in the accident. Ms. Drucker submitted a claim to FARMERS, which paid personal protection insurance (“PIP”) benefits to her and for the benefit of her children pursuant to the Michigan No-Fault Act. *See*, MCL 500.3163. Ms. Dineen likewise submitted a claim to STATE FARM, which paid her PIP benefits. Whether responsibility for payment of these benefits properly lies with FARMERS and STATE FARM or instead should be borne by MIC depends on whether the van involved in the accident was “a motor vehicle used in the business of transporting passengers.” §3114(2).

Lisa Vogel is the president and sole shareholder of WWTMC. She testified in deposition that her company’s sole purpose is to produce the Michigan Womyn’s Music Festival; it is not a business organized for the purpose of providing transportation. The Festival is an annual event, lasting six days. Held on a 650 acre plot of land, the Festival hosts four stages, about 40 performances, a full roster of workshops, a crafts area and a film festival. The price of a ticket is all-inclusive. There are child-care services, facilities for people with disabilities, food, and a community center with open mics. (Vogel deposition, pp. 5-9, 50 -- **State Farm Apx, 6a-7a, 18a**; hearing transcript, pp. 4-5, 18 -- **Farmers Apx, 52a-53a, 66a**; also *see*, WWTMC flyers and promotional materials -- **MIC Apx, 4b-49b**).

¹ Although the STATE FARM and FARMERS policies issued to Ms. Drucker and Ms. Dineen were not Michigan no-fault policies, it is undisputed that, for purposes of this case, the policies apply to provide the insureds with Michigan personal protection insurance coverage by virtue of the certificates filed by STATE FARM and FARMERS in accordance with MCL 500.3163.

Flyers advertising the Festival boast of the many activities and events that make up the Festival (4b-49b). The many workshops include dancing, choir, stilt walking, an Amazon Iron Chef Contest, and silver leaf casting, among others. In addition, the Festival kitchen provides three meals per day. There is a full system of First Aid care and an active peer-support system for “recovery” and general emotional needs. Childcare is provided in three different areas of the Festival, and a shuttle service is provided throughout the grounds -- by use of surreys pulled by tractors (*id.*; Vogel dep., p. 29 -- **State Farm Apx, 12a**) (describing them as “glorified hay wagons with seats”).

Also announced in WWTMC’s promotional materials is that transportation is made available for shuttling attendees between the Grand Rapids airport and the Festival site. Throughout their appeal briefs, Plaintiffs repeatedly assert that the van involved in the subject accident was a part of this “airport shuttle service.” Yet both STATE FARM and FARMERS materially distort the key facts in this regard.

STATE FARM, for instance, falsely suggests that the WWTMC utilized its vans to satisfy its contractual obligation to provide Plaintiffs’ insureds the shuttle transportation they had purchased:

In exchange for payment of the additional \$45.00 Airport Shuttle fee, WWTMC makes arrangements to transport the patrons between the airport and the Festival grounds in one of two ways: (1) via common carrier, a professional motor coach hired for that purpose; or (2) via one of the three 15-Passenger vans owned, operated and insured by the Company.

(State Farm Brief on Appeal, p. 4) (emphasis in original). FARMERS also would distort the facts by asserting that the subject van had been sent by WWTMC to the airport for the

specific purpose of providing transportation to the arriving guests in exchange for the \$45.00 each participant had paid (Farmers Brief on Appeal, p. 3).

Both FARMERS and STATE FARM accompany their statements with cites to Lisa Vogel's deposition, but the referenced testimony does not support their assertions; and her overall testimony is to the contrary (*see*, Vogel dep., pp. 19-21, 31-33, 53-55 -- **State Farm Apx, 10a, 13a, 18a-19a**). The shuttle transportation that WWTMC offered and that Plaintiffs' insureds purchased was provided *not* by 15-passenger utility vans but by "Greyhound type" buses operated by Great Lakes Motor Coach, a commercial carrier with whom WWTMC had contracted specifically for this purpose:

Q. Describe for me as best you can the transportation process between the Kent County Airport and the Festival in the Walhalla area for a person such as Carol Dineen, who signed up for and paid for shuttle service?

A. The typical way that someone would arrive at the Festival is by boarding a commercial bus, a carrier. And they would be met at the airport by a volunteer from -- a Festival volunteer, who is on a crew to do this, who will drive down and meet participants coming off the plane. We have a courtesy room at the airport because people come in at different times. There is a meet and greet and gather everybody, and then a commercial coach comes in and the volunteers help people board and load luggage, and that's a typical way that someone -- that's the most common way. That's the way that Carol Dineen was reserved to come in.

Q. And when you say -- ...

Let me strike that. When you say a commercial bus, are you talking something like a Greyhound type of bus?

A. Yes.

Q. And that's typically or the most common way that your participants arrive at the Festival?

- A. No. The most typical way someone arrives at the Festival is by their own motor vehicle. But the typical way that someone would arrive from the airport on the shuttle is from Great Lakes Motor Coach, a commercial bus. And then our volunteers are meeting them at the airport and helping them get onto the bus.

(Vogel dep., pp. 19-20 -- **State Farm Apx, 10a**).

While in rare and unanticipated situations passengers might be transported in a WWTMC van (*id.*, pp. 20-21, 53-54 -- **State Farm Apx, 10a, 18a-19a**), it was not the business of WWTMC to provide such transportation. Indeed, Plaintiffs' characterizations are directly refuted by the published materials, which clarify that festival participants who contract for the airport shuttle service are promised *only* a reservation on the pre-scheduled runs by the motor coach buses; and if a participant misses the commercial bus, "We [WWTMC] cannot be responsible for your transportation..." In pertinent part, the documentation provided with the transportation shuttle tickets stated as follows:

2008 MICHIGAN WOMYN'S MUSIC FESTIVAL OFF-LAND SHUTTLE SERVICE

The Festival provides a scheduled shuttle between the Grand Rapids, Michigan airport and the Festival site by pre-registration, for womyn arriving by plane ...

It is at least a two-hour drive between Grand Rapids and the Festival site. We schedule shuttles in order to allow time for you to arrive, go through Orientation and set up camp before dark. To utilize the Festival shuttle service, please plan your travel to match the shuttle times listed below (or prepare to arrange for car rental or overnight housing in Grand Rapids to meet the next day's shuttle). We cannot provide shuttle service at times other than those listed. ... Shuttle buses will not wait for late arriving passengers. Upon receipt of your reservation form, we will schedule you on the appropriate bus.

* * *

Shuttle Schedules

Shuttles Leave Airport for Festival:
(Allow 45 minutes from flight arrival to Shuttle departure.
Arrive Festival 2½ hours after Grand Rapids departure)

Mon 8/4:	12:00pm	2:00pm	4:00pm
Tues 8/5:	12:00pm	N/A	4:00pm
Wed 8/6:	N/A	1:00pm	

* * *

1. The very last shuttle from the airport to the Festival site is Wednesday, August 6th at 1:00pm.
2. Round-trip shuttle fare is \$45.00 per passenger.

* * *

6. We cannot be responsible for your transportation if you miss your flight or if you miss the shuttle bus.

(Vogel dep. Exhibit 4 -- **State Farm Apx, 36a**) (emphasis added).

The accident in this case occurred on Tuesday, August 5, 2008. There was no afternoon motor coach shuttle service until 4:00pm that day. As is detailed in Ms. Vogel's testimony, this was the bus on which the appellants' insureds were scheduled to travel to the Festival grounds; it is the only transportation to which they were contractually entitled. They had no contractual entitlement to transportation on a WWTMC passenger van. (Vogel dep., pp. 20-21, 31-33, 53-54 -- **State Farm Apx., 10a, 13a, 18a-19a**).

The large utility vans owned by WWTMC had removable seats that, when installed, could hold up to 15 passengers. In practice, however, the vans were used mainly to transport artists and all their gear from the front gate of the camp down to the stage areas, and as service vehicles by the production staff for moving equipment. The vans also were used by

the camp's many volunteers to serve as Festival greeters at the airport, handle luggage overflow from the commercial buses, or run other errands in Grand Rapids. (Vogel dep., pp. 29-30, 43-44 -- **State Farm Apx, 12a-13a, 16a**). Sometime prior to the subject accident, the three utility vans had been modified by adding side steps to the non-driver side of the vans. This step could be used to facilitate entry into the van, whether by a passenger or anyone else using the van to load and transport equipment (*id.*, pp. 16-17 -- **State Farm Apx, 9a**).

As detailed above, although WWTMC offered a shuttle service via a commercial motor coach to guests arriving at the Grand Rapids airport, the vast majority of attendees would arrive at the Festival by way of their own personal vehicles. As many as 1,000 personal vehicles are parked on a 40 acre lot at the Festival. (Vogel dep., pp. 19-20, 35, 47 -- **State Farm Apx, 10a, 14a, 17a**). Of approximately 4,000 Festival attendees each year, perhaps 200 would arrive from out-of-state and utilize WWTMC-provided transportation from the airport to the festival site -- and of these, the vast majority would ride on the Great Lakes motor coaches (hearing transcript, pp. 22-23 -- **Farmers Apx, 70a-71a**). Only a very small percentage of such attendees, due to unusual circumstances or emergency, would end up utilizing other transportation, which has included the utility vans owned by WWTMC (Vogel dep., pp. 19-20, 35, 47 -- **State Farm Apx, 10a, 14a, 17a**).

The incidental nature of passenger transportation activities as compared to WWTMC's overall Festival business is reflected in the company's statistics and financial records. In 2008 (the year of the subject accident), 3,524 people attended the Festival. Only

211 of these attendees were transported in the Great Lakes motor coaches from the airport, and only 23 (including Plaintiffs' insureds) received rides in a WWTMC van. The previous year, 4,011 people attended the Festival, and of these, 222 utilized the Great Lakes motor coaches, while 39 were transported in WWTMC vans (*see*, Vogel chart -- **50b**; Vogel dep., pp. 23, 42 -- **State Farm Apx, 11a, 16a**).

The fee charged for the transportation service sought only to offset the significant cost of the Great Lakes bus expense. At best, Ms. Vogel testified, WWTMC broke even on the shuttle service. She calculated that fees received from guests purchasing tickets for the bus accounted for less than 1% of the gross revenues for the Festival in 2008. WWTMC's revenues are principally derived from the festival ticket sales, tee shirt "Festy-wear," concession sales, craft fees, the snack stands, a raffle, and other Festival paraphernalia (Vogel chart -- **52b**; Vogel dep., pp. 42, 45-47 -- **State Farm Apx, 16a-17a**).

On August 4, 2008, Plaintiffs' insureds were scheduled to fly into the Grand Rapids airport for the Festival, but bad weather caused a significant delay in their arrival. They had purchased tickets for the shuttle bus transport to take them to the Festival, but the late arrival of their flight caused them to miss that day's scheduled 4:00 p.m. departure of the bus. They were rescheduled for the 4:00 p.m. bus leaving from the airport the following day, August 5, 2008. Eager to get to the Festival, however, they arrived at the airport early on August 5th, and instead of waiting for the 4:00 p.m. bus, they joined a number of others in the same situation and "negotiated" their way onto a WWTMC van. (Vogel dep., pp. 20-21, 31-32, 53 -- **State Farm Apx, 10a, 13a, 18a**).

Although the van happened to be at the airport that day, it was not sent to the airport for the purpose of picking up these late arrivers. Rather, festival volunteers had come to the airport to greet the day's arriving guests at the airport "courtesy room" and assist with luggage. Plaintiffs' insureds could have taken the commercial bus as scheduled, but circumstances allowed for them to ride in the van in order to arrive at the Festival earlier (*id.*, pp. 52-55 -- **State Farm Apx, 18a-19a**).

The van was driven by a WWTMC volunteer. As they were en route to the Festival, the driver lost control of the vehicle and it rolled over. Plaintiffs' insureds sustained injuries in the accident, which resulted in claims against FARMERS and STATE FARM for the insurance benefits to which they were entitled under Michigan's no-fault act. FARMERS and STATE FARM paid the claimants' PIP benefits, then initiated these actions seeking reimbursement from MIC.

Proceedings Below

FARMERS and STATE FARM each filed actions against MIC seeking a determination that MIC is the insurer primarily responsible for payment of the claimants' PIP benefits under MCL 500.3114(1) and MCL 500.3114(2). In addition to reimbursement of the PIP benefits they paid, the plaintiff insurers also sought reimbursement of the "loss adjustment" expenses they incurred while handling the PIP claims. The two cases were consolidated.

Summary disposition motions on behalf of all parties were heard on August 11, 2009, following which an order granting partial summary disposition in favor of Plaintiffs was

entered on November 30, 2009 (**State Farm Apx, 67a-68a**). The parties were to calculate the specific amounts of benefits paid by FARMERS and STATE FARM so that a final order could be entered preceding an eventual appeal; but the parties disagreed on which insurer(s) would continue handling the insureds' claims during the appellate proceedings. Also unresolved was whether MIC would be responsible for reimbursing FARMERS and STATE FARM for their "loss adjustment expenses" from handling of the insureds' claims to date.

The parties thus filed motions for entry of judgment, which were heard April 27, 2010. The court declined to compel MIC to commence handling the claims during the appeal, but held MIC liable for reimbursing FARMERS and STATE FARM not only for the PIP benefits they paid but also for their loss adjustment expenses (**Farmers Apx, 154a-155a**). A Final Order and Judgment was entered June 15, 2010 (**State Farm Apx, 85a-89a**).

On Defendant MIC's appeal, the Court of Appeals reversed the trial court's priority of coverage ruling, and did not need to reach the loss adjustment issue (unpublished per curiam opinion of the Court of Appeals -- **State Farm Apx, 90a-101a**). The court relied upon specific facts of the case, noting particularly that the arguments of STATE FARM and FARMERS selectively disregarded important details:

... [I]n arguing the significance of the shuttle service, State Farm and Farmers Insurance conveniently ignore that the van at issue, although sometimes used to 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. ... Moreover,

we do not find it significant that Drucker and Dineen paid a fee for transportation to the festival. 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.

(State Farm Apx, 100a-101a) (footnote citation omitted). The Court of Appeals concluded that §3114(2) did not apply, and that the claimants' own insurers thus were responsible for payment of the PIP benefits:

... WWTMC's transportation of 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.

(State Farm Apx, 101a).

Both FARMERS and STATE FARM filed applications for leave to appeal. By order of May 23, 2012, the Court granted the applications, limiting its review to the priority of coverage issue:

[The applications] are GRANTED, limited to the issue whether the "primary purpose / incidental nature" test for determining whether a commercial vehicle is being used in the business of transporting passengers is consistent with the language of MCL 500.3114(2), and, if so, whether it was properly applied to the facts of this case.

(Order, Nos. 144144, 144145, 144159, May 23, 2012). For all the reasons set forth herein, MIC submits that the judgment of the Court of Appeals should be affirmed.

STANDARD OF REVIEW

The standard of review applicable to the issues raised in this appeal is *de novo*. Defendant-Appellee, MIC, accepts the appellants' statements of the standard of review as accurate. (*See*, State Farm Brief on Appeal, p. 9, and Farmers Brief on Appeal, pp. 7, 13.)

ARGUMENT

Where accident victims insured by Plaintiffs were passengers in an all-purpose utility van primarily used by its owner, WWTMC, for producing a "Womyn's Music Festival," and any shuttling of attendees between the airport and the festival campground was incidental to WWTMC's overall business of producing the festival, the Court of Appeals was correct in holding that MCL 500.3114(2) does not apply since the van was *not* a vehicle "operated in the business of transporting passengers."

The question presented is whether a large, all-purpose utility van owned by WWTMC was a motor vehicle "operated in the business of transporting passengers" within the meaning of MCL 500.3114(2). If it was, then MIC, as the insurer of the motor vehicle involved in the accident, is the insurer of highest priority under §3114(2). If it was not, then FARMERS and STATE FARM are responsible for payment of the no-fault benefits to which their insured claimants are entitled, under MCL 500.3114(1). The simple and correct answer, provided by the Michigan Court of Appeals, is that WWTMC's van was not a vehicle "operated in the business of transporting passengers." This Court should affirm the Court of Appeals'

judgment and conclude that FARMERS and STATE FARM properly were held to be responsible for payment of their insureds' no-fault benefits.

In an attempt to convince the Court of the need to overturn the "primary purpose / incidental nature" test established and applied by the Court of Appeals, and in essence to re-write the statutory provision which controls in this case, Plaintiffs play slight-of-hand both with the law and the facts. Plaintiffs' strategy is based on asserting repeatedly that MCL 500.3114(2) applies broadly to business and commercial vehicles of any sort, in hopes that this Court will ignore the plain, and limiting, language of §3114(2).

By its terms, the statutory text does not apply to all commercial vehicles, but only to a distinctly limited class of such vehicles. Thus, as an exception to the general rule of coverage priority, §3114(2) provides only that insurers of vehicles "*operated in the business of transporting passengers*" will be liable for providing PIP benefits to passengers of such vehicles in place of the passengers' own insurers. Furthermore, the primary purpose / incidental nature test, as conceived and applied, is consistent with the text and purpose of the statute.

In other words, under both the plain language of §3114(2), and in accordance with the primary purpose / incidental nature test developed to implement that plain language, not all business and commercial vehicles that transport passengers will give rise to a commercial insurer's liability. Instead, only vehicles operated in the business of transporting passengers will do so; and here, there is no question that WWTMC's van was not operated in the

business of transporting passengers where, quite simply, WWTMC was not in the business of transporting passengers.

- A. Where the Legislature's intent is best evidenced by the language of its enacted statute, and the terms of §3114(2) plainly allow an accident victim to recover PIP benefits from an insurer other than his or her own personal no-fault insurer only if injured while occupying a vehicle "operated in the business of transporting passengers," the appellants' position would expand the scope of §3114(2) to include *all* business vehicles and thus is fundamentally flawed.

The principal argument advanced in STATE FARM's Brief on Appeal (endorsed and adopted by FARMERS -- Farmers Brief on Appeal, p. 7) expends several pages analyzing the purported origins and evolution of the provision at issue, §3114(2), in an attempt to convince the Court to plumb the depths of legislative history and thus glean "the Legislature's intent." (State Farm Brief on Appeal, p. 16). In fact, however, STATE FARM would have the Court construe the provision in a way that departs from its plain meaning.

STATE FARM repeatedly asserts the notion that, absent §3114(2), insurers of commercial vehicles "would rarely -- if ever -- bear any liability for the payment of [PIP] benefits" (e.g., State Farm's Brief on Appeal, pp. 1, 18 [top], and 18 [bottom]). The substance of the bill upon which STATE FARM bases its assertion, however, HB 4735, clearly was *not* the same as the bill ultimately passed (*see*, State Farm Brief on Appeal, p. 18), where, unlike the bill addressed by STATE FARM, the statute ultimately passed has no optional election of no-fault coverage, and does not base priority of coverage on an owner's "fault" (*id.*).

In any event, in the statute actually enacted, there is no support for STATE FARM's assertion (*see*, State Farm Brief on Appeal, p. 18).² Contrary to STATE FARM's concern, insurers of commercial vehicles under the No-Fault Act, as it exists, clearly do bear substantial exposure even when neither of the higher priority provisions, §§ 3114(2) and (3), applies. For instance, unless an injured occupant of a commercial vehicle has coverage under a policy of her own or under a policy of a resident family member, the commercial policy must pay her PIP benefits. MCL 500.3114(4)(a). Likewise, when a pedestrian is injured in an accident involving the commercial vehicle, that pedestrian will recover benefits from the commercial insurer unless he has a policy of his own or within his household. MCL 500.3115(1)(a). And if a motorcyclist is injured in an accident involving a commercial vehicle, the insurer of that vehicle is first in priority for payment of benefits *regardless* of any PIP coverage the accident victim might otherwise have. MCL 500.3114(5)(a).

Accordingly, in broadly suggesting that §3114(2) was created so “that insurers of business vehicles would bear the burden of having primary priority status,” (State Farm Brief on Appeal, p. 21), STATE FARM glosses over the plain, limiting language of the statute itself:

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

² STATE FARM asserts that, absent broad application of the provision at issue, insurers of commercial vehicles would “rarely -- if ever -- be responsible” for payment of benefits. In this regard, the bill analysis quoted by STATE FARM expresses concern that no-fault PIP coverage “won’t cost anything” for a commercial entity since there would effectively be no exposure. (State Farm Brief on Appeal, p. 18.)

benefits to which the person is entitled from the insurer of the motor vehicle. ...

MCL 500.3114(2) (emphasis added). According to the statutory language, the Legislature's concern with this provision is not with whether a vehicle is used for commercial purposes generally, or for the purpose of advancing the interests of any type of business. If that were so, then every "operator" of any commercial vehicle, regardless of the nature of the owner's business, would come under this section's coverage even if there was *never* a "passenger" in the vehicle!

Contrary to the position asserted by the appellants, the statutory language contemplates only a specific type of commercial enterprise. Its plain meaning extends not to vehicles operated in any and all business, but only to those that are "operated *in the business of transporting passengers.*" §3114(2) (emphasis added). This limiting language of the statute must be honored. The appellants' strategy of expanding the scope of the provision into a simplistic litmus test that asks only whether a vehicle is a personal vehicle (thus part of a "personal household") or a business vehicle (thus part of a "business household"), creating categories not supported by the plain language of §3114(2), grossly misreads the statute.

The "overarching rule" of statutory construction is that the Court "'must enforce clear and unambiguous statutory provisions as written.'" *US Fidelity Ins & Guar Co v MCCA (On Rehearing)*, 484 Mich 1, 12; 773 NW2d 243 (2009), quoting, *Preferred Risk Mut Ins Co v MCCA*, 433 Mich 710, 721; 449 NW2d 660 (1989). As the goal is to give effect to the intent of the Legislature, the Court's task must begin with examination of the language of the

statute itself because the words of a statute provide the most reliable evidence of the Legislature's intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). “As far as possible, effect should be given to every phrase, clause, and word in the statute.” *US Fidelity Ins & Guar Co*, at 13, quoting, *Sun Valley Foods Co*, 460 Mich at 237. Since the Legislature is presumed to have intended the meaning it plainly expressed in a statute, judicial construction is neither necessary nor even permitted when the plain and ordinary language of the statute is clear. *Sun Valley Foods Co*, 460 Mich at 236; *Eggleston v Bio-Med Apps of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The plain and ordinary meaning of the language of §3114(2) is clear, MIC submits, and it produces results consistent with the overall functioning of the §3114 priority of coverage provisions. In Michigan, pursuant to MCL 500.3114(1),³ it is the general rule that when a person has a no-fault automobile insurance policy of his/her own, or is covered as a spouse or resident relative of a named insured, that insurer is responsible for payment of PIP benefits, without regard to what vehicle the claimant might have been occupying at the time of the accident. *See, Lee v DAIIE*, 412 Mich 505, 515; 315 NW2d 413 (1982); *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 726-727; 635 NW2d 52 (2001). As one of the limited exceptions to the general rule, §3114(2) applies when the person is injured “while an operator or a passenger of a motor vehicle operated in the business of

³ 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. ...

MCL 500.3114(1).

transporting passengers,” in which case the person receives PIP benefits from the insurer of the motor vehicle.

In this case, the facts presented in the whole record and relied upon by the Court of Appeals establish that the WWTMC van was *not* operated in the business of transporting passengers. WWTMC’s business -- the enterprise from which it derived its revenues and its reason for existing -- was the production of the Michigan Womyn’s Music Festival. WWTMC’s transportation of attendees to and from the airport via commercial carrier, let alone in its vans, was not its “business.”⁴ It derived no revenues whatsoever from transporting attendees in its vans,⁵ it did not advertise that it would transport attendees in its vans, and any transportation of attendees in its vans was exceedingly incidental to its production of the Festival. Under the plain language of §3114(2), therefore, WWTMC’s van was not a motor vehicle operated “in the business of transporting passengers.”

STATE FARM’s argument that §3114(2) essentially must be broadly construed to apply to all commercial vehicles is based on the list of exceptions that was added to §3114(2). STATE FARM points to the businesses addressed in the exceptions, which operate vehicles such as school buses, taxi cabs, and buses operated by canoe, bicycles and

⁴ “Business” is defined as “[t]he occupation, work, or trade in which a person is engaged.” The American Heritage College Dictionary (3rd ed, 1997), p. 190. It is also defined as “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” Black’s Law Dictionary (7th ed, 1999), p. 192.

⁵ As the testimony and documentary evidence established, the \$45 fee paid by each shuttle passenger purchased only a reserved place on the commercial bus, which was operated *not* by WWTMC but by the outside carrier with whom WWTMC contracted. The van transportation received by Plaintiffs’ insureds in this case, therefore, cannot be regarded as fulfillment of their shuttle contract but rather as a fortuitous alternative to it.

horse liveryes, and suggests that such “businesses” would not consider themselves to be primarily in the business of transporting passengers, and yet the Legislature must have deemed them as such or else the amendments excluding them from §3114(2) would not have been necessary (State Farm Brief on Appeal, pp. 12, 22 -- “if the provision were intended to be construed as narrowly as the Court of Appeals would have it, then there would have been no need to pass the amendments”).

MIC agrees that the exceptions listed as subsections to §3114(2) provided insight into the scope of the general rule.⁶ Yet STATE FARM’s argument misses the vital role the transportation of passengers plays in all of the identified enterprises. In each case, transportation of customers, patrons, or those whom the “business” otherwise directly serves (i.e., students) is integral to the functioning of the enterprise. Without students, schools would have no reason to exist, and without school bus transportation, today’s schools would

⁶ In context, the whole provision, §3114(2), states as follows:

A person suffering accidental bodily injury while an operator or passenger of a motor vehicle operated in the business of transporting passengers shall receive the [PIP] benefits to which the person is entitled from the insurer of the motor vehicle. This subsection shall not apply to a passenger in the following, unless the passenger is not entitled to [PIP] benefits under any other policy:

- a. A school bus, as defined ...
- b. A bus operated by a common carrier of passengers ...
- c. A bus operated under a government sponsored transportation program.
- d. A taxicab insured as prescribed ...
- e. a bus operated by or providing services to a non-profit organization.
- 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.

have few students. Canoe liveries likewise could not function without the ability to transport their customers to drop-off points or from destination points. And taxicabs, commercial busses and busses serving non-profits or government transportation programs are engaged in nothing but transporting passengers. In each of these instances, transportation of passengers not only is a regular part of, but is integral to, the enterprise, otherwise it would not be in the “business of transporting passengers” in the first place.

Moreover, in its discussion of how §3114(2) evolved with the addition of the listed exceptions, STATE FARM defeats its own argument. STATE FARM emphasizes that these amendatory exceptions were added because the school districts, canoe liveries and taxi drivers were financially suffering under the law due to the cost of premiums to insure their patrons (State Farm’s Brief on Appeal, pp. 22-24). The argument tacitly acknowledges that transporting passengers was a significant enough component of each of these businesses that the cost of insuring such large numbers of passengers would be fatally burdensome.

Unlike those businesses, however, there is no question in this case that transporting passengers is an extremely *insignificant* component of WWTMC’s business. Unlike school buses, which transport thousands of children twice a day; canoe liveries, which likewise transport patrons up river all day and every day in order for their businesses to function; and taxi cabs, whose sole purpose for existence is to transport passengers for hire, the situations in which the WWTMC vans ever transported festival attendees were atypical and exceedingly rare. Critically, unlike the businesses identified in §3114(2)(a)-(f), had WWTMC *never* provided transportation to its customers in its vans, the overall business of

the WWTMC -- the production of the Festival -- would have proceeded without the slightest impact.

By its terms, §3114(2) does not apply to vehicles operated in just *any* business or commercial endeavor; it applies only to vehicles operated in a specified sub-set of all businesses and commercial endeavors: it applies only to those vehicles operated “in the business of transporting passengers.” *Id.* (emphasis added). WWTMC is a business entity engaged in a commercial endeavor -- creating and hosting a week-long music festival for women, but the transportation of passengers is not integral to this endeavor. WWTMC owns and utilizes a variety of motor vehicles to accomplish its commercial purposes, but since WWTMC is *not* in the “business of transporting passengers,” its vehicles are not “operated in the business of transporting passengers.”

FARMERS and STATE FARM were properly held to be first in priority for payment of their insureds’ PIP benefits under §3114(1) of the No-Fault Act, since §3114(2) does not apply under the circumstances in this case. The judgment of the Court of Appeals should be affirmed.

B. The primary purpose/incidental nature test adheres to the language of §3114(2), furthers the purpose of §3114(2), and, when applied in the present case, properly establishes that WWTMC’S van was not operated in the business of transporting passengers.

In its order granting the applications for leave to appeal, the Court posed the question whether the “primary purpose / incidental nature” test is consistent with the language of §3114(2) (Order, May 23, 2012). While Defendant MIC contends that it is, Plaintiffs-

Appellants argue that the test defeats the purpose of §3114(2). The Court of Appeals' decisions applying this test, however, including the one in the case at bar, prove otherwise. Under the test, the WWTMC van was properly determined not to be a vehicle "operated in the business of transporting passengers."

The no-fault act does not itself define what constitutes a "motor vehicle operated in the business of transporting passengers." Looking at the provision's specific language and the pattern of cases decided under the statute, however, the Court of Appeals in *Farmers Ins Exchange v AAA of Michigan*, 256 Mich App 691; 671 NW2d 89 (2003), discerned the "primary purpose/incidental nature" test, which, properly applied, controls the outcome of this case.

The *Farmers* court observed, as prior cases had noted, that while a business can be an owner and registrant of a motor vehicle, a business cannot be a "household" or have a "spouse" or "relative" in the sense that these terms are used in §3114(1). The court thus acknowledged prior expressions of the view that, by enacting the exceptions that pertain to the business setting (§3114(2) and §3114(3)⁷), the Legislature created what amounts to a "business household" so that responsibility for providing benefits would be spread more equitably among all insurers of motor vehicles. 265 Mich App at 697-698. Importantly, however, both by its express terms and as construed by case law, §3114(2) does not impose priority coverage on insurers of all, or even most, businesses; rather, as discussed above, this

⁷ MCL 500.3114(3) addresses injuries sustained by persons occupying an employer-provided vehicle. See, *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84; 549 NW2d 834 (1996).

special priority coverage applies only to those vehicles operated in “the business of transporting passengers.”⁸

The court in *Farmers Ins Exchange*, after reviewing and analyzing the limited case law on point, concluded:

[W]e hold that a primary purpose/incidental nature test is to be applied to determine whether at the time of the accident a motor vehicle was operated in the business of transporting passengers pursuant to subsection 3114(2).

Id. at 701. The facts to which the court applied the test concerned a day-care center that charged an extra fee to parents for their children to be transported from the day-care center to school. Two children were injured while being transported to school in the day-care provider’s vehicle. When not used by the day-care provider during her work day, this vehicle served as her personal vehicle.

Application of the “primary use / incidental nature test” consists of a two-part inquiry, with one part focusing on the primary use of the vehicle, and the other part focusing on the overall nature of the business: (1) Was the transportation of children to and from school the primary function or purpose of the vehicle, or was it incidental to the vehicle’s primary use?

⁸ STATE FARM latches onto case law’s recognition of this general distinction between business entities and personal households in its effort to expand coverage of §3114(2) to all business entities. In the court below, STATE FARM phrased the operative question to be whether the subject vehicle “is a personal vehicle, part of a personal household” or “a business vehicle, part of a business household” (State Farm’s Appellee Brief to the Court of Appeals, p. 20), and it persists in urging this broad dichotomy here (State Farm Brief on Appeal, p. 35 -- asserting the inquiry as being whether the vehicle’s purpose is for business, rather than personal, use). This grossly misapplies the text of the statute. To phrase it in the “personal household” and “business household” terminology, the correct question would be whether the subject vehicle was part of a “business-of-transporting-passengers household,” or part of any other personal or business household. In both *Farmers Ins Exchange* and the case at bar, the vehicle in question clearly was part of the latter class of “households,” not the former.

and (2) Was the transportation of children to and from school the primary purpose of the business, or was transporting passengers only an incidental or small part of the day-care business? Holding that the vehicle was *not* used in the business of transporting passengers, the *Farmers* court reversed the lower court's contrary ruling because "(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." *Id.* at 701-702.

Plaintiffs-Appellants distort the test, however, first by focusing exclusively on the moment in time in which the transportation of passengers was, in fact, occurring, repeating and over-emphasizing the *Farmers* court's use of the phrase, "*at the time of the accident.*" (State Farm Brief on Appeal, pp. 37-38; Farmers Brief on Appeal, pp. 10, 12). They would have the Court ignore the manner in which the vehicle is used at all other moments in time. "The statute, by the way it is drafted and conceived, looks very precisely at the situation at the time of the accident." (State Farm Brief on Appeal, p. 37). STATE FARM is wrong in this regard.

The statutory provision, §3114(2), first refers to a person suffering injury while an operator or passenger of a vehicle, then identifies the particular vehicle; and how does it identify that vehicle? It does *not* identify it as a vehicle that is "*being* operated in the business of transporting passengers." If it did (or if the provision actually included the phrase, "at the time of the accident"), STATE FARM's assertion would have support. But no such indicator of a precise moment in time is included. The absence of the word "*being*"

prior to the phrase “operated in the business of transporting passengers” removes the notion that the focus is on the immediate present and instead allows for a broader view of how the vehicle is used overall.

The *Farmers* case is consistent with this analysis, despite the opinion’s gratuitous (and mistaken) use of the phrase, “at the time of the accident.” 256 Mich App at 701. At the moment in time that the accident occurred in *Farmers*, of course, two children were riding as passengers, for a pre-paid fee, in a vehicle providing such transportation. Yet it was by examining this use of the vehicle *in the context* of the overall manner in which it was used generally, and not narrowly “at the time of the accident,” that led the court to conclude that transporting passengers for hire was incidental to the vehicle’s primary use.

Both FARMERS and STATE FARM also distort the test by attempting to expand its narrow boundary (“the business of transporting passengers”) and stretching it all the way to *any* commercial use of a vehicle. FARMERS thus addresses the “primary purpose/incidental nature” test and argues that its first prong resolves against MIC since the “primary purpose” of the van in this case “was for commercial purposes.” FARMERS relies on Ms. Vogel’s testimony that the van “was only used for the business,” and seems to regard as dispositive the fact that it was “insured under a business automobile policy” (Farmers Brief on Appeal, p. 21) (emphasis added). STATE FARM likewise attempts this sleight of hand, as noted above (p. 23, n. 8, *supra*), by asserting the proper inquiry to be whether the vehicle’s purpose is for business, rather than personal use (State Farm Brief on Appeal, p. 35) and faulting the

Court of Appeals for not limiting its inquiry to “the primary use of the vehicle (i.e., business versus personal)” (*id.*).

The plaintiff insurers would then conclude that, since the van was used generally for business purposes (in this case to transport WWTMC’s equipment, employees and volunteers), §3114(2) is satisfied. Plaintiffs thus ignore the glaring fact that simply moving employees and equipment from place to place during the course of its business does not transform WWTMC’s enterprise into a “business of transporting passengers.”

In discerning the primary purpose / incidental nature test, the Court of Appeals in *Farmers Ins Exchange* relied upon the analysis and reasoning in *Thomas v Tomczyk*, 142 Mich App 237; 369 NW2d 219 (1985), in which two college students responded to a notice on a “ride board.” The defendant vehicle owner provided the students a ride in his automobile to the Flint area in exchange for \$25.00 each. While en route, an accident occurred and the two student passengers in defendant’s vehicle were injured. Both students were insured under other no-fault policies and received PIP benefits. Their insurers sought reimbursement of those benefits from the defendant’s insurer pursuant to §3114(2).

The *Thomas* court held, not surprisingly, that the college student’s car was not a motor vehicle “operated in the business of transporting passengers.” The court noted that the defendant was not in a business at all, let alone one centered on transporting passengers. He was not engaged in any ongoing enterprise (“business”) whose primary purpose was to carry passengers for hire, nor was it the primary purpose of the subject vehicle itself to carry passengers for hire.

In the case at bar, the Court of Appeals recognized a principled similarity with the *Thomas* case, despite the overall commercial setting in this case that was lacking in *Thomas*:

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.

(**State Farm Apx, 100a**) (emphasis in original).

The efficacy and proper application of the "primary purpose / incidental nature" test is illustrated in another Court of Appeals decision, *State Farm Mut Ins Co v Progressive Ins Co*, Court of Appeals per curiam (No. 262833, September 29, 2005) (**Exhibit A**). In *State Farm*, the defendant's insured, Michael J's Adult Day Care, owned a passenger van used for transporting clients, some of whom were wheelchair-bound. As a part of providing adult day care services to make respite available to family care givers, Michael J's needed to meet requirements set forth by the Area Agency on Aging, one of which was to provide transportation or make arrangements for transportation. As an integral part of its business, therefore, the company transported clients between their homes and the day care center, and likewise transported clients to go on field trips (*id.*, slip op at 1).

Resolving the priority of coverage dispute that arose after a wheelchair-bound client sustained injuries in the Michael J's van, the court applied the two-part primary purpose / incidental nature test. It noted that the Michael J's van was specifically equipped to handle transportation of wheelchair-bound and other passengers, and that Michael J's purchase of

the van was for that specific and primary purpose. While transporting passengers was not the only purpose of Michael J's business, the transportation component was significant enough to compel Michael J's to comply with commercial transportation requirements established by the Area Agency on Aging, which referred clients to the business (**Exhibit A** -- slip op at 3).

The result in *State Farm* is entirely consistent with the analysis and holding in the case at bar. Here, per Ms. Vogel's testimony, WWTMC's purpose in purchasing the subject passenger/cargo vans was not primarily for transporting passengers but, rather, for their flexibility to be used as a utility vans for the Festival. The seats were most often taken out of the van to make room for equipment, luggage and other gear. Transporting passengers was left to the commercial buses specifically hired for that purpose, and to the "glorified hay wagons" pulled by farm tractors around the festival site. The ability to remove the seats from the subject van made it more useful for the primary purpose of WWTMC, which was to produce a music festival.

Attempting to equate the specially-equipped van in the *State Farm* case with the WWTMC van in this case, FARMERS emphasizes that the van was modified by the addition of a running-board or step to the passenger-side doorway, suggesting that this indicates the importance of the van as a transportation vehicle (Farmers Brief on Appeal, p. 14). There is no evidence in this case, however, linking the addition of a step to the van to anything more than convenience for those loading and unloading gear into the van. Steps make access and egress easier for everyone, passengers and those engaged in the loading process alike.

Moreover, to test the distinction between these two cases, one needs only to imagine the Michael J's Day Care business without its handicap-van. *State Farm, supra*. Based on the opinion's description of the overall business, it is clear that there never could have been a Michael J's Day Care business *without* the van and its ability to transport wheelchair-bound passengers. Now imagine the WWTMC music festival without use of the 15-passenger utility vans to help with airport-to-campground shuttle. There would be no impact whatsoever. The *vast* majority of festival participants drive their own cars to the grounds; and of the very small percentage of attendees that do arrive via the airport, the vast majority of them utilize the Great Lakes Motor Coach bus shuttle. The Michael J's case thus is materially, indeed conclusively, distinguishable from the case at bar.

Another unpublished case whose facts illustrate the efficacy of the test is *Lampman v Workman*, Court of Appeals per curiam opinion (No. 225743, March 22, 2002) (**Exhibit B**). In *Lampman*, National Fleet Liquidators of Michigan, Inc. ("NFL") bought motor vehicles at auction for later resale to retailers. Because NFL did not have a showroom location, it used drivers to move the vehicles to the sale location, and a van owned and operated by NFL then would transport the drivers back home. Several of these drivers (held by the court to be independent contractors of NFL) were injured when the van in which they were riding was involved in an accident. They brought suit seeking no-fault benefits. The Court of Appeals determined that the primary focus of NFL's business -- the enterprise from which it derived profit -- was the buying and selling of cars, and the transportation of its drivers was incidental to that overall business (*id.*, slip op, at 5). *See, Farmers Ins Exchange*

v AAA of Michigan, 256 Mich App at 701 n. 5 (discussing and summarizing *Lampman*, *supra*).

Even more incidental to its overall business operations than was the transportation of drivers to NFL's business in *Lampman*, WWTMC's involvement in transporting passengers for hire clearly was insufficient to render the company a "business of transporting passengers" for purposes of §3114(2). The enterprise from which WWTMC derived its revenues and earned any profit was the production of a music festival. WWTMC did not profit from the transportation of passengers in its provision of an airport shuttle service, nor were WWTMC vans even a functional part of that offering; this transportation was principally a business endeavor of *Great Lakes Motor Coach*, whose services WWTMC had obtained by contract.

MIC thus submits that the Court of Appeals in its opinion accurately applied the primary purpose / incidental nature test to the factual record of this case, and that the test faithfully adheres to and effectuates the text of the statute. Pursuant both to the plain language of §3114(2) and to the test set forth in the above-cited cases, therefore, WWTMC's van was not a vehicle operated in the business of transporting passengers.

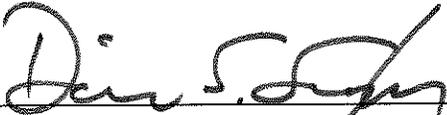
The Court of Appeals properly reversed the ruling of the trial court to hold that FARMERS' and STATE FARM's coverage applies to the losses here at issue. This Court should affirm.

RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellee, MICHIGAN INSURANCE COMPANY, respectfully requests this Honorable Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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October 3, 2012

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A

STATE OF MICHIGAN
COURT OF APPEALS

STATE FARM MUTUAL INSURANCE
COMPANY,

Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 29, 2005

No. 262833
Oakland Circuit Court
LC No. 2004-059962-NF

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order granting summary disposition in favor of plaintiff on the ground that defendant had a higher priority to pay benefits under the Michigan no-fault statute. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Michael J's Adult Day Care owned a van that was insured by defendant. That van was equipped to transport one wheelchair-bound passenger and five or six other passengers. Michael J's was primarily a provider of adult day care to make respite available to family caregivers. As a part of its business it would drive clients to and from their home to Michael J's and it would also use the van if it took the clients on field trips.

Michael J's had some clients that were referred to it by the Area Agency on Aging. To get such referrals, Michael J's had to meet requirements set forth by the Area Agency on Aging. Among other things, those requirements included that Michael J's either had to provide transportation or it had to make arrangements for transportation. Michael J's was also required to have one million dollars in insurance liability coverage on the van that it used for such transportation.

On September 26, 2002, a wheelchair-bound passenger in the Michael J's van was injured when she somehow slumped out of her wheelchair. That passenger resided with her daughter who had no-fault insurance coverage through plaintiff. Plaintiff initially paid the benefits under the no-fault act and then submitted the expenses to defendant for reimbursement

claiming that defendant held a higher priority under the no-fault statute to pay for such benefits. This lawsuit ensued after defendant denied reimbursement.

The trial court heard defendant's motion for summary disposition and determined that defendant was in a higher priority for payment under the statute. The trial court therefore denied defendant's motion and granted summary disposition in favor of plaintiff.

This case involves a priority dispute between two insurance companies under Michigan's no-fault act. MCL 500.3101 *et seq.* Resolution of the issue requires interpretation and application of MCL 500.3114(2). Interpretation and application of a statute is a question of law that is reviewed de novo. *Farmers Ins Exch v AAA of Michigan*, 256 Mich App 691, 694; 671 NW2d 89 (2003).

MCL 500.3114(2) provides that "[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." That subsection of the statute goes on to list six exceptions to that rule, but it is agreed that none of those exceptions are applicable here.

The dispositive question is whether the van owned by Michael J's Adult Day Care, in which the passenger was injured, was "a motor vehicle operated in the business of transporting passengers." The statutory phrase in question—"a motor vehicle operated in the business of transporting passengers"—must be construed under the rules of statutory interpretation because it does not have a clear and unambiguous meaning. *Farmers Ins Exch, supra* at 697. The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Id.* at 695.

Throughout the no-fault act the Legislature generally intended that a person's personal insurer, which is the insurance company that provides no-fault insurance to the household, is primarily liable. *Id.* at 695-696. The Legislature recognized, however, that always following such a general intent would have resulted in insurers of business vehicles rarely being first in priority for payment. *Id.* at 697-698. Consequently, the Legislature "created what amounts to a business household in §3114(2) and (3), so that responsibility for providing benefits would be spread equitably among all insurers of motor vehicles." *Id.* at 698, quoting *Michigan Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 634; 455 NW2d 352 (1990).

The exceptions to the rule of MCL 500.3114(2), that the insurer of the vehicle would be primarily liable, also reveal the legislative intent.

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. [*Farmers Ins Exchange, supra* at 698, quoting *State Farm Mut Automobile Ins Co v Sentry Ins*, 91 Mich App 109, 114; 283 NW2d 661 (1979).]

The *Farmers* Court held “that a primary purpose/incidental nature test is to be applied 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).” *Id.* at 701. In this Court’s actual application of that test it used a two-part analysis. The first part was whether the vehicle was transporting passengers in a manner incidental to the vehicle’s primary use. *Id.* 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. *Id.* at 701-702. In *Farmers*, this Court decided that a daycare provider was not operating her vehicle in the business of transporting passenger when (1) she used her personal automobile to transport children to and from school three to five times a week; and (2) that transportation made up an incidental or small part of her day-care business. *Id.*

In the present case Michael J’s Adult Day Care owned a van specifically equipped to handle transportation of wheelchair-bound and other passengers. Michael J’s purchased the van for that specific and primary purpose, and defendant provided insurance to the commercial entity for that vehicle. While transporting passengers was not the primary purpose of Michael J’s Adult Day Care, it was a significant enough component for Michael J’s to provide the transportation in a specially equipped vehicle, owned and operated by the business and insured according to the commercial requirements established by the Area Agency on Aging that referred clients to the business.

Based on the legislative intent that MCL 500.3114(2) creates a “business household,” and applies to commercial situations, along with the fact that the transportation component of Michael J’s business was important enough for the business to purchase a vehicle that was used primarily for and insured specifically for transporting Michael J’s clients, we hold that MCL 500.3114(2) applies in this situation and defendant has a higher priority to pay Michigan no-fault benefits.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio

B

STATE OF MICHIGAN
COURT OF APPEALS

DONNA LAMPMAN, Personal Representative of
the Estate of LEO J. BANKS,

Plaintiff,

v

DONALD WORKMAN, NATIONAL FLEET
LIQUIDATORS OF MICHIGAN, INC., and
DALE BAKER OLDSMOBILE, INC.,

Defendants.

UNPUBLISHED
March 22, 2002

No. 225743
LC No. 96-02949-NI

GLEN HARTGER and SHARON HARTGER,

Plaintiffs,

v

DONALD WORKMAN, NATIONAL FLEET
LIQUIDATORS OF MICHIGAN, INC., and
DALE BAKER OLDSMOBILE, INC.,

Defendants.

No. 225743
LC No. 96-03227-NI

GLEN HARTGER,

Plaintiff,

v

STATE FARM INSURANCE COMPANIES,

Defendant-Appellee/Cross-
Appellant,

and

MOTORS INSURANCE CORPORATION,

Defendant-Appellant.

No. 225743
LC No. 96-03236-CK

DIANA COLE,,

Plaintiff,

v
DONALD WORKMAN, NATIONAL FLEET
LIQUIDATORS OF MICHIGAN, INC., and
DALE BAKER OLDSMOBILE, INC.,,

Defendants.

No. 225743
LC No. 96-03983-NI

EDWIN LAUER and FRANCES LAUER,

Plaintiffs,

v
DONALD WORKMAN, NATIONAL FLEET
LIQUIDATORS OF MICHIGAN, INC., and
DALE BAKER OLDSMOBILE, INC.,

Defendants.

No. 225743
LC No. 96-03514-NI

DONALD WORKMAN,

Plaintiff-Appellee/Cross-Appellant,

v
CITIZENS INSURANCE COMPANY,

Defendant/Cross-Appellee.

No. 225743
LC Nos. 96-06871-NZ
96-04401-NZ

DONALD WORKMAN,

Plaintiff-Appellee/Cross-Appellant,

v
MOTORS INSURANCE CORPORATION,

Defendant-Appellant,

No. 225743
LC No. 96-06871-NZ

and

CITIZENS INSURANCE COMPANY

Defendant-Appellee/Cross-Appellee,

and

MAXCIS, INC.,

Defendant-Appellee.

MOTORS INSURANCE CORPORATION,

Cross-Plaintiff/Third-Party
Plaintiff-Appellant,

v

No. 225743
LC No. 96-02949-NI

MAXCIS, INC. and CITIZENS INSURANCE
COMPANY,

Cross-Defendants/Third-Party
Defendants-Appellees,

and

STATE FARM INSURANCE COMPANIES;
AAA; FARMERS INSURANCE COMPANY;
AUTO-OWNERS INSURANCE COMPANY;
KENNETH B. FIELDS; ROBERT S. RUPE,
EDWIN J. LAUER; DONNA LAMPMAN,
Personal Representative of the Estate of LEO J.
BANKS, Deceased; BARBARA ANN JENSEN;
MICHAEL CHAWLEK; JOHN FOWLER,

Third-Party Defendants.

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant National Fleet Liquidators of Michigan, Inc. ("NFL") would buy motor vehicles at an auction and resell them to retailers at tent sales; because it did not have a showroom location, NFL used "drivers" to move the vehicles to the sale location, and a van

would then transport the drivers back home. Several of these drivers, who were injured or killed when the van in which they were riding was involved in an accident, brought suit. Their cases were consolidated. The issue before us now is which of several insurers are liable for benefits due or already paid the injured persons.

In these consolidated civil actions, Motors Insurance Corporation ("MIC") appeals by right from the February 7, 2000 order that determined that MIC was responsible to pay Donald Workman's no-fault benefits, the May 1, 1998 order granting summary disposition to Maxcis, Inc. ("Maxcis"), and from a separate May 1, 1998 order granting summary disposition to State Farm Insurance Companies ("State Farm"), Auto-Owners Insurance Company ("Auto-Owners"), and AAA. State Farm cross-appeals by right from the May 1, 1998 order that adjudged Glen Hartger to be an independent contractor. Donald Workman also cross-appeals. We affirm in part, reverse in part and remand.

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition pursuant to MCR 2.116(C)(8) is appropriate where the opposing party has failed to state a claim on which relief can be granted. A motion under this rule tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

A trial court properly grants a motion for summary disposition pursuant to MCR 2.116(C)(10) where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing such a motion, all affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties is viewed "in the light most favorable to the party opposing the motion." *Id.*

The first issue is whether the van occupants were employees or independent contractors. The court made its determination regarding whether the van occupants were NFL's employees or independent contractors according to MCL 418.161(1)(m) [now MCL 418.161(1)(n)] and the economic realities test, which represented the controlling analysis at the time. *Amerisure Ins Cos v Time Auto Transportation, Inc*, 196 Mich App 569, 573; 493 NW2d 482 (1992). Although the Bureau of Workers' Disability Compensation has exclusive jurisdiction to decide whether an injury occurred in the course of an employee's employment, a trial court has jurisdiction to decide the fundamental issue of whether an employer-employee relationship existed. *Id.* at 572.

Our Supreme Court held in *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 572; 592 NW2d 360 (1999), that the economic realities test was superseded by the Legislature's 1985 amendment to MCL 418.161. The *Hoste* Court stated:

The common-law based approach was appropriate until the Legislature . . . chose to speak about who was an independent contractor by amending § 161, in 1985, through the addition of subsection d, to define more completely the term "employee." The new language, in superseding the old economic realities test, incorporated some, but not all the factors of the old test. Accordingly, while the common-law economic realities test cannot be used to supersede the statute, i.e.,

by adding factors not in the legislative formulation of the economic realities test, those factors in the legislative test can be construed by reference to the case law development of those same factors. [*Id.*; citation omitted.]

The *Hoste* Court explained that both subsections 161(1)(b) and (d) [currently §§ 161(1)(l) and (n)] must be satisfied in order for a person to qualify as an “employee.” *Id.* at 573. Under the pertinent language of § 161(1)(l), an “employee” is a “person in the service of another, under any contract of hire, express or implied”

The first inquiry, then, is whether the person is under a “contract of hire.” *Hoste, supra*; MCL 418.161(1)(l). The Court in *Hoste, supra* at 574, defined “contract” as “an intent by two parties to suffer a detriment to receive a benefit, and . . . an agreement to exchange those detriments and benefits.” Because the van occupants agreed to serve as drivers in exchange for hourly wages paid by NFL, we find that a contract existed between the van occupants and NFL.

The contract must also be “of hire,” where the benefit received by the individual is payment intended as wages, i.e., “real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer.” *Id.* at 575-576. Workman was paid \$6 per hour, and the other van occupants were paid \$5 per hour. Also, NFL issued each driver a 1099, the federal tax form for reporting non-employee compensation. In *Hoste, supra* at 577-578, the Court held that the plaintiff, who was not issued a 1099 or a paycheck, was a gratuitous worker and not one “of hire.”

Workman and Maxcis argue that the van occupants were not “of hire” because the income was only supplemental. However, with regard to the payment of wages, *Hoste* did not require that the wages be one’s primary source of income. *Hoste* merely states that the wages be a “regular income source.” *Id.* at 577. Here, Workman and the other drivers could and did drive for NFL “regularly.” Therefore, we find that the van occupants were “of hire” and thus the definition of “employee” in subsection 161(1)(l) is met.

However, the drivers must also satisfy the requirements of § 161(1)(n), which provides that an “employee” is

[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act. [MCL 418.161(1)(n).]

All three conditions must be satisfied in order to find that a person is an employee, i.e., if a person fulfills only one of the three conditions, then the person is an independent contractor. *Blanzzy v Brigadier Gen’l Contractors, Inc*, 240 Mich App 632, 641; 613 NW2d 391 (2000).

The drivers would not be employees if the driver maintained a separate business in relation to the service. The van occupants all testified similarly that they worked as individuals, not as businesses, were not incorporated, did not have a d/b/a, nor did any of them formally

advertise their driving services. Regardless, this Court finds that the van occupants did maintain separate businesses because each was self-employed.

In *Blanzy, supra* at 643, this Court held that the plaintiff maintained a separate business, in part, because he reported business income and filed a Schedule C, Profit or Loss from a Business (Sole Proprietorship). In *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 727; 609 NW2d 859 (2000), the Court also held that the plaintiff maintained his own business because the defendant did not withhold any taxes from the plaintiff's check, the defendant issued the plaintiff a 1099, and the plaintiff furnished his own supplies and equipment.

In the present case, NFL considered all of the drivers as independent contractors, issued them 1099s, and did not withhold any taxes from their checks. The drivers had no set schedule as they could choose which days they worked, and the drivers provided all the necessary equipment for their positions as "drivers," namely, drivers' licenses and themselves. Therefore, we hold that the drivers are not "employees" as defined by MCL 418.161(1)(n). Because fulfillment of only one of the conditions of MCL 418.161(1)(n) necessitates that the person be classified as an independent contractor, *Blanzy, supra* at 641, we need not address the other two conditions of MCL 418.161(1)(n).

We note that MIC also asserts that the drivers did not maintain a separate business because of the high level of control NFL had over the drivers. However, we conclude that the level of control NFL exhibited was minimal because most of NFL's instructions were related to safety or payment procedures.

Additionally, Maxcis and Workman argue that regardless of the conditions delineated in § 161(1)(n), the drivers were not employees under § 161(1)(n) because NFL was not an employer. At the time of the accident in this case, MCL 418.151(1)(b)¹ defined "employer" as

[e]very person, firm, private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written

There is no dispute that NFL was a corporation, and we have concluded that the drivers were under contracts of hire. Thus, NFL was an "employer." Therefore, we agree with the trial court's May 1, 1998 and February 7, 1998 orders to the extent that the van occupants were determined to be independent contractors.

The second issue is whether NFL was in the business of transporting passengers within the meaning of MCL 500.3114(2). In general, a party seeking first-party no-fault benefits must look to his own insurance carrier. MCL 500.3114(1). However, certain exceptions exist to this general rule. MCL 500.3114(2) provides, in 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

¹ MCL 418.151(1)(b) was amended by 1995 PA 206, § 1, effective November 29, 1995. We note that the amended language would not change our analysis in the instant case.

personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle.

Under this exception, the motor vehicle's insurer is responsible for payment of no-fault benefits.

The court determined that because Lauer, Cole, and Hartger were passengers and Workman was an operator of "a motor vehicle operated in the business of transporting passengers," MIC was responsible for paying the no-fault benefits. The court's decision was based on its determination that NFL's situation was analogous to canoe liveries. MCL 500.3114(2) further provides:

This subsection shall not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance under any other policy:

* * *

(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.

The court reasoned that by specifically enumerating specific business (i.e., canoe liveries, etc.) as exceptions to § 3114(2), the Legislature must have intended similar, but unenumerated, businesses to be included in § 3114(2), i.e., those businesses would be considered to be "in the business of transporting passengers."

However, we believe the court's reasoning is flawed. "In the business of" connotes for-profit. MCL 500.3114(2) provides for six specific exceptions, (a)-(f). These subsections involve both for-profit and non-profit organizations. Specifically, § 3114(2)(a) addresses school buses operated by the department of education, § 3114(2)(d) addresses buses operated by or to non-profit organizations, and § 3114(2)(e) addresses taxicabs. Therefore, we conclude that simply because the Legislature excepted a certain type of organization from the general rule of § 3114(2) does not mean that a similar, unexcepted organization is necessarily considered "in the business of transporting passengers."

Only two cases have interpreted the phrase "in the business of transporting passengers" as it is used in MCL 500.3114(2). First, a college student who was paid \$25 to drive two fellow students home on a holiday break was held not to be in the business of transporting passengers. *Thomas v Tomczyk*, 142 Mich App 237, 239, 241-242; 369 NW2d 219 (1985). Second, a shuttle service that operated at an airport was deemed to be in the business of transporting passengers. *USAA Ins Co v Houston Gen'l Ins Co*, 220 Mich App 386, 393; 559 NW2d 98 (1996).

"Business" is defined as "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." Black's Law Dictionary (7th ed, 1999), p 192. Dictionaries may be consulted to discern the meaning of statutorily undefined terms. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

NFL's primary business (i.e., that from which it derived profit) was the buying and selling of cars. NFL's transportation of the drivers was merely incidental to its overall business. Although utilizing drivers may have been integral to NFL's chosen method of operation, NFL

could have delivered the cars to their destination in another manner. Therefore, we conclude that NFL was not in the business of transporting passengers within the meaning of MCL 500.3114(2); therefore, the court's May 1, 1998 order granting summary disposition to State Farm, Auto-Owners, and AAA is reversed.

On cross-appeal, Workman argues that if this Court determines that NFL was not in the business of transporting passengers within the meaning of MCL 500.3114(2), then Citizens is liable for payment of his no-fault benefits under MCL 500.3114(1). We agree. There are only two other exceptions, MCL 500.3114(3) and MCL 500.3114(5), that would hold MIC instead of Citizens liable, and neither is applicable. Therefore, the court's February 7, 1998 order is reversed to the extent that it held that Citizens was not liable, and MIC was, for the payment of Workman's no-fault benefits.

The third issue is whether Workman's redemption of his potential workers' compensation benefits operated as a bar to recovery of no-fault benefits. In denying MIC's motion for summary disposition, the court held that it did not have jurisdiction to award money damages against Maxcis. Although the Bureau of Workers' Disability Compensation indeed has exclusive jurisdiction to award workers' compensation, see MCL 418.841; *Jones v General Motors Corp*, 136 Mich App 251, 254; 355 NW2d 646 (1984); *Bush v Detroit*, 129 Mich App 658, 662; 341 NW2d 859 (1983), MIC was only requesting reimbursement from Maxcis, not a determination that any of the van occupants were entitled to workers' compensation. Therefore, we hold that the court did have jurisdiction to decide that issue.

In September 1998, Workman redeemed all possible workers' compensation claims for \$21,372. MIC argues that as a result of the redemption, Workman was not entitled to any no-fault benefits. The no-fault act provides for a setoff of like benefits. MCL 500.3109(1). Our Supreme Court has held that this statute applies to cases involving workers' compensation and no-fault benefits. *Mathis v Interstate Motor Freight System*, 408 Mich 164, 187; 289 NW2d 708 (1980). Regarding redemptions, the Supreme Court, in *Gregory v Transamerica Ins Co*, 425 Mich 625, 628; 391 NW2d 312 (1986), held that a redemption agreement "precludes the plaintiff from recovering from the no-fault insurer any amount for which the workers' compensation carrier was primarily liable." [Emphasis added.] The purpose was to eliminate double recovery. *Id.* at 635.

Because this Court has concluded that Workman was an independent contractor, not an employee, there was no amount for which the workers' compensation carrier was primarily liable. Furthermore, Workman did not recover twice because of his redemption: he assigned his rights to any no-fault benefits to the Michigan Auto Dealers Self-Insured Fund.

The final issue that this Court addresses is whether MIC is entitled to reimbursement from Workman or Maxcis for any benefits that MIC argues it mistakenly paid to Workman. MIC contends that it is entitled to reimbursement from Workman and Maxcis based on common-law and equitable principles. We disagree. First, because this Court concluded that MIC is not entitled to a setoff because Workman is not an employee, and thus there is no amount for which the workers' compensation carrier is liable, MIC is not entitled to reimbursement. Second, there was no duplication of benefits because Workman assigned his rights to any no-fault benefits to the Michigan Auto Dealers Self-Insured Fund. Third, in any event, Maxcis would not be liable

for reimbursement because it is only the third-party administrator for the Michigan Auto Dealers Self-Insured Fund, NFL's workers' compensation insurance carrier.

Therefore, we affirm the court's May 1, 1998 order that granted Maxcis summary disposition and reverse the court's May 1, 1998 order that granted summary disposition to State Farm, Auto Owners, and AAA. We also affirm in part and reverse in part the court's February 7, 2000 order and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

We affirm in part, reverse in part and remand.

/s/ Patrick M. Meter

/s/ Jane E. Markey

/s/ Donald S. Owens