

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Court of Appeals  
(Hon. Kelly, P.J., Fitzgerald, and Whitbeck, JJ)

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellee,

and

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Plaintiff-Appellant

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY.,

Supreme Court No. 144144

Court of Appeals No. 298984

Lower Court Case No. 09-35-NF (Mason  
County, Hon. Richard I. Cooper)

**APPELLANT FARMERS INSURANCE  
EXCHANGE'S BRIEF ON APPEAL**

**\*\*ORAL ARGUMENT REQUESTED\*\***

Supreme Court No. 144145

Court of Appeals No. 298985

Lower Court Case No. 09-172-NF (Mason  
County, Hon. Richard I. Cooper)

Supreme Court No. 144159

Court of Appeals No. 298985

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Plaintiff-Appellee

v

MICHIGAN INSURANCE COMPANY,

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BRIEF ON APPEAL**

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**WORSFOLD MACFARLANE MCDONALD, PLLC**  
David M. Pierangeli (P55849)  
Attorneys for Plaintiff/Appellant Farmers  
Insurance Exchange

1001 Monroe Ave., NW  
Grand Rapids, MI 49503  
(616) 977-9200

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## JURISDICTIONAL STATEMENT

1. MCR 7.301(A) provides this Honorable Court with the discretion to review the decision of the Court of Appeals.
2. Plaintiff Farmers Insurance Exchange filed an Application for Leave to Appeals from the unpublished per curiam Opinion of the Court of Appeals, released October 18, 2011, reversing the Mason County Circuit Court's Opinion and Order dated November 30, 2009 and the Mason County Circuit Court's June 16, 2010 Final Order and Judgment.
3. This Honorable Court granted leave to appeal in an Order of the Court dated May 23, 2012.

## STATEMENT OF QUESTIONS INVOLVED

- I. Should this Court Discard the “Primary Purpose/Incidental Nature” Test as it Does Not Further the Intended Purpose of MCL 500.3114(2)?
- II. Did the Court of Appeals Err in Reversing the Trial Court’s Determination That When an Insured Is Collecting a Fee to Transport Passengers to and from the Airport, it is “in the Business” of Transporting Passengers Pursuant to MCL 500.3114(2)?

## STATEMENT OF FACTS

### A. Introduction

In this case, Plaintiff Farmers seeks reimbursement for No-Fault Personal Protection Insurance benefits which it has paid to and/or on behalf of its insured, Carol Dineen. The Circuit Court was asked to determine whether a fifteen person passenger van, owned and operated by We Want the Music Company (“WWTMC”), was a **“motor vehicle operated in the business of transporting passengers.”** After a review of all of the facts and case law, the Circuit Court concluded that the passenger van was operated in the business of transporting passengers. (Appendix p. 122A-123A). As such, it was determined that MIC, as the insurer of the passenger van, was in the priority position to provide Ms. Dineen with her PIP benefits. The Circuit Court also determined that both Farmers and State Farm were entitled to receive reimbursement for the loss adjustment costs which were incurred in handling the claims of their insureds. (Appendix p. 159A-163A).

The Court of Appeals reversed the Circuit Court, finding that WWTMC was not in the business of transporting passengers. (Appendix p. 164A-171A). In so doing, the Court of Appeals mechanically applied the “primary purpose/incidental nature” test which had been adopted by another Court of Appeals panel in different circumstances. In short, the Court of Appeals erred in applying that test to this case.

### B. The Michigan Womyn’s Music Festival

The Michigan Womyn’s Music Festival is a six day long event which takes place on a 650 acre plot of land near Walhalla, Michigan. (Appendix p. 35A). During the festival there are approximately 40 performances on four stages and several hundred workshops. (Appendix p. 35A). There are also arts and crafts booths for the participants. (Appendix p. 35A). The festival is

run by WWTMC. (Appendix p. 34A-35A). WWTMC leases the land from Ruby Creek Productions. (Appendix p. 35A). People from all around the country attend the Michigan Womyn's Music Festival.

As part of its promotions for the 2008 event, WWTMC advertised on its website that it provided round trip transportation from the Grand Rapids airport to the music festival site. (Appendix p. 17A and Appendix p. 47A). The cost for the round trip transportation was \$45.00 per person. (Appendix p. 17A - 23A). This \$45.00 was in addition to the cost to attend the music festival. If a participant of the festival wanted shuttle service from the Grand Rapids airport to the music festival, the participant needed to complete and submit a Shuttle Reservation Form. (Appendix p. 37A).

**C. The August 5, 2008 Passenger Van Accident**

Carol Dineen is a Colorado resident who had flown to Michigan to attend the Michigan Womyn's Music Festival. Ms. Dineen had filled out the 2008 Michigan Womyn's Music Festival Shuttle Reservation Form for herself, her life partner (Ann Drucker), and their two children. (Appendix p. 23A). Included with the reservation form, Ms. Dineen gave the WWTMC permission to charge her credit card \$180.00 for the shuttle costs. (Appendix p. 23A).

According to Ms. Vogel, Ms. Dineen and a few other passengers were originally scheduled to arrive in Grand Rapids on Monday, August 4, 2008. (Appendix p. 38A). Ms. Dineen was to catch that day's 4:00 p.m. Great Lakes Motor Coach bus, which was transporting participants from the airport to the festival. (Appendix p. 38A). However, due to bad weather, there were delays at the airport, and Ms. Dineen, as well as several other participants, missed her scheduled transportation. (Appendix p. 38A). Ms. Dineen was re-scheduled to be transported on the Great Lakes Motor Coach bus which left at 4:00 p.m. on Tuesday, August 5, 2008.

(Appendix p. 38A). Ms. Vogel thought that Ms. Dineen was able to “negotiate” her way onto a fifteen person passenger van which WWTMC had sent to the airport to shuttle the music festival participants. (Appendix p. 38A). According to the police report, there were fifteen passengers in the van when it left the airport that afternoon. (Appendix p. 24A-28A).

On the way to the festival, the vehicle was involved in a roll-over accident. (Appendix p. 24A-28A). As a result, Ms. Dineen sustained significant injuries, including multiple level c-spine fractures, a left pneumothorax, and an open mandible fracture. She obtained treatment at Mercy Health Partners - Hackley Campus in Muskegon.

WWTMC owned the passenger van involved in the accident. (Appendix p. 6A). The passenger van was operated by WWTMC “volunteer” Guenevere Page at the time of the accident (Appendix p. 24A-28A). The vehicle was insured by Defendant MIC. (Appendix p. 9A - 16A). Ms. Dineen was insured by Farmers under a Colorado automobile insurance policy. Ms. Dineen and her providers have submitted claims for the payment of Michigan PIP benefits for injuries sustained in the accident. Farmers provided Ms. Dineen with Michigan PIP benefits pursuant to MCL 500.3163. MIC denied the claim on the basis that Farmers, as Ms. Dineen’s personal insurer, was in the highest priority. Farmers has paid Ms. Dineen’s no-fault PIP benefits.

#### **D. The Lawsuit and Motions for Summary Disposition**

It is Farmers’ position that MIC, as the insurer of a **motor vehicle operated in the business of transporting passengers**, is in the highest priority position to pay PIP benefits. On January 28, 2009, Farmers initiated suit against Defendant MIC seeking reimbursement of the PIP benefits which it has paid to and/or on behalf of Ms. Dineen, as well as an order requiring the MIC pay all future PIP benefits which Ms. Dineen is entitled to receive. Eventually the case was consolidated with a similar lawsuit filed by State Farm, in which State Farm was seeking

reimbursement of PIP benefits it had to or on behalf of Ann Drucker and her children for injuries sustained in the same motor vehicle accident.

All parties filed motions for summary disposition on the issue of whether MIC, the insurer of the fifteen person passenger van, was in the priority position to provide PIP benefits to Ms. Dineen, Ms. Rucker, and their children. After reviewing the motions, briefs, responses, and oral arguments, the Court determined that the WWTMC was in the business of transporting passengers. In so ruling, the Court stated:

In ruling I am aware that 3114(2) does establish the initial ground rule that a person's home insurance would normally be responsible for PIP benefits. However, 3114(2) then delves into addition situations. 3114(2) in its specific language does cover both an operator ora passenger. So that brings into play then the persons involved in our present case both under Farmers as well as under State Farm because in both of those matters the persons involved would have been passengers.

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It is my determination that the purpose for which the vehicle was being used directly relates to the concept whether it was operated in the business of transportation. The word business is used in a broad sense. The statute under 3144(2) actually excludes common carrier buses and so the Court has to look at the purpose that the vehicle was involved in.

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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 program, that to enable people who come via airplane, even though the percentage that actually does is small, it was part of your promotional endeavor to bring in campers to provide such transportation. And the people in this had taken advantage of that opportunity.

(Appendix p. 113A-115A).

The Circuit Court entered an Order granting partial summary disposition on November 30, 2009. (Appendix p. 122A-123A).

#### **E. The Motions For Entry of Judgment**

Eventually, the parties stipulated to the amount of PIP benefits which were to reimbursed pursuant to the Court's November 30, 2009 Order. However, the parties could not agree on

whether MIC, as the insurer which was ultimately found liable for the payment of PIP benefits, was responsible to reimburse Farmers and State Farm for the loss adjustment expenses incurred in adjusting the claims. Again, the parties filed cross-motions on their positions. Again, the Circuit Court sided with Farmers and State Farm, and ruled that MIC was responsible to reimburse both Farmers and State Farm for the loss adjustment costs incurred. (Appendix p. 159A-163A). In so doing, the Circuit Court stated:

As far as whether Plaintiffs would have a right to seek cost adjustments, it strikes me that they do have such a right. The fact that Plaintiffs prevailed in the August ruling means that from a point of law their continued payment of benefits to their own clients is being done as a type of responsibility so that their clients are not left hanging for whatever amount of time it would take to do an appeal. And as a rule of thumb, that is on to two years.

If part of processing those continued payments, even though the Court had ruled that Defendant now had liability includes cost adjustments or assessments, that again is something that insurance companies do factor in their accounting procedures.

Therefore, it is my ruling today that the Final Judgment would include language that the damages include the PIP amounts that have been stipulated right along as of particular dates. And it's recognized that those accumulate as payments are made. And the Judgment would also say that the, that Plaintiffs have a right to adjustment costs along with the PIP dollar amounts.

(Appendix p. 152A-153A).

An Order was finally entered on June 16, 2010. (Appendix p. 159A-163A). MIC filed a Claim of Appeal.

#### **F. The Court of Appeals' Reversal**

On October 18, 2011, the Court of Appeals issued an unpublished per curiam decision in which it reversed the Circuit Court's findings. In so doing, the Court of Appeals applied the "primary purpose/incidental nature" test as set forth in *Farmers Ins Exchange v AAA of Michigan*, 256 Mich App 691; 671 NW2d 89 (2003)(Appendix p. 164A-171A). The Court of

Appeals provided a tortured analysis, where the Court of Appeals first determined that although the primary, if not sole, purpose of the van involved in the accident was for commercial use, the actual transporting of these fifteen passengers was only “incidental” to the vehicle’s primary purpose. *See, Farmers Ins Exchange v Michigan Insurance Co*, unpublished per curiam opinion of the Court of Appeals dated October 18, 2011 (Docket Nos. 298984 and 298985), p. 11. (Appendix p. 164A-171A). The Court of Appeals determined that van’s use to transport attendees was “incidental” to the vehicle’s primary use for business production purposes. *Id.* at 11. (Appendix p. 164A-171A). The Court of Appeals went on to state that the WWTMC’s primary business was the production of the music festival and therefore, the transportation of the passengers was merely incidental to that purpose. *Id.* at 12. (Appendix p. 164A-171A). The Court of Appeals reversed the Circuit Court’s decision.

Both Farmers and State Farm filed Applications for Leave to Appeal asking this Court to reverse the Court of Appeals and reinstate the ruling of the trial court. On May 23, 2012, this Court granted the Applications for Leave to Appeal and directed the parties to address the issue of 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 applied properly to the facts in this case.”

Plaintiff Farmers asks this Court to reverse the Court of Appeals’ decision and reinstate the trial court’s grant of summary disposition. Moreover, Plaintiff Farmers requests that this Court discard the “primary purpose/incidental nature” test as it is not in keeping with MCL 500.3114(2).

## ARGUMENT

### **I. This Court Should Abandon the “Primary Purpose/Incidental Nature” Test, Especially When Commercial Vehicles Are Involved, as it Fails to Carry Out the Purpose of MCL 500.3114(2).**

#### **A. Standard of Review**

Questions of statutory interpretation are reviewed de novo. *In re MCI*

*Telecommunications*, 460 Mich 396, 413; 596 NW2d 164 (1999). In *Pohutski v City of Allen Park*, 465 Mich 675, 693-94; 641 NW2d 219 (2002), this Court stated:

When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402, 605 N.W.2d 300 (2000); *Massey v. Mandell*, 462 Mich. 375, 379-380, 614 N.W.2d 70(2000). We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Turner v. Auto Club Ins. Ass'n*, 448 Mich. 22, 27, 528 N.W.2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402, 605 N.W.2d 300. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *See Lansing v. Lansing Twp.*, 356 Mich. 641, 649-650, 97 N.W.2d 804 (1959).

*Pohutski*, 465 Mich at 683.

#### **B. The “Primary Purpose/Incidental Nature Test” is Not Consistent with MCL 500.3114(2).**

State Farm has filed a Brief on Appeal on this specific issue. In its Brief on Appeal, State Farm provides this Court with the history behind the enactment of MCL 500.3114(2) as well as the argument as to why the “primary purpose/incidental nature test” should be abandoned by this Court. Farmers joins, adopts and incorporates by reference the arguments set forth by State Farm.

When statutory language is clear and unambiguous the Court must honor the legislative intent as clearly expressed in that statute. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich. 531, 538, 565 NW2d 828 (1997). Because further construction is not required, none is

permitted. *Id.* When construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory. *Id.* at 541-542.

There is no question that Ms. Dineen is entitled to Michigan PIP benefits as she was the occupant of a motor vehicle which was involved in an accident. MCL 500.3105. The question becomes, which insurance company is in the priority position to provide Ms. Dineen with PIP benefits. Generally, an insured person looks to his or her own insurer, the insurer of a spouse, or the insurer of relative with whom the injured party resides. MCL 500.3114(1). However, MCL 500.3114(2) provides an exception to that general rule. It states:

- (2) 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:
  - (a) A school bus, as defined by the department of education, providing transportation not prohibited by law.
  - (b) A bus operated by a common carrier of passengers certified by the department of transportation.
  - (c) A bus operating under a government sponsored transportation program.
  - (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.

*Id.*

The first thing which is evident from the plain language of MCL 500.3114(2), is that there is no mention of the “primary purpose/incidental purpose” test which has been adopted by

the Courts. Rather, the plain language of the statute states that is a person is injured while the operator or passenger of a “motor vehicle operated in the business of transporting passengers” then that insurer is in a higher priority than the person’s personal insurance provider. Moreover, the Courts’ application of the “primary purpose/incidental nature” test has shifted focus away from the plain language of the statute. This can be seen by reviewing the published Court of Appeals opinions on this issue.

There are only three reported decisions which construe this particular issue. Two of those deal with opposite ends of the spectrum. For example, in *Thomas v Tomczyk*, 142 Mich App 237; 369 NW2d 219 (1985), the Court, with very little analysis, determined that a college student who transported fellow students home for pay did not operate a vehicle in the business of transporting passengers. *Id.* at 242. In *USAA Insurance Co v Houston General Ins Co*, 220 Mich App 386; 559 NW2d 98 (1996), the Court determined that a company which provided transportation for passengers from parking facilities to the airport was subject to the exception stated in MCL 500.3114(2).

The third, and most recent, published decision provides the most analysis with regard to MCL 500.3114(2). In *Farmers Ins Exchange v AAA of Michigan*, 256 Mich App 691; 671 NW2d 89 (2003), two minor children were injured while a passengers in an automobile driven by their daycare provider. *Id.* at 692. The defendant, AAA, insured the motor vehicle driven by the daycare provider at the time of the accident. The plaintiff, Farmers, insured the children’s father, and as such, the children were entitled to PIP benefits as resident relatives of the Farmers’ insured. Farmers provided the injured children with PIP benefits. Farmers then filed a complaint seeking reimbursement from AAA claiming that under MCL 500.3114(2) AAA was in the priority position to provide PIP benefits to the children as the daycare provider was in the

business of transporting its clients. The trial court agreed and ruled that AAA was required to reimburse Farmers. AAA filed an appeal.

In analyzing MCL 500.3114(2), the Court of Appeals reviewed the *Thomas* decision, and stated:

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 constitute his primary function or purpose in operating his vehicle, but that "incidental [ly] to coming home, it was convenient to take on passengers."** *Thomas, supra* at 240 n. 2, 241-242, 369 N.W.2d 219.

*Farmers Ins Exchange*, 256 Mich App at 700-701. (emphasis added).

The Court then 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).

*Farmers Ins Exchange*, 256 Mich App at 701. (emphasis added).

In reviewing the specific facts of that case, the *Farmers* Court noted that the driving of the children to school was incidental to the primary use of the vehicle as a **personal vehicle**, and that the driving of the children to and from school was a small part of her daycare business. *Id.* at 701-702. Based on these facts, the Court of Appeals reversed the trial court, stating:

we hold that the applicability of subsection 3114(2) of the no-fault act depends on a primary purpose/incidental nature inquiry with respect to whether a motor vehicle is operated in the business of transporting passengers. Under the facts of the present case, subsection 3114(2) does not apply, and thus plaintiff is first in priority to pay the no-fault benefits in question.

*Id.* at 702. In announcing the two part primary purpose/incidental nature test, the *Farmers* Court made it very clear that the determination as to whether a vehicle was operated in the business of transporting passengers was very case specific.

This "primary purpose/incidental nature" test was utilized by the Court of Appeals in

*State Farm Mut Ins Co v Progressive Ins Co*, unpublished per curiam decision of the Court of Appeals dated September 29, 2005 (Docket No. 262833). In *State Farm*, a person was injured while an occupant of the motor vehicle owned by an adult day care facility. As part of its business, the adult day care facility would drive its clients to and from their homes. The van was also used to take the clients on field trips. The plaintiff insured a relative of the injured client with whom he resided. The defendant insured the motor vehicle owned by the adult day care facility. The plaintiff paid the PIP benefits to the injured client, and sought reimbursement from the insurer of the adult day care facility.

In reviewing the *Farmers Ins Exchange v AAA of Michigan* decision, the *State Farm* Court of Appeals stated that the two-pronged “primary purpose/incidental nature test” was required to be performed. The Court was first looked to determine “whether the vehicle was transporting passengers in a manner incidental to the vehicle’s primary use.” *Id.* In reviewing the specific facts of that case, the Court noted that the van had been specifically equipped to handle transportation of wheelchair -bound passengers. The Court also noted that the van was purchased for and used solely for commercial purposes. *Id.* It was clear from these facts that the primary purpose of the van was for commercial use.

Next, the Court looked at “whether the transportation of the passengers was incidental or small part of the actual business in question.” *Id.* The Court noted that while transporting passengers was not the primary function of the adult day care facility, it was significant enough that the adult day care facility provided transportation and maintained commercial insurance on the vehicle. Ultimately, the Court of Appeals determined that the adult day care facility’s insurer was in the primary position to provide PIP benefits because the occupied vehicle was in the business of transporting passengers.

MCL 500.3114(2) requires this Court to look at whether Ms. Dineen was a “person suffering accidental bodily injury while . . . a passenger of a motor vehicle operated in the business of transporting passengers . . . .” The plain language of the statute requires that this Court to look at whether the **vehicle** was operated in the business of transporting passengers at the time of the accident. *See, Farmers Ins Exchange*, 256 Mich App at 701. As such, it is how the **vehicle** is being used at the time of the accident which controls whether MCL 500.3114(2) applies.

However, the focus of the “primary purpose/incidental nature” test shifted from a review of the how the vehicle was operated, as required by the statute, to the business of the owner of the vehicle. This is clearly evident in the *State Farm Mut Ins Co, supra*, case where the Court began looking at the transporting of passenger was incidental to the vehicle’s primary use and whether the transportation of passengers was incidental or a small part of the actual business in questions. It is also evident in the instant matter where the Court of Appeals reviewed the profit and losses of the WWTMC, rather than the fact that the 15 person passenger van was transporting customers who paid extra for transportation.

The Court of Appeals’ application of the “primary purpose/ incidental nature” has significantly altered the meaning of MCL 500.3114(2). Courts are now reviewing the purpose of the business, rather than the purpose of the. This is evident in the instant case from the Court of Appeals’ analysis of the profits and loss of the WWTMC’s business, rather than looking to how the vehicle is being used at the time of the accident. As such, the application of the “primary purpose/incidental nature” test is not in keeping with the plain language of MCL 500.3114(2), and should be abandoned by this Court.

**II. Even If the “Primary Purpose/ Incidental Nature” Is in Keeping with MCL 500.3114(2), The Court of Appeal Did Not Properly Apply the Test in the Instant Case.**

**A. Standard of Review**

This Court reviews decisions regarding motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998). A motion for summary disposition will be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *CNA Insurance Co v Cooley*, 164 Mich App 1; 416 NW2d 355 (1987); MCR 2.116(C)(10). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. *Ewers v Stroh Brewery Co*, 178 Mich App 371, 374; 443 NW2d 504 (1989). The opponent to the motion, must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial. *Id.* MCR 2.116(G)(4). The existence of a disputed fact must be established by admissible evidence. *Pauley v Hall*, 124 Mich App 255, 262; 335 NW2d 197 (1983).

**B. Defendant MIC is in the Priority Position to Provide PIP Benefits as Ms. Dineen Was an Occupant of Motor Vehicle Operated in the Business of Transporting Passengers.**

If this Court is not inclined to abandon the primary purpose/incidental nature test, then Farmers is still entitled to a reversal of the Court of Appeals as WWTMC was in the business of transporting passengers at the time of the accident. In this case, the passenger van which transported Ms. Dineen from the airport to the music festival was in the business of transporting passengers, placing MIC in the priority position to provide PIP benefits to Ms. Dineen.

What is clear from both the *Farmers* and the *State Farm* decisions, is that the “primary purpose/incidental nature” test is very fact specific. Under the first prong of the test, this Court is

asked to review the primary nature of the passenger van involved in the accident. As was the case in *State Farm*, the primary purpose of the fifteen person passenger van involved in the instant matter was for commercial purposes. Ms. Vogel testified that the fifteen passenger van which was involved in the accident was only used for the business. (Exhibit 4, Deposition of Lisa Vogel, p. 40). This fact makes the *Farmers* case, *supra*, distinguishable as the childcare facility used its vehicle primarily for personal uses. Moreover, like the vehicle in the *State Farm*, the passenger van in the instant matter was modified just weeks before the accident, as side steps were added to the van. (Exhibit 4, Deposition of Lisa Vogel, p. 16-17 and exhibit 13). The Court can take judicial notice that side steps are used to get in and out of vehicles. The passenger van was also insured under the business automobile insurance policy issued by MIC to WWTMC. (Exhibit 9). As the Circuit Court concluded in *State Farm*, these facts all indicate that the primary purpose of the passenger van was for the transporting of passengers.

While a majority of the music festival participants drove their own vehicles, providing transportation to participants was significant enough that WWTMC advertised that it would provide transportation on its website. (Exhibit 5). In fact, transportation to and from the airport was so important that WWTMC rented a dozen or so Great Lakes Motor Coach buses to shuttle participants to the festival. (Exhibit 4, Deposition of Lisa Vogel, p. 23). Moreover, WWTMC charged an additional \$45.00 for this transportation. (Exhibits 5-6). Finally, as previously mentioned, WWTMC went so far as to modify its fifteen passenger van to make it easier for people to get in and out of it. Furthermore, in a spreadsheet created by Ms. Vogel, it appears as though in 2008, WWTMC made twenty nine trips with its vans to the airport to support the buses which were already being used.(Exhibit 14). As the Court found in *State Farm*, the facts of the instant matter prove that while transporting passenger may not be the primary purpose of

WWTMC, it is clearly significant enough that Plaintiff took specific steps to provide transportation at a cost to its customers. As such, the Court of Appeals erred in determining that the fifteen passenger van was not on the business of transporting passengers at the time of the accident.

The Court of Appeals focused on the fact that WWTMC either makes very little profit, or actually loses money by providing transportation. The Court of Appeals ruled that this transportation was not an integral part of the business. However, this begs the question, if providing transportation is not making the WWTMC a profit, then why does it continue to offer the service? The answer is simple. It is important for WWTMC to take care of its festival participants if possible and reasonable. (Exhibit 4, Deposition of Lisa Vogel, p. 55). Providing transportation is so significant to WWTMC that it continues to provide transportation services to and from the airport even when it barely breaks even or loses money. Again, these specific facts indicate that the WWTMC's van was being operated in the business of transporting passengers at the time of the accident.

In addition to the case law, the plain language of MCL 500.3114(2) supports the determination that the passenger van owned and operated by WWTMC was "in the business of transporting passengers." When statutory language is clear and unambiguous the Court must honor the legislative intent as clearly expressed in that statute. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich. 531, 538, 565 NW2d 828 (1997). Because further construction is not required, none is permitted. *Id.* When construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory. *Id.* at 541-542.

Under the Court of Appeals' interpretation of MCL 500.3114(2), subsection (a) would be

rendered superfluous if MCL 500.3114(2) required a showing that WWTMC was in the business of transporting passengers. The Court can take judicial notice that school districts are in the business of educating children, not transporting passengers. As such, if the determination that the **business** must be “in the business of transporting passengers” were to prevail, MCL 500.3114(2)(a) would be rendered nugatory because school districts would never be considered in the business of transporting passengers. Similarly the language of MCL 500.3114(2)(e) would be superfluous as canoe liveries and the like are not the business of transporting passengers, but rather providing entertainment. Such an interpretation can not be legally sustained.

The plain language of the statute requires that this Court to look at whether the **vehicle** was operated in the business of transporting passengers at the time of the accident. *See, Farmers Ins Exchange*, 256 Mich App at 701. In this case, at the time of the accident, the fifteen person passenger van had been sent to the airport to transport participants to the music festival. Each of the participants had paid extra (\$45.00) to obtain this transportation. There is no doubt that at the time of the accident, the passenger van was being operated in the business of transporting passengers. If the MCL 500.3142(2) exception does not apply in a case where a business is collecting fees to transport passengers, then the exception will never apply. As such, under MCL 500.3114(2) Defendant MIC, as the insurer of a vehicle operating in the business of transporting passengers, is in the priority position to provide Ms. Dineen’s PIP benefits. As a matter of law, the Circuit Court correctly determined that Farmers was entitled to summary disposition and the Court of Appeals erred in reversing this decision.

**RELIEF REQUESTED**

For the reasons stated in this Brief on Appeal, Defendant-Appellant Farmers Insurance Exchange asks this Honorable Court determine that the "primary purpose/incidental nature test" is not consistent with the language of MCL 500.3114(2), reverse the Court of Appeals' ruling, and reinstate the rulings of the Mason County Circuit Court.

Dated: 7-12-2012

Worsfold Macfarlane McDonald, P.L.L.C.



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David M. Pierangeli (P55849)  
Attorneys for Defendant-Appellant Farmers  
Insurance Exchange