# STATE OF MICHIGAN

## COURT OF APPEALS

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Plaintiff-Appellee,

v

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Defendant-Appellant,

and

MICHIGAN MUTUAL INSURANCE COMPANY and NATIONAL AMERICAN INSURANCE COMPANY,

Defendants-Appellees.

October 26, 1993

No. 151331
LC No. 90067608 CZ

---

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Plaintiff-Appellee,

v

MICHIGAN MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

and

EMPIRE FIRE AND MARINE INSURANCE COMPANY and NATIONAL AMERICAN INSURANCE COMPANY,

Defendants-Appellees.

No. 156338
LC No. 90067608 CZ

---

Before: Shepherd, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Defendants Empire Fire and Marine Insurance Company ("Empire") and Michigan Mutual Insurance Company ("Michigan Mutual") separately appeal as of right the March 23, 1992, Kent Circuit Court declaratory judgment stating that Empire, Michigan Mutual, and plaintiff are required to share responsibility for paying Faye Carpenter's personal injury protection ("PIP") benefits. The appeals were consolidated by order of this Court dated November 12, 1992. We affirm the trial court's judgment.

On July 21, 1989, Faye Carpenter hauled a load of oiled steel pipe on his tractor-trailer from Chicago to Grand Rapids, Michigan, for Malone Freight Lines, Inc. ("Malone"), an Alabama corporation. Carpenter was on top of the load unchaining it in preparation for unloading when he slipped and fell to the ground. At the time of the accident, Carpenter leased his tractor-trailer to Malone for continuous thirty-one day intervals. Malone was insured by National American Insurance Company ("National American"). Plaintiff and Empire both had policies covering Carpenter's tractor-trailer. Carpenter was the named insured also under a policy issued by Michigan Mutual covering other vehicles owned by Carpenter.

After the accident, Carpenter was advised that he was ineligible for worker's compensation under the terms of the lease with Malone. Plaintiff subsequently paid Carpenter approximately $60,000 in no-fault benefits. Plaintiff then sought contribution from Empire, Michigan Mutual, and National American.

At the bench trial, defendants Empire and Michigan Mutual attempted to show that Carpenter was Malone's employee. These defendants asserted that Carpenter was entitled to worker's compensation benefits, and not no-fault benefits under MCL 500.3106(2); MSA 24.13106(2), because Carpenter was Malone's employee who was injured while unloading or alighting from a parked vehicle. Defendants Empire and Michigan Mutual also argued that National American, as Malone's insurer, was liable for employee Carpenter's no-fault benefits under MCL 500.3114(3); MSA 24.13114(3).

Applying the economic reality test, the trial court found that Carpenter was not Malone's employee, but was an independent contractor. Consequently, the trial court determined there was no cause of action against National American. The trial court also determined that Carpenter was a named insured on no-fault policies issued by plaintiff, Empire, and Michigan Mutual, and that the three no-fault insurers were thus on the same level of priority and required to each pay one-third of Carpenter's no-fault benefits. The trial court further found that "business use", "other insurance", and "owned vehicle" exclusionary clauses contained in Empire's and Michigan Mutual's policies were inapplicable and invalid as a matter of public policy. The trial court concluded that these exclusions did not absolve Empire and Michigan Mutual from fulfilling their obligations under the no-fault insurance act.

We first consider Empire's and Mutual Michigan's argument that the trial court erred in finding that Carpenter was an independent contractor. Because the issue is a question of law and the material facts are not in dispute, we review the trial court's conclusion de novo. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991); Kocsis v Pierce, 192 Mich App 92, 95; 480 NW2d 598 (1991).

This Court applies the "economic reality" test in order to determine whether an employer-employee relationship exists under MCL 500.3114(3); MSA 24.13114(3) of the Michigan no-fault act. Parham v Preferred Risk Mutual Ins Co, 124 Mich App 618, 623-624; 335 NW2d 106 (1983). The economic reality test involves the totality of the circumstances surrounding the performed work, and includes the following four factors: (1) control over a worker's duties; (2) payment of wages; (3) right to hire, fire and discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. Askew v Macomber, 398 Mich 212, 217-218; 247 NW2d 288 (1976); Tucker v Newaygo Co, 189 Mich App 637, 639-640; 473 NW2d 706 (1991). All of these factors are viewed as a whole and no single factor is controlling. Farrell v Dearborn Mfg Co, 416 Mich 267, 276; 330 NW2d 397 (1982); Derigiotis v J M Feighery Co, 185 Mich App 90, 95; 460 NW2d 235 (1990).

After reviewing the entire record, we conclude that the trial court did not err in finding that Carpenter was an independent contractor. The lease agreement between Carpenter and Malone[1] provides that Carpenter is subject to the limited control of Malone necessary to assure compliance with federal regulations. Like the driver in Williams v Cleveland Cliffs Iron Co, 190 Mich App 624; 476 NW2d 414 (1991), Carpenter owned his tractor-trailer, set his own hours, selected his own loads, and chose his own route to deliver the load. Carpenter received seventy-five percent of each load's net revenue. Malone did not deduct federal or state withholding taxes. Carpenter also did not receive sick pay, worker's compensation, pension or profit sharing benefits. Furthermore, continuation of the lease agreement was subject to cancellation by either Malone or Carpenter. Unlike White v Central Transport, Inc, 150 Mich App 128, 131; (1986), where the relationship between a transportation broker and its transportation company customers was so integrally related that their common objectives were only realized by a combined business effort, Carpenter merely accepted Malone's request to transport certain goods from Chicago to Grand Rapids. Viewing all of these factors as a whole, we find that there was no employer-employee relationship between Malone and Carpenter.

Given our determination that the trial court did not err in finding that Carpenter was an independent contractor, we conclude that sections 3106(2) and 3114(3) of the no-fault act are inapplicable to this case.

Accordingly, the trial court did not err in entering a judgment in favor of National American. The trial court correctly relied upon the priority scheme set forth in section 3114(1) in finding that plaintiff, Empire, and Michigan Mutual were equally responsible for Carpenter's no-fault benefits because these three insurers listed Carpenter as the named insured in their no-fault policies. Detroit Automobile Inter-Insurance Exchange v Home Ins Co, 428 Mich 43, 48-49; 405 NW2d 85 (1987).

Defendants Empire and Michigan Mutual next argue that the trial court erred in determining that certain exclusions in their no-fault policies were invalid and unenforceable.

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Auto-Owners Ins Co v Churchman, 440 Mich v 560, 567; 489 NW2d 431 (1992); Group Ins Co of Michigan v Czopek, 440 Mich 590, 597; 489 NW2d 444 (1992). However, clear and specific exclusions must be enforced because an insurance company cannot be held responsible for a risk it did not assume. Id. An exclusionary clause that was not contemplated by the Legislature is invalid and unenforceable, League General Ins Co v Budget Rent-A-Car of Detroit, 172 Mich App 802, 805; 432 NW2d 751 (1988), but an exclusion is not invalid per se simply because it is not specifically referenced or included in the no-fault act. State Farm Mutual Automobile Ins Co v Auto-Owners Ins Co, 173 Mich App 51, 54; 433 NW2d 323 (1988). This Court reads exclusionary clauses with the insuring agreement and independently of other exclusions. Hawkeye-Security Ins Co v Vector Construction Co, 185 Mich App 369, 384; 460 NW2d 329 (1990).

First, we determine that the trial court did not err in finding inapplicable the business use exclusions contained in Empire's and Michigan Mutual's policies. The exclusions, paragraph A7 in Michigan Mutual's policy and paragraph 13 in Empire's policy, are found in the liability coverage section of each defendant's policy and are inapplicable in this matter concerning PIP benefits. However, the trial court did err in finding that these exclusions were invalid, because liability coverage was not an issue in this case. Nevertheless, the error is harmless beyond a reasonable doubt because the exclusions remain inapplicable.

Second, the business vehicle exclusion listed at paragraph 11 in the PIP benefit section of Empire's policy is also inapplicable. This exclusion merely paraphrases section 3114(3) of the no-fault act and provides that PIP benefits are not available to an insured occupying an employer's vehicle. Because Carpenter is not Malone's employee, Empire's business vehicle exclusion is inapplicable. The trial court's determination that the exclusion is invalid constitutes error because the exclusion is similar to section 3114(3) of the no-fault act, but the error is harmless beyond a reasonable doubt because the clause is inapplicable.

Third, Empire's other insurance exclusion located in paragraph 6 in the PIP benefit section of its policy is contrary to the priority plan set forth in section 3114 of the no-fault act. Although other insurance exclusionary clauses contained in uninsured motorist or liability policies are valid with respect to claims involving third-party or residual liability claims, other insurance exclusionary clauses were not contemplated by the Legislature when enacting the priority plan with regard to PIP benefits. Accordingly, paragraph 6 in the PIP benefits section of Empire's policy is inapplicable and invalid. League General Ins Co, supra.

Fourth, the owned vehicle exclusionary clause contained in paragraph 4 in the PIP benefits section of Michigan Mutual's policy is invalid because it violates the priority plan set forth in section 3114 of the no-fault act. Despite the fact that Michigan Mutual did not insure Carpenter's tractor-trailer, Michigan Mutual is on the same level of priority as Empire and plaintiff. Detroit Automobile Inter-Insurance Exchange v Home Ins Co, 428 Mich 43, 48-49; 405 NW2d 85 (1987). Thus, the trial court did not err in finding that these exclusionary clauses were inapplicable.

Affirmed.

/s/ John H. Shepherd
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

[1] We reject National American's contention that this Court should apply Alabama law to interpret the lease agreement. A contract executed in one state but intended to be performed in another is governed by the law of the place of performance. Vanderveen's Importing Co v Keramische Industrie M deWit, 199 Mich 359, 364; 500 NW2d 779 (1993).