STATE OF MICHIGAN

COURT OF APPEALS

MAGNOLIA HELLAMS,

Plaintiff-Appellee,

and

MICHIGAN SPINE & BRAIN SURGEONS, P.L.L.C.,

Intervening Plaintiff-Appellee,

v

HOME OWNERS INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

INDIANA INSURANCE COMPANY, d/b/a AMERICAN STATES INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellant.

UNPUBLISHED
July 30, 2013

No. 309589
Oakland Circuit Court
LC No. 2011-116093-NF

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant Indiana Insurance Company appeals as of right, challenging a circuit court order granting summary disposition in favor of defendant Home Owners Insurance Company on its cross claim against Indiana Insurance in this priority dispute between insurers. For the reasons set forth in this opinion, we affirm.

Plaintiff Magnolia Hellams was injured in an automobile accident while riding in a vehicle owned by the Pye Funeral Home during a funeral procession. Defendant Home Owners is the insurer of plaintiff's personal vehicle and defendant Indiana Insurance is the insurer of Pye's vehicles.

According to Ozie Pye, the executive director of Pye Funeral Home, his business conducts approximately 1,200 funerals a year. Approximately 78 to 80 percent of those funerals are "traditional," i.e., a memorial service at the funeral home followed by transportation to a cemetery for burial. Transportation is provided for approximately 75 to 80 percent of the traditional funerals, which equates to 700 or more of the 1,200 funerals. In order to accommodate this part of his business, Pye leased a fleet of hearses and limousines for use in traditional funeral services. Pye could charge a fee for use of the vehicle and the driver during the funeral service, or it could provide them free of charge, depending on vehicle availability and the family's circumstances. Pye did not charge an extra fee for the funeral that plaintiff attended. Plaintiff Hellams attended a traditional funeral service conducted by Pye, which provided the use of its vehicles free of charge. Plaintiff was one of six passengers in a limousine that struck the rear of the hearse during the funeral procession. Defendant Home Owners, the insurer of plaintiff's personal vehicle, claimed that defendant Indiana Insurance, the insurer of Pye's vehicles, was primarily liable under MCL 500.3114(2). The trial court agreed and granted summary disposition in favor of Home Owners.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). Statutory interpretation is a question of law that is reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

"[A]n injured person is generally required to seek compensation from his own no-fault insurer even where that person's insured vehicle is not involved in the accident." *Thomas v Thomczyk*, 142 Mich App 237, 241; 369 NW2d 219 (1985). MCL 500.3114(2) provides an exception to this general rule. *Id.* MCL 500.3114(2) provides:

> 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 . . . .[1]

The purpose of § 3114(2) is "to place the burden of providing no-fault benefits on the insurers of [commercial] motor vehicles, rather than on the insurers of the injured individual." *State Farm Mut Auto Ins Co v Sentry Ins*, 91 Mich App 109, 114; 283 NW2d 661 (1979). In *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 697; 671 NW2d 89 (2003), this Court observed that the phrase "in the business of transporting passengers" is not defined, and concluded that it does not have a clear and unambiguous meaning. After examining the Legislature's intent in enacting § 3114(2), this Court held that "a primary purpose/incidental

[1] It is undisputed that none of the listed exceptions is applicable in this case.

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)."[2]

In *Farmers Ins Exch*, a woman operated a for-profit daycare center. She used her husband's personal vehicle, which was insured by the defendant, to drive older children in her charge to and from school. Two children were injured during one such trip. The plaintiff insured the personal vehicle owned by the children's father. This Court held that § 3114(2) was not applicable and that the plaintiff was first in priority. It explained:

> Applying [the primary purpose/incidental nature] test to the instant case, we conclude that the day-care provider's driving of the children to school would not fall within the scope of subsection 3114(2) because the record indicates, and the parties agree, that (1) her 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. Further, a conclusion that the day-care provider's incidental driving of the children to school did not constitute the operation of a vehicle in the business of transporting passengers under subsection 3114(2) is consistent with this Court's observation that the Legislature intended subsection 3114(2) to apply in "commercial" situations. *State Farm*, [91 Mich App] at 114. [*Id.* at 701-702.]

We conclude that § 3114(2) applies in this case and thus defendant Indiana Insurance is primarily liable. While transporting passengers was not Pye's primary business in the sense that its business was not solely dedicated to that activity, as is, for example, that of an airline or commercial coach company, transporting passengers was an integral part of its business. Pye offered transportation to those customers who chose a traditional funeral, provided transportation in more than half of all funeral services conducted during the year, and maintained a fleet of limousines for the express purpose of transporting mourners who attended a traditional funeral. Accordingly, for the reasons set forth in this Court's opinion in *Farmers Ins Exch*, we affirm the trial court's order granting summary disposition in favor of Home Owners.

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[2] We are mindful of the fact that our Supreme Court originally granted leave to appeal in *Farmers Ins Exch II* to address "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 fact of this case." *Farmers Ins Exch v Mich Ins Co*, 491 Mich 924; 812 NW2d 767 (2012). However, after the filing of briefs and oral argument, the Court vacated its prior order and denied leave to appeal because it was no longer persuaded that the question presented should be reviewed. *Farmers Ins Exch v Mich Ins Co*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 144144, 144145, 144159, May 3, 2013). Thus, the "primary purpose/incidental nature" test remains viable.

Affirmed. No costs are awarded to any party. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly