STATE OF MICHIGAN

COURT OF APPEALS

NANCY CLEMENT and MATTHEW CLEMENT, Plaintiffs, v CINCINNATI INSURANCE COMPANY Defendant/Cross-Plaintiff-Appellant, and AUTO CLUB INSURANCE ASSOCIATION, Defendant/Cross-Defendant-Appellee.	UNPUBLISHED December 13, 2011 No. 300573 Saginaw Circuit Court LC No. 09-006800-NF

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Cincinnati Insurance Company ("Cincinnati Insurance") appeals as of right the trial court's order granting Auto Club Insurance Association's ("Auto Club") motion for partial summary disposition[1] and denying Cincinnati Insurance's cross-motion for partial summary disposition in this priority dispute regarding the payment of first-party no-fault benefits.[2] We affirm.

On October 27, 2008, Nancy Clement and the late Nancy Denman[3] were in an automobile accident. Clement was Denman's caregiver and was driving Denman's vehicle when the car was struck by an uninsured driver. Auto Club was the insurer for Denman's vehicle

[1] MCR 2.116(C)(10).

[2] *Id.*

[3] Denman's death was not related to the accident at issue in this case.

while Clement's no-fault carrier was Cincinnati Insurance. Clement filed for no-fault benefits from Auto Club, which were denied. Clement then filed for and received no-fault benefits from Cincinnati Insurance, but they were later discontinued.

Clement and her husband, Matthew Clement, sued both Cincinnati Insurance and Auto Club to reinstate Nancy Clement's no-fault benefits. Clement asserted that she was entitled to benefits from Auto Club and/or Cincinnati Insurance because Denman was her employer and she was injured while in her employer's vehicle. Cincinnati Insurance filed a cross-complaint against Auto Club seeking reimbursement for the benefits it had paid to Clement because Auto Club was the first-priority no-fault insurer.

In seeking summary disposition,[4] Auto Club asserted it was not liable for the payment of benefits because of the absence of an employer-employee relationship between Clement and Denman. Cincinnati Insurance disagreed, contending it was entitled to reimbursement for benefits paid to Clement as an employment relationship existed.[5] The trial court rejected Cincinnati Insurance's claim based on its determination that Clement was not Denman's employee.

On appeal, Cincinnati Insurance argues that the trial court erred in failing to find an employer-employee relationship between Denman and Clement. Specifically, Cincinnati Insurance contends that based on the employment relationship existing at the time of the accident that Auto Club, as the first-priority insurer, was required to reimburse Cincinnati Insurance for no-fault benefits paid to Clement. We disagree.

This Court reviews rulings on motions for summary disposition de novo, "viewing the evidence in the light most favorable to the nonmoving party."[6]

> Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.[7]

MCL 500.3114 provides, in relevant part:

> (1) 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

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[4] MCR 2.116(C)(10).

[5] *Id.*

[6] *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006).

[7] *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

> of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . . When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.
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> * * *
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> (3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

"The cases interpreting [MCL 500.3114(3)] have given it a broad reading designed to allocate the cost of injuries resulting from use of business vehicles to the business involved through the premiums it pays for insurance."[8]

The "economic reality test" is the "appropriate standard to determine the existence of an employment relationship under the Michigan no-fault act."[9] "[F]actors to be considered include: [1] control of the worker's duties, [2] payment of wages, [3] right to hire, fire and discipline, and [4] the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal."[10]

First, Denman was not in control of Clement's duties. Cincinnati Insurance argues that Denman exercised discretion over how she and Clement spent their time together. Denman's daughter Deborah Kirby, however, required that Clement complete a chart and provide her with a summary of how Denman spent her day, such as when she ate meals and was given medication. As such, to the extent that anyone exercised control over Clement's duties as a caregiver, it was Kirby and not Denman.

Second, Denman did not have the right to hire, fire, and discipline Clement. While it is uncontroverted that Kirby hired Clement, Cincinnati Insurance argues that Kirby only did so as her mother's agent. When Kirby was questioned at her deposition regarding whether Clement would have been hired if her mother had not liked her, Kirby advised that her mother's opinion regarding her need for a caregiver changed based on how she was feeling. Kirby also testified that while her mother asked several times that Kirby fire Clement, Kirby would not do so and

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[8] *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996).

[9] *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983).

[10] *Id.* at 623.

would explain to her mother that Clement's services were needed. As such, the evidence shows that Denman was not in a position to hire or fire Clement, as the authority rested with Kirby.

Third, the payment of Clement's wages does not support that Clement was Denman's employee. While Kirby paid Clement with funds from a checking account that she held jointly with her mother, Clement was paid $10 per hour and there were no deductions made for taxes or benefits.

Finally, the fourth factor has this Court consider Clement's "performance of duties as an integral part of [Denman's] business."[11] Cincinnati Insurance argues that Clement's duties as Denman's caregiver "were integral and vital to [Denman's] well-being." Denman, however, was not in the business of "being well." Therefore, the evidence does not show that Clement's duties were integral to a business venture of Denman.

Because Clement was not Denman's employee, the trial court did not err in granting partial summary disposition in favor of Auto Club and denying Cincinnati Insurance's cross-motion for partial summary disposition.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

[11] *Id.*