STATE OF MICHIGAN

COURT OF APPEALS

DRAGEN PERKOVIC,

Plaintiff-Appellee,

v

HUDSON INSURANCE COMPANY,

Defendant-Appellant/Cross Appellee,

and

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant-Cross Appellee,

and

ZURICH AMERICAN INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant,

and

ASSIGNED CLAIMS FACILITY,

Defendant.

UNPUBLISHED
December 20, 2012

No. 302868
Wayne Circuit Court
LC No. 09-019740-NF

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Defendant, Hudson Insurance Company (hereinafter "Hudson"), appeals by leave granted an order denying its motion for reconsideration, of an order finding its exclusion of coverage violated Michigan public policy and the no-fault act, MCL 500.3101 *et seq.*, and finding it had

priority for the payment of no-fault benefits to plaintiff. Defendant, Zurich American Insurance Company (hereinafter "Zurich"), filed a cross-appeal from the November 8, 2010, and November 11, 2010, orders finding Hudson had priority and the November 29, 2010, order vacating the September 9, 2010, opinion and order and the November 8, 2010, and November 11, 2010, orders. We reverse.

This case arises from an accident involving plaintiff on February 28, 2009. Plaintiff testified that, at the time of the accident, he was employed with E.L. Hollingsworth and Company (hereinafter "Hollingsworth") pulling an empty rig to Utah and bringing back air bags twice a week. Plaintiff owned the truck he was driving and leased it to Hollingsworth. Plaintiff and Hollingsworth entered an agreement titled "Independent Contractors Operating Agreement and Unit No. 6269" (hereinafter "Operating Agreement"). When the accident occurred, plaintiff was on dispatch. He was on his way back from Utah, carrying a load of airbags.

At the time of the accident, Citizens insured plaintiff's personal vehicles. Plaintiff also had a policy with Hudson for non-trucking liability insurance (bobtail insurance). An endorsement to the policy provides that personal injury protection (PIP) coverage does "not apply to 'bodily injury' . . . resulting from the operation, maintenance or use of the covered 'auto' in the business of anyone to whom it is leased or rented if the lessee has Michigan Personal Injury . . . Coverage[] on the 'auto'."[1] Zurich was Hollingsworth's insurer.

"Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Which insurer has priority and whether Hudson's policy is valid were addressed by the trial court, which found that Hudson's provision violated public policy and the no-fault act and that Hudson had priority. Therefore, these issues are preserved. The issue regarding MCL 500.3114(3) was not addressed in the trial court's final order, but was addressed in an earlier order, which found that plaintiff was an independent contractor and Zurich did not have priority. Although that order was vacated, the conclusion that plaintiff was an independent contractor and that Zurich did not have priority may have been part of the basis for the trial court's finding that Hudson's provision violates public policy and the no-fault act. Regardless, we may overlook preservation requirements because this issue is necessary for a proper determination of the case. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

The trial court's order indicates that the issue was before the court on Hudson's oral motion for reconsideration. "A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion." *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). The transcript indicates that the hearing was on a motion for summary disposition and Hudson indicates that the trial court granted summary disposition against it. Hudson's motion for summary disposition was brought pursuant to MCR 2.116(C)(10).

[1] According to Hudson, the policy also excludes coverage when the vehicle is under dispatch.

> We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Majestic Golf, LLC v Lake Walden Country Club, Inc*, __ Mich App __; __ NW2d __ (Docket No. 300140, issued July 10, 2012) (slip op at 8) (citations omitted)].

"Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Hudson contends that Zurich has priority under MCL 500.3114(3) and that its exclusion of coverage is valid. Citizens agrees that Zurich has priority under MCL 500.3114(3). Zurich contends that MCL 500.3114(3) does not apply and Citizens has priority under MCL 500.3114(1). Plaintiff argues that if Zurich does not provide coverage, then Hudson's exclusion violates the no-fault act and Hudson has priority. Alternatively, plaintiff argues that either Citizens or Zurich has priority.

This case presents a question of priority among insurers under the no-fault act. We must look to MCL 500.3114 to determine the priority of insurers. See *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 30; 800 NW2d 93 (2010) (citation omitted). MCL 500.3114 provides, in 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 of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .
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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. [Footnote omitted.]

MCL 500.3101(1) provides, in part:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. . . .

The first question is whether MCL 500.3114(3) applies and renders Zurich in the highest order of priority to provide PIP benefits to plaintiff. Citizens argues that plaintiff was an employee of Hollingsworth and suffered accidental bodily injury while an occupant of a motor vehicle owned by Hollingsworth, such that he should receive PIP benefits from the insurer of the vehicle, Zurich. Zurich argues that plaintiff was not an employee, but an independent contractor, such that MCL 500.3114(3) does not apply.

The economic reality test is used to determine whether an employer-employee relationship exists under the no-fault act. *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983). The "factors to be considered include: (a) control of the worker's duties, (b) payment of wages, (c) right to hire, fire and discipline, and (d) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Id.* at 623.

The trial court initially found that plaintiff was not an employee of Hollingsworth, but that order was vacated. Its final order, however, finding Hudson's policy invalid, may assume that plaintiff was not an employee of Hollingsworth.[2] Moreover, neither appellant has challenged this ruling on appeal. Citizens is the only party that argues plaintiff was an employee of Hollingsworth.

Application of the economic reality test shows that plaintiff was not an employee of Hollingsworth. Although plaintiff and Hollingsworth entered an "Independent Contractors Operating Agreement and Unit No. 6269," the contract is not dispositive of the status of the parties. See *Kidder v Miller-Davis Co*, 455 Mich 25, 46; 564 NW2d 872 (1997). With regard to the first factor, control of the worker's duties, plaintiff was responsible for all repairs and could reject loads from Hollingsworth. See *Parham*, 124 Mich App at 623. The Operating Agreement also provided that plaintiff determined the means and methods of transportation services, selected his routes, and was responsible for repair and replacement costs. On the other hand, plaintiff testified that dispatch set his schedule and that he had to inform dispatch if he deviated. With regard to the second factor, payment of wages, Hollingsworth did not withhold taxes from plaintiff's wages. See *id.* Plaintiff was also responsible for his own worker's compensation. With regard to factor three, the right to hire, fire and discipline, the Operating Agreement provides that it is terminable by either party. See *id.* Finally, with regard to the fourth factor, it appears that plaintiff and Hollingsworth were working toward a common goal. See *id.*

Nonetheless, Hudson and Citizens argue that, even if plaintiff was not an employee of Hollingsworth, he was self-employed such that he was an employee who suffered accidental bodily injury while an occupant of a motor vehicle owned by himself; therefore, he should receive PIP benefits from the insurer of the vehicle, Zurich. Citizens argues that plaintiff remained an owner of the vehicle.

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[2] If plaintiff was an employee of Hollingsworth, MCL 500.3114(3) would have applied, Zurich would have been required to pay PIP benefits, and Hudson's exclusion of coverage may have been valid.

In *Besic*, 290 Mich App at 21, Besic owned the tractor and leased it to MGR Express, Inc. The Court stated that "Besic owned the truck and worked as a self-employed independent contractor for MGR." *Id.* at 32. The Court found that MCL 500.3114(3) applied to the self-employment situation of Besic under *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996). *Besic*, 290 Mich App at 32. The Court found that Besic suffered accidental bodily injury while an occupant of a motor vehicle owned by his employer and that Besic was entitled to receive no-fault benefits from the insurer of the vehicle. *Id.* (citation omitted). The Court stated that it was immaterial who Besic's employer was because it was undisputed that Besic was self-employed, so MCL 500.3114(3) controlled. *Besic*, 290 Mich App at 33. Because the bobtail insurer was the only insurer that extended PIP benefits, it had first priority. *Id.* at 32.

In *Celina*, 452 Mich at 87, Robert Rood was injured while operating a motor vehicle he owned. He was a "self-employed owner of Rood's Wrecker & Mobil [sic] Home Service" and was operating the vehicle "within the scope of his responsibilities for Rood's Wrecker." *Id.* The Michigan Supreme Court held that MCL 500.3114(3) applies to a self-employed person. *Celina*, 452 Mich at 89.

As in *Besic*, plaintiff was a self-employed independent contractor for Hollingsworth. Accordingly, MCL 500.3114(3) applies and plaintiff is entitled to receive no-fault benefits from the insurer of the vehicle, Zurich. See *Besic*, 290 Mich App at 32. Contrary to Zurich's assertion, both Besic and plaintiff remained owners of the vehicle. In *Integral Ins Co v Maersk Container Serv Co, Inc*, 206 Mich App 325, 332; 520 NW2d 656 (1994), this Court found that the owner and driver of a tractor, who leased the tractor to another company, remained an owner of the tractor.[3] Moreover, there was no evidence that plaintiff was in the business of leasing vehicles. See MCL 500.3101(2)(h)(*ii*). Also, it appears that plaintiff had use of the vehicle for more than 30 days. See MCL 500.3101(2)(h)(*i*). Thus, under MCL 500.3114(3), plaintiff was an employee who suffered accidental bodily injury while an occupant of a motor vehicle owned by the employer (himself), and he is entitled to receive PIP benefits "from the insurer of the furnished vehicle." MCL 500.3114(3). Thus, Zurich has priority. Contrary to Zurich's assertion, it is not the employer's insurer that must provide benefits.[4] Unlike in *Besic*, however, the insurer of the lessee, Zurich, provides no-fault coverage, so the bobtail insurer, Hudson, is not required to provide benefits. Given that Zurich provides coverage, Hudson's exclusion of coverage is valid because the Hudson and Zurich policies together provide continuous coverage. See *Integral*, 206 Mich App at 331-332.

[3] The lettering of the statute differed at the time of the *Integral* decision.

[4] Zurich contends that in *Besic* and *Celina*, the insurance in priority was procured by the self-employer. However, in *Besic*, the bobtail insurer had priority because the insurer of the lessee did not provide PIP benefits. *Besic*, 290 Mich App at 26-27.

Reversed.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray