ADVANCE SHEET HEADNOTE
April 27, 2026

2026 CO 26

No. 24SC183, *Hertz Corp. v. Babayev*—Statutory Insurer—Common Law De Facto Insurer—Motor Vehicle Rental Companies—Insurer's Nondelegable Duty of Good Faith and Fair Dealing—Bad-Faith Insurance Claims—§ 10-1-102(13), (15), C.R.S. (2025)—*Passamano v. Travelers Indemnity Co.*, 882 P.2d 1312 (Colo. 1994)—*Cary v. United of Omaha Life Insurance Co.*, 68 P.3d 462 (Colo. 2003)—*Riccatone v. Colo. Choice Health Plans*, 2013 COA 133, 315 P.3d 203.

The supreme court holds that, although a car rental company may offer its customers supplemental insurance through its own insurer, that arrangement does not impose on the car rental company a nondelegable duty, under either statute or the common law, to act as an insurer. Rather, that duty remains where the law has placed it: with the insurer named on the policy providing the supplemental insurance (that is, the car rental company's insurer).

The legislature did not intend to permit the treatment of car rental companies offering supplemental insurance as statutory insurers under title 10 of the Colorado Revised Statutes. Further, while *Cary v. United of Omaha Life Insurance Co.*, 68 P.3d 462 (Colo. 2003), extended the common-law duty of good faith and fair dealing beyond insurers—to a narrow class of third-party

administrators—that holding lacks enough elasticity to encompass the car rental company in this case. In *Cary*, this court penned a modest holding, confined to third-party administrators that not only possess a significant financial stake in the resolution of claims but also have primary responsibility over claims handling on behalf of the ultimate insurer. That holding remains so cabined after today. Because the car rental company here is not a third-party administrator, and because claims handling for its insurer has never been its primary responsibility, it does not qualify as a facto insurer under *Cary*'s circumscribed holding.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2026 CO 26

Supreme Court Case No. 24SC183
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 23CA117

Petitioner:

Hertz Corporation,

v.

Respondents:

Stanislav Babayev and Oleg Chikov.

Judgment Reversed
en banc
April 27, 2026

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE HOOD, joined by **JUSTICE GABRIEL** and **JUSTICE BLANCO**, concurred in part and dissented in part.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 "If you call a tail a leg, how many legs has a dog? Five? No; calling a tail a leg don't make it a leg." *Bank One Dayton, N.A. v. Limbach*, 553 N.E.2d 624, 627 n.5 (Ohio 1990) (quoting John Bartlett, *The Shorter Bartlett's Familiar Quotations* 218(d) (Christopher Morely ed., 1953)). This famous aphorism often attributed to Abraham Lincoln helps frame today's decision. Words cannot alter facts. One may call something whatever one likes, but the underlying reality remains unchanged. A dog has four legs, and relabeling its tail a "leg" doesn't magically create a fifth one. So too here. Plaintiffs may label the car rental company before us an insurer based on its involvement in claims handling and its significant financial incentives in resolving claims. But the reality remains the same: Under Colorado law, the car rental company does not qualify as a statutory insurer or as a common-law de facto insurer.

¶2 The specific issue we confront today is narrow but carries outsized importance to the car rental industry—and potentially beyond: Can a car rental company be deemed an *insurer* of customers who purchase a "Liability Insurance Supplement" ("supplemental insurance") through their rental agreement and thereby become additional insureds on a policy listing the car rental company as the *insured* and the car rental company's insurer as the policy insurer? Our analysis focuses on two dispositive questions. First, did the legislature intend to

treat car rental companies offering supplemental insurance as insurers under title 10 of the Colorado Revised Statutes, which governs "Insurance"? Second, does our decision in *Cary v. United of Omaha Life Insurance Co.*, 68 P.3d 462 (Colo. 2003), sanction the treatment of car rental companies offering supplemental insurance as de facto insurers (that is, insurers in practice) under the common law? We answer no to both questions.

¶3 We hold that, although a car rental company may offer its customers supplemental insurance *through its own insurer*, that arrangement does not impose on the car rental company a nondelegable duty, under either statute or the common law, to act as an insurer. Rather, that duty remains where the law has placed it: with the insurer named on the policy providing the supplemental insurance (that is, with the car rental company's insurer).

¶4 In so holding, we recognize that the car rental company in this case had both some involvement in administering plaintiffs' insurance claims and a significant financial incentive in the outcome of those claims. But, as the old adage reminds us, "fine feathers don't make fine birds." And as with many things in nature, what catches the eye doesn't always capture the truth. *Cary*'s judicially crafted tort is limited to third-party administrators with both primary responsibility for handling insurance claims and a significant financial stake in the outcome of those claims. *See* 68 P.3d at 468–69. Whatever else may be said about the car rental

company here, its business has never been claims handling; its trade has always been renting cars. *Cary* therefore furnishes no alchemy capable of transforming it into a de facto insurer.

¶5 Because a division of the court of appeals concluded that the car rental company in this case was plaintiffs' statutory insurer and could, alternatively, be plaintiffs' common-law de facto insurer, we reverse its judgment. The district court correctly dismissed plaintiffs' complaint against the car rental company as a matter of law. We therefore remand the case to the division with instructions to return it to the district court for reinstatement of the dismissal order.[1]

I. Facts and Procedural History

¶6 On February 26, 2020, Roman Rakhimov, a nonparty, rented a car from Hertz Corporation ("Hertz"). As part of his rental agreement, Rakhimov opted to purchase, for an additional $18.85 per day, supplemental insurance, which included uninsured/underinsured ("UM/UIM") coverage for all occupants of the

[1] We granted certiorari to review the following issue:

> Whether, after the legislative abrogation of *Passamano v. Travelers Indemnity Co.*, 882 P.2d 1312 (Colo. 1994), a "motor vehicle rental company" may be considered a statutory or de facto "insurer," where its rental agreement incidentally offers customers the option of purchasing insurance coverage provided by a licensed, third-party insurer under the rental company's own pre-existing policy with that insurer.

rental car. The supplemental insurance provision was embedded within a paragraph appearing on the final page of the rental agreement:

> If You elect [supplemental insurance], [supplemental insurance] provides protection from liability for third party automobile claims for the difference between the liability limits in Paragraph 10 of the Rental Agreement and the maximum combined single limit of $1,000,000 for bodily injury, including death and property damage. [Supplemental insurance] also includes uninsured/underinsured motorist coverage (while occupying the Car) for bodily injury and property damage, if applicable, for the difference between the statutory minimum underlying limits and $1,000,000 for each accident.

¶7 The next day, as Rakhimov was driving the rental car accompanied by two passengers, Stanislav Babayev and Oleg Chikov ("plaintiffs"), another vehicle collided with the rental car and fled the scene. Plaintiffs sustained injuries and were transported by ambulance to an emergency room where they received extensive treatment.

¶8 As beneficiaries of the UM/UIM coverage in the supplemental insurance purchased by Rakhimov, plaintiffs submitted claims for medical expenses. The automobile insurance policy providing this coverage was issued by ACE American Insurance Company ("Chubb"), a licensed and regulated third-party insurer. Under the policy issued by Chubb (the "Chubb Policy"), Chubb was the insurer, Hertz was the named insured, and Rakhimov and plaintiffs were additional insureds.

¶9 Within a few weeks of plaintiffs' claims being submitted, Chubb's third-party claims administrator, ESIS, Inc. ("ESIS"), started an investigation. ESIS is a wholly-owned subsidiary of Chubb and is specifically designated under the Chubb Policy as the authorized entity responsible for claims handling.[2]

¶10 Shortly after ESIS began reviewing plaintiffs' claims, one of its claims adjusters sent a letter to plaintiffs' counsel describing the relationship between Chubb, ESIS, and Hertz. Specifically, the claims adjuster stated that (1) neither ESIS nor Hertz was an insurance company; (2) ESIS acted solely as a third-party claims administrator for Chubb (the insurer); and (3) Hertz was the named insured under the Chubb Policy. The letter enclosed a copy of the Chubb Policy identifying Hertz as the named insured on the Declarations page. A few weeks later, plaintiffs' counsel followed up via email, making clear that everyone was singing from the same hymn sheet: "CHUBB insurance is responsible for all claims in Colorado."

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[2] Hertz maintained a Risk Management Services Agreement with ESIS. Consistent with the Chubb Policy, that agreement stated that ESIS was authorized to provide claims-handling services for Hertz, including: opening and maintaining claim files; establishing claim reserves; investigating claims; retaining defense counsel; and settling claims on Hertz's behalf, subject to discretionary settlement limits of $25,000 per person and $50,000 per accident. The Risk Management Services Agreement further obligated Hertz to secure and maintain "any consent from [Chubb] that is necessary for ESIS to perform Claim Adjustment Services for Claims under [the Chubb Policy]," thereby reinforcing the tripartite relationship among Chubb, ESIS, and Hertz.

¶11 The investigation into plaintiffs' claims spanned just over a year. During that timeframe, ESIS regularly communicated with plaintiffs' counsel, reviewed plaintiffs' medical records, ordered medical examinations, and issued some payments. Because plaintiffs received payments that totaled less than the medical expenses claimed, they filed suit against Hertz.[3] Plaintiffs' complaint included claims for: (1) breach of contract; (2) common-law bad-faith breach of an insurance contract; and (3) unreasonable delay or denial of insurance benefits in violation of sections 10-3-1115 and -1116, C.R.S. (2025).[4]

¶12 During a discovery hearing, plaintiffs asserted that Hertz was their insurer. Hertz disagreed. In the briefing that followed, Hertz explained that plaintiffs' insurer was Hertz's own insurer, Chubb, and that the Chubb Policy had provided plaintiffs UM/UIM coverage as part of the supplemental insurance purchased by Rakhimov. Plaintiffs, however, insisted that Hertz qualified as a statutory insurer

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[3] The original complaint also included claims against George Parker, a licensed attorney representing Hertz, and Samantha Howard, a claims adjuster acting on behalf of ESIS. Parker and Howard moved to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief could be granted. The district court granted their motion, finding that neither individual (1) was a party to the rental agreement or a statutory insurer or (2) owed plaintiffs a common-law duty of good faith and fair dealing. The dismissal of those claims is not before us.

[4] Plaintiffs' bad-faith claims were premised on the theory that, by selling supplemental insurance coverage, Hertz qualified as both a statutory insurer and a common-law de facto insurer. However, plaintiffs expressly acknowledged in their complaint that ESIS was the third-party administrator responsible for processing claims, including those seeking UM/UIM benefits.

or as a common-law de facto insurer because it had engaged in the business of insurance by providing supplemental insurance coverage as part of its rental agreement with Rakhimov.

¶13 The district court held, as a matter of law, that Hertz was neither a statutory insurer under title 10 nor a common-law de facto insurer under our decision in *Cary*. In terms of title 10, the court agreed with Hertz that legislative amendments had abrogated the holding in *Passamano v. Travelers Indemnity Co.*, 882 P.2d 1312 (Colo. 1994), a case on which plaintiffs relied. The court explained that, through these amendments, the legislature had clearly distinguished between car rental companies and insurers. And because Hertz was not in the business of making contracts of insurance, the court ruled that Hertz did not qualify as a title 10 insurer.

¶14 Separate and apart from title 10, the court considered the common law. Specifically, the court considered whether Hertz qualified as a common-law de facto insurer under *Cary* given (1) Hertz's involvement in the early stages of the assessment of plaintiffs' claims and (2) Hertz's significant financial stake in the resolution of those claims. The court recognized that Hertz had a significant financial interest in the resolution of plaintiffs' claims based on a risk-allocation agreement (also known as a "fronting agreement") it had executed with Chubb

related to the UM/UIM coverage in the supplemental insurance.[5] But the court nevertheless ruled against plaintiffs because it concluded that whatever control Hertz may have exerted during the initial investigation of plaintiffs' claims did not amount to *primary responsibility* for processing those claims. The court therefore concluded that Hertz could not be deemed a de facto insurer under *Cary*. Accordingly, the court dismissed all of the claims brought against Hertz.

¶15 Plaintiffs then moved to amend their complaint to add Chubb and ESIS as defendants and to assert a new deceptive trade practices claim against Hertz. But the court denied the motion and entered a final judgment against plaintiffs.[6]

¶16 Plaintiffs appealed the dismissal order, and a division of the court of appeals reversed. *Babayev v. Hertz Corp.*, 2024 COA 15, ¶ 1, 548 P.3d 1180, 1181. The division determined both that Hertz was a statutory insurer under title 10 and that there were disputed issues of material fact as to whether Hertz regularly

[5] Under this arrangement, Chubb initially paid UM/UIM claims on Hertz's behalf up to the $1,000,000 policy limit, after which Hertz was required to reimburse Chubb (through a "deductible") the exact amount paid. Practically speaking, this structure placed the ultimate financial responsibility for UM/UIM claims on Hertz.

[6] One month later, plaintiffs filed claims in federal court similar to those it sought to add through its motion to amend. *See* Complaint, *Babayev v. Hertz Corp.*, No. 1:23-cv-00311-GPG-MEH (D. Colo. Feb. 2, 2023). The federal case is on hold pending the resolution of this case. Plaintiffs' Status Report, *Babayev v. Hertz Corp.*, No.1:23-cv-00311-GPG-MEH (D. Colo. May 24, 2023).

performed the functions of an insurer and should thus be deemed a common-law de facto insurer under *Cary*. *Id.* at ¶¶ 35, 47, 548 P.3d at 1186–87.

¶17 As it relates to title 10, the division determined that nothing in the statutory definitions of "insurance," "insurer," and "motor vehicle rental company" precluded a car rental company like Hertz from being deemed an insurer. *Id.* at ¶¶ 14–18, 548 P.3d at 1183. Because Hertz had offered Rakhimov and his passengers supplemental insurance encompassing UM/UIM coverage, the division concluded that Hertz was plaintiffs' statutory insurer. *Id.* at ¶ 35, 548 P.3d at 1186. In doing so, the division disagreed with the district court's view that *Passamano* had been abrogated in relevant part by our legislature. *Id.* at ¶ 19, 548 P.3d at 1183–84. Although the division acknowledged that, in the aftermath of *Passamano*, our legislature had exempted car rental insurance policies from the rules governing automobile insurance in title 10, including the requirement to offer UM/UIM coverage, the division discerned that the legislature had not exempted car rental companies altogether from qualifying as insurers. *Id.* at ¶ 24, 548 P.3d at 1184.

¶18 Then, turning to our decision in *Cary*, the division homed in on Hertz's significant financial incentive in the resolution of plaintiffs' claims and Hertz's involvement in ESIS's early handling of those claims. The division observed that there was evidence that Hertz had performed some of the functions of an insurer,

which the division took to mean that a genuine dispute of material fact existed as to whether Hertz may be deemed a de facto insurer under the common law. *Id.* at ¶ 46, 548 P.3d at 1187. Accordingly, the division held that the district court had erred by resolving the issue on a motion filed pursuant to C.R.C.P. 56(h) ("Determination of a Question of Law"). *Id.* at ¶ 47, 548 P.3d at 1187. Hertz sought our review, and we granted its petition.

II. Analysis

¶19 The issue before us entails two distinct inquiries: (1) whether Hertz qualifies as a statutory insurer; and (2) whether Hertz qualifies as a common-law de facto insurer under *Cary*. But we mustn't get over our skis. We must first identify the applicable standard of review. Only after doing so may we get down to brass tacks.

¶20 With the applicable standard of review as our lodestar, we consider whether the legislature intended to permit the treatment of car rental companies offering supplemental insurance as statutory insurers under title 10. We conclude that it did not. We next examine whether *Cary*'s extension of the common-law duty of good faith and fair dealing beyond insurers—to a narrow class of third-party administrators—has enough elasticity to encompass Hertz. We conclude that it does not. In *Cary*, we penned a modest holding, confined to third-party administrators that not only possess a significant financial stake in the resolution

of claims but also have primary responsibility over claims handling on behalf of the ultimate insurer. It remains so cabined after today.

A. Standard of Review

¶21 First, whether Hertz qualifies as an insurer under title 10 is an issue implicating statutory interpretation, which we review de novo. *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 660 (Colo. 2011). Our initial step in construing a statute is to ascertain and give effect to the intent of the General Assembly. *See Apodaca v. Allstate Ins. Co.*, 255 P.3d 1099, 1102 (Colo. 2011). We decipher our legislature's intent by affording a statute's words and phrases their plain and ordinary meaning. *Robbins v. People*, 107 P.3d 384, 387 (Colo. 2005). To do so, we read such words and phrases in context and in accordance with the rules of grammar. *Doubleday v. People*, 2016 CO 3, ¶ 19, 364 P.3d 193, 196. We are required to consider "the statutory scheme as a whole" and "'to give consistent, harmonious, and sensible effect to all its parts.'" *Archuleta v. Roane*, 2024 CO 74, ¶ 9, 560 P.3d 399, 402 (quoting *Dep't of Nat. Res. v. 5 Star Feedlot, Inc.*, 2021 CO 27, ¶ 20, 486 P.3d 250, 256).

¶22 Second, we likewise review de novo the district court's determination, pursuant to C.R.C.P. 56(h), that Hertz may be deemed plaintiffs' common-law de facto insurer. *Great N. Props., LLLP v. Extraction Oil & Gas, Inc.*, 2024 CO 28, ¶ 20, 547 P.3d 1110, 1116. A court may determine a question of law under C.R.C.P. 56(h)

if there is "no genuine issue of any material fact" necessary for its resolution. *Coffman v. Williamson*, 2015 CO 35, ¶ 12, 348 P.3d 929, 934 (quoting C.R.C.P. 56(h)). In the context of a C.R.C.P. 56(h) motion, the nonmoving party is entitled to "all favorable inferences from the undisputed facts," and "all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Id.*

B. Hertz Is Not a Statutory Insurer Under Title 10

¶23 The division set out on firm footing, starting where it should: with the plain meaning of the statutory definitions of "insurance" and "insurer." Section 10-1-102(12), C.R.S. (2025), defines "[i]nsurance" as a "contract whereby one . . . undertakes to indemnify another . . . upon determinable risk contingencies." And section 10-1-102(13) defines an "[i]nsurer" as "every person engaged as principal, indemnitor, surety, or contractor in the business of making contracts of insurance." Having erected its decision on this sturdy foundation, however, the division stumbled on the very next step.

¶24 Without giving the framework of title 10 much scrutiny, the division concluded that Hertz was a statutory insurer. It reasoned that, since "[t]he rental agreement between Hertz and Rakhimov indemnified Rakhimov and his passengers for damage caused by uninsured motorists," Hertz had "engaged as a contractor, if not an indemnitor, in the business of making an insurance contract." *Babayev*, ¶ 18, 548 P.3d at 1183.

¶25 The division used *Passamano* as the scaffolding for its determination. *Id.* at ¶¶ 20–24, 548 P.3d at 1184. But *Passamano* cannot bear the weight the division asked it to support. The plaintiff in *Passamano*, like plaintiffs here, entered into an agreement with a car rental company. 882 P.2d at 1316. We held that, as a result of offering Passamano "various insurance coverages for specified prices," the car rental company qualified as an insurer "for purposes of section 10-4-609(1)[, C.R.S. (1994)]," a statutory provision compelling automobile insurers to offer UM/UIM coverage. *Passamano*, 882 P.2d at 1317. We therefore declared that all car rental companies offering to sell their customers the option of purchasing insurance were deemed to be insurers and were required to offer UM/UIM coverage. *Id.* at 1323.

¶26 Significantly, however, our General Assembly responded to *Passamano* while the ink was still wet. In the very next legislative session, it began abrogating *Passamano*, leaving it moribund as relevant here; and in a session a few years later, it all but interred that decision—spade, soil, and all. Ch. 88, sec. 3, § 10-2-105(1)(g)(I)–(IV), 1998 Colo. Sess. Laws 233, 234[7]; *see also* Ch. 88, sec. 4, § 10-3-903(2)(j), 1998 Colo. Sess. Laws 233, 234; § 10-3-105(2), C.R.S. (2025).

[7] In 2001, the legislature amended this statute, adding a new subsection (1) and relocating this portion of the statute to subsection (2). Ch. 306, sec. 5, § 10-2-105(2)(g)(I)–(IV), 2001 Colo. Sess. Laws 1190, 1992–94.

¶27 Specifically, in the wake of *Passamano*, the legislature made significant amendments to title 10. For starters, it inserted paragraph (b) in section 10-4-609(1), the provision we applied in *Passamano*. Ch. 51, sec. 4, § 10-4-609(1)(b), Colo. Sess. Laws 142, 143. The added paragraph provides that "[t]his subsection (1) shall not apply to motor vehicle rental agreements or motor vehicle rental companies." § 10-4-609(1)(b), C.R.S. (2025).

¶28 Relatedly, the legislature distinguished between insurers and car rental companies. It defined the former as "every person engaged as principal, indemnitor, surety, or contractor in the business of making contracts of insurance," and the latter as "an entity that is in the business of renting, pursuant to motor vehicle rental agreements, motor vehicles." § 10-1-102(13), (15). In so doing, the legislature separated insurers and car rental companies as cleanly as if it had drawn the line with a razor.

¶29 Elsewhere the legislature expressly declared that car rental agreements of the kind at issue in *Passamano* (the same kind at issue here) are not automobile insurance policies. Section 10-4-601(10), C.R.S. (2025), defines "[p]olicy" as "an automobile insurance policy providing coverage for all *or any* of the following coverages: . . . bodily injury liability, property damage liability . . . and *uninsured motorist coverage*." (Emphases added.) But, spurred by *Passamano*, the legislature added paragraph (a) to that subsection, explicitly exempting any agreement in

which the vehicle insured is "rented to others pursuant to the terms of a motor vehicle rental agreement." § 10-4-601(10)(a).

¶30 Similarly, the legislature carved out an exception to the definition of "transacting insurance business" by proclaiming that "[t]he sale of authorized insurance by agents of a motor vehicle rental company" does not qualify as "transacting insurance business." § 10-3-903(1), (2)(j), C.R.S. (2025).

¶31 Lastly, the legislature addressed the statutory definition of an "[i]nsurance producer." § 10-2-103(6), C.R.S. (2025). A person qualifies as an insurance producer when the person "solicits, negotiates, effects, procures, delivers, renews, continues, or binds" policies of insurance. § 10-2-103(6)(a)(I). But here, too, the legislature made a change by including a specific exception for "[o]fficers or employees of a motor vehicle rental company" who offer insurance coverage. § 10-2-105(2)(g).

¶32 Thus, prompted by our holding in *Passamano*, the legislature enacted multiple provisions to establish that (1) car rental companies are not insurers, (2) a car rental agreement offering insurance is not an automobile insurance policy, (3) the sale of insurance in a car rental agreement does not qualify as transacting insurance business, and (4) agents of car rental companies offering insurance through car rental agreements are not insurance producers. These changes, in addition to consigning the germane portions of *Passamano* to their final resting

place, reflect a clear intent by the legislature to differentiate car rental companies from insurers and rental agreements from insurance policies.

¶33 The supplemental insurance sold here, therefore, was not an automobile insurance policy under title 10. *See* § 10-4-608(1)(c), C.R.S. (2025) (exempting any policy "arising out of a motor vehicle rental agreement" from all of title 10, article 4, part 6). And if the agreement for supplemental insurance did not constitute an automobile insurance policy, how can Hertz be deemed a contractor or indemnitor "in the business of making contracts of insurance" under section 10-1-102(13), as the division concluded? It can't.

¶34 In arriving on the other side of the analytical divide, the division downplayed our legislature's swift response to *Passamano* and tried to explain each relevant statutory amendment away. *Babayev*, ¶¶ 24, 25–33, 548 P.3d at 1184-85. But the division improperly parsed those amendments and analyzed each in isolation without regard to title 10's overall design. *See id. at* ¶¶ 28, 30, 33, 548 P.3d at 1185. This was a misstep. Courts must take a panoramic view of a statutory scheme and give consistent, harmonious, and sensible effect to all its parts. *Archuleta*, ¶ 9, 560 P.3d at 402. Giving the integrated statutory framework a holistic reading, as we must, it becomes evident that a car rental company that offers its customers supplemental insurance does not fit within the definition of a title 10 insurer. *See* § 10-1-102(13).

¶35 Interestingly, the division acknowledged that "this delineation of what is and is not 'transacting insurance business' does not apply to rental car insurance, presumably because motor vehicle rental companies are not insurance companies that must procure a certificate of authority to do business." *Babayev*, ¶ 33, 548 P.3d at 1185. But, surprisingly, the division nevertheless determined that Hertz was a statutory insurer. The statutory scheme offers no hint that the legislature meant to steer in opposite directions at once. And to the extent the division attempted to label Hertz an "indemnitor" for agreeing to secure supplemental insurance for its clients, it pushed past the title 10 shoreline into waters the legislature never meant to navigate.

¶36 In sum, by leaning on a case whose supporting beam has been shaved down in the very place this dispute turns, the division arrived at the wrong destination. Using a wide-lens perspective of title 10, as amended post-*Passamano*, we conclude that Hertz does not qualify as a statutory insurer. Rather than being in the business of making insurance contracts, Hertz is "in the business of renting . . . motor vehicles." § 10-1-102(15); *see also Passamano*, 882 P.2d at 1329 (Vollack, J., dissenting) (noting that the car rental company involved was "engaged in the business of renting motor vehicles, and not in the business of insurance sales").

¶37 Having held that Hertz is not a statutory insurer, the remaining question is whether it nonetheless bears the hallmarks of one under the common law as interpreted by *Cary*—in short, whether it should wear the mantle of a de facto insurer. We turn to that issue now.

C. Hertz Does Not Qualify as a De Facto Insurer Under the Common Law

1. Applicable Common-Law Principles

¶38 Although Colorado law reads into every contract a duty of good faith and fair dealing, a breach of this duty is not generally actionable in tort. *Cary*, 68 P.3d at 466. Insurance contracts, however, are cut from a different cloth. *Id.* Given the "special nature of the insurance contract" relative to other kinds of contracts, and given further "the 'special nature' of the relationship that exists between an insured and his insurer," a breach of the duty of good faith and fair dealing in an insurance contract "gives rise to a separate cause of action sounding in tort." *Id.* at 466–67 (quoting *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1272 (Colo. 1985)); *see also Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 414 (Colo. 2004) (examining the distinct motivations and disparate positions of insurers and insureds).

¶39 To succeed on a tort cause of action for a bad-faith breach of an insurance contract, a plaintiff must prove that the defendant owed a duty of good faith and fair dealing in investigating and processing the plaintiff's claim. *Id.* at 465. An

insurer breaches its duty of good faith and fair dealing when it conducts an unreasonable investigation, unreasonably refuses to pay benefits, or offers an unreasonable explanation for denying a claim—while knowingly or recklessly disregarding the unreasonableness of its conduct in each instance. *See Riccatone v. Colo. Choice Health Plans*, 2013 COA 133, ¶ 41, 315 P.3d 203, 210.

¶40 Because an insurer's duty of good faith and fair dealing is nondelegable, an insurer "cannot escape" liability simply by outsourcing claims handling or other tasks. *Cary*, 68 P.3d at 466. Thus, when the duty of good faith and fair dealing is breached, it is generally the insurer—rather than an "agent[] involved in claims processing"—that is on the hook for any tort liability. *Riccatone*, ¶ 14, 315 P.3d at 206 (quoting *Cary*, 68 P.3d at 466).

¶41 Relatedly, the general rule is that, because the insurer has a special relationship with the insured by virtue of the insurance contract, the insurer owes a duty of good faith and fair dealing to the insured. *Cary*, 68 P.3d at 466. Typically, then, the insured may bring a claim for breach of the duty of good faith and fair dealing only against the insurer.

¶42 Of course, a general rule, by its very nature, leaves room at the margins for exceptions. Enter *Cary*. We held there that when "a third-party administrator [(1)] performs many of the tasks of an insurance company and [(2)] bears some of the financial risk of loss for the claim," there is "a special relationship" between

the administrator and the insured "sufficient for imposition of a duty of good faith and tort liability for its breach—even when there is no contractual privity between the defendant and the [insured]." *Id.* at 466, 469. This holding forms the battleground on which the parties' common-law disagreement is fought.

2. *Cary*'s Judicially Crafted Tort Duty Is Narrowly Confined and Does Not Extend to Hertz Here

¶43 Plaintiffs contend that Hertz meets *Cary*'s criteria and should therefore be liable under the common law for breach of the duty of good faith and fair dealing. In other words, according to plaintiffs, even if Hertz doesn't qualify as a statutory insurer under title 10, it should nevertheless be treated as a de facto insurer under the common law. Hertz counters that plaintiffs' comparison of this case to *Cary* is an apples-to-oranges one because, unlike the third-party administrator in *Cary*, Hertz was neither *expressly retained* by the insurer to act on its behalf in administering claims nor regularly operating in the business of insurance. Consequently, Hertz urges us to decline plaintiffs' invitation to extend our holding in *Cary* to the circumstances of this case. To get to the bottom of the question, we must unpack *Cary*.

¶44 In *Cary*, the City of Arvada offered its employees access to a self-funded health insurance program overseen by the Arvada Medical and Disability Program Trust Fund (the "Trust"). *Id.* at 464. Because the Trust had limited resources and little claims-handling experience, it retained third-party

administrators, United of Omaha Life Insurance Company and Mutual of Omaha of Colorado (collectively, "United"), to execute "virtually all of the functions normally performed by an insurance company in processing claims and determining whether to deliver insurance benefits." *Id.* at 464, 468, 464 n.3. Specifically, United assumed responsibility for the following aspects of the claims-handling process:

- providing claims-handling facilities, personnel, procedures, files, and systems;
- verifying claimant eligibility;
- receiving all claim forms and related materials from plan members;
- processing submitted claims and issuing explanation-of-benefits letters to claimants upon taking action on a claim;
- preparing claim payments;
- offering actuarial and underwriting services to recommend benefit modifications;
- printing and covering the cost of all plan claim forms and benefit checks;
- developing and printing plan-benefit booklets and identification cards;
- evaluating the health histories of late applicants and determining whether they should receive plan coverage; and
- periodically auditing the claims-processing system to assess the quality of claim administration, including establishing an appellate procedure for coverage denials.

Id. at 464.

¶45 Beyond exercising "primary control" over the administration of claims and the determination of benefits, United was also a party to a reinsurance agreement under which it insured claim payments between $75,000 and $1,000,000, creating "a significant financial incentive to delay payment of benefits or coerce [the insured] into a diminished settlement." *Id.* at 463–64, 468.

¶46 Given that United had both *primary responsibility* for claims handling and a significant financial stake in the resolution of claims, we concluded that it effectively stood in the shoes of an insurer. *Id.* at 469. We added that United shared a "special relationship" with the insureds that warranted treatment as a de facto insurer under the common law. *Id.* at 468. In essence, we applied the familiar "duck test": United walked, swam, and quacked like an insurer, so we deemed it one.

¶47 Thus, *Cary* ushered in a judicially crafted tort limited to third-party administrators with both primary responsibility over the claims-handling process and a significant financial incentive in the resolution of claims. *See id.* at 468–69. For twenty-three years, *Cary* has stood where we first placed it; we have not revisited it—let alone pushed its boundaries.

¶48 A division of the court of appeals did apply *Cary*, though, a decade into that case's life. *See Riccatone*, ¶ 12, 315 P.3d at 206. Much like *Cary*, *Riccatone* addressed the conduct of third-party administrators performing claims-adjustment duties for

a self-funded health plan. *Id.* at ¶¶ 2, 12–22, 315 P.3d at 205–07. The division ultimately concluded that, in the absence of the reinsurance agreement present in *Cary* or any comparable "financial incentive" tied to the ultimate risk of loss, the third-party administrators could not be held liable for breach of the duty of good faith and fair dealing under the common law. *Id.* at ¶¶ 18, 22, 315 P.3d at 207. Accordingly, the division determined that the third-party administrators were not liable to the insured. *Id.* at ¶ 22, 315 P.3d at 207.

¶49 Although *Riccatone* crossed the finish line in the right place, its stride along the way deserves attention. The *Riccatone* division distilled *Cary*'s holding into a two-part inquiry: Whether a "third part[y]" (1) had performed the functions of an insurer and (2) possessed a significant financial incentive to limit an insured's claims. *Id.* at ¶ 17, 315 P.3d at 207. We refine *Riccatone*'s reading of the *Cary* test now by emphasizing that the "third parties" to whom common-law bad-faith liability may extend are limited to *administrators* whose primary business is claims handling and who have a significant financial stake in the resolution of claims. *Cary*, 68 P.3d at 468–69. That's what *Cary* teaches. *Id.* To the extent the division in this case relied on *Riccatone* to extend *Cary*'s scope to *any third party* satisfying the two-part criteria just described, it erred.

¶50 *Cary* sought to make certain that administrators whose primary business is claims handling (i.e., administrators retained *primarily* to perform insurer-like

functions) and who share the insurer's financial incentives in the resolution of claims are held to the standards applicable to insurers. In *Cary*, treating the third-party administrator as a de facto insurer was appropriate because United was primarily responsible for claims handling, regularly operated within the claims-management industry, and had a significant financial stake in the resolution of claims. *Id.*

¶51 Unlike United, Hertz is not a third-party administrator; that role belongs solely to ESIS. Nor does Hertz carry primary responsibility for claims handling; that duty rests squarely with ESIS.

¶52 Moreover, the relationship between Hertz and plaintiffs bears minimal resemblance to the "special relationship" between United and the insureds in *Cary*. *See id.* at 468. In this case, an actual insurer—Chubb—stands at the center of the insurer-insured relationship and is expressly designated as the entity responsible for making payments on plaintiffs' claims. The Chubb Policy spells out the parties' roles in black-and-white: Chubb is the insurer; Hertz is the named insured; and purchasers of supplemental insurance are additional insureds. Further, the record confirms that Hertz paid premiums to Chubb; that plaintiffs were told early on in this litigation that Chubb was the entity ultimately responsible for coverage decisions and payments; and that ESIS—a Chubb subsidiary expressly retained to process claims—investigated, adjusted, and paid claims on Chubb's behalf. In

both form and function, Chubb acted as the insurer, ESIS acted as the third-party administrator, Hertz acted as the insured, and plaintiffs acted as additional insureds.

¶53 Thus, while United determined eligibility, processed and paid claims, issued benefit decisions, and handled appeals, Hertz did none of this. It did not underwrite the risk, adjust claims, or issue payments. Those *primary insurer* functions were performed by ESIS, which investigated the claims, collected and reviewed records, coordinated examinations, communicated with plaintiffs' counsel, and paid benefits under the Chubb Policy. These circumstances reflect Hertz's business reality: Hertz rents cars; it doesn't insure them.

¶54 True, Hertz participated in the early investigation and adjustment of plaintiffs' claims and offered input on potential settlement. But those actions pale in comparison to United's and come up woefully short of what *Cary* requires for de facto insurer status.

¶55 We caution that *Cary*'s cornerstone is not an open invitation for courts to impose bad-faith tort liability on every entity that happens to touch an insurance claim. No, *Cary* offered a targeted solution to a narrow problem—one that arises only when control, expertise, and financial incentives converge in a third-party administrator *whose primary business is claims handling* and *who effectively substitutes*

for the insurer. And *Cary*'s limited reach over the past two-plus decades confirms this reading.[8]

¶56 We are not persuaded otherwise by plaintiffs' argument that Hertz's offer of supplemental insurance during a car-rental transaction transformed it into a de facto insurer. At most, Hertz agreed through the supplemental insurance sold in its rental agreement to *secure* coverage for purchasers, a commonplace commercial arrangement. *See, e.g.*, *Md. Cas. Co. v. Buckeye Gas Prods. Co.*, 797 P.2d 11, 12 (Colo. 1990) (examining a supplier–distributor agreement requiring the supplier to name the distributor as an additional insured); *Weitz Co. v. Mid-Century Ins. Co.*, 181 P.3d 309, 310 (Colo. App. 2007) (interpreting an additional-insured endorsement based on a subcontractor's promise to insure the general contractor). While such

[8] It is worth noting that *Cary* placed Colorado in rare company among the states. *See De Dios v. Indem. Ins. Co. of N. Am.*, 927 N.W.2d 611, 622 (Iowa 2019) (indicating there are "relatively few jurisdictions that allow claims against third-party administrators"). The vast majority of jurisdictions to consider the issue have declined to extend bad-faith liability to other entities—including, in some instances, third-party administrators—lacking privity with the insured. *Id.* at 623; *see also William Powell Co. v. Nat'l Indem. Co.*, 141 F. Supp. 3d 773, 782–83 (S.D. Ohio 2015) (concluding that, absent privity, Ohio law does not permit bad faith claims against third-party administrators); *McLaren v. AIG Domestic Claims, Inc.*, 853 F. Supp. 2d 499, 511 (E.D. Pa. 2012) (same under Pennsylvania law); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 586 S.E.2d 586, 588 (S.C. 2003) (holding that "no bad faith claim can be brought against an independent adjuster or independent adjusting company" due to the lack of privity). Stretching bad-faith liability past *Cary*'s contours, as plaintiffs urge, would place Colorado in even sharper tension with the overwhelming majority of states and propel it into territory that few—if any—jurisdictions have chosen to chart.

agreements routinely confer additional-insured status to others (such as Hertz's customers) under a named insured's policy (such as Hertz's Chubb Policy), they do not alter the fundamental roles of the insurer, the named insured, and the additional insureds.

¶57 Treating a mere agreement by a named insured to secure supplemental insurance coverage for additional insureds as though it were the actual issuance of an insurance policy would collapse the distinction between the insurer and the named insured. More importantly, doing so would have a chilling effect that could extend beyond the car rental industry. If a car rental company offering incidental access to insurance coverage is an "insurer" potentially subject to liability—notwithstanding the General Assembly's painstaking efforts to make clear that such a company is not an "insurer"—the same would seemingly be true of any Colorado business that offers access to third-party insurance incidental to the services or products it sells.

¶58 Imposing de facto insurer status on Hertz is also particularly unwarranted here given the legislature's deliberate decision to prevent car rental companies from being treated as insurers under title 10. Our jurisprudence makes clear that it is "not this court's place to substitute the judiciary's policy judgments for those of the General Assembly." *Bermel v. BlueRadios, Inc.*, 2019 CO 31, ¶ 37, 440 P.3d 1150, 1158. Indeed, we do not act by judicial fiat. Our mission instead is to honor

the legislature's considered judgment. Because the legislature has expressly carved out an exception from title 10 for car rental companies that merely facilitate insurance, we must uphold that choice rather than invent liability through the common law. *See, e.g.*, *Martinez v. Lewis*, 969 P.2d 213, 219 (Colo. 1998) *(*declining to impose a duty of care onto a physician performing an independent medical evaluation when doing so would countermand the General Assembly's decision "to limit an IME practitioner's liability for his or her findings"). To take plaintiffs up on their request to stretch *Cary* in a way that treats as insurers any rental companies offering supplemental insurance would be to improperly sneak through the "back door" what the legislature has barred at the "front door." *See Laird v. Nelms*, 406 U.S. 797, 802 (1972).[9]

¶59 Before we draw the curtain on this opinion, one final point is worth making. Rejecting plaintiffs' request to deem Hertz a de facto insurer does not leave them without alternate recourse. Unlike the situation in *Cary*, where the "unavailability or inadequacy" of recovery was a reality that seemingly motivated this court to recognize de facto insurer status, *Cary*, 68 P.3d at 472 (Coats, J., dissenting), plaintiffs here have avenues for relief against Chubb and ESIS under both

[9] Plaintiffs ask us not to consider Hertz's assertion that it did not owe them a duty of care under *traditional tort principles* because it did not raise the argument in the proceedings below. Inasmuch as Hertz prevails on other grounds, we do not need to reach that question or plaintiffs' waiver contention.

statutory and common-law theories. Indeed, plaintiffs are currently pursuing statutory and common-law claims against Chubb and ESIS in federal court. Additionally, plaintiffs have another path open to them with respect to Hertz, as evidenced by the claim they have brought in federal court pursuant to the Colorado Consumer Protection Act, alleging that Hertz engaged in deceptive trade practices with respect to the marketing and sale of supplemental insurance benefits.

III. Conclusion

¶60 For these reasons, we conclude that, under Colorado law, Hertz is neither plaintiffs' statutory insurer nor plaintiffs' common-law de facto insurer. Accordingly, we reverse the division's judgment. The district court correctly dismissed plaintiffs' claims against Hertz as a matter of law. We therefore remand the case to the division with instructions to return it to the district court for reinstatement of the dismissal order.

JUSTICE HOOD, joined by **JUSTICE GABRIEL** and **JUSTICE BLANCO**, concurred in part and dissented in part.

JUSTICE HOOD, joined by JUSTICE GABRIEL and JUSTICE BLANCO, concurring in part and dissenting in part.

¶61 I agree with the majority that the General Assembly didn't intend for rental car companies like Hertz to be treated as statutory insurers. Maj. op. ¶ 36.

¶62 But when, as here, a rental car company (1) generates revenue from a third-party insurance policy it offers to its customers, (2) assists in adjusting claims under that policy, and (3) assumes complete financial risk for those claims, the rental car company potentially becomes a de facto insurer under the common law. This is because the rental car company's control over benefits and its incentive to minimize claims exposure create a special relationship and thus a duty of good faith and fair dealing with the policyholder. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 468 (Colo. 2003). Under *Cary*, a de facto insurer can't escape liability for breaching that duty by pointing to the formalities of contractual privity that typically define a bad-faith claim.

¶63 Because statutory and common-law insurance claims are distinct under Colorado law, *Vaccaro v. Am. Fam. Ins. Grp.*, 2012 COA 9M, ¶¶ 20–21, 275 P.3d 750, 756, and because I believe that resolution of the remaining factual disputes may reveal that the plaintiffs' common-law claims fall within the breadth of *Cary*, I respectfully dissent from Part II.C of the majority opinion.

¶64 At its core, *Cary* tells us when a plaintiff should be allowed to bring an insurance bad-faith claim despite lacking privity of contract with the defendant. Privity of contract is the direct legal relationship created between two parties to a valid contract. *Privity*, Black's Law Dictionary (12th ed. 2024). It's a required element of most bad-faith claims because the "special relationship" between the policyholder and the insurer creates a nondelegable duty of good faith and fair dealing that is implied in an insurance contract. *Cary*, 68 P.3d at 466. But the assumption that the special relationship only exists between parties in privity of contract is predicated on the notion that insurance involves a simple, two-party relationship between the insurer and its policyholder. Under more complex insurance arrangements, those assumptions break down. *Cary* demonstrated that in multi-party insurance structures, the entity asked to evaluate the policyholder's claim in good faith retains a special relationship with the policyholder, even without privity of contract.

¶65 The fronting policy between Hertz and Chubb is an example of a complex insurance arrangement that strains the assumptions underpinning the privity requirement. Under a fronting policy, a noninsurer enterprise and a licensed insurer agree to policy limits that match the deductible. 1 Robert H. Jerry, II, *New Appleman on Insurance Law Library Edition*, § 1.09[4], LEXIS (database updated 2025). In practice, this means that while an insurer like Chubb may compensate

the policyholder up to the limits of its policy, Hertz is obligated to reimburse Chubb through its deductible, which will cover the entire amount paid by Chubb. *Babayev v. Hertz Corp.*, 2024 COA 15, ¶ 6 n.2, 548 P.3d 1180, 1182 n.2; *see also* Esteban Carranza-Kopper, *Fronting Arrangements: Industry Practices and Regulatory Concerns*, 17 Conn. Ins. L.J. 227, 229 (2010). As a result, on the facts before us, Hertz functionally retained liability for all claims and transferred no risk to Chubb.

¶66 Fronting effectively allows large corporations, which are not licensed insurers, to operate their own self-funded insurance programs when state insurance regulation would make it impractical to officially do so. *See Reliance Ins. Co. v. Shriver, Inc.*, 224 F.3d 641, 643 (7th Cir. 2000). Put another way, "[i]n a fronting policy, the insured essentially rents an insurance company's licensing and filing capabilities, but the insurance company does not actually pay any claims." *Dorsey v. Fed. Ins. Co.*, 798 N.E.2d 47, 51 (Ohio Ct. App. 2003). That's why courts have granted "a direct right of action" to "the person[] to whom [the fronting policy is payable]" against the enterprise-policyholder to enforce payment, even when that would otherwise flout privity requirements. *O'Hare v. Pursell*, 329 S.W.2d 614, 620 (Mo. 1959).

¶67 While our precedent hasn't addressed fronting policies directly, the privity-requirement exception established in *Cary* demonstrates that Colorado law is compatible with a cause of action based on fronting. 68 P.3d at 468. *Cary* provided

a two-prong standard for dispensing with privity, justified by a pragmatic understanding of the multi-party relationships that arise in complex insurance arrangements. *Id.* *Cary* held that a common-law insurance bad-faith plaintiff is exempt from proving privity if the would-be defendant had (1) "primary control over benefit determinations" and (2) "significant financial incentive to delay payment of benefits or [to] coerce [the policyholder] into a diminished settlement." *Id.* at 467–68 (first citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1272 (Colo. 1985); and then citing *Scott Wetzel Servs., Inc. v. Johnson*, 821 P.2d 804, 808 (Colo. 1991), to trace the conditions under which Colorado has created exceptions to privity requirements). When both requirements are met, a court may consider the control and financial incentives demonstrated by all parties to the insurance arrangement without putting dispositive weight on explicit contractual obligations or formal titles.

¶68 In contrast, the majority narrowly reads *Cary* as creating a formalistic rule that regulates the conduct of third-party claims administrators when they provide operational support to self-funded insurance programs. Maj. op. ¶¶ 47–50. Under that reading, the analysis is simple—Hertz isn't a third-party claims administrator, so it can't be a de facto insurer under *Cary*.

¶69 But I find no language in *Cary* to indicate that our holding was "limited to third-party administrators." *Id.* at ¶ 47. Rather, the sentence from *Cary* that the

majority leans on is the *only* instance when we narrowly referred to third-party claims administrators, and we did so to apply the rule to the defendant in that case. *Cary*, 68 P.3d at 468–69 (concluding the analysis of the subsection "Special Relationship *in This Case*" by stating: "When a third-party administrator performs many of the tasks of an insurance company and bears some of the financial risk of loss for the claim, the administrator has a duty of good faith and fair dealing to the insured in the investigation and servicing of the insurance claim." (emphasis added)).

¶70 Taking that sentence in isolation, as the majority does, ignores other points in the opinion when we used more general terms to describe the legal rule that would shape what types of entities could be subject to *Cary* liability. *See, e.g.*, *id.* at 466 ("When the actions of *a defendant* are similar enough to those typically performed by an insurance company in claim administration and disposition, we have found the existence of a special relationship . . . even when there is no contractual privity between the defendant and the plaintiff." (emphasis added)). In limiting *Cary* to its facts, the majority ignores the broader principles upon which *Cary* is built. *See id.*

¶71 And perhaps more importantly, I fear that appending a third requirement to *Cary*, as the majority does today, Maj. op. ¶ 49, creates a formalistic limit to which entities can be held responsible for unfair insurance practices under *Cary*.

Adding a label-driven third requirement to *Cary* provides a way for sophisticated actors in the insurance industry to administer aggressive claims-adjustment practices through an entity not titled "third-party claims administrator," and then use the absence of that all-important title as evidence that *Cary* doesn't apply. Rather than simply making *Cary* a "walks-like-a-duck, quacks-like-a-duck" standard, the majority requires a plaintiff to identify a singular species of duck to access *Cary*'s rule. *Id.* at ¶ 46.

¶72 For the sake of argument, let's assume that *Cary* identifies a category of entities, rather than a specific example, and apply that assumption to these facts. If *Cary* does create a general standard, instead of a factually constrained rule, could the fronting policy between Hertz and Chubb establish the necessary control and financial incentives for Hertz to be a de facto insurer? I believe so.

¶73 It's undisputed that the policy formed a fronting relationship between Hertz and Chubb and that Hertz retained final financial liability for all of plaintiffs' claims up to one million dollars through the deductible it pays Chubb. Facing impending financial liability for plaintiffs' claim, Hertz appears to have tried to minimize that cost.

¶74 For example:

- A member of Hertz's legal team requested that plaintiffs provide Hertz with their medical records, which would allow "Hertz to complete its evaluation of these claims."

- An employee of ESIS revealed in a deposition that Hertz "maintain[ed] high involvement" throughout the claims-adjustment process and "h[e]ld the ultimate authority" in determining the value of claims because "[i]t is their money[;] . . . it's their case, in the end."
- And the Risk Management Services Agreement between Hertz and ESIS identified Hertz as "responsible for certain obligations," including final settlement authority for larger claims.

This demonstrates "primary control over benefit determinations" and "significant financial incentive to delay payment of benefits or . . . diminish[] settlement." *Cary*, 68 P.3d at 468.[1]

¶75 It's entirely possible that additional discovery might reveal an alternate explanation for Hertz's actions that demonstrates why it's outside of the reach of *Cary*. But the opportunity to allow that factual development to continue is why the division held that the trial court erred by resolving plaintiffs' common-law claims under C.R.C.P. 56(h). *Babayev*, ¶ 47, 548 P.3d at 1178. I agree.

¶76 Accordingly, I would affirm the division's opinion in relevant part and remand this case to the trial court to allow the parties to litigate the application of *Cary*, consistent with the broader view of that case I express here. So, I respectfully

[1] To be clear, I'm not suggesting that every entity carrying a fronting policy *must* be treated as a de facto insurer in all circumstances. Rather, I would conclude that Hertz's level of involvement and course of conduct during the claims administration process satisfied *Cary*'s test for de facto insurers.

dissent in part with respect to the majority's application of *Cary* to the plaintiffs' common-law claims.