S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

UNIVERSAL UNDERWRITERS,

Defendant/Counter-Plaintiff-Appellant/Cross-Appellee,

and

M&M MOTOR MALL, INC. and CRAIG ENGLE,

Defendant/Counter-Plaintiff-Cross-Appellee.

UNPUBLISHED
June 20, 2006

No. 259227
Oakland Circuit Court
LC No. 2004-056916-CK

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant Universal Underwriters ("defendant") appeals as of right from the trial court's order granting summary disposition for plaintiff MEEMIC Insurance Company ("plaintiff"). Plaintiff cross appeals, raising an alternative ground for affirming the trial court's decision. We reverse the trial court's grant of summary disposition for plaintiff and reject plaintiff's argument on cross appeal.

I. FACTS

Duane Monroe brought his 2002 Dodge Durango to the M&M Motor Mall for service after his "check engine light" came on intermittently. The vehicle was covered by a no-fault automobile insurance policy issued by plaintiff. Craig Engle, a customer service consultant, decided to drive the vehicle home after work, and then back to the M&M Motor Mall the next morning, to see whether the warning light would come on during the approximate 100-mile round trip. Engle stated the reason for the drive was to help the service technicians diagnose and resolve the problem. On his way back the next morning, Engle was involved in an accident with a vehicle driven by Willie Whetstone. Whetstone brought an action against Engle, Monroe,

M&M Motor Mall, and other defendants. Defendant is M&M Motor Mall's no-fault insurance carrier.

Plaintiff filed this declaratory action against defendant, Engle and M&M Motor Mall, requesting that the trial court declare that it had no duty to defend or indemnify Engle or M&M Motor Mall in Whetstone's action because Engle drove the car without Monroe's consent, and further, a "car-business" exclusion in Monroe's policy shielded it from liability. The car-business exclusion provides:

> CARS NOT COVERED
>
> The Liability Coverage does not cover:
>
> **your car** if used in the course of the **car business**. **You** or a **resident relative**, however, are covered;
>
> an **other car** if used in the course of any other business of an **insured person** except a private passenger **car** operated or **occupied** by **you**. [Policy, p 5, attached as Exhibit A to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition.]

The policy defines "car business" as "the business or occupation of selling, repairing, servicing, storing or parking motor vehicles including road testing and delivery."

Defendant filed a counterclaim, seeking a declaratory judgment that plaintiff was primarily responsible for liability coverage to the extent of $20,000. Defendant subsequently filed a motion for summary disposition, arguing that plaintiff's car-business exclusion was void under Michigan law and public policy to the extent of $20,000, the mandatory minimum amount of liability coverage required by the no-fault act, MCL 500.3009. Defendant also argued that Monroe implicitly permitted Engle to drive the car in the course of diagnosing and repairing its malfunction.

In response, plaintiff argued that its car-business exclusion was valid and enforceable, and was specifically permitted by MCL 500.2118(2)(f). Plaintiff also argued that there was a question of fact regarding whether Monroe permitted Engle to use the car. Plaintiff agreed that a repair facility's employees are implicitly permitted to drive a customer's car for purposes of repair and diagnosis, but argued that there was a question of fact whether Engle's 100-mile round trip was outside the scope of this permitted use. Plaintiff requested that the trial court grant summary disposition for it based on the car-business exclusion, or deny summary disposition to defendant because there was a question of fact as to permissive use.

The trial court granted summary disposition for plaintiff, finding that the car-business exclusion was valid and enforceable. The court rejected plaintiff's alternative argument that Engle drove the car without Monroe's consent. Defendant now appeals the trial court's grant of summary disposition in favor of plaintiff on the issue of the enforceability of the car-business exclusion. Also, plaintiff cross appeals arguing that the trial court erred in finding that Engle drove the car with Monroe's consent.

II. STANDARD OF REVIEW

We review de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Maiden, supra* at 119. The moving party has the initial burden to support its claim that it is entitled to summary disposition. *Quinto v Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). If the moving party carries its initial burden, the party opposing the motion must then demonstrate with admissible evidence that a genuine issue of material fact exists; otherwise summary disposition is properly granted. *Smith v Globe Life Ins Co,* 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). A trial court may grant summary disposition if, after considering the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120.

III. ANALYSIS

A. Car-Business Exclusion

On appeal, defendant argues that the trial court erred as a matter of law when it held that plaintiff's "car business" exclusion permitted MEEMIC to avoid primary liability for the first $20,000 of residual liability coverage required under Michigan's no-fault act. MCL 500.3009(1). Plaintiff contends that the policy exclusion is for "commercial purposes," as specifically authorized by MCL 500.2118(2)(f). We find that plaintiff's policy does not qualify as a legal exclusion for commercial purposes, and is therefore void as contrary to public policy.

Plaintiff wishes this Court to impose portable residual liability upon the operators of motor vehicles by affirming the trial court's ruling, while defendant urges that we create a bright line rule placing responsibility for residual liability insurance exclusively on the owners of vehicles, thereby overruling our previous decisions in *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585; 669 NW2d 304 (2003), and *Amerisure Mut Ins Co v Farmers Ins Exch*, unpublished opinion per curiam of the Court of Appeals, issued May 4, 2004 (Docket Nos 243085, 243105),[1] We agree that portability of insurance is not required under the no-fault act, but decline to take the measures prescribed by defendant. The lack of a portability requirement has been established by substantial precedent: "There is nothing in the no-fault act which requires one to have residual liability coverage for injuries occurring when one is driving another's vehicle." *State Farm Mut Auto Ins Co v Ruuska*, 90 Mich App. 767, 772; 282 NW2d 472 (1979). Our Supreme Court reaffirmed this principle in *Citizens Ins Co of Am v Federated Mut Ins Co*, 448 Mich 225, 235-236; 531 NW2d 138 (1995), and again in the very case plaintiff invokes for support, in which the Court states that the statutory language "does not require liability for any or all or each and every vehicle an insured drives." *Husted v Dobbs*, 459 Mich

[1] *Amerisure v Farmers* is an unpublished case, and therefore is not binding precedent under *stare decisis*. MCR 7.215(C)(1).

500, 510; 591 NW2d 642 (1999). It does not necessarily follow, however, that an operator *never* assumes primary responsibility for residual insurance liability, such as when permissive users violate valid policy exclusions, as occurred in *Graff* and *Farmers.*

The no-fault act allows insurers to exclude primary residual liability in specific circumstances, and Plaintiff maintains that its "car business" exclusion conforms to one such provision. We disagree. An insurer may legally exclude residual liability if an insured's vehicle is used for "commercial purposes." MCL 500.2118(2) states:

> The underwriting rules which an insurer may establish for automobile insurance shall be based only on the following:
>
> * * *
>
> (f) Use of a vehicle insured or to be insured for transportation of passengers for hire, for rental purposes, or for commercial purposes. Rules under this subdivision shall not be based on the use of a vehicle for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.

At issue here is the definition of "commercial purposes." Our Supreme Court defined "commercial use" as "**use** in **business** in which one is engaged for profit." *Lintern v Zentz*, 327 Mich 595, 601; 42 NW2d 753. (Emphasis in original.) The Court then stated in *Husted* that "the Legislature specifically permits insurance companies, in the course of underwriting, to base an exclusion from coverage on business use." *Husted, supra* at 506. Our Supreme Court thus paraphrased "commercial purposes" as "business use," for clarification. Plaintiff contends that its definition of "car business" fits within "business use." However, although the policy exclusion mimics the Court's wording in *Husted*, the manner in which the "car business" exclusion is defined and applied in MEEMIC's policy differs in actual meaning from "commercial purposes" in MCL 500.2118(2)(f), and subverts its purpose.

Plaintiff argues that Craig Engle drove Duane Monroe's vehicle for a commercial purpose, but this is inaccurate. Our Supreme Court in *Lintern* defined "commercial use" as the "delivery of material or merchandise," *Lintern, supra* at 598, and this Court upheld a policy exclusion which expanded that definition to include "carrying people or property for a consideration, express or implied." *Graff, supra* at 595. As will be discussed *infra*, Engle drove Monroe's vehicle permissively, for diagnostic purposes. Engle's use of Monroe's vehicle was incidental to M&M's business of automotive sales and automotive repair. The vehicle was neither owned nor insured by M&M. As we noted in *Graff*, the Legislature's purpose for allowing commercial exclusions of residual insurance is clear:

> It is reasonable to conclude that a commercial vehicle would command a higher insurance premium because it would likely accumulate more mileage and be used in circumstances more likely to result in accidents. *Graff, supra* at 597.

In contrast, Engle drove Monroe's vehicle once, for a specific purpose, over a limited distance, and in relatively typical circumstances. Engle's operation was consequently noncommercial as defined by law.

Plaintiff attempts to broaden the application of the "car business" exclusion contained in its policy beyond its insured, Monroe. Plaintiff has overreached. The policy's express disclaimer of residual liability resulting from Engle's operation of Monroe's vehicle reveals its illegality. Plaintiff's policy excludes liability whenever an insured's vehicle is operated by repair personnel, valets, parking attendants, and others the policy defines as part of the "car business." This violates the purpose of the no-fault act. Our Supreme Court has stated that the Legislature designed the act to "afford protection to persons suffering injury arising out of the ownership, maintenance, or use of an automobile." *Clevenger v Allstate Ins Co*, 443 Mich 646, 651; 505 NW2d 553 (1993). The very words the Court employed in *Clevenger* are part of the act's residual liability requirement itself. MCL 500.3009(1). Engle's permissive *use* of the vehicle was in furtherance of *maintenance*, in an attempt to ensure safe operation of the insured vehicle, which is a prerequisite to responsible *ownership*. MEEMIC's "car business" exclusion far exceeds the bounds imposed under *Clevenger*, and is therefore void.

Accordingly, we hold that the trial court erred in finding MEEMIC's "car business" exclusion valid and applicable to this case.

B. Consent

On cross-appeal, plaintiff argues that the trial court erred in ruling as a matter of law that the vehicle in question was being operated with the owner's consent. We disagree.

If consent to operate a motor vehicle has been given by its owner, and not subsequently denied, the permissive user cannot invalidate that consent by exceeding the scope of use the owner intended to license. Our Supreme Court has held that consent "refers to the *fact* of the driving. It does not refer to the *purpose* of the driving, the *place* of the driving, or to the *time* of the driving." *Roberts v Posey*, 386 Mich 656, 661-62; 194 NW2d 310 (1972). (Emphasis in the original.) In the instant case, implied consent was clearly given. When Duane Monroe left his vehicle and keys at M&M Motor Mall, he impliedly permitted the employees of M&M to drive his vehicle. The fact that the vehicle's operator, Craig Engle, was a service advisor rather than a mechanic is irrelevant, especially given the lack of expertise required to observe whether the "check engine" light appeared. The distance driven is also immaterial, because Engle's permission to use the vehicle is not revoked simply because he *may* have violated the owner's intended terms of permission. *Roberts, supra* at 664. See also: *Drielick v Drielick*, 151 Mich App 665, 673-4; 391 NW2d 435 (1986).

Plaintiff did not offer any evidence, documentary or otherwise, raising a genuine issue of material fact contradicting the legal presumption of Engle's permission to operate the vehicle. MCR 2.116(G)(4) states:

> [A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Without a showing of specific facts supporting the contention that Monroe explicitly denied Engle permission to operate his vehicle, the trial court was correct in rejecting plaintiff's contention that the vehicle was driven without consent.

We reverse the trial court's grant of summary disposition for plaintiff and reject plaintiff's argument on cross appeal. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper