STATE OF MICHIGAN

COURT OF APPEALS

BRISTOL WEST INSURANCE GROUP, a/k/a BRISTOL WEST INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellant,

v

JAMES BUTZBACH and NANCY BUTZBACH,

Defendants-Appellees,

and

MARIANNE CALLAWAY,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
November 20, 2007

No. 275719
Van Buren Circuit Court
LC No. 06-054538-CK

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition in this declaratory judgment action involving an insurance coverage dispute. We reverse and remand for entry of judgment in favor of plaintiff.

The parties do not dispute the material facts. Defendant Marianne Callaway was injured in an automobile accident involving a vehicle driven and owned by defendant Nancy Butzbach. At the time of the accident, Nancy Butzbach was delivering newspapers for compensation, and therefore her use of the vehicle fell within a business use exclusion set forth in the insurance policy issued by plaintiff to the Butzbachs. The policy stated, in part, that plaintiff did not provide liability coverage for any insured's liability "arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for compensation or fee, including, but not limited to, delivery of magazines, newspapers and food."

Plaintiff filed a declaratory judgment action, asserting that the Butzbachs had no liability coverage with plaintiff for any claim made against them by Marianne Callaway in connection with the accident. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the business-use exclusion contained in the policy was unenforceable because it

violated the no-fault act, MCL 500.3101 *et seq*.[1] Plaintiff argued that the exclusion was valid under *Husted v Dobbs*, 459 Mich 500; 591 NW2d 642 (1999), but the trial court held that *Husted* was distinguishable because, in that case, the person seeking liability coverage did not own the vehicle involved in the accident but had instead been driving his employer's vehicle. See *Husted*, *supra* at 503. The trial court granted defendants' motion for summary disposition, and plaintiff now argues that it erred in doing so.

We review de novo a trial court's decision with regard to a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). When reviewing a summary disposition motion granted under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the opposing party. *Zsigo*, *supra* at 220. Summary disposition was appropriate if, except for the amount of damages, there was no genuine issue regarding any material fact and the moving party was entitled to judgment as a matter of law. *Id*.

At first blush, *Husted* does appear to support defendants' and the trial court's position in the instant case. As noted above, in *Husted*, the person seeking liability coverage did not own the vehicle involved in the accident but was instead merely an operator of it. *Husted*, *supra* at 503. The *Husted* Court, in concluding that the business-use exclusion at issue was valid and did not violate the no-fault act, emphasized that the no-fault act requires *owners or registrants*, but not mere operators, of vehicles to maintain residual liability coverage. *Id*. at 508-509, 515. The Court concluded that the no-fault act's requirement of residual liability coverage "does not mandate such coverage with respect to *any* vehicle [i.e., even a non-owned vehicle] an insured operates." *Id*. at 512 (emphasis added). Here, Nancy Butzbach was operating a vehicle that she also owned, making the *Husted* Court's analysis inapposite.

However, the *Husted* Court went on to state the following:

> Moreover, even were this analysis insufficient to demonstrate that plaintiff's reading of the no-fault act is flawed, a reading of the no-fault act in conjunction with the essential insurance act proves fatal to plaintiff's claim. As discussed above, the essential insurance act[, MCL 500.2101 *et seq*.,] explicitly authorizes business-use exclusions.[2] The essential insurance act was adopted by 1979 PA 145, effective January 1, 1980, while the no-fault act was adopted by 1972 PA 294, effective October 1, 1973. It is a "well-noted principle of

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[1] As noted in *Husted v Dobbs*, 459 Mich 500, 512; 591 NW2d 642 (1999), "[t]his Court has indicated that a policy exclusion that conflicts with the mandatory coverage requirements of the no-fault act is void as contrary to public policy."

[2] MCL 500.2118(2), a provision of the essential insurance act, states that "[t]he underwriting rules that 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." In *Husted*, *supra* at 506, the Court stated that, "in this provision, the Legislature specifically permits insurance companies, in the course of underwriting, to base an exclusion from coverage on business use."

> construction that a subsequently enacted specific statute is regarded as an exception to a prior general one, especially if they are in pari materia." *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). This is the case here because the essential insurance act is clearly more specifically directed to the issue of a business-use exclusion than is the more general no-fault act. Therefore, even if a policy of portable residual liability coverage could be divined from the no-fault act, it would not void a business-use exclusion that the Legislature more recently and specifically authorized in the essential insurance act.

This paragraph by the *Husted* Court is dispositive of the issue we face today. The Court indicated that the essential insurance act authorizes business-use exclusions and that such exclusions are valid, despite the pertinent provisions in the no-fault act. We are bound to follow precedent established by a majority of Michigan Supreme Court justices. *Solomon v Civil Service Comm'n, City of Highland Park*, 64 Mich App 433, 436; 236 NW2d 94 (1975). Accordingly, the business-use exception in plaintiff's policy was enforceable.[3]

In *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 596-597; 669 NW2d 304 (2003), rev'd in part on other grounds 469 Mich 1003 (2004), this Court mentioned policy considerations that support our holding today. In *Amerisure*, *supra* at 587, Debra Rahn rented a vehicle from Graff while her own vehicle was being repaired. The rental contract listed Richard Threehouse as a "permissive user of the car." *Id*. "However, the contract stated that insurance coverage was excluded when the rental car was used 'to carry . . . property for consideration . . .'" Threehouse, while driving the rental vehicle and delivering pizzas for a Hungry Howie's Pizza store, was involved in an accident. *Id*. This Court, in the course of determining whether the business-use exception invalidated liability coverage for the accident, stated:

> [T]he provision at issue is an appropriate contract exclusion. Graff was renting out a car to Rahn, presumably as a temporary replacement for Rahn's private car. 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. [*Id*. at 596-597.]

To invalidate the business exclusion at issue in the present case would be to subject plaintiff to a risk for which it had not necessarily received adequate consideration.

The trial court erred in granting defendants summary disposition. Although plaintiff did not request summary disposition in its favor below, under MCR 7.216(A)(7), "[t]he Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it

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[3] The panel in *Amerisure Mut Ins Co v Farmers Ins Exchange*, 2004 WL 953146, unpublished opinion per curiam of the Court of Appeals, issued May 4, 2004 (Docket Nos. 243085 & 243105), slip op, p 3, reached a similar conclusion. We acknowledge that unpublished opinions are not binding on us, but we agree with the reasoning expressed in the opinion. We note that the Supreme Court denied leave to appeal in that case. See 471 Mich 939; 690 NW2d 98 (2004).

deems just . . . enter any judgment or order or grant further or different relief as the case may require . . . ." It is clear to us that summary disposition in favor of plaintiff is appropriate.

Reversed and remanded for entry of judgment in favor of plaintiff. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter