

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN MILLERS MUTUAL INSURANCE
COMPANY,

Plaintiff-Appellant,

v

JASON AWAD and JASON JONES,

Defendants,

and

HEATHER CLIFFORD,

Defendant-Appellee.

UNPUBLISHED

April 25, 2006

No. 266842

Genesee Circuit Court

LC No. 04-079258-CK

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying its motion for summary disposition and granting defendant Heather Clifford's cross-motion for summary disposition in this declaratory judgment action. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In the summer of 2003, defendant Jason Awad, along with two other individuals, operated three fireworks stands for a two-week period up to and including the Fourth of July holiday. On July 4, 2003, defendant Jason Jones pestered Awad for some free fireworks. As Awad was closing up the stand for the day, Jones continued to pester Awad, who gave Jones some illegal bottle rocket fireworks in order to get Jones to leave him alone. Jones subsequently lit a bottle rocket from inside a vehicle and let it go out the car window. The bottle rocket unexpectedly struck Clifford in the eye as she was getting out of the other side of the vehicle.

Clifford filed a lawsuit against both Awad and Jones. Plaintiff subsequently brought this declaratory action, requesting a determination that it was not liable to defend or indemnify Awad under a homeowner's policy issued by plaintiff to Awad's parents. The parties filed cross-motions for summary disposition. The trial court determined that Clifford's injuries arose from an "occurrence" as defined in the policy, and further, that coverage was not excluded under a

business-pursuit exclusion and, accordingly, it denied plaintiff's motion for summary disposition and granted summary disposition in favor of defendant Clifford.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* "Further, the interpretation of an insurance contract is a question of law that this Court similarly reviews de novo." *Allstate Ins Co v JJM*, 254 Mich App 418, 421; 657 NW2d 181 (2002).

Plaintiff argues that Clifford's injuries were not caused by an "occurrence" under the policy, which term is defined in relevant part as "an accident." We find it unnecessary to address this issue because, assuming the incident in which Clifford was harmed constituted an accident and thus an occurrence, the business-pursuit exclusion applies. The following exclusion is in plaintiff's policy:

SECTION II - EXCLUSIONS

1. Coverage E - Personal Liability and Coverage F - Medical Payments to Others do not apply to "bodily injury" or "property damage":

* * *

b. Arising out of or in connection with a "business" engaged in by an "insured." This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business"; . . .

Plaintiff's policy defines "business" to include "trade, profession or occupation."

Awad was a college student when this incident occurred in 2003, and he occasionally worked at his father's grocery store in the summer. When he worked at his father's store, Awad sometimes sold fireworks, including bottle rockets. In the summer of 2003, Awad, along with two other men, decided to operate their own stands to sell fireworks. They rented tents and purchased fireworks and signs from a wholesaler to operate stands in three locations. The men borrowed a truck and trailer to drive to Ohio to purchase about 200 cases of fireworks. They also obtained permits from the local governments. They did not incorporate their business or file for an assumed name certificate. The fireworks were stored at a storage facility owned by one of the men's relatives.

They operated the fireworks stands for 12 to 14 days from approximately 10:00 a.m. until 9:00 p.m. The men sold fireworks and combined the cash they earned at the end of each day. In total, the men made about \$15,000 in "total receipts" from selling fireworks. Awad believed he netted about \$3,000 selling fireworks.

Jones was an acquaintance of Awad. Awad testified that he gave Jones the bottle rocket fireworks to get rid of him when Awad was trying to close the stand on July 4, 2003, after Jones had pestered Awad for some free fireworks during the day. After he gave Jones a handful of the bottle rockets, Jones threw a few dollars in Awad's car window.

Plaintiff argues that its business-pursuit exception bars coverage because Awad was operating the fireworks stand on a continuous basis for a profit. "To trigger the business pursuit exclusion, the activity must be engaged in continually and for profit." *State Mut Ins Co v Russell*, 185 Mich App 521, 529; 462 NW2d 785 (1990). "The complained-of acts themselves need not be performed for profit; the acts need only be performed during the business pursuit of the insured." *Greenman v Mich Mut Ins Co*, 173 Mich App 88, 94; 433 NW2d 346 (1988).

In *Riverside Ins Co v Kolonich*, 122 Mich App 51, 56-57; 329 NW2d 528 (1982), this Court further explained what activities fall within the business-pursuit exception:

In *State Mutual Cyclone Ins Co v Abbott*, [52 Mich App 103, 108; 216 NW2d 606 (1974)], the insurer sought to absolve itself from extending coverage to its insured under a business pursuit exception of the insurance policy. The insured, who was a part-time blacksmith, allegedly caused the horse that he was shoeing to strike and injure the horse's owner. In reversing the trial court's holding that the insured was not engaged in a business pursuit when the injury occurred, we set forth the following definition for "business pursuit":

"To constitute a business pursuit, there must be two elements: first, continuity, and secondly, the profit motive; as to the first, there must be a customary engagement or a stated occupation; and, as to the latter, there must be shown to be such activity as a means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit, commercial transactions or engagements."

Another case involving an insurance company's attempt to avoid extending coverage under the business-pursuit exception is *Randolph v Ackerson*, [108 Mich App 746; 310 NW2d 865 (1981)], where a farmer, the insured party, in an isolated transaction, purchased an old barn with the intention of selling the barn wood. A purchaser of the barn wood was injured while loading the wood onto a truck. We upheld the trial court's ruling that the exception to the insured's policy of insurance was not applicable because one of the two elements of the two-pronged business-pursuit test was not satisfied, namely, that the insured's involvement in the activity of selling barn wood was not of a customary or continuous nature. [Footnotes omitted.]

In *Kolonich, supra* at 55, 57, the panel held that there was a question of fact regarding whether the insured operated a pottery business at her home or merely was engaged in a hobby.

In the case at bar, there appears to be no dispute that Awad and his friends were operating the fireworks stand to make a profit, which Awad admitted that they did. The trial court noted that Awad was not involved in "a customary engagement or a stated occupation" and, therefore, the element of continuity was not satisfied. We conclude that the trial court incorrectly held that

because Awad operated the fireworks stands for only a short period of time, it did not qualify as "a customary engagement or a stated occupation."

It was undisputed that Awad operated this stand on a daily basis for about two weeks until the Fourth of July holiday with regular hours. More importantly, this operation existed for only a short period of time due to the seasonal nature of the product being sold. Seasonal operations of this type are still valid business pursuits, even if they are not operated as permanent businesses. For two weeks, Awad was continually engaged in the business of selling fireworks to the public, which would qualify as a customary engagement, because it is consistent with the seasonal nature of selling fireworks.

Moreover, this was not an isolated transaction. The facts in this case are distinguishable from those in *Randolph, supra*, where a farmer engaged in an isolated transaction to sell barn wood. We cannot find that Awad's venture in this case could likewise qualify as an isolated transaction despite the seasonal nature of the venture. In *Randolph, supra* at 748-749, the insured had never razed a barn for profit before, but Awad had some experience selling fireworks at his father's store.

Additionally, the trial court too narrowly applied the profit element by concluding that this operation did not result in gainful employment for Awad, beyond the two weeks it existed. Awad, a college student, did earn a living over the two weeks he worked the fireworks stands even if it was not a permanent venture. Moreover, the definition adopted in *Abbott, supra* at 108, for proving the profit element not only includes gainful employment, but also "procuring subsistence or profit, commercial transactions or engagements." Thus, plaintiff was not required to prove that Awad could have supported himself by selling fireworks in order for the business-pursuit exception to apply. Here, it is clear that Awad was engaged in a commercial transaction by selling fireworks to the general public.

In addition, the undisputed facts of this case demonstrate that this was more than simply a hobby. Awad and his associates ran this operation as a business with the sole plan to make money.

Finally, even if Awad gave the fireworks to Jones, instead of selling them to him, the business-pursuit exception still applies because Jones acquired the fireworks as a result of the business Awad was operating. *Greenman, supra* at 94. In sum, Clifford's injuries arose out of or in connection with Awad's business.

Based on the foregoing, the trial court erred in not granting summary disposition for plaintiff under MCR 2.116(C)(10).

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

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray