

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FARM BUREAU GENERAL INSURANCE  
COMPANY OF MICHIGAN,,

UNPUBLISHED  
September 2, 2014

Plaintiff-Appellee,

v

No. 314652  
Iosco Circuit Court  
LC No. 12-007036-CK

FREDERICK J. HOLSTINE,

Defendant,

and

TIMOTHY BIALEK, as Conservator for the Estate  
of JOSEPH BIALEK, a Protected Individual,

Defendant-Appellant.

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Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant Bialek (hereinafter defendant) appeals by right the final order of the trial court granting summary disposition to plaintiff under MCR 2.116(C)(10) and denying him judgment under MCR 2.116(I)(2). We affirm.

**I. BACKGROUND**

This case involves the unfortunate accident of 12 year old Joseph Bialek with a meat mixer at the home of Frederick Holstine that cost Joseph his arm up to his elbow. Joseph's dad, Timothy Biaklek, filed an underlying tort action against Holstine outside of this appeal. Plaintiff insurance company brought a declaratory action by way of summary disposition asking the trial court to declare that Joseph's injury was not covered under Holstine's homeowner's insurance policy due to a business exclusion provision. The trial court believed the business exclusion applied and found that Joseph was injured by a machine that was used in a business that was not covered by insurance. Bialek, on behalf of his son, now appeals that ruling by the trial court.

The events that led to Joseph's injury occurred on or about November 20, 2011. Joseph was in Holstine's detached garage with Holstine and Holstine's son, Chris. The garage was set-up like a meat processing facility with a cement floor and plenty of standard commercial

equipment to process meat. At the time of the incident, Holstine was in the garage talking to potential customers about skinning a deer. Chris and Joseph were also in the garage. Chris' responsibility was to clean the meat mixer which had to be done in between meet processing jobs to remove bacteria. As part of this process a solution was poured into the mixer and the mixer was then turned on so that the solution could run through and clean the mixer. A towel was on top of the mixer that would have been used for drying after cleaning. While the mixer was running, the towel fell in. Joseph went to grab the towel and the mixer pulled his hand inside causing it be mangled by the machine. The injury was so severe that Joseph was required to have half his arm, from hand to elbow, amputated.

Holstine's deposition was taken on October 16, 2012. According to Holstine, Joseph came to his home on or about November 20, 2011, so that he could have an 'outdoors experience', observe the meat processing process, skin a deer, stack firewood, and maybe go hunting. Although not licensed, Holstine engaged in custom meat processing under the assumed name Holstine's Butcher Block. Meat processing was not his trade or his occupation. By occupation, Holstine was a truck driver. Holstine kept his meat processing equipment in the garage. That equipment consisted of band saws, meat grinders, meat cubers, knives, hand saws, a meat mixer, a meat slicer, a walk-in freezer, a cooler and a smoker. Holstine used the equipment for personal use as well as for profit.

Holstine admitted that he did not have any insurance for Holstine's Butcher Block and only his homeowners policy from plaintiff was in effect. Regarding obtaining insurance for the business, Holstine had been in contact with insurance agent Roger Noble. Holstine indicated he and Noble discussed the issue of liability involving the business in light of it being uninsured. Holstine testified Noble told him "there would certainly be issues if there had been an accident as to what the coverage would be because I – it would be considered a business."

Roger Noble testified by affidavit that he provided Holstine with a homeowner's insurance policy, effective March 7, 2011, that did not contain liability coverage for a business. Noble became aware of Holstine's business shortly after having issued the homeowners policy and contacted him regarding additional insurance on or about September 21, 2011. According to Noble, Holstine did request quotes for commercial risk insurance, but when he received them, prior to the November 20, 2011, he rejected them as being too high. Noble testified that he cautioned Holstine that his homeowner's policy through Farm Bureau would not cover his business while he was looking for affordable commercial risk insurance. Thus, as of November 20, 2011, the date of incident, Holstine's business was without insurance coverage.

Kuebler was a litigation specialist in the claims department at Farm Bureau Insurance. Her position required her to make decisions about whether to apply or deny coverage to claims of insurance. In this case, Kuebler made the decision to deny Holstine coverage for Joseph's injury. She authored a reservation of rights letter dated May 7, 2012, to Holstine that detailed the basis for denying him coverage. Kuebler considered Holstine's business equipment, tax records, photos of his business set-up in the garage, and his business cards. She explained that the focus of her decision to deny coverage was on what Holstine, the policyholder, was doing i.e. operating a business, and not on what Joseph was doing. Kuebler described that the business exclusion prevented coverage for Joseph's injuries because

If you go to [Farm Bureau's] exclusion for the personal liability coverages for Mr. Holstine, which he is the policyholder, it tells you we don't pay for bodily injury or property damage arising out of or in the connection of a business engaged by our insureds [sic] and this business is being ran by our insured.

The hearing for plaintiff's motion for summary disposition occurred on January 24, 2013. Plaintiff argued that Holstine was using the meat mixer to operate a business and the policy coverage Holstine had was not a commercial general liability policy. Bialek argued that plaintiff's only reason for denying coverage was based on the business exclusion provision of the policy which did not apply because the definition of business did not encompass activities of minors like Joseph. Holstine argued that his meat processing service was not causally connected to the injury suffered by Joseph. The trial court concluded:

Well, in this case there is a question of whether this homeowner's policy covers this situation, and I think the evidence is basically undisputed that this little operation, including this machine, were mostly used for business purposes. Unfortunately, this young boy was there. Probably quite unfortunately there wasn't any business/commercial insurance in effect there. I think this business exclusion, business activity exclusion, well determines that there is no coverage here, and that's my ruling.

The trial court issued its order on January 24, 2013, granting summary disposition to plaintiff and denying summary disposition to defendant.

## II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). Issues of contract interpretation, including whether a contract is ambiguous, are also reviewed de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007).

Plaintiff's motion for summary disposition was granted pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a complaint." *Urbain v Beierling*, 301 Mich App 114, 122; 835 NW2d 455 (2013) (citation omitted). This Court can consider the pleadings, depositions, admissions, and documentary evidence in its review. MCR 2.116(G)(5). The evidence submitted is viewed in a light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is proper when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008) (citation omitted).

## III. ANALYSIS

### *The Business Clause Exclusion*

The issue in this case is whether the business exclusion in Holstine's homeowners policy applies to exclude coverage for Joseph's injuries and prevent plaintiff from indemnifying or defending Holstine in an underlying tort suit brought by Joseph and his father, Mr. Bialek. The controversy is over the definition of "business" in the policy. Plaintiff argues that business is defined as a trade or occupation in the policy and that Holstine's meat processing operation was a trade and therefore, the business exclusion applies. Bialek argues that the definition of "business" excludes 'activities performed by minors' and that Joseph was a minor performing an activity and therefore, the business exception does not apply.

"The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). "The rules of contract interpretation apply to the interpretation of insurance contracts." *Id.* In the case of insurance policy exclusions, this Court held in *Ile v Foremost Ins Co*, 293 Mich App 309, 316; 809 NW2d 617 (2011), rev'd on other grounds 493 Mich 915 (2012) that:

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume.

Plaintiff issued Holstine a homeowner's policy with the effective date of October 7, 2011. It contained sections on property and liability coverage. Property coverage included the dwelling, other structures and personal property. Liability coverage included personal liability as well as medical payments to others.

Under the property coverage section of the policy the residence, as well as other structures used by the residence, were considered "**insured locations**". Other structures did not have to be attached to the dwelling to be covered. Ideally, Holstine's garage would have been an 'other structure' provided with coverage under the homeowners policy. However, the same section then stated that coverage for other structures did not extend to "structures used in whole or in part for **business**." This expressed provision stating that there would be no coverage for a business on the insured's property under the homeowners policy is before and outside of the specific exclusions section of the policy and serves as an additional way for Holstine to have known that his business and any accidents occurring in his garage would not be covered by his homeowners policy.

There was evidence that first, Holstine had a meat processing business and second, that he operated it out of his garage. Business cards, a customer ledger, customer receipts, income taxes, and assumed name paperwork submitted by plaintiff all indicated Holstine was engaged in the for-profit endeavor of processing meat for customers. The fact that he may have also processed meat for himself or at times did not charge for his services is of no import. A business exclusion is not rendered inapplicable based on isolated acts where the services normally performed are for profit. *State Mut Ins Co v Russell*, 185 Mich App 521, 529-530; 462 NW2d 785 (1990) (citation omitted). Here, Holstine answered interrogatories where he admitted that he had been processing meat for a fee for "19 to 20 years".

There was also evidence that Holstine used his garage wholly as a business. The garage was where the meat mixer was located. The set-up of commercial equipment and a customer present in the garage at the time of the accident supported the fact that Holstine was using his garage as Holstine's Butcher Block. Interestingly, Holstine never testified that Holstine's Butcher Block was located somewhere else besides the garage. Further, the exhibits of Holstine's garage did not show the garage being used as a garage on any level; there were no vehicles parked inside, no tools, no storage shelves, no boxes or bikes or any other items that one would normally expect to find in a garage.

Holstine's policy clearly stated that it did not cover "structures used in whole or in part for **business**." This section indicates that Holstine's garage, where Joseph was hurt, would not have been covered under the homeowners policy at the time Joseph was injured. Even without application of the business exclusion, this structure was completely uninsured at the time of Joseph's accident according to the clear language of the policy. Holstine's knowledge of this was evidenced by his inquires to agent Noble right before the accident to find a commercial policy that would cover his business and consequently, his garage. While neither party devotes analysis to this provision in the policy regarding no coverage for other structures used as a business, it is fatal that Bialek has not addressed the issue at all. Where it cannot be argued that the structure was used in any other way than a business, precluding the conclusion that it was instead utilized for activities performed by minors, clearly, any bodily or property injury occurring in the garage would not be covered under Holstine's property coverage section of his homeowners policy.

Under the liability coverage section, the policy ordinarily "[would] pay the necessary **medical expenses** incurred within one year from the date of an accident causing bodily injury ... to a person on the **insured location** with the permission of an **insured**." In pertinent part, an **insured** was defined as the policyholder, his relatives and persons "under the age of 18 living on the **residence premises** continuously for longer than 30 days at the time of loss." While Holstine was an insured under the homeowners policy and Joseph was at Holstine's with permission, because the garage was being used as a business, Joseph's bodily injury did not occur on an insured location; therefore Joseph would not be entitled to medical expenses under Holstine's homeowner's policy. While this writer believes the plain language of the property coverage section in Holstine's homeowners policy controls, the parties find the thrust of this case to be isolated in the policy business exclusion provision.

Holstine's homeowners policy also provided that personal liability and coverage for medical payments to others would not apply when the bodily injury arose out of or was in connection with a business engaged in by an insured. The presumption is that another policy, i.e. a commercial policy, would be required for liabilities associated with the business. This portion of the homeowners policy is what the parties refer to as the business exclusion provision:

## SECTION II – EXCLUSIONS

1. **Coverage E – Personal Liability and Coverage F – Medical Payments to Others** do not apply to:

\* \* \*

- b. **bodily injury or property damage** 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**. This exclusion does not apply to the occasional or part-time **business** pursuits of an insured who is a student under 18 years of age;

The index to the policy provided definitions of terms that are in bold above. Of most significance here is the definition of the term “business”. The policy defined “**Business**” as “farming, a trade, profession, or occupation, all whether full or part-time.” The policy further defined that “**Business** does not include activities performed by minors, such as newspaper delivery, baby-sitting, caddying, or lawn care.”

It is appropriate for a trial court to consider depositions and admissions when deciding a motion for summary disposition. MCR 2.116(G)(5). Before the trial court were the depositions of Holstine and Kuebler, the affidavit of insurance agent Roger Noble as well as the admissions of Holstine in response to plaintiff’s interrogatories. It is not disputed that Holstine qualified as an insured under his homeowners policy. And while Holstine testified that his primary occupation was truck driving, he did testify that meat processing was a trade and admitted that he had been engaged in that trade for more than five years. The real question on appeal then becomes whether Joseph’s injury arose out of or was in connection with the business, which is directly related to the question of what Joseph was doing at the time: an act involving a service to be provided because of the nature of the business or an activity performed by a minor.

Viewing the evidence in a light most favorable to Bialek, there is little support that Joseph was engaged in an activity performed by a minor. ‘Activities performed by minors’ is a phrase not defined by the policy, but analogies are given to “newspaper delivery, baby-sitting, caddying, or lawn care.” Nothing by way of documentary evidence was submitted to this Court to allow us to deduce that Joseph’s one-time reflexive or impulsive grabbing of the towel from the mixer was an activity akin to those analogized above. Neither did Bialek elaborate in his brief to this Court how Joseph’s act of grabbing the towel constituted an “activity.” According to the record on appeal, the only “activity” occurring at the time of Joseph’s accident was the cleaning of the meat mixer and Joseph was not the one doing the cleaning. Holstine’s testimony proves that instead it was his son who was performing an activity by cleaning the machine. Therefore, no evidence was presented to show that Joseph was performing an activity when Chris was the one cleaning the machine.

Bialek’s analogy that cleaning the mixer was like any other household chore, parallel to washing the dishes, is unavailing. Accordingly, “household” is defined as “for use in the home[.]” *Random House Webster’s College Dictionary* (1995). First the meat mixer was not in the house, it was in the garage with all the other equipment used to operate the business. Second, the meat mixer could not be separated in function from the other commercial equipment being that it represented one process in the entire process of processing meat. Third, Holstine admitted in his response to plaintiff’s interrogatories that the purpose of the meat mixer involved in the

accident “was to process meat in connection with [his] meat processing activities.” The evidence dictates that cleaning the mixer was a business chore, not a household chore.

Joseph’s injury arose out of and was connected with Holstine’s business. Holstine admitted that cleaning the machine, the activity his son was engaged in, was an activity associated with the Holstine Butcher Block Business:

Q: And when this happened, there wasn’t any activity – when I’m saying this, the injury to Joseph, there wasn’t any activity that was going on with respect to the Holstine Butcher Block business, correct?

A: Other than cleaning the machine, no sir.

Holstine’s answer admits that the meat mixer was used for the business and being cleaned for the business. “[A]ll that is required to trigger the exclusion is that the acts be performed as part of the business or service normally performed by the insured for profit”. *Russell*, 185 Mich App at 530 (citation omitted). Cleaning the meat mixer was an act normally performed to rid the machine of bacteria in between processing jobs for Holstine’s business. Joseph’s injury occurred during this act of cleaning and was directly attributable to the meat mixer. Because the meat mixer was a piece of business equipment and the cause of Joseph’s injury, it follows that the injury arose out of the business engaged in by Holstine, an insured. Under these circumstances, the trial court was correct to find that the business exclusion applied.

Even outside of the business exclusion, Holstine’s garage was no longer an **insured location** under the homeowners policy, and with no additional commercial policy to cover the garage, plaintiff is under no obligation to defend or indemnify Holstine for an accident that occurred in connection with Holstine’s business in the garage. Summary disposition was appropriate given the circumstances of this case and the clear language of the coverage and exclusion provisions of Holstine’s homeowners policy.

#### *Reasonable Expectation of Coverage*

Next, Bialek contends that Holstine had a reasonable expectation that the business exclusion did not apply because the bodily injury resulted from an activity performed by a minor and did not arise out of or in connection with his business. Holstine’s deposition provides no evidence for this contention. Holstine provided no testimony regarding whether or not he expected Joseph’s injuries to be covered under his homeowners policy. There was also no testimony that Joseph was performing any activity. Rather, Holstine testified that the only policy he had was his homeowners policy and that his son Chris was cleaning the mixer. The affidavit of agent Noble asserted that he told Holstine his homeowner’s policy would not cover Holstine’s Butcher Block. Holstine also testified that he and agent Noble “were in the process of trying to put together a business insurance package” which demonstrates that he knew he needed a separate commercial policy for his business. There is no record evidence that Holstine could have had a reasonable expectation that his homeowner’s policy would cover Joseph’s injuries from the meat mixer in the garage.

#### *Contract Ambiguity*

Bialek also asserts, alternatively, that the language of the homeowner's insurance contract is ambiguous. Bialek rests his contention partly on Kuebler's response to a question during her deposition.

Q (Bialek's Counsel): We're talking about a general interpretation of the policy language. It's a really simple question. If you were given a file, any file, and it's not the Holstine, any file, and you look at it to see whether or not coverage would be there and one of the things you look at is to see whether or not it's a business or not and you've looked at everything and you say in my mind, me, Judith, I'm satisfied that this is not a business, do you agree with me that the business exclusion would not apply?

A (Kuebler): I guess I can't, it's too vague.

A reading of Kuebler's entire deposition illustrates that Kuebler's answer, "it's too vague", was taken out of context by Bialek. Kuebler was not referring to Holstine's homeowners policy as being vague, indeed her deposition testimony vigorously displays she held the opposite position. Kuebler's statement in regard to vagueness referred to the condition of the hypothetical posed to her by Bialek's counsel. He wanted her to provide a substantive answer based on any file, with any facts to which she could not do because the situation was "too vague". Accordingly, plaintiff did not admit an ambiguity in its own contract as Bialek would have this Court believe.

Bialek also argues that evidence of ambiguity is present when two people can read the policy and one finds coverage, while the other does not. However, our Supreme Court has held that it will not find ambiguity "solely because an insured might interpret a term differently than the express definition provided in a contract." *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999). When deposed, Holstine did not offer an interpretation for the definition of "business" different than that expressed in the contract. There was no evidence presented to the trial court that Holstine read the policy differently than Kuebler. The different interpretation of the word "business" here has been borne by litigation, not by evidence and the "court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972). Counsel's ambiguity argument is merely a response to summary disposition and not supported by the record evidence before this Court. The argument therefore cannot by itself create an ambiguity.

*MCR 2.116(I)(2)*

Lastly, Bialek faults the trial court for not rendering judgment in his favor under MCR 2.116(I)(2). Summary disposition is proper under MCR 2.116(I)(2) "if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment[.]"

The trial court did not err in refusing Bialek summary disposition under MCR 2.116(I)(2) where it did not appear that Bialek was entitled to judgment. The admissions by Holstine as well as his deposition testimony supported the fact that he was operating a business in his garage. This evidence coupled with the affidavit of agent Roger Noble demonstrated that Holstine was

operating his business without commercial insurance and that he was aware that his homeowners policy would not cover his business liabilities while he searched for a commercial policy. Bialek's only response to summary disposition rested on the definition of the word "business". Bialek ignored the 'other structures' provision of the policy that excluded coverage for the garage when it was used in part or in whole as a business. And his responsive motion as well as his oral argument to the trial court lacked critical analysis of how the phrase "activity performed by a minor" related to what Joseph was doing in the garage that day. Based on this record before the trial court, it did not appear as if judgment should have been rendered in Bialek's favor.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter