

STATE OF MICHIGAN
COURT OF APPEALS

STATE FARM FIRE AND CASUALTY
COMPANY,

UNPUBLISHED
July 28, 2000

Plaintiff-Appellee,

v

No. 218886
Kent Circuit Court
LC No. 98-003749-CZ

SCOTT GATES,

Defendant,

and

MARK BOGGS,

Defendant-Appellant.

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant Mark Boggs appeals as of right from an order of the trial court granting summary disposition to plaintiff pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of an injury suffered by defendant Boggs while working as a supervising machinist at Quality Die and Mold Corporation. Defendant Scott Gates was Boggs' supervisor and the plant superintendent at Quality Die. In December 1994, a spindle speeder was not working properly on the steel milling machine that Boggs was operating. Boggs removed the spindle speeder and gave it to Gates for repair. Ultimately, Gates took the part home to fix it and returned the part to Boggs the following day. When Boggs installed the spindle speeder, he heard a rattling noise and leaned closer to the machine to detect the cause of the noise. Boggs was then struck in the right eye by a rod that had bent outward and he lost eighty-five percent of the vision in that eye. Boggs filed suit against Gates in October 1996, alleging that Gates negligently attempted to repair the spindle speeder.¹

¹ The underlying case involving Boggs' suit against Gates is also being decided by this panel today. See *Boggs v Gates*, unpublished opinion per curiam of the Court of Appeals, issued ___/___/2000 (Docket

Plaintiff, who issued Gates' homeowner's insurance, subsequently initiated this action, in April 1998, for a declaratory judgment. Plaintiff alleges, and the trial court agreed, that the following exclusion precludes coverage for Gates in this situation:

Section II - EXCLUSIONS

1. Coverage L and Coverage M do not apply to:

* * *

b. bodily injury or property damage arising out of business pursuits of any insured or the rental or holding for rental of any part of any premises by any insured.

Boggs argues that the trial court erred in granting summary disposition to plaintiff because there is a issue of material fact regarding whether Gates' repair of the machine part was a business pursuit activity or a hobby. Boggs further argues that whether Gates acted outside his scope of employment is also an issue.

We review de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10). *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). In reviewing a motion for summary disposition under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, and other documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party to determine if any genuine issue of a material fact exists to warrant a trial. *Harts, supra*, p 5. Similarly, the construction and interpretation of an insurance contract is a question of law for a court to determine that is reviewed de novo on appeal. *Henderson v State Farm Fire and Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). If the contractual language is clear and unambiguous and no reasonable person could differ with respect to the application of the contractual provision to the undisputed material facts, then the court should grant summary disposition to the proper party. *Id.* If reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists. *Id.*

The well-established test to determine a business pursuit, first set forth in *State Mutual Cyclone Ins Co v Abbott*, 52 Mich App 103, 108; 216 NW2d 606 (1974), quoting *Fadden v Cambridge Mutual Fire Ins Co*, 51 Misc 2d 858; 274 NYS2d 235, 241 (1966), is whether there is continuity and a profit motive. "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 Michigan Mutual Ins Co*, 173 Mich App 88, 94; 433 NW2d 346 (1988), citing *Frankenmuth Mutual Ins Co v Kompus*, 135 Mich App 667; 354 NW2d 303 (1984).

There is no factual dispute here because it is clear from the evidence presented that Gates' repair was done as a business pursuit, or as part of his job duties. It is not important whether Gates profited from repairing the part or whether making the repair was a task normally done by him for profit.

No. 220995).

See *State Mutual Ins Co v Russell*, 185 Mich App 521, 529-530; 462 NW2d 785 (1990) (for exclusion purposes, the focus is on the business pursuit itself, not the specific act complained of). It is undisputed that Gates took the spindle speeder home, attempted to repair it at home, and returned the part to Boggs the following day. This was clearly done in furtherance of Gates' job duties as the plant supervisor. In fact, Gates testified at his deposition that as plant superintendent, he continued to make minor repairs to machines, but did not undertake major repairs.

Further, even if there is a factual dispute regarding whether Gates acted outside the scope of his employment duties, as Boggs contends, that dispute is not relevant when analyzing the business pursuit exclusion. For example, in *Russell, supra*, the insured molested a child who was being cared for in his wife's day-care facility that was operated out of their home. These acts were excluded under the business pursuit exclusion because they occurred while the child was attending the in-home day-care facility. In *Greenman, supra*, the insured sexually harassed and discriminated against an employee. These acts were deemed to be excluded by the business pursuit exclusion because they occurred at the law firm where the parties worked. Similarly, in *Kompus, supra*, the insured engaged in sexual acts with his patients purportedly as part of their therapy. However, these acts were deemed to be excluded by the business pursuit exclusion because the acts were performed as part of the insured's business pursuit, that being psychiatric treatment. Finally, in *Kermans v Pendleton*, 62 Mich App 576; 233 NW2d 658 (1975), the insured shot a patron at his bar and this was found to be a business pursuit because the gun was kept in the bar and linked to it. It cannot be seriously contended that any of these acts were part of the insureds' scope of employment; however, such is not an issue with respect to the business pursuit exclusion. Rather, "all that is required to trigger the exclusion is that the act be performed as part of the business or service normally performed by the insured for profit." *Russell, supra*, p 530.

Accordingly, the trial court did not err in granting summary disposition in favor of defendant. Gates clearly attempted to repair the spindle speeder at home as part of his business as plant superintendent. Consequently, the business pursuit exclusion applies and plaintiff is not under a duty to defend and indemnify.

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck