STATE OF MICHIGAN

COURT OF APPEALS

DARRYL L. CASTILLO, JR., Personal Representative of the Estate of VINCENT DARIO CASTILLO,

Plaintiff-Appellant,

v

TERESA WIMPEE and KENNETH WIMPEE, d/b/a HANDPRINTS,

Plaintiffs,

and

CAPITOL INDEMNITY CORPORATION, CITIZENS INSURANCE COMPANY OF AMERICA, and BERENDS-HENDRICKS STUIT INSURANCE AGENCY, INC,

Defendant-Appellees,

and

J.M. WILSON CORPORATION,

Defendant.

UNPUBLISHED
December 6, 2005

No. 255605
Ottawa Circuit Court
LC No. 02-043346-CK

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

This case involves the tragic drowning of a young child. Plaintiff, as third-party assignee of the insureds, filed the instant action seeking a declaration of coverage and recovery for breach of contract. Plaintiff is the personal representative of his deceased, twenty-month-old son who drowned in the swimming pool of his day care provider, the insureds. Plaintiff appeals as of right the grant of summary disposition to defendants Citizens Insurance and Capitol Indemnity. We affirm.

I

This Court reviews rulings on motions for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Additionally, issues involving interpretation of insurance contracts are reviewed de novo. *Allstate Ins Co v McCarn*, 471 Mich 283, 288; 683 NW2d 656 (2004).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A party facing a motion for summary disposition brought under MCR 2.116(C)(10) is required to present evidentiary proofs creating a genuine issue of material fact for trial. *Smith, supra* at 455-456 n 2. The existence of a disputed fact must be established by admissible evidence. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

Generally, exclusionary clauses in insurance policies are construed against the insurer, but clear exclusions must be given effect. *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218, 224; 549 NW2d 872 (1996). An insured bears the burden of proving coverage; however, it is the insurer that must prove that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995).

II

The insureds' homeowners' policy issued by defendant Citizens Insurance contained a "business pursuits" exclusion which provided:

> 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 circumstances, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business."

The exclusion also provided for a "non-business" exception:

> However, this exclusion does not apply to incidental "business" activities ordinarily undertaken by minors or activities which are ordinarily incidental to non-"business" pursuits.

Plaintiff argues that the "business pursuits" exclusion is inapplicable in this case. Michigan law provides for a two-pronged "business pursuits" test that looks to continuity and the profit motive. *Frankenmuth Mut Ins Co v Kompus*, 135 Mich App 667, 674; 354 NW2d 303 (1984). The insured must have a customary engagement or a stated occupation, and that activity

must be shown to be a "means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit, commercial transactions or engagements." *Id*. at 674-675 (citations omitted). Applying that test, the day care business of the insureds was continuous and for profit and therefore meets both prongs of the test.

Plaintiff contends, however, that the exclusion does not apply here because the status of the decedent changed from that of an invitee to a licensee. Plaintiff maintains that once the decedent climbed from his crib and left the designated day care area, his status changed to that of a social guest, and his drowning therefore did not arise out of a business pursuit. We disagree. The status of the decedent, while pertinent to a premises liability action, is inapplicable here. His status does not affect the inquiry of the two-pronged "business pursuits" test.

Similarly, whether the decedent's status changed to a social guest because the insured caregiver received compensation for his care only until the end of his mother's work day is irrelevant to the inquiry.[1] Additionally, this argument essentially has been previously been rejected by this Court. *Kompus, supra* at 676-677; *State Mut Ins Co v Russell*, 185 Mich App 521, 529-530; 462 NW2d 785 (1990).

III

Plaintiff argues that even if the "business pursuits" exclusion applies to the insured wife, it does not apply to her husband, also an insured on the policy. We disagree. An exclusion that precludes coverage for "an insured" "excludes coverage to all insureds on the basis of the conduct of any insured." *Vanguard Ins Co v McKinney*, 184 Mich App 799, 809; 459 NW2d 316 (1990).

IV

Plaintiff further argues that even if the exclusion is applicable to preclude coverage, the exception applies to provide coverage. We disagree. While defendant argues on appeal that it is a failure to supervise that is the immediate act causing injury and, as such, that act would clearly be "arising out of" or "in connection with" the business pursuit of the day care, plaintiff argues the immediate act causing injury was the failure to repair a broken door latch that allowed the child to get into the yard where the pool was. Even accepting plaintiff's argument that the immediate act causing injury is the failure to repair the broken latch, his argument for coverage is without merit.

The insured day care owner testified that she put the latch on the door leading from the day care area to the backyard pool because she "didn't want kids to get out there." She also stated that the latch was installed up high so that "kids couldn't reach it." We therefore conclude that the only evidence on the matter establishes that the latch and failure to repair it are directly connected to the day care business and are not incidental to a "non-business" pursuit. In light of

[1] The mother's workday ended at approximately 2:55 p.m., and the decedent was found in the pool at approximately 3:05 p.m.

the above, we conclude that the trial court properly granted summary disposition to defendant Citizens Insurance.

V

Plaintiff's next issue on appeal is whether the water activities exclusion of the insureds' commercial general liability (CGL) policy precluded coverage in the underlying case. That exclusion provides:

> This insurance does not apply to any claim or suit for bodily injury, property damage or medical payments arising out of the use, ownership or maintenance of any swimming pool, wading pool or other artificial body of water, or any natural body of water, located on or adjacent to the property of any insured.

Plaintiff first argues that a question of fact exists whether the water activities exclusion was ever communicated to the insureds or was a part of the policy that existed between Capitol Indemnity and the insureds, and therefore summary disposition was improper. We disagree.

Plaintiff has failed to present admissible evidence that creates an issue of material fact. Plaintiff's argument is merely that the exclusion *may* not have been communicated to the insured, i.e., or that it is "plausible" that it was not. Speculation and conjecture are insufficient to survive a motion for summary disposition. *Ghaffari v Turner Construction Co (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 240025, issued 10/20/05) slip op p 5; *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Although the insured testified that she was unaware of the exclusion, she also stated that she did not read the policy. The policy attached to the complaint contains the exclusion, but plaintiff asserted that that copy of the policy came from the insurance agent because the insured did not have her copy. Because the insured did not read her policy when she received it, her testimony offers no support for the argument that she did not receive the exclusion with her policy.

Plaintiff's reliance on the testimony of the insurance agency representative, Linda Sharp, is equally inconclusive. Plaintiff's attorney questioned Sharp during her deposition about a water activities endorsement, but apparently intermittently incorrectly referred to the endorsement as the "exclusion." Plaintiff cites Sharp's testimony related to the endorsement as supportive concerning the possible omission of the exclusion. This supposition does not create a genuine issue of fact.

V

Plaintiff also contends that even if the "Water Activities" exclusion is part of the policy, it is not clear that the exclusion precludes coverage for this accidental drowning. Plaintiff asserts that the exclusion is ambiguous because the title of the exclusion, "Water Activities," connotes recreational use or water activity related to a particular body of water other than pools; however, the text precludes liability for mere ownership of a swimming pool. Plaintiff asserts that this ambiguity must be construed against the insurer to maximize coverage. We disagree.

This Court recently held that a section's title, compared to the substantive language within, can create an ambiguity. *Scott v Farmers Ins Exchange*, 266 Mich App 557, 562; 702 NW2d 681 (2005). However, we find plaintiff's argument based on the ambiguity in the title here unpersuasive. The exclusion is clear concerning water activities, including swimming pool liability.

VI

We likewise find plaintiff's remaining arguments unavailing. To the extent that plaintiff argues that defendants had a duty to defend, this issue was not set forth in the statement of questions presented and therefore is not properly presented for review. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). In any event, there is no independent duty to defend if coverage is expressly excluded. *Meridan Mut Ins Co v Hunt*, 168 Mich App 672, 677; 425 NW2d 111 (1988).

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey