STATE OF MICHIGAN

COURT OF APPEALS

JANE MYRICK, Conservator of CHRISTOPHER MYRICK, Individually and as assignee of NILES LAUTZENHISER,

Plaintiff-Appellant,

and

JOHN ANDREW FISK, Individually and as assignee of NILES LAUTZENHISER,

Plaintiff,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
October 17, 1997

No. 191489
Newaygo Circuit Court
LC No. 94-014679-CK

JOHN ANDREW FISK,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

No. 191646
Newaygo Circuit Court
LC No. 94-015238-CZ

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

In appeals of right consolidated by this Court, plaintiffs challenge an order granting defendant summary disposition pursuant to MCR 2.116(C)(10) for the reason that defendant was excluded from liability for bodily injury where its insured, Niles Lautzenhiser, was operating a non-owned, non-private passenger vehicle in the course of business at the time he caused a motor vehicle accident that injured plaintiffs. We affirm.

This Court reviews a summary disposition determination de novo as a question of law. *Kennedy v Auto Club of Michigan*, 215 Mich App 264, 266; 544 NW2d 750 (1996). The evidence showed that while Lautzenhiser was an independent contractor and was not engaged in an employment relationship with the owner of the truck, he was engaged in business at the time of the accident. Lautzenhiser was on an out-of-town drywalling job that he undertook for the contractor who provided Lautzenhiser with the truck to haul materials and equipment. After arriving at the job site and working for several hours unloading the truck, Lautzenhiser and his helper left the job site to call the contractor for additional instructions. The two were unable to reach the contractor and decided to eat a meal at a local establishment where they also played pool and consumed alcoholic beverages for about two to three hours. On the way back to the job site, Lautzenhiser ran a stop sign and struck plaintiffs' vehicle.

Plaintiffs both argue that a test similar to the scope of employment test applied in worker's compensation cases should be applied to determine the scope of the business use exclusion in the no-fault insurance policy at issue. Plaintiffs contend that under such a test, Lautzenhiser was on a sufficient deviation from his mission to break the work nexus and was not in the course of business at the time of the accident. We disagree. This Court has concluded that the focus for determining whether a business use exclusion applies must be "on how the nonowned car is being used," not on the insured's employment status. *Wilson v Gilde*, 204 Mich App 251, 254; 514 NW2d 520 (1994).[1] Thus, the scope of the business use exclusion is broader than the type of test advocated by plaintiffs. The policy language itself, by using the word "business" as opposed to the word "employment," also supports that conclusion because it connotes that the exclusion is not limited to employment situations. A break for a meal was a necessary part of the "course of . . . business" undertaken in the extended out-of-town employment situation at issue here. The truck was thus being used in the course of business at the time of the accident, and the policy's business use exclusion applied. *Id.*

Plaintiffs also argue that a test similar to the "engaged in continually and for profit" test for exclusion of negligence coverage for business pursuits in a homeowners' policy should be applied to determine the scope of the no-fault business use exclusion. Plaintiffs contend that under such a test, Lautzenhiser's drinking and pool playing would not be part of drywalling activity. To constitute a business pursuit in the homeowners' context, there must be continuity. *Frankenmuth Mutual Ins Co v Kompus*, 135 Mich App 667, 674-675; 354 NW2d 303 (1984). However, we disagree that this analysis is proper to determine the scope of the no-fault business use exclusion at issue here. In any event, it was not the acts of drinking and pool playing that caused the harm to plaintiffs. The act that caused the harm to plaintiffs was the negligent driving of the truck. Although Lautzenhiser's drinking undoubtedly contributed to that negligence, the fact that Lautzenhiser had been drinking and playing pool is irrelevant to the legal issue at hand. If Lautzenhiser had been completely sober when he ran the stop sign and collided with plaintiffs, the issue before this Court and the result would be unchanged.

Plaintiff Myrick also claims that the trial court improperly weighed the credibility of Lautzenhiser's testimony and found that Lautzenhiser intended to return to work after leaving the bar. Plaintiff's argument is based on the assertion that it is incredible to think that Lautzenhiser could have intended to return to the cabin to work given the late hour and his drinking. Plaintiff contends that the trial court's acceptance of Lautzenhiser's statement at face value constituted an assessment of Lautzenhiser's credibility. We disagree. Plaintiff presented no evidence or testimony to refute the professed intent of Lautzenhiser to return to work, so there was no competing testimony or evidence for a trier of fact to improperly weigh. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995); *Skinner v Square D Co*, 445 Mich 153, 160-161; 516 NW2d 475 (1994).

Finally, plaintiff Myrick argues that the business use exclusion language contained in Lautzenhiser's policy of no-fault insurance with defendant is vague and ambiguous and thus unenforceable. We disagree. This Court recently scrutinized similar business use exception language and found it to be clear and unambiguous. *Wilson, supra* at 252-254. In the present case, the policy language clearly conveys that if the insured is driving a non-owned, non-private passenger vehicle in the course of any business of the insured, except the car business, then the exclusion is in force.

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald

[1] We find no relevant distinction between the language of the business use exception here and that at issue in *Wilson*.