STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE CO., Plaintiff-Appellant,	UNPUBLISHED January 18, 2011
v	No. 294634 Oakland Circuit Court
DAVID MIAN and JOSHUA SPARKS, Defendants-Appellees.	LC No. 2009-099712-CK

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

In this declaratory action, plaintiff appeals as of right from an order of the trial court granting summary disposition in favor of defendants. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Underlying this action is an alleged injury suffered in April 2005 by defendant Joshua Sparks, an employee of Century Tool and Die, Inc. Defendant David Mian is the sole employee of Mian Machine, L.L.C., and has a homeowner's insurance policy through plaintiff. At all times relevant to this appeal Mian Machine rented space from Century Tool and Die.

Somewhere between 1998 and 2002, David Mian purchased a press from another company. Mian testified that he does not use a press in his business or have any experience operating one. He maintains that he bought the press primarily because of a vise attached to the press that he thought could be used by Mian Machine. In regards to the press itself, Mian thought that he might be able to sell it for scrap. Approximately one to two years before Sparks was injured, Mian gave the press to Century Tool and Die. Allstate is currently defending Mian in the underlying action under a strict reservation of rights.

Plaintiff brought this action for declaratory relief, asserting that it did not owe Mian a duty to defend or indemnify pursuant to the business-activities exclusion of his homeowner's insurance policy. The relevant exclusion states in part, "We do not cover bodily injury or property damage arising out of the past or present business activities of an insured person." The word "business" is defined in the policy, in relevant part, as "any full or part-time activity of any kind engaged in for economic gain including the use of any part of any premises for such purposes."

Defendants' motion for summary disposition was granted under MCR 2.116(C)(10), a decision which we review de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). When evaluating a motion for summary disposition under MCR 2.116(C)(10), this Court and the trial court must consider the documentary evidence provided in the light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A party opposing the motion, by affidavits or otherwise, must demonstrate there is a genuine issue of material fact for trial. MCR 2.116(G)(4). "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden*, 461 Mich at 121.

Interpretation of a contract, including an insurance policy, is a legal issue also reviewed de novo. *Klapp*, 468 Mich at 463. Any insurance contract must be looked at as a whole, and any clear, unambiguous clause that does not contravene public policy is valid. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992). "Clear and specific exclusionary clauses must be given effect, but are strictly construed in favor of the insured." *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001).

The policy definition of "business" noted above provides a category of actions characterized by the focus on seeking "economic gain" and by some degree of consistency, i.e., full-time or part-time engagement. C.f. *State Mut Cyclons Ins Co v Abbott*, 52 Mich App 103, 108; 216 NW2d 606 (1974) ("To constitute a business pursuit, there must be two elements: first, continuity, and, secondly, the profit motive . . . ."). (internal quotation marks and citation omitted). While "part-time activity" denotes something less than full time action, it is generally understood to mean some degree more than one-time or even sporadic activity.

Mian's removing and using the vise in his business could have had an economic impact that might have, minimally, impacted his company's profit picture. Further, if the vise had been incorporated into Mian Machine's regular manufacturing process, continuity would be established. However, there is no evidence that Mian Machine ever used the vise, and there is no dispute that the press itself was never used or operated by Mian.

While it is true that Mian had hoped to profit off the press by selling it for scrap, this activity lacks the required degree of continuity. There is no evidence Mian was engaged in the business of purchasing and reselling such equipment for profit before or after Sparks's injury. See *Randolph v Ackerson*, 108 Mich App 746, 748-749; 310 NW2d 865 (1981) (concluding that while razing a barn and selling off the wood was clearly profit motivated, there was no evidence that the defendant had razed barns for profit previously or subsequently).

Moreover, as the trial court noted, even if it could be said that Mian's purchase of the press was a business activity under the policy, the injury here does not "arise out of" this activity. Certainly, the injury sustained by Sparks would not have occurred had not Mian purchased the press and then given it to Century. Clearly there is a "but for" relationship between the two events. However, the injury is too attenuated—almost fortuitous—to be considered to have

arisen out of the purchase.[1] In any event, the act of giving the press to Century Tool and Die essentially broke any causal link between the economic motive for the purchase and the injury sustained. When the press was given away, any remaining notion that it might be sold for scrap was abandoned.

Finally, plaintiff's arguments that summary disposition was inappropriate because there are disputed facts and Mian's credibility is at issue also fail. Plaintiff has simply failed to state what material facts are in dispute. The only evidence in the record is Mian's uncontroverted testimony from two depositions. Plaintiff has not presented any affidavits, deposition testimony, or any other evidence that contradicts Mian's deposition testimony, nor has plaintiff pointed to any part of Mian's testimony that is contradictory. Plaintiff's bare allegation that there are facts in dispute is simply not enough. See *Maiden*, 461 Mich at 120.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

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[1] Plaintiff cites *Kermans v Pendleton*, 62 Mich App 576, 579; 233 NW2d 658 (1975), for the proposition that the causal element has been shown. The injured plaintiff in *Kermans* was shot and wounded by the insured bar owner with a gun he kept in the bar. *Id.* at 577, 579. The policy in issue excluded from coverage "'any business pursuits of an Insured, except activities therein which are ordinarily incident to the nonbusiness pursuits." *Id.* at 579. *Kermans* is distinguishable because (1) the policy language in that case was much more vague than it is in this case, and (2) the gun utilized in *Kermans* was directly related to and used in the business of the insured. Here, the press was never utilized or operated by Mian.