

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

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AUTO CLUB GROUP INSURANCE  
COMPANY,

UNPUBLISHED  
January 25, 2011

Plaintiff-Appellee,

v

No. 294697  
Jackson Circuit Court  
LC No. 08-003456-CK

ROBERT LEE SMITH and CYNTHIA HALL  
SMITH,

Defendants,

and

KARON POOL and DUANE POOL,

Defendants-Appellants.

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Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

In this insurance contract case, defendants Karon and Duane Pool appeal as of right the trial court's order granting plaintiff Auto Club Group Insurance Company (Auto Club) summary disposition. We affirm.

**I. FACTS**

On July 23, 2006, Karon and Duane Pool were riding together in their boat in a lake channel approximately half-way between Price Lake and Michigan Center Lake in Leoni Township, Michigan. Duane Pool was operating the boat. At approximately 6:25 p.m., another boat collided with the Pools' boat. Robert Lee Smith operated the boat that hit the Pools' boat, and his passenger was his wife, Cynthia Hall Smith. The collision caused physical injuries and property damage to the Pools.

Following the accident, Robert Smith was charged with two counts of second-degree child abuse<sup>1</sup> for injuries that his children allegedly suffered as passengers in his boat when the accident occurred. No criminal charges were ever brought against Robert Smith for injuries that the Pools suffered. Ultimately, Robert Smith pleaded no contest to one count of fourth-degree child abuse and drunk boating.

The Pools brought suit against the Smiths,<sup>2</sup> alleging that Robert Smith was operating his boat while under the influence of alcohol or, alternatively, with an unlawful blood alcohol content.<sup>3</sup> The Pools also alleged that, as a result of his intoxication, Robert Smith was unable to safely operate his boat, which he did at a dangerous rate of speed and in a reckless manner.<sup>4</sup> In an amended complaint, the Pools further alleged that Cynthia Smith was liable by virtue of her co-ownership of the boat.<sup>5</sup>

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<sup>1</sup> MCL 750.136b.

<sup>2</sup> *Pool v Smith*, Jackson Circuit Court, Case No 08-002306-NI.

<sup>3</sup> MCL 324.80176(1) states:

A person shall not operate a vessel on the waters of this state if either of the following applies:

(a) The person is under the influence of intoxicating liquor or a controlled substance, or both.

(b) The person has a blood alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

<sup>4</sup> MCL 324.80147 states:

If a person carelessly and heedlessly operates a vessel upon the waters of this state in disregard of the rights or safety of others, without due caution and circumspection, or at a rate of speed or in a manner that endangers or is likely to endanger a person or property, that person is guilty of reckless operation of a vessel . . . .

<sup>5</sup> The boatowner liability statute, MCL 324.80157, states:

The owner of a vessel is liable for any injury occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the statutes of this state, or in the failure to observe such ordinary care in the operation as the rules of the common law require. The owner is not liable unless the vessel is being used with his or her expressed or implied consent. It shall be presumed that the vessel is being operated with the knowledge and consent of the owner if it is driven at the time of the injury by his or her son, daughter, spouse, father, mother, brother, sister, or other immediate member of the owner's family.

At the time of the accident, the Smiths had a boatowners insurance policy with Auto Club. Therefore, following the filing of the Pools' cause of action, the Smiths tendered the complaint to Auto Club. Auto Club then filed this declaratory action, seeking a declaration that it had no duty to defend or indemnify the Smiths based on the "intentional acts" and "criminal acts" exclusions in the insurance policy. In its amended complaint, Auto Club also sought to avoid defending and indemnifying Cynthia Smith, alleging that the Pools' claims against her were derivative of their claims against Robert Smith.

Auto Club moved for summary disposition under MCR 2.116(C)(8) and (C)(10), pointing out that the Pools alleged in their complaint that Robert Smith was operating his boat in a wanton and willful manner at a high rate of speed while intoxicated. It also pointed out that Robert Smith pleaded *nolo contendere* to drunk boating. Auto Club argued that the language in its insurance policy was clear and unambiguous.<sup>6</sup> And Auto Club noted that this Court has previously held that derivative claims against co-insureds are excluded when the primary claim is excluded.<sup>7</sup> Thus, Auto Club argued that it had no duty to defend or indemnify the Smiths based on the "intentional acts" and "criminal acts" exclusions in the insurance policy.

The Pools responded, arguing that the insurance policy exclusion language was ambiguous and that the coverage was illusory. The Pools also argued that Auto Club should defend and indemnify Cynthia Smith based on the clear language of the boatowner liability statute.

After hearing oral arguments on the motion, the trial court found that Robert Smith had committed a criminal act: boating while under the influence of alcohol. Therefore, the trial court ruled that coverage was excluded on the basis of Robert Smith's criminal act. The trial court further found that the Pools' claim against Cynthia Smith was derivative of their other claims. Accordingly, the trial court entered an order granting summary disposition.

The Pools now appeal.

## II. MOTION FOR SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. Under this motion, the pleadings alone test the legal basis of the complaint.<sup>8</sup> Courts take all factual allegations as

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<sup>6</sup> See *Auto Club Group Ins Co v Daniel*, 254 Mich App 1, 4; 658 NW2d 193 (2002).

<sup>7</sup> *Allstate Ins Co v Johnson*, 205 Mich App 495, 501; 517 NW2d 799 (1994) ("[W]here coverage of a particular claim is excluded by virtue of a specific exclusionary clause, derivative claims against co-insureds are also excluded.").

<sup>8</sup> *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

true, and construe any reasonable inferences or conclusions that can be drawn from the facts in the light most favorable to the nonmoving party.<sup>9</sup> The trial court should deny the motion unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover.<sup>10</sup>

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.<sup>11</sup> The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.<sup>12</sup> The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.<sup>13</sup> The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.<sup>14</sup>

This Court reviews de novo a trial court's ruling on a motion for summary disposition.<sup>15</sup> Further, if a contract's language is clear, its construction is a question of law for this Court that is subject to de novo review.<sup>16</sup> Whether contract language is ambiguous is also a question of law subject to de novo review.<sup>17</sup> Also, this Court reviews de novo whether an insurance contract violates public policy.<sup>18</sup> And issues of statutory interpretation are subject to this Court's de novo review.<sup>19</sup>

## B. AMBIGUITY

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 121; *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

<sup>12</sup> MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

<sup>13</sup> *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

<sup>14</sup> MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

<sup>15</sup> *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009); *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

<sup>16</sup> *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Hafner v DAIIE*, 176 Mich App 151, 156; 438 NW2d 891 (1989).

<sup>17</sup> *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

<sup>18</sup> *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005).

<sup>19</sup> *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

The Auto Club insurance policy at issue contains the following liability coverage: “Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay damages for which an insured person is legally liable because of bodily injury or property damage arising out of the ownership, maintenance or use of an insured boat.” The exclusions to which the preceding provision refers include the following exclusions to coverage for bodily injury or property damage:

bodily injury or property damage resulting from an act or omission by an insured person which is intended or could reasonably be expected to cause bodily injury or property damage. This exclusion applies even if the bodily injury or property damage is different from, or greater than, that which is expected or intended.

bodily injury or property damage resulting from:

a criminal act or omission; or

an act or omission, criminal in nature, committed by an insured person even if the insured person lacked the mental capacity to:

(a) appreciate the criminal nature or wrongfulness of the act or omission; or

(b) conform his or her conduct to the requirements of the law; or

(c) form the necessary intent under the law.

This exclusion will apply whether or not the insured person:

is charged with a crime;

is convicted of a crime whether by a court, jury, or plea of nolo contendere;  
or

enters a plea of guilty whether or not accepted by the court.

It is a basic rule of contract construction that “[a]n unambiguous policy must be enforced as written.”<sup>20</sup> “Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy.”<sup>21</sup> “An insurance company is free to limit its liability as

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<sup>20</sup> *Auto Club Group Ins Co v Daniel*, 254 Mich App 1, 3; 658 NW2d 193 (2002).

<sup>21</sup> *Id.* at 4, quoting *Raska v Farm Bureau Ins Co*, 412 Mich 355, 361-362; 314 NW2d 440 (1982).

long as it does so clearly and unambiguously.” “When the language in an insurance contract is subject to more than one reasonable interpretation, it is considered ambiguous.”<sup>22</sup>

The Pools contend that the qualifying language—“which is intended or could reasonably be expected to cause”—that appears just above the criminal acts exclusion makes that exclusion ambiguous because an insured person would reasonably believe that, to exclude coverage, the criminal act must be “intended” or “reasonably expected” to cause injury or damage.

We disagree that the above exclusions are ambiguous. Although the Pools offer an alternative interpretation of the exclusions section language, we do not agree that this is a reasonable interpretation. The exclusions section, when taken as a whole, sets forth 11 different and separate exclusions to coverage. Just because the “intentional acts” exclusion paragraph precedes the “criminal acts” exclusion paragraph in the list of those 11 exclusions does not mean that the conditions of the former provision apply to latter, or that any reasonable reader would interpret them in that manner. A clear and plain reading of the language, taking into account the formatting of the section (which sets forth each separate exclusion using bold language, paragraph breaks, and indentations), indicates that the qualifying language—“which is intended or could reasonably be expected to cause”—in the “intentional acts” exclusion paragraph applies only to that specific exclusion. The “criminal acts” exclusion has its own set of conditions, as do the other 9 categories of exclusions. To read the contract as the Pools would have us do, would lead to the absurd result that each exclusion was limited by the terms of each of the preceding exclusions. We decline to read the section that way. The exclusions section is not ambiguous because the language of the “intentional acts” exclusion paragraph is separate and distinct from the language of the “criminal acts” exclusion paragraph.

To the extent that the Pools rely on the Michigan Supreme Court’s decision in *Allstate Ins Co v McCarn*,<sup>23</sup> we find their argument without merit. In that case, the Supreme Court was interpreting an insurance contract provision that stated: “We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person.” Under the particular language of the *McCarn* contract, that exclusion applied when the bodily injury or property damage was intended or occurred as a reasonable expectation of *intentional or criminal acts or omissions*. Unlike the language in *McCarn* that combined the two types of conduct into one paragraph, the contract language at issue here lays out 11 distinct exclusions, including a separate paragraph for “intentional acts” as opposed to “criminal acts.” Thus, the *McCarn* decision’s two-pronged test based on the language of that particular joint exclusion does not apply in this case.

Contrary to the Pools’ contentions, there is no requirement here that a criminal act be “intended or . . . reasonably . . . expected to cause bodily injury or property damage.” To be excluded under the “criminal acts” exclusion the bodily injury or property damage need only

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<sup>22</sup> *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003).

<sup>23</sup> *Allstate Ins Co v McCarn*, 471 Mich 283; 683 NW2d 656 (2004).

result from “a criminal act or omission; or an act or omission, criminal in nature, committed by an insured person.” The exclusion applies “even if the insured person lacked the mental capacity to: (a) appreciate the criminal nature or wrongfulness of the act or omission; or (b) conform his or her conduct to the requirements of the law; or (c) form the necessary intent under the law.” And further, the exclusion applies “whether or not the insured person: is charged with a crime; is convicted of a crime whether by a court, jury, or plea of nolo contendere; or enters a plea of guilty whether or not accepted by the court.” The exclusion clearly applies, by its own terms, regardless of the actor’s intent or expectations.

### C. ILLUSORY COVERAGE

The Pools contend that most negligent boating acts also constitute crimes under Michigan’s Watercraft and Marine Safety Act.<sup>24</sup> Therefore, they argue that, contrary to public policy, the liability portion of the Auto Club insurance policy only offers illusory coverage because coverage for virtually *any* negligence while boating could be excluded on the basis of the “criminal acts” exclusion. That is, the Pools argue that conduct that may seem merely careless is almost always a violation of the law, i.e., a crime, when committed while boating. Therefore, the Pools argue that is “hard to imagine exactly what boaters are insured for if most negligent acts could be excluded by [Auto Club] under its criminal acts exclusion.”

In *Auto Club Group Ins Co v Daniel*, this Court considered the validity of a similar criminal acts exclusion in a homeowners insurance policy.<sup>25</sup> This Court rejected the defendant’s arguments that the contract was illusory and against public policy. This Court stated that a clause in an insurance contract is valid as long as it is not in contravention of public policy, and that, as long as policy language is clear and unambiguous, the insurer is free to limit its liability.<sup>26</sup> Further, this Court recognized that “as a matter of public policy, an insurance policy that excludes coverage for a person’s criminal acts serves to *deter* crime, while a policy that provides benefits to those who commit crimes would *encourage* it.”<sup>27</sup>

Here, the criminal act exclusion is not contrary to public policy because the policy language is clear and unambiguous and Auto Club is free to limit its liability. When Robert Smith pleaded nolo contendere to a criminal charge, he voluntarily excluded himself from insurance coverage. Further, the Pools have presented no evidence that a similar insurance policy, without a criminal act exclusion, was unavailable from another company.<sup>28</sup>

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<sup>24</sup> MCL 324.80101 *et seq.*

<sup>25</sup> *Daniel*, 254 Mich App at 3 (the exclusion in that case denied coverage for “bodily injury resulting from a criminal act or omission or an act or omission that is criminal in nature”).

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> See *id.* at 5.

Moreover, contrary to the Pools' contention that it is "hard to imagine" any situations where a boat operator could be negligent or careless and not concurrently commit a crime, we note there are prohibitions in the Watercraft and Marine Safety Act that subject the violator to only civil infractions and fines, not criminal liability.<sup>29</sup> Thus, we reject the Pools' argument that the criminal acts exclusion when used in a boating insurance policy renders the contract against public policy or illusory.

#### D. QUESTIONS OF FACT

The Pools argue that Auto Club failed to meet its burdens under MCR 2.116(C)(8) and (C)(10) and that material questions of fact preclude the grant of summary disposition to Auto Club. More specifically, they argue that summary disposition was not proper under subpart (C)(8) because their complaint and amended complaint "did state claims upon which relief may be granted." And they argue that summary disposition was not proper under subpart (C)(10) because material issues of fact remained regarding "what actually caused the accident." On this point, the Pools posit: "was it Mr. Smith's use of alcohol, was it due to a narrow channel overcrowded with boats, or due to possible excessive speed or indecision by various boaters, or some combination or these factors?"

Upon our de novo review and to the extent it was necessary to look beyond the immediate pleadings in the present case, we conclude that summary disposition in favor of Auto Club was proper under MCR 2.116(C)(10). In their complaint against the Smiths, the Pools alleged that Robert Smith was not operating his boat in a reasonably prudent manner and was in fact negligent for operating his boat "while under the influence of intoxicating liquor and/or with an unlawful blood alcohol content of 0.10 grams or more per 100 ml of [blood, per] 210 [liters] of breath or 67 ml of urine and/or operated said vessel when, due to the consumption of intoxicating liquor his ability to operate said vessel was visibly impaired contrary to . . . MCL 324.8[0]176." The Pools further alleged that "Smith knew he was intoxicated and his ability to operate his vessel was impaired or he was otherwise unable to safely operate his vessel and that notwithstanding such knowledge operated the vessel at a dangerous rate of speed and in a reckless manner causing the collision between the Smith vessel and the Pool vessel[.]" Further, the evidence showed that Robert Smith pleaded nolo contendere to violation of MCL 324.80176. Therefore, we conclude that there was no genuine issue of material fact that the Pools' claims clearly fell within the "criminal acts" exclusion in the Auto Club policy.

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<sup>29</sup> See e.g., MCL 324.80144 (making it a civil infraction to operate a vessel in violation of the right of way rules); MCL 324.80145 (making it a civil infraction to operate a vessel in "at a rate of speed greater than will permit him or her, in the exercise of reasonable care, to bring the vessel to a stop within the assured clear distance ahead" or "in a manner so as to interfere unreasonably with the lawful use by others of any waters"); MCL 324.80146 (making it a civil infraction to exceed motorboat speed limits); MCL 324.80151 (making it a civil infraction to tow or assist in the propulsion of persons on water skis, water sleds, surfboards, etc., during prohibited hours).

Moreover, we note that the Pools did not properly preserve this argument during the lower court proceedings and in failing to do so, they in fact failed to meet *their* burden of producing admissible evidence to establish disputed facts.<sup>30</sup> Thus, the trial court did not err in granting summary disposition in Auto Club's favor where there were no disputed material questions of fact.

#### E. DUTY TO DEFEND AND INDEMNIFY CYNTHIA SMITH

The Pools argue that the trial court erred when it granted Auto Club summary disposition regarding Auto Club's duty to defend and indemnify Cynthia Smith. The Pools contend that Cynthia Smith's liability is not derivative of Robert Smith's liability because her liability as a co-owner of the boat is separately mandated by statute.

The boatowner liability statute states:

The owner of a vessel is liable for any injury occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the statutes of this state, or in the failure to observe such ordinary care in the operation as the rules of the common law require. The owner is not liable unless the vessel is being used with his or her expressed or implied consent. It shall be presumed that the vessel is being operated with the knowledge and consent of the owner if it is driven at the time of the injury by his or her son, daughter, spouse, father, mother, brother, sister, or other immediate member of the owner's family.<sup>[31]</sup>

We appreciate the Pools' point to the extent that Cynthia Smith is allegedly subject to distinct liability simply by virtue of her co-ownership of the boat. However, the policy language does not distinguish the circumstances of the "criminal acts" exclusion on the basis of who owned the boat. The exclusion precludes coverage for bodily injury or property damage resulting from a criminal act—regardless of who committed the act or who owned the boat. Cynthia Smith's alleged statutory liability to the Pools does not negate the fact that the claimed injuries still resulted from a criminal act and are thus precluded from coverage under the Auto Club insurance policy.

We affirm.

/s/ David H. Sawyer  
/s/ William C. Whitbeck  
/s/ Kurtis T. Wilder

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<sup>30</sup> *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

<sup>31</sup> MCL 324.80157.

