

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

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FARM BUREAU GENERAL INSURANCE  
COMPANY OF MICHIGAN,

UNPUBLISHED  
November 25, 2014

Plaintiff-Appellant,

v

No. 317505  
Livingston Circuit Court  
LC No. 12-027099-CK

EDWARD J. WALSH and DIANA K. WALSH,

Defendants,

and

MICHELLE SCHOEMER, Personal  
Representative for the Estate of CARL J.  
SCHOEMER, JR.,

Defendant-Appellee.

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Before: OWENS, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

In this insurance coverage dispute, plaintiff, the insurer, disputes the court's order granting summary disposition to defendant and denying that same relief to plaintiff. Because a question of fact exists as to whether the business exclusion in the insureds' policy precludes coverage, we reverse and remand for a factfinder to resolve that issue. We affirm in all other respects.

On April 6, 2011, Carl J. Schoemer, Jr. perished during a fire in a pole barn located on the property of Edward and Diana Walsh, the insureds. At the time, Schoemer was staying in an apartment that had been built in the upper part of the pole barn. Defendant, the personal representative of Schoemer's estate (Michelle Schoemer), sued the insureds in an independent action<sup>1</sup> for wrongful death and negligence. Plaintiff sought declaratory relief from the trial court, asking the trial court to hold that its insurance policy did not cover the insureds' liability to defendant for Schoemer's death. The insureds' insurance policy obligates plaintiff to cover the

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<sup>1</sup> Those parties have since settled the independent lawsuit.

insureds for bodily injury incurred by other persons on an “insured location,” which includes the “residence premises”—i.e., a “one family dwelling, other structures, and grounds.” But the policy also contains several exclusions from coverage. Plaintiff argued that the following three policy exclusions vitiate its responsibility to cover the insureds for Schoemer’s demise:

b. **bodily injury** or **property damage** 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 circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the **business**. This exclusion does not apply to the occasional or part-time **business** pursuits of an **insured** who is a student under 18 years of age;

c. **bodily injury** or **property damage** arising out of the rental or holding for rental of any part of any premises by an **insured**. This exclusion does not apply to the rental or holding for rental of an **insured location**:

(1) on an occasional basis, if used only as a residence;

(2) in part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two **roomers** or **boarders**; or

(3) in part, as an office, school, studio, or private garage;

\* \* \*

m. **bodily injury** or **property damage** resulting from a **criminal act** of an **insured**, regardless of whether an insured person is actually charged with, or convicted of, a crime;

In granting summary disposition to defendant and denying relief to plaintiff, the trial court held that none of the exclusions asserted by plaintiff applied, and thus plaintiff was required to provide coverage to the insureds for their liability to defendant for Schoemer’s death. The trial court noted that the business exception did not apply because plaintiff did not establish that the fire was connected to business operations occurring in the pole barn. It held that the criminality exclusion did not apply because any violations of the State Construction Code by the insureds when they refurbished the pole barn into a garage and apartment were civil infractions. Finally, the trial court held that the rental exclusion did not apply because the insureds rented only the upper portion of the pole barn to Schoemer, who used it as an apartment, and that this was sufficient to invoke the (c)(2) exception to an exclusion from coverage. This appeal followed.

On appeal, this Court reviews de novo a trial court’s grant of summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Since the trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(10), the trial court had to evaluate whether there was a genuine issue of material fact. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). A genuine issue of material fact exists if the record, when taken in the light most favorable to the nonmoving party, establishes an issue on which reasonable minds

could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). When deciding a motion for summary disposition, the court may not make findings of fact or weigh the credibility of the evidence. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). This Court must review the record in the same manner as the trial court, giving no deference to their decision in order to determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

Insurance contracts are treated no differently from any other contract; accordingly, contractual language that is clear and unambiguous should be given full effect according to its plain meaning unless it violates the law or is in contravention of public policy. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). The trial court cannot infer the parties' "reasonable expectations" in order to rewrite a clear and unambiguous contract. *Id.* However, if the language is unclear, undefined or ambiguous, the trial court may seek guidance from a dictionary to interpret the language. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000). Ambiguous language that cannot be explained through extrinsic evidence should be construed against the drafter of the policy. *Wilkie*, 469 Mich at 60. Even if the contractual language is poorly worded, it is not ambiguous if it "fairly admits of but one interpretation." *Nankervis v Auto-Owners Ins Co*, 198 Mich App 262, 265; 497 NW2d 573 (1993). Regarding insurance policy exclusions, our Supreme Court has stated:

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992) (internal citations omitted).

Turning to the specific claimed exclusions, the rental exclusion in the policy states as follows:

c. **bodily injury** or **property damage** arising out of the rental or holding for rental of any part of any premises by an **insured**. This exclusion does not apply to the rental or holding for rental of an **insured location**:

- (1) on an occasional basis, if used only as a residence;
- (2) in part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two **roomers** or **boarders**; or
- (3) in part, as an office, school, studio, or private garage[.]

Initially, although the parties presented contested evidence as to the frequency of Schoemer's *residing* in the apartment, it is undisputed that Schoemer *rented* the apartment from the insureds on a consistent basis. Plaintiff presented documentary evidence that Schoemer made monthly payments to the insureds from 2008 until he perished in the fire. Although the insureds equivocated on whether these payments qualified as "rent" and regarding the frequency of Schoemer's *residing* in the apartment, they did not provide an alternative explanation for these

regular monthly payments. And, the frequency of Schoemer's staying in the apartment is irrelevant to whether or not Schoemer was renting the apartment. Moreover, the insureds denied, except for one payment in 2008, that Schoemer rented space in the barn for his Rivas. Thus, their testimony is insufficient to rebut plaintiff's evidence that Schoemer was renting the apartment from the insureds. Thus, the exception in (c)(1) to the rental exclusion does not apply to the facts of this case.

Further, the (c)(3) exception to the rental exclusion does not apply because no portion of the pole barn was rented for use as "an office, school, studio, or private garage." Defendant argued that the lower part of the pole barn qualified as a private garage. Although our Courts have not yet defined this term of art, we note that the Michigan Building Code, part of the State Construction Code, distinguishes a "private garage" from a "repair garage." Mich Building Code, R 406.1, 406.6. Therefore, regardless of what "private garage" means, it is clear that a private garage is different from a repair garage. It is undisputed that Edward Walsh and his friends used the lower part of the garage to repair, refurbish, and repaint vehicles. Thus, it does not matter whether the insureds rented space in the barn to others; it simply was not being used as a private garage. Accordingly, the exception in (c)(3) does not vitiate the rental exclusion.

However, the (c)(2) exception to the rental exclusion does apply, which nullifies this exclusion. Initially, plaintiff contends that the relevant "insured location" is the "entire 10-acre parcel owned by the Walshes that constitutes the residence premises . . ." This interpretation is an accurate reflection of the policy, as the remaining definitions of "insured location" in the policy are inapplicable. In light of that definition, the meaning and application of "in part" contained in the (c)(2) and (c)(3) exceptions becomes of paramount significance.

The rental exclusion, when read together with the language of (c)(2), precludes coverage for "bodily injury or property damage arising out of the rental or holding for rental of any part of any premises by an insured. This exclusion does not apply to the rental or holding for rental of an insured location in part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders[.]" When read with the language of (c)(3), an exception from the rental exclusion is created for "the rental or holding for rental of an insured location in part, as an office, school, studio, or private garage[.]" Defendant contends that this language, when considered in context, means that any part of an insured location that is used as specified in the exceptions is entitled to coverage under the policy. This interpretation gives full effect to all of the operative language in the policy.

The (c)(2) exclusion broadly revokes coverage arising from the rental of any part of any premises by an insured. It then proceeds to create exceptions that reinstate coverage for insured locations that fall into certain categories of use. If defendant's interpretation is accepted, the (c)(1) exception applies if the entire insured premises is rented to another, but only if done so on an occasional basis. The (c)(2) exception applies to portions of the insured location, such as a room within a house, that are used solely as a residence, unless the insured rents a single-family

unit to more than two persons.<sup>2</sup> And the (c)(3) exception applies to portions of the insured location that are used as an office, a school, a studio, or a private garage. Because this interpretation gives full effect to the language in the exclusion, the trial court correctly interpreted and applied the (c)(2) exception. And, because plaintiff contends that Schoemer consistently rented the upper apartment portion of the pole barn and used it as his residence, and there is no evidence that more than two persons were lodged at the apartment, the trial court correctly found that this exception effectively vitiated the rental exclusion.

Plaintiff interprets the language “in part” differently, claiming that—because “in part” means “to some measure or degree”—the exception only applies if “the entire premises is rented to some measure or degree only as a residence.” We hold that this interpretation springs from a tortured reading of the policy and runs contrary to the language in the policy. Critically, this interpretation calls for a logical impossibility. Plaintiff’s interpretation attempts to create gradations of a polarized outcome, which is nonsensical and logically impossible. The entire premises either can, or cannot, be rented only as a residence. Because this interpretation creates irreconcilable contradictions, we reject this interpretation of the policy.

Plaintiff also contends that the criminal acts exclusion in the policy precludes coverage. That exclusion precludes coverage for:

m. **bodily injury** or **property damage** resulting from a **criminal act** of an **insured**, regardless of whether an insured person is actually charged with, or convicted of, a crime[.]

Plaintiff contends that the insureds, by knowingly violating residential building restrictions protected by MCL 125.1523, committed criminal acts that implicated this exclusion. Initially, plaintiff is correct that it is immaterial whether the insureds were criminally charged for violating state law, as the exclusion explicitly states that it applies to criminal acts “regardless of whether an insured person is actually charged with, or convicted of, a crime.” MCL 125.1523, part of the Stille-Derossett-Hale Single State Construction Code Act, states as follows in relevant part:

(1) *Except as provided in subsection (3)*, a person or corporation, including an officer, director, or employee of a corporation, or a governmental official or agent charged with the responsibility of issuing permits or inspecting buildings or structures, who does any of the following is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 90 days, or both:

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<sup>2</sup> Plaintiff attempts to rewrite the (c)(2) exception by crossing out the latter language in the provision. However, doing so fundamentally alters the meaning of the exception and takes the exception out of context. When the (c)(1) and (c)(2) provisions are viewed together, it creates exceptions for rental of the entire premises, if only done occasionally, and for rental of a portion of the premises, regardless of frequency, unless too many persons were living in a single family space.

- (a) Knowingly violates this act or the code or a rule for the enforcement of this act or code.
- (b) Knowingly constructs or builds a structure or building in violation of a condition of a building permit.
- (c) Knowingly fails to comply with an order issued by an enforcing agency, a construction board of appeals, a board, or the commission pursuant to this act.
- (d) Knowingly makes a false or misleading written statement, or knowingly omits required information or a statement in an inspection report, application, petition, request for approval, or appeal to an enforcing agency, a construction board of appeals, a board, or the commission.
- (e) Knowingly refuses entry or access to an inspector lawfully authorized to inspect any premises, building, or structure pursuant to this act.
- (f) Unreasonably interferes with an authorized inspection.
- (g) Knowingly issues, fails to issue, causes to be issued, or assists in the issuance of a certificate, permit, or license in violation of this act or a rule promulgated under this act or other applicable laws.
- (h) Having a duty to report violations of this act or a rule promulgated under this act or other applicable laws, knowingly conceals a violation.

\* \* \*

(3) If a governmental subdivision has the responsibility of administering and enforcing this act and prosecutes a violation of this act, the governmental subdivision may retain a fine imposed upon conviction. *If a governmental subdivision has the responsibility of administering and enforcing this act, the governmental subdivision may by ordinance designate a violation described in subsection (1) or (2) as a municipal civil infraction and provide a civil fine for the violation.* The governmental subdivision may retain the civil fine imposed upon judgment. [MCL 125.1523 (emphasis added).]

The applicable Code, the State Construction Code, includes the “international residential code, the international building code, the international mechanical code, the international plumbing code, the international existing building code, and the international energy conservation code[.]” MCL 125.1504(2).

Plaintiff argues that the insureds’ violation of the State Construction Code implicate the criminal exclusion found at m. of its policy. Defendant concedes that the insureds violated the Code when they refurbished the pole barn, although defendant contended that the insureds did not knowingly do so. But that is irrelevant. When subsections (1) and (3) of MCL 125.1523 are read *in pari materia*, it is apparent that any violation of subsection (1) is converted from a

criminal violation into a civil infraction if the enforcement entity so designates by ordinance. If a municipality creates a conversion ordinance, then it has provided an alternative punishment from the default criminal penalty established subsection (1). By providing the alternative allowed in subsection (3), a municipality renders the remainder of subsection (1) inapplicable, thus abrogating any criminal penalties under state law. This is clear from the very first words in subsection (1) reading “Except as provided in subsection (3) . . . .” Thus, all of the remaining language in subsection (1) applies “except as provided in subsection (3),” which is when a governmental subdivision has the responsibility of administering and enforcing the act and by ordinance designates a violation of subsection (1) as a municipal civil infraction.

And, the policy at issue specifically defines “criminal act” as “any act or omission or number of actions or omissions that constitute a felony or misdemeanor crime prohibited by statute or ordinance.” A municipal civil infraction is not a felony or misdemeanor crime and thus does not fit within the policy definition of a “criminal act.” See also, *People v Barbarich*, 291 Mich App 468, 491-492; 807 NW2d 56 (2011)(a civil infraction is not a crime). Therefore, the outcome of this issue is dependent on whether the “governmental subdivision [that] has the responsibility of administering and enforcing this act” has “by ordinance designate[d] a violation described in subsection (1) or (2) as a municipal civil infraction.”

Ira Rowell, director of the Livingston County building department, testified that Livingston County has jurisdiction to enforce violations of the State Building Code. Livingston County passed an ordinance designating “violations of the State Construction Code to be municipal infractions.” Section 1 of the ordinance states as follows in relevant part:

Designation of violations of the State Construction Code, as adopted and enforceable through rules of the Michigan Department of Consumer & Industry Services, Construction Code Commission, and enforced by Livingston County, as municipal civil infractions.

It declares that “any violation of any provision of the State Construction Code . . . shall be a municipal civil infraction. A violation includes any act which is prohibited or made or declared to be unlawful or an offense, and any omission or failure to act where the act is required by the State Construction Code.” The ordinance states that the “sanction for any violation of the State Construction Code, which is a municipal civil infraction, shall be a civil fine as provided herein, plus any cost, damages, expenses and other sanctions, as authorized . . . and other applicable laws.” It also states as follows:

In addition to enforcement of violations of the State Construction Code as municipal civil infractions, enforcement of violations of the State Construction Code may be accomplished by civil action, along with any other remedies provided by law. Violation of this Ordinance is hereby declared a nuisance, per se, and adjudication of responsibility for a municipal civil infraction violation of the State Construction Code shall not preclude other civil proceedings to abate such nuisance.

In light of this unambiguous language, the ordinance effectively converted any violation of the Code from a criminal violation into a civil infraction; thus, the insureds’ violation of the

Code was not criminal conduct under the policy. The resolution and ordinance repeatedly declared its intent to make any violations of the Code into civil infractions. Part A of Section 1 clearly demonstrated its intent to make “any violation,” including those that are otherwise unlawful, to be a civil municipal infraction.

Plaintiff contends that the insureds could be criminally prosecuted because Livingston County retained “other remedies provided by law,” which includes the right to treat their violations as crimes. But this interpretation is incorrect for a number of reasons. First, it would run counter to the ordinance’s declared purpose. Second, criminal prosecution is not a “remedy,” as remedies are used in the context of civil law. If the county intended to retain the power of prosecution, the ordinance would have declared that the county reserved the right to seek “restitution” from violators. Third, the ordinance leaves no room for criminal prosecution, as it declares that violations are to be treated as nuisance per se and must be enforced in civil proceedings. Because the ordinance converted these violations into civil infractions, the insureds did not commit criminal conduct, and thus the criminality exclusion does not apply.

Plaintiff next contends that the business exclusion in the policy precludes coverage. The business exclusion in the insureds’ policy excludes from coverage:

**b. bodily injury or property damage** 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 circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the **business**. This exclusion does not apply to the occasional or part-time **business** pursuits of an **insured** who is a student under 18 years of age[.]

“Business” is defined in the policy, in relevant part as “farming, a trade, profession, or occupation, all whether full or part time.” If a business’s services are ordinarily performed for profit by the insured, then the act of occasionally providing those services to others for free is insufficient to vitiate the applicability of a business exclusion. *State Mut Ins Co v Russell*, 185 Mich App 521, 529-530; 462 NW2d 785 (1990). All “that is required to trigger the exclusion is that the acts be performed as part of the business or service normally performed by the insured for profit.” *Russell*, 185 Mich App at 530.

Under its plain language, the focus of this exclusion is on business activity, not status. Plaintiff presented evidence that Edward Walsh operated a business out of the pole barn by receiving reimbursement for labor in repairing vehicles and renting space in the barn for vehicle storage. Edward admitted that he had stored and repaired his transport trucks in the garage, which he used to operate his vehicle transport business, “Overdrive Transport, LLC.” And, Diane Walsh acknowledged that they had been paid by others for those services in the past; albeit she gave no clear timeframe in which those activities occurred. But, Edward denied that he was paid rent for vehicle storage and implied that he was infrequently reimbursed for his services. Notably, the testimony offered did not establish timeframes in which Edward did, and did not, receive compensation. Thus, it cannot be determined on this record whether Edward was operating a business in the barn at the time of the fire. Paul Green, the fire inspector, opined in his report that Edward operated a hobby garage where he repaired and refurbished vehicles along with his friends. And plaintiff offered no evidence that these friends were employees who

were compensated for their labor. Moreover, because the fire report was inconclusive as to the cause of the fire, it cannot provide direct evidence that the fire was connected to, or arose from, the alleged business operations. The fire report could provide circumstantial evidence to establish that the fire was caused by the repair operations, as the report concluded that the fire originated on the lower floor of the pole barn, which was where Edward and his friends worked on the vehicles. However, reaching that conclusion necessarily requires a factfinder to make an inference. That is not something that a court may reach as a matter of law.

In light of this evidence, there is a material factual dispute over whether Edward operated a business out of the pole barn, and whether the fire arose out of, or was connected to, any of Edward's alleged business activities. There are thus outstanding material factual disputes precluding the trial court from granting either party judgment as a matter of law on the business exclusion. In sum, although the court erred in granting summary disposition to defendant based on this exclusion, plaintiff was not entitled to summary disposition for the same reason. Because this dispute requires resolution by trial, reversal and remand is required.

Plaintiff contends that the apartment rental was also a "business" that implicates the exclusion. This assertion, however, is belied by the evidence and plaintiff's prior argument. As stated above, the business exclusion is focused on business activity, not status. In other words, the business's activities must be connected to the fire; the fact that the fire occurred in a business location is immaterial to the application of the exclusion. It is undisputed that the fire originated in the lower floor of the pole barn. Plaintiff acknowledged that the fire originated in the garage portion of the barn, and relied on that in arguing that the operations in the repair garage were connected to the fire. The fire only spread to the apartment from the garage where the fire originated. Because it is undisputed that the fire did not originate in the apartment, it is legally and factually impossible for the complained-of acts-the unknown cause of the fire-to be connected with the rental activities in the apartment. Thus, this argument is meritless.

A factfinder must resolve, based on the disputed facts, whether the insureds operated a business out of the pole barn and, if so, whether the fire arose out of, or was connected to, the alleged business activities in the barn. Accordingly, we reverse and remand to resolve that question. In all other respects, we affirm. We do not retain jurisdiction. Neither party having prevailed in full, taxation of costs is unwarranted.

/s/ Donald S. Owens  
/s/ Jane E. Markey  
/s/ Deborah A. Servitto