STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY,

Plaintiff-Appellee,

v

RANDY BOOS,

Defendant,

and

ALICIA BULKO, SUSAN COOK, CUREN ESSEX, and ELIZABETH ZUBOR,

Defendants-Appellants.

UNPUBLISHED
October 18, 2011

No. 299273
Livingston Circuit Court
LC No. 09-024577-CK

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY,

Plaintiff-Appellant,

v

RANDY BOOS, ALICIA BULKO, and ELIZABETH ZUBOR,

Defendants-Appellees,

and

SUSAN COOK and CUREN ESSEX,

Defendants.

No. 300093
Livingston Circuit Court
LC No. 09-024577-CK

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

The instant appeals arise from the trial court's July 1, 2010, order granting in part and denying in part plaintiff Michigan Municipal Risk Management Authority's (MMRMA) motion for summary disposition and granting partial summary disposition to both defendant Randy Boos ("Boos") and defendants-appellants Alicia Bulko, Susan Cook, Curen Essex, and Elizabeth Zubor (collectively "defendants") in this declaratory action to determine the availability of insurance coverage for civil claims brought by defendants against Boos. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I

MMRMA is a Michigan group self-insurance pool created by intergovernmental contract pursuant to MCL 124.1 *et seq.* MMRMA supplies insurance coverage to its members under the terms of its "Coverage Documents," which state the following:

> MMRMA will pay on behalf of the Member all monies the Member becomes legally obligated to pay as damages to another person because of an occurrence first taking place or commencing during the period of membership in MMRMA for subjects of coverage 1-6 below. MMRMA has the right and the duty to defend any lawsuit seeking money damages. . . .
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> 1. Bodily injury;
> 2. Property damage;
> 3. Personal injury;
> 4. Medical malpractice . . .
> 5. Motor vehicle liability . . .
> 6. Wrongful act.

The Coverage Documents exclude coverage for any "demand, notice, claim or lawsuit alleging bodily injury, property injury, personal injury or other subjects of coverage . . . resulting directly, indirectly or consequently from, in, or due to . . . [a]ny criminal act, as to the person or entity proven, admitted or non-contested to have committed such act." The Coverage Documents define "Member" to include any former or present employee "while acting within the scope of their official duties or operations on behalf of" a member municipal corporation.

It is undisputed for purposes of this action that Boos sexually assaulted defendants while they were in his custody during his employment as a Livingston County Sheriff's Deputy. As a result, Boos was terminated from his employment. Boos pleaded guilty to three counts of second-degree criminal sexual conduct for his actions toward Essex, Cook, and a third inmate not a party here. Boos did not face criminal charges for his conduct toward Bulko and Zubor. Defendants sued Livingston County, the Livingston County Sheriff and Jail Administrator, and Boos in federal court, alleging that Boos's conduct violated their state and federal constitutional rights and their civil rights under 42 USC § 1983. MMRMA then filed the instant action seeking a declaratory judgment that it had no duty to defend Boos against or indemnify him for defendants' federal claims. MMRMA alleged that Boos engaged in criminal "sexual contact" with defendants as defined by MCL 750.520a(q) and MCL 750.520c(1)(k). MMRMA further

alleged that Boos's unlawful conduct toward defendants was outside the scope of his employment, official duties, and official operations and subject to the criminal act exclusion set forth in the Coverage Documents.[1] Boos did not respond to MMRMA's complaint. Consequently, the trial court entered a default judgment against him.

MMRMA filed concurrent motions for summary disposition, seeking declarations that it had no duty to indemnify Boos for the claims brought against him by defendants. The trial court granted MMRMA's motion as to the claims brought against Boos by Cook and Essex on the basis of the criminal act exclusion, but it concluded that coverage was available to Boos for the claims brought by Bulko and Zubor. The parties appeal the trial court's decision.

II

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Whether MMRMA is contractually obligated under the Coverage Documents to defend or indemnify certain claims requires interpretation of the insuring agreement. *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004). This Court reviews de novo a trial court's construction and interpretation of an insurance contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).[2]

As this Court explained in *Century Surety Co v Charron*, 230 Mich App 79, 82-83; 583 NW2d 486 (1998):

> An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992). When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained the [sic] policy. The court must give the

[1] MMRMA did not seek any such declaration as to the other defendants in the federal action.

[2] As a panel of this Court noted previously, in *Wilcox v Munger*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2007 (Docket No. 275329), at 2 n 1, while MMRMA is not a traditional "insurer,"

> [t]he similarities between the purpose and content of [MMRMA's] coverage documents and traditional insurance policies . . . coupled with the fact that this matter is solely concerned with a dispute over the terms of the coverage documents leads us to conclude that the most appropriate analysis would be the same as that given disputes over insurance policy language. Moreover, [MMRMA] has suggested no other applicable analysis and relies on cases concerning the interpretation of insurance contracts to support its position.

The same is unequivocally true here.

> language contained in the policy its plain and ordinary meaning so that technical and strained constructions are avoided. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). If an insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. *Cavalier Mfg Co v Employers Ins of Wausau* (*On Remand*), 222 Mich App 89, 94; 564 NW2d 68 (1997). Where the language of an insurance policy is clear and unambiguous, it must be enforced as written. Courts must be careful not to read an ambiguity into a policy where none exists. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).
>
> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. *Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims.* Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume. *Churchman*, [440 Mich] at 567; *Frankenmuth Mut Ins Co v Masters*, 225 Mich App 51, 62; 570 NW2d 134 (1997). [Emphasis added.]

Insurers are free to limit the scope of their liability by excluding particular conduct from coverage. *Auto Club Group Ins Co v Daniel*, 254 Mich App 1, 4; 658 NW2d 193 (2002); *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 531; 547 NW2d 52 (1996).

In the present case, the criminal act exclusion precludes coverage upon the occurrence of two separate components. First, there must be a criminal act. Second, the act must be "proven, admitted or non-contested" as to the person committing the act, i.e., the insured. The trial court determined that Boos's conduct toward Cook and Essex fell within the criminal act exclusion but that Boos's actions toward Bulko and Zubor did not fall within the exclusion because of the absence of criminal proceedings for his assaults on Bulko and Zubor.

With respect to Boos's conduct toward Cook and Essex, there is no dispute that Boos's acts were criminal and that Boos admitted committing the criminal acts by pleading guilty to second-degree criminal sexual conduct. "[W]hen [Boos] voluntarily pleaded guilty to a criminal charge, [he] excluded [himself] from insurance coverage" for the acts underlying that charge. *Daniel*, 254 Mich App at 4-5. Accordingly, the trial court correctly determined that the criminal act exclusion bars coverage for Boos's conduct toward these defendants.

With respect to Boos's conduct toward Bulko and Zubor, however, we conclude that the trial court erred by finding that this conduct did not fall within the criminal act exclusion. There is no dispute that Boos's conduct toward these defendants constituted a crime: second-degree criminal sexual conduct. However, the trial court concluded that the criminal acts had not been "proven, admitted or non-contested" within the meaning of the policy because there were no criminal proceedings addressing that conduct. Contrary to the trial court's conclusion, Boos's failure to contest the allegations brought by MMRMA in the instant action, specifically the allegation that his conduct with Bulko and Zubor constituted criminal acts within the meaning of the policy, compels the conclusion that coverage is also precluded as to these defendants.

The policy does not define the terms "proven," "admitted," or "non-contested." An undefined term is accorded its commonly understood meaning, and this Court may rely on

"dictionary definitions to ascertain the plain and ordinary meaning of . . . terms as they would appear to a reader of the contract." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004); *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 294; 778 NW2d 275 (2009). Random House Webster's College Dictionary (2000) defines "admit" in pertinent part as "to concede as valid" or "to acknowledge or confess." To "contest" means "to call in question; challenge" or "to dispute; contend." "Non" is "a prefix meaning 'not,' usu. having a simple negative force, as implying mere negation or absence of something." Thus, "non-contested" means not challenged, disputed, or contended. MMRMA filed the instant action against both Boos and defendants, asserting that Boos's conduct toward each defendant constituted a criminal act within the meaning of the criminal act exclusion and, therefore, that Boos was not entitled to coverage under the policy for claims arising from that conduct. Boos did not answer the complaint. Thus, Boos did not contest MMRMA's allegation that he committed criminal acts toward Bulko and Zubor. Further, by virtue of his default, all well-pleaded allegations against Boos, including that his conduct toward Bulko and Zubor constituted criminal acts, are deemed admitted. *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982); *Dollar Rent-A-Car Sys v Nodel Constr Co*, 172 Mich App 738, 743; 432 NW2d 423 (1988).

Nothing in the language of the exclusion requires that Boos be charged with or convicted of a crime. The language does not limit the proceedings in which the criminal act can be "proven," "admitted," or "non-contested" to only criminal proceedings. Certainly, as a general matter, allegations may be "admitted" or "non-contested" in both criminal and civil proceedings. See MCR 2.111(C) (providing that a responsive pleading must state as to each allegation on which the adverse party relies an explicit *admission* or denial or must *plead no contest* or must state that the pleader lacks knowledge or information sufficient to form a belief as to the truth of the allegation); MCR 6.302. In civil cases, allegations must be "proven" by a preponderance of the evidence. *Martucci v Ballenger*, 322 Mich 270, 274; 33 NW2d 789 (1948). Applying the doctrine of *noscitur a sociis*, the trial court treated the terms "proven," "admitted," and "non-contested" as terms of art particular to criminal proceedings. We recognize that the meaning of contract terms may be deduced from their context under the principle of *noscitur a sociis*. *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007). However, viewing the criminal act exclusion in context, we do not agree with the trial court's treatment of the terms as terms of art particular to criminal proceedings. Nothing in the Coverage Documents suggests that the parties intended the terms to mean anything but their plain and ordinary meaning. Affording these terms their plain and ordinary, commonly-understood meaning, *Twichel*, 469 Mich at 534; *Hastings Mut Ins Co*, 286 Mich App at 294, the terms encompass criminal acts "proven, admitted or non-contested" in both criminal and civil proceedings. Consequently, the criminality of Boos's conduct with Bulko and Zubor has been "non-contested" and "admitted" within the meaning of the policy by Boos's failure to contest the allegations against him in this action.

We reject defendants' assertion that the policy is rendered ambiguous by the criminal act exclusion. A provision in a contract is ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning. *Klapp*, 468 Mich at 469-471; *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). Defendants do not assert that the terms contained in the criminal act exclusion are ambiguous. Rather, they argue that the exclusion becomes ambiguous when read together with

the definition of the coverage provided because the exclusion precludes coverage for conduct that otherwise falls directly within the provision of coverage afforded by the Coverage Documents. However, that coverage would otherwise be provided but for the presence of the exclusion does not render the policy ambiguous; indeed, this is the very nature of coverage exclusions: "[c]overage under a policy is lost if any exclusion in the policy applies to an insured's particular claims." *Hayley v Allstate Ins Co*, 262 Mich App 571, 574; 686 NW2d 273 (2004); see also *Churchman*, 440 Mich at 567; *Century Surety Co*, 230 Mich App at 83. Thus, the Coverage Documents plainly exclude from coverage any claims resulting from criminal acts by Boos where, as here, those claims would otherwise be within the scope of coverage afforded by the Coverage Documents absent the criminal acts exclusion.

We also reject defendants' suggestion that the coverage afforded by the policy is rendered illusory by the criminal act exclusion because Boos's conduct toward defendants both serves as a basis for a suit alleging a violation of civil or constitutional rights and, at the same time, constitutes criminal conduct. This Court has previously rejected the notion that a criminal act exclusion, which necessarily precludes coverage for acts that otherwise would be covered under the policy, renders a policy illusory. See, e.g., *Auto Club Group Ins Co v Booth*, 289 Mich App 606, 614; 797 NW2d 695 (2010) (as to negligent act also constituting a criminal act within the meaning of the exclusion); *Daniel*, 254 Mich App at 4-5 (as to unintentional, negligent act that also constituted criminal act); *Allstate Ins Co v Fick*, 226 Mich App 197, 203-204; 572 NW2d 265 (1997) (noting that, considering the admittedly criminal nature of the act and the all-encompassing criminal acts exclusion at issue, the insured could not reasonably have expected coverage under the circumstances). The policy here afforded coverage to Boos to the extent that he was "acting within the scope of [his] official duties or operations" as a Livingston County Sheriff's Deputy, so long as his actions were not criminal. Thus, the policy afforded actual benefit to Boos, and it did not improperly limit MMRMA's liability. Consequently, the MMRMA policy is not illusory.

Accordingly, the criminal act exclusion precludes coverage for the underlying federal claims brought against Boos by Bulko and Zubor.[3]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane M. Beckering

[3] In light of our findings with respect to the criminal act exclusion, we need not address the plaintiff's other arguments on appeal.