STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. YOR-23-413

METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY

Appellee

v.

SUSAN MCCARTHY, et al.

Appellant

APPEAL FROM THE SUPERIOR COURT (YORK)

REPLY BRIEF OF APPELLANT SUSAN MCCARTHY

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ARGUMENT

I. METROPOLITAN IGNORES THE LANGUAGE OF ITS POLICY AND THE RULES OF INSURANCE CONTRACT CONSTRUCTION

Metropolitan argues that because both ZC and McCormark fall within the definition of "you," the intentional loss and abuse exclusions somehow automatically apply to defeat coverage for McCormack's negligence. (Red Br. at 8, 11). Metropolitan's argument ignores the context in which "you" is used and the plain language of the exclusions, and violates Maine's bedrock rules of insurance contract construction.[1]

A. "You" cannot be read in isolation.

Metropolitan argues that the Policy provides that certain defined words, including "you," have a special meaning and must be given that meaning when used in the Policy. There is no dispute that "you" means what it is defined to mean, but "you," like all other terms, must be read in context and in light of how it is used in the Policy. Jipson v. Liberty Mut. Fire Ins. Co., 2008 ME 57, ¶ 10, 942 A.2d 1213 ("All parts and clauses [of an insurance policy] must be considered together that it may be seen if and how far one clause is explained, modified,

[1] Metropolitan also asserts, again incorrectly, that McCarthy admitted that if McCormack is a "you" then the intentional acts and abuse exclusions apply. (Red Br. at 8). Quite the contrary, McCarthy argued that if McCormack is a "you" as that term is used in each exclusion, then the exclusions apply, but if McCormack does not fit within the scope of "you" as used in the exclusions, then the exclusions do not apply. (*See* Blue Br. at 17, 28).

limited or controlled by the others." (internal quotation marks omitted)); see also Metro. Prop. & Cas. Ins. Co. v. McCarthy, 754 F.3d 47, 49-50 (1st Cir. 2014). The flaw in Metropolitan's argument is that it attempts to read "you" in isolation, based solely on the general definition of "you," and in so doing, turns a blind eye to the other language contained in the exclusions, including language that modifies, explains, and determines the scope of "you."

The "intentional loss" exclusion applies to bodily injury (or property damage) which is reasonably expected or intended, or is the result of an intentional and criminal act. (App. at 115). The exclusion applies even if "you" lack the mental capacity to govern "your" conduct, or if the bodily injury is different than what "you" reasonably expected or intended to cause, and even if the injury is sustained by a different person than "you" intended or expected. (App. at 115).

Reading the exclusion as a whole, and giving meaning to all of the words used, it is clear that the exclusion precludes coverage for the insured (the "you") who expected or intended to cause the bodily injury or when bodily injury results from that insured's intentional and criminal act or omission. Jipson, 2008 ME 57, ¶ 10, 942 A.2d 1213. The plain language of the exclusion demonstrates that it applies to the intentional acts of an intentional actor and has no application to injuries caused by negligence. Sarah G. v. Maine Bonding & Cas. Co., 2005 ME

13, ¶ 10, 866 A.2d 835 (insurance contract exclusions are interpreted in accord "with their obvious contractual purpose").

Similarly, giving meaning to all words used in the "abuse" exclusion demonstrates that it applies to bodily injury inflicted or directed by the insured. (App. at 119); see also McCarthy, 754 F.3d at 49 (ruling that Metropolitan's abuse exclusion applies only to insureds who inflict or direct the abuse). Like the intentional loss exclusion, the abuse exclusion has no application to injuries caused by a negligent act or omission.

B. "You" alone is not enough.

Metropolitan claims that the intentional loss exclusion applies to both ZC and McCormack because bodily injury was reasonably expected or intended by ZC, a person meeting the definition of "you," and similarly, the abuse exclusion applies to both ZC and McCormack because the bodily injury included sexual and physical abuse inflicted by ZC. (Red Br. at 11). Metropolitan fails to identify any act or omission by McCormack that meets the requirements of either exclusion. Nothing in the intentional loss or abuse exclusions makes clear that they apply to defeat coverage for McCormack solely because she is a "you."

Acknowledging later in its brief that "you" standing alone is not enough to automatically apply to all insureds, Metropolitan resorts, as the trial court did, to an interpretation that replaces the word "you" with "an insured." (Red Br. at 18). But

there is no article adjective defining "you" in either exclusion, and as McCarthy argued in her original brief—"You" is not practically identical to "an insured." (Blue Br. at 17-20). Moreover, the interpretation boldly contravenes Maine law by impermissibly expanding the scope of the exclusion in favor of the insurer. Tibbetts v Dairyland Ins. Co., 2010 ME 61, ¶ 23, 999 A.2d 930 (exclusions in insurance policies are disfavored and to be construed strictly against the insurer).

Metropolitan, as the party arguing against coverage, bears the burden of proving that the exclusions apply, which it has failed to do. Progressive Northwest Ins. Co. v. Metro. Prop. & Cas. Ins. Co., 2021 ME 54, ¶ 11, 261 A.3d 920; see also Blue Br. at 16 n.1.

C. An average person in the position of McCormack would not understand that the exclusions apply to her.

Applying bedrock principles of insurance contract construction to the plain language of the exclusions raised by Metropolitan demonstrate that they have no application here. The language of an insurance policy must be read "from the perspective of an average person untrained in either the law or the insurance field in light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured." Concord Gen. Mut. Ins. Co. v. Est. of Bourne, 2021 ME 57 ¶ 15, 263 A.3d 167 (internal quotation marks and citations omitted). Because McCormack did not intend, or reasonably expect, to cause any bodily

injury or commit any intentional or criminal act (and she was never charged with a crime), the exclusion cannot reasonably be applied to her. There is nothing in the language of the intentional loss exclusion that suggests that it applies to the bodily injury caused by the negligence of McCormack. And because McCormack did not inflict or direct any sexual molestation or abuse, the abuse exclusion cannot reasonably be read to apply to her. An average person in the position of McCormack, including one who understood that she was a "you" under the Policy, would read the language of each exclusion and conclude that neither applies to her, because she did not intend or expect to cause any bodily injury, commit any intentional or criminal act or omission, or inflict or direct any abuse.

D. Other provisions of Metropolitan's policy "clarify" when it intended "you" to apply more broadly.

Unable to meet its burden of proof, or overcome bedrock principles of insurance contract construction, Metropolitan's argument runs into another, more problematic, obstacle. Metropolitan expanded the scope and application of some of its exclusions and policy provisions by making clear that the act of one "you" defeats coverage for all insureds, but has not done so in the exclusions it relies upon here.

For instance, the intentional loss provision of Metropolitan's Property Coverages provides:

A. Intentional Loss, meaning any loss arising out of any intentional or criminal act committed:

1. by **you** or at **your** direction; and
2. with the intent to cause a loss.

This exclusion applies regardless of whether **you** are actually charged with or convicted of a crime.

In the event of such loss, no one defined as **you** or **your** is entitled to coverage, even people defined as **you** or **your** who did not commit or conspire to commit the act causing the loss.

(App. at 106) (emphasis added).[2]

In the intentional loss exclusion of its Property Coverages, Metropolitan makes clear that the act of one "you" impacts coverage for all insureds, and that in the event of an intentional or criminal act "no one defined as you or your is entitled to coverage." But there is no similar language in the intentional loss or abuse exclusions in Metropolitan's Liability Coverages that are at issue here.

Metropolitan claims that it added the language "clarifying that no one defined as 'you' is entitled to coverage, even those who do not commit the act causing the loss" to the intentional loss exclusion of its Property Coverages. (Red Br. at 17). Doubling down on its argument that "you" is enough to apply the

[2] In the Maine amendatory endorsement to the Policy, Metropolitan added the following paragraph to this exclusion:

> This exclusion does not apply, with respect to loss to covered property caused by fire, to any person defined as "**you**" who does not commit or conspire to commit, any act that results in loss by fire. **We** cover such insured person only to the extent of that person's legal interest but not exceeding the applicable limit of liability.

(App. at 131) (emphasis added).

intentional loss and abuse exclusions to all insureds, Metropolitan claims that "[n]owhere does the policy change the definition of 'you' or 'your.'" (Red Br. at 17).

However, as demonstrated above, "you" alone is not enough to expand the application of the exclusions to "all insureds." Rather, it is this "clarifying" language, not the definition of "you," that expands the scope and application of the intentional loss exclusion in the property section to all insureds.

Other parts of Metropolitan's Policy contain similar language expanding the scope and application of certain provisions to "all insureds." For instance, the General Conditions of the Policy state that:

> 2. **Concealment or Fraud**. If any person defined as **you** conceals or misrepresents any material fact or circumstance or makes any material false statement or engages in fraudulent conduct affecting any matter relating to this insurance or any loss for which coverage is sought, whether before or after a loss, no coverage is provided under this policy to any person defined as **you.**

(App. at 126) (emphasis added).

. . .

> 13. **Injury of an Insured. We** do not cover **bodily injury** to any insured within the meaning of Part 1 of the definition of **you**. This exclusion applies regardless of whether claim is made or suit is brought against **you** by the injured person or by a third party seeking contribution or indemnity.

(App. at 118) (emphasis added).

The addition of "any person defined as **you**" and "any insured within the meaning of Part 1 of the definition of **you,**" clearly expands the scope and application of these provisions to all insureds. The significance to the present matter, of course, is the absence of this, or any similar language, expanding the scope and application of the intentional loss and abuse exclusions to "all insureds." Without it, the exclusions do not apply to McCormack. Because Metropolitan has used different language in different parts of its policy, it must be presumed that it intended to cover different situations. See Hanover Ins. Co. v. Crocker, 1997 ME 19, ¶ 8, 688 A.2d 928; see also Evans v. Metro. Cas. Ins. Co., No. 3:16-CV-24, 2016 WL 8124248, at *9 (M.D. Pa. Oct. 19, 2016) ("The use of different language in different parts of the policy is an indication that Metropolitan understood how to exclude motorcycles from Exclusion A, but for whatever reason chose not to do so. . . . It would be improper for the Court to rewrite Metropolitan's policy to reform the language to what Metropolitan now claims it meant.").

II. AT BEST FOR METROPOLITAN, ITS EXCLUSIONS ARE AMBIGUOUS

At best for Metropolitan, the application and scope of the exclusions are ambiguous, and must be construed against Metropolitan and in favor of coverage. Foremost Ins. Co. v. Levesque, 2005 ME 34, ¶ 7, 868 A.2d 244 ("Any ambiguity in an insurance policy must be resolved against the insurer and in favor of coverage."); see also Blue Br. at 26.

While McCarthy has argued that the exclusions clearly do not apply to McCormack, to the extent the Court determines that they are reasonably susceptible to different interpretations, then the exclusions are ambiguous and must be construed against Metropolitan.

III. METROPOLITAN'S RELIANCE ON *RODICK* AND *COLMEY* IS MISPLACED

Metropolitan also relies heavily on two cases from New York federal courts, which it says are "more instructive" of "how courts have interpreted this same Metropolitan policy language under similar fact patterns." (Red Br. at 14). However, in both cases, Metropolitan's motions were **unopposed**. Metro. Prop. and Cas. Ins. Co. v. Rodick, 1:21-CV-1039 (GTS/ATB), 2023 WL 6122849, at *3 (N.D.N.Y. Sept. 19, 2023) ("None of the Defendants submitted a response to Plaintiff's motion for summary judgment. . . . Again, Defendants Adam and Stephanie Rodick did not submit a response to Plaintiff's motion for default judgment."); Metro. Prop. and Cas. Ins. Co. v. Colmey, 18 CV 9259 (VB), 2019 WL 6184262, at *1 (S.D.N.Y. Nov. 20, 2019) ("Now pending is plaintiff's unopposed motion for judgment on the pleadings.").[3] As the *Rodick* Court explained: "What the non-movant's failure to respond to the motion [for summary judgment] does is lighten the movant's burden. Similarly, in this District, where a

[3] This is the first time that Metropolitan has cited Colmey during the course of this litigation, notwithstanding that the decision was issued nearly five years ago.

non-movant has willfully failed to respond to a movant's properly filed and facially meritorious memorandum of law, the non-movant is deemed to have 'consented' to the legal arguments contained in that memorandum of law under Local Rule 7.1(b)(3)." 2023 WL 6122849, at *5. Metropolitan effectively scored two "empty netters" without any goalie in net, which is far from the case before this Court. Given these decisions were issued without the benefit of any opposition briefing for these courts' consideration, they are far from "instructive" and should be given no weight by this Court.

IV. THE JOINT OBLIGATIONS LANGUAGE IN THE POLICY SHOULD HAVE NO BEARING ON HOW THIS COURT INTERPRETS THE EXCLUSIONS

Metropolitan also asserts—for the first time in the trajectory of this dispute spanning over 10 years—in a footnote: "And the parties agreed in the policy that the acts of one insured would be binding on any other insured." (Red. Br. at 20 n.3 (citing App. at 94)). Metropolitan and McCormack did no such thing in connection with the application of exclusion provisions contained in the Policy.

Although Metropolitan does not cite the language from the Policy that it relies on to support this assertion, McCarthy assumes that it is focused on the following language contained in the general declarations section of the Policy: "This means that the responsibilities, acts and failures to act of a person defined as **you** will be binding upon another person defined as **you**." (App. at 94). As a

threshold matter, the Court should deem this newly formed argument as waived. Foster v. Oral Surgery Assocs., P.A., 2008 ME 21, ¶ 22, 940 A.2d 1102 ("An issue raised for the first time on appeal is not properly preserved for appellate review."). To preserve an issue for appeal, the issue must first be presented to the trial court in a timely fashion; "[o]therwise, the issue is deemed waived." Homeward Residential, Inc. v. Gregor, 2017 ME 128, ¶ 9, 165 A.3d 357.

However, even if the Court were to consider this newly formed argument, it should swiftly reject it. Again reading Policy terms in isolation, Metropolitan ignores the preceding sentences of the declarations section of the Policy, which state: "The Declarations are an important part of this policy. By acceptance of this policy, **you** agree that the statements contained in the Declarations and in any application are **your** true and accurate representations. This policy is issued and renewed in reliance upon the truth of such representation. The terms of this policy impose joint obligations on all persons defined as **you**." (App. at 94). "Joint obligations" is not a defined term under the Policy. The next sentence of this section of the Policy (i.e., the one that Metropolitan presumably relies on) states "**[t]his means** that . . ." (emphasis added), which is intended to refer back to the previous reference to "joint obligations." Again, these sentences are found in the declarations section of the Policy. There is nothing in any of these sentences to suggest that they have anything to do with the exclusion provisions in the Policy,

let alone how "you" is to be applied when used in an exclusion. Rather, they are centered on declarations and representations made in connection with Metropolitan's issuance of the Policy. Metropolitan also ignores the subsequent sentences that follow the language it relies on, further confirming that the joint obligations language has nothing to do with the exclusion provisions, including that: "The exact terms and conditions are explained in the following pages." (App. at 94). Alternatively, and at best, the language is ambiguous, and all ambiguities must be construed in favor of the insured.

McCarthy could not locate any case in Maine in which a court construed a "joint obligations" provision in an insurance policy. Instead, she found a split in authority on how other courts have interpreted similar language in relation to exclusions provisions. (See Red Br. at 10-11 (citing the Fairfull decision in which the court found certain "joint obligations" language to preclude coverage for all insureds)). McCarthy respectfully suggests that, should the Court decide to take up this issue rather than deem it waived, it should not follow Metropolitan's approach or Fairfull, which endorses a broad rather than a narrow interpretation of exclusions, in violation of Maine law. Instead, this Court should follow those lines of cases that have interpreted similar language narrowly, by finding that "joint obligations" language in an insurance policy did not defeat coverage for all insureds. See, e.g., Wasik v. Allstate Ins. Co., 813 N.E.2d 1152, 1157-58 (Ill. App.

Ct. 2004) (reasoning that where the language "an insured person" was at issue, exclusions must be ready narrowly and the "'joint obligations' language is not a part of any of the exclusionary clauses but is instead found among the general policy declarations. We agree with plaintiff that one plausible construction of the joint obligations clause is that it refers to the general obligations to pay premiums and to take certain actions before and after a loss and that a reasonable insured would not understand the clause to exclude coverage for all insureds when coverage is excluded for one insured.");[4] C.P. v. Allstate Ins. Co., 996 P.2d 1216, 1226-27 (Alaska 2000) ("[I]t is not clear how the joint obligations clause even bears on the exclusionary language critical here. . . . We conclude that the attribution is irrelevant to either exclusion where the claims against the insureds who claim coverage are based on their negligent, unintentional, noncriminal conduct."); see also cf. Metro. Prop. and Cas. Ins. Co. v. Meza, No. 18-cv-00505-MEH, 2018 WL 11435257, at *4 (D. Colo. Oct. 12, 2018) (rejecting Metropolitan's interpretation that fraud committed by one insured was imputable to other insureds under "joint obligations" language of policy and reasoning that given "nothing in the Amended Complaint alleges the 'joint obligations' imposed

[4] Like in Wasik, in the Policy at issue before this Court, one sentence after the joint obligations language, it states: "This policy is issued and renewed in reliance upon payment of the required premium." (App. at 94).

by the Policy include intentional torts, the Policy does not impute legal liability for a tort committed by one person defined as 'you' to all such people").

V. METROPOLITAN MISINTERPRETS THE FIRST CIRCUIT DECISION

Ironically (and inaccurately), Metropolitan also argues that McCarthy did not "provide the full context" concerning the First Circuit's decision in *McCarthy* concerning Metropolitan's duty to defend. (Red Br. at 18). Metropolitan misconstrues the First Circuit's decision, in an attempt to suggest that the First Circuit previously found in Metropolitan's favor on the issue presently before this Court, which, obviously, it did not. If it had, we would not be here. The First Circuit did not conclude that if one insured's conduct triggered an exclusion as to him or her, that meant that everyone defined as "you" would also be subject to the exclusion. Rather, the First Circuit rejected Metropolitan's argument that a non-insured individual's conduct could trigger the abuse exclusion, and instead held that only an insured could trigger the exclusion. McCarthy, 754 F.3d at 49. As McCarthy pointed out in her opening brief, the First Circuit did not reach the issue of whether the exclusion would apply only to *the* insured who inflicted or directed the abuse, or to all insureds if one of them inflicted or directed the abuse, and the district court below explicitly declined to decide the issue. (Blue Br. at 29 & n.3). The First Circuit simply did not say what Metropolitan wanted it to say.

CONCLUSION

For these reasons and those stated in McCarthy's opening brief, Appellant respectfully requests that the Court vacate the ruling of the trial court with respect to the trial court's determination that Metropolitan's Intentional Loss and Abuse Exclusions bar coverage for the McCarthys' claims, and remand to the trial court for the entry of Judgment against Metropolitan on all counts of its Declaratory Judgment action, and in favor of McCarthy on Counts I and II of her Counterclaim, with pre-judgment and post-judgment interest, and for further proceedings with respect to Count III of the Counterclaim and attorney's fees.

Dated at Portland, Maine this 12th day of April, 2024.

/s/ Michael J. Donlan

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Reply Brief of Appellant Susan McCarthy complies with the page and word limits set forth in Rule 7A(f)(1).

/s/ Michael J. Donlan

Dated: April 12, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2024, I caused to be served, on all counsel of record, one electronic copy of the foregoing brief by e-mail and two printed copies by first-class mail.

/s/ Michael J. Donlan

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