NO. 23339

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff/Third-Party Defendant-Appellant and Cross-Appellee v. ROYAL INSURANCE COMPANY OF AMERICA, Defendant/Third-Party Plaintiff-Appellee and Cross-Appellant, DESTINATION RESORTS MANAGEMENT, INC., Defendant/Third-Party Plaintiff-Appellee, JOHN DOES 1-50, JANE DOES 1-50, DOE CORPORATIONS 1-50, DOE PARTNERSHIPS 1-50, AND DOE GOVERNMENTAL ENTITIES 1-50, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 99-0800)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

On October 19, 1995, The Association of Apartment Owners of Polo Beach Club (Polo Beach) commenced this lawsuit (Civil No. 95-0800) against its independent rental management contractor, Destination Resorts Management, Inc. (Destination), and Destination's insurer, Royal Insurance Company of America (Royal), claiming that Destination -- and Royal by virtue of its insurance coverage of Destination as named insured and Polo Beach as additional insured -- breached a duty to defend and indemnify Polo Beach in connection with a settlement payment made on behalf of Polo Beach to the plaintiffs in a separate, underlying tort lawsuit, Tom Heiser, et al. v. Association of Apartment Owners of the Polo Beach Club, et al., Civil No. 92-0390(1) (the Heiser

lawsuit). The Heiser lawsuit was filed by a Polo Beach rental guest for serious injuries he had suffered in a shore break adjacent to the Polo Beach premises.

In this case, Polo Beach's insurer, State Farm Fire and Casualty Company (State Farm), substituted for Polo Beach as the real party in interest. State Farm appeals the February 24, 1998 partial summary judgment, entered by the circuit court of the second circuit,[1] that Royal had no duty to indemnify Polo Beach in connection with the Heiser lawsuit. We affirm.

I. Background.

Destination is a company that manages condominium rentals. The Polo Beach Club is a condominium apartment project located on the island of Maui. Polo Beach agreed to have Destination manage the rentals of some of its condominium units. Accordingly, on November 24, 1989, Destination and Polo Beach entered into an agreement, the Front Desk Lease, effective January 1, 1990. The pertinent provisions of the Front Desk Lease read as follows:

> This Lease is entered into this 24th day of November 1989 by and between the Polo Beach Club Association of Apartment Owners (AOAO) (Lessor), and Destination Resorts Management Inc. (DRM), a California Corporation (Lessee), and shall become effective January 1, 1990.
> . . . .
> The Lessor Agrees to Provide the Following:
> 1. Exclusive use of the Basement Storage room for the specific and limited purpose of

[1] The Honorable E. John McConnell, judge presiding.

> housekeeping, light maintenance and storage to support the contemplated rental operation of the Lessee. . . .
>
> 2. Exclusive use of a portion of the Lessor's presently used office area delineated as "Desk & Registration" within the Lobby area . . . . In addition thereto, the Shared use of the "Lavatory[.]"
>
> . . . .
>
> 13. Lessee agrees to carry Liability, Personal, and Bodily Insurance coverage in the amount of not less than Five Million dollars (5,000,000) with Lessor named as an additional insured. Prior to the inception of this Lease, Lessee will provide a Certificate of Insurance for review and approval by Lessor. Additionally, Lessee agrees to defend, protect and indemnify Lessor from all suits of any kind that occur as a result of Lessee's operations with respect to the specific leased facilities identified in Sections 1 and 2 of this Lease.

(Underlining and capitalization in the original.)

Under a separate, standard agreement with each of the individual owners of the condominium units to be rented, Destination was to provide "reservation, front desk, and housekeeping services." Destination also agreed to perform repair and maintenance on the unit, to market the unit, and to provide rental income and expense accounting.

Destination had been servicing the Polo Beach rentals for about six months when, on June 6, 1990, Nebraska orthopedic surgeon Tom Heiser (Heiser), who was renting one of the

condominium units while on vacation with his family, was seriously injured while boogie boarding in the ocean adjacent to the Polo Beach Club. He was apparently slammed into the sand and rendered unconscious by a wave, resulting in quadriplegia.

According to Polo Beach,

> there is no dispute that Heiser was staying in a unit managed by Destination, that he checked in at the check-in desk operated by Destination, and that Destination gave him a packet of information which contained a warning about ocean conditions.

Opening Brief at 17. The referenced warning was provided by Polo Beach and placed by Destination in all of the rental units along with other materials in an informational packet. The warning was printed on one side of a piece of paper. The other side contained a listing of telephone charges. The warning read:

> WARNING!
>
> STRONG TIDES AND ROUGH SURF ARE ESPECIALLY HAZARDOUS AT THIS TIME OF YEAR. UNDER CURRENTS CAN BE VERY DANGEROUS AS THEY ARE OFTEN NOT NOTICEABLE FROM THE SHORE. PLEASE USE EXTREME CAUTION WHEN SWIMMING IN FRONT OF POLO BEACH. SWIMMING IS AT YOUR OWN RISK. WE HOPE YOU HAVE A SAFE AND RESTFUL STAY WITH US!
>
> MAHALO,
>
> POLO BEACH MANAGEMENT

(Typesetting in the original.)

On May 20, 1992, Heiser and his family filed the Heiser lawsuit (Civil No. 92-0390(1)) against Polo Beach, Destination, the owners of the condominium unit in which the Heisers sojourned, and the State of Hawai‘i, alleging that the defendants negligently failed to warn Heiser of dangerous ocean conditions

adjacent to the Polo Beach Club. The Heiser lawsuit asserted only direct claims of negligence against the defendants. There were no allegations that any of the defendants was vicariously liable or liable under *respondeat superior*. Polo Beach later filed a cross-claim against Destination.

Polo Beach tendered the defense of the Heiser lawsuit to Destination via letter dated June 29, 1993, and renewed the tender on November 3, 1993. Polo Beach referenced "Paragraph 13 contained on page 5 of the [Front Desk Lease]," the provision relating to insurance, defense and indemnification (quoted above), as the basis for its tender.

On February 14, 1994, Destination filed a motion for summary judgment on the Heisers' complaint and Polo Beach's cross-claim. Apparently, the Heisers joined in Destination's motion, thereby acquiescing in the entry of summary judgment in favor of Destination on their complaint. At the February 25, 1994 hearing on the motion, the Heisers' attorney explained why he had determined there was no basis for liability on the part of Destination. Despite opposition from Polo Beach, the court granted Destination summary judgment on the Heisers' complaint and on Polo Beach's cross-claim, orally ruling that "there's no genuine issue of fact here, but that the landlord -- I'm sorry, but that Destination did not know or have reason to know of the dangerous conditions." The written order granting Destination's

motion for summary judgment was filed on March 8, 1994.

Destination relied on the aforementioned summary judgment when, on March 2, 1994, it rejected Polo Beach's tender of defense and indemnification and suggested that Polo Beach deal directly with Royal. In a May 17, 1994 letter to Polo Beach, Royal took the position that "there is no coverage for Polo Beach Club under the Royal policy for the Heiser claim, because the incident did not arise out of our insured's operations."

On February 7, 1995, the Heisers and Polo Beach settled the Heiser lawsuit, with State Farm paying $1.5 million dollars on behalf of Polo Beach. Polo Beach then assigned all of its rights against Destination and Royal to State Farm. On December 12, 1996, final judgment was entered in the Heiser lawsuit.[2]

On October 19, 1995, Polo Beach filed this action against Destination and Royal. Pertinent provisions of Polo Beach's first amended complaint follow:

> 7. On November 24, 1989, [Polo Beach] entered

[2] On September 13, 1996, in Civil No. 92-0390(1), The Association of Apartment Owners of Polo Beach Club (Polo Beach) filed a notice of appeal of, among other things, the court's March 8, 1994 order granting Destination Resorts Management, Inc. (Destination) summary judgment on the complaint and Polo Beach's cross-claim. The supreme court dismissed the appeal for lack of appellate jurisdiction on March 20, 1997. The order of dismissal stated, in relevant part, that "[Polo Beach] is not aggrieved by the March 8, 1994 order determining that [Polo Beach] . . . is not entitled to contribution and indemnification against [Destination] because no judgment of liability was entered against [Polo Beach] . . . and thus, . . . Appellant lacks standing to appeal."Polo Beach's motion for reconsideration was denied by the supreme court because "it appears that [Polo Beach's] settlement with the plaintiffs provided a basis for pursuing the contribution claims before the circuit court, but the settlement does not provide a basis for appealing the contribution claims when no judgment of liability was ultimately entered against [Polo Beach]."

into [the Front Desk Lease] with [Destination].

8. The [Front Desk] Lease required Destination to carry liability, personal and bodily insurance coverage in an amount not less than five million dollars ($5,000,000) with [Polo Beach] named as an additional insured.

9. Through the [Front Desk] Lease, [Destination] also agreed to defend, protect and indemnify [Polo Beach] from suit of any kind.

10. [Destination] took out a general liability insurance policy with [Royal] in which [Polo Beach] was designated as an additional insured.

11. Said policy was in force from February 1, 1990 through February 1, 1991.

12. [Royal] had a duty to defend and indemnify [Polo Beach] as part of its insurance contract with [Destination].

13. On June 6, 1990, a guest at the Polo Beach Club was injured while engaging in activities in waters fronting the Polo Beach Club.

14. A Complaint was filed in the Circuit Court of the Second Circuit on behalf of the injured guest. [Polo Beach] was named as one of the defendants in said action.

15. On June 29, 1993, [Polo Beach] tendered defense of said action to [Royal].

16. Although [Polo Beach] was a named insured, [Royal] wrongfully and willfully refused to abide by its obligations, and refused tender of said defense by [Polo Beach].

17. As a direct result of [Royal's] breach of duty to defend [Polo Beach], legal costs were expended in defense of the aforementioned action on behalf of [Polo Beach].

18. As a direct result of [Royal's] breach of duty to defend [Polo Beach], settlement monies in settlement of the aforementioned action were paid by or on behalf of [Polo Beach] in amounts greater that what would have been paid if [Royal] had not breached its obligations to [Polo Beach].

19. As a direct result of [Royal's] breach of duty to defend [Polo Beach], attorney fees and costs were incurred to defend [Polo Beach] in the aforementioned action, in amounts greater than what would have been paid if [Royal] had not breached its obligations to [Polo Beach].

20. As part of the [Front Desk Lease], [Destination] had a duty to defend, protect and indemnify [Polo Beach] from all suits of any kind occurring as a result of [Destination's] operations with respect to [Polo Beach's] facilities: 1) basement storage room, and 2) the office area delineated "Desk and Registration."

21. The [Front Desk Lease] was in effect on June 6, 1990, when a guest at the Polo Beach Club was injured while engaging in activities in waters fronting the Polo Beach Club.

> 22. The above-mentioned guest was a customer of the operation maintained by [Destination] in [Polo Beach's] facilities at the time of the above-mentioned injury.
>
> 23. [Destination] breached its duty to [Polo Beach] when it failed and/or refused to defend, protect, and indemnify [Polo Beach] from the suit filed by the injured guest.
>
> 24. As a direct result of [Destination's] breach of duty to defend, protect and indemnify [Polo Beach], settlement monies in settlement of the aforementioned action were paid by or on behalf of [Polo Beach] in amounts greater than what would have been paid if [Destination] had not breached its obligations to [Polo Beach].
>
> 25. As a direct result of [Destination's] breach of duty to defend, protect, and indemnify [Polo Beach] in the aforementioned action, attorney fees and costs were incurred to defend [Polo Beach], in amounts greater than what would have been paid if [Destination] had not breached its obligations to [Polo Beach].
>
> WHEREFORE, [Polo Beach] prays as follows:
>
> A. That judgment be entered in favor of [Polo Beach] and against [Royal] and [Destination] for one million five hundred thousand dollars ($1,500,000) and such additional amounts as are proven.
>
> B. For special and general damages as proven at trial.
>
> C. For an award of its costs, attorney's fees, interest, and such other and further relief as to this court seems just and proper.

(Capitalization in the original.)

Royal covered Destination, as a named insured, under its commercial umbrella policy (Policy No. 038758). The policy in effect from February 1, 1990 to February 1, 1991 provided insurance against, among many other things, bodily injury liability. On September 11, 1990, Royal issued a certificate of insurance that listed the certificate holder as

> ADDITIONAL INSURED
> POLO BEACH CLUB
> 20 McKenna [(sic)] Road
> Mckenna [(sic)], Maui, HI 96753.

(Capitalization in the original.) Under the heading of

"DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/RESTRICTIONS/ SPECIAL ITEMS[,]" the certificate of insurance indicated, "Re: Leased space at 20 McKenna [(sic)] Road, McKenna[(sic)], Maui, HI[.]" (Typesetting in the original.)

Apparently, at the time of Heiser's June 6, 1990 accident, Destination had yet to obtain additional insured coverage for Polo Beach, as required by the Front Desk Lease. The September 11, 1990 certificate of insurance represented the first time Destination acquired additional insured coverage for Polo Beach. However, Royal back-dated the additional insured coverage to the coverage period February 1, 1990 to February 1, 1991. Polo Beach was therefore covered as Royal's additional insured -- albeit retroactively -- as of the date of Heiser's June accident. This was confirmed by the May 17, 1994 letter from Royal to Polo Beach, mentioned above, to which the September 11, 1990 certificate of insurance was attached. The letter represented that the certificate of insurance "add[ed] Polo Beach Club to the policy as an additional insured, in compliance with the contract requirement."

It was not until the next renewal of the policy, effective February 1, 1991 to February 1, 1992, that Royal included an endorsement to the policy relating to additional insured parties. The endorsement read as follows:

ADDITIONAL INSURED PROVISION

ANY ENTITY YOU ARE REQUIRED IN A WRITTEN CONTRACT

> (HEREINAFTER CALLED ADDITIONAL INSURED) TO BE NAMED AS AN INSURED IS AN INSURED BUT ONLY WITH RESPECT TO LIABILITY ARISING OUT OF YOUR PREMISES, 'YOUR WORK' FOR THE ADDITIONAL INSURED IN CONNECTION WITH THE GENERAL SUPERVISION OF 'YOUR WORK'.
>
> ANY OTHER PARTY TO WHOM A CERTIFICATE OF INSURANCE HAS BEEN ISSUED AS AN ADDITIONAL INSURED IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF SAID DOCUMENT.

(Capitalization in the original.)

On April 17, 1997, Destination and Royal filed a motion to dismiss Polo Beach's complaint as against Destination or, in the alternative, for partial summary judgment thereon. The motion requested dismissal of all of Polo Beach's claims against Destination "on the grounds of res judicata as all issues have been disposed and/or decided in the appeal [in the Heiser lawsuit.]" (Underlining in the original.) In particular, Destination and Royal argued that the summary judgment in favor of Destination in the Heiser lawsuit "held that [Destination] was not contractually obligated to contribute to and/or indemnify Polo Beach for the accident as it owed no legal duty to the Heisers to warn of and/or prevent [Heiser's] accident[,]" and hence, settled the question whether Destination breached its duty "to defend, protect, and indemnify [Polo Beach]" in Destination's favor once and for all. The court granted the motion on June 19, 1997.

On January 21, 1998, Royal filed the motion to dismiss and/or for partial summary judgment on the issue of its duty to indemnify Polo Beach that is the subject of this appeal. Royal

contended that "[w]hen the additional insured is provided coverage with respect to liability arising only out of the operations performed for the additional insured by the named insured at a designated location, the additional insured is not entitled to be indemnified for its own negligence absent any liability on the part of the named insured." Royal also pointed out that State Farm, and not its insured Polo Beach, paid the Heiser settlement and received a corresponding assignment of rights from Polo Beach. Hence, Royal argued, "[State Farm] is not a party to this action and should be either substituted as a real party in interest . . . or the instant suit should be dismissed."

Royal submitted two affidavits in connection with its motion. The first one was from Gregg Dennington (Dennington), of Van Gilder Insurance Corporation, the insurance agent who procured the insurance coverage for Destination from 1990 to 1992. He asserted that:

> 5. It was the intent of [Destination] to have Polo Beach Club as an additional insured for purposes of liability arising out of the operations of named insured [Destination] at the leased space at 20 Makena Road, Makena, Maui, Hawaii.
>
> 6. This is evidenced by the entry "Re: Leased space at 20 Makena Road, Makena, Maui, HI" in the category of "Description of Operations/Locations/ Vehicles/Restrictions/Special Items."
>
> 7. The Additional Insured Certificate was not issued to cover Polo Beach Club for Polo Beach Club's own negligence or liability.

The second affidavit was from Maynard Torchiana (Torchiana), who was the vice-president and general manager of Destination in

1990. He similarly contended:

> 3. Pursuant to our companies' obligation under the . . . Front Desk Lease, a request was made to our insurance agent, Van Gilder Insurance Corporation, to add Polo Beach Club as an additional insured on a Royal Insurance policy issued to [Destination] effective 2/1/90 to 2/1/91.
>
> 4. It was intent of [Destination] to have Polo Beach Club identified as an additional insured for purposes of liabilty arising out of the operations of the named insured [Destination] at the leased space at 20 Makena Road, Makena, Maui, Hawaii.
>
> 5. [Destination] did not intend to have Polo Beach Club covered under said Royal Insurance Policy for Polo Beach Club's own negligence or liability.
>
> 6. The intent of [Destination] in having Polo Beach Club identified as an additional insured for only purposes of liability arising out of the operations of the named insured [Destination] at the leased space at 20 Makena Road, Makena, Maui, Hawaii is consistent with the requirement of the . . . Front Desk Lease that I executed on November 24, 1989.

On February 10, 1998, the court held a hearing on Royal's motion. The court filed its written order granting Royal's motion on February 24, 1998. It concluded, generally, that "there are no genuine issues of material fact in dispute and that [Royal] is entitled to judgment as a matter of law." The court also granted the Royal's motion to dismiss the complaint for Polo Beach's failure to bring the suit under State Farm's name as the real party in interest, unless State Farm was substituted for Polo Beach within ten days of the date of the order. The parties stipulated to State Farm's substitution on February 27, 1998.

After it decided subsequent motions filed by the parties, the court entered a final judgment on March 9, 2000. On March 31, 2000, State Farm filed its notice of appeal "from the

Final Judgment entered herein on March 9, 2000, and, more specifically, from the **Order Granting [Royal's] Motion To Dismiss Complaint And/Or For Partial Summary Judgment On The Issue Of Duty To Indemnify, Filed January 21, 1998** (sic), filed herein on February 24, 1998[.]" (Bold emphases and parenthetical in the original.)

II. Points of Error on Appeal.

State Farm stakes out the following points of error on appeal:

> 1. . . . . It was error for the lower Court to look beyond the "four corners" of the written insurance policy to apply a limitation to coverage found in an exclusion that was not part of the subject policy.
> . . . .
> 2. . . . . It was error for the lower Court to rely upon the insurer's subsequently issued exclusion as evidence of its intent to limit coverage to less than that set forth in the Certificate of Insurance and the policy in force at the time of the claimed loss.
> . . . .
> 3. It was error for the lower Court to allow an insurer to enforce an exclusion which [Royal] may have intended to include in the subject policy, but which was not actually incorporated into the policy until a subsequent renewal period.
> . . . .
> 4. It was error for the lower Court to consider extrinsic evidence to determine the "reasonable expectations of the parties" in such a way as to negate the clear language of the policy.
> . . . .
> 5. Even if the exclusion claimed by [Royal] is valid, the underlying claims "arose" out of Destination's premises or work within the meaning of the claimed exclusion.

Opening Brief at 6-9.

III. Discussion.

In essence, the issue on appeal is whether Royal had an obligation under its insurance policy to indemnify Polo Beach, an

additional insured, pertaining to the settlement in the Heiser lawsuit. The court in this case granted Royal's motion for partial summary judgment, concluding that no such duty existed as a matter of law.

Appellate courts "review a circuit court's grant or denial of summary judgment *de novo* under the same standard applied by the circuit court." Dairy Rd. Partners v. Island Ins. Co., Ltd., 92 Hawai'i 398, 411, 992 P.2d 93, 106 (2000) (brackets and citation omitted). "[S]ummary judgment will be sustained only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." First Ins. Co. of Hawaii, Inc. v. State, 66 Haw. 413, 416, 665 P.2d 648, 651 (1983) (citations and internal quotation marks omitted). See also Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c) (2001).

> A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Dairy Rd., 92 Hawai'i at 411, 992 P.2d at 106 (brackets, citations and internal quotation marks and block quote format omitted).

First, we acknowledge that "insurance policies are subject to the general rules of contract construction[.]" Dairy Rd., 92 Hawai'i at 411, 992 P.2d at 106 (brackets, citation and

internal quotation marks omitted). Thus, "liability insurers have the same rights as individuals to limit their liability, and to impose whatever conditions they please on their obligation, provided they are not in contravention of statutory inhibitions or public policy." First Ins., 66 Haw. at 423, 665 P.2d at 655 (citations and internal quotation marks omitted). Consequently, "[a]n insurer has a duty to indemnify its insured only if liability is established for conduct that actually falls within the scope of the policy coverage." State Farm Fire & Casualty Co. v. Gorospe, 106 F.Supp.2d 1028, 1030 (D. Haw. 2000) (citations omitted).

In determining the scope of policy coverage, certain general rules of construction obtain:

> In the context of insurance coverage disputes, we must look to the language of the insurance policies themselves to ascertain whether coverage exists, consistent with the insurer and insured's intent and expectations. In so doing, we shall construe insurance policies according to their plain, ordinary, and accepted sense in common speech unless it appears that a different meaning was intended. Moreover, this court has stated that it is committed to enforce the objectively reasonable expectations of parties claiming coverage under insurance contracts, which are construed in accord with the reasonable expectations of a layperson.

Hawaiian Ins. & Guar. Co., Ltd. v. Financial Sec. Ins. Co., 72 Haw. 80, 87-88, 807 P.2d 1256, 1260 (1991) (citations and internal quotation marks omitted; emphasis added). Cf. 2 Couch on Ins. § 22:7 (3d ed.) ("The object of the interpretation or construction of an insurance policy is to determine the intent of the parties, or their mutual understanding as expressed in the

writing, so that it may be given effect according to their real purpose and intention." (Footnotes omitted; emphasis added.)).

The catalyst for Destination's procurement of coverage of Polo Beach as Royal's additional insured was enumerated paragraph 13 of the Front Desk Lease between Polo Beach, as lessor, and Destination, as lessee:

> 13. Lessee agrees to carry Liability, Personal, and Bodily Insurance coverage in the amount of not less than Five Million dollars (5,000,000) with Lessor named as an additional insured.
>
> Prior to the inception of this Lease, Lessee will provide a Certificate of Insurance for review and approval by Lessor.
>
> Additionally, Lessee agrees to defend, protect and indemnify Lessor from all suits of any kind that occur as a result of Lessee's operations with respect to the specific leased facilities identified in Sections 1 and 2 of this Lease [(exclusive use of the basement storage room and a portion of the registration desk in the lobby, and shared use of a lavatory)].

(Emphases added.) Destination did provide additional insured coverage for Polo Beach through Royal, albeit after the Heiser accident and retroactively. This is reflected in the September 11, 1990 certificate of insurance, addressed to "ADDITIONAL INSURED POLO BEACH CLUB" and containing the specification: "Re: Leased space at 20 McKenna [(sic)] Road, McKenna [(sic)], Maui, HI[,]" and the affidavits of Dennington and Torchiana.

Although it is clear that the Front Desk Lease required Destination to obtain additional insured coverage for Polo Beach

in order to effectuate and insure Destination's obligation under the Front Desk Lease "to defend, protect and indemnify [Polo Beach] from all suits of any kind that occur as a result of [Destination's] operations with respect to the specific leased facilities[,]" State Farm urges us to interpret Polo Beach's additional insured coverage much more broadly.

Specifically, State Farm argues on appeal that, "[h]aving identified [Polo Beach] as an additional insured, [Royal] is now obligated to provide the full protection of the policy to its additional insured, because there is no clear exclusion contained in the policy." Opening Brief at 11. And that, "having failed to set forth any clear exclusion on the [certificate of insurance, Royal] is estopped from any such exclusion gleaned from the policy itself." Opening Brief at 13.

On this point, we first observe that the insurance policy itself lacks any provision, express or implied, that would afford any insurance coverage for Polo Beach. Polo Beach was not a named insured under the policy. It was only by virtue of the certificate of insurance that Polo Beach could claim coverage, and the certificate's reference to the premises let to Destination by the Front Desk Lease is a clear enough expression of a limitation on the insurance coverage thereby afforded. State Farm's assertion that this reference "is simply a description of where the named insured, [Destination] conducted operations[,]" Opening Brief at 12, is a kind of tunnel vision

inimical to the practical conduct of commercial affairs.

Nevertheless, State Farm cites the Hawai‘i Supreme Court's pronouncement of the general rule that insurance policies "must be construed liberally in favor of the insured and the ambiguities resolved against the insurer." Sturla, Inc. v. Fireman's Fund Ins. Co., 67 Haw. 203, 209, 684 P.2d 960, 964 (1984) (citations and internal quotation marks omitted). But in the same breath, the supreme court reiterated, "Put another way, the rule is that policies are to be construed in accord with the reasonable expectations of a layperson." Id. (citation omitted). And the rule exalted by State Farm is

> not for application whenever the insurer and insured simply disagree over the interpretation of the terms of a policy and there is an assertion of ambiguity. Nor does mere complexity create an ambiguity calling for its use. Rather, ambiguity is found to exist and the rule is followed only when the contract taken as a whole, is reasonably subject to differing interpretation. And what we are committed to enforce are the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts.

Id. at 209-10, 684 P.2d at 964 (brackets, citations and internal quotation marks omitted).

Viewed objectively -- even without reference to the clearly limiting 1991-1992 endorsement that is the target of State Farm's first three points of error on appeal -- it is abundantly clear that State Farm's interpretation of Polo Beach's additional insured coverage constitutes a patently unreasonable expectation thereof. See id. It was not objectively or

commercially reasonable to expect that Royal would confer umbrella liability coverage to an additional insured, covered as such only because of Destination's lease from the additional insured of specified facilities for specified purposes. Daresay that a disinterested State Farm would abjure as unreasonable under the circumstances, any expectation that Royal would cover any and all liability incurred by Polo Beach on its retained premises, even that incurred by reason of Polo Beach's sole negligence in an activity wholly unrelated to Destination's.

As one court summarized:

> In the industry, additional insured provisons have a well established meaning. They are intended to protect parties who are not named insureds from exposure to vicarious liability for acts of the named insured. These provisions are employed in countless situations in the industry, including such simple circumstances as those involving landlord and tenant relations, where the landlord asks or requires the tenant to procure insurance for the landlord for liability resulting from the tenant's activities.
>
> The insurance industry places this meaning on additional insured provisions because insurers will not increase and alter the kind of risks insured against without the charge of additional premiums. In this kind of provision, the risks have not been increased or altered, for the insurer is only insuring the additional insureds against vicarious liability for acts of the named insured.

Harbor Ins. Co. v. Lewis, 562 F.Supp 800, 803 (E.D. Pa. 1983) (enumeration omitted). See also BP Chemicals, Inc. v. First State Ins. Co., 226 F.3d 420, 428 (6th Cir. 2000) ("We find that the most reasonable construction of the additional insured endorsements in this case is that they were intended to assure performance of the indemnity agreement and, therefore, must be

read in conjunction with the indemnity provisions, which certainly do not explicitly express any intention to indemnify [the additional insured] for its own negligence." (Footnote omitted.)); State of Alaska v. State Farm Fire and Casualty Co., 939 P.2d 788, 793 (Alaska 1997) ("Coverage should be limited to claims that have a fair relationship to the use of the leased premises."); Northbrook Ins. Co. v. American States Ins. Co., 495 N.W.2d 450, 453 (Minn. Ct. App. 1993) ("One of the primary functions of the additional insured endorsement is to protect the additional insured from vicarious liability for acts of the named insured. In the landlord-tenant context, the additional insured endorsement limits the coverage afforded the landlord to the tenant's premises." (Citations omitted.)).

It was, therefore, objectively reasonable in this case to expect that Destination procured additional insured coverage for Polo Beach to insure its Front Desk Lease obligation to defend and indemnify Polo Beach, and only that:

> Although the language of an insurance policy must be given its natural and ordinary meaning and the words are to be taken in their popular sense, such language and words as expressive of intent cannot be wholly disassociated from the purpose for and subject to which they are applied, or from the obvious purpose of the insurance contract as a whole.

2 Couch on Ins. § 21:19 (3d ed.).

State Farm also contends on appeal that the court erroneously considered facts extrinsic to the insurance policy in arriving at its conclusion that Royal had no duty to indemnify

Polo Beach. There is no merit to this contention. Surely, the grail of the "objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts[,]" Sturla, 67 Haw. at 210, 684 P.2d at 964 (citation and internal quotation marks omitted), cannot be sought solely in the words of the insurance policy. The necessary resort to the purpose and intent of a corresponding indemnity agreement likewise counsels otherwise. See. e.g., BP Chemicals, Inc., supra. And the Hawai'i Supreme Court has stated that, "with respect to the issue of indemnity, the circuit court was entitled to consider *any* competent evidence adduced in the cause of adjudicating [an insured's] complaint for declaratory relief, even if the evidence might be subject to dispute in the underlying lawsuits." Dairy Rd., 92 Hawai'i at 423, 992 P.2d at 118 (emphasis in the original).

State Farm argues alternatively on appeal that even if Royal's additional insured coverage of Polo Beach was circumscribed as set out above, indemnification was due all the same because the Heiser accident "'arose' out Destination's premises or work within the meaning of the claimed exclusion[(sic)]." Opening Brief at 9. We disagree.

First, the Heisers' complaint alleged only direct claims of negligence against the defendants. No claims of vicarious liability or *respondeat superior* were asserted. Hence,

claims paid in settlement by State Farm on behalf of Polo Beach could not have stemmed from any liability attributable to Destination. Furthermore, before the settlement in the Heiser lawsuit, Destination obtained summary judgment on the complaint and on Polo Beach's cross-claim, adjudging Destination not liable, either directly to the Heisers or by way of contribution or indemnity vis `a vis Polo Beach. Cf. First Ins., 66 Haw. at 424-25, 665 P.2d at 655 (holding in a defense-and-indemnity declaratory judgment action that there was no duty on the part of the insurer of the named insured to indemnify the additional insured where the jury's verdict in the underlying tort lawsuit absolved the named insured and found the additional insured negligent); Baltimore Gas and Elec. Co. v. Commercial Union Ins. Co., 688 A.2d 496, 514 (Md. Ct. Spec. App. 1997) ("As the judgment against the [additional insured] in the [underlying tort] suit was not based on the [named insured's] negligence, it was not covered by the policy. Therefore, [the insurer] had no duty to indemnify [the additional insured] for the judgment in the [underlying tort suit]."). And critically, Destination obtained summary judgment in this case as well, dismissing all of Polo Beach's claims against Destination, including its claim for indemnity. State Farm does not appeal or otherwise attack that particular summary judgment. Because Destination's contractual duty to indemnify Polo Beach was the basis and all of the basis for Royal's additional insured coverage of Polo Beach, properly

understood, such coverage was not elicited in this particular case.

The materials Royal adduced in support of its motion for partial summary judgment amply demonstrated that there was no genuine issue of material fact and that Polo Beach was, as a matter of law, not entitled to indemnity from Royal. Although State Farm argued a much broader construction of the insurance coverage, it failed to adduce any facts that remotely supported its contention, beyond the words of the insurance policy to which it sought to confine the discussion:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

HRCP Rule 56(e) (2001). See also Dairy Rd., 92 Hawai‘i at 412, 992 P.2d at 107. Having thus framed this appeal as a choice of which contending set of facts is germane, State Farm reduced our decision to a matter of law.

Even viewing the evidence in the light most favorable to State Farm, id. at 411, 992 P.2d at 106, there is no question as to the purpose and scope of Royal's additional insured coverage of Polo Beach. Under the circumstances of this particular case, it simply makes no objectively reasonable sense that Royal would provide its additional insured what amounts to

umbrella liability coverage, solely on account of its named insured's lease of a small portion of the additional insured's premises for a limited, specified purpose.

IV. Conclusion.

The March 9, 2000 final judgment is affirmed, as is the February 24, 1998 order granting Royal's motion to dismiss complaint and/or for partial summary judgment on the issue of duty to indemnify.

DATED: Honolulu, Hawaii, June 14, 2002.

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Associate Judge