NO. 26202

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

TRI-S CORPORATION and KARL MILTON TAFT, Plaintiffs-Appellees,

and

CHARLES L. RAPOZA, SR., Individually and as Special Administrator of the Estate of CHARLES L. RAPOZA, JR., DECEASED; CHARLA PUA LINDSEY, as Next Friend of CHAE-LYNN KEALAPUA LINDSEY; THERESA HOLICEK; and CASEY SOUZA, Plaintiffs In Intervention-Appellees,

vs.

WESTERN WORLD INSURANCE COMPANY; JOHN DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants-Appellants.

WESTERN WORLD INSURANCE COMPANY,
Third-Party Plaintiff-Cross-Appellee,

vs.

THE TRAVELERS INSURANCE COMPANY; JOHN DOES 1-10; JANE DOES 1-10; DOES CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; ROE "NON-PROFIT" CORPORATIONS 1-10; and ROE GOVERNMENTAL AGENCIES 1-10,
Third-Party Defendant-Cross-Appellant.

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 97-358)

ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING THE OPINION OF THE COURT
(By: Duffy, J. for the court[1])

Upon consideration of Defendant-Appellant/Third-Party Plaintiff-Cross Appellee Western World Insurance Co.'s motion for

---

[1] Considered by: Moon, C.J., Levinson, Nakayama, and Duffy, JJ., and Circuit Judge Hifo, in place of Acoba, J., recused.

reconsideration filed on May 1, 2006 and the record herein,

IT IS HEREBY ORDERED that the motion is granted and the published opinion of the court filed on April 20, 2006 (Opinion), is hereby amended as follows:

(1) **On page 40 of the Opinion, a footnote is inserted after the following sentence:** "It goes without saying that, in light of Iddings and the undisputed evidence in Taft's affidavit, WWI cannot prove that it would be impossible for the Rapoza Estate to prevail against Taft on a 'wilful and wanton' misconduct claim based upon evidence only of non-intentional misconduct because the possibility exists that Taft could be found liable for recklessness, which does not involve intent or expectation of injury and is thus a covered occurrence under the policy."

- Text of new footnote:

In holding that recklessly caused injuries are not excluded under the "expected or intended" injury exclusion found in Section I.2.a of the policy, we adopt the interpretation of that exclusion followed in PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705 (Ind. Ct. App. 2004). There, the court reasoned and held as follows:

> [O]ur court [has] made the following observations with regard to the "standard 'intended or expected' exclusionary clauses:"
>
> > The intent aspect . . . contemplate[s] the 'volitional performance of an act with an intent to cause injury, although not necessarily the precise injury or severity of damage that in fact occurs.' It is met either by showing an

> actual intent to injure, or by showing the nature and character of the act to be such that an intent to cause harm to the other party must be inferred as a matter of law.
>
> 'Expected' injury means injury that occurred when the insured acted even though he was consciously aware that harm was practically certain to occur from his actions. However, the definition of 'expected' does not exclude harm that the insured 'should have anticipated[.]' Consciousness of the likelihood of certain results occurring is determined by examination of the subjective mental state of the insured.
>
> Sans v. Monticello Ins. Co., 676 N.E.2d 1099, 1102 (Ind. Ct. App. 1997), trans. denied (quoting Stevenson v. Hamilton Mut. Ins. Co., 672 N.E.2d 467, 470-72 (Ind. Ct. App. 1996), trans. denied). Our court has also concluded that negligent and reckless conduct "is not enough to meet the 'practically certain' standard required for an insurance policy to exclude expected injuries." Coy v. Nat'l Ins. Ass'n, 713 N.E.2d 355, 360 (Ind. Ct. App. 1999) (citing Bolin v. State Farm Fire & Cas. Co., 557 N.E.2d 1084, 1088 (Ind. Ct. App. 1990), trans. denied). Therefore, even if the evidence demonstrates a disregard for safety, such evidence "is not enough to warrant exclusion under either the lesser 'expected injuries' standard or the greater 'intended injuries' standard." Id.

Id. at 728 (emphasis added). Accord Ohio Cas. Ins. Co. v. Henderson, 939 P.2d 1337, 1343 (Ariz. 1997) (holding that the "expected or intended" injury exclusion excludes injuries that were intended or "substantially certain" to occur from the standpoint of the insured); Cont'l W. Ins. Co. v. Toal, 244 N.W.2d 121, 125 n.3 (Minn. 1976) (observing that "expected" requires a "high degree of certainty"); State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364, 366 (Neb. 1973) ("The term 'expected' when used in association with 'intended' carries the connotation of a high degree of certainty or probability and seems to be used to practically equate with 'intended,' because one expects the consequences of what one intends." (Citation omitted.)); United Services Auto Ass'n v. Elitzky, 517 A.2d 982, 989 (Pa. Super. Ct. 1986) (holding that the "expected or

intended" injury exclusion excludes injuries that were designed or planned, as well as those that were "substantially certain" to occur from the standpoint of the insured). Here, because the underlying complaint contains allegations that Rapoza's death was "highly probable," rather than "practically certain," to occur from Taft's standpoint, the alleged conduct does not fall under the policy's "expected or intended" bodily injury exclusion.

(2) **On page 44 of the Opinion, a footnote is inserted after the following sentence:** "It is also possible that a jury would conclude that Taft was at most negligent rather than reckless, and thus not liable to the Rapoza Estate under Iddings."

- Text of new footnote: In this connection, we note that nothing in the instant opinion should be taken to expand, diminish, or in any way disturb our holding in Iddings regarding the scope of the "wilful and wanton misconduct" exception to workers compensation exclusivity found in HRS § 386-8.

(3) **On page 45, footnote 10 of the Opinion, a sentence is added at the end of the footnote.**

- Text of new sentence: To be clear, we note that our finding that WWI waived the argument that it does not owe Taft a duty of indemnification (or that such a determination is premature) should not be taken either

as a comment on the merits of the circuit court's application of our decision in Sentinel to the instant case or as precedent for the general proposition that the duty to indemnify may be irrebuttably presumed from the duty to defend.

An amended opinion is being filed concurrently with this order, incorporating the foregoing amendments. The Clerk of the Court is directed to provide a copy of this order and a copy of the amended opinion to the parties and notify the publishing agencies of the changes. The Clerk of the Court is further instructed to distribute copies of this order of amendment to those who received the previously filed opinion.

IT IS FURTHER ORDERED that the motion is denied in all other respects.

DATED: Honolulu, Hawai'i, May 18, 2006.

FOR THE COURT:

Associate Justice

APPELLATE COURTS SEAL STATE OF HAWAI'I

John H. Price
and Amanda J. Weston
for defendant-appellant/
third-party plaintiff-
cross-appellee Western
World Insurance Company
on the motion