

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur with the majority's decision except that I disagree with the majority's holding that the Circuit Court of the First Circuit (the court) erred in ruling that liability coverage should be afforded to Defendants/Third Party Plaintiffs-Appellants/Cross-Appellees/Cross-Appellees Pearl Pruett (Pearl) and Ikaika Pruett (Ikaika).

I.

The following undisputed facts are taken from the parties' briefs and the record on appeal. Pearl is the biological grandmother and adoptive mother of Ikaika who is a minor. Defendant/Third Party Plaintiff-Appellant/Cross-Appellee/Cross-Appellee Meredith Pruett (Meredith) is the biological daughter of Pearl and the biological aunt of Ikaika. Pearl, Ikaika, and Meredith reside in the same household.

On February 8, 2002, Ikaika was involved in an auto accident. The auto involved in the accident was a four wheel private passenger auto owned by Meredith and was insured under an auto insurance policy issued by Third-Party Defendant-Appellee/Cross-Appellant AIG Hawaii Insurance Company (AIG) to Meredith. The auto was not listed on the declarations page of the auto insurance policy issued by Plaintiff-Appellee/Cross-Appellee Allstate Insurance Company (Allstate) to Pearl.

Ikaika was driving the auto without permission from Meredith when he became involved in the accident. On the day of the accident, Ikaika did not have a reasonable belief that he was entitled to operate the vehicle. Defendants-Appellees/Cross-Appellees Charlene Manglicmot (Manglicmot) and Michelle Casil (Casil) have filed claims against Pearl, Meredith, and Ikaika for bodily injury. Defendants-Cross-Appellees Salvador PeBenito and Board of Water Supply, City and County of Honolulu have filed claims against Pearl, Meredith, and Ikaika for property damage.

II.

Part I of the Allstate auto insurance policy pertained to liability coverage and is entitled "Automobile Liability Insurance Bodily Injury - Coverage AA Property Damage - Coverage BB." The pertinent statement regarding liability coverage reads as follows:

Allstate will pay for all damages an insured person is legally obligated to pay - because of:

1. bodily injury sustained by any person, and
2. damage to or destruction of property, including loss of use.

Under these coverages, your policy protects an insured person from claims for accidents arising out of the ownership, maintenance or use, loading or unloading of an insured auto.

(Emphases added.) The section under Part I is subtitled "Insured Persons." It defines "Insured Persons" as falling within two categories. Relevant to this case, an insured person is first described in (1)(b) as a resident using the policyholder's

"insured auto." No qualification of the insured person being a "relative" or of obtaining "permission" of the policyholder to drive is attached to this definition of an "insured person."

Insured Persons

1. While using your insured auto:
  - a) you, [<sup>1</sup>]
  - b) any resident, [<sup>2</sup>] and
  - c) any other person using it with your permission.

(Some emphases in original and some added.)

Second, in (2) (b) of the same section, an insured person is also described as a "resident relative using a four wheel private passenger auto" that is a "non-owned auto."

2. While using a non-owned auto:
  - a) you,
  - b) any resident relative using a four wheel private passenger auto or utility auto.

(Some emphases in original and some added.)

There is a policyholder "relative" qualification in 2(b). Similar to the "resident" reference in the first definition of insured persons in (1) (b), no "permission" to drive qualification is attached to the status of an insured person described in (2) (b). Plainly, Ikaika falls within the (2) (b) category of insured persons inasmuch as he is a resident relative

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<sup>1</sup> "You" is defined, inter alia, as "the policyholder named on the declarations page[.]"

<sup>2</sup> "Resident" is defined as one having "physical presence in [the named policy holder's] household with the intention to continue living there."

who used a "non-owned auto" that was "a four wheel private passenger auto."<sup>3</sup>

Immediately following the section defining insured persons in the Allstate auto insurance policy is a section subtitled "Insured Autos." Relevant to this case, that section states:

Insured Autos

1. Any auto described on the declarations page. This includes the four wheel private passenger auto or utility auto you replace it with.
- . . . .
4. A non-owned auto used by you or a resident relative with the owner's permission. This auto must not be available or furnished for the regular use of an insured person.

(Some emphases in original and some added.)<sup>4</sup> The Pruetts do not argue that Ikaika was driving an "insured auto." Allstate is

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<sup>3</sup> As is evident from the face of these provisions concerning an insured person, "permission" is wholly irrelevant where the insured person is a "resident."

<sup>4</sup> "Insured Autos" also includes the following definitions:

2. An additional four wheel private passenger auto or utility auto you become the owner of during the premium period. This auto will be covered if we insure all other private passenger autos or utility autos you own. You must, however, tell us within 60 days of acquiring the auto. You must pay any additional premium.
3. A substitute four wheel private passenger auto or utility auto, not owned by you or a resident, being temporarily used while your insured auto is being serviced or repaired, or if your insured auto is stolen or destroyed.
- . . . .
5. A trailer while attached to an insured auto. The trailer must be designed for use with a private passenger auto or utility auto. This trailer can't be used for business purposes with other than a private passenger auto or utility auto.

correct that the car involved in the accident was not an insured auto under the policy terms.<sup>5</sup>

III.

Allstate argued before the court that liability coverage should not be provided to Ikaika and Pearl under its auto insurance policy because "in order to have coverage" there must be both an "insured person" and an "insured auto." According to Allstate, liability coverage should be denied to Pearl and Ikaika because he was not driving an "insured auto." The majority agrees with Allstate that because the accident-related claims in question do not involve the use of an "insured auto," Allstate was not bound to afford liability coverage to Ikaika.

However, Allstate's auto insurance policy was ambiguous in that it did not provide that liability coverage was limited to an "insured person" using an "insured auto" as opposed to an "insured person" using a "non-owned auto." To reiterate, Part I

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<sup>5</sup> The car did not meet the first definition of an insured auto because the auto driven by Ikaika apparently was not described on the declarations page. The car in question did not meet the second definition of an insured auto because Pearl was not the owner of the auto. The car in question did not meet the third definition of an insured auto because there is no evidence in the record, and neither party asserts, that the auto was being temporarily used while an insured auto was being serviced or repaired or while an insured auto was stolen or destroyed. The car in question did not meet the fourth definition of an insured auto because it is undisputed that the auto was not being used with the owner's (Meredith's) permission. The car in question does not meet the fifth definition of an insured auto because it is not a trailer.

provides that Allstate will pay all damages an insured person is legally obligated to pay because of bodily injury sustained by "any person," i.e., Manglicmot and Casil.

This policy statement is not qualified by any language limiting coverage only to insured persons using insured autos. Allstate owed coverage to Ikaika under the unambiguous language of this provision. As the court ruled, Ikaika was an "insured person" under the Allstate auto insurance policy insofar as he was (1) a "resident relative" of the policyholder, Pearl, named on the declarations page, and (2) was using a "four wheel private passenger auto[.]" As mentioned before, Ikaika comes within the second category of an "Insured Person" as noted above in (2)(b); insured person defined as one who uses "a non-owned auto."

By virtue of that definition, an insured person includes "any resident relative using a four wheel private passenger auto" if using a "non-owned auto." (Emphasis added.) However, the second paragraph in Part I, as set forth above, states that "[u]nder these coverages, your policy protects an insured person from claims for accidents arising out of the ownership, maintenance or use, loading or unloading of an insured auto." As opposed to insured auto, the term non-owned auto is not defined. However, the term indisputably applies to the vehicle Ikaika was using at the time of the accident. See Dairy

Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 411, 992 P.2d 93, 106 (2000) (explaining that "insurance policies are subject to the general rules of contract construction; the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech unless it appears from the policy that a different meaning is intended" (citation, quotation marks, and brackets omitted)). Accordingly, the reference to an insured person in (2)(b) as being one who, while using "a non-owned auto," is "a resident relative" using a "four wheel private passenger auto," creates a patent ambiguity when read with the statement that coverage would be provided to insured persons using an insured auto.<sup>6</sup>

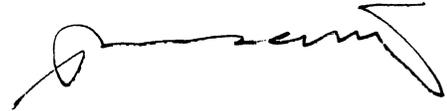
Allstate's argument that liability coverage is limited only to insured persons using insured autos, then, is inconsistent with the reading that an insured person such as a resident is afforded coverage while driving a non-owned auto as well as the policyholder's "insured auto." Under the circumstances, the issue of liability coverage under the policy must be resolved in favor of the insured and against the insurer. See Tri-S Corp. v. Western World Ins. Co., 110 Hawai'i 473, 489, 135 P.3d 82, 98 (2006) (explaining that ambiguities must be

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<sup>6</sup> Even more confusing is the fact that in the definition of "insured persons" as applied to a "resident," permission is wholly irrelevant, see supra note 3, whereas no. 4 in the definition of "insured autos" describes an insured auto as a non-owned auto used with the owner's permission.

resolved in favor of the insured and "policies are to be construed in accord with the reasonable expectations of a layperson"); Oahu Transit Services, Inc. v. Northfield Ins. Co., 107 Hawai'i 231, 235, 112 P.3d 717, 721 (2005) (stating that if the automobile exclusion provision in the insurance policy in question were ambiguous, "this court would construe [the] phrase in favor of the insured"); Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 458, 99 P.3d 96, 109 (2004) (holding that the ambiguity in the term of the insurance contract should be resolved in favor of the insured); Estate of Doe v. Paul Revere Ins. Group, 86 Hawai'i 262, 277, 948 P.2d 1103, 1118 (1997) (stating that this court must "resolve any contractual ambiguities against the insurer"); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 110 n.5, 839 P.2d 10, 25 n.5 (1992) (noting that there is a "fundamental principle that any ambiguities in a contract should be interpreted most strongly against the party who has drafted the language . . . where a contract is open to more than one reasonable construction"); Sturla, Inc. v. Fireman's Fund Ins. Co., 67 Haw. 203, 209, 684 P.2d 960, 964 (1984) (explaining that "[b]ecause insurance policies are contracts of adhesion and are premised on standard forms prepared by the insurer's attorneys, we have long subscribed to the principle that they must be construed liberally

in favor of the insured and [any] ambiguities [must be] resolved against the insurer" (internal quotation marks and citations omitted)).<sup>7</sup> For the foregoing reasons I would affirm the court's determination of liability coverage under the Allstate policy.



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<sup>7</sup> I agree with the majority that the court did not err in determining that the Pruetts were excluded from coverage under Allstate's homeowner's insurance policy. However, I disagree with the majority's interpretation of Fortune v. Wong, 68 Haw. 1, 702 P.2d 299 (1985), to support its argument that the Pruetts had no reasonable expectation of coverage under the Allstate homeowner's policy. In the case of Fortune, the homeowners insurance policy contained an exclusion that "declared in unambiguous language that it did not apply to bodily injury arising from the operation of a motor vehicle by an insured." Id. at 11, 702 P.2d at 306. In light of this exclusionary provision, the court held that it could not be concluded that liability for the insured's negligent operation of his motor vehicle "was within the intendment of the parties." Id.

Furthermore, the parents of the insured, who were insureds themselves under the homeowner's policy, "purchased two policies specifically written to insure the risks associated with operation of automobiles." Id. (emphasis added). The Fortune court cited the purchase of the two auto insurance policies in its conclusion that there were no "grounds for inferring the insured[s] could have reasonably expected their homeowner's policy to insure the risk of [the insured's] negligence in driving." Id.

Consequently, Fortune should not be read as establishing a presumption that an insured has no reasonable expectation of coverage for motor vehicle accidents under his or her homeowner's policy if the insured has an auto insurance policy written specifically to insure against liability arising from motor vehicle accidents. Rather, the Fortune court considered the unambiguous exclusion provision in the homeowner's insurance policy excluding coverage for motor vehicle accidents in conjunction with the insureds' purchase of two auto insurance policies in its determination that the insureds did not have a reasonable expectation of coverage under the homeowner's policy for the motor vehicle accident.

Like the insured in Fortune, Pearl had a policy, i.e. the Allstate auto policy, specifically written to insure the risks associated with automobile operation. As in Fortune, in this case there was an exclusion provision in Pearl's homeowner's policy with Allstate that clearly stated coverage would not be provided for "bodily injury or property damage arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motor vehicle or trailer." It is the presence of an unambiguous exclusion provision in the homeowner's policy excluding coverage for auto accidents that makes an expectation of such coverage unreasonable.