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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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ALOHA PETROLEUM, LTD.,
Plaintiff-Appellant,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,
and AMERICAN HOME ASSURANCE COMPANY,
Defendants-Appellees.

SCCQ-23-0000515

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI
(CASE NO. 22-00372 JAO-WRP)

OCTOBER 7, 2024

CONCURRING OPINION BY GINOZA, J.

I join the majority opinion with regard to the second question (**Question 2**). For the first question (**Question 1**), I respectfully concur and write separately to more fully explain my position.

Question 1 certified to this court asks:

> 1) For an insurance policy defining a covered "occurrence" in part as an "accident," can an "accident" include recklessness?

For purposes of this case,[1] I answer Question 1 "yes," so long as the harm is not expected or intended.

Like the majority, I conclude this court's decision in Tri-S Corp. v. Western World Ins. Co., 110 Hawai'i 473, 135 P.3d 82 (2006), sets out the relevant authority on the issue. In Tri-S, the underlying claims against the insured included allegations of "wilful and wanton misconduct" which this court noted included recklessness. Id. at 493, 135 P.3d at 102. Given evidence of non-intentional conduct in Tri-S, "the possibility exist[ed] that [the insured] could be found liable for recklessness, which does not involve intent or expectation of injury[.]" Id. at 494, 135 P.3d at 103 (emphasis added). Thus, this court held that the conduct alleged in the underlying complaint constituted an "occurrence" (defined as an "accident" in the policy) for purposes of the duty to defend. Id. at 481, 494, 135 P.3d at 90, 103.

[1] Coverage for indemnity and the duty to defend under an insurance policy "depends, in the first instance, on the language of the particular policy involved." Hawaiian Ins. & Guar. Co. v. Brooks, 67 Haw. 285, 289, 686 P.2d 23, 26 (1984) (citations omitted); see also Dairy Road Partners v. Island Ins. Co., 92 Hawai'i 398, 413, 992 P.2d 93, 108 (2000).

Here, the United States District Court for the District of Hawaii (**District Court**) articulates an apparent conflict between Tri-S and our prior decision in AIG Haw. Ins. Co. v. Est. of Caraang, 74 Haw. 620, 851 P.2d 321 (1993). In particular, the District Court points to language in Caraang that states, for a duty to defend or indemnify to apply, "the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions." 74 Haw. at 636, 851 P.2d at 329 (emphasis added). The District Court questions how "recklessness" (which can be defined as consciously disregarding a known risk) can be covered under Tri-S, when Caraang states the injury cannot be the expected or "reasonably foreseeable result" of the insured's intentional acts or omissions.

As discussed below, the passage from Caraang sought to summarize this court's prior holdings in Hawaiian Ins. & Guar. Co. v. Blanco, 72 Haw. 9, 804 P.2d 876 (1990) and Hawaiian Ins. & Guar. Co. v. Brooks, 67 Haw. 285, 686 P.2d 23 (1984).[2] The passage dealt with non-coverage when harm is expected or intended. The "reasonably foreseeable" language pertained to

[2] In Dairy Road Partners, this court overruled Blanco and Brooks "to the limited extent that they imply that an insurer may rely upon extrinsic facts that may be subject to dispute in the underlying lawsuit as a basis for disclaiming its duty to defend where the complaint in the underlying lawsuit alleges facts within coverage." 92 Hawai'i at 422, 992 P.2d at 117.

the intended harm exception to coverage, which this court in Blanco, Brooks and Caraang applied in a manner to honor the reasonable expectations of policyholders as to whether there would be coverage for dangerous intentional conduct.

In Tri-S, on the other hand, conduct alleged to be reckless, that did not reach the level of expected or intended harm, was deemed an accident triggering the duty to defend.

In this light, Caraang, Blanco and Brooks are consistent with Tri-S and the "expected or intended" injury exclusions discussed in Tri-S. In footnote 8 of Tri-S, this court adopted the following standards for the "expected or intended" injury exclusions based on Indiana case law:

> The intent aspect ... contemplates 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.

Tri-S, 110 Hawaiʻi at 494 n.8, 135 P.3d at 103 n.8 (underline emphases added) (citations, quotation marks and brackets

omitted) (quoting PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 728 (Ind. App. 2004)).[3]

I. District Court's Order Certifying Question 1

In certifying Question 1 to this court, the District Court explains that Plaintiff Aloha Petroleum, Ltd. asserts that Defendants National Union Fire Insurance Company of Pittsburgh, PA, and American Home Assurance Company have a duty to defend in two underlying lawsuits. The District Court concludes that the parties' dispute as to Question 1 hinges on whether recklessness

[3] Question 1 does not ask us to consider expected or intended injury exclusions, but I agree with the majority that the exclusions discussed in footnote 8 in Tri-S are relevant to setting the outer limit to an "accident" under a standard liability policy. Tri-S, 110 Hawai'i at 494 n.8, 135 P.3d at 103 n.8. In addition to the reasons discussed by the majority on this point, PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 724 (2004) provides:

> It is generally recognized that "the insurance doctrine of 'implied exception' serves to guard against the hazard of loss intentionally caused by the insured, or arising out of the insured's careless lack of concern." Eric Holmes, 16 Appleman Insurance 2d § 116.1 at 6 (2000). "As used in this context, the phrase *implied exception* refers to a basis for an insurer's non-liability that is not expressed anywhere in the contract but is said to be implicit in the nature of the agreement and the circumstances to which it applies." *Id.* (emphasis in original).
>
> Pursuant to this exception, which is predicated on an application of fortuity, even if there is no express policy language, "there is an implied exception that denies liability insurance coverage for harm . . . intentionally inflicted by the insured." *Id.* at 8.

(Emphases added.)

can amount to an "accident," given how the term "accident" has been defined by this court.[4]

The District Court points to the discussion in Tri-S about the possibility that the defendant could be found liable for recklessness, not involving intent or expectation of injury, and thus there was a covered occurrence in that case. 110 Hawai'i at 494, 135 P.3d at 103. Given the statement in Tri-S that "recklessness . . . is thus a covered occurrence," the District Court presents the conundrum that prompted Question 1:

> If recklessness can be an "occurrence" ("accident") under *Tri-S*, then what to make of the multiple Hawai'i Supreme Court decisions defining an "accident" to require injuries that are neither the "expected [n]or *reasonably foreseeable* result of the insured's own intentional acts or omissions"? *E.g.*, *Caraang*, 74 Haw. at 636, 851 P.2d at 329 (emphasis added) . . . . *Tri-S* says that an "accident" is not expected, as does *Caraang*, so no conflict there. The conflict arises from *Tri-S* implying that an "accident" can be the result of recklessness, and *Caraang* saying that an "accident" cannot be "reasonably foreseeable" from the insured's perspective, a standard almost synonymous with the subjective foreseeability required by recklessness.

(Emphasis added) (footnote omitted).

II. Discussion

In my view, the purported conflict which prompts Question 1 arises when "reasonably foreseeable" is detached from "intentional acts or omissions" and the rest of the key passage from Caraang. The full passage from Caraang states:

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[4] The subject policies cover "occurrences" causing property damage during the policy period. An "occurrence" is defined to mean "accident," in relevant part, but "accident" is not further defined.

> The teaching of *Blanco* and *Brooks*, however, is that, in order for the insurer to owe a duty to defend or indemnify, the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions.

74 Haw. at 636, 851 P.2d at 329. This passage in Caraang is illuminated by the context and rulings in Blanco and Brooks, which dealt with conduct where harm was either expected or intended (even if a different type of harm was intended) and this court expressed that it would honor the "reasonable expectations" of policyholders as to whether such intentional conduct or omissions would be covered or defended. See Blanco, 72 Haw. at 18, 804 P.2d at 881; Brooks, 67 Haw. at 290-91, 686 P.2d at 27-28; see also Caraang, 74 Haw. at 635-36, 643, 851 P.2d at 328-29, 332. When the full passage from Caraang is read in context with Brooks and Blanco, it fits well within the standards for expected and intentional injury exclusions later adopted by this court in Tri-S.

In Brooks, an insured driver did nothing when he was aware that a woman was being raped in the back of the truck he was driving. This court rejected his claim that he did not expect or intend the harm, noting the objectively reasonable expectations of insureds should be honored, but it was unreasonable for the insured driver to think he would be covered in this situation. 67 Haw. at 291, 686 P.2d at 27-28.

In Blanco and Caraang, insureds fired gunshots intending to frighten someone but instead an injury resulted in

Blanco and a death resulted in Caraang. This court's analysis in those cases included honoring the reasonable expectations of policyholders and, given the intentional act of firing a gun at someone, whether it was reasonably foreseeable to the insured that injury would occur.

Brooks, Blanco and Caraang applied principles that were later expressly adopted in footnote 8 of Tri-S under the "intended injury" exclusion, including inferring the intent to cause injury as a matter of law given the nature of the intentional conduct.

Regarding the intent to injure exclusion, it has been explained that:

> Courts will . . . often infer intent to injure in circumstances where the injurious results are obvious and conclude that the act was not an "accident." For example, most states will infer intent to injure in a sex abuse case, regardless of the insured's claim that no injury was intended.

3 Martha A. Kersey, New Appleman on Insurance Law Library Edition, § 18.02[6][c] (Jeffrey E. Thomas & Francis J. Mootz III eds., 2024). Moreover, as to situations in which courts will infer intent to injure as a matter of law,

> [m]any jurisdictions have recognized that the intent to injure, especially when guns or sexual abuse are involved, can be inferred as a matter of law based on the egregious nature of the act involved and the accompanying foreseeability or certainty of harm. In these cases, courts infer intent regardless of the insured's testimony that no harm was intended.

Id. at § 18.03[2][f] (emphases added); see also Allstate Ins. Co. v. Herman, 551 N.E.2d 844, 846 (Ind. 1990) (where insured fired four gun shots in the general direction of a group fleeing a scene, injuring an individual, the Indiana Supreme Court held as a matter of law that the insured shooter "deliberately committ[ed] an act which any reasonable person would deem calculated to cause injury[,]" and thus intentional act exclusion precluded coverage (emphasis added) (citing Auto-Owners Ins. Co. v. Smith, 376 N.W.2d 506 (Minn. App. 1985))); State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421, 424 (Minn. 1984) (where underlying claim against insured was for the intentional act of nonconsensual sexual assault, court inferred intent to cause bodily injury as a matter of law precluding coverage and noting that "neither the insured nor the insurer in entering into the insurance contract contemplated coverage against claims arising out of nonconsensual sexual assaults"); Woida v. North Star Mutual Ins. Co., 306 N.W.2d 570 (Minn. 1981) (en banc) (where insureds armed with rifles, knowing a vehicle was occupied, proceeded with their plan to shoot at the vehicle, intent to cause injury was inferred as a matter of law); Amco Ins. Co. v. Haht, 490 N.W.2d 843, 845 (Iowa 1992) ("The intent to cause the injury may be either actual or inferred. Intent may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm. In addition, once intent to

cause injury is found, it is immaterial that the actual injury caused is of a different character or magnitude than that intended." (emphasis added) (citations and internal quotation marks omitted)); Am. Fam. Mut. Ins. Co. v. Wubbena, 496 N.W.2d 783, 785 (Iowa Ct. App. 1992) ("[W]e believe that it can be inferred as a matter of law that when a person shoots a bb gun at another, there is the intent to cause bodily injury. Some harm is inherent in and inevitably results from such an act. The character of the act of pointing a bb gun at another is such that physical harm can be foreseen as accompanying it." (emphasis added)).

A. Brooks

In Brooks, a woman was raped in the back of a pick-up truck and the driver, although aware of what was happening, failed to do anything. 67 Haw. at 289, 686 P.2d at 26. The woman filed an underlying lawsuit and the insurer of the truck brought a declaratory relief action which raised the following question:

> We are called upon to decide whether an insurer who issued an automobile liability policy to the owner of a truck is obligated to defend and assume the liability for damages when a claim for damages is asserted against a driver who did nothing to prevent the rape of a female passenger by another passenger in the truck's rear section.

Id. at 289, 686 P.2d at 26.[5]

The court stated that "[w]e are guided in the task by the broad principle that the objectively reasonable expectations of policyholders and intended beneficiaries regarding the terms of insurance contracts will be honored[.]" Id. at 290-91, 686 P.2d at 27 (emphases added) (quotation marks and brackets omitted) (quoting Robert E. Keeton, Insurance Law Rights at Variance With Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970); then citing Sturla, Inc. v. Fireman's Fund Ins. Co., 67 Haw. 203, 209–10, 684 P.2d 960, 964 (1984)). Viewing the incident from the driver's perspective, the court rejected his claim that he did not intend or expect the rape to happen. Id. at 291, 686 P.2d at 27-28. The court pointed to the driver's affidavit in which he acknowledged he could see the incident taking place, but did not do anything to prevent or mitigate the harm to the woman. Id. at 291, 686 P.2d at 28.

The court explained:

> Given these circumstances, we can only conclude the "occurrence" in question was not one for which coverage was afforded [the driver]. From his standpoint, it was not an accident that resulted in bodily injury neither expected nor intended. Though we are committed to honor the objectively reasonable expectations of an intended beneficiary of an insurance contract . . . it was definitely unreasonable for [the driver] to think

[5] The automobile liability policy in Brooks provided coverage for "bodily injury . . . caused by an occurrence" and further provided that "occurrence means an accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Id. at 289-90, 686 P.2d at 26-27.

> Continental's automobile liability policy would protect him from liability in this instance[.]

Id. (emphases added).

In Brooks, this court thus held that the injury to the woman due to the driver's omission to act was, from his perspective, both intentional and expected. He could not reasonably expect to be covered. This holding under the circumstances in Brooks is consistent with footnote 8 in Tri-S.

B. Blanco

Blanco involved an insured who intentionally fired a rifle toward his neighbor intending to frighten him, but instead injured the neighbor.[6] 72 Haw. at 11, 18, 804 P.2d at 877-78, 881. It was unclear if the neighbor was hit by a bullet or by a stone due to a ricochet. Id. at 18, 804 P.2d at 881. This court held there was no accident and thus no duty to defend. Id. The court reasoned that physical injury from the insured's intentional act of shooting the rifle was something a "reasonable man" in the insured's position should have anticipated, and noted its position in Brooks "that the reasonable expectation of policyholders regarding terms of insurance policies will be honored." Id. (emphasis added).

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[6] A homeowner's policy for the insured in Blanco provided coverage for "bodily injury . . . caused by an occurrence" and defined "occurrence" as "an accident." 72 Haw. at 11-12, 804 P.2d at 878. The policy also had an exclusion for bodily injury "which is expected or intended by the insured." Id. at 11, 804 P.2d at 878.

Regarding the neighbor's wife, who witnessed her husband being shot and suffered emotional distress, the evidence indicated the insured saw her and that the insured knew the neighbor had a wife. Id. This court held the harm to the wife likewise was not an accident:

> regardless of whether [the insured] saw [the neighbor's wife], it is clear that a reasonable man in [the insured's] position, firing a rifle intentionally in the direction of a woman's husband, would anticipate, and hence expect, that that woman might suffer emotional injury and distress at witnessing the incident. Accordingly, with respect to [the neighbor's wife] also, there was no accident and hence no occurrence and, therefore no duty to defend.

Id.

Given the insured's intentional act of firing the rifle at his neighbor, this court noted that it would honor the reasonable expectations of policyholders, and concluded there was no accident, even when a different harm occurred than was intended. Id. Blanco is consistent with footnote 8 in Tri-S because, although there was not an "actual intent to injure," the Blanco court essentially determined that "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." Tri-S, 110 Hawaiʻi at 494 n.8, 135 P.3d at 103 n.8.

C. Caraang

In Caraang, the occupants of an insured vehicle were the driver and a passenger. 74 Haw. at 624, 851 P.2d at 324. Their vehicle was being chased by another vehicle, and the

passenger in the insured vehicle fired a gun at the other driver. Id. at 625, 851 P.2d at 324. The other driver was killed. Id. At the time of the shooting, the driver of the insured vehicle did not know that his passenger had a gun. Id. at 632-33, 851 P.2d at 327. The issues before this court included whether the insurer had a duty to defend and indemnify the driver and passenger of the insured vehicle based on whether the death of the other driver resulted from "accidental harm."[7] Id. at 635-36, 642-43, 851 P.2d at 328-29, 331-32.

Regarding the coverage for the driver of the insured vehicle, this court reasoned as follows:

> The question whether [the other driver's] death constituted "accidental harm" must be answered from the viewpoint or perspective of the person — in this instance, [the insured driver] — claiming the status of an insured. In this connection we have ruled that "if the insured did something or . . . failed to do something, and the insured's expected result of the act or omission was the injury, then the injury was not caused by an accident and therefore not . . . within the coverage of the policy. . . ." *Blanco*, 72 Haw. at 16, 804 P.2d at 880 (insured fired rifle in victim's direction, intending to frighten but instead injuring him; injury held to be reasonably foreseeable and therefore not accidental from insured's viewpoint; consequently, insurer had no duty to defend); *see also Brooks*, 67 Haw. at 292, 686 P.2d at 27–28 (from perspective of insured truck driver, sexual assault of hitchhiker in rear section of vehicle by insured's co-worker not accidental where insured aware of attack but chose not to do anything to prevent or mitigate harm to victim, thereby facilitating commission of act; insurer held to have no duty to defend or indemnify).

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[7] In Caraang, this court analyzed auto liability coverage that was required under governing statutes. 74 Haw. at 633-35, 851 P.2d at 328. The applicable statutes required liability coverage for damages arising out of "accidental harm." Id. at 635, 851 P.2d at 328. There was also an intentional act exclusion in the policy. Id. at 624, 851 P.2d at 324.

> . . . . **The teaching of *Blanco* and *Brooks,* however, is that, in order for the insurer to owe a duty to defend or indemnify, the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions**. The analysis thus comes full circle; whether an injury is caused by a motor vehicle "accident" or by an insured's intentional act is determined from the viewpoint or perspective of the insured.
>
> In the present case, the trial court's unchallenged FOF simply do not support its conclusion that, as to [the insured driver], [the other driver's] death did not arise out of a motor vehicle accident. On the contrary, the FOF unequivocally establish that: (1) from [the insured driver's] perspective, the death was not the expected or anticipated result of any intentional act or omission on his part; (2) [the insured driver], being unaware the shooting was taking place, obviously made no decision to refrain from preventing [the other driver's] death or otherwise mitigating the harm; and (3) [the insured driver] did nothing to facilitate the shooting. In fact, it appears that [the insured driver's] constant effort was to elude [the other driver] via the instrumentality of the truck, and he was wholly unaware that [his passenger] was in possession of a firearm until after the shooting occurred. Accordingly, from [the insured driver's] viewpoint or perspective [the other driver's] death was accidental.

Id. at 635-37, 851 P.2d at 328-29 (emphases added). This analysis in Caraang considered whether there was accidental harm by ruling out that the other driver's death was the expected or intended result of the insured driver's conduct. In other words, before ultimately holding there was coverage for accidental harm, the court considered whether the death of the other driver was either expected or intended from the perspective of the insured driver. Likewise, the key passage in Caraang was addressing both of these potential reasons for there not to be accidental harm.

With respect to coverage for the passenger who shot at the other vehicle, he "claimed that he merely intended to frighten [the other driver] by striking his vehicle." Id. at 642-43, 851 P.2d at 332. In analyzing whether the other driver's death was accidental from the perspective of the passenger, this court reasoned:

> Granting, *arguendo,* that [the passenger] fired the gun in [the other driver's] direction intending to frighten him, "[t]hat physical injury might result from such an action is certainly something which a reasonable man in [the passenger's] position should have anticipated and expected." *See* [*Blanco,* 72 Haw. at 18, 804 P.2d at 881].
>
> We hold that the trial court was correct in concluding, from [the passenger's] viewpoint or perspective, that the shooting death of [the other driver] did not arise out of an auto accident, but rather was intentionally caused. We have recognized in the past that the objectively reasonable expectations of policyholders and intended beneficiaries regarding terms of insurance policies will be honored. *See, e.g., Blanco,* 72 Haw. at 18, 804 P.2d at 881; *Brooks,* 67 Haw. at 290–91, 686 P.2d at 27. Thus, assuming that [the passenger] was otherwise a "covered person" under the policy (an issue we need not reach in this opinion), and in light of the exclusion from liability coverage of any person who intentionally causes bodily injury, [the passenger] "could not reasonably expect to be covered or defended" with respect to [the other driver's] death. *See Blanco,* 72 Haw. at 11, 15, 18–19, 804 P.2d at 878–79, 881. Accordingly, we hold that the trial court was correct in concluding as a matter of law that AIG owes [the passenger] no duty to defend and indemnify with respect to the tort claim.

Id. at 643, 851 P.2d at 332 (emphases added).

Similar to and based on Blanco, this court determined that given the passenger's intentional act of firing a gun at the other vehicle, the death of the other driver was something a "reasonable man" should have anticipated, even if he only

intended to frighten the other driver. Further, this court again articulated that it would honor the "objectively reasonable expectations of policyholders" and that the passenger could not reasonably expect to be covered. This court thus ruled "as a matter of law" that there was no coverage given the intentional act of firing the gun in this case. Because the intentional act precluded coverage, the court did not need to address whether the death was expected from the perspective of the passenger.

In sum, the "reasonably foreseeable" language in the key passage from Caraang is part of the analysis this court utilized in Brooks, Blanco and Caraang to honor the "objectively reasonable expectations" of policyholders, such that they would not be covered for dangerous intentional acts such as firing a gun at another person or allowing a woman to be raped while aware it was happening. The analysis was part of this court's decisions to essentially infer an intent to cause harm as a matter of law, even when the insured claimed there was no intent to cause injury. In short, Brooks, Blanco and Caraang are consistent with Tri-S. In Tri-S, the holding was that reckless conduct, that did not involve intended or expected injury, was a covered occurrence or accident.

III. Conclusion

For the reasons discussed above, I respectfully concur with the majority regarding Question 1. I join the majority with regard to Question 2.

/s/ Lisa M. Ginoza