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)

BRIEF OF APPELLANT SUSAN MCCARTHY

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This appeal over an insurance coverage dispute stems from Glynis Dixon McCormack's ("McCormack") years of negligence and persistent failure in a position of trust as a guardian to supervise her then-minor nephew, ZC, who abused another then-minor child, MCM, inflicting serious physical and emotional injuries upon MCM. Following years of litigation, including through the U.S. District Court for the District of Maine to the First Circuit Court of Appeals, and now through the Maine Superior Court to the Law Court in this present appeal, this case is long overdue for final disposition and closure.

By way of background, in 2007, Appellant Susan McCarthy ("McCarthy") moved to Maine, with her then-minor son, MCM. (App. at 026). McCarthy and McCormack were best friends prior to McCarthy's move to Maine, and the McCarthys (Susan and MCM) visited the McCormack home more frequently after the move. (App. at 026). At all times relevant to this case, MCM was "frail and thin" . (App at 026). He was subsequently (after he disclosed the abuse) diagnosed with cystic fibrosis, requiring surgery, including abdominal surgery to remove three organs. (App. at 026). ZC was about three years older than MCM and was strong, healthy, and had no physical issues. (App. at 026).

In around 2007, McCormack began frequently babysitting MCM and ZC while McCarthy worked, typically about once per week. (App. at 027). Prior to

2007 and more frequently after the move in 2007, ZC sexually, physically, and emotionally abused MCM. (App. at 027). For example, ZC would jump on MCM, shake his hand hard enough to cause physical pain, wrestle MCM to the ground, apply choke holds on MCM's neck and elbow, and punch MCM in the abdomen. (App. at 027). Sometimes the violence was physical and sexual, and sometimes only physical. (App. at 027, 035-36). The physical abuse also included punching, kicking, wrestling and choking, and was distinguishable from the sexual abuse. (App. at 036). ZC sexually molested, abused, and raped MCM while under McCormack's putative supervision. (App. at 027). ZC told MCM that, if he told his mother about the abuse, ZC would "kill" her (i.e., MCM's mother, McCarthy). (App. at 027). The abuse persisted on a "regular and repeated basis" until April 2009, when MCM disclosed the abuse. (App. at 027). As a result of the abuse he endured, MCM suffered and continues to suffer from emotional injuries, including depression and post-traumatic stress disorder ("PTSD"), and has been treated by Dr. William Griffith for these injuries for years following the abuse. (App. at 027).

McCarthy v. McCormack (York County Superior Court)

In February 2012, McCarthy, individually and as mother and next friend of MCM, filed a complaint in the York County Superior Court against McCormack, individually and as guardian of ZC (the "McCarthy Complaint"). (App. at 027, 137-41). The McCarthy Complaint alleged sexual and physical abuse. (App. at

027, 137-41). An Amended Complaint alleged that ZC intimidated, threatened, physically abused, punched and physically beat MCM "in order to . . . prevent him from discussing the abuse," and alleged physical and psychological injuries. (App. at 027-28, 142-149).

The Amended Complaint asserted a number of different legal theories against McCormack, including against her husband, John McCormack. Count I (Negligence) of the Amended Complaint alleged that the McCormacks acted negligently in their special relationship with MCM as his babysitter, including when they failed to keep him safe, exposed him to unreasonable risks, failed to control ZC, even after he displayed dangerous propensities, and failed to prevent ZC from injuring MCM while in their care. (App. at 028; Amended Complaint at ¶¶ 24-39 (App. at 144-46)). The Amended Complaint further alleged that the McCormacks breached a fiduciary duty owed to MCM (Count V), and asserted a claim for premises liability (Count VI). (App. at 028; Amended Complaint at ¶¶ 57-67 (App. at 148-49)). McCarthy acknowledges that there is no insurance coverage for the negligent infliction of emotional distress claim (Count II), assault and battery claim (Count III), or the intentional infliction of emotional distress claim (Count IV) of her Amended Complaint.

Metropolitan v. McCarthy and McCormack (U.S. District Court)

During the relevant time period, the McCormacks had an insurance policy with the Appellee, Metropolitan Property and Casualty Insurance Company ("Metropolitan"). (App. at 025 n.1; *see also* "Relevant Policy Provisions," *infra*). Seeking to evade responsibility for its insured's persistent negligence, in May 2012, Metropolitan filed a complaint in the U.S. District Court for the District of Maine (the "District Court"), seeking a declaratory judgment that it had neither a duty to defend nor a duty to indemnify McCormack against the allegations made in the McCarthy Complaint ("the Metropolitan Complaint"). (App. at 028). In June 2013, the District Court entered summary judgment against Metropolitan, concluding that it had a duty to defend McCormack in connection with the McCarthy Complaint and that Metropolitan had violated that duty. (App. at 028; Metro. Prop. & Cas. Co. v. McCarthy, No: 2:12-CV-151-NT, 2013 U.S. Dist. LEXIS 80900 (D. Me. June 10, 2013)). The District Court's ruling was affirmed by the United States Court of Appeals for the First Circuit. (App. at 028; Metro. Prop. & Cas. Co. v. McCarthy, 754 F.3d 47 (1st Cir. 2014)). Both the District Court and the First Circuit determined that Metropolitan's Abuse Exclusion, at issue here, was ambiguous. The case subsequently returned to the District Court on McCarthy's application for attorney's fees. See Metro. Prop. and Cas. Ins. Co. v. McCarthy, No. 2:12-cv-151-NT, 2015 WL 5440793 (D. Me. Sept. 15, 2015).

The Settlement Agreement and The Consent Judgment

In November 2013, while the federal court litigation was still pending, McCarthy and the McCormacks reached a settlement agreement, resolving all of the McCarthys' claims asserted against the McCormacks in the York County Superior Court (the "Settlement Agreement"). (App. at 028, 150-53). As part of the settlement, the McCormacks agreed to a Consent Judgment, dated December 11, 2013, in the amount of $300,000, on all counts of the Amended Complaint, with pre-judgment and post-judgment interest, against McCormack individually and as Guardian of ZC, and John McCormack, jointly and severally (the "Consent Judgment"). (App. at 029, 151, 154-55). As part of the settlement, the McCormacks assigned all of their rights under their Metropolitan insurance policy to McCarthy, and agreed to pay $30,000.00 to McCarthy. (App. at 029, 151-52). McCarthy agreed to limit the collection of the remainder of the Consent Judgment from Metropolitan. (App. at 029, 151). The McCarthys released the McCormacks and ZC from all claims, except those addressed in the Consent Judgment, and those arising out of the Settlement Agreement and documents referred to therein, or the enforcement thereof. (App. at 151).

Metropolitan v. McCarthy and McCormack (York County Superior Court)

On November 24, 2015, Metropolitan filed another complaint for declaratory judgment, arguing, among other things, that it has no duty to indemnify McCormack, or otherwise pay McCarthy for the Consent Judgment. (App. at 046-57). On April 16, 2016, McCarthy answered Metropolitan's complaint and counterclaimed, alleging that Metropolitan breached its contract in refusing to indemnify its insureds, asserting a reach and apply action pursuant to 24-A M.R.S. § 2904, and alleging that Metropolitan engaged in unfair claims settlement practices by refusing to settle claims when liability was reasonably clear (the "Counterclaim"). (App. at 058-69).

McCormack filed a motion for summary judgment on August 9, 2017, which the Superior Court (or the "trial court") granted on May 16, 2018, because McCormack had assigned all her rights under the Policy (defined below) to McCarthy, removing any interest she had in the litigation. (App. at 029 n.4). In March 2019, Metropolitan filed a motion for summary judgment and McCarthy filed a cross-motion for summary judgment. On November 4, 2019, the Superior Court denied both parties' motions due to the number of factual disputes. (App. at 015).

By the time of trial, the parties had narrowed the issues and stipulated that the Settlement Agreement was reasonable, and that the Consent Judgment was not the product of fraud or collusion. (App. at 028, 135-36). The parties further

agreed that Metropolitan had notice of McCarthy's claims and the underlying personal injury action prior to the Settlement Agreement and entry of the Consent Judgment. (App. at 028-29, 135-36).

All of the claims were tried before the Superior Court on July 7, 2022, except for McCarthy's claim for unfair claims settlement practices. The trial centered on whether there was "bodily injury" and whether such injuries were covered losses in light of the Intentional Loss Exclusion and Abuse Exclusion contained under the Policy. (App. at 034 ("[I]n order to find coverage for the claims subject to the Consent Judgment, the Court must find that the claims were for bodily injury, arising out of an occurrence, and not subject to any of the relevant policy exclusions.").

On September 15, 2022, the Superior Court entered its Partial Judgment and Order in Metropolitan's favor on its Declaratory Judgment Complaint because it concluded that the bodily injuries suffered by MCM were excluded by the Intentional Loss and Abuse Exclusions of the Policy. The Superior Court also granted judgment to Metropolitan and against McCarthy on Counts I (Breach of Contract) and II (Reach and Apply) of her Counterclaim. However, the Superior Court specifically found that there was a "bodily injury" within the meaning of the Policy and that the physical abuse was "not so intertwined with the sexual abuse that it cannot be separated from it." (App. at 036). Although not addressed

expressly, the Superior Court also implicitly found that there was an "occurrence" insofar as it concluded that the "abuse constitutes bodily injury for purposes of the insurance policy" and "[*t]herefore*, the abuse *will be covered* by the policy so long as it is not subject to any exclusion." (App. at 036 (emphasis added)). Metropolitan never challenged the existence of an "occurrence" in its Post-Trial Brief or Proposed Findings of Fact and Conclusions of Law, or in its Post-Trial Rely Brief. (App. at 020).

On October 3, 2022, McCarthy filed motions for amended and/or additional findings of fact and for reconsideration (collectively, the "Motion For Additional Findings of Fact"). (App. at 073-85). Specifically, McCarthy requested that the Superior Court include in its Partial Judgment and Order the entire Intentional Loss Exclusion and Abuse Exclusion provisions of the Policy (the Order included only portions of the same), as well as other provisions of the Policy that applied the term "you" more broadly (such as "to anyone defined as 'you'"). McCarthy also requested some clarifying language on the terms of the Settlement Agreement and scope of the release therein. (App. at 073-78).

On February 22, 2023, the trial court denied the Motion For Additional Findings of Fact, determining that "all necessary and appropriate factual findings" had already been made. (App. at 043-44). On September 29, 2023, on Metropolitan's motion to dismiss the final count of the Counterclaim (Count III –

Unfair Claims Settlement Practices), (App. at 086-88), the trial court granted the motion to dismiss and entered judgment in favor of Metropolitan on this final count, representing final judgment in the matter. (App. at 045). McCarthy then filed a timely notice of appeal. (App. at 023).

Relevant Policy Provisions

The Metropolitan policy at issue became effective on February 2, 2006 ("the Policy" or "Metropolitan's policy"). (App. at 029 & n.5, 089-134). At all relevant times, the McCormacks were insured by Metropolitan. (App. at 029). As the Superior Court noted, there were various policies in place during the times in which McCormack negligently supervised ZC and ZC inflicted physical and emotional injury on MCM; however, the parties agreed that the relevant policy language remained unchanged. (App. at 029 & n.5).

The Policy includes sections specifying the losses covered by the Policy and the exclusions from coverage. The relevant policy language, with **plain bold font** in the original and **underlined bold font** added for emphasis, follows:

LIABILITY, MEDICAL EXPENSES AND OPTIONAL COVERAGES

SECTION II – LOSSES WE COVER

COVERAGE F – PERSONAL LIABILITY

Agreement. **We** will pay all sums for **bodily injury** and **property damage** to others for which the law holds **you** responsible because of an **occurrence** to which this coverage applies. This includes prejudgment interest awarded against **you**.

. . .

(App. at 115). The Policy contains definitions of "bodily injury" and "you":

"Bodily injury" means any physical harm to the body including any resulting sickness or disease. This term includes required care, loss of services and death if it is a result of such physical harm, sickness or disease.

"Bodily injury" does not include:

. . .

3. the actual, alleged or threatened sexual molestation of a person; or
4. emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury **unless the direct result of physical harm.**

(App. at 094).

"You" and **"your"** mean:

1. the person or persons named in the Declarations and if a resident of the same household:
   A. the spouse of such person or persons;
   B. the relatives of either; or
   C. any other person under the age of twenty-one in the care of any of the above; and

. . .

(App. at 095).

The Policy specifies the losses that it does not cover:

SECTION II - LOSSES WE DO NOT COVER

COVERAGE F - PERSONAL LIABILITY AND COVERAGE G - MEDICAL PAYMENTS TO OTHERS

1. **Intentional Loss. We** do not cover **bodily injury** or **property damage** which is reasonably expected or intended by **you** or which is the result of **your** intentional and criminal acts or omissions. This exclusion is applicable even if:

   A. you lack the mental capacity to govern **your** conduct;
   B. such **bodily injury or property damage** is of a different kind or degree than reasonably expected or intended by **you;** or
   C. such **bodily injury** or **property damage** is sustained by a different person than expected or intended by **you.**

This exclusion applies regardless of whether you are actually charged with or convicted of a crime. However this exclusion does not apply to **bodily injury** or **property damage** resulting from the use of reasonable force by **you** to protect persons or property.

(App. at 115).

13. **Injury of an Insured. We** do not cover **bodily injury <u>to any insured within the meaning of Part 1 of the definition of you.</u>** 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).

18. **Abuse. We** do not cover **bodily injury** caused by or resulting from the actual, alleged or threatened sexual molestation or contact, corporal punishment, physical abuse, mental abuse or emotional abuse of a person. This exclusion applies whether the **bodily injury** is inflicted by **you** or directed by **you** for another person to inflict sexual molestation or contact, corporal punishment, physical abuse, mental abuse or emotional abuse upon a person.

19. **Emotional and Mental Anguish. We** do not cover **bodily injury** caused by or resulting from emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury. However, this exclusion does not apply if the person seeking damages from emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury **<u>has first experienced direct physical harm.</u>**

(App. at 119).

The Policy also includes additional sections addressing other types of losses covered and exclusions from coverage, the relevant portions of which follow, again with **plain bold font** as appears in the original and **<u>underlined bold font</u>** added for emphasis:

> Section I coverages (relating to property loss) of the Policy excludes:
>
> 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, **<u>no one defined as you or your</u>** 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). The Maine amendatory endorsement to this exclusion provides:

I. Under **SECTION I - LOSSES WE DO NOT COVER:**

A. item 1.A. **Intentional Loss**, the following paragraphs are added:

> This exclusion does not apply, with respect to loss to covered property caused by fire, to **<u>any person defined as "you"</u>** 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.
>
> **We** may apply reasonable standards of proof to claims for such loss.

(App. at 131). The General Conditions of the Policy provides:

> **2. Concealment or Fraud. <u>If any person defined as you</u>** 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).

STATEMENT OF THE ISSUES

I. Whether or not the trial court erred in ruling that the Intentional Loss Exclusion in the Policy bars coverage for the McCarthys' claims against the McCormacks;

II. Whether or not the trial court erred in ruling that the Abuse Exclusion in the Policy bars coverage for the McCarthys' claims against the McCormacks;

III. Whether or not public policy prohibits insurance coverage for an insured whose negligence contributed to an injury from sexual abuse;

IV. Whether or not the trial court erred in dismissing Count III of the McCarthys' Counterclaim for Metropolitan's violation of Maine's Unfair Claims Settlement Practices Act; and

V. Whether or not the trial court erred in denying McCarthy's Motion for Amended and/or Additional Findings of Fact Pursuant to M.R. Civ. P. 52(b) and a Motion to Alter or Amend the Partial Judgment and Order and/or for Reconsideration.

SUMMARY OF THE ARGUMENT

The trial court found that the claims at issue were for "bodily injury" under the Policy and, as indicated above, appeared to also conclude that those claims arose out of an "occurrence" under the Policy. The trial court's findings in these respects have not been appealed by either party, and are therefore not at issue in this appeal. Instead, the primary issue on appeal for this Court is whether the claims are subject to any of the relevant policy exclusions. If this Court determines

that the exclusions in the Policy do not apply, then Metropolitan has a contractual obligation to indemnify McCarthy, as the assignee of Metropolitan's insureds, the McCormacks, and a statutory obligation to indemnify pursuant to the Reach and Apply statute, 24-A M.R.S. § 2904.

The trial court erred in finding that the term "you" and "your" as used under the Intentional Loss and Abuse Exclusions of the Policy effectively means "an insured" or "any insured," as opposed to "the insured" who seeks coverage under the Policy, thereby barring coverage. In doing so, the trial court misapplied bedrock insurance contract construction principles under Maine law that required it to, *inter alia*, strictly construe the exclusions against Metropolitan, read the language of the Policy from the perspective of an average person untrained in the law or the insurance field, and construe any ambiguities in the Policy in favor of the insured. Instead of interpreting these exclusions narrowly and in favor of coverage, the trial court improperly interpreted them broadly, in favor of *exclusions to coverage*. The trial court also failed to consider that, when reading the Policy as a whole, as it must, "you" as used under the exclusions was not intended to mean "all insureds." Furthermore, and contrary to the trial court's suggestion, public policy does not prohibit insurance coverage for an insured like the McCormacks whose negligence contributed to an injury from sexual abuse.

Because the trial court erred in finding that the exclusions to the Policy applied to bar coverage, it also erred by dismissing Count III of the McCarthys' Counterclaim for Metropolitan's violation of Maine's Unfair Claims Settlement Practices Act.

For these and other reasons stated herein, McCarthy respectfully requests that this Court vacate the ruling of the trial court with respect to its 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.

ARGUMENT

I. STANDARD OF REVIEW AND INSURANCE CONTRACT CONSTRUCTION PRINCIPLES

The meaning of the language used in an insurance contract is a question of law that the Law Court reviews de novo. Concord Gen. Mut. Ins. Co. v. Est. of Boure, 2021 ME 57, ¶ 15, 263 A.3d 167. "If the language of an insurance policy is unambiguous, [this Court] interpret[s] it in accordance with its plain meaning, but [this Court] construe[s] ambiguous policy language strictly against the insurance company and liberally in favor of the policyholder." Id. (quotation marks omitted).

The language of an insurance policy is 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." Id. (quotation marks omitted). "Exclusions and exceptions in insurance policies are disfavored and are construed strictly against the insurer." Tibbetts v. Dairyland Ins. Co., 2010 ME 61, ¶ 23, 999 A.2d 930 (quoting Pease v. State Farm Mut. Auto Ins. Co., 2007 ME 134, ¶ 7, 931 A.2d 1072); see also Foremost Ins. Co. v. Levesque, 2005 ME 34, ¶ 7, 868 A.2d 244 (restating these principles, including that "[a]n insurance contract is ambiguous if it is reasonably susceptible of different interpretations" (quotation marks omitted)).[1]

II. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE INTENTIONAL LOSS EXCLUSION

The trial court did not properly apply these bedrock insurance contract construction principles when it concluded, first, that coverage was barred under the Intentional Loss Exclusion of the Policy. That exclusion provides:

[1] It is also worth noting that, because Metropolitan breached its duty to defend its insured, as determined in the federal court litigation, the burden of proof on several key issues fell to Metropolitan. When an insurer wrongfully refuses to defend its insured, as Metropolitan did here, the insurer assumes the burden of proving noncoverage in a subsequent claim for indemnification by its insured. Harlor v. Amica Mut. Ins. Co., 2016 ME 161, ¶ 24, 150 A.3d 793. Because of the assignment of the McCormacks' interests in the Policy to McCarthy, McCarthy now stands in the shoes of McCormack. The insurer also bears the burden of proving there is no coverage, after wrongfully refusing to defend its insured, when the claim is brought by the insured's assignee (as is the case here) under the Reach and Apply statute. Elliott v. Hanover Ins. Co., 1998 ME 138, ¶ 11, 711 A.2d 1310. Thus, under either an indemnification or reach and apply theory, Metropolitan bears the burden of showing there is no coverage.

1. **Intentional Loss**. **We** do not cover **bodily injury** or **property damage** which is reasonably expected or intended by **you** or which is the result of **your** intentional and criminal acts or omissions. This exclusion is applicable even if:
   A. **you** lack the mental capacity to govern **your** conduct;
   B. such **bodily injury** or **property damage** is of a different kind or degree than reasonably expected or intended by **you**; or
   C. such **bodily injury** or **property damage** is sustained by a different person than expected or intended by **you**.

   This exclusion applies regardless of whether **you** are actually charged with or convicted of a crime. However, this exclusion does not apply to **bodily injury** or **property damage** resulting from the use of reasonable force by **you** to protect persons or property.

(App. at 115).

"**You**" and "**your**" mean:

1. the person or persons named in the Declarations and if a resident of the same household:
   A. the spouse of such person or persons;
   B. the relatives of either; or
   C. any other person under the age of twenty-one in the care of any of the above; and

. . .

(App. at 095). For all intents and purposes, the job for this Court is to determine whether McCormack, an insured under the Policy, falls under the term "you" and "your" within the meaning of this exclusion. If she does, then the exclusion applies. On the other hand, if she does not, then the exclusion does not apply and coverage is not barred by this exclusion.

A. "**<u>You" is not "practically identical to an insured.</u>**"

The trial court erroneously concluded that the interpretation of the Intentional Loss Exclusion "must be harmonious with other cases interpreting the

intentional loss exclusion," and determined, without any precedent for support, that replacing the word "you" in Metropolitan's version of the exclusion, with "an insured," creates no practical difference, because "you" and "an insured" are "practically identical." (App. at 038). The trial court then applied the exclusion broadly to preclude coverage for the negligence, breach of fiduciary duty and premises liability claims against McCormack. (App. at 038-39).

Slightly different policy language can lead to significantly different coverage determinations. See Royal Ins. Co. v. Pinette, 2000 ME 155, 756 A.2d 520. The decision in Pinette highlights the importance of the policy language. In Pinette, this Court discussed its prior decisions in Hanover Insurance Co. v. Crocker, 1997 ME 19, 688 A.2d 928, and Johnson v. Allstate, 1997 ME 3, 687 A.2d 642, in which third party claimants in both cases sought recovery for the injuries caused by the sexual abuse of an insured, and also sought recovery for the same injury caused by the negligence of a coinsured who failed to protect against the abuse. Pinette, 2000 ME 155, ¶¶ 9-10, 756 A.2d 520. Because the intentional and negligent actors were different, even though the injuries were the same, coverage depended on the language of the policy, and the results in those cases were different because the policy language in each case were not the same. Id. (citations omitted).

In Johnson, the policy excluded coverage for bodily injury or property damage intentionally caused by "an insured person." 1997 ME 3, ¶ 6, 687 A.2d

642. This Court reasoned that the indefinite article "an" is "routinely used in the sense of 'any' in referring to more than one individual object," and concluded that by excluding coverage for damages intentionally caused by "an insured person," the policy "unambiguously excluded coverage for damages intentionally caused by *any* insured person under the policy." Id. (emphasis in original). Because both claims were caused by the same intentional sexual abuse, and because the exclusion precluded damages intentionally caused by "*any* insured person," there was no coverage for the claims against the intentional actor or the negligent coinsured.

In Crocker, this Court reached a different result because of the different policy language. The policy in Crocker excluded coverage for injuries "either expected or intended from the standpoint of the insured." 1997 ME 19, ¶ 6, 688 A.2d 928. This Court concluded that an exclusion for injuries intentionally caused by "the insured" refers to "a definite, specific insured, who is directly involved in the occurrence that causes the injury," and consequently did not bar the claims against the negligent coinsured. Id. ¶¶ 7-8. This Court distinguished the exclusion in Johnson (referring to "an insured"), which expanded the application and scope

of the exclusion because the acts of any insured exclude coverage for all insureds. Id.[2]

Contrary to the suggestion by the trial court below, and as Pinette, Johnson and Crocker make clear, there is not one universal interpretation of the intentional loss exclusion in homeowners' policies. The interpretation, and consequently, coverage, turn on the language of the specific policy at issue in each case. Metropolitan's intentional loss provision contains no adjective or phrase directly modifying the word "you." Rather than apply "you" to the specific insured involved in causing the underlying intentional injury (i.e., ZC), as in Crocker, the trial court improperly utilized an expansive rather than a narrow interpretation of "you," applying the exclusion to damages intentionally caused by *any* insured person (i.e., McCormack), as in Johnson, to defeat coverage. In other words, rather than construing the exclusion strictly against Metropolitan and in favor of coverage as it must, the trial court erred in impermissibly expanding the scope and application of the exclusion. Tibbetts, 2010 ME 61, ¶ 23, 999 A.2d 930.

In sum, the trial court erred as a matter of law in its determination that "you" is practically identical to "an insured" and erred in the application of the exclusion to the claims against the McCormacks.

[2] In Crocker, this Court noted that it was "premature" to rule on whether the insurer had a duty to indemnify, because the insured's liability had not yet been determined. 1997 ME 19, ¶ 1 n.1, 688 A.2d 928. In this case, the duty to indemnify is clear in light of the Consent Judgment.

B. Reading the Policy as a whole demonstrates that "you" does not apply to "all insureds."

An insurance policy must be examined as a whole, and "[a]ll 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, limited or controlled by the others." Jipson v. Liberty Mut. Fire Ins. Co., 2008 ME 57, ¶ 10, 942 A.2d 1213 (quotation marks omitted). Unlike the use of "you" in the Intentional Loss Exclusion at issue in this appeal, in other provisions of the Policy, Metropolitan made clear that it intended "you" to apply to all insureds. For example, the intentional loss exclusion for property damage claims states:

> 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).

In the Maine 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).

Rather than rely on the word "you" to demonstrate that the intentional loss provision for property damage applies to all insureds, Metropolitan clarified that "In the event of such loss, no one defined as **you** or **your** is entitled to coverage" (emphasis added). And, in the Maine endorsement to the Policy, additional language was added to limit the scope of that expanded application of "you."

Metropolitan cannot have it both ways. It cannot reasonably argue that "you," as used in the Intentional Loss Exclusion of its liability coverages, applies to everyone defined as "you," while at the same time it adds additional language expanding the definition of "you" (to apply to everyone defined as "you") in the analogous provision of its property coverages. Metropolitan fails to explain why it added the expanded definition of "you" in one, but not the other.

Similarly, another exclusion in the Liability Section of the Policy states that:

> 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 language "to any insured within . . . the definition of you" was intended to expand the scope of "you." Similarly, 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).

The references throughout the Policy to "no one defined as you," "any insured within the meaning of . . . the definition of you," and "any person defined as you," demonstrate that Metropolitan knew how to expand the scope of "you" when it intended to do so. The manner in which Metropolitan expanded the word "you" in some parts of the Policy, and not in others, indicates an intent to expand the scope of "you" in only certain situations. See Crocker, 1997 ME 19, ¶ 8, 688 A.2d 928 (the use of "the" and "an" insured in the same policy indicates its intent to cover different situations (citing Pawtucket Mut. Ins. Co. v. Lebrecht, 104 N.H. 465, 190 A.2d 420, 423 (1963))). There is no language in the Intentional Loss Exclusion to reasonably suggest that it applies to all insureds.

C. A plain reading of the unambiguous language of the Policy demonstrates that the exclusion does not apply to the claims against the McCormacks.

Because the claims against the McCormacks are based on negligence, breach of fiduciary duty, and premises liability, the Intentional Loss Exclusion does not apply. The claims against the McCormacks, in essence, assert that they negligently failed to supervise and/or protect the children under their care, which resulted in harm to MCM. There is no claim, or any evidence, that the McCormacks acted with the intention or expectation of harming MCM or that the McCormacks committed an intentional and criminal act. On its face, the Intentional Loss Exclusion has no application here.

Metropolitan's intentional loss provision, which has previously been interpreted by this Court, contains two distinct exclusions. Metro. Prop. and Cas. Ins. Co. v Estate of Benson, 2015 ME 155, ¶ 11, 128 A.3d 1065. The first exclusion pertains to "bodily injury or property damage which is reasonably expected or intended by you" and the second relates to "bodily injury or property damage…which is the result of your intentional and criminal acts or omissions." Id. The word "you" in Metropolitan's policy refers to the insured. Nothing in the use of the word "you" demonstrates that it applies to "all people defined as you."

Again, the language of the Policy must be viewed 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." Peerless Ins. Co. v. Wood, 685 A.2d 1173, 1174 (Me. 1996).

An average person reviewing the Metropolitan policy would reasonably understand that the word "you" referred to him or her individually, no one else, particularly because the exclusion further limits its scope by including references to the insured's state of mind, including her expectations, intentions, and "mental capacity," and states that it applies whether you are "actually charged with or convicted of a crime." These words personalize and limit the scope of the exclusion.

An average person in the shoes of ZC, the intentional actor, would read the Intentional Loss Exclusion and conclude that it applied to him. However, an ordinarily intelligent insured in the position of the McCormacks, reading the plain language of the Policy, would not understand that the Intentional Loss Exclusion applies to them because they did not "expect or intend" any bodily injury, and because they did not engage in any intentional and criminal act. Nothing in the exclusion suggests that it applies to the McCormacks if another insured commits the intentional acts. The word "you," without some clear expansion of its literal meaning, would not cause an ordinary person to conclude that ZC's conduct defeated coverage for them as well.

D. Alternatively, if the Intentional Loss Exclusion is ambiguous, then it must be construed against Metropolitan.

At best for Metropolitan, the application and scope of "you" is ambiguous, which means it 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."). Language in an insurance contract is ambiguous if "an ordinary person in the shoes of the insured would not understand that the policy did not cover claims such as those brought." Peerless Ins. Co. v. Brennon, 564 A.2d 383, 384 (Me. 1989) (quotation marks omitted). Language in an insurance policy is ambiguous if it is "reasonably susceptible to different interpretations." Progressive Northwest Ins. Co. v. Metro. Prop. and Cas. Ins. Co., 2021 ME 54, ¶ 10, 261 A.3d 920. The policy must be "examined as a whole to determine whether it is ambiguous." Id.

As McCarthy has argued, the Intentional Loss Exclusion applies only to the specific insured directly involved in causing the bodily injury (which was expected or intended or the result of their intentional and criminal acts/omissions). The trial court, however, determined that "you" was "practically" identical to "an insured" and applied the exclusion to all claims of bodily injury reasonably expected or intended or the result of the intentional and criminal acts of any insured. McCarthy's interpretation limits the application of the exclusion to the claims against ZC, the intentional actor. The trial court's interpretation applies the exclusion to all claims, including the negligence claims, against the McCormacks. To the extent there are two possible interpretations of this exclusion, the narrower

definition of "you" (i.e., applies only to claims against the insured who intended or expected the harm or committed the intentional and criminal acts) must be applied and interpreted against the insurer. Coverage for the negligence claims against the McCormacks are therefore not excluded by the Intentional Loss Exclusion because the McCormacks did not act with the intention or expectation that another would be harmed, nor did they commit an intentional and criminal act.

III. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE ABUSE EXCLUSION

Many of the same arguments supporting why the trial court erred in holding that the Intentional Loss Exclusion applies to bar coverage under the Policy apply with equal force as to why the trial court also erred in holding that the Abuse Exclusion applies to bar coverage under the Policy. See Argument, Section II, supra. McCarthy incorporates by reference her arguments above into this Section of her brief, with these additions:

A. The trial court erroneously determined that "you" under the Abuse Exclusion applied to "all insureds."

The trial court also did not properly apply the aforementioned bedrock insurance contract construction principles when it concluded, second, that coverage was barred under the so-called "Abuse" Exclusion of the Policy. That exclusion provides:

> 18. **Abuse**. **We** do not cover **bodily injury** caused by or resulting from the actual, alleged or threatened sexual molestation or contact, corporal

> punishment, physical abuse, mental abuse, or emotional abuse of a person. This exclusion applies whether the **bodily injury** is inflicted by **you** or directed by **you** for another person to inflict sexual molestation or contact, corporal punishment, physical abuse, mental abuse or emotional abuse upon a person.

(App. at 119). Again, the Policy defines "you" as:

> "You" and "your" mean:
>
> 1. the person or persons named in the Declarations and if a resident of the same household:
>   A. the spouse of such person or persons;
>   B. the relatives of either; or
>   C. any other person under the age of twenty-one in the care of any of the above; and
>
> …

(App. at 095). As with the Intentional Loss Exclusion, for all intents and purposes, the job for this Court is to determine whether McCormack, an insured under the Policy, falls under the term "you" and "your" within the meaning of this exclusion. If she does, then the exclusion applies. On the other hand, if she does not, then the exclusion does not apply and coverage is not barred by this Exclusion.

In the prior litigation between the parties, the First Circuit, applying bedrock insurance contract construction principles under Maine law, ruled that the Abuse Exclusion could reasonably be read to preclude coverage only for abuse inflicted or directed by an insured, rather than abuse inflicted or directed by any person. Metro. Prop. & Cas. Ins. Co. v. McCarthy, 754 F.3d 47, 49-50 (1st Cir. 2014). The

first sentence of the exclusion is written in general terms, but the second sentence may be read to limit the exclusion to acts of its insured. Id. at 49.

Due to the ambiguity, the exclusion was narrowly construed against Metropolitan, and determined to apply only to abuse committed by an insured or directed by an insured. Because the factual allegations of the Complaint did not make clear that ZC, the perpetrator, was an insured, the Court ruled that the exclusion might not apply to defeat coverage, and therefore, did not exonerate Metropolitan from its duty to defend. Id. at 50-51. 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.[3]

In this action, the parties stipulated that ZC is a "you," i.e., an insured under the Policy, and consequently, the Abuse Exclusion applies to defeat coverage for the claims against ZC. However, the trial court incorrectly determined that the abuse committed by ZC also applies to defeat coverage for the negligence claims against the McCormacks. Like its interpretation of the Intentional Loss Exclusion, the trial court appears to have construed "you" to be the practical equivalent of "an insured" and construed bodily injury caused by one insured to defeat coverage for all insureds. (App. at 039-41). As discussed in the Argument, Section II, supra,

[3] In ruling on the parties' cross-motions for summary judgment, the District Court did "not reach the parties' arguments about whether 'you' as used in the abuse and intentional loss exclusions refers to 'the insured' or to 'any insured' or 'all insureds.'" McCarthy, 2013 WL 12061851, at *5.

concerning the Intentional Loss Exclusion, there is no adjective or phrase directly modifying the word "you." Rather than apply "you" to the insured who actually inflicted or directed the abuse, the trial court applied the exclusion to all insureds if one of them inflicted or directed the abuse. Like its decision concerning the Intentional Loss Exclusion, and for the same reasons discussed above, *see* Argument, Section II, supra, the trial court erred as a matter of law in expanding the scope and application of the exclusion, in violation of Tibbetts, 2010 ME 61, ¶ 23, 999 A.2d 930.

As also argued in the Argument, Section II, supra, the Policy must be examined as a whole, whereby "[a]ll 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, limited or controlled by the others." Jipson, 2008 ME 57, ¶ 10, 942 A.2d 1213 (quotation marks omitted). Unlike Metropolitan's use of "you" in the Abuse Exclusion, other parts of the Policy make clear Metropolitan's intention that "you" applies to all insureds. For instance, in the Intentional Loss Exclusion in the Property section of the Policy, the exclusion provides: "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). Similarly, in the Concealment or Fraud provision of the General Conditions, the Policy provides that there will be no coverage under

the Policy "[i]f any person defined as **you** conceals or misrepresents any material fact." (App. at 126). Metropolitan's differing uses of "you" demonstrates its intent to utilize "you" to cover different situations. Had Metropolitan intended "you" in the Abuse Exclusion to apply to the acts of "any insured," it clearly could have said so.

It also bears repeating that an average person reviewing the Metropolitan policy would understand the word "you" to refer to him or her individually, and would conclude that the Abuse Exclusion did not apply to him or her, unless they inflicted or directed the abuse. An ordinary person in the shoes of an insured would not understand that the Policy did not cover claims against a negligent coinsured, who did not inflict or direct the abuse. The word "you," without some clear expansion of its literal meaning, would not cause an ordinary person to conclude that ZC's conduct defeated coverage for them as well.

The trial court's reliance on Sarah G. v. Maine Bonding & Casualty Co., 2005 ME 13, 866 A.2d 835, as a case involving a "similar abuse exclusion," is misplaced. The issue in Sarah G. was whether the word "abuse" was ambiguous. Unlike the Abuse Exclusion in Metropolitan's policy, the exclusion in Sarah G. expressly stated that it applied to, among other things, negligent employment and supervision claims against a person for whom "any insured is or ever was legally responsible . . ." Id. ¶ 9. Sarah G. is readily distinguishable because the language

of the abuse exclusion in that case was markedly different from the language of Metropolitan's Abuse Exclusion, given that the exclusion in Sarah G. expressly applied to negligence claims.

B. The trial court erred in ruling that the Abuse Exclusion applies to all claims for bodily injury caused by or resulting from sexual molestation and physical abuse.

Though not entirely clear, the trial court appears to have also determined that the Abuse Exclusion applies to all claims for bodily injury caused by or resulting from sexual molestation and physical abuse without regard to the identity of the perpetrator. The trial court stated:

> The abuse exclusion specifically limits coverage for all claims of bodily injury caused by or resulting from sexual molestation *and* physical abuse. The bodily injuries in this case were, in fact, caused by sexual molestation and physical abuse. That is the end of the analysis because the negligence claims asserted in the McCarthy complaint are still claims for bodily injury that was caused by sexual molestation and physical abuse—the damages are precluded by operation of the abuse exclusion.

(App. at 040-41).

To the extent the trial court determined that the exclusion applies to all claims for bodily injury caused by or resulting from sexual molestation or abuse, the ruling overlooks the obvious ambiguity in the exclusion. The exclusion is ambiguous because, as previously discussed herein, the First Circuit held it can reasonably be read to preclude coverage only for abuse inflicted or directed by an insured, rather than abuse inflicted or directed by any person. McCarthy, 754 F.3d

at 49-50. Because all ambiguities must be resolved in favor of coverage and exclusions are strictly construed and disfavored, the Court should find that it only applies to the specific insured who inflicted or directed the abuse. In sum, the trial court erred as a matter of law in ruling that the exclusion applies to all bodily injury caused by or resulting from molestation or abuse without regard to the identity of the perpetrator.

C. Crocker supports that the Abuse Exclusion does not bar coverage for the McCarthys' claims against the McCormacks.

It bears repeating this Court's holding in Crocker. This Court held that the policy exclusion at issue did not apply to negligence claims against a coinsured, where the policy excluded injuries "expected or intended from the standpoint of the insured," which this Court ruled would not apply to the negligent actor, who did not expect or intend to cause any injury. 1997 ME 19, ¶¶ 6-8, 688 A.2d 928. Here, Metropolitan's Abuse Exclusion applies to bodily injury "inflicted by **you** or directed by **you**." Like the exclusion in Crocker, Metropolitan's exclusion only applies to the insured who inflicted or directed the bodily injury. Because the McCormacks did not inflict or direct any bodily injury, the Abuse Exclusion does not apply to them.

In short, coverage for the claims against the McCormacks is not excluded by the Abuse Exclusion because they did not "direct" or "inflict" any bodily injury.

IV. PUBLIC POLICY DOES NOT PROHIBIT INSURANCE COVERAGE FOR AN INSURED WHOSE NEGLIGENCE CONTRIBUTED TO AN INJURY FROM SEXUAL ABUSE

Contracts that violate public policy will not be enforced. Riemann v. Toland, 2022 ME 13, ¶ 36, 269 A.3d 229. "A contract is against public policy if it clearly appears to be in violation of some well established rule of law, or that its tendency will be harmful to the interests of society." Id. (quoting Allstate Ins. Co. v. Elwell, 513 A.2d 269, 272 (Me. 1986) (quotation marks omitted)).

As additional support for its determination that the Intentional Loss and Abuse Exclusions bar coverage for McCarthy's claims, the trial court also suggested that the claims tread too close to the public policy line. (App. at 041). But this Court already rejected that argument in Crocker. Furthermore, Maine's public policy prohibiting insurance coverage for sexual abuse claims extends only to the actual perpetrator of the abuse. In Perreault v. Maine Bonding & Casualty Co., this Court determined that public policy considerations prohibit the indemnification of an insured for civil claims relating to his or her own criminal acts of child sexual abuse. 568 A.2d 1100 (Me. 1990). The public policy prohibition extends only to the perpetrator of the child sexual abuse, and also does not apply when the intentional and negligent actors are different, even though the injury is the same. Crocker, 1997 ME 19, ¶ 9, 688 A.2d 928. The same is true here. In the present matter, the injuries are not distinct, but the exclusions in

Metropolitan's policy only apply to the intentional actor, and not to the McCormacks, the negligent coinsured.

Even when a policy excludes coverage for the intentional or criminal acts or omissions of "any insured person," negligence claims against a coinsured may be covered if the injury is distinct from the sexual abuse. In Korhonen v. Allstate Insurance Co., the policy at issue contained an intentional acts exclusion excluding coverage for bodily injury or property damage intended or expected from the intentional or criminal acts or omissions of "any insured person." 2003 ME 77, ¶ 5, 827 A.2d 833. This Court determined that the negligent supervision claims against a coinsured were covered by the Allstate policy, despite the intentional acts exclusion that applied to "any insured person," because Plaintiff asserted injuries against the negligent coinsured that were distinct from the sexual abuse. Id. ¶¶ 12-16. In short, there is no public policy prohibiting coverage of the McCarthys' claims against the McCormacks.

V. THE TRIAL COURT ERRED BY DISMISSING COUNT III OF THE MCCARTHYS' COUNTERCLAIM

The trial court's ruling on a motion to dismiss, pursuant to M.R. Civ. P. 12(b)(6), is reviewed de novo. Doe v. Bd. of Osteopathic Licensure, 2020 ME 134, ¶ 6, 242 A.3d 182. This Court reviews the legal sufficiency of the complaint "in the light most favorable to the plaintiff to determine whether it sets forth

elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." Id. (quoting Johanson v. Dunnington, 2001 ME 169, ¶ 5, 785 A.2d 1244 (quotation marks omitted)).

By Order dated September 29, 2023, the trial court dismissed Count III of McCarthy's Counterclaim for failure to state a claim upon which relief may be granted because of its earlier decision determining that the Intentional Loss and Abuse Exclusions prevent coverage for any of the claims in the Consent Judgment. (App. at 045). Because the trial court erred in its decision on coverage as discussed in the Argument, supra, the Order dismissing Count III of the Counterclaim should be vacated.

VI. THE TRIAL COURT ERRED BY DENYING MCCARTHY'S MOTION FOR ADDITIONAL FINDINGS OF FACT

This Court reviews "a ruling on the substance of a Rule 52(b) motion [for findings of fact] for an abuse of discretion." Atkinson v. Capoldo, 2021 ME 27, ¶ 10, 250 A.3d 1099 (quoting Roberts v. Roberts, 2007 ME 109, ¶ 6, 928 A.2d 776). When a motion for findings of fact is denied, this Court will not "assume that the court implicitly found facts sufficient to support its ultimate determination." Id.

By Order dated February 22, 2023, the trial court denied the Motion For Additional Findings of Fact, determining that "all necessary and appropriate

factual findings" had already been made. (App. at 043-44). However, it erred by not including in its Findings of Fact in the Partial Judgment and Order the entire Intentional Loss Exclusion and Abuse Exclusion provisions of the Policy, as well as other provisions of the Policy that applied the term "you" more broadly (such as "to anyone defined as 'you'"). Had it done so, the trial court should have then found in favor of McCarthy.

CONCLUSION

In light of the foregoing, 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 2nd day of February, 2024.

_____

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CERTIFICATE OF COMPLIANCE

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

Dated: February 2, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 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.

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