COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2019-P-0159

GREEN MOUNTAIN INSURANCE COMPANY, INC.

Plaintiff-Appellant

V.

MARK J. WAKELIN, CHARMAINE NORRIS, as PERSONAL REPRESENTATIVE of the ESTATE of KEITH NORRIS and ROBERT POWERS, as ADMINISTRATOR of the ESTATE of DEANA LEE POWERS

Defendants-Appellees

On Appeal From A Judgment of the Superior Court of Norfolk County

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BRIEF OF THE PLAINTIFF-APPELLANT, GREEN MOUNTAIN INSURANCE COMPANY, INC.

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Date: March 6, 2019

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STATEMENT OF ISSUES

Whether the Superior Court erred in this declaratory judgment action when it determined that the exclusion in plaintiff/appellant's insurance policy stating that it will not provide coverage for injuries/death "arising out of" premises owned by the insured but not listed as the "insured location" in the policy would not apply to the specific facts of this case.

STATEMENT OF THE CASE

Statement of Facts

This is an insurance coverage dispute in which plaintiff/appellant Green Mountain Insurance Company ["Green Mountain"] commenced a lawsuit seeking declaratory judgment relief with regard to the existence of insurance coverage arising out of a tragic incident occurring at a cabin in Byron, Maine on or around July 14, 2015.

In 2015, defendant Mark Wakelin ["Wakelin"] was the owner of a cabin and property in Byron, Maine which was "off the grid", meaning that it had no town-supplied electricity. On or around July 14, 2015, decedents Keith Norris and Deana Lee Powers, as well as Wakelin's two children, Brooke and Matthew Wakelin,

visited the cabin. On that same evening or within a short time thereafter, all four young adults died due to carbon monoxide poisoning which had emanated from a gas-powered generator which they had started inside the cabin to provide electrical power [RA, v. 2, 120-121 and 124]; it is indisputable that the cabin had no appropriate ventilation for said generator [RA, v. 1, 73-76].

The Medical Examiners report confirms that decedents died due to carbon monoxide poisoning which was emitted from a gas-powered generator in the basement of the Maine property [RA, v. 1, 73-77]; the parties do not dispute this.

The Medical Examiners report also stated on page 2 that "(B)uilding is very solid and no obvious drafts. All windows and doors are closed" [RA, v. 1, 74].

This generator was purchased by Wakelin around 2012 and brought up to the Maine property where it has always remained up to the present time [RA, v. 2, 88]; in fact, Wakelin has never used that generator anywhere else besides his Maine property [RA, v. 2, 88].

Whenever Wakelin left the Maine property, he chained the generator to the garage door [RA, v. 2, 89]; a photograph depicting the generator and how it was always chained to the building itself is included. [RA, v. 2, 116].

As explained, Wakelin's Maine property is "off the grid", meaning that there is no town-supplied source of electricity and the only electrical source which he had for the Maine property was the generator. [RA. v. 2, pages 86-87 and 113]. Without the generator, then, the house had no lights, no electricity, no refrigerator use and no ability to use any other equipment there which required an electrical source [RA, v. 2, 114; 120-121 and 126-127].

By way of example, besides a refrigerator and a microwave in it, the Maine property also had other equipment which required electrical power, including a slot machine, vacuum, window fan, space heater and lamps [RA, v. 2, 118] and none of these things could be operated unless the generator was turned on. Although Wakelin gave deposition testimony in the Superior Court case that he typically used the generator for only his power tools and microwave, the fact remains that the generator was critical to his

ability to actually live in the Maine premises. Even more significantly, at the time of this incident, police determined that the decedents were using the generator to provide electrical power for the use of basic household equipment, i.e., the refrigerator, and it was clear that this appliance, which was a fixture to, and condition of, the Maine premises, could not be used without the generator [RA, v. 2, 120-127].

Finally, and perhaps most significantly, the generator was always going to be the only and permanent power source for the Maine premises [RA, v. 2, 114].

During the discovery phase of this case, Green Mountain retained an electrical engineer, Andrew Diamond, to inspect the premises and provide his opinions based on that inspection and his expertise as an electrical engineer; a copy of that report, his curriculum vitae and attachments were included in Green Mountain's summary judgment submissions [RA, v. 2, 129-142]. Mr. Diamond opined, to a reasonable degree of engineering certainty that:

1. The death of [decedents] that occurred on or about July 14, 2015 **arose out of** a combination of a) using the generator inside

> the cabin which b) had no adequate ventilation to disperse the carbon monoxide…
>
> 2. The subject generator was strictly used to provide electrical power for the cabin and its premises because electric utility power was not available. [emphasis added]. [RA, v. 2, 133].

In short, this tragic incident could not have occurred just anywhere, as the Superior Court determined, but instead was a condition of the Maine premises and, in fact, occurred inside that specific Maine building which did not have sufficient ventilation, thereby allowing the carbon monoxide to accumulate and poison decedents while they were inside that specific building.

The Applicable Insurance Policy

Green Mountain provided homeowners insurance coverage to Wakelin for his property located at 1237 Washington Street, Braintree, MA [RA, v. 1, 94], but Wakelin owned no insurance coverage on his property located in Maine where this incident occurred [RA, v. 1, 95]. This is confirmed by the deposition testimony of Wakelin himself who conceded that he never

purchased homeowners insurance coverage for the Maine property [RA, v. 2, 85].

At the inception of this lawsuit, Green Mountain protected its insured by proposing- and defendants agreed- that they would enter into a subsidiary agreement whereby Wakelin will be insulated from, and not exposed to, any liability beyond potentially the insurance policy limits from the contested Green Mountain insurance policy. For this reason, Wakelin has not incurred, and will not incur, any defense costs and is a party to this lawsuit and appeal in name only.

The relevant homeowners insurance policy which Wakelin had purchased from Green Mountain for his Massachusetts property is referenced herein, [RA, v.1, 19-68; RA, v. 2, 26-73], as is the Declarations Page identifying the insured location solely as the Massachusetts property. [RA, v. 1, 21-22; RA, v. 2, 75-76].

The applicable insurance policy expressly excludes coverage for the following:

SECTION II- EXCLUSIONS

E. Coverage E- Personal Liability and Coverage
F- Medical Payments to Others

> Coverages E and F do not apply to the following:
>
> 4. "Insured's" Premises Not An "Insured Location"
>
> "Bodily Injury" or "property damage" arising out of a premises:
>
> a. Owned by an "insured";
>
> b. Rented to an "insured" or
>
> c. Rented to others by an "insured":
>
> **that is not an "insured location"**.
>
> [emphasis added] [RA, v. 1, 40; RA, v. 2, 45.

The applicable insurance policy expressly defines the "insured location" as the Massachusetts property, meaning that the Maine property where this incident occurred cannot be considered an "insured location"-therefore, by the very terms of the policy, coverage would be excluded for this incident [RA, v. 1, 24; RA, v. 2, 29].

The Course of Proceedings Below

Suit was commenced by Green Mountain in December, 2015 seeking declaratory judgment relief. In January, 2018, Green Mountain filed its motion for summary

judgment and supporting memorandum of law [RA, v. 1, 111-127]; in February, 2018, the estate representatives of both decedents, Powers and Norris, filed oppositions to Green Mountain's motion, as well as their own motions for summary judgment [RA, v. 1, 128-134; 142-154]. At or around that same date, defendant Powers also filed a motion to strike portions of Green Mountain's summary judgment materials [RA, v. 1, 135-141]. Green Mountain, in turn, filed both an opposition to Powers' motion to strike [RA, v. 1, 155-160] and a reply memorandum to defendant Norris' opposition to its summary judgment motion [RA, v. 1, 161-164].

Oral argument was heard on June 26, 2018 before the Honorable Mark A. Hallal in Norfolk County Superior Court [RA, v. 2, 184-214]. During this hearing and in open court, Judge Hallal denied defendant Powers' motion to strike portions of plaintiff's summary judgment materials and otherwise took this matter under advisement [RA, v. 2, 167].

On August 29, 2018, Judge Hallal issued his Memorandum of Decision and Order on Defendants' Summary Judgment and denied Green Mountain's motion for summary judgment [RA, v. 2, 167-175]. Left

undecided- at least officially- was any action taken on defendants' motion for summary judgment [RA, v. 2, 176].

Therefore, the parties in subject case drafted and filed with the Court a motion for entry of judgment [RA, v. 2, 177-179]. On October 22, 2018, Judge Hallal allowed the parties' motion for entry of judgment and further revised his order, dated August 29, 2018, to state that:

> "the Court's ruling was intended to conclude this declaratory judgment action in favor of the Defendants on the issue of the existence of insurance coverage. Judgment shall enter" [RA. v. 2, 180].

The Court then endorsed a document, dated November 26, 2018 and entitled "Judgment", which stated:

> "Judgment to enter in favor of Defendants declaring that insurance coverage exists with regard to Count I of Plaintiff's Complaint seeking a declaratory judgment" [RA, v. 2, 182].

Green Mountain then filed a timely Notice of Appeal on December 4, 2018 [RA, v. 2, 183].

SUMMARY OF THE ARGUMENT

This is a *de novo* review by this Court. The Superior Court erred when it allowed summary judgment in favor of the estates of Norris and Powers. Specifically, the particular facts of this case, combined with applicable caselaw, should have resulted in a finding in favor of Green Mountain on its complaint seeking declaratory judgment relief.

Additionally, the Superior Court erred in ignoring the clear intentions of the parties: defendant Wakelin never intended to insure the Maine property and Green Mountain never knew anything about the Maine property, never had the opportunity to do a risk assessment on that property and certainly never received a premium to insure that Maine property.

Further, the Superior Court erred since the "arising out of" language in the exclusion provision of the relevant insurance policy did apply and should have absolved Green Mountain from being required to provide insurance coverage for this incident. Specifically, the incident did arise out of the Maine property which was not insured by Green Mountain; the Superior Court erred in deciding otherwise.

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT FAILED TO CONSIDER THE CLEAR AND UNAMBIGUOUS INTENTIONS OF THE PARTIES TO THE INSURANCE CONTRACT.

Wakelin had purchased a homeowners insurance policy with Green Mountain for his primary residence in Braintree, MA [RA,v. 1, 21-22]. Although he also owned a vacation home in Byron, Maine, he voluntarily chose not to purchase insurance for that property [RA, v. 2, 85]. An insurer such as Green Mountain is not expected to be liable for losses arising from risks associated with other premises for which it has not evaluated the risk and/or received a premium; however, that is what the Superior Court concluded in this case. In Massachusetts, there is a "long-standing rule of construction that the favored interpretation of any insurance policy is one which "best effectuates the main manifested design of the parties", *Metropolitan Property and Casualty Insurance Company v. Fitchburg Mutual Insurance Company*, 58 Mass.App.Ct. 818, 823 (2003). In short, Wakelin intentionally chose not to have insurance on the Maine property; conversely, as explained in the Affidavit of Paula Nieman, the Claim Specialist handling this claim,

Green Mountain knew nothing about the Maine property, had never inspected or evaluated it to determine whether there were risks related to the fact that Wakelin would have to supply his own electricity source and certainly never received a premium to insure the Maine property [RA, v. 2, 144].

Although the exclusionary language is expected to be fair to the insured, the rights of the insurer, Green Mountain, are equally important that it not be prejudiced by "unfair surprise or burdensome risk" when assessing whether there is coverage for an uninsured location, *Utica Mutual Insurance Company v. Fontneau, et al*, 70 Mass.App.Ct. 553, 560 (2007).

Simply stated, it is clear that Green Mountain did not intend to provide insurance coverage for incidents which arose out of the uninsured Maine property.

II. THE SUPERIOR COURT ERRED WHEN IT DETERMINED THAT THIS INCIDENT DID NOT ARISE OUT OF THE MAINE PROPERTY.

The Estates took the position in their summary judgment papers that the term "arising out of" is ambiguous and that the exclusionary language in the policy should therefore be interpreted against the insurer [RA, v. 1, 150-151]. Green Mountain agrees

with that portion of the Superior Court's decision in which it stated that, although the parties may disagree with the interpretation of the term "arising out of", that does not render the term ambiguous [RA, v. 2, 170].

Caselaw interpreting that exclusionary language is, in fact, both clear and unambiguous. The Supreme Judicial Court in the case of *Bagley v. Monticello Insurance Company*, 430 Mass. 454, 457 (1999) stated that:

> "The phrase 'arising out of' must be read expansively, incorporating a greater range of causation than that encompassed by proximate cause under tort law. See *Rischitelli v. Safety Ins. Co.*, 423 Mass. 703, 304 (1996) [cites]. **Indeed, cases interpreting the phrase 'arising out of' in insurance exclusionary provisions suggest a causation more analogous to 'but for' causation,** in which the court examining the exclusion inquires whether there would have been personal injuries, and a basis for the plaintiff's suit, in the absence of the objectionable underlying conduct [cites] [Emphasis added]. See *New England Mutual Life Ins. Co. v. Liberty Mutual Ins. Co.*, 40 Mass.App.Ct. 722, 727 (1996).

Subsequent decisions by the Supreme Judicial Court and the Appeals Court have reinforced this

"expansive" interpretation of the "arising out of" standard when used in the context of insurance policy exclusions, e.g., *Commerce Insurance Co. v. Theodore* case, *Id*; *Fuller v. First Financial Ins. Co.,* 448 Mass. 1, 6-7 (2006) and *Monticello Insurance Company v. Dion, et al,* 65 Mass.App.Ct. 46 (2005). In other words, although third-party insurance policies generally protect the insured from liability to the injured party, the '"arising out of' exclusions in liability policies operate to alter this general rule by eliminating coverage regardless of the theories of recovery asserted if the injury or damage flows from or originates from events or causes identified in the exclusion", *Massachusetts Prop. Ins. Underwriting Ass'n v. Gallagher,* 75 Mass.App.Ct. 58, 60-61 (2009).

Moreover, Massachusetts courts have interpreted the "arising out of" language to mean "originating from", "growing out of", "flowing from", "incident to" or "having connection with", *Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Insurance Company*, 220 F.3d 1, 7 [1st Cir., 2000] [applying Massachusetts law and citing *New England Mutual Life Ins. Co. v. Liberty Mutual Ins. Co.,* 40 Mass.App.Ct.

722, 725 (1996) and Webster's Third New International Dictionary 117 (1981)].

Accordingly, whether the term "arising out of" is used or instead substituted by "having connection with", for example, there is clearly an exclusion for injuries [and death] which arise out of premises owned by the insured but which are not the insured location.

Therefore, the Superior Court did err when it concluded that the exclusionary language in the insurance policy did not apply, purportedly because the decedent's deaths did not "arise out of" the Maine property.

A. The Superior Court erred when it focused on the portability of the generator rather than the relationship of the generator to the Maine property.

In rejecting the applicability of the exclusionary language in the Policy, the Superior Court analogized the generator in subject case to the portable fire pit which was central to the case of *Vermont Mutual Insurance Company v. Zamsky, et al,* 732 F.3d 37 (2013). [RA, v. 2, 174]. In the *Zamsky* case, partygoers at property which was not an insured location were injured while sitting outside around a portable fire pit when gasoline was poured on that

portable fire pit, thereby causing serious burns to those partygoers. The *Zamsky* court ruled that the exclusionary language of the insurance policy did not apply since the injuries did not "arise out of" the uninsured premises.

Following that logic, the Superior Court incorrectly concluded that because the generator could have potentially been moved off the Maine premises- just as the fire pit could- the *Zamsky* analysis must apply. However, it is equally undisputed that the generator in subject case was never moved off the property from the day Wakelin first brought it to the Maine premises up until the incident itself [RA, v. 2, 88]; that the only electrical source for the Maine property was the generator [RA, v. 2, 86-87 and 113]; and that when this tragic incident occurred, the decedents were using the generator to provide electrical power for the lights and refrigerator at the Maine property [RA, v. 2, 120-127]. Rather, it was as much a fixture at the Maine premises as any kitchen or lighting appliance; in short, it provided an essential benefit to the Maine premises.

For this reason, the Superior Court's focus on the portability of the generator, as opposed to its relationship with the Maine property, was misplaced.

Specifically, the Superior Court acknowledged that "the Maine premises required the generator, or some other similar alternative electrical source, to provide power to equipment within the building", but that electrical power was not a "necessary and inherent condition of the Maine premises" [RA, v. 2, 173. This analysis misses the mark.

The generator was not a fire pit used outside the house for entertainment, nor was it a dog brought onto the property. Rather, the generator had a critical relationship with the Maine property- it provided an essential electrical source so that the property was more livable. The case of *Callahan v. Quincy Mutual Fire Co.,* 50 Mass.App.Ct. 260 (2000) is instructive here. In that case, a dog was brought onto premises which was not the "insured location" and bit someone; this Court concluded that the injury did not "arise out of" the uninsured premises and that therefore the exclusionary language in the homeowners insurance policy did not apply. In the *Callahan* case, however, this Court aptly explained that relationship when

analyzing this exclusionary language: "(f)or an injury to 'arise out of', it is enough if it is reasonably apparent that there is a causal connection between the injury and the use to which the premises… are put". at 262. Based on that analysis alone, the exclusionary language in the policy in subject case should have applied since there was an obvious causal connection between the deaths and electrical power being provided to the property itself; in other words, the deaths clearly "arose out of" an effort to provide electrical power to the property.

In this regard, it is not difficult to distinguish the connection which a dog had with the uninsured premises from a generator which was actually providing electricity to the uninsured premises. The difference is clear- whereas the dog may have provided some value to the property owner, the generator in subject case provided a value to the property itself- it changed both the character and the condition of the property.

The case of *Commerce Insurance Company v. Theodore*, 65 Mass.App.Ct. 471 (2006) is dispositive in subject case. In that case, defendant Theodore owned property in Framingham, MA which was insured by

plaintiff, Commerce Insurance Company; he also owned property in Dorchester, MA which was neither identified nor insured under the Commerce policy. Theodore asked a third-party to help him cut down a tree on the Dorchester property. Theodore was initially holding the ladder which the third-party was using to cut down the tree but moved away, after which the ladder began to shift. The third-party lost his balance, fell and sustained certain injuries, thereafter commencing a lawsuit against Theodore alleging his negligence in failing to hold the ladder. Significantly, the language in the Commerce policy is exactly the same as in the Green Mountain homeowners policy with Wakelin. The Appeals Court ruled in the *Theodore* case that the exclusion applied, i.e., the same exclusion which is at issue in subject case, since there is a "sufficiently close relationship between the injury and the premises". *Id.,* at p. 476. Consistent with that analysis, since there was a relationship between a condition on Wakelin's uninsured property and the resulting deaths, the same exclusion must apply.

B. The Superior Court erred when it determined that the generator was not a condition of the Maine property.

The Superior Court further erred when it concluded that even though the generator was the sole source of electricity for the Maine property, the electricity was still not a "necessary and inherent condition of the Maine Premises" [RA, v. 2, 173]. It is respectfully asserted that this argument again misses the mark. In fact, the parties can identify literally hundreds of "conditions" on a piece of property which are not inherent, necessary or defective; by way of example only, if decedents had drowned in an in-ground swimming pool situated on the Maine property or had burnt themselves on a stove which was plugged into the generator, it is assumed that the Superior Court would have concluded that the exclusionary language of the policy applied. In addition, had decedents been electrocuted by an electric fence, once again the exclusionary language would have been applied. We know this because this very Court actually used that example in the *Callahan* case by stating that although a dog biting someone on the uninsured premises would not be a condition of those premises, an "electric fence would be", at p.

263. It is frankly impossible to distinguish the generator in subject case from the electric fence in the *Callahan* case. Each provided a benefit to the property, each had a connection to the property and each provided some type of utility to the property which would have enhanced its value to the owner. In addition, neither was necessary, inherent or defective; yet, because the generator in subject case could apparently be moved- even though it never was- the Superior Court found that the exclusionary language in the policy did not apply.

There is no substantive difference between the generator in subject case and the electric fence cited in the *Callahan* case; in short, the relationship of the generator to the uninsured property, as opposed to its portability, should be the determining factor in deciding whether the exclusionary language applies.

C. The Superior Court erred when it failed to adhere to this Court's instruction that the "arising out of" language was to be interpreted expansively.

As stated above, Green Mountain's analysis is clearly consistent with recent decisions by the Supreme Judicial Court and the Appeals Court to enforce the "expansive" interpretation of the "arising

out of" standard when used in the context of insurance policy exclusions.

In fact, in the case of *Metropolitan Prop. & Cas. Ins. Co. v. Fitchburg Mut. Ins. Co.,* 58 Mass.App.Ct. 818 (2003) which involved the applicability of an exclusion in a homeowner's insurance policy for injury or damage "arising out of or in connection with [the insured's] business activities", this Court expressly stated that "(T)he terms 'arising out of' and 'in connection with' are not to be construed narrowly but are read expansively in insurance contracts", at 820-821.

However, in apparently ignoring this Court's instructions regarding the "arising out of" language, the Superior Court cited one out-of-state case in support of its decision- a Missouri case decided in 1977- *Lititz Mut. Ins. Co. v. Branch,* 561 S.W.2d 371, 373-374 (1977) in which it was determined that the insurance policy's exclusionary language did not apply in a dog bite incident since an easily movable dog was not part of the premises [RA, v. 2, 172]. The Superior Court also failed to note that the Missouri court in *Lititz* expressly adopted a very narrow interpretation of the "arising out of" language in insurance

contracts, i.e., "an injury arises 'out of' the employment when there is a direct causal connection between the injury and the employment…", [emphasis added] at 373.

The Supreme Judicial Court has expressed a preference in giving the same treatment to identical language in policies issued in other states, *Pappas Enters, Inc., v. Commerce & Indus. Ins. Co.,* 422 Mass. 80 (1996). Therefore, notwithstanding the Superior Court's reliance on the *Lititz* case, it is clear that other jurisdictions have also trended towards a more expansive interpretation of what constitutes the "arising out of" standard. By way of example, even in a dog bite case, the Connecticut court in the case of *Hanover Insurance Company v. Danbury Insurance Company*, 50 Conn.L. Rptr. 258 (2010) ruled that the homeowner's exclusionary language applied since the dog bite resulted from a condition at the uninsured premises, i.e., "the porch hid the dog", p. 3 [RA, v. 2, 146-148].

Additionally, in the case of *Maroney v. New York Central Mutual Fire Insurance Company,* 805 N.Y.S. 2d 533 (2005) which was cited in the Massachusetts case of *Commerce Ins. Co. v. Theodore*, 65 Mass.App.Ct. at

475, the Court of Appeals of the State of New York ruled that an uninsured premises exclusion precluded coverage for an accident in which a child who was left in an insured's care was kicked by a horse in an uninsured barn owned by the insured. In deciding this case, the Court found that the term "arising out of" is "broader and pertains to both the physical condition of the premises and conduct related to the use of the uninsured premises that is causally connected to the injury", at p. 535-536. In that case, the Court ruled that the uninsured premises exclusion includes uses of the premises and not just the physical condition of the premises [RA, v. 2, 149-153].

Further, in the case of *Schinner v. Gundrum,* 349 Wis.2d 529 (2013), which involved an injury occurring during an underage drinking party at an uninsured shed owned by a family business and which involved the exact same exclusionary language, the Wisconsin Supreme Court ruled that coverage should be excluded when:

> "In this case, the homeowners policy language is clear on its face. The policy excludes coverage for injuries arising out of a non-insured premises, not

> from a condition of a non-insured premises. [Plaintiff's] bodily injury clearly arose out of, or originated, or flowed from, the shed where the illegal party took place… a non-insured location", at 566.

The *Theodore* case decided by this Court, as well as these decided by the NY, WI and CT courts, reflect the trend of courts to interpret the "arising out of" language broadly and, as importantly, in accordance with the intentions of the parties who entered into the insurance contract, i.e., neither Wakelin nor Green Mountain ever intended that Green Mountain would provide insurance coverage for injuries or deaths which occurred on a Maine property which Green Mountain knew nothing about.

D. The Superior Court erred when it failed to consider the condition of the Maine building itself, i.e., that this incident arose out of the cabin's inadequate ventilation.

The Superior Court also chose to ignore the fact that, unlike the fire pit in the *Zamsky* case or the dog who bit a visitor at an uninsured location in the case of *Callahan v. Quincy Mutual Insurance Co.,* 50 Mass.App.Ct. 260 (2000), the incident in subject case could not have happened just anywhere else. Rather, this incident occurred inside Wakelin's house which

required the use of a generator to provide electricity and which had inadequate ventilation which caused the carbon monoxide to accumulate. As Green Mountain's electrical engineering expert explained during proceedings in the lower court, it was the combination of "a) using the generator inside the cabin which b) had no adequate ventilation to disperse the carbon monoxide" which caused decedent's deaths [RA, v. 2, 129-142].

In short, the use of a portable generator alone did not cause their deaths; rather, it was the use of that generator to provide electricity inside a building which had no adequate ventilation which caused their death.

The lack of adequate ventilation was therefore a condition of Wakelin's Maine premises. This was corroborated by a supplemental police report which confirmed that all the windows and doors of the premises were closed [RA, v. 2, 7-14].

Significantly, the Appeals Court in the *Theodore* case concluded in their decision that:

> "(T)he condition of the premises need not actually cause the injury. To hold otherwise would tend to make the exclusion indistinguishable from the

> requirement of proximate cause, a requirement rejected by our case. We hold that the exclusion under the policy applies both to 'Coverage E- Personal Liability' and 'Coverage F- Medical Payments to Others' and precludes coverage for [third-party's] injuries", at p. 476.

In other words, Wakelin's premises need not to have been "defective"; rather, it is enough for the exclusion to apply that the deaths arose out of a condition at his premises. In short, it remains clear that this incident could not have happened just anywhere; there was a condition at defendant Wakelin's premises, i.e., the lack of adequate ventilation, and that, in combination with the use of a generator inside those premises, caused the deaths of decedents.

E. The Superior Court erred when it concluded that Coverage E of the applicable insurance policy provided coverage separate from, and/or greater than, the rest of Section II of the Policy.

Finally, the Superior Court appears to take a position in its decision that has not been applied before in Massachusetts, i.e., that Coverage E of the applicable insurance policy provides coverage to Wakelin which is separate from, and/or greater than, the rest of Section II of the Policy.

Specifically, the Superior Court stated in its decision that:

> "Analyzing the exclusionary language regarding Coverage E must also recognize that Wakelin is entitled to personal liability protection for incidents arising at location other than the Massachusetts premises" [RA, v. 2, 174].

Green Mountain understands this portion of the Superior Court's decision to perhaps suggest that it is against public policy for an insurance policy to provide insurance, then create exclusions for that same coverage- clearly, that is not true.

In fact, this Court in the *Theodore* case specifically dealt with this issue and stated that:

> "We hold that the exclusion under the policy applies both to 'Coverage E- Personal Liability' and 'Coverage F- Medical Payments to Others' and precludes coverage for [third-party's] injuries", at p. 476.

In short, Coverage E must be read in conjunction with all of Section II of the applicable insurance policy and does not provide coverage which is separate from the rest of that Section. It is axiomatic in Massachusetts that the courts will interpret the words of the policy, including the exclusionary language, in

their usual and ordinary sense, *Fuller v. First Financial Insurance Company,* 448 Mass. 1, 5 (2006).

The Superior Court's decision, however, would ignore this analysis. The whole reason that exclusion exists in policies is to avoid what the Superior Court has now decided- that is, that although Wakelin owns two properties, but is paying insurance on only one, he is still the beneficiary of insurance coverage for both properties. Clearly, that was not the intention of either Wakelin or Green Mountain.

CONCLUSION

For the reasons stated above, Green Mountain respectfully requests that this Court enter an order reversing the Superior Court's denial of its motion for summary judgment and allowance of defendants' cross-motion for summary judgment.

Respectfully submitted,
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March 6, 2019

ADDENDA

Docket 8/23/18

19

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2015-01636

GREEN MOUNTAIN INSURANCE COMPANY, INC.

vs.

MARK J. WAKELIN & others[1]

RECEIVED & FILED
CLERK OF THE COURTS
NORFOLK COUNTY
8/29/18

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff in this matter, Green Mountain Insurance Company, Inc. ("Green Mountain"), filed a Complaint for Declaratory Relief regarding insurance coverage for a July 2015 incident in which four individuals died from exposure to carbon monoxide. One of the defendants, Mark J. Wakelin ("Wakelin"), had a homeowners insurance policy with Green Mountain in effect at the time of the incident, and the two other defendants are seeking payments pursuant to this policy. This matter is before the Court on the plaintiff's Motion for Summary Judgment.[2] For the following reasons, the plaintiff's Motion is **DENIED**.

BACKGROUND

The undisputed facts as revealed by the summary judgment record, and viewed in the light most favorable to the defendants as non-moving parties, are as follows.

On May 29, 2009, Wakelin applied for a building permit with the Town of Byron, Maine. Per the permit, Wakelin intended to build a 640-square foot seasonal structure ("the Maine

[1] Charmaine Norris, as Personal Representative of the Estate of Keith Norris, and Robert Powers, as Administrator of the Estate of Deana Lee Powers

[2] As part of the Superior Court 9A package for the instant motion, the defendant, Robert Powers, filed a Motion to Strike Portions of the Plaintiff's Summary Judgment Materials. The Court denied the motion to strike from the bench at the summary judgment hearing.

Premises"). The Maine Premises had a wood stove and was not connected to any municipal electricity source. In 2012, Wakelin purchased a gas-powered generator in Weymouth, Massachusetts, then subsequently brought the generator to the Maine Premises. The generator remained at the Maine Premises up to and including July 2015. When Wakelin left the Maine Premises after periodic visits, he chained the generator to the garage door. The generator was portable and had wheels on it. Wakelin never used the generator at a location other than the Maine Premises. At the Maine Premises, the generator was to power various electrical equipment, including a refrigerator, microwave, slot machine, vacuum, window fan, space heater, and several lamps.

On or about July 14, 2015, Wakelin's two children, Brooke and Matthew, along with two friends, Keith Norris and Deana Lee Powers, travelled to the Maine Premises. Soon after their arrival in Maine, the four individuals died due to carbon monoxide poisoning. According to a police report regarding their deaths, it appeared the decedents had been using the generator to power the refrigerator at the Maine Premises. The decedents had been using the generator inside the cabin, which caused the carbon monoxide accumulation.

As of the time of this incident, Wakelin had a homeowners insurance policy with Green Mountain ("the Policy") regarding his primary residence in Braintree, Massachusetts ("the Massachusetts Premises"). The Policy's Declaration Page listed 1237 Washington Street in Braintree as the "Location of Premises." The Policy provided coverage for personal liability (Coverage E) and medical payments to others (Coverage F). Per the personal liability provision:

> A. Coverage E- Personal Liability
>
> If a claim is made or a suit brought against an "insured" for damages caused because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an insured."
>
> . . .

"Bodily injury" is defined in the Policy as "harm, sickness or disease, including required care, loss of services and death that results." Coverages E and F are subject to exclusions, however. One such exclusion is as follows:

> Coverages E and F do not apply to the following:
> . . .
>
> 4. "Insured's" Premises Not An "Insured Location"
>
> "Bodily Injury" or "property damage" arising out of a premises:
> a. Owned by an "insured";
> b. Rented to an "insured" or
> c. Rented to others by an "insured":
>
> that is not an insured location

Thus, the Policy excluded coverage for personal liability and medical payments to others when an insured's liability contributed to bodily injury arising out of a premises other than the insured location, which was the Massachusetts Premises. Wakelin did not have a homeowners insurance policy for the Maine Premises at the time of the July 2015 incident in this case.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c); *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of

affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. *Kourouvacilis* v. *General Motors Co.*, 410 Mass. 706, 716 (1991).

II. Analysis

In their filings, the parties dispute whether the Policy's exclusion for bodily injury "arising out of a premises . . . that is not an insured location" applies to this case. As a preliminary consideration, the term "arising out of" is not ambiguous insofar as it relates to the Policy language. "Ambiguity exists when the policy language is susceptible to more than one rational interpretation. But it does not follow that ambiguity exists solely because the parties disagree as to the provision's meaning." *Brazas Sporting Arms, Inc.* v. *American Empire Surplus Lines Ins. Co.*, 220 F.3d 1, 4-5 (1st Cir. 2000) (citations omitted) (applying Massachusetts law). While the parties here dispute the application of the term "arising out of," such disagreement does not render that term ambiguous. Instead, this Court looks to other Massachusetts cases that have deemed the term unambiguous and have interpreted its meaning.

The term "arising out of" "is generally understood to mean 'originating from,' 'growing out of,' 'flowing from,' 'incident to,' or 'having connection with.' " *Id.* at 7 (citations omitted). This phrase "must be read expansively, incorporating a greater range of causation than that encompassed by proximate cause under tort law." *Bagley* v. *Monticello Ins. Co.*, 430 Mass. 454, 457 (1999). When determining coverage, "[i]t is the source from which the plaintiff's personal injury originates rather than the specific theories of liability alleged" which controls. *New*

England Mut. Life Ins. Co. v. *Liberty Mut. Ins. Co.*, 40 Mass. App. Ct. 722, 727 (1996). Additionally, as the insurer here, Green Mountain "has the burden of proving that the exclusionary clause applies." *Metropolitan Prop. and Cas. Ins. Co.* v. *Fitchburg Mut. Ins. Co.*, 58 Mass. App. Ct. 818, 820 (2003).

There are a trio of cases upon which the parties principally rely in debating interpretation of the term "arising out of" and the applicability exclusionary language similar to that of the Policy: *Vermont Mut. Ins. Co.* v. *Zamsky*, 732 F.3d 37 (1st Cir. 2013) (visitors to a premises that was not an insured location suffered injuries after pouring gasoline into a fire pit); *Commerce Ins. Co.* v. *Theodore*, 65 Mass. App. Ct. 471 (2006) (injured party fell from a ladder on property that was not an insured location while in the process of removing a damaged tree); and *Callahan* v. *Quincy Mut. Fire Ins. Co.*, 50 Mass. App. Ct. 260 (2000) (insured's dog bit a business invitee at a premises that was not an insured location). The *Zamsky* and *Callahan* courts held that the exclusion did not prohibit coverage, namely personal liability coverage, and the *Theodore* court held that the exclusion barred such coverage based upon the particular facts before it.

The two cases which permitted coverage found that the instrument ultimately causing personal injuries was a portable object rather than a condition of the property that was not an insured location. *Zamsky*, 732 F.3d at 44; *Callahan*, 50 Mass. App. Ct. at 262 - 263. The *Zamsky* court noted that the "arising out of" exclusionary language applied if there was a causal link between the occurrence and a condition actually on the premises. *Zamsky*, 732 F.3d at 43. When analyzing what constitutes a condition on the premises, the *Zamsky* court held

> it is nose-on-the-face plain that this portable fire pit – stored on the property for a matter of months and used just once prior to the occurrence (in a different location) – was not a condition of the Falmouth premises. The fact that the fire pit was easily movable is a significant consideration
>
> *Id.* at 44.

Similarly, the *Callahan* court's decision addressed whether the underlying cause of the accident, a dog, was a condition of the premises and noted that the insured was entitled to coverage for his own personal liability. In applying a personal liability provision, the court found that such "coverage is not confined to the insured premises." *Callahan*, 50 Mass. App. Ct. at 262. The Court cited with approval a Montana case which stated that the "arising out of" exclusion did not apply to an easily movable dog because a "dog, whether permanently kenneled or tethered on the property, is not a part of the premises." *Id.* at 263, citing *Litiz Mut. Ins. Co.* v. *Branch*, 561 S.W.2d 371, 373 -374 (1977). Notably, the dog at issue played some role in providing security to the female owner of the property when the male owner was away on business. As such, the dog served a purpose at the property. Nonetheless, the SJC held "[w]e do not think that the character of a mobile animal or the principal purpose for which an owner keeps the animal changes the analysis of the circumstances in which the 'arising out of' exclusion applies." *Callahan*, 50 Mass. App. Ct. 260, 263 n. 4 (2000). As such, the fire pit in *Zamsky* and the dog in *Callahan* were not conditions of the premises, and therefore the courts found that the bodily injuries were not "arising out of" premises that was not an insured location.

Theodore is materially different from *Zamsky* and *Callahan* because the source of the victim's personal injuries in *Theodore* involved a condition on the premises, namely a damaged tree. *Theodore*, 65 Mass. App. Ct. at 476; see also *New England Mut. Life Ins. Co.*, 40 Mass. App. Ct. at 727. In *Theodore*, a victim fell off a ladder while helping to repair a damaged tree on property that was not an insured location under the policy for which coverage was sought in the lawsuit. Such ladder was improperly secured by an insured who had personal injury coverage stemming from a homeowners policy for a different property. The *Theodore* court held that the tree was the cause of the accident, and there was a "sufficiently close relationship between the

injury and the premises," thereby finding the Coverage E (personal liability coverage) exclusion applied. *Theodore*, 65 Mass. App. Ct. at 476 (citations omitted). As such, the *Theodore* court focused on the tree as the cause of the accident, rather than the ladder, and held that such tree was an inherent condition of the premises. Accordingly, the plaintiff's attempts to analogize the mobility of the ladder to the portable items in *Zamsky*, *Callahan*, and the instant case are without merit because the ladder was not the source of the injuries in *Theodore*.

The Court acknowledges that the Maine Premises required the generator, or some other similar alternative electrical source, to provide power to equipment within the building. What the plaintiff has no reasonable expectation of proving, however, is that electrical power was a necessary and inherent condition of the Maine Premises. While perhaps not ideal to many, it is certainly possible to live in a residential setting without electricity. The items powered by the generator at the Maine Premises – refrigerator, microwave, slot machine, vacuum, window fan, space heater, and lamps – would likely make spending time in that location more comfortable. Nonetheless, lack of electricity to power those modern devices does not render the Maine Premises uninhabitable. Much like the fire pit generating warmth and light in *Zamsky* or the dog providing some degree of protection in *Callahan*, the generator was merely a superfluous, if beneficial, aspect of the Maine Premises.[3] Where the generator was neither a condition nor an integral aspect of the premises, the tragic accident did not "arise out of" the Maine Premises simply because the generator served the structure in some way.

The plaintiff's motion argues that not applying the exclusion would frustrate the purpose of the Policy, which was a homeowners policy regarding the Massachusetts Premises.

[3] Notably, the Maine Premises was equipped with a wood burning stove, presumably capable of providing heat and basic cooking functions.

In making such argument, the plaintiff seemingly ignores Coverage E of the Policy, which covers Wakelin's personal liability as an insured. Per this coverage, Wakelin himself is insured, absent an exclusion, if he is subject to a claim or lawsuit involving allegations of bodily injury or death. Thus, analyzing the exclusionary language regarding Coverage E must also recognize that Wakelin is entitled to personal liability protection for incidents arising at locations other than the Massachusetts Premises.

To view the Policy as merely providing coverage for personal injury at the insured location, the Massachusetts Premises, would improperly negate the scope of Coverage E. See *Liberty Mutual Ins. Co.* v. *Tabor*, 407 Mass. 354, 358 (1990) ("A provision in an insurance policy that negates the very coverage that the policy purports to provide in the circumstances where the person is liable is void as against public policy."). "If [Green Mountain] wanted to exclude from coverage all injuries *occurring* at an owned premises that it did not insure, it would have been child's play to do so." *Zamsky*, 732 F.3d at 44 (emphasis in original). As such, we adopt this reasoning and recognize the notable distinction between incidents occurring at a property versus incidents arising out of a property. While interpretation of the "arising out of" language poses a relatively close question in this case, "exclusionary provisions are to be strictly construed so as not to diminish the protection purchased by the insured." *Bates* v. *John Hancock Mut. Life Ins. Co.*, 6 Mass. App. Ct. 823, 823 (1978). In applying these principles for interpreting insurance policies, the Court likens the generator at issue to the fire pit in *Zamsky* and the dog in *Callahan*, thereby finding that the "arising out of" exclusionary language in the Policy does not apply.

Furthermore, the Court rejects the plaintiff's contentions concerning ventilation at the Maine Premises. There is no evidence in the summary judgment record that the Maine Premises

had ventilation or structural components that were materially different from any other residential building, such that the interior operation of a generator therein was particularly or uniquely dangerous. Based upon the evidence before this Court, the same tragic outcome would have resulted from the subject generator being brought to any other enclosed, residential setting. The mere fact that the Maine Premises had closed windows and doors is insufficient to transform this incident into an accident arising out of the property. Thus, the Court does not agree with the plaintiff's contention that "this tragic accident could not have occurred just anywhere . . . and, in fact, had to have occurred inside that specific Maine building which did not have sufficient ventilation." Accordingly, the subject accident was not "arising out of" the Maine Premises. Wakelin is therefore insured through the Coverage E and Coverage F provisions of the Policy, which confers coverage for personal liability and medical payments.

ORDER

For the foregoing reasons, the plaintiff's Motion for Summary Judgment is **DENIED**.

Mark A. Hallal
Justice of the Superior Court

August 10, 2018

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Deputy Assistant Clerk
8/29/18

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 1582CV01636

GREEN MOUNTAIN INSURANCE COMPANY, INC.,
Plaintiff

v.

MARK J. WAKELIN,
CHARMAINE NORRIS, as PERSONAL REPRESENTATIVE
of the ESTATE of KEITH NORRIS and
ROBERT POWERS, as ADMINISTRATOR
of the ESTATE of DEANA LEE POWERS,
Defendants

PARTIES' MOTION FOR AN ENTRY OF JUDGMENT

The parties in subject case hereby move this Honorable Court that an entry of judgment be entered in subject case so that plaintiff, should it so decide, can initiate the appeals process.

The parties state as reasons therefore the following:

1. This is a lawsuit seeking declaratory judgment relief, pursuant to G.L. c. 231A, regarding the existence of certain insurance coverage arising out of an incident occurring in Maine in July, 2015.

2. Both plaintiff and defendants filed cross-motions for summary judgment; after hearing, this Court entered its decision on August 29, 2018 denying plaintiff's motion for summary judgment.

3. The Court did not address in its Memorandum of Decision and Order whether defendants' cross-motion for summary judgment was thereby allowed. However, given the relief sought by all parties in subject case, it is assumed by said parties that the Court's decision was intended to conclude this declaratory judgment action in favor of defendants on the issue of the existence of insurance coverage.

4. For these reasons, the parties request that judgment be entered by this Court so that plaintiff can initiate the process of appealing this case to the Appeals Court.

WHEREFORE, the parties in subject case request that this motion be allowed.

Respectfully submitted,
By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the attorney of record for each party first-class mail.

Date: 9/26/18

CLERK'S NOTICE

DOCKET NUMBER
1582CV01636

Trial Court of Massachusetts
The Superior Court

CASE NAME:
Green Mountain Insurance Company Inc vs. Mark J Wakelin et al

Walter F. Timilty, Clerk of Courts

TO:
Brian P Harris, Esq.
Harris & Associates PC
15 Broad St
Suite 701
Boston, MA 02109

COURT NAME & ADDRESS
Norfolk County Superior Court
650 High Street
Dedham, MA 02026

You are hereby notified that on 10/22/2018 the following entry was made on the above referenced docket:

Endorsement on Motion for entry of judgment (#20.0): ALLOWED
after review and by agreement. To clarify, the Court's ruling was intended to conclude this declaratory judgment action in favor of the Defendants on the issue of the existence of insurance coverage. Judgment shall enter. (dated 10/16/18) notice set dl

Judge: Hallal, Hon. Mark A

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
10/22/2018	Hon. Mark A Hallal	

22.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 1582CV01636

GREEN MOUNTAIN INSURANCE COMPANY, INC.,
Plaintiff

v.

MARK J. WAKELIN,
CHARMAINE NORRIS, as PERSONAL REPRESENTATIVE
of the ESTATE of KEITH NORRIS and
ROBERT POWERS, as ADMINISTRATOR
of the ESTATE of DEANA LEE POWERS,
Defendants

JUDGMENT

Judgment to enter in favor of Defendants declaring that insurance coverage exists with regard to Count I of Plaintiff's Complaint seeking a declaratory judgment.

Dated: 11.26.18

Mark A. Hallal, Judge
Superior Court Justice

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RECEIVED & FILED 11/28/18
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NORFOLK COUNTY

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) (pertinent findings or memorandum of decision);

Rule 16(e) (references to the record);

Rule 16(f) (reproduction of statutes, rules, regulations);

Rule 16(h) (length of briefs);

Rule 18 (appendix to the briefs); and

Rule 20 (typesize, margins, and form of briefs and appendices).

/s/ Brian P. Harris

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March 6, 2019

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on March 6, 2019, I have made service of this Brief upon the attorney of record for Defendants/Appellees by email, and upon attorney of record for Defendant/Appellee, Wakelin, by Electronic Filing System on:

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