COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12760

GREEEN 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 DEFENDANT-APPELLEE, ROBERT POWERS, AS ADMINISTRATOR OF THE ESTATE OF DEANA LEE POWERS

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STATEMENT OF THE ISSUE

Mark Wakelin having purchased and paid for insurance with the plaintiff/appellant, Green Mountain Insurance Company, did the Superior Court err in determining that the Green Mountain Insurance Company's policy provided insurance coverage for their insured, Mark Wakelin.

The defendant adopts and incorporates any issue and any arguments raised by the co-defendant, Charmaine Norris, as the personal representative of the estate of Keith Norris.

STATEMENT OF THE CASE

Statement of Facts

Deana Lee Powers, Keith Norris as well as Brooke Wakelin and Matthew Wakelin died on or about July 14, 2016 as a result of carbon monoxide toxicity (RA, v. 2, 7-14). The death of these four young adults took place at 10 Bateman's Lane, Byron, Maine (RA, v. 2, 7). At that time, there was a gasoline-powered portable generator inside the ground level basement of the cabin (RA, v. 2, 9).

In June of 2009 Mark Wakelin applied for a building permit with the Town of Byron. Mark Wakelin applied to build a seasonal log home (RA, v. 2, 78-80). The structure is identified as the Wakelin Camp (RA, v. 2, 80). Mark Wakelin's property at 10 Bateman's Lane, Byron, Maine is commonly referred to as a camp (RA, v. 2, 83, 84, 85, 92, 93, 96). Mark Wakelin began erection of the camp some time about 2012 (RA, v. 2, 96). The camp at 10 Bateman's Lane had many solar-powered lights, both inside and outside. Mark Wakelin used both battery-powered as well as solar-powered lights (RA, v. 2, 93). The building permit indicates that a wood stove – vented would be installed as part of the camp (RA, v. 2, 78). The wood stove was installed (RA, v. 2, 139). The wood stove was installed in order to heat the camp (RA, v. 2, 106).

Once Mark Wakelin had the walls and roof of the camp installed he started to bring personal items to the camp (RA, v. 2, 107). Mark Wakelin brought slot machines to Maine from Massachusetts. He brought the slot machines because he was worried that they would be stolen if left in his Massachusetts home (RA, v. 2, 106). He brought a college size refrigerator (RA, v. 2, 105). Mark Wakelin does not know if the college

size refrigerator works. The college size refrigerator was used for storage (RA, v. 2, 94). The college size refrigerator was never plugged into the generator (RA v. 2, 94).

In 2012 Mark Wakelin purchased a gas powered generator in Massachusetts and brought it to Maine (RA, v. 2, 88). The generator was portable, which was an important consideration for Mark Wakelin (RA, v. 2, 108). The portable generator was never permanently attached to Mark Wakelin's log cabin. The generator was always on wheels so that it could be rolled in and out of the cabin (RA, v. 2, 107). Mark Wakelin did not use the generator every time he went to Byron, Maine, but only when he did work there (RA, v. 2, 92). At night, while at the Byron camp, Mark Wakelin used battery operated and solar powered flashlights and lanterns, kind of like the Waltons, a 1970s television show depicting the struggles of a family in rural Virginia during the 1930s. (RA, v. 2, 92-93). When in Maine, Mark Wakelin gets up in the daytime and at night he lights a fire. When it is dark he goes to bed (RA, v. 2, 93).

The portable gas generator was used for power tools, to do work (RA, v. 2, 90). The generator was

not used to power anything else beside the tools (RA, v. 2, 91). Every time Mark Wakelin used the generator he would unlock it, open the garage door, put it outside and use an extension cord (RA, v. 2, 104). Mark Wakelin brought personal items, including a refrigerator and slot machines to Maine some time after the walls and roof of the camp were erected. (RA, v.2, 94, 107). The refrigerator was not powered with the generator (RA, v. 2, 94). The refrigerator was a college size refrigerator (RA, v. 2, 105). Mark Wakelin was not sure that the college size refrigerator worked. (RA, v. 2, 94). Mark Wakelin used the refrigerator for storage. (RA, v. 2, 94) The slot machines were never plugged in (RA, v. 2, 106). The microwave may have been plugged into the generator, but only if the generator was already on (RA, v. 2, 95). The rough electrical wiring in the cabin was not functional at the time (RA, v. 2, 98).

Mark Wakelin was glad he bought a moveable generator (RA, v. 2, 101 and 102). Mark Wakelin chained the generator as well as all terrain vehicles (*ATVs)* to prevent thieves from stealing them *(*RA, v. 2, 102-104). The generator was never permanently attached to the cabin (RA, v. 2, 107). When Mark

Wakelin was buying the generator the fact that it was portable was an important consideration (RA, v. 2, 108). The generator was never hard wired into the cabin's electrical system (RA, v. 2, 109).

The plaintiff, Green Mountain Insurance Company provided insurance, which included personal liability coverage for Mark Wakelin (RA, v. 2, 43). Personal liability coverage is provided to Mark Wakelin for bodily injury claims caused by an occurrence. An "occurrence" is defined by the policy as an accident, . . . , which results, during the policy period, in:

a. bodily injury;

(RA, v. 2, 29).

STATEMENT OF THE SUPERIOR COURT PROCEEDINGS

Green Mountain Insurance Company commenced suit in December of 2015 seeking declaratory relief. In January of 2018, Green Mountain Insurance Company filed a motion for summary judgment and supporting memorandum of law (RA, v. 1, 111-127). In February, 2018, the estate representatives of both decedents, Deana Lee Powers and Keith Norris, filed oppositions to Green Mountain Insurance Company's motion, as well

as their own motions for summary judgment (RA, v. 1, 128-134; 142-154).

Oral argument was heard on June 26, 2018 before the Honorable Mark A. Hallal in Norfolk County Superior Court (RA, v. 2, 184-214). Judge Hallal took this matter under advisement (RA, v. 2, 167).

On August 29, 2018, Judge Hallal issued his Memorandum of Decision and Order denying Green Mountain Insurance Company's motion for summary judgment (RA, v. 2, 167-175). Left undecided was any decision on the motions for summary judgment filed on behalf the estate representatives of both decedents, Deana Lee Powers and Keith Norris (RA, v. 2, 176).

Thereafter, the parties 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 Insurance Company then filed a timely Notice of Appeal on December 4, 2018 (RA, v. 2, 183).

SUMMARY OF THE ARGUMENT

The decedents passed away not due to bodily injuries arising out of the premises but due to Mark Wakelin leaving a portable gas powered generator in Maine and failing to instruct the decedents in the use of the portable gas powered generator. Green Mountain Insurance Company owes Mark Wakelin coverage under its policy.

ARGUMENT

The plaintiff, Green Mountain Insurance Company petitions this Court to enter an order that it's policy excludes coverage for the events which took place on or about July 14, 2015 involving Deana Lee Powers, Keith Norris, Brooke Wakelin and Matthew Wakelin. This Court should deny Green Mountain Insurance Company's request and enter an order holding that the exclusion within the insurance policy did not apply and the company owed Mark Wakelin coverage under the policy.

In Massachusetts the interpretation of an insurance policy typically embodies a question of law for the Court. *Cody v. Conn. Gen. Life Ins. Co.*, 387 Mass. 142 (1982). As with any contract, a court "must construe the words of the policy in their usual and ordinary senses." *Boston Gas Co. v. Century Indemnity Co.*, 454 Mass. 337 (2009). Massachusetts strictly construes exclusions from insurance coverage and resolves ambiguities in the policy against the insurer. *Quincy Mutual Fire Inc. v. Alemathy*, 393 Mass. 81, 83 (1984). Ambiguities, if any, are to be construed against the insurer and in favor of the insured. *Boazova v. Safety Ins. Co.*, 462 Mass. 346 (2012).

Standing alone a phrase may appear to be unambiguous. However using the phrase as the basis for an exclusion in a policy that provides coverage may produce an ambiguity. *Preferred Mutual Ins. Co. v. Gamache*, 42 Mass. App. Ct. 194, 198-199 (1997). The Green Mountain Insurance Company policy contains an exclusion for "bodily injury . . . arising out of a premises" while also providing personal liability coverage for their insured, Mark Wakelin. This Court should not enforce the exclusionary phrase and eliminate Green Mountain Insurance Company's duty to provide coverage for Mark Wakelin.

In this matter, there is no genuine dispute as to any material fact. The undisputed facts raise the issue of whether the Green Mountain Insurance Company's policy is applicable to provide liability coverage for Mark Wakelin or whether an exclusion within the policy is applicable.

Section II – Exclusions of the Green Mountain Insurance Company policy excludes coverage for "bodily injury . . . arising out of a premises". Arising out of a premises has been interpreted to mean arising out of a condition of premises. *Commerce Insurance Co. v. Theodore*, 65 Mass. App. Ct. 471 (2006); *Callahan v.*

Quincy Mutual Fire Insurance Co., 50 Mass. App. Ct. 260 (2000). The former involved a dying tree and the fall from a ladder while the later case involved a dog bite.

Green Mountain Insurance Company attempts to employ an expansive interpretation of the "arising out of" language contained within the exclusion. Just as Vermont Mutual Insurance Company argued that "arising out of" should be interpreted broadly so does Green Mountain Insurance Company now argue *Vermont Mutual Ins. Co. v. Zamsky*, 732 F 3d 37 (1st Cir. 2013). This argument fails because the "arising out of" language is applicable only if there is a causal link between the covered occurrence and a condition of the premises. Just as the victim/plaintiff's purpose in going to do tree work in *Theodore* was intertwined with the condition of the premises, here and in *Zamsky* the reason for going to the property was not material because the purpose was not related to the condition of the premises. *Id.* at 43. The decedents did not go to Maine to see and use a gas powered generator but rather to get away, to vacation in the backwoods of Maine. To decide otherwise would be inconsistent with the provision of the Green Mountain Insurance

Company's policy providing liability coverage for Mark Wakelin.

If Green Mountain Insurance Company wanted to exclude all injuries occurring at an owner's premises, which it did not insure, it would have been child's play to say so. *Id.* at 44. Green Mountain Insurance Company instead employs legalize and now attempts to rewrite its policy to exclude coverage.

The Honda generator was a portable piece of equipment, bought for that very reason. Mark Wakelin bought the generator in Massachusetts with plans to move it to Maine. Mark Wakelin bought the generator so that it could be stored inside away from thieves. Just as the Court in *Zamsky* found significant that the fire pit was easily moveable so to should this Court find significant that the generator was easily moveable and was moved. *Id.* at 44. Unlike the electric fence that the *Callahan* court hypothesized would be considered a condition of the premises *Callahan v. Quincy Mutual Fire Ins. Co.*, 50 Mass. App. Ct. 260 (2000) the generator was not an integral part of the property. Nor did the generator constitute a defect in some part of the premises, such as the loose board, the falling roof slate, the defect in the

walkway, or the failure of outdoor lighting. *Vermont Mutual Insurance Co. v. Zamsky*, 732 F 3d 37, 45 (1st Cir. 2013) (as mentioned in both *Theodore* and *Callahan*). Rather the generator "was a portable item of personal property that happened to be stored in a building." *Id.* at 45.

CONCLUSION

The defendant adopts and incorporates any issue and any arguments raised by the co-defendant, Charmaine Norris, as the personal representative of the estate of Keith Norris.

The death of Deana Lee Powers and the others did not arise out of a condition of the premises. Consequently the Exclusion does not apply and this Court should enter an order that Green Mountain Insurance Company is obligated to provide coverage under its policy.

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June 20, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify this 20th day of June, 2019, 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).

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CERTIFICATE OF SERVICE

Pursuant to the Massachusetts Rules of Appellate Procedure 13(d), I hereby certify, under the pains and penalties of perjury, that on June 20, 2019 I have made service of this Brief upon the attorney of record for the Plaintiff/Appellant and the Defendants/Appellees by email and upon the attorneys of record for the Plaintiff/Appellant and the Defendant/Appellee, Charmaine Norris, as Personal Representative of the Estate of Keith Norris by electronic filing system by serving on:

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