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, CHARMAINE NORRIS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KEITH NORRIS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE

Whether the Superior Court Justice was correct in ruling that a portable generator is not a condition of premises, and that consequently, a standard homeowner's policy personal liability coverage exclusion for bodily injury "arising out of a premises … owned by an insured … that is not an insured location" does not exclude coverage for deaths caused by the improper operation of the generator indoors in a cabin on uninsured premises.

STATEMENT OF THE CASE

This is an action for declaratory judgment in which the Plaintiff, Green Mountain Insurance Company, Inc., seeks to avoid coverage for its insured, Mark Wakelin, for damages arising from the death of Keith Norris and Deana Lee Powers. Norris and Powers, along with Wakelin's two children, Brooke and Matthew, were accidentally killed on or about July 14, 2016 at Wakelin's cabin in Byron, Maine. All four perished as a result of carbon monoxide toxicity. The source of the carbon monoxide was a gasoline powered portable generator which was operated indoors in the ground

level basement of the cabin.[1] Counsel for Charmaine Norris sent a notice of claim,[2] and the insurer filed this action. No tort lawsuit has been filed, so there is no pleading against which to measure the claimants' theories of recovery. Thus, to avoid its responsibility, the insurer must establish that all potential theories are excluded from coverage.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mark Wakelin owned a piece of property in Byron, Maine on which he was building a cabin. The property was "off the grid" in the sense that it had no electricity and had no water supply. Prior to 2012, Wakelin relied on generators borrowed from friends to power tools for constructing the cabin.[3]

In 2012, Wakelin purchased a Honda generator in Weymouth and paid an extra $250 for a portable model. Portability was an important consideration. Among the features that made portability desirable to Wakelin was his awareness that the generator could be used as

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[1] Medical Examiner's Report. R.A. v. 2, 7-14.
[2] Sousa letter, dated 10/07/15. R.A. v. 2, 16-18
[3] Wakelin Deposition, pp. 34-36. R.A. v. 2, 82-114.

a backup power source at home, and that the generator could be used as a power source in a campground.[4]

He transported it to Byron where he used it exclusively for powering his tools (and occasionally for running a microwave oven if the generator was powered up anyway).[5]

When using the portable generator, Wakelin would position it outside of the cabin. When not in use, the generator was stored in the cabin's ground level basement. When he departed the property, Wakelin would chain the generator to the garage door, along with two all-terrain vehicles, to prevent thieves from wheeling it away.[6]

The generator was never permanently attached to the cabin.[7] The generator was never hard wired into

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[4] Wakelin Deposition, page 67, lines 4-8. R.A. v. 2, 108.

[5] Wakelin Deposition, page 40, lines 7-9 (R.A. v. 2, 90), page 41, lines 7-9 (R.A. v. 2, 91), page 44, lines 18-21 (R.A. v. 2, 94), page 45, lines 13-19 (R.A. v. 2, 95).

[6] Wakelin Deposition, page 54-56. R.A. v. 2, 102-104. Wakelin similarly chained two ATVs to the other garage door for the same reason.

[7] Wakelin Deposition, page 66, lines 17-19. R.A. v. 2, 107.

the cabin's electrical system and could not be.[8] The rough electrical wiring was not yet functional.[9]

The Plaintiff, Green Mountain Insurance Company, sold Wakelin a homeowner's insurance policy in association with his home in Braintree.[10] The policy includes personal liability coverage for 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.

The policy contains an exclusion for personal liability coverage for bodily injury "arising out of a

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[8] Wakelin Deposition, page 68, lines 20-22. R.A. v. 2, 109.

[9] Wakelin Deposition page 50, lines 15-20. R.A. v. 2, 98.

The statement in the insurer's brief on page nine: "Finally, and perhaps most significantly, the generator was always going to be the only and permanent power source for the Maine premises," has no support in the record. The statement sources to testimony questioning whether Town-provided power would reach the property. There is no evidence how Mr. Wakelin planned to permanently power the cabin when construction was completed, and Mr. Wakelin testified that he never had plans to hard wire the generator to the cabin's electrical system. R.A. v. 2, 109-110.

[10] Homeowners Insurance Policy, R.A. v.2, 26-73.

premises … owned by an insured … that is not an insured location.” [11]

Green Mountain Insurance Company commenced this action in December 2015. In January 2018, Green Mountain Insurance Company filed a motion for summary judgment and supporting memorandum of law.[12] In February, 2018, the estate representatives of both decedents, Deana Lee Powers and Keith Norris, filed oppositions to Green Mountain Insurance Company’s motion, and filed cross motions for summary judgment.[13]

The matter was heard by Justice Mark A. Hallal on June 26, 2018.[14] On August 29, 2018, Judge Hallal issued his Memorandum of Decision and Order denying

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[11] Homeowners Insurance Policy, R.A. V.2, 4. **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”.

[12] Plaintiff’s Motion for Summary Judgement. R.A. v. 1, 111-12.

[13] Defendant, Robert Powers, Administrator’s Opposition to Plaintiff’s Motion for Summary Judgment and Defendant’s Motion for Summary Judgment. R.A. v. 1, 128-134; 142-154.

[14] Transcript from Hearing on Summary Judgment Motion on June 26, 2018. R.A. v. 2, 184-214.

Green Mountain Insurance Company's motion for summary judgment.[15] The decision did not specifically address the corresponding motions on behalf of the estates. On a motion from all parties, Justice Hallal revised his order, dated August 29, 2018, to state: "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."[16] Subsequently, on November 26, 2018 the Court issued its declaration, "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."[17] Green Mountain Insurance Company then filed a timely Notice of Appeal.[18]

[15] Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, docketed on August 29, 2018. R.A. v. 2, 167-175.
[16] Court Order, dated October 22, 2018, Allowing the Parties' Motion for Entry of Judgment. R.A. v. 2, 180.
[17] Judgment entered on November 26, 2018 "declaring the insurance coverage exists with regard to Count I of Plaintiff's Complaint seeking declaratory judgment." R.A. v. 2, 18.
[18] Plaintiff's Notice of Appeal Filed on December 4, 2018. R.A. v. 2, 183.

ARGUMENT[19]

There is no dispute that the Byron, Maine property was owned by Wakelin and is not an insured location under the policy.

However, the Plaintiff-insurer cannot avoid coverage because the deaths of Keith Norris and Deanna Lee Powers were due to carbon monoxide fumes which were produced by a *portable* generator. The tragedy occurred at the Byron premises, but did not arise out of the premises.

A. Rules Of Construction

"In the interpretive aspects of [an insurance coverage] case the insurer has to contend with the rule that exclusionary policy terms are to be strictly construed against the insurer, and the further rule that doubts created by any terms in a policy that may be considered ambiguous are to be resolved against the insurer." *Shamban v. Worcester Ins. Co.*, 47 Mass.App.Ct. 10, 16 (1999), citing, *Liquor Liab. Joint Underwriting Assn. of Mass. v. Hermitage Ins. Co.,* 419 Mass. 316, 322 (1995); *Camp Dresser & McKee, Inc. v.*

[19] The defendant joins in the arguments raised by the co-defendant, Robert Powers, as Administrator of the Estate of Deana Lee Powers.

Home Ins. Co., 30 Mass.App.Ct. 318, 324 (1991). When an insurer drafts the insurance contract, it is strictly construed against the insurer. E.g., *Duggan v. Travelers Indem. Co*., 383 F.2d. 871 (1st Cir. 1967); *Transamerica Ins. Co. v. Norfolk & Dedham Mut. Fire Ins. Co*., 361 Mass. 144 (1972). Every doubt as to the meaning of the words and every ambiguity is resolved against the insurer. E.g., *Quincy Mutual Fire Insurance Company v. Abernathy*, 393 Mass. 81, 84 (1984); *Bilodeau v. Lumbermens Mut. Casualty Co.*, 392 Mass. 537 (1984); *Preferred Mut. Ins. Co. v. Gamache*, 42 Mass.App.Ct. 94 (1997), *aff'd* 426 Mass. 93; *Panesis v. Loyal Protective Life Ins*. Co., 5 Mass.App.Ct. 66 (1977); *Cardin v. Royal Ins. Co.*, 394 Mass. 450 (1985); *King v. Prudential Ins. Co*., 359 Mass. 46 (1971). When an insurance policy is ambiguous -- that is when its language is reasonably susceptible to more than one meaning or when there is more than one rational interpretation of insurance policy language -- the insured is entitled to the benefit of the interpretation most favorable to coverage. *Hakim v. Massachusetts Insurer's Insolvency Fund*, 424 Mass. 275 (1997); *Hazen Paper Co. v. United States Fidelity & Guaranty Co*., 407 Mass. 689, 700 (1990); *Preferred Mut.*

Ins. Co. v. Gamache, 42 Mass.App.Ct. 94 (1997), *aff'd* 426 Mass. 93.

Policy exclusions are likewise strictly construed against the insurer and in favor of coverage. *Middlesex Ins. Co. v. American Employers Ins. Co.*, 9 Mass.App.Ct. 855 (1980); *Bates v. John Hancock Mut. Life Ins. Co.*, 6 Mass.App.Ct. 823 (1978). The rule that when there is more than one rational interpretation of insurance policy language, the most favorable interpretation applies with particular force to exclusionary provisions. *Hakim v. Massachusetts Insurer's Insolvency Fund*, 424 Mass. 275 (1997).

Moreover, in interpreting all insurance policies, Massachusetts courts consider what an objectively reasonable insured reading the relevant policy language would expect to be covered. See *Ruggerio Ambulance Service, Inc. v. National Grange Ins. Co.*, 430 Mass. 794 (2000); *Maclean v. Hingham Mutual Fire Ins. Co.*, 51 Mass.App.Ct. 870 (2001).

B. Personal Liability Coverage

The personal liability insured against by the Green Mountain homeowners policy is of two kinds: "first, that liability which may be incurred because of the condition of the premises insured; secondly,

that liability incurred by the insured personally because of his tortious personal conduct, not otherwise excluded, which may occur at any place on or off the insured premises. The insurance company may well limit (and has by exclusion 1(e)) its liability for condition of the premises to the property insured for which a premium has been paid. It is reasonable that the company may not provide for liability coverage on "conditions" which cause injury on other uninsured land. It would be a rare case where an insured was liable for the condition of premises which he did not own, rent or control. It is to be expected, therefore, that the company's liability for condition of the premises would be restricted to accidents happening on or in close proximity to the insured premises, and that premiums would be charged with that in mind. It would be unreasonable to allow an insured to expand that coverage to additional land and structures owned, rented or controlled by him which are unknown and not contemplated by the company." *Lititz Mut. Ins. Co. v. Branch*, 561 S.W.2d 371, 374 (Mo. Ct. App. 1977). "The company has not chosen to geographically limit the coverage provided for tortious personal conduct of the insured. If it had so

intended, it could simply have provided that the exclusion ran to an accident "occurring on" other owned premises. There appears to be little reason to exclude personal tortious conduct occurring on owned but uninsured land, as little correlation exists between such conduct and the land itself." *Id*. "The language used in exclusion 1(e) recognizes this distinction." *Id*. *Contrast California Cas. Ins. Co. v. American Family Mut. Ins. Co.*, 208 Ariz. 416, 421 (Ct. App. 2004)(adjudicating policy exclusion of coverage for injury "arising out of any act or omission" both "in connection with" owned and uninsured premises, and "occurring on" owned and uninsured premises.)

C. The Occurrence Did Not Arise Out Of The Byron, Maine Premises

In *Callahan v. Quincy Mut. Fire Ins. Co.*, 50 Mass.App.Ct. 260 (2000) – a dog bite case – the Appeals Court considered the exclusion here at issue. "The question is whether the exclusion ought to be read as pertaining to anything that occurs on the off-policy premises or whether the exclusion is limited to accidents that occur because of a condition of the off-policy premises, such as a hole in a walkway, a

loose step, defective plumbing, or faulty electric wiring." Adopting the latter interpretation, the Court observed, "What we learn from [the policy's] text is that when the drafter considers the details, 'arises out of' in the policy relates to a condition of a location; that the insurer differentiates what *arises out of* from what *occurs on* … [italics original]." The Court provided as examples of excluded risk a "loose board, the falling roof slate, the defect in the walkway, the failure of outdoor lighting," or "a protective electric fence." *Id*. at 263, citing *Lititz*, supra, at 374.

Writing for the Court, Justice Kass noted that "efforts to describe the reach of 'arising out of' are only marginally helpful in deciphering the problem at hand. The question is less one of reach than it is of fit." *Callahan v. Quincy Mut. Fire Ins. Co.*, 50 Mass.App.Ct. 260 (2000).

In *Commerce Insurance Co. v. Theodore*, 65 Mass.App.Ct. 471 (2006), a claimant was on the premises owned by the insured but not covered by Commerce in order to minister to a diseased tree, and was injured in a fall from a ladder due to the insured's alleged negligence. The Appeals Court held

that the exclusion applied, reasoning that "where ... a third person is on the property to repair a condition of the property ... [t]here is a sufficiently close relationship between the injury and the premises" for the injury to be deemed to have arisen out of the premises. *Id*. at 285.

In *Vt. Mut. Ins. Co. v. Zamsky*, 732 F.3d 37 (2013), the First Circuit Court of Appeals, applying Massachusetts law, ruled that the exclusion would not apply to defeat personal liability coverage in a negligence action by a plaintiff injured by a portable fire pit on uninsured property. The Court reviewed *Callahan* and *Theodore* and stated:

> These bookend cases set the parameters of our inquiry. In both of them, the Appeals Court interpreted the UL exclusion's ambiguous "arising out of a premises" language to mean arising out of a condition of a premises. Read together, the cases establish a dichotomy: if the covered occurrence arises out of a condition of the premises and the exclusion's other requirements are satisfied, the exclusion applies; otherwise, it does not. This dichotomy is faithful to an interpretive principle long hallowed by the SJC: ambiguities in insurance policies are to be construed in favor of affording coverage to the insured. This venerable principle underpins, and is fully consistent with, the SJC's unwavering insistence that exclusions from coverage should be strictly construed.

Id. at 42-43.

> Although we leave for another day the exact contours of the phrase "a condition of the premises," 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. Unlike the tree in *Theodore*, the fire pit was not a part of the premises. Unlike the electric fence that the *Callahan* court hypothesized would be considered a condition of the premises, the fire pit was not erected on the property. Nor did the fire pit 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" mentioned by both the *Theodore* and *Callahan* courts. Rather, the fire pit was a portable item of personal property that happened to be stored in a building on the Falmouth premises.

Id. at 44-45.

Like the fire pit in *Zamsky*, Wakelin's portable generator was easily movable, and was not part of the premises, was not erected on the property, and did not constitute a defect in some part of the premises. It was a portable item of personal property that happens to be kept at the Byron premises.

Presumably recognizing the case law unhelpful to its position, the insurer seeks to identify a contributory condition of the property by claiming that the cabin had inadequate ventilation to operate the gas powered portable generator. This, however, is

not a feature of the property, and certainly not a defect. Rather it is, according to the generator's warnings, a characteristic of every closed or partially closed structure. Similarly, the insurer posits as representing a condition from which the injuries arose that the cabin's windows were closed. Assuming this to be true, and further assuming that open windows could have made a difference, having properly operating windows in an up or down position is not a condition or "defect in some part of the premises" so as to trigger the exclusion.[20]

CONCLUSION

The portable generator that produced the carbon monoxide which killed Keith Norris and others was neither a fixture nor a condition of the Byron Maine premises. Consequently Exclusion E does not apply and this Court should affirm the judgment of the Superior Court declaring that Green Mountain Insurance Company is obligated to provide coverage under its policy.

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[20] The warnings caution against operating the generator outdoors other than "far away from windows doors and vents." Extending the insurer's logic, if an injury resulted from ignoring this warning while operating the generator outside, the presence of an open window could likewise represent a disqualifying condition.

Respectfully submitted,

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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 (type size, 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 attorneys of record for the Plaintiff/Appellant and the Defendants/Appellees by email and by electronic filing system by serving on:

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