Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12760

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 NORFOLK SUPERIOR COURT

BRIEF OF AMICUS CURIAE
THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS
IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT OF THE AMICUS CURIAE

The Massachusetts Academy of Trial Attorneys (the Academy) offers this *amicus curiae* brief in the above-captioned case. The Academy is a voluntary, non-profit, Commonwealth-wide professional association of attorneys in the Commonwealth. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

The Academy urges the Court to acknowledge that when a homeowner's liability insurance policy excludes coverage for bodily injury "arising out of a premises" owned by the insured and which does not occur on an "insured location" under the policy, coverage nonetheless obtains for an injury caused by a portable device (*e.g.*, a generator) used on property owned by that insured even though it is not an "insured location" under the policy.

RULE 17(c)(5) DECLARATION

No affirmative declaration pursuant to the conditions set forth in Mass. R. App. P. 17(c)(5) is warranted by the preparation and financing of this brief.

ISSUE PRESENTED

Where personal tortious conduct of an insured homeowner causes injury on premises owned by the tortfeasor but not identified as an "insured location" in the insurance Policy, did that injury "arise out of" the premises and does the "other premises" exclusion preclude coverage?

STATEMENT OF THE CASE

The Academy adopts the Statement of the Case set forth in the brief of Defendant-Appellee Charmaine Norris, as Personal Representative of the Estate of Keith Norris (Norris).

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The Academy adopts the Statement of Facts and Prior Proceedings set forth in the brief of Defendant-Appellee Norris.

SUMMARY OF ARGUMENT

The standard of review is *de novo*. (pp. 11-13).

Under Massachusetts law, an "other premises" exclusion does not apply where the injuries did not arise of a condition of the premises. (pp. 13-15). This

rule is consistent with the weight of authority in other jurisdictions. (pp. 15-17). This rule furthers sound public policy, because it enforces reasonable expectations of homeowners, it construes an exclusionary clause narrowly, and it recognizes the distinction between liability for premises and liability for personal torts. (pp. 17-19).

The trial court correctly held that the "other premises" exclusion does not apply to the injuries here. (pp. 19-21). That exclusion applies to injuries "arising out of" premises owned by an insured but not listed in the Policy. (pp. 19-21). The injuries did not arise out of the location where the portable generator caused those fatalities. (pp. 21-22). A portable generator is not part of the "premises." (pp. 22-26). The Policy excludes coverage for injuries "arising out of premises," not coverage for injuries "occurring on premises." (pp. 26-27). The injuries here arose out of the personal tortious conduct of Wakelin. (pp. 28-29).

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*, AND GREEN MOUNTAIN INSURANCE COMPANY, INC. AS THE INSURER BEARS THE BURDEN OF PROVING THE APPLICABILITY OF THE EXCLUSION.

The disposition below was on summary judgment, and review is therefore *de novo* "to determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party

is entitled to judgment as a matter of law" (internal punctuation omitted). *Chambers* v. *RDI Logistics, Inc.*, 476 Mass. 95, 99 (2016). In *de novo* review, "no deference is accorded the decision of the judge in the trial court." *Id*. at 99.

The trial court may grant summary judgment if the pleadings, depositions, answers to interrogatories, responses to requests for admissions, and affidavits "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); *Miller* v. *Mooney*, 431 Mass. 57, 60 (2000). The moving party bears the burden of establishing that no genuine issue as to any material fact exists. *Chambers*, 476 Mass. at 100. The trial court reviews all evidence and draws all reasonable inferences in the light most favorable to the nonmoving party. *Drakopoulos* v. *United States Bank Nat'l Ass'n*, 465 Mass. 775, 777 (2013).

"It is the insurer who bears the burden of proving the applicability of an exclusion." *Norfolk & Dedham Mut. Fire Ins. Co*. v. *Cleary Consultants Inc*., 81 Mass. App. Ct. 40, 52 (2011). "Interpretation of an insurance policy"—here, the meaning of the phrase "arising out of a premises"—"is a question of law to be determined by the court." *Golchin* v. *Liberty Mut. Ins. Co.*, 466 Mass. 156, 159 (2013). See *Mass. Bay Transp. Auth.* v. *Allianz Ins. Co.*, 413 Mass. 473, 476 (1992) (same), citing *Nelson* v. *Cambridge Mut. Fire Ins. Co.*, 30 Mass. App. Ct. 671, 673 (1991) (same). "[R]eview of questions of law is *de novo*." *Mass. Fine*

Wine & Spirits, LLC v. *Alcoholic Beverages Control Comm'n*, 482 Mass. 683, 687 (2019).

II. AN "OTHER PREMISES" EXCLUSION DOES NOT APPLY UNLESS THE INJURIES ARISE OUT OF A CONDITION OF THE OTHER PREMISES.

A. Under Massachusetts law, "other premises" exclusions do not apply unless the injuries arose out of a condition of the premises.

Callahan v. *Quincy Mut. Fire Ins. Co.*, 50 Mass. App. Ct. 260 (2000), addressed whether an insurer of a New Hampshire home had to defend and indemnify its insured in connection with a Massachusetts dog bite. *Id*. at 260. The *Callahan* policy provided, *inter alia*, that "Coverage E — Personal Liability ... do[es] not apply to bodily injury or property damage: ... arising out of a premises [] owned by an insured ... that is not an insured location." *Id*. at 261.

The insured homeowner in *Callahan* sought to enforce personal liability coverage "for the damages for which the insured is legally liable"; that "coverage [was] not confined to the insured premises." *Id*. at 262. The Court held that the policy did not exclude the off-premises dog bite:

> The point is, [the dog] was not a condition of the [uninsured Massachusetts] premises, as a protective electric fence would be. [The dog's] bite was no more connected to the [uninsured premises] than had [the insured homeowner] spilled hot coffee on a guest on those premises. It happened there, but it did not "arise out of," as the phrase is understood. [The insured homeowner]'s liability stems from

> his harboring a vicious animal—i.e., personal tortious conduct—not any condition of the [uninsured] premises.

Id. at 263. See R.A./II:172[1] (discussing *Callahan*).

But in *Commerce Ins. Co*. v. *Theodore*, 65 Mass. App. Ct. 471 (2006), the insured homeowner owned a second, uninsured property. *Id*. at 472. A man fell from a ladder while helping the insured homeowner to cut down a dying tree that was rooted on the uninsured property. *Id*. The Court concluded that "where, as here, a third person is on the property to repair a condition of the property—the dying tree—and in the course of such repair an injury results, such injury is one 'arising out of a premises.'" *Id*. at 476. See R.A./II:172-173 (discussing *Theodore*). Because there was a "'sufficiently close relationship between the injury' and the premises," the exclusion applied. *Theodore*, 65 Mass. App. Ct. at 476 (internal citations omitted).

In *Vt. Mut. Ins. Co*. v. *Zamsky*, 732 F.3d 37 (1st Cir. 2013), a portable fire pit caused burn injuries at an uninsured premises. *Id*. at 40. The First Circuit, applying Massachusetts law, held that "the dichotomy delineated by the Appeals Court in *Callahan* and *Theodore*—a dichotomy that focuses the inquiry, in the first instance, on whether or not the occurrence arose out of a condition of the premises—is sensible and conforms to general principles long embedded in

[1] This brief cites to the Record Appendix as "R.A./[volume]:[page(s)]."

Massachusetts jurisprudence." *Id*. at 44. Given that the fire pit "was easily moveable," "was not a part of the premises," "was not erected on the property," and "did [not] constitute a defect in some part of the premises," "it [was] 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 [uninsured] premises." *Id*. at 44-45. See R.A./II:171 (discussing *Zamsky*). Thus, the exclusion did not apply. *Zamsky*, 732 F.3d at 45.

B. The rule from the Appeals Court and the First Circuit is consistent with the weight of authority in other jurisdictions.

"[R]eading the [uninsured loss] exclusion in this way coincides with the weight of authority elsewhere." *Vt. Mut. Ins. Co*., 732 F.3d at 44.[2] See, *e.g*.,

[2] "This is not to say that courts outside Massachusetts are unanimous in this view. They are not.... But [the First Circuit] conclude[d] that the [Supreme Judicial Court]—like the Appeals Court—would be apt to follow the weight of authority." *Vt. Mut. Ins. Co*., 732 F.3d at 44. The minority cases often involve split appellate courts, conflicts of precedent, or facts in which the uninsured property was destroyed as a result of the tort. See, e.g., *St. Paul Fire & Marine Ins. Co*. v. *Ins. Co. of N. Am*., 501 F. Supp. 136, 139 (W.D. Va. 1980) ("There would have been no fire but for the [uninsured] building" that burned down); *Schinner* v. *Gundrum*, 349 Wis. 2d 529, 565-566 (2013) (recounting vascillation between precedents construing "arising out of" policy language and favoring construction in *Garriguenc* v. *Love*, 67 Wis. 2d 130 (1975) over construction in *Newhouse by Skow* v. *Laidig, Inc*., 145 Wis. 2d 236 (1988)); *Maroney* v. *N.Y. Cent. Mut. Fire Ins. Co*., 5 N.Y.3d 467, 474 (2005) (Rosenblatt, J., dissenting) ("the phrase 'arising out of a premises' does not, without strain, refer to the conduct of the insured [where horse on uninsured premises kicked plaintiff]. It is more easily read to refer to injuries causally connected to a dangerous *condition* of the premises. While I grant that the issue is debatable, the phrase is at least ambiguous and the exclusion should be construed against the carrier"); *Nat'l Farmers Union*

Safeco Ins. Co. v. *Hale*, 140 Cal. App. 3d 347, 354 (1983) (exclusion inapplicable where horse stabled at uninsured premises escaped and caused injury on road); *Hanson* v. *Gen. Acc. Fire & Life Ins. Corp. Ltd.*, 450 So. 2d 1260, 1262 (Fla. Dist. Ct. App. 1984) (exclusion inapplicable where insured negligently lowered antenna from roof of uninsured business property); *Tacker* v. *Am. Family Mut. Ins. Co.*, 530 N.W.2d 674, 677 (Iowa 1995) (exclusion inapplicable where insured negligently wired house); *Eyler* v. *Nationwide Mut. Fire Ins. Co.*, 824 S.W.2d 855, 858 (Ky. 1992) (exclusion inapplicable to damage by rolling tires from uninsured premises down hill); *Kitchens* v. *Brown*, 545 So. 2d 1310, 1312 (La. Ct. App. 1989) (exclusion inapplicable where insured negligently instructed plaintiff to use gasoline to ignite brush at uninsured premises); *Lititz Mut. Ins. Co.* v. *Branch*, 561 S.W.2d 371, 373-374 (Mo. Ct. App. 1977) (exclusion inapplicable because dog bite not condition of premises); *Westfield Ins. Co*. v. *Hunter*, 128 Ohio St. 3d 540, 546 (2011) (exclusion inapplicable if complaint based upon "negligence in permitting [tortfeasor] to operate [all-terrain vehicle] in a negligent or reckless manner, which has no causal link to the quality or condition of the premises"); *Hingham Mut. Ins. Co*. v. *Heroux*, 549 A.2d 265, 267 (R.I. 1988) (exclusion

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Prop. & Cas. Co. v. *W. Cas. & Sur. Co*., 577 P.2d 961, 964 (Utah 1978) (exclusion applicable where horse escaped uninsured premises and caused injury on highway).

inapplicable where horse stabled at uninsured premises escaped and caused injury on neighboring road); *Marshall* v. *Fair*, 187 W.Va. 109, 114 (1992) (exclusion inapplicable to damage by trespass and unauthorized harvesting of timber at uninsured premises).

C. Defendants' reading of the Policy furthers sound public policy because it is consistent with the reasonable expectations of insured homeowners, it narrowly construes an exclusionary clause, and it recognizes the difference between liability for a *condition* of the premises and liability for tortious *conduct* of the individual.

"Such a reading also comports with sound public policy. After all, the dichotomy draws an easily administered line and enhances predictability of results—a laudable objective from the vantage point of both insurers and insureds." *Vt. Mut. Ins. Co*. v. *Zamsky*, 732 F.3d at 44.

> Insurance policies should be construed, where possible, to conform to the reasonable expectations of the parties.... [The carrier] drafted the policies at issue here. If it 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 say so. But [the carrier] eschewed this straightforward course and chose instead to sound an uncertain trumpet. Under such circumstances, we do not believe that the SJC would countenance the insurer's revisionist attempt to make a policy exclusion sweep more broadly than its language dictates.

Id.

"When used in the context of a coverage clause, words like 'arising out of' must be given a broad, comprehensive meaning." *Tacker*, 530 N.W.2d at 677. "Exclusionary clauses, however, call for a narrow or restrictive construction." *Id*.

"[G]eneral liability provisions of a homeowner's policy provide insurance against *two distinct* perils: (1) liability resulting from the *condition* of the insured premises, and (2) liability stemming from the insured's tortious personal *conduct* which may occur at any place on or off the insured premises" (emphasis added). *Tacker*, 530 N.W.2d at 677. See *Kitchens*, 545 So. 2d at 1312 ("Coverage under the language of this policy *for that negligence* is *irrespective of the site* of the occurrence" [emphasis added]); *Lititz Mut. Ins. Co.*, 561 S.W.2d at 374 ("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"). "[T]he only manner of bodily injury or property damage that can arise out of premises is that which results from a defect in said premises. Premises are inanimate and do not commit delicts.... Premises can, however, be defective, which condition can form the basis of delictual liability." *Kitchens*, 545 So. 2d at 1312. See *Eyler*, 824 S.W.2d at 858 ("the controlling legal question is whether [the tortfeasor's] personal conduct or the premises was the greater causative force in the harm which resulted"); *Marshall*, 187 W. Va. at 114 ("bodily injury and property damage 'arising out of' uninsured premises, as that phrase is used in an uninsured premises exclusion provision, refers to the condition of the uninsured premises and does not exclude coverage for the allegedly tortious acts of the insured committed on either such uninsured premises or on premises closely

related to the uninsured premises"). See also *Westfield Ins. Co*., 128 Ohio St. 3d at 546 ("On remand, the trial court should determine whether the [plaintiffs'] theory of liability is that the [tortfeasors] breached a personal duty that the [tortfeasors] assumed ... in which case the exclusion would not apply, or whether the [plaintiffs'] claims are based only on the fact that the [tortfeasors] owned the property where the injuries occurred, in which case the exclusion does apply").

In short, "[t]he simple fact that [a tortfeasor's] misconduct took place on land is a matter of the law of gravity, not the law of insurance." *Westfield Ins. Co*., 128 Ohio St. 3d at 546.

III. THE TRIAL COURT CORRECTLY HELD THAT THE EXCLUSION DOES NOT APPLY IN THIS CASE BECAUSE THE INJURIES DID NOT ARISE OUT OF A CONDITION OF THE OTHER PREMISES.

A. The Policy excludes coverage for injuries "arising out of" premises owned by an insured but not listed in the Policy.

"The interpretation of an insurance contract is no different from the interpretation of any other contract, and [this Court] must construe the words of the policy in their usual and ordinary sense." *Hakim* v. *Mass. Insurers' Insolvency Fund*, 424 Mass. 275, 280 (1997). This Court will "read the policy as written and '[is] not free to revise it or change the order of the words.'" *Id*. at 281, quoting *Cont. Cas. Co*. v. *Gilbane Bldg. Co*., 391 Mass. 143, 147 (1984). "Where, as here, there is more than one rational interpretation of policy language, 'the insured is entitled to the benefit of the one that is more favorable to it.'" *Hakim*, 424 Mass. at

281, quoting *Trustees of Tufts Univ*. v. *Commercial Union Ins. Co*., 415 Mass. 844, 849 (1993). "This rule of construction applies with particular force to exclusionary provisions." *Hakim*, 424 Mass. at 282. "'[E]xclusions from coverage are to be strictly construed,' and any ambiguity in the exclusion 'must be construed against the insurer.'" *Id*. at 282, quoting *Vappi & Co*. v. *Aetna Cas. & Sur. Co*., 348 Mass. 427, 431 (1965). "It is also appropriate [that this Court] consider 'what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'" *Hakim*, 424 Mass. at 282, quoting *Trustees of Tufts Univ*., 415 Mass. at 849.

The "Liability Coverages" section of the Policy obligates Green Mountain Insurance Company, Inc. (Green Mountain) to defend against and indemnify for all claims or suits "against an insured for damages because of bodily injury or property damage." R.A./II:43:168-169. But a number of exclusions narrow that obligation. Policy Section II-Exclusions, Subsection A.4 (the "Other Premises Exclusion") excludes coverage for bodily injury "arising out of a premises owned by an insured ... that is not an insured location." R.A./II:45:169.

These injuries occurred at a camp in Byron, Maine (the Maine camp), which was owned by Appellant Mark Wakelin, Green Mountain's insured. R.A./II:167-168. The declarations page of the Policy must list any property that is to be an

"insured location." R.A./II:29. Because that page of the Policy does not list the Maine camp, it is not an insured location. R.A./II:75-76.

B. Injuries caused by the generator did not arise out of the premises where that generator happened to be at the time of the fatalities.

The Other Premises Exclusion does not apply to injuries caused by a portable generator, because they did not arise out of the premises where the portable generator happened to be at the time of the losses. As in *Callahan*, in which "liability stem[med] from [the insured property owner] harboring a vicious animal—*i.e*., personal tortious conduct—not any condition of the [uninsured] premises," liability here stems from the insured property owner harboring a toxic, dangerous, and easily *portable* device—*i.e*., personal tortious conduct—not any condition of the other premises. *Callahan*, 50 Mass. App. Ct. at 263.

Like the dog in *Callahan*, the portable generator "was not a condition of the [other] premises, as a protective electric fence would be." *Id*. "Had [the dog] bitten someone in front of the municipal building on [a local street], [the insured homeowner] would be protected by the personal liability coverage of the [homeowner's insurance] policy on his New Hampshire property"; likewise, had Wakelin negligently entrusted the portable generator to his children's friends and had he failed to warn them of the dangers of improperly using that generator, and further had those friends later died of carbon-monoxide poisoning while using the generator in a location in which Wakelin had no interest, Wakelin would be

protected by the personal liability coverage of the Policy on his Massachusetts property. *Callahan*, 50 Mass. App. Ct. at 262. It would be discordant in the extreme to say that in such a situation coverage obtains, but in the instant case it does not.

Like the fire pit in *Zamsky*, the portable generator "was easily moveable," "was not a part of the premises," "was not erected on the property," and "did [not] constitute a defect in some part of the premises." *Zamsky*, 732 F.3d at 45. "Rather, [the generator] was a portable item of personal property that happened to be stored in a building on the [Maine] premises." *Id*. Consequently, "it is nose-on-the-face plain that this portable [generator]—stored on the property for a matter of months... was not a condition of the [Maine] premises." *Id*. at 44.

Few things are less moveable and more a fixed part of a premises than the literally rooted tree in *Theodore*. *Theodore*, 65 Mass. App. Ct. at 472. By contrast, the very nature and utility of this particular generator is its portability. "The simple fact that [the] misconduct took place on land is a matter of the law of gravity, not the law of insurance." *Westfield Ins. Co*., 128 Ohio St. 3d at 546.

C. A portable generator is not part of the "premises."

The Policy excludes coverage for bodily injury "arising out of a premises owned by an insured ... that is not an insured location." R.A./II:45. An orderly

and proper construction of this exclusion requires an understanding of both the phrase "arising out of" and the term "premises" as used here.

"The phrase 'arising out of' 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). "[C]ases interpreting the phrase 'arising out of' in insurance exclusionary provisions suggest a situation 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." *Id*. "'[A]rising out of' is ordinarily held to mean 'originating from, growing out of, flowing from, incident to or having connection with.'" *Theodore*, 65 Mass. App. Ct. at 474, quoting *Metro. Prop. & Cas. Ins. Co*. v. *Fitchburg Mut. Ins. Co.*, 58 Mass. App. Ct. 818, 821 (2003). The exclusion therefore requires a *causal* connection between the injury and the "premises."

This Policy does not define the term "premises." "The interpretation of an insurance contract is no different from the interpretation of any other contract, and [this Court] must construe the words of the policy in their usual and ordinary sense." *Hakim*, 424 Mass. at 280. "The word 'premises' may have different meanings, depending on the context in which it is used." *W. Mass. Theatres* v. *Liberty Mut. Ins. Co.*, 354 Mass. 655, 658 (1968). "The word as commonly used

has reference to lands or buildings regarded as separate units or entities. Except possibly when used in some peculiar context, 'premises' does not include personal property" (internal punctuation omitted). *Id*. "[T]he term 'premises' does not include and is never used to designate personal property. It is used, both in law and in common speech, to indicate lands and tenements.'" *Id*., quoting *Carr* v. *Roger Williams Ins. Co*., 60 N.H. 513, 520 (1881).

Classification of an item as part of real property is governed by the common law of fixtures:

> It is the rule in this Commonwealth that the conversion of chattels to realty by reason of annexation depends, as between owner and mortgagee, on the intent of the owner when he puts the chattels in place. It is not his undisclosed purpose which controls, but his intent as objectively manifested by his acts and implied from what is external and visible. Where the chattel is so affixed to the realty that its identity is lost, or where it cannot be removed without material injury to the realty or to itself, the intent to make it a part of the realty may be established as matter of law but ordinarily its determination requires a finding of fact. Consideration must be given to the nature of the chattel and the apparent object, effect, and mode of its annexation to the realty.

Bay State York Co. v. *Marvix, Inc.*, 331 Mass. 407, 411 (1954).

Massachusetts courts have applied these principles in many varied contexts. See, e.g., *Welch* v. *Sudbury Youth Soccer Ass'n, Inc.*, 453 Mass. 352, 356-357 (2009) (extent of tort immunity G.L. c. 231, § 85V for nonprofit association); *Bay State York Co*. v. *Marvix, Inc.*, 331 Mass. 407, 411 (1954) (mortgage foreclosures); *Ward* v. *Perna*, 69 Mass. App. Ct. 532, 537 (2007) (sale of real property); and

Consiglio v. *Carey*, 12 Mass. App. Ct. 135, 138-139 (1981) (landlord-tenant). This Court should now apply the law of fixtures to determine whether the portable generator was part of the Maine "premises" within the meaning of the Policy.

This generator was not a "fixture," nor was it part of the Maine realty. It was on wheels, so that one might easily roll it; it was never permanently attached to the cabin; and it was never hard-wired into the cabin's electrical system. R.A./II:101:107:109. The record contains no evidence that removing the portable generator from the cabin would cause "material injury" to the cabin. See *Bay State York Co*., 331 Mass. at 411. Indeed, Wakelin was forced to move the generator out of the garage and into the yard each time that he used it. R.A./II:104. He would then run an extension cord through a doorway and into the house in order to power an item, such as an electric tool. R.A./II:104. Wakelin bought a portable generator, in part, in order that he could easily take it from the home to other locations, such as a campground. R.A./II:112. Taken together, these facts establish that the generator was not a fixture, was not real property, and was not part of the Maine "premises."

Courts in other jurisdictions, in considering whether a household generator is a fixture, examine the extent to which the generator is affixed or attached to the real property. Compare *In re Ryerson*, 519 B.R. 275, 287 (Bankr. D. Idaho 2014) (generator not fixture where "generator could be and was removed without damage

to the realty," where generator "rested upon, but was not otherwise affixed to the concrete slab," and where wiring could be reconnected to alternative generator in "but an hour") with *Fifth Third Mtge. Corp*. v. *Johnson*, Nos. 2011–CAE–05–0049, 2011–CAE–06–0059, 2011 Ohio 6778 (Ohio Ct. App. Dec. 27, 2011) (not published in official reports or regional reporter) (attached) (generator was fixture where generator "attached to a home by electric and gas lines," where generator kept in cabinet specifically designed for specific generator model, and where generator so large as to "require[] a flat-bed truck and boom to remove it").

The law of fixtures is settled, and "settled law breeds little litigation." *Consiglio*, 12 Mass. App. Ct. at 139. In interpreting an insurance policy, "predictability of results [is] a laudable objective from the vantage point of both insurers and insureds." *Zamsky*, 732 F.3d at 44. The portable generator here was not a fixture, and was not part of the premises at the Maine camp. It follows then, that the fatal injuries at the Maine camp did not arise out of the premises.

D. The Policy excludes coverage for injuries "arising out of premises," not coverage for injuries "occurring on premises."

An insurance company could easily change the policy language to achieve the result that Green Mountain seeks here. See, e.g., *Zamsky*, 732 F.3d at 44 ("If [the insurer] 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 say so"); *Sea Ins. Co*. v. *Westchester Fire Ins. Co.*, 849 F. Supp. 221, 224-225 (S.D.N.Y. 1994)

(Sotomayor, J.), *aff'd*, 51 F.3d 22 (2d Cir. 1995) ("it could have done so simply by excluding injuries 'occurring on' other owned premises"), citing *Lititz*, 561 S.W.2d at 374.

In fact, some insurance companies have done precisely that: in *Cal. Cas. Ins. Co.* v. *Am. Family Mut. Ins. Co.*, 208 Ariz. 416 (Ariz. Ct. App. 2004), an "other premises" exclusion expressly applied the exclusion to any injuries "occurring on" other premises: "Premises Owned Rented or Controlled. We will not cover bodily injury or property damage arising out of any act or omission occurring on or in connection with any premises owned, rented or controlled by any insured other than an insured premises." *Id*. at 418.

The Court found *Lititz* and *Callahan* inapplicable specifically "because the policy language at issue in them differs materially from the language at issue in American's policy." *Id*. at 420. The insurer "has chosen to geographically limit the coverage provided for tortious personal conduct of the insured, excluding coverage for tortious acts 'occurring on' owned but uninsured premises. There is no dispute in this case that the dog bite 'occurred on' owned and uninsured premises. Coverage is therefore excluded." *Id*. at 421.

Green Mountain could easily have changed the language of the Policy to exclude coverage for all injuries occurring at the Maine camp. But Green Mountain failed to do so and such failure has consequences.

E. The injuries arose out of Wakelin's personal tortious conduct.

Courts have interpreted language similar to the language here as covering two distinct types of claims: the Policy covers injuries "incurred because of the condition of the premises insured" and also covers "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." *Lititz*, 561 S.W.2d at 374, cited with approval in *Callahan*, 50 Mass. App. Ct. at 263. See *Tacker*, 530 N.W.2d at 677 (bifurcating homeowner's insurance coverage into "*two distinct perils*"); *Kitchens*, 545 So. 2d at 1312 (coverage for negligence is irrespective of site of occurrence). The "exclusion applies when the alleged injuries stem from some dangerous condition in uninsured premises, but not when they result primarily from tortious acts on such premises." *Sea Ins. Co*., 849 F. Supp. at 224-226.

If the injuries here arose out of the "tortious personal conduct" of Wakelin, and not the condition of the Maine camp, then Green Mountain is obligated to defend and indemnify him. There has been no trial, much less any discovery, to establish the facts that inform the theories of liability (*e.g.*, negligence) against Wakelin. Instead, the evidence in the Record Appendix includes a letter in which counsel for the Estate of Keith Norris leveled a number of allegations against Wakelin. They include, *inter alia*, the following:

1. Wakelin failed to properly instruct his children and their friends on the proper and safe use of a generator;

2. Wakelin failed to warn his children and their friends of the dangers of running a generator in an enclosed area which included the likely potential for carbon monoxide poisoning and death;

3. Wakelin failed to warn his children and their friends not to run a generator in the garage under basement;

4. Wakelin failed to instruct his children and their friends to at least open the garage door to attempt to ventilate the area while the generator was running;

5. Wakelin failed to warn and instruct his children and their friends that the generator should not be run under any circumstances inside the dwelling, including the garage; [and]

6. Wakelin chained and locked the generator in place in the garage so that it could not be moved outside[.]

R.A.II:17. These averments allege "tortious personal conduct" by Wakelin, wholly independent of the premises. Bodily injuries arising out of these independent tortious acts do not fall within the exclusion for injuries arising out of the premises.

CONCLUSION

For the foregoing reasons, the Amicus requests that the Court affirm the trial court's judgment declaring that Green Mountain is obligated to provide coverage under its policy.

Respectfully submitted,

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Date: November 14, 2019

ADDENDUM

ADDENDUM
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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
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Chapter 231. Pleading and Practice (Refs & Annos)

M.G.L.A. 231 § 85V

§ 85V. Sports program volunteers' liability; definitions

Currentness

As used in this section, unless the context requires otherwise, the following words shall have the following meanings:--

“Compensation”, shall not include reimbursement for reasonable expenses actually incurred or to be incurred or, in the case of umpires or referees, a modest honorarium.

“Nonprofit association”, an entity which is organized as a nonprofit corporation or nonprofit unincorporated association under the laws of the commonwealth or the United States or any entity which is authorized to do business in the commonwealth as a nonprofit corporation or unincorporated association under the laws of the commonwealth.

“Sports program”, baseball, softball, football, basketball, soccer and any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 Public Law 95-606, 36 USC sec. 371 et seq., the Amateur Athletic Union or the National Collegiate Athletic Association. It shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are eighteen years of age or younger whose nineteenth birthday occurs during the year of participation or the competitive season, whichever is longer; provided, however, that there shall be no age limitation for programs operated for the physically handicapped or mentally retarded.

Except as otherwise provided, in this section, no person who without compensation and as a volunteer, renders services as a manager, coach, umpire or referee or as an assistant to a manager or coach in a sports program of a nonprofit association or who renders services to a sailing program of a nonprofit association, no nonprofit association conducting a sports or a sailing program, and no officer, director, trustee, or member thereof serving without compensation shall be liable to any person for any action in tort as a result of any acts or failures to act in rendering such services or in conducting such sports program. The immunity conferred by this section shall not apply to any acts or failures to act intentionally designed to harm, or to any grossly negligent acts or failures to act which result in harm to the person. Nothing in this section shall be construed to affect or modify any existing legal basis for determining the liability, or any defense thereto, of any person not covered by the immunity conferred by this section.

Nothing in this section shall be construed to affect or modify the liability of a person or nonprofit association for any of the following:

(i) acts or failures to act which are committed in the course of activities primarily commercial in nature even though carried on to obtain revenue for maintaining the sports program or revenue used for other charitable purposes.

(ii) any acts or failures to act relating to the transportation of participants in a sports program or others to or from a game, event or practice.

(iii) acts or failures to act relating to the care and maintenance of real estate which such persons or nonprofit associations own, possess or control and which is used in connection with a sports program and or any other nonprofit association activity.

Credits
Added by St.1987, c. 265. Amended by St.1993, c. 331.

Notes of Decisions (1)

M.G.L.A. 231 § 85V, MA ST 231 § 85V
Current through Chapter 88 of the 2019 1st Annual Session

End of Document

2011 WL 6929621

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Delaware County.

FIFTH THIRD MORTGAGE
CORP., et al, Plaintiffs–Appellees
v.
John V. JOHNSON, et al, Defendants–Appellants.

Nos. 2011–CAE–05–0049, 2011–CAE–06–0059.
|
Decided Dec. 27, 2011.

Civil appeal from the Delaware County, Court of Common Pleas, Case No.09CVE091199.

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Opinion

GWIN, P.J.

***1** {¶ 1} Defendants-appellants John V. and Raye Johnson appeal a judgment of the Court of Common Pleas of Delaware County, Ohio, which granted a permanent injunction in favor of intervening party-assignee/appellee Anne Stubbs prohibiting appellants from removing certain property from their former home, and ordering return of some items already removed. Appellants assign three errors to the trial court:

{¶ 2} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY RULING THAT THE JOHNSONS INTENDED THE CLIVE CHRISTIAN, THE CLOSET SYSTEMS, THE GENERATOR AND THE GARAGE VACUUM TO BECOME A PERMANENT PART OF THE REALTY.

{¶ 3} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FINDING THAT THE JOHNSONS (sic) FALURE TO NOTIFY THEIR MORTGAGE COMPANY OF THEIR INTENTION THAT THE CLIVE CHRISTIAN, THE CLOSET SYSTEMS, THE GENERATOR AND THE GARAGE VACUUM WOULD RETAIN THEIR CHARACTERISTICS AS CHATTEL, PRECLUDED THEM FROM ASSERTING SUCH INTENTIONS WITH RESPECT TO DR. STUBBS.

{¶ 4} "III. THE TRIAL COURT'S FINDINGS THAT THE CLIVE CHRISTIAN, THE CLOSET SYSTEMS, THE GENERATOR AND THE GARAGE VACUUM WERE FIXTURES WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

{¶ 5} In 2004, appellants built a luxury residence in Westerville, Ohio. They hired an architect to design the home and acted as their own general contractor. The home is over 9,400 square feet. During the design phase, appellants advised the architect they intended to purchase imported custom cabinetry, by designer Clive Christian, for the kitchen, dining room, living room, and study. The architect designed the home to accommodate the cabinetry.

{¶ 6} Unfortunately, by 2009, appellants suffered financial problems and plaintiff Fifth Third Mortgage Company, which is not a party to this appeal, eventually filed a foreclosure action on the home. While the foreclosure action was pending, appellants attempted to sell their home themselves, originally listing it at $2,095,000. They later dropped the price to $1,699,000. At this listing price, the Johnsons testified they were willing to include the Clive Christian cabinetry and the generator.

{¶ 7} The only offer appellants received was from appellee, who offered $1,050,000. Appellants made a counter offer at the same price, but removing the Clive Christian cabinetry and the generator from the sale. Eventually, appellants and appellee came to an agreement on the sale excluding all furniture and fixtures as agreed to by and between the parties. However, Fifth Third Mortgage Company did not agree to the short sale, and the property was sold at Sheriff's Auction.

{¶ 8} Fifth Third Mortgage Company was a successful bidder at a price of $1,255,000. Appellee's representatives attended the sale and negotiated an assignment of the Fifth Third Mortgage Company's bid for $1,301,000. Following the sale, appellants met with appellee to discuss her interest in purchasing certain property, including the Clive Christian cabinetry, the generator, weight room equipment, certain rugs, and a car lift. Appellee considered certain of the items to be

fixtures which she had already purchased them as assignee of Fifth Third Bank' successful bid at the sheriff's sale.

***2** {¶ 9} The parties could not agree and appellants began removing their personal property from the home. On April 1, 2011, appellee filed a motion for a restraining order injunction to restrain appellants from removing any fixtures from the property. Appellants had already removed some of the disputed items. Eventually, the court found the generator, the closet systems, the desk, bookshelves and cabinets from the den, the cabinetry, the central vacuum system and all its attachments were fixtures. The court found certain other property could not be considered fixtures and were the property of appellants. The court enjoined appellants from removing any of the fixtures and ordered them to return the fixtures they had removed.

I. & II.

{¶ 10} We will discuss the first two assignments of error together because they are interrelated. In their first assignment of error, appellants argue the trial court erred in finding appellants intended the various articles were to be a permanent part of the realty. In their second assignment of error, appellants argue the trial court erred in finding because they did not notify the mortgage company of their intention to retain the various items as chattel, they were precluded from raising such intentions with regard to appellee.

{¶ 11} The trial court found the disputed property were fixtures, and when the bank foreclosed on the property, the bank foreclosed on the fixtures; when the sheriff sold the property he sold the fixtures.

{¶ 12} The trial court found appellants originally intended to treat the property as fixtures and had not excluded them as separate chattel when they attempted a private arms-length sale. The court found they may have voiced a contrary intention after the foreclosure proceedings when they were attempting to mitigate their losses by removing whatever they could to sell separately. The court found in an arms-length transaction a buyer and seller can agree what would be included in a contract of sale, but if the sale is a forced sale, the homeowners' intentions do not carry much weight.

{¶ 13} Appellants argue they did not advise the bank of their intent to treat the property as personal property rather than fixtures, but as a matter of fact the bank's assignee, appellee, had actual knowledge appellants considered the disputed items as chattel.

{¶ 14} The trial court found as a general rule, chattels affixed to a property become subject to an existing mortgage unless the mortgagor and mortgagee agree otherwise. Opinion of May 26, 2011, at page four, citing 35 American Jurisprudence 2d (1967) 740, Fixtures, Sections 50–51. The court found for this reason, in a foreclosure action, everything subject to the mortgage is included in the foreclosure, including all the fixtures.

{¶ 15} The trial court cited *Holland Furnace Company v. Trumball Savings & Loan Company* (1939), 135 Ohio St. 48, 52, 19 N.E.2d 273 and *Teaff v. Hewitt* (1853), 1 Ohio St. 511, where the supreme court set out a three-part test to determine whether and when a chattel becomes a fixture. The court found firstly, to become a fixture the chattel in question must be attached to some extent to the realty. Secondly, the chattel must have an appropriate application to the use or purpose to which the realty to which it is attached is devoted. Thirdly, there must be an actual or apparent intention upon the part of the owner of the chattel to make it a permanent part of the realty. *Id.*

***3** {¶ 16} The trial court cited *Holland Furnace,* supra, as authority for the proposition that it is not necessarily the real intention of the owner of the chattel which governs. The owners' apparent or legal intention to make it a fixture is sufficient. The owners' intention can be inferred from the situation and surroundings. The owners' intention not to make chattel a fixture cannot be secret, but could be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, the purpose and use for which the annexation is made, the utility of the chattel once it is attached to the realty, and if the owner of the realty and the owner of the chattel are different, the relationship of the owner of the chattel to the owner of the realty, and to others who may become interested in the property. Whether a chattel is or is not a fixture must appear from the inspection of the property itself, in the absence of actual notice of the contrary, or under such circumstances as would put a prudent person upon inquiry to ascertain the fact. Opinion at page five.

{¶ 17} Appellants argue there was conflicting testimony as to the first prong of the *Holland Furnace* test, regarding whether the disputed items were actually affixed to the real estate. The parties agree the items in dispute met the second part of the

test, appropriateness to the realty. Regarding the third part of the *Holland Furnace* test, the parties hotly disputed the intention of the appellants in affixing the chattel to the realty.

{¶ 18} Further, appellants argue appellee had actual knowledge that appellants intended to remove the items or sell them separately. Appellant Raye Johnson testified that when the Clive Christian cabinetry was purchased and placed in the home, she intended it would become an heirloom to be moved to a future home and passed down to her children. Appellants testified they purchased this particular cabinetry because they were told it was furniture and could be taken anywhere they wanted.

{¶ 19} Appellants argue appellee only presented testimony regarding how the items looked in situ to, or how expensive it would be to replace them. Appellee did not present evidence rebutting their argument she was aware they intended to treat the items as chattel.

{¶ 20} The court made extensive findings of fact. Appellants hired two men to remove Clive Christian cabinetry from the walls using pry bars and drills. The lower cabinets have metal legs which are covered in a toe-kick plate for aesthetic reasons. The upper cabinets are hung on brackets screwed into the walls. The brackets were removed in addition to the cabinets and spackling was used to fill the holes.

{¶ 21} The cabinets were custom made for the location with baseboards built to the ends of the cabinets and abutting the cabinets, all built in at the time the home was constructed. The ends of the cabinets which abutted the walls were not finished. The flooring did not extend under the cabinets as it would have under furniture. The trial court found appellants testified if the price was right, they were willing to part with the cabinetry.

***4** {¶ 22} The closets had custom designed California Closet type shelving systems. The closet rods and shelving were affixed to the walls of the closets.

{¶ 23} The trial court found the generator is a fixture and was installed when the appellants obtained the mortgage. It is attached to the home by electric and gas lines. The lines run into a large cabinet in the basement which can only be utilized with this particular model of generator. The generator is not portable, and required a flat-bed truck and boom to remove it. The generator was intended to make the home self-sufficient just like the battery backup for the panic room. The court concluded the appellants intended for the generator to become a fixture and had listed it in their advertizing when they were attempting to sell the home themselves.

{¶ 24} The gas range was disconnected and removed. It had one screw bolting it to the wall. Two refrigerators and the trash compactor were removed, as well as a chandelier. The trial court found custom appliances are generally removed by the sellers upon sale of the realty unless included in a real estate purchase contract. The court found the kitchen appliances were personalty, but ordered appellants to return the cabinet fronts for the trash compactor, refrigerators, and freezer to appellee because the cabinet fronts matched the other kitchen cabinets.

{¶ 25} In all, the court found the desk, cabinetry, various shelving, closet rods, and the built-in vacuum system and attachments were fixtures that were included in the sheriff's sale.

{¶ 26} The *Holland Furnace* case and its progeny refer to the intent of the owner at the time the owner affixes the property to the realty. We find it is the intent at the time the chattel is affixed that transforms the chattel to fixtures, but if the owner changes his or her mind later, the fixtures are not transformed back into chattel.

{¶ 27} Here, the trial court found that essentially, appellants intended to sell the disputed items with the house if they could get a high enough price. After the auction, appellants wished to remove the items and sell them separately. This does not demonstrate appellants intended for the items to remain chattel at the time they were installed in the home.

{¶ 28} We find the trial court did not err in finding the disputed items were fixtures and had become a permanent part of the realty.

{¶ 29} The first and second assignments of error are overruled.

III.

{¶ 30} In their third assignment of error, appellants argue the trial court's findings were against the manifest weight and sufficiency of the evidence. Our standard of reviewing a claim a trial court's decision is against the manifest weight of the evidence is to review the record and determine if the decision

is supported by some competent and credible evidence. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Oho St.2d 279. This court may not substitute our judgment for that of the trier of fact. *Pons v. Ohio State Medical Board* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

***5** {¶ 31} We find there is sufficient, competent and credible evidence in the record to support the trial court's determination the disputed items were fixtures rather than chattel.

{¶ 32} The third assignment of error is overruled.

{¶ 33} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

GWIN, P.J., WISE, J., and DELANEY, J., concur.

All Citations

Slip Copy, 2011 WL 6929621, 2011 -Ohio- 6778

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RULE 16 CERTIFICATION

I, Kevin J. Powers, hereby certify that the Brief herein complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. App. P. 16(a)(13) (addendum);

Mass. R. App. P. 16(e) (references to the record;

Mass. R. App. P. 18 (appendix to the briefs);

Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. App. P. 21 (redaction).

I further certify, pursuant to Mass. R. App. P. 16(k), that the Brief herein complies with the applicable length limitation in Mass. R. App. P. 20 because it is printed in a proportional spaced font, Times New Roman, at size 14 point, and contains 5,275 words in Microsoft Word 2013.

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I certify that on the 14th day of November, 2019, I served the foregoing brief upon the other parties in this matter by electronic delivery via the efileMA system to their attorneys of record or, if such attorneys are not registered with efileMA or if such parties are *pro se* and not registered with efileMA, via First-Class Mail. The attorneys or parties served are:

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