484 Mass. 222
Supreme Judicial Court of Massachusetts,
Norfolk..

GREEN MOUNTAIN
INSURANCE COMPANY, INC.
v.
Mark J. WAKELIN & others.[1]

1 Charmaine Norris, as personal representative of the estate of Keith Norris; and Robert Powers, as administrator of the estate of Deana Lee Powers.

SJC-12760
|
Argued December 6, 2019.
|
Decided March 3, 2020.

Synopsis

Background: Homeowners insurer brought action against insured and estates of victims of carbon monoxide poisoning for declaratory judgment that policy excluded liability coverage. The Superior Court Department, Norfolk County, Mark A. Hallal, J., entered summary judgment in favor of defendants. Insurer appealed, and Supreme Judicial Court transferred case on its own motion.

[Holding:] The Supreme Judicial Court, Kafker, J., held that as a matter of first impression, deaths from carbon monoxide poisoning caused by use of portable gasoline generator to power refrigerator inside cabin did not arise out of uninsured premises.

Affirmed.

West Headnotes (6)

[1] Judgment Absence of issue of fact

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) Absence of issue of fact

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

[2] Appeal and Error Cross-motions

30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3950 Summary Judgment
30k3952 Cross-motions

Where both parties have moved for summary judgment, the evidence is viewed by appellate court in the light most favorable to the party against whom judgment was entered.

[3] Appeal and Error Insurers and insurance

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3771 Trade, Business, and Finance
30k3774 Insurers and insurance

The interpretation of an insurance policy is a question of law subject to de novo review.

[4] Insurance Plain, ordinary or popular sense of language

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language

If the language of an insurance policy is unambiguous, then courts construe the words in their usual and ordinary sense.

1 Cases that cite this headnote

[5] Insurance Ambiguity, Uncertainty or Conflict

Insurance Exclusions, exceptions or limitations

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) In general
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1835 Particular Portions or Provisions of Policies
217k1835(2) Exclusions, exceptions or limitations

If insurance policy language is ambiguous, doubts as to the intended meaning of the words must be resolved against the insurance company that employed them and in favor of the insured, and this rule of construction applies with particular force to exclusionary provisions.

1 Cases that cite this headnote

[6] **Insurance** Particular exclusions

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2353 Homeowners' Liabilities
217k2356 Particular exclusions

Deaths from carbon monoxide poisoning caused by use of portable gasoline generator to power refrigerator inside cabin did not arise out of uninsured premises, and, thus, homeowners policy exclusion for bodily injury arising out of premises that was not insured location did not apply, despite cabin's allegedly inadequate ventilation; generator was not connected to cabin's rough electrical system to make it part of cabin and was not a property condition or permanent fixture, insured used generator to charge power tools for cabin construction, labels warned that use indoors could be lethal and that generator should not be used in enclosed area, and cabin was not more susceptible to carbon monoxide poisoning than any other enclosed area.

1 Cases that cite this headnote

****419** Insurance, Homeowner's insurance, Owned property exclusion. Declaratory Relief. Practice, Civil, Declaratory proceeding, Summary judgment. Contract, Insurance, Construction of contract. Words, "Arising out of."

Civil action commenced in the Superior Court Department on December 18, 2015.

The case was heard by Mark A. Hallal, J., on motions for summary judgment, and a motion for entry of judgment was considered by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Attorneys and Law Firms

Brian P. Harris, Boston, for the plaintiff.

J. Michael Conley, Braintree, for Charmaine Norris.

William J. Doyle, Worcester, for Robert Powers.

Peter E. Heppner, South Easton, for Mark J. Wakelin, was present but did not argue.

Kathy Jo Cook, Thomas R. Murphy, Salem, Kevin J. Powers, Paul R. Johnson, Foxboro, & Lawrence A. Wind, Brighton, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Opinion

KAFKER, J.

***222** This is a declaratory judgment action requiring us to interpret an exclusion in a homeowner's insurance policy. The plaintiff, Green Mountain Insurance Company, Inc. (insurer), sold ***223** a homeowner's policy to Mark Wakelin for property that he owned in Braintree. As is typically the case, the homeowner's policy provided him protection against personal liability as well as property damage. The policy also contained an exclusion for bodily injury "arising out of a premises" owned by the insured but not insured under the policy. In the instant case, Wakelin owned an uninsured property, a cabin without electrical power in Maine. Tragically, four people -- two of Wakelin's children and two of their friends -- died from carbon monoxide poisoning when

a portable generator Wakelin left at the cabin was improperly used inside the cabin to power a small refrigerator. The issue is whether the deaths caused by the improper use of the portable generator arose out of the uninsured premises as defined by the exclusion. We conclude that the portable generator does not constitute a condition of Wakelin's uninsured property and that, as a result, the victims' claims here do not arise out of that premises. For these reasons, the policy exclusion does not apply under the facts ****420** of this case, and the judgment of the Superior Court is affirmed.[2]

2 We acknowledge the amicus brief submitted by the Massachusetts Academy of Trial Attorneys.

1. Background. Wakelin is the named insured on a homeowner's insurance policy issued by the plaintiff insurer. In addition to coverage for loss of property under the policy, the policy also insures Wakelin against personal liability. The property insured under Wakelin's policy is in Braintree.

Coverage E of Wakelin's policy insures him if "a claim is made ... against [him] for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which [the policy] applies." The policy excludes the following from coverage:

"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."

***224** Wakelin also owned a cabin and property in Byron, Maine (the camp). The parties do not dispute that the camp in Maine is not an "insured location" within the meaning of the policy. It is also not covered by another homeowner's insurance policy.

The tragic accident underlying this case took place at the cabin on or around July 14, 2015. The facts regarding the cabin are as follows: Wakelin obtained a building permit in 2009 to construct the cabin on the property, but never obtained a certificate of occupancy. The camp was "off the grid," meaning it was not supplied with town electricity. Wakelin had hoped that someday in the future either the town would supply electricity, or he would be able to install solar panels. The cabin had a wood stove, and Wakelin used solar-powered or battery-operated lights when at the camp. Although the cabin had rough wiring strung through parts of its ceiling, that wiring was not functional as of the summer of 2015. The cabin was seasonal and was not used in the winter.

Wakelin purchased a gasoline-powered generator in Weymouth around 2012. When buying the generator, Wakelin viewed its portability as an important consideration.[3] He took advantage of the option to buy a generator with wheels and a handle for $250 more. After he purchased the generator, he brought it from Massachusetts to the camp in Maine. He only used the generator at the camp and never used it anywhere else. Whenever Wakelin left the property, he would chain the generator to the garage door so it could not be stolen. He similarly chained his two all-terrain vehicles (ATVs) to the door whenever he left the property.

3 Although Wakelin considered someday installing a permanent generator to keep outside the cabin, at the time he purchased the generator in question, the option of purchasing a permanent generator was too expensive.

Wakelin did not use the generator every time he went to the camp. He did use the generator when he or someone else who was working on the property needed it to charge power tools. The generator was used strictly for working on the property. When he or someone else working on the property used the generator, Wakelin would always ensure the generator was outside. The generator was not hard wired into the camp's electrical system, and Wakelin did not have any plans to hard wire the generator to the cabin.

****421** Wakelin testified without contradiction that, if the generator was already started to power the tools, he might plug the microwave that was in the camp kitchen into the generator to heat ***225** something up. However, he testified that he rarely did so and would not start the generator just to use the microwave.

Wakelin had other items at the camp that required electricity, including a small, college-sized refrigerator, and several slot machines. He brought the slot machines to the camp so they would not be stolen from his home in Braintree. Wakelin testified that he had not plugged in either the refrigerator or the slot machines since bringing them to the camp.

On or around July 14, 2015, Wakelin's daughter, Brooke (twenty-one years old), and son, Matthew (eighteen years old), went to the camp with two friends, Keith Norris (twenty-three years old) and Deana Lee Powers (twenty-two years old), to celebrate Brooke's upcoming twenty-second birthday. Shortly after arriving at the camp, all four individuals died from carbon monoxide poisoning. Upon inspection, it was discovered that the victims had plugged the small refrigerator into the generator using an extension cord, and ran the generator inside the cabin without opening any windows or doors. The generator was not running when it was found, but its switch was in the "on" position, and it contained little to no gasoline.

After the accident, counsel for the estate of Norris notified the insurer in a letter dated October 7, 2015, of the estate's wrongful death claim against its insured, Wakelin. Among other things, counsel claimed that Wakelin failed to instruct his children and their friends on the proper and safe use of the generator and also failed to warn them of the dangers of running the generator in an enclosed area.

After receiving this letter, the insurer initiated a declaratory judgment action against Wakelin, the estate of Norris, and the estate of Powers in December 2015. In its complaint, the insurer anticipated that the respective estates of Norris and Powers would make claims that its insured, Wakelin, was negligent and caused the death of both victims. The insurer sought a judgment from the Superior Court declaring that coverage for these claims was barred under the policy's exclusion for claims arising out of a premises owned by the insured but not an insured location under the policy. At the inception of the lawsuit, the insurer entered into a subsidiary agreement with the defendants that insulated Wakelin from any liability beyond the policy limits if coverage was not excluded. Because he would not incur any defense costs or be personally liable for any damages under the agreement, Wakelin is a party to the lawsuit in name only.

***226** The parties filed cross motions for summary judgment. As a part of its motion, the insurer relied on an electrical engineer's conclusions that the deaths arose out of a combination of using the generator inside the cabin and the cabin's inadequate ventilation to disperse the carbon monoxide.[4]

4 The defendants moved to strike from the insurer's motion for summary judgment any reference to the engineer's conclusions, and argued that the engineer failed to satisfy the requisite standard of reliability established in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Superior Court judge denied the defendants' motion to strike.

The Superior Court judge denied the insurer's motion for summary judgment and entered judgment in favor of the defendants. The insurer filed a timely notice of appeal, and we transferred the insurer's appeal to this court on our own motion.

****422 [1] [2] [3] [4] [5]** 2. Discussion. a. Standard of review. "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Boazova v. Safety Ins. Co., 462 Mass. 346, 350, 968 N.E.2d 385 (2012). "In a case like this one where both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment [has entered]" (citation omitted). Id. The interpretation of an insurance policy is a question of law subject to de novo review. Id. "[I]f the language of an insurance policy is unambiguous, then we construe the words in their usual and ordinary sense" (quotation and citation omitted). Id. However, if the policy language is ambiguous, "doubts as to the intended meaning of the words must be resolved against the insurance company that employed them and in favor of the insured. This rule of construction applies with particular force to exclusionary provisions" (quotations and citations omitted). Id. at 350-351, 968 N.E.2d 385.

No material facts are in dispute in this case. The sole question whether the policy exclusion applies is a question of law ripe for summary judgment, as it requires interpreting the policy language and applying that language to the undisputed facts of this case.

b. Homeowner's insurance and the exclusionary language at issue. "As is characteristic of a standard homeowner's policy," the policy at issue "has two categories of coverage: insurance against loss to property, including its use, and insurance against [personal] liability." Callahan v. Quincy Mut. Fire Ins. Co., 50 Mass. App. Ct. 260, 262, 736 N.E.2d 857 (2000). See J.F. Comerford & M.S. Coven, Insurance Law § 3:2 (2013). Thus, homeowner's insurance ***227** provides protection 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." Tacker v. American Family Mut. Ins. Co., 530 N.W.2d 674, 677

(Iowa 1995), citing Lititz Mut. Ins. Co. v. Branch, 561 S.W.2d 371, 374 (Mo. App. 1977). See 9 Couch on Insurance 3d § 126:8 (rev. ed. 2015).

However, the policy excludeS from coverage bodily injury or property damage arising out of a premises owned by an insured that is not an insured location under the policy. It is not appropriate to impose liability for this distinct third "peril" -- injury arising out of the premises of uninsured property -- because the insurer has not been given the opportunity to inspect and assess the uninsured property and been compensated to assume this additional risk. If an insured wishes to be insured against liability arising out of another premises, he or she must allow inspection and assessment of that risk and pay for that additional coverage, as an additional premises results in additional exposure for the insurance company. See Callahan, 50 Mass. App. Ct. at 263, 736 N.E.2d 857 ("the many personal risks incident to ownership of property ... are distinctly greater when an insured owns additional real estate that the insurer has not inspected and assessed from the point of view of risk"). The insurer cannot agree to insure a property for its "falling roof slate" or other defects if it has not had the opportunity to understand the risk it would be insuring against on that premises and, in most cases, subsequently require an insured to make certain repairs before offering protection against liability for the conditions of that premises. See id. See also Commerce Ins. Co. v. Theodore, 65 Mass. App. Ct. 471, 475, 841 N.E.2d 281 (2006) (Theodore). It is for this reason that the uninsured premises exclusion exists in ****423** most if not all homeowner's insurance policies providing personal liability coverage. See id.; Callahan, supra.

[6] As it is undisputed that the deaths here were caused by the improper use of a portable generator inside the cabin, and the cabin was not an insured premises, we are clearly not concerned with the first peril discussed supra. The only issue is whether the bodily injury arose from the uninsured premises or from tortious personal conduct. This requires a more precise understanding of what it means for bodily injury to arise from the uninsured premises.

Although this court has not yet interpreted the specific exclusionary language at issue, the Appeals Court and the United ***228** States Court of Appeals for the First Circuit have interpreted the words "arising out of a premises" to mean "arising out of a condition of a premises." Vermont Mut. Ins. Co. v. Zamsky, 732 F.3d 37, 42 (1st Cir. 2013) (Zamsky). See Theodore, 65 Mass. App. Ct. at 475, 841 N.E.2d 281; Callahan, 50 Mass. App. Ct. at 262-263, 264 n.5, 736 N.E.2d 857. Many other courts around the country have similarly interpreted this language. See, e.g., id. at 264 n.5, 736 N.E.2d 857 (collecting cases); Lititz Mut. Ins. Co., 561 S.W.2d at 373. This language "differentiates what arises out of [the premises] from what occurs on" an uninsured premises. Callahan, supra at 262, 736 N.E.2d 857. The relevant exclusionary language does not exclude, for example, coverage for the second peril described supra -- namely, "liability stemming from the insured's tortious personal conduct which may occur at any place on or off the insured premises." Tacker, 530 N.W.2d at 677. See Westfield Ins. Co. v. Hunter, 128 Ohio St. 3d 540, 541-542, 948 N.E.2d 931 (2011) (negligent entrustment of minor with ATV did not arise out of uninsured premises).

To better illustrate this distinction, we turn first to the decision of the Appeals Court in Callahan. In that case, the insured had a homeowner's insurance policy for property he owned in New Hampshire. Callahan, 50 Mass. App. Ct. at 261, 736 N.E.2d 857. The claim arose, however, when the insured's dog attacked a business invitee on property the insured owned in Massachusetts. Id. at 260, 736 N.E.2d 857. The homeowner's policy insured against personal liability, but excluded coverage for "bodily injury or property damage ... arising out of a premises [ ]owned by an insured ... that is not an insured location." Id. at 261, 736 N.E.2d 857. The Massachusetts property was owned by the insured but not an insured location under the policy. Id. The question before the court on the insurer's claim for declaratory judgment was whether the dog bite -- for which the insured was personally liable -- arose out of the Massachusetts property. Id. Stated differently, "[t]he question [was] 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." Id.

The Appeals Court held that the exclusion in the policy did not apply to a dog bite that occurred on the uninsured premises. Id. at 264-265, 736 N.E.2d 857. In its analysis, the court relied on Lititz Mut. Ins. Co., a parallel Missouri case involving an off-policy premises dog bite. Callahan, supra at 263-264, 736 N.E.2d 857, citing ***229** Lititz Mut. Ins. Co., 561 S.W.2d at 373-374. The court concluded: "That an accident happened on a premises did not make it 'in connection with' those premises." Callahan, supra at 263, 736 N.E.2d 857. The court contrasted tortious personal conduct -- ****424** which "was not greatly expanded by an insured's ownership of other real

property" -- with "personal risks incident to ownership of property," such as "the loose board, the falling roof slate, the defect in the walkway, [and] the failure of outdoor lighting." Id.

Applying the same analysis it used in Callahan, the Appeals Court reached a different result six years later in Theodore, 65 Mass. App. Ct. at 476, 841 N.E.2d 281. In that case, the insured homeowner owned a property in the Dorchester section of Boston that was not covered under the insured's homeowner's policy for property in Framingham. Id. at 472, 841 N.E.2d 281. A man helping the insured cut down a dying tree at the Dorchester property fell from a ladder while attempting to remove his chainsaw from the tree. Id. The insurer commenced a civil action seeking a judgment declaring that it had no obligation to defend or indemnify its insured for his personal liability in the man's fall. Id. The insurer invoked an exclusion that pretermitted coverage for personal liability "[a]rising out of a premises ... [o]wned by an 'insured' ... that is not an 'insured location.'" Id. at 471, 841 N.E.2d 281.

The court compared the facts of Theodore to the facts of Callahan: "That an accident happens on the uninsured premises does not by itself trigger the exclusion. The dog bite [in Callahan] did not stem from any condition of the uninsured premises and in our view did not arise from the premises." Id. at 475, 841 N.E.2d 281. However, the court concluded that "where ... 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, 841 N.E.2d 281. Thus, the tree -- unlike the dog in Callahan -- was a condition of the premises, and falling from the ladder was sufficiently related to the condition of the premises to trigger the exclusion. Id.

The First Circuit used the two "bookend cases" discussed supra to frame its inquiry in Zamsky, 732 F.3d at 42. In that case, three people suffered severe burns when an insured's guest poured gasoline on a portable fire pit. Id. at 40. The injuries occurred at the insureds' property in Falmouth, which was not an insured location under the policy at issue. Id. at 39-40. Similar to the policies in Callahan and Theodore, the policy in Zamsky excluded from coverage injuries "[a]rising out of a premises" ***230** owned by an insured but not itself an "insured location." Id. at 40 n.2. In comparing Callahan and Theodore to the case before it, the First Circuit reasoned:

> "In both [Callahan and Theodore], the Appeals Court interpreted the ... 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 [Supreme Judicial Court]: 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 [Supreme Judicial Court's] unwavering insistence that exclusions from coverage should be strictly construed." (Citations omitted.)

Id. at 42-43. Thus, the First Circuit concluded that "arising out of a premises" was ambiguous policy language and that, as such, it must be construed in favor of the insured. Id. The court went on to conclude that the portable fire pit at issue in the ****425** case was not a condition of the premises that fell under the exclusion:

> "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. See 9 Steven Plitt et al., Couch on Insurance 3d § 126:8 (2008). See also Callahan, [50 Mass. App. Ct. at 263, 736 N.E.2d 857]. Unlike the tree in Theodore, [65 Mass. App. Ct. at 475-476, 841 N.E.2d 281], 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, [Callahan, supra], 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. [See Theodore, supra at 475, 841 N.E.2d 281, quoting ***231** Callahan, supra]. 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. In reaching this conclusion, the court in Zamsky emphasized that, if the insurer had "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." Id. at 44. See, e.g., California Cas. Ins. Co. v. American Family Mut. Ins. Co., 208 Ariz. 416, 420, 94 P.3d 616 (2004) (barring coverage for off-policy premises dog bite when policy excluded from coverage damages "arising out

of any act or omission occurring on or in connection with any premises owned ... by any insured other than an insured premises" [emphasis added]). Instead, it used the standard "arising out of" language.

In the three cases discussed supra, as well as in the great weight of authority on this subject, there is a distinction drawn between cases of tortious conduct that occur on an uninsured premises and personal liability that arises out of a condition of a premises. For example, the dog bite in Callahan "was no more connected to [the insured's] real estate than had [the insured] spilled hot coffee on a guest on those premises. It happened there, but it did not 'arise out of,' as the phrase is understood." Callahan, 50 Mass. App. Ct. at 263, 736 N.E.2d 857. "Had [the dog] bitten someone in front of the municipal building" or most anywhere else in town, the insured would have been protected by the personal liability portion of the policy. Id. at 262, 736 N.E.2d 857.

Whether the personal liability in the instant case arises out of the uninsured premises presents a close question. We conclude that the generator does not constitute a condition of the uninsured premises, and the accident caused by the generator therefore cannot trigger the uninsured premises exclusion. The generator was portable, andWakelin even spent more money on the generator so that it would be portable. It was also not hard wired into the cabin's rough electrical system to make it a part of the cabin. It was only "attached" to the cabin by means of a chain so it would not be stolen -- just like the ATVs, which are also Wakelin's personal property. Nor was it regularly used to provide electricity in the cabin. The generator was brought to the cabin to charge power tools used to complete the cabin's construction, and was not continuously run to power everyday appliances inside the camp. Although ****426** it was always kept at the Maine cabin, it was portable like the fire pit in Zamsky. Zamsky, 732 F.3d at 45.

***232** The generator here did not resemble any property condition that typically gives rise to personal liability, such as "the loose board, the falling roof slate, the defect in the walkway, [or] the failure of outdoor lighting." Callahan, 50 Mass. App. Ct. at 263, 736 N.E.2d 857. Inspection of the property would not have revealed a correctable defect, as it would have had the generator been hard wired inside the house. Nor was the generator a permanent fixture of the cabin.[5] Compare In re Ryerson, 519 B.R. 275, 287 (Bankr. D. Idaho 2014) (generator not fixture where it could be removed without damage to realty and wiring was amenable to reconnecting to generator with appropriate cabling and lugs), with Fifth Third Mtge. Corp. v. Johnson, 2011-Ohio-6778, ¶¶23, 28, 2011 WL 6929621 (Ct. App. 2011) (nonportable generator was fixture where it was attached to home by electric and gasoline lines that could only be used with specific generator, and where generator was listed in advertising when defendants attempted to sell home).

5 Although the law of fixtures does not control the analysis in the present case, we find it a helpful analogy in determining whether an item of personal property can form the basis for liability arising out of a premises for purposes of the policy exclusion, particularly since the word "premises" "contemplates the land and more or less permanently affixed structures contained thereon." Westfield Ins. Co. v. Hunter, 128 Ohio St. 3d 540, 545, 948 N.E.2d 931 (2011), quoting Lititz Mut. Ins. Co. v. Branch, 561 S.W.2d 371, 373 (Mo. App. 1977). See, e.g., Bay State York Co. v. Marvix, Inc., 331 Mass. 407, 411, 119 N.E.2d 727 (1954) ("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").

Further, it was Wakelin's failure to instruct his children on how to properly use the generator rather than any condition or defect on the property that is the basis for his potential liability here. See Lititz Mut. Ins. Co., 561 S.W.2d at 374 ("Liability for injuries caused by an animal owned by an insured arises from the insured's personal tortious conduct in harboring a vicious animal, not from any condition of the premises upon which the animal may be located"); Westfield Ins. Co., 128 Ohio St. 3d at 546, 948 N.E.2d 931 ("our inquiry must focus on the insureds' alleged negligence in permitting [the minor] to operate the ATV in a negligent or reckless manner, which has no causal link to the quality or condition of the premises"). See also Zamsky, 732 F.3d at 40 (burns caused by negligence of pouring gasoline on fire and not condition of premises). Wakelin could have been responsible for the very same omission elsewhere and still would have been covered by the policy. See Lititz Mut. Ins. Co., supra. By way of example, Wakelin ***233** could have lent the portable generator to a neighbor and failed to instruct him or her on how to properly use it, and had any harm resulted, he would have been covered under his policy for the same alleged tortious conduct that underlies the present case.

In a similar vein, we reject the insurer's argument that the cabin's "inadequate ventilation" was a condition of the premises out of which the accident arose. The generator's

danger and warning labels explicitly warned that using a generator anywhere indoors can be lethal. The labels specified that the generator should only be used outside, and never in any enclosed or even partly enclosed area. Nothing from our review of the record makes this particular cabin any more susceptible to an accident involving carbon monoxide poisoning than any other enclosed area, as no enclosed ****427** area is a safe place to run a generator. This further supports our conclusion that this accident -- however tragic -- could have happened anywhere, and did not arise out of a condition of the uninsured premises.

In reaching this decision, we also conclude that the relevant language of the policy is ambiguous enough to require that it be read against the insurer, particularly since the policy language at issue is an exclusion from coverage. See Boazova, 462 Mass. at 350-351, 968 N.E.2d 385; Zamsky, 732 F.3d at 42-43. In so doing, we acknowledge Massachusetts case law requiring the phrase "arising out of" in insurance policies to "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, 720 N.E.2d 813 (1999). However, we reject the insurer's argument that an expansive reading of "arising out of" also requires an expansive reading of "arising out of a premises." An expansive reading of "arising out of" comes only after establishing that the object in question -- here, a generator -- is a condition of the premises. See, e.g., Theodore, 65 Mass. App. Ct. at 472-473, 841 N.E.2d 281 (applying expansive interpretation of "arising out of" only after establishing tree was condition of property); Zamsky, supra at 43 ("the 'arising out of' language only comes into play if there is some causal link between the covered occurrence and a condition of the premises"). Accepting the insurer's argument to broadly expand what arises out of a premises would defeat our long-standing principle of strictly construing exclusions from coverage against the insurer. See Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc., 480 Mass. 480, 485, 106 N.E.3d 572 (2018).

In sum, we cannot "countenance the insurer's revisionist attempt to make a policy exclusion sweep more broadly than its ***234** language dictates," particularly where the insurer had the ability to include different exclusionary language in its policy and failed to do so.[6] Zamsky, 732 F.3d at 44.

6 For example, the insurer chose to use broader language in a separate exclusion for property damage arising out of "[a]ny act or omission in connection with a premises owned, rented or controlled by an 'insured', other than the 'insured location,' " (emphasis added). This exclusion, which does not apply to the present case, references an act or omission on the premises rather than liability arising from the premises itself. Further, the phrase " '[i]n connection with' is ordinarily held to have even a broader meaning than 'arising out of.' " Metropolitan Prop. & Cas. Ins. Co. v. Fitchburg Mut. Ins. Co., 58 Mass. App. Ct. 818, 821, 793 N.E.2d 1252 (2003). The insurer could have, but did not, use similar language in the exclusion that is the subject of this appeal.

3. Conclusion. The generator that caused the tragic accident in this case when it was improperly used inside the cabin was not a condition of the uninsured premises. The accident therefore did not arise out of the uninsured premises, and the coverage exclusion at issue does not apply. The judgment of the Superior Court is therefore affirmed.

So ordered.

All Citations

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