STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Docket No. Wal-24-236

ALICIA ROWE
Appellant

v.

STATE MUTUAL INSURANCE COMPANY
Appellee

On Appeal from the Maine Superior Court

BRIEF OF APPELLEE

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INTRODUCTION

This matter concerns a reach-and-apply action commenced by Appellant Alicia Rowe ("Rowe") pursuant to 24-A M.R.S.A. §2904 against Appellee State Mutual Insurance Company ("State Mutual"). Rowe's reach-and-apply action was preceded by a personal injury claim by Rowe against State Mutual's insureds, William and Gwen Chase, (the "Chases"). State Mutual issued a homeowners' policy to the Chases covering property located at 157 Troy Road, Burnham, Maine. Rowe sustained personal injury when she fell into a gap between a deck and a mobile home on the Chases' property at a different location – 23 Winnecook Road, Burnham. State Mutual denied that it had a duty to indemnify the Chases for Rowe's injuries due to application of the homeowners' policy exclusion 4. "Insured's" Premises Not An "Insured Location." Very simply, because Rowe was injured from conditions at a location, other than the State Mutual insured location, there is no coverage available.

The Chases entered a stipulated judgment with Rowe in the amount of $500,000, and Rowe sought in her reach-and-apply action recovery of the judgment amount from State Mutual. At the Waldo County Superior Court, State Mutual obtained summary judgment on Rowe's reach-and-apply Complaint. State Mutual seeks affirmation of the Superior Court Order in its favor in this pending appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Background

Appellant Alicia Rowe ("Rowe") commenced a civil action against William and Gwen Chase (the "Chases") for personal injuries sustained on October 30, 2019, at the Chases' property located at 23 Winnecook Road, Burnham, Maine. (Appendix "A." 198, 201 (State Mutual Statement of Material Facts ("SMSMF") at ¶¶ 1, 25).) Rowe alleged that she sustained the injuries while attempting to enter a mobile home located at 23 Winnecook Road. (A. 198 (SMSMF at ¶ 1).) Rowe was at the property on October 30, 2019, in order to see a mobile home the Chases were renting and had advertised for rent on Facebook Marketplace. (A. 198 (SMSMF at ¶ 2).) At the time she arrived, the Chases were showing the mobile home to another prospective tenant. (A. 199 (SMSMF at ¶ 4).) As Rowe went to enter the mobile home she stepped into a gap between the mobile home and the deck. (A. 199 (SMSMF at ¶ 5).) Mr. Chase was in the process of replacing a door to the mobile home and the associated siding, so he had pulled the entry deck and stairs about 12" away from the mobile home leaving the gap. (A. 199 (SMSMF at ¶ 6).) In her fall, Rowe's right foot went down nearly to the ground, her left foot remained on the entry deck, and she was injured. (A. 199 (SMSMF at ¶ 7).)

Appellee State Mutual Insurance Company ("State Mutual") issued a Master Mobilehomeowners policy to the Chases that was in effect at the time of Rowe's injury, policy no. 0667999, with a policy period of 11/30/2018 to 11/30/2019 (the "Policy"). (A. 199 (SMSMF at ¶ 8).) The Policy insured property located at 157 Troy Road, Burnham, Maine, which is where the Chases lived at the time of Rowe's injury, as identified in the Policy Declarations. (A. 199 (SMSMF at ¶ 9), A. 33-83, 37-38.) The Policy did not list as an insured location, premises, address, residence, etc. – 23 Winnecook Road – which is the location where Rowe's injury took place. (A. 199 (SMSMF at ¶ 10), A. 33-83, 37-38.)

The property at 23 Winnecook Road, Burnham, is a 12-13 acre property purchased by the Chases in 1995. (A. 200 (SMSMF at ¶ 11).) Following purchase of the property, the Chases put a mobile home on the parcel. (A. 200 (SMSMF at ¶ 12).) This involved clearing some of the lot, installing a well and septic, running electricity, and placing a mobile home on the lot, as well as a driveway. (A. 200 (SMSMF at ¶ 13).) The mobile home was originally purchased somewhere between 1996-2002 and placed on the lot at 23 Winnecook Road. (A. 200 (SMSMF at ¶ 14).) Thereafter, the property with the mobile home on it, was rented out to various family members, relatives, friends, and the public. (A. 200 (SMSMF at ¶ 15).)

In about 2000 or 2002, the Chases first sold the mobile home to their son and daughter-in-law, Wesley and Kelly Brooks. (A. 200 (SMSMF at ¶ 16).) Wesley and Kelly Brooks then sold the mobile home to the Chases' nephew, Jason Brooks. (A. 200 (SMSMF at ¶ 17).) After a period of time, Jason Brooks sold the mobile home back to the Chases and they rented the mobile home until it was sold to Justin Drake, a nephew of Ms. Chase. (A. 200 (SMSMF at ¶ 18).) Justin Drake owned the mobile home for about 5-6 years until he gave it to Hillary Drake, Justin's sister. (A. 200 (SMSMF at ¶ 19).) Hillary lived at the mobile home for about 2-3 years up to September 1, 2019, when she sold it back to the Chases. (A. 200 (SMSMF at ¶ 20).)

Except for Wesley and Kelly Brooks, the other individuals who owned the mobile home – Jason Brooks, Justin Drake, and Hillary Drake – paid rent for the lot upon which the mobile home sat. (A. 201 (SMSMF at ¶ 21).) Despite the mobile home sitting at 23 Winnecook Road, Burnham, changing ownership over the years, the parcel of land never changed ownership and the Chases owned the land continuously since 1995. (A. 201 (SMSMF at ¶ 22).) The mobile home did not move at all from when it was originally placed on the property shortly after 1995 – it was only that ownership of the mobile home changed. (A. 201 (SMSMF at ¶ 23).) The Chases never resided at 23 Winnecook Road and they did not intend

to live there in October of 2019 when they were seeking tenants to rent the property. (A. 201 (SMSMF at ¶ 24).)

Rowe's civil action in the Waldo County Superior Court against the Chases included a count for negligence (the "underlying Complaint"), Docket No. CV-20-20. (A. 201 (SMSMF at ¶ 25).) Rowe's underlying Complaint included among other allegations: "On the said property there were serious defects causing unsafe conditions. There was a foot-wide gap between the porch and the mobile home. Also, between the porch and mobile home, there was a hole approximately 3 feet deep. Furthermore, there were no outside lights and anyone stepping from the porch to the mobile home would not be able to view the gap at night." (A. 29, 201 (SMSMF at ¶ 26).) Rowe's underlying Complaint included among other allegations: "Plaintiff climbed up the 4 steps to the small porch, walked across the porch, and as she began to open the sliding door to the mobile home, she fell into the gap between the porch and the mobile home." (A. 29, 202 (SMSMF at ¶ 27).) Rowe's underlying Complaint included, among other allegations: "The Defendants caused bodily injury to Plaintiff by failing to warn and instruct her of the dangerous condition of the property, including, without limitation, that there was a gap between the porch and that the mobile home had no lights so that the defect would be visible at night." (A. 30, 202 (SMSMF at ¶ 28).)

State Mutual defended the Chases against Rowe's underlying Complaint, under a reservation of rights. (A. 202 (SMSMF at ¶ 29).) The principal basis of the dispute of coverage in this matter was, and continues to be, that the exclusion for 4. "Insured's" Premises Not An "Insured Location" applied because 23 Winnecook Road, Burnham was not an "insured location" as defined under the Policy. (A. 202 (SMSMF at ¶ 30).) The property where Rowe sustained her injury was not an "insured location" because it was not shown on the Policy Declarations, it was not used by the Chases as a residence, and it was not acquired by the Chases during the Policy period for their use as a residence. (A. 202-203 (SMSMF at ¶ 31).)

The State Mutual Insurance Policy

The State Mutual Policy issued to the Chases provides, in pertinent part,

> **SECTION II – LIABILITY COVERAGES**
>
> A. Coverage E – Personal Liability
>
> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable; and[1]
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or

[1] Amended by Special Provisions – Maine endorsement, form HO 01 18 08 17. (A. 62-65, 63.)

fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.

SECTION II – EXCLUSIONS

E. Coverage E – Personal Liability And Coverage F – Medical Payments To Others

Coverages E and F do not apply to the following:

4. "Insured's" Premises Not An "Insured Location"

"Bodily injury" or "property damage" arising out of a premises:
a. Owned by an "insured";
b. Rented to an "insured"; or
c. Rented to others by an "insured";
that is not an "insured location";

DEFINITIONS

A. In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a residence of the same household. "We", "us" and "our" refer to the Company providing this insurance.

B. In addition, certain words and phrases are defined as follows:

2. "Bodily injury" means bodily harm, sickness or disease, including required care, loss of services and death that results.

5. "Insured" means:
a. You and residents of your household who are:

(1) Your relatives; or
(2) Other persons under the age of 21 and in the care of any person named above;

b. A student enrolled in school full time, as defined by the school, who was a resident of your household before moving out to attend school, provided the student is under the age of:
(1) 24 and your relative; or
(2) 21 and in your care or the care of a person described in a.(1) above; or

c. Under Section II:
(1) With respect to animals or watercraft to which this policy applies, any person or organization legally responsible for these animals or watercraft which are owned by you or any person included in a. or b. above. "Insured" does not mean a person or organization using or having custody or these animals or watercraft in the course of any "business" or without consent of the owner; or
(2) With respect to a "motor vehicle" to which this policy applies:
(a) Persons while engaged in your employ or that of any person included in a. or b. above; or
(b) Other persons using the vehicle on an "insured location" with your consent.

Under both Sections I and II, when the word an immediately precedes the word "insured", the words an "insured" together mean one or more "insureds".

6. "Insured location" means:
a. The "residence premises";
b. The part of other premises, other structures and grounds used by you as a residence; and
(1) Which is shown in the Declarations; or

(2) Which is acquired by you during the policy period for your use as a residence;

c. Any premises used by you in connection with a premises described in a. and b. above;

d. Any part of a premises;
   (1) Not owned by an "insured"; and
   (2) Where an "insured" is temporarily residing;

e. Vacant land, other than farm land, owned by or rented to an "insured";

f. Land owned by or rented to an "insured" on which a one, two, three or four family dwelling is being built as a residence for an "insured";

g. Individual or family cemetery plots or burial vaults of an "insured"; or

h. Any part of a premises occasionally rented to an "insured" for other than "business" use.

8. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
   a. "Bodily injury"; or
   b. "Property damage".

9. "Property damage" means physical injury to, destruction of, or loss of use of tangible property.

11. "Residence premises" means the mobilehome and other structures located on land:[2]

    a. Owned or leased by you where you reside; and
    b. Which is shown as the "Residence premises" in the Declarations.

(A. 203-206 (SMSMF at ¶ 32), A. 33-83, 40-41, 55, 57.)

[2] Amended by the Mobilehome endorsement, form MH 04 01 10 00. (A. 80.)

Procedural History

Rowe and State Mutual were unable to resolve the claims against the Chases, so Rowe and the Chases entered a settlement agreement and a stipulated judgment with respect to Rowe's underlying Complaint in the amount of $500,000, with a covenant not to execute against the Chases' personal assets. (A. 206 (SMSMF at ¶ 33).) As part of the stipulated judgment the Chases paid $50,000 of their own money to Rowe. *Id.*

Rowe subsequently initiated the present reach-and-apply action against State Mutual to recover the amount of the stipulated judgment from State Mutual under the Policy issued to the Chases ("reach-and-apply Complaint"). (A. 206 (SMSMF at ¶ 34).) Rowe contends in her reach-and-apply Complaint that the State Mutual Policy affords coverage to the Chases for the stipulated judgment and that the Policy's exclusion 4. "Insured's" Premises Not An "Insured Location" is inapplicable. (A. 26, 113.) Rowe's reach-and-apply Complaint includes, among other allegations, "On October 30, 2019, the mobile home contained serious defects that rendered the mobile home unsafe, including a foot wide gap between the front porch and the mobile home itself"; "Plaintiff Alicia Rowe was seriously injured when she fell through the gap between the front porch and the mobile home"; and "Alicia Rowe was injured because of the unsafe conditions in the mobile home." (A. 24, 207 (SMSMF at ¶ 36).) Rowe admitted at her deposition

that the gap between the front porch and the mobile home caused her injuries. (A. 206 (SMSMF at ¶ 37).)

State Mutual and Rowe filed competing motions for summary judgment on May 10, 2023. (A. 3.) In an Order dated May 6, 2024, and entered on the Docket on May 8, 2024, the Waldo County Superior Court, Justice Murray, granted summary judgment in favor of State Mutual. (A. 4, 7-22.) The Superior Court concluded that the definition of "insured location" was not ambiguous, that 23 Winnecook Road was not an "insured location," and that exclusion 4. "Insured's" Premises Not An "Insured Location" was applicable to Rowe's claims against the Chases. (A. 7-22.) Therefore, coverage was excluded under the State Mutual Policy. *Id.* Rowe's Notice of Appeal was docketed on May 21, 2024. (A. 5.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court correctly held that where Rowe's injuries took place was not a premises that meets the definition of an "insured location" under the Policy?

2. Whether the Superior Court correctly held that Rowe's bodily injury arose out of a premises that was not an "insured location"?

SUMMARY OF ARGUMENT

Where Rowe fell was not an "insured location" under the State Mutual Policy. For purposes of the pending matter, in order for a property to qualify as an "insured location" it needed to be used by the named insureds, the Chases, as a residence, and either shown on the Policy Declarations or have been acquired by the Chases during the policy period for the Chases use as a residence. The property where Rowe fell does not meet this definition because it did not appear on the Policy Declarations, it was a rental property that the Chases were seeking a tenant for at the time of Rowe's fall, the Chases had never lived at the property, the Chases did not intend to live at the property, and they had owned the real estate upon which the mobile home sat since 1995. Because the property does not meet the unambiguous definition of "insured location," the Policy exclusion 4. "Insured's" Premises Not An "Insured Location" is applicable where Rowe's injuries arose out of a premises owned by the Chases and/or rented to others by the Chases. The Superior Court's entry of summary judgment in favor of State Mutual should be affirmed.

ARGUMENT

I. Standard of Review

This Court conducts a de novo review of both a Superior Court's grant of summary judgment and its interpretation of an insurance policy. *Kelley v. N. E. Ins. Co.*, 2017 ME 166, ¶ 4, 168 A.3d 779. When the material facts are not in dispute, the Court limits its review to "whether the prevailing party [is] entitled to judgment as a matter of law." *Id.* (citing *Langevin v. Allstate Ins. Co.*, 2013 ME 55, ¶ 7, 66 A.3d 585; M.R. Civ. P. 56). Unambiguous policy language is interpreted consistent with its plain meaning. *Kelley*, 2017 ME 166, ¶ 5, 168 A.3d 779.

It is established Maine law that the judgment creditor in a reach and apply action, pursuant to 24-A M.R.S.A. §2904, has the burden to establish that the recovered damages fall within the scope of the insurance contract. *Jacobi v. MMG Ins. Co.*, 2011 ME 56, ¶ 14, 17 A.3d 1229, 1233 (judgment creditor had to demonstrate that the damages awarded by the court for intentional infliction of emotional distress or for negligent infliction of emotional distress were covered by the Policy, despite the intentional act and sexual molestation exclusions); and *Langevin v. Allstate Ins. Co.*, 2013 ME 55, 66 A.3d 585 (party seeking to recover against a liability insurer pursuant to the reach-and-apply statute after obtaining a money judgment against the insured has the burden to demonstrate that his awarded damages fall within the scope of the insurance contract.)

II. The Superior Court correctly held that where Rowe's injuries took place was not a premises that meets the definition of an "insured location" under the Policy.

A. The Policy language is unambiguous and is subject to only one reasonable interpretation.

The Policy language at issue in this matter is unambiguous. In order for there to be coverage under the Policy, it is necessary that the location of where Rowe's accident took place meets the definition of an "insured location" under the State Mutual Policy. It is well established that even though an insurance policy may be complex, that does not automatically render it ambiguous. Although a policy may contain many words, paragraphs, or provisions that a first-time reader does not understand, that is not a ground to remove those provisions from the policy. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 19 (Me. 1990). The entire policy is evaluated as a whole to determine whether it is ambiguous. *Found. for Blood Research v. St. Paul Marine & Fire Ins. Co.*, 1999 ME 87, ¶ 11, 730 A.2d 175. The Court reads the policy's language "from the perspective of an average person untrained in either the law or the insurance field in light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured." *Haskell v. State Farm Fire & Cas. Co.*, 2020 ME 88, ¶ 15, 236 A.3d 458 (quoting *Kelley*, 2017 ME 166, ¶ 5, 168 A.3d 779).

Despite reading the policy from the insured's perspective, "[m]ere hope of coverage by the insured, or inability of the insured to understand the policy, does

not render the contract ambiguous." *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 614 (Me. 1996). Complexity should not be mistaken for ambiguity. *See id*. It is the Court's role to ascertain the meaning of the policy "*actually made*," not to create a new policy by "enlarging or diminishing its terms." *Philadelphia Indem. Ins. Co. v. Farrington*, 2012 ME 23, ¶ 7, 37 A.3d 305 (quoting *Apgar v. Commercial Union Ins. Co.*, 683 A.2d 497, 500 (Me. 1996)).

Other jurisdictions construing exclusion 4. "Insured's" Premises Not An "Insured Location" and the definition "insured location" have concluded that the provisions are unambiguous. *See Marshall v. Tower Ins. Co. of New York*, 44 A.D.3d 1014, 845 N.Y.S.2d 90 (2007) (property insurance policy that insured the "residence premises" and defined that term as a family dwelling, other structures or that part of any other building "where you reside" unambiguously did not cover premises at which insured did not reside); *Pike v. Am. States Preferred Ins. Co.*, 55 P.3d 212, 216 (Colo. App. 2002) (concluding that go-cart accident taking place off insured location was excluded from coverage and rejecting argument that coverage provisions were ambiguous); *Dawson v. Dawson*, 841 P.2d 749, 751 (Utah Ct. App. 1992) ("We find that the term 'vacant land,' viewed in light of the purpose of the policy and in accordance with its 'usual and natural' meaning, would be plain to a person of 'ordinary intelligence.' The term is unambiguous and should be given its plain and ordinary meaning.)

The language at issue in the subject policy is unambiguous. Interpreting the language as argued by Rowe in the pending appeal is not a reasonable interpretation of the Policy language. The Court in the present matter should conclude that the policy language is unambiguous and subject only to the interpretations advanced by State Mutual.

B. The Chases' property at 23 Winnecook Road, Burnham was not an "insured location" and Rowe's claims are excluded from coverage.

The portion of the definition of "insured location" at issue in the pending matter includes,

> 6. "Insured location" means:
>
> b. The part of other premises, other structures and grounds used by you as a residence; and
> (1) Which is shown in the Declarations; or
> (2) Which is acquired by you during the policy period for your use as a residence;

(A. 41, 205 (SMSMF at ¶32).)[3] Rowe contends that the reason the State Mutual Policy affords coverage to the Chases for the stipulated judgment entered by her

[3] Rowe has not argued at any point in this matter, nor in her appeal brief, that any of the other subsections are applicable and the Superior Court agreed that none of the other subsections are applicable. (A. 17.) The 23 Winnecook Road premises does not meet the definition of "residence premises" required by subsection a.; there was never any claim by the Chases or Rowe or evidence that 23 Winnecook Road was used in connection with the property listed on the Policy at 157 Troy Road as required by subsection c.; the Chases owned the property at 23 Winnecook Road and never temporarily resided there, so subsection d. is inapplicable; the premises was not vacant land due to it being developed and having a mobile home on it, so subsection e. is inapplicable; there was no construction of a dwelling for the Chases at the premises, so subsection f. is inapplicable; there were no cemetery plots or burial vaults of the Chases at

and the Chases is that the State Mutual Policy "provides coverage for bodily injury arising out of property acquired by the named insureds during the policy period for use as a residence." (A. 206 (SMSMF at ¶35).) Rowe's argument is a mischaracterization of the Policy language and should be disregarded.

1. *Subsection b.1. of the definition of "insured location" is inapplicable because 23 Winnecook Road was not used by the Chases as a residence and it was not shown in the Declarations pages of the Policy.*

The Policy's definition of "insured location" requires that other premises, structures, and grounds be used by you – the Chases – as a residence and be shown in the Declarations, for it to meet subsection b.1 of the definition of "insured location." "You" is defined to refer to the named insureds shown in the Declarations. (A. 40, 204 (SMSMF at ¶ 32).) The Declarations identifies the Chases as the named insureds. (A. 37, 199 (SMSMF at ¶ 8).) The Chases had not previously resided at 23 Winnecook Road and they had no intent of residing at the location, as they were actively seeking to rent the property. (A. 201 (SMSMF at ¶ 24.) This portion of the Policy definition requires that the use of 23 Winnecook Road be by the Chases for their use as a residence. The fact that the Chases had previously rented to others or were actively seeking to rent to individuals, such as Rowe, for use as a residence, does not meet the definition's standard. If this were

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the premises, so subsection g. is inapplicable; and no part of the premises was occasionally rented to the Chases, due to it being owned by them, so subsection h. is inapplicable.

the standard, the language of the definition could be "[t]he part of other premises, other structures and grounds used as a residence." Instead, the definition requires "[t]he part of other premises, other structures and grounds used **by you** as a residence." Clearly, the Policy has a requirement that 23 Winnecook Road be used by the Chases as their residence, which they did not do.

Subsection b.1. also requires that the part of other premises, other structures and grounds be shown in the Declarations. The property at 23 Winnecook Road was not listed in the Policy or its Declarations as an insured location, premises, address, residence, etc. (A. 33-83, 37, 199 (SMSMF at ¶ 10).) As a result, 23 Winnecook Road does not satisfy the requirements in subsection b.1. of the "insured location" definition.

2. Subsection b.2. of the definition of "insured location" is inapplicable because 23 Winnecook Road was not acquired by the Chases during the policy period for the Chases' use as a residence.

The Policy's definition of "insured location" in subsection b.2. requires (1) that the premises be used by the Chases as a residence; and (2) that the residence, other premises, structures, and grounds be acquired by the Chases during the policy period for the Chases' use as a residence, in order for the property to be an "insured location." (A. 41, 205 (SMSMF at ¶32).) Once again, the Chases' property at 23 Winnecook Road does not qualify.

The Chases did not acquire 23 Winnecook Road during the policy period. They owned 23 Winnecook Road since 1995 when the property was purchased by them. (A. 200 (SMSMF at ¶ 11).) Although the mobile home on the property was sold to various family members over the years and reacquired from Hillary Drake on September 1, 2019, (A. 200 (SMSMF at ¶¶ 14-20)), the Chases never sold the real property after their acquisition in 1995. Therefore, the premises were not acquired by the Chases during the policy period.

However, even if it is determined that the Chases' reacquisition of the mobile home from Hillary Drake on September 1, 2019, is sufficient to meet the first prong of subsection b.2. it is still necessary that the mobile home was acquired by the Chases for "[the Chases'] use as a residence" in order to be an "insured location." As stated previously, the Chases did not ever use 23 Winnecook Road or the mobile home situated at 23 Winnecook Road as their residence. The Chases never resided at 23 Winnecook Road and they did not intend to live there in October of 2019 when they were seeking tenants to rent the property. (A. 201 (SMSMF at ¶ 24).)

Jurisdictions looking at the "insured location" definition and requirements similar to "your use as a residence" require the named insured to actually use the premises or structure as the named insured's residence. *See Harrington v. Citizens Property Ins. Corp.*, 54 So.3d 999, 1003 (Fla.App. 4 Dist. 2010) (interpreting the

exact same language of subsection b. of definition of "insured location", the court stated that "the other premises must be used by the insureds as their 'residence'" (emphasis added)); *Gardner v. State Farm Fire and Cas. Co.*, 544 F.3d 553, 560 (3d Cir. 2008) (where named insured moved out of insured premises and in with his girlfriend who lived around the corner, leasing the property for 6 months pursuant to a written lease agreement, then for several more months until he evicted tenant for nonpayment of rent, policy did not cover insured's liability for injuries sustained by tenant's mother in a fall on insured premises; insured location exclusion precluded coverage where insured simply was not residing at the insured premises when tenant's mother was injured, policy language provided, "any part of any other premises ... used by you as a residence"); and *Centre Ins. Co. v. Blake*, 370 F. Supp. 2d 951, 955, 958 (D.N.D. 2005) (where insured purchased policy to cover duplex where he lived in one unit and rented the other, but moved out 16 months later, renting both units, policy did not cover liability incurred by minor injured on back porch railing; terms reside and resident were not ambiguous; insured no longer resided at the insured location; "To require the insurance company to provide coverage for property not used as the insured's residence

premises would constitute an extension of liability where none previously existed").[4]

Rowe's interpretation of the Policy language reads out of the Policy the word "you" and "your." The pertinent language provides,

> 6. "Insured location" means:
>
> b. The part of other premises, other structures and grounds used by you as a residence; and
> (1) Which is shown in the Declarations; or
> (2) Which is acquired by you during the policy period for your use as a residence;

If the Court were to interpret the definition of "insured location" in the manner argued for by Rowe it would eliminate pertinent language of the definition that requires the use as a residence to be by the Chases themselves. If it was sufficient that the tenants were using the mobile home the Chases were leasing as the tenants' residence, then the Policy would simply state "b. The part of other premises, other structures and grounds used as a residence; and (2) Which is

[4] *Cf. Gammon v. Auto-Owners Ins. Co.*, 454 N.W.2d 434, 436 (Minn.App. 1990) (policy's definition of insured premises was unambiguous and did not include the property insured rented out for an estate as its personal representative where tenants were burned in a fire; policy language at issue was "d. Any part of a premises not owned by an insured person but where the insured person may be temporarily residing or which an insured person may occasionally rent for non-business purposes"; claimants argued "that the term 'rent' in subsection 'd' is ambiguous as reasonably subject to more than one interpretation and thus could mean rented by [the insured] to someone else"; this argument was rejected, "There is no ambiguity to the term 'rent' unless it is taken entirely out of context. **Read in the context of the entire section defining 'insured premises,' all of the subsections contemplate personal use by the insured**.")

acquired by you during the policy period for use as a residence." This is not how the Policy language was drafted.

The only reasonable interpretation of the "insured location" definition is that the Chases had to use the mobile home at 23 Winnecook Road themselves as a residence. The undisputed facts are that the Chases never lived at 23 Winnecook Road during the almost twenty-five years they owned it and did not intend on residing there. Whether they acquired the mobile home during the policy period or not makes no difference because the Chases did not use it as their residence. As a result, 23 Winnecook Road does not satisfy the requirements in subsection b.2. of the "insured location" definition, and therefore, 23 Winnecook Road is not an "insured location".

III. The Superior Court correctly held that Rowe's bodily injury arose out of a premises that was not an "insured location".

A. The case law referenced by Rowe in support of her argument that exclusion 4 is inapplicable in this matter actually supports the positions advocated for by State Mutual that exclusion 4 does apply.

Rowe has argued that her claims against the Chases arose out of an alleged failure of the Chases to warn her about the gap between the front porch and the mobile home, such that exclusion 4. does not apply. Rowe's argument in the context of the exclusion at issue, although creative, is an inaccurate reading and interpretation of the Policy. Rowe's argument also ignores the rationale behind the very decisions she relies upon in advancing her arguments. One of those decisions

is *Green Mountain Ins. Co. v. Wakelin*, 484 Mass. 222, 140 N.E. 3d 418 (2020). A review of that decision makes it abundantly clear that the *Wakelin* decision does not stand for the proposition advocated for by Rowe. The Superior Court agreed and found that the rationale and holding of *Wakelin* and those preceding decisions referenced therein actually support the positions advocated for by State Mutual. Rowe's arguments about failure to warn are undercut by the undisputed facts in this matter, her own allegations in her Complaint, and her deposition testimony that her injury was caused by a condition at 23 Winnecook Road.

Rowe seems to not appreciate that there never would have been a failure to warn by the Chases if there had not been a defect or dangerous condition at 23 Winnecook Road. It is the defect or dangerous condition that gave rise to any duty to warn. The very type of defect in existence at the Chases' home is of the type that multiple jurisdictions have held trigger the application of exclusion 4.

In *Wakelin*, the issue was whether coverage existed under a homeowners policy for deaths from carbon monoxide poisoning caused by use of a portable gasoline generator at a cabin. The policy insured a property owned by the insured in Braintree, MA. The policy included the same exclusion 4. "Insured's" Premises Not An "Insured Location" at issue in the present matter. The cabin was uninsured and located in Maine. Two of the insured's children and two of their friends died when they used a portable generator inside the cabin. At issue was whether the

deaths caused by the improper use of the generator arose out of the cabin. *Id.* at 222-23.

The *Wakelin* court concluded,

> 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, [v. Quincy Mut. Fire Ins. Co., 50 Mass. App. Ct. 260, 263, 736 N.E.2d 857 (2000)]. 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.

Wakelin, 484 Mass. at 232. (Emphasis added.) The court in *Wakelin* concluded that the deaths did not arise out of a property condition at the uninsured location, and therefore, exclusion 4. "Insured's" premises not an "Insured Location" did not apply.[5] This is in contrast to the pending matter where Rowe's injury did in fact arise out of a property condition at 23 Winnecook Road.

The *Wakelin* decision supports application of exclusion 4. "Insured's" Premises Not An "Insured Location" in the pending matter as do the other cases referenced in Rowe's brief. In *Callahan v. Quincy Mut. Fire Ins. Co.*, 50 Mass.

[5] *See also Norfolk & Dedham Mut. Fire Ins. Co. v. Norton*, 100 Mass. App. Ct. 476, 177 N.E.3d 1251 (2021) (An injury arises out of a premises, for purposes of whether an uninsured premises exclusion in a homeowner's insurance policy applies, if it has a causal connection to a condition of the premises, as opposed to an injury that could have happened anywhere; uninsured premises exclusion applied to bar coverage for insureds who were sued for intentional and negligent misrepresentation and breach of contract alleging that insured made false statements that induced third party to purchase the property; the alleged property damage arose out of the uninsured premises.)

App. Ct. 260, 736 N.E.2d 857 (2000), the court held that the "insured location" exclusion did not apply to a dog bite that occurred on off-policy premises. In reaching this holding, the court framed the questions as, "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.* at 261, 736 N.E.2d at 858. The court continued,

> The point is, Harley [the dog] was not a condition of the Marshfield premises, as a protective electric fence would be. Harley's bite was no more connected to the Marshfield real estate than had Callahan 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's liability stems from his harboring a vicious animal—i.e., personal tortious conduct—not any condition of the Marshfield premises.

Id. at 263, 736 N.E.2d at 859. In the pending matter, the gap between the front entry porch and the mobile home where Rowe fell, sustaining her injury, and the insufficient lighting were conditions of the premises at 23 Winnecook Road.

In *Vermont Mut. Ins. Co. v. Zamsky*, 732 F.3d 37 (1st Cir. 2013), the court held that the subject exclusion did not apply to an injury occurring when a portable fire pit located at an uninsured premises was ignited with gasoline. The court explained that the exclusion was limited to accidents occurring because of a

condition of the off-policy premises, and the fire pit and gasoline were not a "condition" on the off-policy premises.

> [T]his 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*, 736 N.E.2d at 859. Unlike the tree in [*Commerce Insurance Co. v. Theodore*, 65 Mass.App.Ct. 471, 841 N.E.2d 281, 285 (2006)], 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, 736 N.E.2d at 859, 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*, 841 N.E.2d at 284 (quoting *Callahan*, 736 N.E.2d at 860). Rather, the fire pit was a portable item of personal property that happened to be stored in a building on the Falmouth premises.

Zamsky, 732 F.3d at 44–45.

In *Kitchens v. Brown*, 545 So. 2d 1310 (La. Ct. App. 1989), the court construed policy language that provided,

> PERSONAL LIABILITY COVERAGE AND ["MEDICAL PAYMENTS TO OTHERS"] COVERAGE DOESN'T PAY FOR BODILY INJURY OR PROPERTY DAMAGE ... Arising out of any premises owned or rented to YOU unless it is shown on Page One or a premium charge has been made.

Id. at 1311. "Kitchens was an employee of defendant's printing company but was working at defendant's personal residence clearing brush when the incident occurred." *Id.* "Plaintiffs allege that it was defendant's negligence in instructing Kitchens to use gasoline to ignite a pile of brush that caused the burns he sustained when the gasoline exploded." *Id.* The court identified that there was "no assertion that the pile of brush was defective, or that the can of gasoline Kitchens used to ignite the pile of brush was defective." *Id.* at 1312. The allegation was that the property owner/insured was negligent in instructing Kitchens to use the gasoline to ignite the pile of brush.

In *Westfield Ins. Co. v. Hunter*, 128 Ohio St. 3d 540, 948 N.E.2d 931 (2011), a minor grandson brought a negligence action against his grandparents to recover for bodily injuries he sustained in an accident on a farm owned by grandparents when he was run over by the driver of an all-terrain vehicle. The farm property was not listed as an insured location on the Westfield policy. It was unclear from the Complaint allegations what the grandson's theory of negligence against his grandparents was based upon. Therefore, the court remanded the matter to the trial court to "determine whether the [the minor grandson's] theory of liability is that the [the grandparents] breached a personal duty that the [the grandparents] assumed for the care and control of [the ATV riders, including the minor grandson], in which case the exclusion would not apply, or whether the [the minor

grandson's] claims are based only on the fact that the [grandparents] owned the property where the injuries occurred, in which case the exclusion does apply." *Id.* at 546, 948 N.E.2d at 937–38. The reason for the need of further fact finding was due to the court's determination on the proper interpretation of the subject exclusion.

> We therefore hold that an exclusion in a homeowner's insurance policy for claims "arising out of " premises owned by the insured other than the insured location excludes coverage for premises-based liability claims, such as those that arise from the quality or condition of the premises. Moreover, although the exclusion does not bar coverage of claims that arise from the insured's alleged negligence if that negligence is unrelated to the quality or condition of the premises, it does exclude coverage for claims based upon the insured's ownership of the property upon which the injury occurred.

Id. at 545, 948 N.E.2d at 937.

In *Lititz Mut. Ins. Co. v. Branch*, 561 S.W.2d 371 (Mo. App. 1977), the court determined that a dog bite occurring on a premises that was not an insured location was not excluded from coverage.

> It is apparent that "premises" in common parlance and in the policy itself contemplates the land and more or less permanently affixed structures contained thereon. "It does not contemplate easily movable property which may be located on the property at a given time or even on a regular or permanent basis. A dog, whether permanently kenneled or tethered on the property, is not a part of the premises.

Id. at 373. In reaching its holding, the *Lititz Mut. Ins. Co.* court discussed the purpose behind liability insurance.

> The personal liability insured against 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. <u>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</u>. (Emphasis added.)

Id. at 374.

Notably absent from the cases referenced by Rowe is the decision of *Commerce Insurance Co. v. Theodore,* 65 Mass.App.Ct. 471, 841 N.E.2d 281 (2006), which was mentioned in at least two of the cases she argues supports her position. In *Theodore*, a third party entered premises owned by the insured but not covered by Commerce in order to address a dying tree. *See id.* at 282. Due to the insured's alleged negligence in holding the ladder the third party was on while

attempting to cut the tree, the third party fell from the ladder and sustained injuries. He subsequently brought suit against the insured. In the ensuing coverage dispute, the court held that the subject exclusion in Commerce's policy applied. It reasoned 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" such that the injury should be understood to have arisen out of the premises. *Id.* at 285. Applying the rationale of *Theodore* to the present matter, the fact that Rowe was at 23 Winnecook Road in response to the Chases' advertisement of the rental of the property and in order to view the property to see if she wanted to rent it from the Chases places a sufficiently close relationship between her injury and the premises, such that her injury should be understood to have arisen out of 23 Winnecook Road.

In the present matter, Rowe injured herself when she stepped into a gap between the front porch and the mobile home as she was attempting to enter the mobile home. In her Complaint against the Chases she alleged, among other things, "On the said property there were serious defects causing unsafe conditions. There was a foot-wide gap between the porch and the mobile home. Also, between the porch and mobile home, there was a hole approximately 3 feet deep. Furthermore, there were no outside lights and anyone stepping from the porch to the mobile home would not be able to view the gap at night." (A. 201 (SMSMF at

¶26).) This is the very type of defect at a premises that the above case law identifies as triggering application of the exclusion. Minus the gap between the deck and the mobile home and/or the deficient exterior lighting, Rowe would not have sustained her injury in the present matter. The causal connection necessary for application of the exclusion is present.

B. Despite the labeling applied by Rowe, the fact remains that her damages arose out of the defective condition at the Chases' property as those terms are used in the State Mutual Policy.

Looking at Rowe's underlying Complaint and her reach-and-apply Complaint, it is clear that her injury arose out of the existence of the defective condition at 23 Winnecook Road. *See Langevin v. Allstate Ins. Co.*, 2013 ME 55, ¶ 8, 66 A.3d 585, 590 ("To resolve a reach and apply action, we first identify the basis of liability and damages from the underlying complaint and judgment.") Rowe is unable to separate her claim for a failure to warn of the defective deck condition and inadequate lighting in the pending matter from the claim for the existence of a defective deck condition and inadequate lighting because they are one in the same and both a claim for premises liability.

"A landowner owes a duty of reasonable care to provide safe premises to all persons lawfully on the land, and a duty to use ordinary care to ensure the premises are safe and to guard against all reasonably foreseeable dangers, in light of the totality of the circumstances." *Coffin v. Lariat Assocs.*, 2001 ME 33, ¶ 8, 766 A.2d

1018, 1020. "The duty also includes the exercise of reasonable care to prevent harm caused by third persons." *Id.* The Law Court has adopted Restatement (Second) of Torts § 343A(1) Known or Obvious Dangers (1965), which addresses the circumstances in which there is a duty to warn. "[A] duty to warn or take other action will arise if the landowner should anticipate that harm would befall an invitee despite the invitee's knowledge of the dangerous condition or despite the obviousness of the condition." *Williams v. Boise Cascade Corp.*, 507 A.2d 576, 577 (Me. 1986). Restatement (Second) of Torts § 343A(1) (1965) appears in Chapter 13. Liability for Condition and Use of Land, Topic 1. Liability of Possessors of Land to Persons on the Land. The cause of action for premises liability due to a defective condition includes, depending on the circumstances, whether there was a failure to warn. There is no separate cause of action for failure to warn of defective condition on premises – it is one in the same with the claim for the existence of the defective condition causing injury.

Moreover, Maine courts construing the language "arising out of" have given it a broad interpretation and expansive reading.

> [W]e have given the term "arising out of" a broad interpretation, stating "[a]n injury arises out of employment when, in some proximate way, it has its origin, its source, or its cause in the employment." *Hawkes v. Commercial Union Ins. Co.*, 2001 ME 8, ¶ 12, 764 A.2d 258, 264 (quotation marks omitted). The First Circuit has given the phrase a similarly expansive reading when it appeared in an insurance contract,

> defining "arising out of" to mean "originating from, growing out of, flowing from, incident to or having connection with." *Murdock v. Dinsmoor,* 892 F.2d 7, 8 (1st Cir.1989) (quotation marks omitted).

Acadia Ins. Co. v. Vermont Mut. Ins. Co., 2004 ME 121, ¶ 8, 860 A.2d 390, 393. Rowe's injuries originated from, grew out of, flowed from, were incident to, or had connection with the alleged defects at 23 Winnecook Road.

In 2021, the Maine Superior Court, Justice O'Neil, rejected a similar argument by claimants who were attempting to circumvent the motor vehicle exclusion to a homeowner's insurance policy in *Merrimack Mut. Fire Ins. Co. v. Capolupo*, No. CV-2021-148, 2021 WL 6776870 (Me.Super. Sep. 14, 2021). The facts giving rise to *Capolupo* centered on the death of a seventeen-year-old boy who died while driving a snowmobile across a frozen lake in Maine with his friends. A claim asserted against the homeowner/insureds was negligent supervision. The insureds argued, and the Court rejected, that the negligent supervision was "non-auto related conduct" making it "fall outside the bounds of the motor vehicle exclusion." *Id.* at *4. In reaching its holding the Court stated as follows,

> In *American Universal Ins. Co. v. Cummings*, the Law Court spoke directly on whether the pleading of a specific liability theory operates as an evasion of a motor vehicle exclusion to liability coverage within an insurance policy. 475 A.2d 1136 (Me. 1983). In this case, the lower court, based on an exception identical to the one at bar, had imposed a duty to defend on the

> insurer based on the plaintiff's pleading of "failure of supervision" and "negligent entrustment" *Id.* In vacating that decision, the Law Court saw no reason to conduct "any detailed analysis of the problem" as "theories of liability" are "inherent in a claim" and what was specifically excluded by the policy was *all claims. Id.*
>
> Here, the Policy specifically provides that Liability coverage does not apply to "a *claim* … brought against any insured for damages because of bodily injury arising out of the … use … of any motor vehicle… " (emphasis added). Inherent in the phrase "a claim" is the theory of liability which advances the merits of such a claim—including a theory of negligent supervision. As such, regardless of the theory of liability, the record supports application of the exclusion here.

Capolupo, at *4.

The *Capolupo* Court continued to discuss the "arising out of" language utilized in the motor vehicle exclusion at issue.

> Moreover, the fact that the Mardens' claims *arise out of* the use of a motor vehicle—as defined by the Policy—also prevents the evasion of the liability exclusion at issue. When the claim at bar "arose out of" the subject matter of the exclusion, Maine courts have held the specific theory of liability advanced to be irrelevant.

Id. at *4 (*citing Acadia Ins. Co. v. Vt. Mut. Ins. Co.*, 2004 ME 121, ¶8, 860 A.2d 390 ("an injury *arises out of* employment when, in some proximate way, it has its origin, its source or its cause in the employment.") The Court ultimately concluded that,

> The Policy here unambiguously provides that liability coverage is not available to the insured for bodily injury that "*aris[es] out of* the ownership, maintenance, use, loading or unloading of any motor vehicle owned or operated by or rented, or loaned to any insured." Regardless of the theory of liability that the Mardens' advance, their claims here still arose out of an accident involving a motor vehicle. Thus, the claims fit within the policy's motor vehicle exception.

Id. at *5.

The result in the present matter should be no different and exclusion 4 should apply to Rowe's claims against State Mutual regardless of the label Rowe gives to her claims. Rowe's claims for "bodily injury" occurred at 23 Winnecook Road, her claims arose out of defective conditions at 23 Winnecook Road, and 23 Winnecook Road does not meet the definition of "insured location" under the Policy. Therefore, exclusion 4. "Insured's" Premises Not An "Insured Location" is applicable and excludes coverage for Rowe's stipulated judgment with the Chases.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellee State Mutual Insurance Company respectfully requests that this Court affirm the Superior Court's decision granting summary judgment to State Mutual. Exclusion 4. "Insured's" Premises Not An "Insured Location" is applicable to the facts of the pending appeal and excludes coverage for the injuries sustained by Appellant Alicia Rowe at the Chases' property on October 30, 2019, at 23 Winnecook Road, as well as the stipulated judgment entered between Rowe and the Chases.

DATED at Portland, Maine this 10th day of October, 2024.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee State Mutual Insurance Company certifies that he has caused service of the Appellee's Brief upon counsel of record for Appellant Alicia Rowe, by causing an electronic copy to be emailed and two copies of the same to be mailed by United States first class mail, postage prepaid, addressed as follows:

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