STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Wal-24-236

ALICIA ROWE
Appellant

v.

STATE MUTUAL INSURANCE COMPANY
Appellee

On Appeal from the Superior Court, Waldo County
Docket No. CV-2022-8

REPLY BRIEF OF APPELLANT ALICIA ROWE

Jeffrey T. Edwards, Bar No. 0679
Preti, Flaherty, Beliveau & Pachios, LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Tel: 207-791-3000
jedwards@preti.com

Attorney for Appellant, Alicia Rowe

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

ARGUMENT

1. 23 Winnecook Road, Burnham, Maine is an "Insured Location."

The insurance policy's definition of "Insured Location" includes property that is (1) "acquired by you during the policy period" (2) "for your use as a residence." Both are met here.

On the first point, State Mutual argues that because the Chases never sold the real property after their acquisition in 1995, the premises were not acquired by the Chases during the policy period. (Red Br. at 20.) But the trial court was persuaded that the Chases' re-acquisition of the mobile home on September 1, 2019 constituted the Chases having acquired the premises "during the policy period." (A.17, n.6.) That finding has not been appealed and is properly supported by the record. *See* A.200.

On the second point, the Chases acquired the mobile home for their use as a residence, as they were seeking tenants to reside in the mobile home. State Mutual is adamant that "the Chases did not ever use 23 Winnecook Road or the mobile home situated at 23 Winnecook Road as their residence." (Red Br. at 20.) That is precisely the point. The Chases may not have used the premises as *their* residence, but they did use it as *a* residence when they sought tenants to reside there.

State Mutual says that Rowe's interpretation of "for your use as a residence" reads out of the policy the word "your." (Red Br. at 22.) But State Mutual's interpretation replaces the policy language "as a residence" with State Mutual's preferred language: "as *their* residence." That's not what the policy says. Rowe's interpretation is consistent with the plain language of the definition. There is no requirement in the policy definition of "Insured Location" that the Chases actually live at or physically occupy the premises. If State Mutual intended to impose such a requirement, the definition could have been drafted to require that the property be used "as your residence" instead of that the property be used as "a residence."

Further support for Rowe's interpretation is found throughout the policy. For example, the policy definition of "residence premises**"** includes the language "where you reside" in order to make clear that the insured must live in and occupy the property for the property to qualify as residence premises. No such clarifying language exists in the policy definition of "Insured Location." If State Mutual wanted to impose the requirement that the insured actually live in the property in order for the property to qualify as an "Insured Location," it should have said so explicitly. It is not the responsibility of the courts to transmogrify the plain meaning of policy language so that the scope

of the coverage under the policy works out the way the insurer hoped it would.

The cases that State Mutual cites to support its interpretation do not help its cause. For example, it relies on *Harrington v. Citizens Property Insurance Corporation*, a fourteen-year-old case out of Florida, and suggests that the court interpreted "your use as a residence" to mean "your use as your residence." (Red Br. 20-21.) That is a mischaracterization. The court there considered whether an insured's primary residence fell under the policy's definition of an "Insured Location." There was no question in that case about whether an insured could use the property as a residence by renting it to a third party because it was undisputed in that case that the property in question was the insured's primary residence. 54 So. 3d 999, 1003 (Fla. Dist. Ct. App. 2010). The court simply did not address the issue. Moreover, in interpreting the policy's definition of "Insured Location," the *Harrington* court explicitly said that "if the language is ambiguous, the language must be construed against the drafter of the contract, Citizens, in favor of the insureds, the Harringtons." *Id.* at 1004.

The same is true here. If the definition of "Insured Location" is reasonably susceptible to more than one interpretation, it is ambiguous. *See Geyerhahn v. U.S. Fid. & Guar. Co.*, 1999 ME 40, ¶ 12, 724 A.2d 1258. Under

Maine law, any ambiguity must be resolved against the insurer and in favor of coverage. *Id.* That construction here leads to the conclusion that the mobile home acquired by the Chases during the policy period for use as a residence by tenants qualifies as an "Insured Location." The policy exclusion for bodily injury arising out of premises that is not an "Insured Location" therefore has not been triggered.

2. Rowe's claim arises out of the Chases' failure to warn.

State Mutual argues that Rowe's bodily injury arose out of the premises, but this is not a premises liability case. State Mutual admits that coverage is determined by an examination of the facts alleged in the underlying Complaint. (Red Br. at 32.) *See Langevin v. Allstate Ins. Co.,* 2013 ME 55, ¶ 10, 66 A.3d 585. Here, Rowe's claim against the Chases, as alleged in her complaint, arises out of their conduct in failing to warn her about the hidden gap between the front steps and the entrance to the mobile home. The claim is based upon the Chases' independent tortious conduct in failing to warn her; it is not based on the conditions of the accident scene. The Chases owed a duty to exercise reasonable care to avoid the foreseeable risks of harm to Rowe, and the policy's "Insured Location" exclusion does not apply to the insured's duty of care that is independent of any duty of care arising out of the insured's ownership of the premises.

Contrary to State Mutual's contention, the cases cited by Rowe interpreting the "Insured Location" exclusion confirm that this exclusion only applies to claims for premises liability arising out of a condition of the premises and not to the insured's negligent conduct independent of the duties that arise out of the ownership of the premises. *See e.g.*, *Green Mountain Ins. Co., Inc. v. Wakelin*, 484 Mass. 222, 231, 140 N.E.3d 418, 425 (2020) (claim for wrongful death from carbon monoxide poisoning by an electrical heater arose out of tortious conduct of the insured, not out of a condition of the premises). *Cf. Dickinson v. Clark*, 2001 ME 49, 767 A.2d 303 (holding that Maine's Recreational Use Statute, 14 M.R.S. § 159-A, only applies to the landowner's liability for claims alleging premises liability and did not apply to claims for which there was an independent source of duty).

State Mutual criticizes Rowe for not citing *Commerce Insurance Company v. Theodore*, 65 Mass. App. Ct. 471, 841 N.E.2d 281 (2006), yet subsequent courts have recognized that the *Theodore* court may have applied too broad of a meaning to "arising out of" when it is used in an exclusionary provision. *See, e.g.*, *Quincy Mut. Fire Ins. Co. v. Crispo*, 80 Mass. App. Ct. 484, 490, 954 N.E.2d 27, 31 (2011). Indeed, under Maine law, the exclusion's "arising out of" language must be narrowly construed. *See AIG Prop. Cas. Co. v. Cosby,* 892 F.3d 25, 29 (1st Cir. 2018); *Union Mut. Fire Ins. Co. v. Com. Union Ins.*

Co., 521 A.2d 308, 311 (Me. 1987). That being so, the policy exclusion for "bodily injury" arising out of a condition of a premises which is not an "Insured Location" cannot be construed to exclude Rowe's bodily injury claim which arises out of the Chases' negligent conduct in failing to provide her with adequate warnings. State Mutual's interpretation would extend the exclusion to all tort liability of the insured for bodily injury occurring at an uninsured location owned by the insured, regardless of the basis of liability. Such a reading of the exclusionary language must be rejected. Because Rowe's claim does not arise out of a condition of the premises, the exclusion does not apply.

CONCLUSION

For these reasons and those set forth in her opening brief, Appellant Alicia Rowe respectfully requests that this Court determine that "Insured Location" exclusion is inapplicable and hold that Appellee State Mutual Insurance Company is not entitled to judgment.

Dated at Portland, Maine this 31st day of October, 2024.

/s/ Jeffrey T. Edwards

Jeffrey T. Edwards, Esq. Bar No. 0679
Attorney for Appellant
Preti Flaherty Beliveau & Pachios, LLP
P.O. Box 9546
Portland, ME 04112-9546
207.791.3000
jedwards@preti.com

CERTIFICATE OF SERVICE

I, Jeffrey T. Edwards, Attorney for Alicia Rowe, certify that I have, this date, served by email (by agreement of counsel) Appellant's Reply Brief to the attorney listed below:

Matthew T. Mehalic, Esq. (Bar No. 4162)
Norman, Hanson & DeTroy
Two Canal Plaza
P.O. Box 4600
Portland, Maine 04112
207.774.7000
mmehalic@nhdlaw.com

Dated: October 31, 2024

/s/ Jeffrey T. Edwards

Jeffrey T. Edwards, Esq. Bar No. 0679