

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 11 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TAMARA BARNHART,

Plaintiff-counter-
defendant-Appellant,

v.

PHILADELPHIA INDEMNITY
INSURANCE COMPANY,

Defendant-counter-claimant-
Appellee.

No. 23-35216

D.C. No. 1:21-cv-00009-SPW

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

Submitted December 6, 2023**
Portland, Oregon

Before: BERZON, NGUYEN, and MILLER, Circuit Judges.

Tamara Barnhart appeals the district court's order granting summary judgment in favor of Philadelphia Indemnity Insurance Company. We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *see Progressive Cas. Ins. v. Owen*, 519 F.3d 1035, 1037 (9th Cir. 2008), we affirm.

When interpreting the language of an insurance policy governed by Montana law, we assign terms “their usual, common sense meaning as viewed from the perspective of a reasonable consumer of insurance products.” *Christian v. United Fire & Cas. Co.*, 530 P.3d 456, 459 (Mont. 2023) (quoting *Steadele v. Colony Ins.*, 260 P.3d 145, 149 (Mont. 2011)). “If the language of the policy is clear and explicit, [we] may not rewrite the contract but must enforce it as written.” *Daniels v. Gallatin County*, 513 P.3d 514, 518 (Mont. 2022).

The Youth Dynamics, Inc. policy covers “[a]nyone ‘occupying’ a covered ‘auto’ or a temporary substitute for a covered ‘auto.’” Although the policy does not define “temporary substitute,” it provides that “[t]he covered ‘auto’ must be out of service because of its breakdown, repair, servicing, ‘loss’ or destruction.” “Substitute” means one particular thing that stands in for another. *See Substitute*, Merriam-Webster, <https://perma.cc/NQH7-36XQ> (last visited Oct. 31, 2023) (defining “substitute” as “a person or thing that takes the place or function of another”).

Under this provision’s first sentence, “a temporary substitute” takes the place or function of “a covered ‘auto.’” Under the second sentence, a temporary substitute does not take the place of *any* covered auto, but rather “[t]he covered

‘auto’” that is “out of service because of its breakdown, repair, servicing, ‘loss’ or destruction” (emphasis added). *See Doe I v. Reddit, Inc.*, 51 F.4th 1137, 1142 n.1 (9th Cir. 2022) (“[T]he use of a definite article with a singular noun speaks to a ‘discrete thing.’” (quoting *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1483 (2021))), *cert. denied*, 143 S. Ct. 2560 (2023).

While this language can be ambiguous in certain contexts, *see, e.g.*, *Stonehocker v. Gulf Ins.*, 368 P.3d 1187, 1192 (Mont. 2016), it is not ambiguous here. Barnhart’s vehicle was not, as in *Stonehocker*, “put to the same use to which the covered vehicle would have been put but for its withdrawal from service.” *Id.* The covered unavailable vehicle was in Bozeman, whereas Barnhart worked in Billings. Nothing in the record suggests that the vehicle garaged in Billings would have been used that day in Bozeman, 140 miles away, had it not been out of service. As Barnhart’s vehicle was therefore not a “substitute” for the covered auto, the policy is inapplicable.

AFFIRMED.