

ORIGINAL

IN THE SUPREME COURT OF OHIO

GRINNELL MUTUAL REINSURANCE COMPANY

SUPREME COURT CASE NO.

Defendant/Appellant

09-2214

vs.

WESTFIELD INSURANCE COMPANY

ON APPEAL FROM THE
BUTLER COUNTY COURT OF
APPEALS, TWELFTH
APPELLATE DISTRICT

Plaintiff/Appellee

and

COURT OF APPEALS CASE
NOS. CA 2009 05 0134 &
ca2009-06-157

TERRELL WHICKER, a minor, and VINCE AND
TARA WHICKER

Defendants/Appellees

and

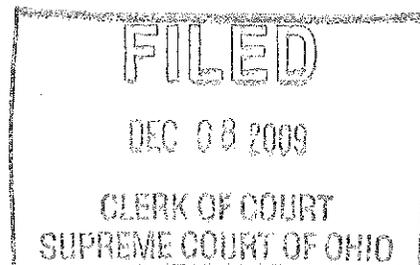
MICHAEL AND MARILYN HUNTER

Defendants/Appellees

**MOTION OF DEFENDANT/APPELLANT GRINNELL MUTUAL
REINSURANCE COMPANY IN SUPPORT OF SUPREME COURT
JURISDICTION**

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST**

The Butler County Court of Appeals, Twelfth Appellate District, held that an exclusion in Appellee Westfield's homeowners' liability insurance policy for bodily injuries "arising out of a premises owned by an insured that is not an insured location" did not require the bodily injury to arise out of a condition of the premises. Rather, the Court held that the exclusion applied if the injury was "casually related" to the premises. This holding directly conflicts with a decision from the Court of Appeals for the Second Appellate District, *American States Ins. Co. v. Guillermin*,¹ in which the Court construed the exact same exclusion as requiring the injury to arise out of a defective condition on the premises.

The Second District's holding in *Guillermin* is in accord with the majority of jurisdictions to have construed this exclusion. By accepting jurisdiction, this Court will resolve a conflict between two Ohio Appellate Courts regarding this common exclusion in a standard homeowners policy. Ohio consumers and insurers need clarity as to how this exclusion will be interpreted consistently throughout the state. Otherwise, insurers and insureds risk different interpretations of the same policy language depending on the particular Appellate District in which the case is pending.

Further, accepting jurisdiction will reinforce the proposition that insurance companies must be held responsible for the language they choose in their policies. By holding that the injuries do not need to arise out of a condition of the premises for the exclusion to apply, the Court of Appeals has allowed Westfield to escape its coverage obligations simply because the incident happened to occur on premises owned by the

¹ (2nd Dist., 1996), 108 Ohio App.3d 547, 671 N.E.2d 317.

insured. Since the plaintiffs' claims against Westfield's insureds are based on the insureds' personal conduct, and not their ownership of the premises, the location of the accident in this case is merely incidental. Westfield did not write its policy to exclude coverage for any injuries occurring off the residence premises. Rather, its policy excludes coverage for for injuries "arising out of" a non-insured premises. As recognized by a majority of courts, this language clearly requires the injuries to arise out of some defect in the land. Westfield must be held to the language it selected in its policy.

Therefore, given the need for statewide consistency on the construction of this exclusion, as well as principal that an insurance company must be held to the language it selects in its policies, this Appeal presents an issue of great and public interest.

STATEMENT OF THE CASE AND FACTS

On July 7, 2001, Defendant-Appellee Terrell Whicker was operating an ATV at the Indiana property of his grandparents, Defendants-Appellees Michael and Marilyn Hunter. Terrell's ATV collided with an ATV being driven by Ashley Arvin, causing Terrell to sustain bodily injury. Terrell and his parents ("the Whickers") filed a lawsuit against Ashley Arvin and her parents and the Hunters in the Hamilton County Court of Common Pleas. The Whickers' claims against the Hunters are based on the Hunters' alleged personal tortious conduct. Count Three of the Whickers' Complaint describes the claims against the Hunters as follows: 1. the Hunters knew of Arvin's reckless and/or negligent tendencies; 2. the Hunters had the ability and duty to exercise control over Arvin; and 3. the Hunters breached that duty by not exercising control over Arvin.

Westfield issued a homeowners insurance policy to the Hunters. Westfield filed a declaratory judgment action against the Hunters, the Whickers, and Grinnell in the Butler County Court of Common Pleas, seeking a declaration that it had no duty to defend or indemnify the Hunters for the claims asserted against them in the Whickers' underlying lawsuit. Grinnell issued a farm insurance policy to the Hunters, covering their property in Indiana. Grinnell asserted a CounterClaim against Westfield, seeking a declaration that Westfield and Grinnell were obligated on a *pro rata* basis to share in the defense costs and any indemnity of the Hunters. At issue in this appeal are Westfield's obligations under its homeowners policy to the Hunters for the claims asserted against them in the Whickers' underlying lawsuit.

Westfield issued a Homeowners Policy No. HOP 2849481 to Michael Hunter for the policy period June 10, 2001 through June 10, 2002. Westfield's Policy lists the Hunters'

primary residence on Ohio in the Declarations Page. Its Policy provides liability coverage as follows:

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 the insured is legally liable. . . .
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. ...

Westfield's Policy contains the following exclusion:

Coverage E - Personal Liability and Coverage F - Medical Payments to Others do not apply to **bodily injury** or **property damage**:

e. Arising out of a premises:

- (1) Owned by an insured; ****

that is not an **insured location**.

The Policy defines an **insured location** as follows:

4. **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 in 4.a. or 4.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 or two family dwelling is being built as a residence for an insured.

Westfield's Policy defines the **residence premises** as follows:

8. **Residence premises** means:

- a. The one family dwelling, other structures, and grounds; or
- b. That part of any other building;
where you reside and which is shown as the residence premises in the
Declarations.

Residence premises also means a two family dwelling where you reside in at least one of the family units and which is shown as the residence premises in the location.

Grinnell and Westfield filed Motions for Summary Judgment on the issue of Westfield's obligations to the Hunters in the Whicker's underlying lawsuit. The Trial Court granted summary judgment to Westfield and denied summary judgment to Grinnell. On Appeal to the Twelfth District Court of Appeals, the Court affirmed the grant of summary judgment in favor of Westfield, finding that the "arising out of" language in the exclusion only required a causal connection between the injury and the premises, and did not require the injuries to arise out of a condition of the land.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: An exclusion in an insurance policy for injuries “arising out of a premises owned by an insured that is not an insured location” requires the injuries to arise out of a defect or condition of the premises.

The Whickers’ Complaint asserts personal liability claims against the Hunters. Their Complaint alleges that 1. the Hunters knew of Arvin’s reckless and/or negligent tendencies; 2. the Hunters had the ability and duty to exercise control over Arvin; and 3. the Hunters breached that duty by not exercising control over Arvin. These claims are not based on the Hunters’ status as landowners, but rather their personal liability due their prior knowledge of Arvin’s reckless or negligent tendencies.

In *American States Ins. Co. v. Guillermin*,² the Court of Appeals for the Second Appellate District construed the exact same exclusion that exists in Westfield’s policy to require the injuries to arise out of a dangerous condition on the premises. In that case, American States issued a homeowners policy of insurance to Alverda Guillermin, which insured her residence. Alverda also owned a farm in Brown, County, Ohio that was not listed as an insured premise on the policy. Alverda permitted her sons to stay at the farm, where they kept horses and other animals. A lion escaped from the farm and attacked two minors. Their parents filed suit against Alverda and her sons, alleging that the sons, with Alverda’s permission, harbored the animal on the farm. They alleged that Alverda and her sons were negligent for allowing the lion to remain unattended on the premises without sufficient precautions to prevent it from leaving the premises. Alverda and her sons sought a defense and indemnification from American States under the homeowners policy.

² (2nd Dist., 1996), 108 Ohio App.3d 547, 671 N.E.2d 317.

The policy contained an exclusion for bodily injury arising out of a premises owned by an insured that is not an insured location, which is the same exclusion at issue in Westfield's policy. The court reviewed various cases from other jurisdictions interpreting this language, and concluded that the exclusion applies only when the liability arises out of a dangerous condition on the premises. "We are convinced that the weight of authority construing identical or similar 'off premises' exclusions recognizes the 'dichotomy of causation between negligent personal conduct and dangerous condition of the premises'. . . These jurisdictions believe that the 'key factor' determinative of the applicability of this exclusion 'relates to the condition of the uninsured premises and not the to the tortious acts committed thereon.'"³ Since the negligent harboring of the lion did not implicate any direct, causal link to the injury, but rather related to Alverda's alleged tortious conduct in not taking adequate precautions to prevent the lion's escape, the court held that the exclusion did not apply.

As discussed above, the Whickers' claims against the Hunters are not based on any defects or conditions of the property, but rather the Hunters' allegedly tortious conduct. The Whickers claim that the Hunters were negligent in failing to exercise control over Arvin. This is a claim based on personal liability—not their status as landowners. Thus, because the Hunters' liability does not arise out of any condition on the land, Westfield's "other owned property" exclusion does not apply.

The Appeals Court held that the phrase "arising out of" in Westfield's policy exclusion requires a only causal connection, and not proximate cause. Under this

³ Id. at 564, 329.

construction, the Appeals Court found that the causal connection was met, since the accident flowed from and had its origin in the farm. The Court noted that the ownership of the farm was the only possible source for the Whickers' claims that Hunters had a duty to protect Terrell Whicker as an invitee. But the Whickers' Complaint did not allege claims against the Hunters based on their status as landowners. Rather, they asserted claims based on their personal liability, including their prior knowledge of Ashley Arvin's negligent or reckless tendencies and failure to prevent the injuries based on this knowledge.

Accordingly, the claims against the Hunters are based on their personal liability, like the claims against the insured in *Guillermin*. Since the Court in *Guillermin* construed the exact same policy language as is contained in Westfield's policy, the cases are directly analogous.

Further, the majority of courts to interpret this exclusion have adopted the same construction as the court in *Guillermin* and advanced by Grinnell in this case. For example, in *Marshall v. Fair*,⁴ the court noted that "the overwhelming authority pertaining to this type of provision is that such an exclusion applies only to *conditions* of the uninsured premises and not to *tortious acts* committed by the insured on the property of others." The court referenced the "overwhelming majority" of cases that have followed this construction.⁵

⁴ (Ct. App. W.Va., 1992), 187 W.Va. 109, 416 S.E.2d 67, 70.

⁵ *MFA Mutual Ins. Co. v. Nye* (Mo. Ct. App. 1980), 612 S.W.2d 2,4 holding that there is "floating coverage for the insured wherever he might be, but coverage for defects in the land are excluded;" *Safeco Ins. Co. v. Hale* (1983), 140 Cal. App.3d 347, 189 Cal. Rptr. 463; *Hingham Mutual Fire Ins. Co. v. Heroux* (R.I., 1988), 549 A.2d 265; *Hanson v. General Accident Fire & Life Ins. Corp. Ltd.* (Fla. Dist. Ct. App., 1984), 450 So.2d 1260, 1262; *Economy Fire & Casualty Co. v. Green* (1985), 139 Ill. App.3d 147, 93 Ill. Dec. 656, 660, 487 N.E.2d 100, 104 (1985); *Kitchens v. Brown* (La. Ct. App. 1989), 545 So.2d 1310, 1312; *Newhouse v. Laidig, Inc.* (Ct. App.), 145 Wis.2d 236, 426 N.W.2d 88, 90.

In *Lititz Mut. Ins. Co. v. Branch*, the court explained the reasoning for limiting the exclusion to conditions of the land:

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 the uninsured premises exclusion) its liability for the 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 the "conditions" which cause injury on other uninsured land. It would be a rare case where an insured was liable for the condition of the 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. 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.

The company has not chosen to geographically limit the coverage provided for tortious personal conduct of the insured. If it had so intended, it could simply have provided that the exclusion ran to an accident "occurring on" other owned premises. There appears to be little reason to exclude personal tortious conduct occurring on owned but uninsured land, as little correlation exists between such conduct and the land itself.⁶

Clearly, the majority of cases to consider this exclusion have adopted the reasoning advanced by Grinnell and applied by the Court of Appeals in *Guillermín*.⁷

Had Westfield wanted to exclude coverage for all liability or injuries occurring on an uninsured premises, it clearly could have chosen language to achieve this result. But as the drafter of the policy, Westfield must be held to the language it chose. And the language of

⁶ (Mo.Ct.App., 1977), 561 S.W.2d 371, 374.

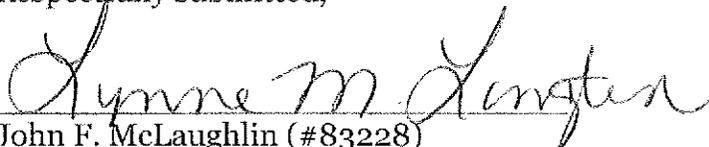
⁷ See also *Eyler v. Nationwide Mut. Fire Ins. Co.* (Ky., 1992), 824 S.W.2d 855; *Sea Ins. Co., Ltd. v. Westchester Fire Ins. Co.* (S.D.N.Y., 1994), 849 F.Supp. 221, aff'd (2nd Cir., 1995), 51 F.3d 22;

this exclusion has been interpreted by an overwhelming number of courts to apply only when the injury arises out of a condition on the land.

CONCLUSION

The Court of Appeals' holding is directly in conflict with that of the Second District Court of Appeals and a majority of jurisdictions to consider the "other owned property" exclusion. The reasoning adopted by the Second District Court in *Guillerman* as well as the majority of courts to apply the exclusion is sound. The policy language as written applies to injuries arising out of the premises, not injuries based on the insured's personal conduct that incidentally occurs on the premises. Accordingly, Grinnell respectfully requests this Court to accept jurisdiction of this issue, and reverse the judgment in favor of Westfield. Such a decision will provide uniformity throughout the State of Ohio regarding this common exclusion in many standard homeowners' policies.

Respectfully submitted,



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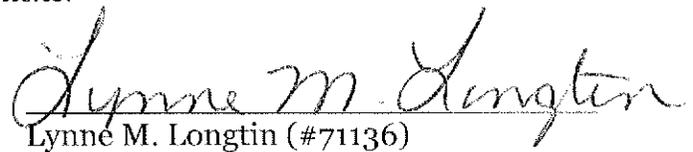
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via regular U.S. Mail this 8th day of December, 2009, to the following:

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APPENDIX

Appx. pg.

Entry from the Butler County Court of Appeals, Twelfth App. Dist. (Oct. 26, 2009) . . . 1
Opinion from the Butler County Court of Appeals, Twelfth App. Dist. (Oct. 26, 2009) . 2

FILED

IN THE COURT OF APPEALS

2009 OCT 26 PM 3:11 TWELFTH APPELLATE DISTRICT OF OHIO

CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

BUTLER COUNTY

WESTFIELD INSURANCE COMPANY,

Plaintiff-Appellee,

CASE NOS. CA2009-05-134
CA2009-06-157

- vs -

FILED BUTLER CO.
COURT OF APPEALS

JUDGMENT ENTRY

OCT 26 2009

MICHAEL HUNTER, et al.,

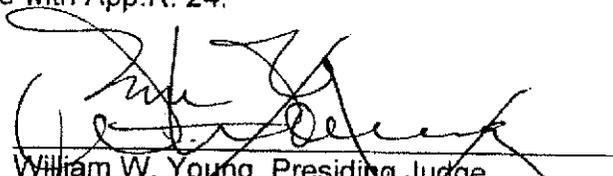
CINDY CARPENTER
CLERK OF COURTS

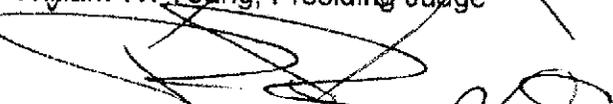
Defendants-Appellants.

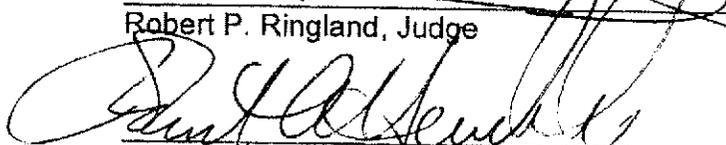
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


William W. Young, Presiding Judge


Robert P. Ringland, Judge


Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

WESTFIELD INSURANCE COMPANY, :
 :
 Plaintiff-Appellee, : CASE NOS. CA2009-05-134
 : CA2009-06-157
 :
 - vs - : OPINION
 : 10/26/2009
 :
 MICHAEL HUNTER, et al., :
 :
 Defendants-Appellants. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-05-2295

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HENDRICKSON, J.

{¶1} Defendant-appellant, Grinnell Mutual Reinsurance Company (Grinnell), appeals the decision of the Butler County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Westfield Insurance Company (Westfield). Defendant-appellant,

Terrell Whicker, also appeals the decision of the trial court to deny his motion for summary judgment and grant summary judgment in favor of Westfield.¹ We affirm the decision of the trial court.

{¶2} In 2001, while both were minors, Terrell Whicker and his cousin Ashley Arvin, were involved in an accident when the ATV's they were operating collided. The accident occurred on a farm in Indiana owned by Michael and Marilyn Hunter, who reside in Hamilton, Ohio and are Whicker and Arvin's grandparents. Whicker filed suit against Arvin, Arvin's parents, and the Hunters to recover for the bodily injuries he sustained in the accident.²

{¶3} The Hunters' Hamilton residence is insured by Westfield and their Indiana farm is insured by Grinnell. Westfield filed a declaratory judgment action against the Hunters and Grinnell, and Grinnell filed a counter-claim, seeking a declaration that Westfield was obligated to share in the costs of the Hunters' defense and any indemnity on a pro rata basis.

{¶4} Both insurance companies and Whicker moved for summary judgment, asking the court to determine whether Westfield's policy provided coverage for the claims asserted against the Hunters. The trial court ruled in favor of Westfield, finding that because the accident "arose out of a premises" that was not an "insured location," the Westfield policy did not cover the Hunters' legal defense and indemnification.

{¶5} Grinnell and Whicker now appeal, raising the following assignments of error:

{¶6} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTFIELD AND DENYING SUMMARY JUDGMENT IN FAVOR OF GRINNELL."

1. According to App.R. 3(B), we sua sponte consolidate these appeals for purposes of writing this single opinion. We also sua sponte remove these cases from the accelerated calendar according to Loc.R. 6(A).

2. This action was filed in the Hamilton County Common Pleas Court prior to Westfield filing the instant declaratory judgment action.

{¶7} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO WESTFIELD AND DENYING SUMMARY JUDGMENT TO THE WHICKERS."

{¶8} In the assignments of error, Grinnell and the Whickers argue that the trial court misconstrued two terms in the disputed insurance policy, and thereby improperly granted Westfield's motion for summary judgment. This argument lacks merit.

{¶9} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Byrd v. Smith*, Clermont App. No. CA2007-08-093, 2008-Ohio-3597. Civ.R.56 requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party in order to grant summary judgment. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8.

{¶10} When construing an insurance policy and its provisions, "the role of a court is to give effect to the intent of the parties to the agreement. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. On the other hand, where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. A court, however, is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11-12. (Internal citations omitted.)

{¶11} According to the Hunters' policy with Westfield, personal liability coverage does not apply "to bodily injury or property damages: e. Arising out of a premises: (1) Owned by an

insured, *** that is not an insured location."

{¶12} The first issue for review is the application of "arising out of a premises" when construing the policy. In Ohio, two sister districts have applied the term in different fashions. First, the Eighth District Court of Appeals, in *Nationwide Mut. Fire Ins. Co. v. Turner* (1986), 29 Ohio App.3d 73, 77, held that "'arising out of' means generally 'flowing from' or 'having its origin in.' The phrase generally indicates a causal connection with the insured property, not that the insured premises be the proximate cause of the injury." Conversely, the Second District Court of Appeals, in *American States Ins. Co. v. Guillermin* (1995), 108 Ohio App.3d 547, 565, found that an injury arises out of the premises only if some dangerous condition exists on the premises that caused or contributed to the bodily injury.

{¶13} In granting summary judgment to Westfield, the trial court relied on the *Turner* definition of "arising out of," and analyzed the case in terms of a causal connection instead of a condition on the Hunters' farm being a proximate cause of the ATV accident. After reviewing Ohio's insurance case law, we agree with the trial court and analyze the case at bar for a causal connection, rather than a proximate cause.

{¶14} While the Ohio Supreme Court has not construed "arising out of" in the context of a homeowners' insurance policy, it has interpreted the term when reviewing summary judgment awards denying uninsured motorist coverage. In *Kish v. Central Nat. Ins. Group of Omaha* (1981), 67 Ohio St.2d 41, the court found that the decedent's uninsured motorist policy did not apply where the decedent was unharmed during a car accident but was fatally shot by the driver of the car that hit him. There, the court considered whether the shooting arose out the uninsured's ownership, maintenance, or use of the uninsured vehicle, and found that the shooting did not. The court reasoned that "a 'but for' analysis is inappropriate to determine whether recovery should be allowed under uninsured motorist provisions ***.

The relevant inquiry is whether the chain of events resulting in the accident was unbroken by the intervention of any event unrelated to the use of the vehicle." *Id.* at 51.

{¶15} Following this precedent, the court in *Lattanzi v. Travelers Ins. Co.*, 72 Ohio St.3d 350, 1995-Ohio-189, applied *Kish's* causal connection test to determine whether the insured's injuries arose out of the uninsured motorist's maintenance and use of his uninsured car. In *Lattanzi*, the uninsured motorist hit the insured's car, forced his way into her car, kidnapped her at gunpoint, and drove to an unknown location where he raped her. The court applied the causal connection test and found that the policy did not cover the insured's injuries because they were sustained as a result of the "assailant's own brutal, criminal conduct," therefore breaking the causal connection between the assailant's use of his uninsured car and the insured's injuries. *Id.* at 354.

{¶16} Both courts construed "arising out of" to require a causal connection, and neither the *Kish* nor *Lattanzi* court considered a proximate cause analysis when determining if the injuries arose out of the uninsured motorists' use of their vehicle. The way in which Federal courts apply Ohio insurance law also supports our analysis.

{¶17} Released after both *Turner* and *Guillermin*, the United States District Court for the Northern District of Ohio considered how Ohio courts would apply "arising out of" in insurance cases. In *Owens Corning v. Nat. Union Fire Ins. Co.* (N.D. Ohio Mar. 10, 1997) No. 3.95 CV 7700, the court considered both *Turner* and *Guillermin* and found that "the term 'arising out of' clearly requires a causal connection, but does not require proximate cause." *Id.* at *16. On appeal, the Sixth Circuit reviewed the district court's decision to construe "arising out of" on a causal connection basis, and also took into consideration the *Kish* and *Lattanzi* cases. The Sixth Circuit, while it reversed the district court's decision to grant summary judgment, agreed that the analysis called for a causal connection and did not

employ a proximate cause determination. *Owens Corning v. Nat. Union Fire Ins. Co.* (C.A.6, 1997), 257 F.3d 484.

{¶18} Grinnell asserts that because two districts interpret the term differently, the term is ambiguous and we must therefore construe the provision in the Hunters' favor. However, the plain and ordinary meaning of "arising out of," as well as direction from the Ohio Supreme Court and federal courts, allow us to ascertain the definite legal meaning of the term so that, as a matter of law, the insurance contract is unambiguous.

{¶19} Keeping in mind that a court is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties, applying the term as requiring a causal connection instead of a condition on the land also comports with the policy itself and the way the parties reasonably understood the phrase. If we were to construe "arising out of" to require a dangerous condition on the land, we would not only be changing the language of the policy, but also circumventing the parties' intention every time the phrase is used in the policy.

{¶20} As the policy reads, the exclusion applies to bodily injury "arising out of a premises," not arising out of a *condition on* a premises. If we were to impute such a reading, the phrase "arising out of" would hold an illogical application given the way it is used multiple times throughout the contract. Specifically, the term is also used to introduce other policy exclusions, including injuries or property damage "arising out of": (b) business engaged in by an insured; (c) a rental or holding; (d) rendering of or failure to render professional services; (f-h) ownership or maintenance of a motorized vehicle, watercraft, or aircraft; (j) transmission of a communicable disease; (k) sexual molestation, corporal punishment, or physical or mental abuse; or the (l) use, sale, or manufacture of a controlled substance. While construing "arising out of" to require a dangerous condition on these other exclusions is illogical, the

causal connection definition produces a rational application given the plain and ordinary definition of the phrase.

{¶21} Using the causal connection test, we find that the ATV accident arose out of the premises. Specifically, the accident involved two children riding ATV's on the Hunters' farm. The farm was more than just the location where the accident occurred because the ATV Whicker was riding at the time of the accident was purchased for him to operate while at the farm, and was garaged in a shed on the farm. Additionally, Arvin's parents owned the ATV she was riding at the time of the accident and specifically brought it to the farm for her to ride. As stipulated, the ATV's were recreational vehicles, not intended for use on public roads, so that the farm provided the opportunity and occasion to operate the ATV's, which causally led to the accident and Whicker's injuries. Because the accident flowed from and had its origin in the farm, the ATV accident and Whicker's resulting bodily injuries arose from the premises. We also note that because they owned the farm, the Hunters were made party to Whicker's claim, and their ownership of the farm is the only possible source for Whicker's claim that the Hunters had a duty to protect him from injury as an invitee.³

{¶22} The second issue for review is whether the farm is an insured location under the Westfield policy, which defines insured location as follows:

{¶23} "4. 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 in 4. a and 4. b above; d. Any part of a premises; (1) Not owned by an insured; and (2) Where an insured is

3. Because the issue is one of contract interpretation, we do not address any tort claims or analyze any possible liability the Hunters may have had because of the accident.

temporarily residing; e. Vacant land, other than farm land, owned by or rented to an insured; f. Land owned or rented to an insured on which a one or two family dwelling is being built as a residence for an insured."

{¶24} Given the stipulated facts and arguments before this court, the only definition of insured location that may possibly apply is found in section c., which covers any premises used by the Hunters in connection with their Ohio residence.

{¶25} The trial court, in finding that the farm is not an insured location, relied on *Pierson v. Farmers Ins. Of Columbus, Inc.*, Ottawa App. No. OT-06-031, 2007-Ohio-1188, in which the court noted three factors to consider in determining whether a premises is used in connection with the insured residence: (1) the proximity of the premises; (2) the type of use of the premises; and (3) the purpose of the insurance policy, as a whole.

{¶26} Regarding the proximity, the stipulated facts establish that the Westfield policy covers the Hunters' Ohio residence, while the farm is located across state borders in Indiana. While there is no bright-line test to establish how close a location has to be in order to be in proximity of a residence, it is reasonable to determine that a farm miles away and across state lines is not in proximity to the Hunters' Ohio home. See *Pierson* (noting that the uninsured location was not proximately located to the insured residence where the secondary premises was located in a different city than the insured residence).

{¶27} Concerning the way in which the Hunters used the farm, the stipulated facts establish that the Indiana farm was not used in conjunction with the Hunters' Ohio residence. In the trial court's decision, it noted that Grinnell provided no evidence to suggest that the farm was used in connection with the Hunters' home in Ohio. Grinnell now argues on appeal that because Westfield moved for summary judgment, it had the burden to prove that the Hunters did not use the farm in connection with their Ohio home. We agree with Grinnell's

assertion that Westfield held the burden of proof, but we do so for a different reason. Aside from summary judgment, Westfield held the burden because it was asserting the applicability of a policy exclusion. *Continental Ins. Co. v. Louis Marx & Co.* (1980), 64 Ohio St.2d 399.

{¶28} Grinnell asserts that because the parties did not set forth enough facts to determine how the Hunters used the Indiana farm, there exists a genuine issue of material fact so that summary judgment was improper. Westfield conversely argues that the trial court had enough evidence to determine that the Hunters did not use the farm in conjunction with their Hamilton residence. In the alternative, Westfield states, "there is a possibility of genuine issues over this critical factual issue. In that event, the Court should remand the case so that additional evidence might be obtained and presented on that issue." However, by virtue of stipulating the facts, the parties are bound by their agreement.⁴

{¶29} In *Newhouse v. Sumner* (Aug. 6, 1986), Hamilton App. No. C-850665, the First District considered an appeal of the trial court's decision granting summary judgment to the appellees based on stipulated facts. Appellants argued on appeal that a genuine issue of material fact existed regarding their usury defense. In affirming the grant of summary judgment, the court discussed the impact stipulated facts have on the summary judgment process.

{¶30} "A stipulation between contesting parties evidences an agreement between them ***. To the extent that a stipulation jointly made represents an agreed statement of the facts material to the case, it is a substitute for the evidence which would otherwise have to be adduced in open court. Resultantly, when a stipulation of facts is handed up by the adversaries in a case, the trier of facts must accept what is set forth as a statement of settled

4. The stipulation of facts was signed by counsel for Westfield, Grinnell, the Whickers and the Hunters so that all parties agreed to the submitted facts.

fact that is undisputed and binding upon the parties to the agreement. Therefore, it is paradoxical for the appellants to assert on appeal that there is a genuine issue of material fact which must be resolved after having stipulated below the operative facts and placing themselves, resultantly, in a position in which they must be held to have agreed to be bound by those facts. We hold that where, as here, adversaries in a case stipulate the facts necessary to determine the essential issues presented by the pleadings, those parties are bound mutually by what they have stipulated to be true, and that an unsuccessful litigant cannot assert that a motion for summary judgment has been granted erroneously because there is a genuine issue of material fact to be resolved before judgment can be given as a matter of law. By eliminating the need to adduce evidence to establish the facts, the plaintiffs-appellants avoided the trial they now seek upon remand. Having once had the opportunity to have the facts decided in an adversarial proceeding, they cannot now regain that right by claiming that some fact material to their cause existed. They are bound by the facts agreed upon and by their representation that, within the stipulation, the court below was given all that was needed to determine the legal issue." *Id.* at *3-*4.

{¶31} Therefore, and regardless of which party held the burden, the facts as stipulated, do not establish any link or relationship between the farm and the Hunters' Ohio residence. Instead, the facts establish that the Hunters reside in Hamilton, Ohio and that Westfield insures the Hunters under a "Homeowners' Policy," whereas Grinnell insures the Hunters under a "farm policy" for their Indiana property. As stipulated by the parties, the farm property includes a house with electricity and running water, and the land was used in part to store and provide a place to ride ATV's. As defined by the parties, the ATV's "were motorized land conveyances and vehicles designed and used for recreational use and non-agricultural and leisure time***." Based on the stipulation, the facts establish the Hunters'

use of their farm, and that the farm was not used in connection with their Ohio residence.

{¶32} Regarding the last factor of the *Pierson* test, and based on the insurance policy as a whole, it is apparent that the Hunters intended the Westfield policy to cover their Ohio residence and the Grinnell policy to cover the farm. Specifically, the only premises stated in the Westfield policy is the Hunters' Ohio home, the declaration page fails to mention coverage for any location other than the Hamilton residence, and the Indiana farm is not mentioned anywhere in that policy. Additionally, the fact that the Hunters chose to insure their Hamilton home under a homeowners policy and their Indiana property under a separate farm policy also supports the conclusion that the Hunters believed that their Westfield policy covered only the Hamilton residence, or at the very least, they needed to carry coverage on the farm aside from the Westfield policy.

{¶33} Based on the *Pierson* test, and after reviewing the record and stipulated facts, we agree with the trial court that the Indiana farm was an uninsured location. We also note that several jurisdictions have analyzed whether a premises is used in connection with an insured residence using an analysis other than the factors in *Pierce*. See *Massachusetts Prop. Ins. Underwriting Ass'n v. Wynn* (2004), 60 Mass. App. Ct. 824, 830 (finding that "insured location" is "intended and appropriately understood to be limited to the residence and premises integral to its use as a residence"); and *Illinois Farmers Insurance Co. v. Coppa* (Minn. App. 1992), 494 N.W.2d 503 (affirming grant of summary judgment in favor of insurer where injury occurred on a neighbor's adjoining field that was neither part of the insured's residence premises nor "used in connection with" such premises, as are approaches or easements of ingress to or egress from the property").

{¶34} *State Farm Fire & Cas. Co. v. Comer* (Jan. 5, 1996), N.D. M.S. No. 3:95CV041-B-A, is also a useful case in our analysis. In *Comer*, the insureds held two homeowners'

policies with State Farm with one covering their home and the other covering a mobile home they also owned. The insureds also rented a pasture where they kept a herd of cattle that ultimately broke free and caused an accident. In denying coverage, State Farm cited a policy exclusion very similar to the one found in the Hunters' Westfield policy. In finding that coverage did not apply, the court stated that the insureds "assert that the pasture was used in connection with their residence premises, much like any other homeowners' hobby. The court fails to see how a pasture *located several miles from the [insureds'] home* could be used in connection with the residence premises. The [insureds] have failed to present any facts which would tend to show a connection between the cattle operation of Highway 7 and either of the premises located on Old Taylor Road." (Emphasis added.) *Id.* at *6.

{¶35} Grinnell argues that these cases are not dispositive because they are factually distinguishable in that none of the insureds in the preceding cases owned the premises on which the accident occurred. While factually distinguishable, the cases establish that courts apply policy exclusions when there is no connection between the insured's residence and their use of the accident site. Similar to these cases, we note that the Indiana farm was not a premises integral to the Ohio home's use as a residence, and we fail to see how the Indiana farm located miles away and across state lines was used in connection with the Hunters' Hamilton residence.

{¶36} Having found that the ATV accident arose from the farm and that the farm was an uninsured location, Westfield's policy exclusion applies to the Hunters' claim and bars coverage. Because the policy exclusion applies, Westfield's motion for summary judgment was properly granted, Grinnell's and the Whickers' motions for summary judgment were properly denied, and their assignments of error are overruled.

{¶37} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.

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