IN THE SUPREME COURT OF OHIO

GRINNELL MUTUAL REINSURANCE COMPANY

Defendant/Appellant

vs.

WESTFIELD INSURANCE COMPANY

Plaintiff/Appellee

and

TERRELL WHICKER, a minor, and VINCE AND TARA WHICKER

Defendants/Appellees

and

MICHAEL AND MARILYN HUNTER

Defendants/Appellees

SUPREME COURT CASE NO.

10-0024

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

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

NOTICE OF CERTIFIED CONFLICT FROM THE BUTLER COUNTY COURT OF APPEALS, TWELFTH APPELLATE DISTRICT

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FILED
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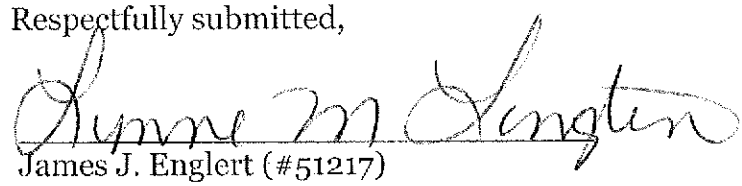
Appellant Grinnell Mutual Reinsurance Company hereby gives notice, under S. Ct. Prac. R. 4.1, that on December 8, 2009, the Court of Appeals for Butler County, Ohio, Twelfth Appellate District, issued an Entry certifying a conflict under Article IV, Section 3(B) of the Ohio Constitution and Appellate Rule 25, in Appeal Nos. CA2009-05-134 and CA2009-06-157. The certified question is as follows:

> When construing an insurance policy exclusion, does an injury "arise out" of a premises only if some dangerous condition exists on the premises that caused or contributed to the injury, or must the injury only originate in or have a causal connection with the premises?

A copy of the Entry certifying the Conflict is attached hereto. In addition, copies of the conflicting appellate decisions are also attached.

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 5th day of January, 2010, to the following:

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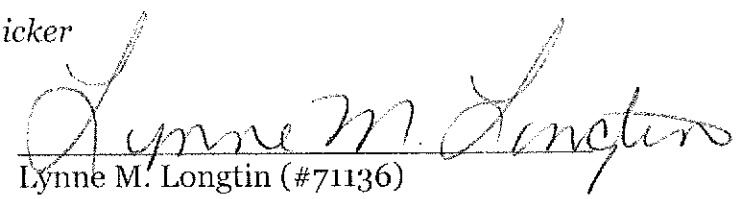

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CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

WESTFIELD INS. CO.,	:	CASE NO. CA2009-05-134, -06-157
Appellee,	:	ENTRY GRANTING MOTIONS TO CERTIFY CONFLICT
vs.	:	
MICHAEL HUNTER, et al.,	:	
Appellants.	:	

The above cause is before the court pursuant to motions to certify conflict to the Supreme Court of Ohio filed by counsel for appellant, Grinnell Mutual Reinsurance Company, on November 4, 2009 and appellants, Terrell Whicker, a minor, and Vincent and Tara Whicker, on November 5, 2009. A memorandum in opposition to the motions to certify conflict was filed by counsel for appellee, Westfield Insurance Company, on November 16, 2009.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals, the judges shall certify the record of the case to the supreme court for review and final determination.

Appellants argue that this court's decision is in direct conflict with a Second District Court of Appeals decision, *American States Ins. Co. v. Guillermin* (1995), 108 Ohio App.3d 547. In *Guillermin*, the Second District held that an injury "arises out" of a premises only if some dangerous condition exists on the premises that caused or contributed to the injury. In the present case however, this court chose to apply a definition consistent with a decision by the Eighth District Court of Appeals

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Nationwide Mut. Ins. Co. v. Turner (1986), 29 Ohio App.3d 73. In *Turner*, the court defined "arising out" of as "flowing from, or having its origin in." With respect to an insured premises, the phrase was found to indicate a causal connection with the insured premises, not that the insured premises was the proximate cause of the injury. *Id.* at 77.

Upon consideration, the court finds that its present decision is in conflict with the Second District's decision in *Guillermin*. Accordingly, the motion for certification is GRANTED. The certified question is as follows: When construing an insurance policy exclusion, does an injury "arise out" of a premises only if some dangerous condition exists on the premises that caused or contributed to the injury, or must the injury only originate in or have a causal connection with the premises?

IT IS SO ORDERED.

William W. Young, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

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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

James H. Ledman, J. Stephen Teetor, 250 E. Broad Street, Suite 900, Columbus, Ohio 43215-3742, for plaintiff-appellee, Westfield Insurance Company

Steven A. Tooman, 6900 Tylersville Road, Suite B, Mason, Ohio 45040, for defendants-appellees, Michael and Marilyn Hunter

Daniel J. Temming, Jarrod M. Mohler, 7 West 7th Street, Suite 1400 Cincinnati, Ohio 45202, for defendants-appellees, Terrell Whicker, Vince and Tara Whicker

John F. McLaughlin, Lynne M. Longtin, One West Fourth Street, Suite 900, Cincinnati, Ohio 45202, for defendant-appellant, Grinnell Mutual Reinsurance Company

HENDRICKSON, J.

{¶1} Defendant-appellant, Grinnell Mutual Reinsurance Company (Grinnell), appeals the decision of the Butler County Court of Common Please 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."

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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 heard 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.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/ROD/documents/. Final versions of decisions are also available on the Twelfth District's web site at: http://www.twelfth.courts.state.oh.us/search.asp

H

Court of Appeals of Ohio,
Second District, Montgomery County.

AMERICAN STATES INSURANCE COMPANY,
Appellee,
v.
GUILLERMIN et al.; Kimberly et al., Appellants.[FN*]

FN* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1996), 76 Ohio St.3d 1409, 666 N.E.2d 569.

No. 15259.

Decided Jan. 17, 1996.

Homeowners' insurer brought declaratory judgment action seeking determination that it had no duty to defend or indemnify its insured or her son for liability arising when son's lion escaped from premises and mauled child. The Court of Common Pleas, Montgomery County, entered summary judgment in favor of insurer, and appeal was taken on behalf of injured child. The Court of Appeals, Brogan, P.J., held that: (1) insured's son was not resident relative and thus was not insured under her homeowners' policy; (2) material issue of fact was raised as to whether insured "harbored" lion and thus was personally liable; and (3) off-premises exclusion in policy under which liability coverage did not apply to bodily injury "arising out of a premises" owned by an insured but not insured under the policy did not apply.

Reversed in part and remanded.

Grady, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Judgment 228 ⚷185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
On motion for summary judgment, nonmoving party must produce evidence on any issue for which it bears burden of production at trial once movant meets its burden of establishing through evidentiary material that there is no genuine issue of material fact. Rules Civ.Proc., Rule 56(C).

[2] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Because trial court's determination of summary judgment concerns question of law, appellate court's review is de novo. Rules Civ.Proc., Rule 56(C).

[3] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Insurance 217 ⚷1863

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1863 k. Questions of Law or Fact. Most Cited Cases
(Formerly 217k155.1)
Since interpretation of insurance contract is matter of law, appellate court reviews its terms de novo.

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[4] Insurance 217 ⚷2272

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2272 k. Persons Covered. Most Cited Cases
(Formerly 217k435.36(2))
Plain and ordinary meaning of undefined term "household," as used in homeowners' policy providing coverage for relatives who were residents of insured's household, includes those who dwell under same roof and compose family; social unit composed of those living together in same dwelling; inmates of house collectively; organized family, including servants or attendants, dwelling in house; domestic establishment.

[5] Insurance 217 ⚷2272

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2272 k. Persons Covered. Most Cited Cases
(Formerly 217k435.36(2))
Adult son was not "resident" of his mother's household, so as to be covered as resident relative under her homeowners' policy, notwithstanding fact that he listed his mailing address as mother's address and he stayed with his mother on inconsistent or occasional basis; insured lived with his children and their mother in another town.

[6] Insurance 217 ⚷2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
(Formerly 217k2355, 217k435.36(6))
Term "occurrence," as used in homeowners' policy, meant accident that insurer did not intend or expect.

[7] Insurance 217 ⚷2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
(Formerly 217k2355, 217k435.36(6))
Insured's actions in allegedly harboring wild animal which got loose and mauled child constituted "occurrence" under personal liability coverage in insured's homeowner's policy.

[8] Animals 28 ⚷66.5(2)

28 Animals
28k66 Injuries to Persons
28k66.5 Dogs
28k66.5(2) k. Vicious Propensities and Knowledge Thereof. Most Cited Cases
(Formerly 28k70)
Knowledge of dog's dangerous propensities is prerequisite to liability at common law as owner, keeper, harborer.

[9] Animals 28 ⚷66.1

28 Animals
28k66 Injuries to Persons
28k66.1 k. Duties and Liabilities in General. Most Cited Cases
(Formerly 28k69)

Animals 28 ⚷74(3)

28 Animals
28k66 Injuries to Persons
28k74 Actions
28k74(3) k. Presumptions and Burden of Proof. Most Cited Cases
Since knowledge of wild animal's vicious tendencies is presumed, strict liability is imposed upon owners, keepers or harborers for injuries caused by wild animal; acquiescence to animal's presence on premises is sufficient for harborer's liability to attach.

[10] Insurance 217 ⚷2459

217 Insurance
217XX Coverage--Health and Accident Insurance
217XX(B) Medical Insurance
217k2458 Persons Covered
217k2459 k. In General. Most Cited Cases

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(Formerly 217k467.4(1))
Insured was not entitled to coverage for medical payments for liability arising when wild animal kept by her son escaped from her premises and mauled child; homeowner's policy provision provided coverage if bodily injury was caused by "animal owned by or in the care of an insured," son was not insured under policy, and insured was not owner or keeper of lion.

[11] Judgment 228 ⚷185.3(12)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(12) k. Insurance. Most Cited Cases
Genuine issue of material fact regarding insured's liability as harborer of lion which mauled child precluded summary judgment in homeowners' insurer's favor on issue of coverage; there was evidence from which jury could find that lion belonged to son and that, even if son did not ask permission to keep lion on mother's farm premises, mother was aware of lion's presence by virtue of her weekend visits to premises, and thus that mother permitted or acquiesced in lion's presence.

[12] Insurance 217 ⚷2356

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2353 Homeowners' Liabilities
217k2356 k. Particular Exclusions. Most Cited Cases
(Formerly 217k2278(19), 217k435.36(2))
"Off premises exclusion" in homeowners' policy, under which liability coverage did not apply to bodily injury "arising out of a premises" owned by an insured that was not an insured location under policy, did not preclude liability coverage for insured's alleged liability for harboring her son's lion which mauled child after escaping from her farm, which was not listed as insured location under policy; distinction existed for purposes of causation between negligent personal conduct, such as harboring, and dangerous condition of premises, and exclusion related to condition of premises and not tortious acts committed thereon.

**318 Thomas E. Jenks and W. Benjamin Hood, Dayton, for appellee.

Bruce S. Wallace, Mt. Orab, for the Guillermins.

Carl W. Zugelter and Ronald W. Springman, Jr., Amelia, for appellants, the Kimberlys.

BROGAN, Presiding Judge.

Appellants, Lee John Kimberly, a minor by and through his father and next friend Ronald Kimberly, Sr., Virginia Kimberly, Ronald Kimberly, Jr., a minor by and through his father and next friend Ronald Kimberly, Sr., and Ronald Kimberly, Sr., appeal from a grant of summary judgment by the Montgomery County Court of Common Pleas in favor of American States Insurance Company ("American States"), appellee herein. The trial court awarded summary judgment upon American States' action for declaratory relief, in which the company claimed it was not bound under the terms of its homeowner's policy to extend ***550** coverage or a defense to its insured, Alverda Guillermin ("Alverda"), defendant below.

American States issued a homeowner's policy to Alverda which was effective from December**319 20, 1992 to December 20, 1993. The policy insured Alverda's residence, located at 320 Ashwood in Dayton (the "insured location"). Alverda also owns a fifty-two-acre farm in Brown County, Ohio. The policy did not include the farm within its coverage terms. Although Alverda did not reside on the farm and only visited there intermittently, she permitted her sons, Jerry Guillermin ("Jerry") and Ronald Guillermin ("Ronald"), defendants below, access to the farm. The sons testified that they kept horses and other animals on the farm.

On August 8, 1993, Lee John Kimberly allegedly was attacked and mauled while on property occupied by the Kimberlys by a lion that the appellants claim escaped from Alverda's farm. The Kimberlys filed suit against the Guillermins on September 16, 1993, alleging that, with Alverda's permission and Ronald's assistance, Jerry harbored the animal on the farm. The Kimberlys charged that the Guillermins were negligent for allowing the lion "to remain unattended on the premises without sufficient precautions to prevent [it] from leaving the premises." The Guillermins sought coverage and legal defense under the terms of Alver-

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da's homeowner's policy.

On April 12, 1994, American States sought declaratory judgment in the Montgomery County Court of Common Pleas. The company alleged that it was not obligated to provide either coverage or defense for the Guillermins under the terms of the policy. American States asserted two theories: (1) that Jerry and Ronald were not "insureds"; and (2) that Alverda's farm was not an "insured location." Following discovery, American States and the Kimberlys filed motions for summary judgment and their respective memoranda in opposition to the motions. In addition to their assertion that Jerry and Ronald were "insureds," the Kimberlys also claimed that the policy should cover Alverda's allegedly tortious act of harboring the lion on her property. The trial court determined that neither son was an "insured" under the policy and that the farm was not an "insured location." The court did not address the Kimberlys' claim of coverage based on Alverda's purported harboring of the animal. The court granted American States' motion for summary judgment and denied the Kimberlys' summary judgment motion. From that judgment, the Kimberlys appeal. The Guillermins did not take an appeal from the judgment.

We consolidate the appellants' two assignments of error for our analysis.

"I. The trial court erred as a matter of law in granting American States' motion for summary judgment.

***551** "II. The trial court erred as a matter of law in denying appellants ['] (the Kimberlys[']) motion for summary judgment."

The Kimberlys present two issues for our disposition. First, they argue that Jerry is a resident of his mother's household and, therefore, is an "insured" under the policy. The Kimberlys do not argue on appeal that Ronald is an "insured." Next, they claim the policy should extend coverage to Alverda's allegedly tortious acts. Arising necessarily from their second issue is their argument that the policy exclusion to payment for personal liability or medical treatment for " 'bodily injury' * * * arising out of a premises * * * owned by an 'insured' * * * that is not an 'insured location' " is inapplicable under the facts of this case. The appellants do not challenge the trial court's finding that the farm is not an "insured location."

Before a court may grant summary judgment, the successful party must satisfy a three-pronged test:

"The appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 74, 375 N.E.2d 46, 47. See, also, Civ.R. 56(C).

Because it avoids a trial, summary judgment circumvents the normal litigation process. Therefore, "the burden is strictly upon ****320** the moving party to establish, through the evidentiary material permitted by the rule, that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law." *AAAA Ent., Inc. v. River Place Community Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601.

[1] Once the movant meets its burden, the nonmoving party may not simply rely on the mere allegations of its pleadings to survive a motion for summary judgment, but must set forth specific facts showing there exists a genuine issue for determination at trial. *Savransky v. Cleveland* (1983), 4 Ohio St.3d 118, 119, 4 OBR 364, 365, 447 N.E.2d 98, 99. Moreover, the nonmoving party must produce evidence on any issue for which it bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Brads v. First Baptist Church of Germantown, Ohio* (1993), 89 Ohio App.3d 328, 333, 624 N.E.2d 737, 741, jurisdictional motion overruled (1993), 67 Ohio St.3d 1506, 622 N.E.2d 654. Courts have interpreted *Wing* to mean that the nonmovant must produce evidence on "any issue upon ***552** which the movant meets its initial burden." *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 41, 623 N.E.2d 591, 595, jurisdictional motion overruled (1993), 67 Ohio St.3d 1489, 621 N.E.2d 410. See *Few v. Cobblestone, Inc.* (Oct. 17, 1991), Montgomery App. No. 12490, unreported, 1991 WL 216413.

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[2] Because a trial court's determination of summary judgment concerns a question of law, we apply the same standard as the trial court in our review of its disposition of the motion; in other words, our review is *de novo*. *Children's Med. Ctr. v. Ward* (1993), 87 Ohio App.3d 504, 508, 622 N.E.2d 692, 695, jurisdictional motion overruled (1993), 67 Ohio St.3d 1481, 620 N.E.2d 854. We "accept the evidence properly before [us] and, with respect to the merit issues involved, construe the evidence most strongly in favor of the claims of the party against whom the motion is made." *Buckingham v. Middlestetter* (Mar. 22, 1993), Montgomery App. No. 13575, unreported, 1993 WL 81827. Therefore, our decision, like the trial court's, is founded on the record before us, including the evidence submitted by the parties in support of their respective positions.

[3] Similarly, since the interpretation of an insurance contract is a matter of law, *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684, 685;*Johnson v. Lincoln Natl. Life Ins. Co.* (1990), 69 Ohio App.3d 249, 254, 590 N.E.2d 761, 764, we review its terms *de novo*, *Guman Bros. Farm*, 73 Ohio St.3d at 108, 652 N.E.2d at 685, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286, 287. When construing the provisions of an insurance policy, we are mindful that "[g]enerally, * * * words in a policy must be given their plain and ordinary meaning, and only in situations where the contract is ambiguous and thus susceptible to more than one meaning must the policy language be liberally construed in favor of the claimant who seeks the benefits of coverage." *State Farm Auto. Ins. Co. v. Rose* (1991), 61 Ohio St.3d 528, 531-532, 575 N.E.2d 459, 461, overruled on other grounds by *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, 620 N.E.2d 809. Accord *Leber v. Smith* (1994), 70 Ohio St.3d 548, 557, 639 N.E.2d 1159, 1165;*King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus; *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St.2d 95, 99, 68 O.O.2d 56, 58, 313 N.E.2d 844, 846;*Ohio Farmers Ins. Co. v. Wright* (1969), 17 Ohio St.2d 73, 78, 46 O.O.2d 404, 406, 246 N.E.2d 552, 554.

The concept of strict interpretation applies with "greater force to language that purports to limit or to qualify coverage." *Watkins v. Brown* (1994), 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487, discretionary appeal not allowed in (1995), 71 Ohio St.3d 1458, 644 N.E.2d 1030. "However, the rule of strict construction does not permit a court to change the obvious intent of a provision just to impose coverage." ***553***Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102, certiorari denied (1992), 507 U.S. 987, 113 S.Ct. 1585, 123 L.Ed.2d 152.

****321**[4] Initially, we address the matter of Jerry's status as regards the policy. The policy defines "insured" as "[Alverda] and residents of your household who are * * * your relatives." There is no question but that Jerry is Alverda's son and, therefore, her relative. Thus, the issue is whether Jerry is a "resident[ ] of [her] household." The term "household" is not defined in the policy. The plain and ordinary meaning of this undefined term is " ' * * * those who dwell under the same roof and compose a family: * * * a social unit comprised of those living together in the same dwelling place,' " *Shear v. W. Am. Ins. Co.* (1984), 11 Ohio St.3d 162, 166, 11 OBR 478, 481, 464 N.E.2d 545, 548, quoting Webster's Third New International Dictionary, or, alternatively, " 'the inmates of a house collectively; an organized family, including servants or attendants, dwelling in a house; a domestic establishment,' " *State Farm Fire & Cas. Co. v. Davidson* (1993), 87 Ohio App.3d 101, 106, 621 N.E.2d 887, 891, quoting the Oxford English Dictionary, motion to certify record overruled (1993), 67 Ohio St.3d 1438, 617 N.E.2d 688. Similarly, the phrase "resident of your household" has been defined as referring to "one who lives in the home of the named insured for a period of some duration or regularity, although not necessarily there permanently, but excludes a temporary or transient visitor." *Farmers Ins. of Columbus, Inc. v. Taylor* (1987), 39 Ohio App.3d 68, 528 N.E.2d 968, syllabus. The *Shear* court also stressed the nontemporary nature of the domestic living arrangements as a factor when determining if relatives are members of the same household. *Shear*, 11 Ohio St.3d at 166, 11 OBR at 481, 464 N.E.2d at 548.

[5] The evidence presented by the appellants fails to establish a genuine issue of material fact regarding Jerry's status as an "insured." Viewing the evidence most favorably for the appellants, we conclude that he is not covered by the policy. He testified at his deposition that he was born in 1951. Since 1993, he has lived in Arcanum with his children and their mother. However, he lists his mailing address as 320 Ashwood in Dayton-his mother's address and the policy's "in-

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sured premises." Jerry has stayed with his mother at the Ashwood residence on an "inconsistent" or "occasional" basis: he resided with his mother continuously for a month at some time between October 1993 and October 1994; he stayed with Alverda for two days between August and October 1994; he moved in and out of her home up to six times since he was eighteen-one stay could have been as long as ten months. Jerry kept bedroom furniture and some clothes at the Ashwood residence. Furthermore, he performs remodeling work and other chores at Alverda's residence, "checks on" her at different times, and regularly stops to pick up his mail. Nevertheless, he stated: "Ashwood is a mailing ***554** address. That's my mother's. I'm not actually living there. I'm living in Arcanum."

The appellants argue that this evidence is sufficient to raise a material question regarding Jerry's status as a resident of Alverda's household or, at the very least, establishes an issue of dual residency. We disagree. Although courts will consider other factors when determining whether an individual is a resident of the insured household, including mail delivery and storage of belongings, *Davidson, supra,* and the layout and use of the residential dwelling, *Renwick v. Lightning Rod Mut. Ins. Co.* (1991), 72 Ohio App.3d 708, 710-711, 595 N.E.2d 1007, 1008-1010, the primary consideration is the nontemporary nature, *Shear, supra; Taylor, supra; Napier v. Banks* (1969), 19 Ohio App.2d 152, 156, 48 O.O.2d 263, 265, 250 N.E.2d 417, 419, or regularity of the living arrangements, *Bunch v. Nationwide Mut. Ins. Co.* (Jan. 11, 1983), Montgomery App. No. 7897, unreported 1983 WL 5014.

The appellants' evidence does not establish a genuine issue of an intent to stay at the insured premises for more than a temporary period. Although Jerry received his mail at the Ashwood address, he testified that this was for his convenience so that he would not receive mail at more than one location. The appellants did not present any evidence that Jerry's one-month stay with his mother between October 1993 and October 1994 was intended to be anything other than part of a pattern of "inconsistent," "occasional," or irregular visits. Furthermore, the Kimberlys did not show that this period was effective on ****322** the date of the mauling, let alone within the applicable policy period; the same may be said for his extended ten-month stay, which occurred sometime after his eighteenth birthday. We do not find the storage of some clothes or furniture at his mother's residence, alone, persuasive on this issue. Moreover, Jerry's statement that he lives in Arcanum is compelling evidence that he did not intend these visits, at least those beginning in 1993, to be more than temporary arrangements. Therefore, we conclude that the appellants failed to raise a genuine issue of material fact on this matter.

The appellants maintain that this evidence is sufficient to survive summary judgment on this issue because it raises a question of Jerry's dual residency. Dual residency was recognized in *Taylor, supra,* 39 Ohio App.3d 68, 70-71, 528 N.E.2d 968, 969-970, but the clear majority of cases applying this principle involves "minor children of divorced parents." *Still v. Fox* (1994), 67 Ohio Misc.2d 67, 69, 644 N.E.2d 1133, 1135.

"After reviewing Ohio caselaw in this area, we have discovered that two prominent factual elements appear in a majority of the cases in which a minor is found to be a dual resident of separate households: (1) the minor has divorced parents with whom the minor alternately resides under a custody or visitation ***555** arrangement; and (2) the minor's dual residency generally involves a consistent living pattern between the two households which exists for a period of some duration or regularity." *Brooks v. Progressive Specialty Ins. Co.* (July 20, 1994), Summit App. No. 16639, unreported, 1994 WL 376768, discretionary appeal not allowed in (1994), 71 Ohio St.3d 1423, 642 N.E.2d 388. See, also, *Snedegar v. Midwestern Indemn. Co.* (1988), 44 Ohio App.3d 64, 541 N.E.2d 90, motion to certify record overruled (1988), 37 Ohio St.3d 712, 532 N.E.2d 142;*Taylor, supra; United Ohio Ins. Co. v. Bolin* (Apr. 11, 1989), Miami App. No. 88 CA 21, unreported, 1989 WL 35885, jurisdictional motion overruled (1989), 46 Ohio St.3d 705, 545 N.E.2d 1283;*Bolin v. State Auto. Mut. Ins. Co.* (Mar. 25, 1988), Miami App. No. 87 CA 46, unreported, 1988 WL 35291.

The appellants cite *Ziegler v. Workman* (Mar. 30, 1994), Muskingum App. No. 93-28, unreported, 1994 WL 140755, for the proposition that dual residency may apply to emancipated children. In *Ziegler,* the court affirmed a summary judgment which found that the emancipated son of the insured was covered by the insured's automobile insurance policy. The court held that the son established dual residency when he testi-

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fied that he resided in his parents' household twenty-five percent of the time, and at his girlfriend's residence seventy-five percent of the time. The son also received his mail at his parents' home. The court reasoned that the emancipated status of the son was "a distinction without a difference" because the son was a relative of the insured, and the policy language did not "restrict coverage to exclusive residents [of the insured's household], or * * * allow dual residency only concerning minors." *Id.* We need not reach the issue of dual residency for emancipated children because, for the reasons previously stated, we find that the appellants did not produce evidence of a regular pattern of residency approximating that found in *Ziegler.*

We turn now to the issue which the trial court declined to address: whether the policy extends coverage to Alverda based on her allegedly tortious conduct. Section Two of the policy delineates the liability coverage ("Coverage E") provided by American States. The policy extends personal liability coverage and defense "[i]f a claim is made or a suit is brought against an 'insured' for damages because of 'personal injury' * * * caused by an 'occurrence' to which this coverage applies[.]" There is no question but that Alverda is the "insured." The policy defines "personal injury" as including "bodily injury," which it designates as "bodily harm, sickness or disease, including required care, loss of services and death that results." The policy defines "occurrence" as "an accident * * * which results, during the policy period, in * * * personal injury[.]" This policy section also provides medical payments ("Coverage F") "to a person off the 'insured location', if the 'bodily injury' * * * is caused by an animal owned by or in the care of an 'insured'."

****323*556**[6][7] Generally, an occurrence which gives rise to liability coverage is construed as an event that occurs outside the expectation of the insured:

"[A]n 'accident' is an event proceeding from an unexpected happening or unknown cause without design and not in the usual course of things; an event that takes place without one's expectation; an undesigned, sudden, and unexpected event; an event which proceeds from an unknown cause or is an unusual effect of a known cause and, therefore, unexpected." *Toronto v. Westfield Cos.* (Sept. 18, 1995), Jefferson App. No. 94-J-46, unreported, 1995 WL 555672.

"[T]his court finds that the word 'occurrence,' defined as 'an accident' was intended to mean just that-an unexpected, unforeseeable event." *Randolf v. Grange Mut. Cas. Co.* (1979), 57 Ohio St.2d 25, 28-29, 11 O.O.3d 110, 112, 385 N.E.2d 1305, 1307. Indeed, the typical policy definition of an "occurrence" includes terms that indicate that the "accident * * * results in injury or damage which the insured did not intend or expect." *Hybud Equip. Corp., supra,* 64 Ohio St.3d at 666, 597 N.E.2d at 1102. Although the American States' policy definition is less extensive, we construe "occurrence" here in the same fashion: an accident that the insured did not intend or expect. If Alverda harbored the lion, we conclude that her actions would constitute an "occurrence" according to the policy provisions.

For the Kimberlys to survive summary judgment, we must find that they have raised a genuine issue of material fact on the question of whether the policy extends coverage to its insured upon the allegations of this unfortunate incident. See *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78, 80, 23 OBR 208, 209, 491 N.E.2d 688, 690 (insurer has duty to defend when allegations of complaint bring action within policy coverage). We believe this entails two separate analyses: (1) whether, based on the evidence presented by the appellants, a genuine issue is raised regarding Alverda's liability for the lion attack; and, (2) if so, whether as a matter of law, any policy exclusion relieves American States of coverage.

If an issue exists as to Alverda's potential liability, it must arise upon a showing that she was a harborer of the lion, which the Kimberlys alleged her to be in their underlying complaint. At common law, a harborer of "a wild animal * * * is subject to the same liability as if he were in possession of it." 3 Restatement of the Law 2d, Torts (1977) 24, Section 514. A "harborer" of an animal is distinguished from an "owner" or a "keeper" because " '[i]n determining whether a person is a "harborer" * * * the focus shifts from possession and control over the [animal] to possession and control of the premises where the [animal] lives.' " *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25, 608 N.E.2d 809, 812, quoting *Godsey v. Franz* (Mar. 13, 1992), Williams App. No. 91WM000008, unreported, 1992 WL 48532, jurisdictional motion overruled ***557**(1992), 64 Ohio St.3d 1443, 596 N.E.2d 473. "Thus, a harborer is one who has possession and control of the premises where the [animal] lives, and silently acquiesces to the [animal's] presence." *Id.,*

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citing *Sengel v. Maddox* (C.P.1945), 31 O.O. 201, 16 Ohio Supp. 137.

[8][9] We are aware that Comment *a* to the Restatement may be read to preclude liability as a harborer in some situations. The comment points out that, typically, liability turns on whether the animal is brought into the harborer's household. See 3 Restatement of the Law 2d, Torts (1977) 24-25, Section 514, Comment *a*. In this instance, we do not follow that rationale. Although Section 514 applies to harborers of wild or "abnormally dangerous domestic animal[s]," the comment raises hypothetical situations involving dogs. At common law, knowledge of a dog's dangerous propensities is a prerequisite to liability as an owner, keeper, or harborer. See *McAuliffe v. W. States Import Co.* (1995), 72 Ohio St.3d 534, 537, 651 N.E.2d 957, 959;*Bora v. Kerchelich* (1983), 2 Ohio St.3d 146, 147, 2 OBR 692, 692, 443 N.E.2d 509, 510;*Hayes v. Smith* (1900), 62 Ohio St. 161, 56 N.E. 879, paragraph one of the syllabus; *Flint*, 80 Ohio App.3d at 26, 608 N.E.2d at 812. Where wild animals, such as lions, are involved, the common law imposes strict liability upon owners, keepers, or harborers, following *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330. ****324***Morrison v. Nolan Amusement Co.* (May 1, 1985), Muskingum App. No. CA-84-31, unreported, 1985 WL 9216 (Turpin, J., dissenting). "No member of such a species, however domesticated, can ever be regarded as safe, and liability does not rest upon any experience with the particular animal." Prosser & Keeton on Torts (5 Ed.1984) 542, Section 76. Therefore, since knowledge of a wild animal's vicious tendencies is presumed, nothing is added by requiring a harborer to gain personal experience with the animal by bringing it into the harborer's household. Mere acquiescence to the animal's presence on the premises is sufficient for a harborer's liability to attach. Cf. *Hayes*, 62 Ohio St. at 183, 56 N.E. at 882 ("One may thus negligently keep and harbor a vicious dog, knowing him to be such, without being the owner of the animal; and he may thus keep and harbor a vicious dog without even owning or controlling the premises where he may be kept, and he may be chargeable with notice of the viciousness of the dog through his neglect to take notice of its vicious habits.").

[10] First of all, we conclude that Alverda is not entitled to coverage for medical payments pursuant to Section Two of the policy. The policy terms provide medical payments "if the 'bodily injury' * * * is caused by an animal owned by or in the care of an 'insured.' " The Kimberlys complaint charged that Alverda "allowed [Jerry and Ronald] to keep and harbor a wild lion on the premises and failed to take any action to remove the lion from said premises." The Kimberlys do not assert, nor do they present any evidence to show, that ***558** Alverda was an owner or keeper of the lion. Coupled with our finding that Jerry is not an "insured," there is no question but that the lion was not owned or cared for by an insured. The trial court providently granted summary judgment on this issue.

[11] However, we find that the appellants have presented a genuine issue of material fact regarding Alverda's liability as a harborer. The evidence, construed in favor of the Kimberlys, shows that Alverda acquired the Brown County farm in 1978; thirty-seven acres of the land are farmed by a tenant farmer; the farm property is improved with a residence, barn, and some outbuildings; Alverda visits the property regularly; Alverda permitted Jerry and Ronald, at their request, to keep horses there; Jerry kept one lion and two tigers in chain-link cages on the property; and Jerry built five cages, measuring twenty-five by fifty by twelve feet to house the cats.

Alverda testified that she had no independent knowledge of the wild animals that Jerry owned and kept on the farm property:

"[THOMAS JENKS, Plaintiff's Counsel]:

" * * * Jerry had some exotic type animals down there; some tigers and a lion; is that your understanding?

"[ALVERDA]: I understand he did, but I never was down there enough actually to know what he had.

"Q. I take it you never saw them?

"A. No.

"Q. They were not your animals?

"A. No, they weren't.

"Q. Those were Jerry's tigers and Jerry's lion?

"A. Whatever he had there were his.

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"Q. And they were not your animals?

"A. No.

"Q. Did you have any interest in those animals of a financial way?

"A. No, because I didn't know exactly what he had down there.

"Q. Did you have any control over those animals?

"A. No."

She also testified that Jerry did not ask her permission to keep the cats on her property, as he had with his horse; Jerry originally told her the cages were built ***559** to house ostriches; she saw the support posts for the cages, but never saw the cages themselves; and she never heard any unusual noises.

In response, the Kimberlys submitted affidavits from neighbors of Alverda's farm. The neighbors testified that Alverda visited her farm "regularly almost every weekend since before 1992" and that they were aware ****325** of the presence of lions and tigers on the premises because (1) for two years prior to the attack, they could hear the cats from their residence; and (2) one neighbor was on Alverda's farm approximately three months prior to the mauling and was able to "observe large cats," although he was unable because of his distance from the cages, to determine whether the cats were lions or tigers.

Jerry testified that his lion did not attack Lee John Kimberly. In addition to Jerry's assertion that there are other "cat compounds" in the vicinity of Alverda's farm, he claimed that he had no wild cats at the time of the attack. He stated that his lion died more than a year prior to the incident and that his tigers died three months before the attack. The appellants presented affidavits of the Brown County Sheriff and a deputy sheriff. The officers testified that they responded to the report of the mauling; while the deputy was at the scene, Ronald arrived with a tranquilizer gun and "stated that it was his brother's lion"; when Ronald's attempt to tranquilize the lion failed, the officers killed it; Ronald became "irate" and "hostile"; the officers visited Alverda's farm one or two days later; the deputy observed the caged area, saw a dead chicken which had been there "a day or so" and "quite a bit of fur around the cage"; the lion the officers killed "had most of its mane gone"; the deputy believed an animal or animals had been in the cage within the prior forty-eight hours; both officers saw a "hole" or "separation" in the caged area, "about the width of a lion's body"; the cages were located between one hundred and three hundred feet behind the house; and there was a clear view of the cages from the house.

We conclude that this evidence is sufficient to raise a genuine issue of material fact regarding Alverda's liability as a harborer of the lion. Our review of the evidence indicates that reasonable minds could differ upon whether Alverda permitted or acquiesced in the lion's presence on her farm. We also find that the Kimberlys have raised a triable question on the issue of whose lion attacked the victim.

[12] The key remaining issue is whether the policy's coverage exclusion of liability coverage for " 'bodily injury' * * * arising out of a premises * * * owned by an 'insured' * * * that is not an 'insured location' " is applicable to deny coverage based upon these facts. The appellants argue that the exclusionary language should be interpreted to require a direct, causal link between the injury and some condition upon the land before American States can deny coverage. The Kimberlys claim the exclusion is not effective because the injury can be ***560** attributed directly to Alverda's alleged negligence, and not to any condition upon the land. The appellee urges us to construe the provision as being effective because of a direct, causal connection between the injury and the alleged harboring of the lion upon, and the lion's escape from, the farm property; in other words, the injury arose out of the premises because that is where Jerry purportedly caged the lion. Furthermore, American States argues that the risks associated with ownership of a farm sixty to seventy miles distant from the insured premises could not have been within the bargain agreed to by the parties.

Both sides have directed us to cases, primarily from our sister jurisdictions, in support of their positions. While there are no Ohio cases on all fours, the Cuyahoga County Court of Appeals construed a somewhat analogous policy exclusion in *Nationwide Mut. Fire Ins. Co. v. Turner* (1986), 29 Ohio App.3d 73, 29 OBR 83, 503 N.E.2d 212. *Turner* involved a

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wrongful death action filed against the estate of the insured. The court of appeals reversed a finding of summary judgment in favor of the insurer because it found, *inter alia,* that the allegedly tortious conduct by the insured arose out of the " 'ownership, maintenance or use of the real * * * property.' " *Id.* at 77, 29 OBR at 87, 503 N.E.2d at 217. " 'Arising out of the ownership, maintenance or use of the real * * * property' generally means '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." *Id.* at paragraph four of the syllabus. See ****326***Nationwide Ins. Co. v. Auto-Owners Mut. Ins. Co.* (1987), 37 Ohio App.3d 199, 525 N.E.2d 508, at paragraph two of the syllabus, motion to certify overruled (Sept. 2, 1987), No. 87-941, unreported (causal connection, not proximate cause, must exist between accident or injury and "ownership, maintenance or use" of insured's vehicle, when construing automobile insurance policy covering damages "arising out of the ownership, maintenance or use" of insured's vehicle).

The Kimberlys rely primarily on *Lititz Mut. Ins. Co. v. Branch* (Mo.App.1977), 561 S.W.2d 371, in support of their interpretation of the exclusionary language. In *Branch,* the insured's dog bit a girl while it was tethered on the insured's business property-property that was not covered by the terms of the insured's homeowner's policy. Although the policy provided liability coverage for an "occurrence," the insurer won a declaratory judgment in the trial court based on a policy exclusion for "bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any insured." *Id.* at 372, fn. 1. The appellate court reversed, finding 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 moveable property which may be located on the property at a ***561** 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.

"It cannot therefore be said that a dog bite arises out of-originates from, grows out of, or flows from-the premises. That it occurs upon the premises does not establish a causal connection between the bite and the premises. We find that the language used does not contemplate that the exclusion applies to liability arising from a dog bite occurring on the * * * business property. * * * " *Id.* at 373.

The court found that the policy provided two types of liability coverage: "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." *Id.* at 374. The court noted the policy limited the geographic scope of the former coverage, but did not so limit the latter coverage:

" * * * 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. Liability for injuries caused by an animal owned by an insured arises from the insured's personal tortious conduct in harboring a vicious animal, not from any condition of the premises upon which the animal may be located. * * * " *Id.* Accord *MFA Mut. Ins. Co. v. Nye* (Mo.App.1980), 612 S.W.2d 2.

In *Lanoue v. Fireman's Fund Am. Ins. Cos.* (Minn.1979), 278 N.W.2d 49, a minor employee of the insured's grocery store broke into the insured's locked office and took one of several bottles of whiskey that the insured had received as Christmas gifts from suppliers, but had not yet taken home. Later that night, another minor drank some of the stolen liquor and was involved in a subsequent traffic accident. Neither Lanoue's business liability insurer nor the provider of his homeowner's policy agreed to defend against the dram shop complaint filed against him. Fireman's Fund claimed an exception under its homeowner's policy for "bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any insured." *Id.* at 53. The Minnesota Supreme Court reversed a declaratory judgment in favor of Fireman's Fund based, in part, upon its construction of Fireman's Fund's "other premises" exclusion:

"This court * * * has considered the 'arising out of' language in other contexts and concluded that causation is implied. * * * Thus, the premises must bear some causal relationship to the liability. Such a relationship is apparent when a claimant trips over improperly maintained steps. In this case, however, causation is more difficult to perceive. The fact that something occurs at a place is not sufficient by itself to

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imply causation as to that place. It is more appropriate ***562** under the facts of this case to focus on the personal property-the whiskey-as being ****327** allegedly carelessly possessed by Lanoue at his office. Thus the liability is causally related to the whiskey, not the premises involved." (Citations omitted.) *Id.* at 54.

The Kimberlys also cite *Eyler v. Nationwide Mut. Fire Ins. Co.* (Ky.1992), 824 S.W.2d 855. *Eyler* involved farm property upon which the owner stored more than a million used vehicle tires. The owner conveyed the property to the insured, who attempted to clean the property by hiring an individual to roll the tires around a building and down a hill on the property. During the process, Eyler was struck and sustained serious injuries. She sued the insured. The insured sought coverage and defense from Nationwide through his homeowner's policy, but the insurer declined. Subsequently, the insured assigned his rights to Eyler, who recovered judgment against Nationwide. The court of appeals reversed, finding that an exclusion "for an occurrence 'arising out of premises owned or rented to an insured but not an insured location,' " defeated coverage. *Id.* at 857. The Kentucky Supreme Court reversed, holding that "this [exclusion] suggests the necessity for a causal connection between the premises and the injury. Ordinarily, 'arising out of' does not mean merely occurring on or slightly connected with but connotes the need for a direct consequence or responsible condition. As we view it, to satisfy the 'arising out of' exclusion in the policy, it would be necessary to show that the premises, apart from the insured's conduct thereon, was causally related to the occurrence. While most of the endeavors of mankind occur upon the surface of the earth and without it, harm could not occur, the law nevertheless imposes liability for negligent personal conduct upon the recognition that, in most cases, human behavior is the primary cause of the harm and the condition of the earth only secondary." *Id.*

The court agreed with *Branch* that the "dichotomy of causation between negligent personal conduct and dangerous condition of the premises" was dispositive. *Id.*

The appellee counters by citing a trio of cases in support of its construction of its "off premises" exclusion. In *Natl. Farmers Union Prop. & Cas. Co. v. W. Cas. & Sur. Co.* (Utah 1978), 577 P.2d 961, a horse escaped from a sheriff's department's mounted patrol drill grounds when a fence gate was left open by the patrol captain. The horse wandered onto a highway and was struck by a vehicle, causing serious injury to a passenger in the vehicle. The department was covered by the plaintiff insurer's liability coverage policy, which named the captain, as the executive officer, as the insured. The captain also carried a homeowner's policy, issued by the defendant insurer. The plaintiff settled and sought contribution from the defendant. The defendant refused contribution, and relied on a homeowner's policy exclusion for "bodily injury or property damage ***563** arising out of any premises, other than an insured premises, owned, rented, or controlled by any insured." *Id.* at 962. Affirming summary judgment for the defendant, the Utah Supreme Court held:

"The active force leading to injury in plaintiff's complaint was an escaping horse. The term 'escape' connotes a removal from a geographical location caused by a loss of control by the one responsible for confinement. To confine the animal to the drill field, there was an enclosure around the uninsured premises. Captain Story's alleged negligence was his failure to close the gate and thus prevent the escape. The alleged acts arose from, originated, and were connected with the uninsured premises, and the exclusion in his homeowner's policy was applicable." *Id.* at 964.

The Minnesota Supreme Court, in *Arndt v. Am. Family Ins. Co.* (Minn.1986), 394 N.W.2d 791, found the insurer was entitled to summary judgment based on an exclusion in its "farm family liability policy." The plaintiff was injured while helping the insured unload frozen cornstalks from a "chopper box." The farm property upon which he was injured was not covered under the terms of the liability policy. The insurer claimed an exclusion for "any bodily injury or property damages: * * * arising out of the ownership, use or control by or rental to any insured of any premises, other than insured premises." *Id.* at 794. The trial court granted summary judgment for the insurer, but the court of appeals reversed, based upon *Lanoue, supra.*****328** The Minnesota Supreme Court reversed, and distinguished *Lanoue:*

"Applying *Lanoue,* the Court of Appeals found that Jeffrey Arndt's injuries arose out of Ronald Kieffer's negligent use of the chopper box, rather than his ownership, use, or control of the property. *Lanoue* is factually distinguishable, however. In *Lanoue,* we did

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not look to the causal relation between Lanoue's liability and his ownership, use or control of the superette because the exclusion did not contain those words. The court instead focused on whether a causal relation existed between Lanoue's liability and the premises to satisfy the terms 'arising out of the premises.' In contrast, exclusion 1(d) applies to injuries arising out of Kieffer's *acts* of ownership, use or control of uninsured premises. It is clear that defendant would not have been negligently using the chopper box on New Year's Day but for his desire to provide bedding for the barn located on the uninsured * * * property. The task of providing bedding for the barn is a part of Kieffer's ownership and use of the * * * property. We conclude that a causal relation exists between Kieffer's liability and his ownership, use and control of the uninsured premises, and that exclusion 1(d) therefore bars recovery against American." (Emphasis *sic.*) *Id.* at 794-795.

The appellee also relies on a case cited by the *Arndt* court: *St. Paul Fire & Marine Ins. Co. v. Ins. Co. of N. Am.* (W.D.Va.1980), 501 F.Supp. 136. Insurance ***564** Company of North America ("INA") issued a liability policy to the joint owners of vacation property, with a liability limit of one hundred thousand dollars. INA also issued separate homeowner's policies on the owners' respective residences. St. Paul was the excess insurer on the jointly owned property. The owners burned an outbuilding on the vacation property to remove it. The fire spread to the property of adjoining landowners and caused a quarter-million dollars in damage. INA paid to its limits under the vacation property policy, and St. Paul paid the excess. St. Paul sought indemnification from INA under the insureds' homeowner's policies, claiming that an exception for "bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any insured * * * " did not apply. *Id.* at 138. The court disagreed, and found that the exception barred indemnification.

"Without defining its outer perimeter, the phrase is certainly broad enough to encompass a fire which spreads from a building on the premises to adjoining land. Accordingly, the insureds' liability *arose out* of their * * * premises. Second, the court finds St. Paul's suggested interpretation of the phrase 'arising out of' to be unreasonable. St. Paul argues that it was the insureds' negligence which led to their liability and not some condition of the premises. Obviously, except in cases of strict liability, liability has to be predicated upon a violation of a duty or standard of care. St. Paul must mean, therefore, that a condition of the premises which has resulted from negligence must form the basis of the insureds' liability for the exclusion to apply. That interpretation, however, reads a term into the exclusion not put there by the insurer. Had INA intended to exclude only bodily injury or property damage resulting from a *condition* of the premises, it could have so stated. Instead, INA used the more encompassing phrase-'arising out of,' and the court is constrained to give the phrase its established meaning.

" * * *

"Contrary to St. Paul's major premise, the facts of the present case do establish a causal nexus between the premises and the insureds' negligence giving rise to liability. There would have been no fire but for the building which the insureds desired to remove. Accordingly, the insureds' liability resulting from the fire arose out of their * * * premises." (Emphasis *sic*). *Id.* at 139.

American States finds support in these cases for its claim that, if there had been no farm property, there would have been no lion, no escape, and no injury to Lee John Kimberly. Hence, the appellee claims, the injury arose out of the property and the exclusion applies.

Appellee attempts to distinguish *Branch* and *Eyler, supra.* American States asserts that the key difference in *Branch* is that the ****329** dog bite occurred on the uninsured premises. According to the appellee, if the dog had escaped from the ***565** premises, "any ensuing damages would have had a causal connection to the uninsured premises" and the "off premises" exclusion would have applied. American States argues that *Eyler* is inapposite because "the premises had nothing to do with the loss; rather, the loss had its sole roots in the carelessness of the employee and the manner in which he rolled the tires down the hill."

We are persuaded that the appellants' position is the proper one in determining the construction of this exception. We are mindful that, as a corollary to the premise that ambiguous insurance contract language is interpreted in favor of the insured, "in construing exceptions, 'a general presumption arises to the effect that that which is not clearly excluded from the oper-

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ation of [the] contract is included' in its operation." *Weaver v. Motorists Mut. Ins. Co.* (1989), 62 Ohio App.3d 836, 839, 577 N.E.2d 703, 705, citing *Home Indemn. Co. v. Plymouth* (1945), 146 Ohio St. 96, 32 O.O. 30, 64 N.E.2d 248, at paragraph two of the syllabus, motion to certify record overruled (1989), 45 Ohio St.3d 711, 545 N.E.2d 906. 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" spoken of by the *Eyler* court, *supra,* 824 S.W.2d at 857. These jurisdictions believe that the "key factor" determinative of the applicability of this exclusion "relates to the *condition* of the uninsured premises and not to tortious acts committed thereon." (Emphasis *sic.*) *Marshall v. Fair* (1992), 187 W.Va. 109, 112, 416 S.E.2d 67, 70. See, *e.g., Sea Ins. Co., Ltd. v. Westchester Fire Ins. Co.* (S.D.N.Y.1994), 849 F.Supp. 221, affirmed (C.A.2, 1995), 51 F.3d 22;*Safeco Ins. Co. of Am. v. Hale* (Cal.App.1983), 140 Cal.App.3d 347, 189 Cal.Rptr. 463;*Hanson v. Gen. Acc. Fire & Life Ins. Corp., Ltd.* (Fla.Dist.App.1984), 450 So.2d 1260;*Economy Fire & Cas. Co. v. Green* (1985), 139 Ill.App.3d 147, 93 Ill.Dec. 656, 487 N.E.2d 100;*Kitchens v. Brown* (La.App.1989), 545 So.2d 1310;*Hingham Mut. Fire Ins. Co. v. Heroux* (R.I.1988), 549 A.2d 265;*Marshall, supra; Newhouse v. Laidig, Inc.* (App.1988), 145 Wis.2d 236, 426 N.W.2d 88.

The Kimberlys allege that Alverda negligently harbored Jerry's lion. This assertion does not implicate any condition upon the land as a direct, causal link to the injury; rather, it looks to Alverda's alleged tortious conduct in not taking adequate precautions to prevent the lion's escape. We agree with the *Branch* court's comment that, had American States desired to limit the geographic scope of its coverage for personal tortious conduct, it expressly could have done so. In this case, as in *Branch,* the insurer did not insert any such limiting language.

The cases offered in support by American States do not persuade us. The court in *Natl. Farmers Union Prop. & Cas. Co., supra,* noted that the horse's escape was caused by the captain's negligence in failing to confine the animal, but then held that the escape arose from the premises. We simply disagree with the ***566** court's integration of personal tortious conduct and conditions upon the premises upon the facts of that case. As the *Arndt* court itself mentioned, the exclusionary language in that case differs from the terms at issue here, in that Alverda's policy does not mention the use of the property; we conclude that the *Lanoue* case provides a closer analogy. The courts in *Marshall* and *Newhouse* considered the decision in *St. Paul Fire & Marine Ins. Co., supra,* to be "aberrational and * * * 'inconsistent' " with strict interpretation of exclusionary language against the insurer. *Marshall, supra,* 187 W.Va. at 114, 416 S.E.2d at 72, quoting *Newhouse, supra,* 145 Wis.2d at 241, 426 N.W.2d at 91. We agree and reject the result in *St. Paul Fire & Marine Ins. Co.*[FN1] Therefore, we hold that the exclusion of coverage for " 'bodily injury' * * * arising out of a premises * * * owned by an 'insured'****330** * * * that is not an 'insured location' " refers to the condition of the uninsured premises and does not exclude coverage for the insured's alleged tortious acts on the uninsured premises.

FN1. The district court in *St. Paul Fire & Marine Ins. Co., supra,* implied that it might have held the exclusion ineffective had it been faced with an issue of strict liability. See *id.,* 501 F.Supp. at 139. We note that, although an issue of Alverda's strict liability as a harborer might have been raised by the Kimberlys in their underlying complaint, they chose to limit their theories of liability to negligence, gross negligence and/or wanton conduct.

Because the Kimberlys have raised a genuine issue of material fact regarding Alverda's status as a harborer of the lion, and because we find that American States' "off premises" exclusion does not apply as a matter of law, we sustain the appellants' first assignment of error in part. We conclude that the trial court erred when it granted summary judgment in favor of American States on the issue of personal liability coverage but properly granted summary judgment for American States on the issue of medical coverage. We overrule the Kimberlys' second assignment of error, however, because triable questions remain on the issue of Alverda's alleged harboring of the lion. We conclude that the trial court did not err when it denied summary judgment for the Kimberlys.

Therefore, we reverse the judgment of the trial court in part and remand this case for further proceedings not inconsistent with this opinion.

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Judgment accordingly.

FAIN, J., concurs.
GRADY, J., concurs in part and dissents in part.GRADY, Justice, concurring and dissenting in part.
I respectfully dissent from the decision of the majority sustaining the second assignment of error. I would affirm the summary judgment for appellee ***567** American States Insurance Company because its policy with appellant Alverda Guillermin creates no coverage for Guillermin with respect to the claims alleged.

A policy of liability insurance imposes a duty on the insurer to defend and indemnify the insured against claims of third persons for injuries and losses that arise out of an insured risk, occurrence of which creates potential legal liability for the insured. The insurer's duty of "coverage" is therefore determined in the first instance by the occurrence of a risk identified in the policy, not by the potential liability of the insured resulting from it. See 43 American Jurisprudence 2d (1982), Insurance, Section 703.

Section II of the policy before us provides coverage for claims against an insured for personal injury or property damage and for necessary medical expenses caused by an occurrence to which the coverage applies. The Exclusions Clause within that Section states:

"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 definitions section of the policy states that " 'insured location' means * * * e. vacant land, other than farm land, owned by or rented to an 'insured'."

Whether an injury and the claims of legal liability it creates "arise out of" a location is determined by the causal connection between the property and the injury alleged. *Nationwide Mut. Fire Ins. Co. v. Turner* (1986), 29 Ohio App.3d 73, 29 OBR 83, 503 N.E.2d 212. The test is functional, therefore, and does not involve a concept of fault, though fault is necessarily involved in the negligent act or omission from which the landowner's legal liability results. With respect to the occurrence that triggers the duty of coverage, therefore, the conduct of the insured is irrelevant. The only relevant inquiry is whether the chain of events resulting in the injury alleged was unbroken by the intervention of any event unrelated to the land or its particular use.

According to the allegations involved in this claim, Alverda Guillermin was negligent in allowing a lion to be kept on her land without taking adequate precautions against its escape. She is potentially liable for the injuries which Lee John Kimberley suffered as a proximate result, whether that liability results from a hazardous condition on the land or her tortious acts or omissions. In either event, however, American States has no duty of coverage under the policy because ****331** Lee John Kimberly's injuries are the direct result of an "occurrence" arising out of farm land for which coverage is expressly excluded under the terms of the policy.

***568** I would overrule the second assignment of error on the foregoing analysis. I concur with Judge Brogan's decision overruling the first assignment.

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