

ORIGINAL

IN THE SUPREME COURT OF OHIO

GRINNELL MUTUAL REINSURANCE
COMPANY,

Defendant-Appellant

Supreme Court Case No. 09-2214

vs.

WESTFIELD INSURANCE COMPANY,

Plaintiff-Appellee

On appeal from the Butler County
Court of Appeals, Twelfth Appellate
District

and

TERRELL WHICKER, a minor, and VINCE
AND TARA WHICKER, *et al*,

Defendants-Appellees

Court of Appeals Case Nos.
CA 2009 05 134 and
CA 2009 06 157

and

MICHAEL AND MARILYN HUNTER,

Defendants-Appellees

MEMORANDUM IN OPPOSITION OF APPELLEE WESTFIELD INSURANCE
COMPANY TO JURISDICTION

James H. Ledman (0023356)
jhl@isaacbrant.com
J. Stephen Teetor (0023355)
jst@isaacbrant.com
ISAAC, BRANT, LEDMAN & TEETOR LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
(614) 221-2121 (phone)
(614) 365-9516 (fax)
Attorneys for Plaintiff-Appellee Westfield
Insurance Company

James J. Englert (0051217)
jenglert@rendigs.com
Lynne M. Longtin (0071136)
llongtin@rendigs.com
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202-3688
(513) 381-9200 (phone)
(513) 381-9206 (fax)
Attorneys for Defendant-Appellant Grinnell
Mutual Reinsurance Company

FILED
JAN 08 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Daniel J. Temming (0030364)

dtemming@rkpt.com

Jarrold M. Mohler (0072519)

jmohler@rkpt.com

ROBBINS, KELLY, PATTERSON & TUCKER

7 West Seventh Street, Suite 1400

Cincinnati, OH 45202

(513) 721-3330 (phone)

(513) 721-5001 (fax)

Attorneys for Defendants-Appellees Terrell Whicker,
Vince Whicker, and Tara Whicker

Steven A. Tooman (0066988)

tooman@mfitton.com

MILLIKIN & FITTON LAW FIRM

6900 Tylersville Road, Suite B

Mason, OH 45040

(513) 336-6363 (phone)

(513) 336-9411 (fax)

Attorney for Defendants-Appellees
Michael Hunter and Marilyn Hunter

TABLE OF CONTENTS

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

ARGUMENT IN OPPOSITION TO APPELLANT’S PROPOSITION OF LAW 2

 Appellant’s 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..... 2

CONCLUSION 6

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Appellant's explanation of why this case is of public or great general interest is not convincing and is misdirected. It raises primarily an argument over the alleged conflict between the Court of Appeals decision in this case and *American States Ins. Co. v. Guillermin* (2d Dist., 1996), 108 Ohio App.3d 547, 671 N.E.2d 317. Appellant also summarizes its argument on the merits of the appeal. Neither argument addresses the question before this Court at the moment, i.e., whether the case is one of public or great general interest.

The question presented is whether the phrase "arising out of a premises" owned by an insured but which is not an insured location under the policy can be interpreted by the courts to state: "arising out of a condition of a premises" owned by the insured but not insured. By definition it comes into play only when a homeowner owns other real property which he does not insure under his homeowner's policy. Appellant has not shown that this situation occurs with significant frequency to satisfy the "public or great general interest" test, and common sense suggests otherwise. Nor has Appellant shown that claims involving owned-but-not-insured premises and which do not involve allegations of some dangerous or defective condition of the premises occur with frequency, and again common sense suggests otherwise. If the claim had alleged some dangerous or defective condition of the farm property where the accident occurred, even Grinnell concedes the exclusion would apply.

So the question in this case can arise only where there is a claim for bodily injury or property damage involving other premises owned by an insured and not insured under his homeowner's policy AND which does not involve allegations of a defective or dangerous condition of that premises.

An issue which can only possibly arise so rarely does not make this a case of public or great general interest, and this Court should decline to exercise jurisdiction on that claimed basis.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW

Appellant's 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.

Appellant seeks to engraft an additional requirement onto the phrase "arising out of," which appears repeatedly in liability insurance policies. This Court should not countenance that.

"Arising out of" is a phrase that appears in both insuring agreements and exclusions in liability insurance policies. For example it appears in the insuring agreement of uninsured/underinsured motorist policies, e.g., "arise out of the ownership, maintenance or use of" an un- or under-insured motor vehicle. *Kish v. Central National Insurance Group* (1981), 67 Ohio St.2d 41, 424 N.E.2d 288. It appears in exclusions.

In the Hunters' Westfield policy it appears in numerous exclusions, e.g.:

- 1.b. Arising out of or in connection with a business engaged in by an insured.
- 1.c. Arising out of the rental or holding for rental of any part of any premises by an insured.
- 1.d. Arising out of the rendering or failure to render professional services.
- 1.e. Arising out of a premises owned by an insured which is not an insured location under the policy. This is the exclusion involved in the case at bar.
- 1.f. Arising out of: (1) the ownership, maintenance, use, loading or unloading of motor vehicles Exclusions 1.g. and 1.h. contain similar language relating to certain watercraft and to aircraft.
- 1.k. Arising out of sexual molestation.

Courts have interpreted this commonly-used phrase consistently to mean "flowing from" or "having its origin in." *Ins. Co. of North America v. Royal Indem. Co.* (CA6, 1970), 429 F.2d

1014 (applying Ohio law). In *Nationwide Insurance Company v. Turner* (8th Dist., 1986), 29 Ohio App.3d 73, a case construing the same type of “other owned premises” exclusion as is involved in this case, the court stated:

The phrase generally indicates a causal connection with the insured property, not that the insured’s premises be the proximate cause of the injury.

In *Nationwide Ins. Co. v. Auto-Owners Mut. Ins. Co.* (10th Dist., 1987), 37 Ohio App.3d 199, M.C.O. September 2, 1987, the court held that a causal relation or connection, not proximate cause, must exist between injury and ownership, maintenance, or use of the insured’s vehicle when construing an insurance policy covering damages “arising out of the ownership, maintenance, or use” of the insured’s vehicle.

And in *Latturizi v. Travelers Ins. Co.*, 72 Ohio St.3d 350, 1995-Ohio-189, this Court held that there was no uninsured motorist coverage for a woman whose car was struck by an uninsured motorist, after which an assailant entered her damaged car, drove it and her to a house in Youngstown where he raped her. She sought UM coverage for bodily injury and psychological damage due to the rape. This Court determined that a “but for” analysis of the term “arising out of the . . . use of an uninsured motor vehicle” was not appropriate, and that the assailant’s “brutal, criminal conduct became the only relevant instrument of injury.” In so holding, this Court applied its own earlier decisions in *Kish, supra*, and *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 544 N.E.2d 878, both of which involved shootings by occupants of motor vehicles and claims for uninsured motorist coverage.

If “causal connection to” or “flowing from” or “having its origin in” is the meaning of “arising out of,” then Terrell Whicker’s injuries clearly arose out of the Indiana farm. They occurred there, during an outing attended by members of the Hunters’ extended family. And, as Westfield has consistently argued and as the Court of Appeals found, the only conceivable basis

for seeking to impose liability on the Hunters is their ownership of the Indiana farm. They did not own the ATV Ashley Arvin was riding; her parents did. They were not acting *in loco parentis* toward either Terrell or Ashley; Ashley's parents and Terrell's mother were present at the farm when the accident occurred.

Westfield acknowledges that the Second District Court of Appeals in the *Guillermin* case imposed the additional requirement that the bodily injury or property damage must arise out of some defective or dangerous condition in the premises in order for the exclusion in question to apply. Some other non-Ohio cases have done so as well. But *Guillermin* is plainly distinguishable from the instant case. In *Guillermin*, the insured's duty toward the injured plaintiff stemmed from her status as harborer of a dangerous animal (a lion), not as owner of the premises from which it escaped. In the instant case, the insureds had insured their properties and liability with two different insurers; in *Guillermin*, the insured had not insured the Brown County farm she owned and from which the lion escaped; she had only insured her Montgomery County home.¹

Morcover, the very existence of the Grinnell policy purchased to cover the Hunters' Indiana farm serves as evidence of the intent of the parties to the Westfield policy — that that policy not cover injuries occurring at the Indiana farm where a breach of duty is claimed due to the Hunters' ownership of that farm.

If this Court were to effectively re-write Westfield's exclusion so as to read "arising out of a condition of a premises" owned by the insured but not insured under the policy, it would

¹ After Appellant filed its appeal to this Court, the Court of Appeals certified its decision to this Court as being in conflict with the *Guillermin* case. Westfield maintains that no true conflict exists between the two cases, for all the reasons stated in its Memorandum in Opposition to Motions to Certify a Conflict filed in the Court of Appeals on November 16, 2009. If this Court agrees that a conflict exists and accepts jurisdiction on that basis, Westfield urges the Court to confine the appeal to the question certified by the Court of Appeals.

ignore the plain fact that other language in the Westfield policy expressly imposes that condition. In addition to providing fault based liability coverage (Coverage E), the policy also provides “no fault” coverage for certain medical payments (Coverage F). That coverage states:

COVERAGE F – Medical Payments To Others

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing **bodily injury**.

* * * As to others, this coverage applies only:

1. To a person on the **insured location** with the permission of an **insured**; or
2. To a person off the **insured location**, if the **bodily injury**:
 - a. *Arises out of a condition of the insured location* or the ways immediately adjoining

* * *

(Italics added for emphasis. Bolded terms in original.)

The point is, there is a difference between the policy language in the medical payments coverage and the language in the “other owned premises” exclusion at issue in this case. This Court must presume there is a reason for the difference. Construing the “other owned premises” exclusion as Grinnell urges simply rewrites Westfield’s policy to eliminate the difference. There is no justification for that and courts which do so, including the *Guillermín* court, commit error.

Grinnell argues that the claims against the Hunters “are not based on their status as landowners, but rather their personal liability due to their [alleged] prior knowledge of Ashley Arvin’s reckless or negligent tendencies.” (Grinnell’s Motion in Support of Supreme Court Jurisdiction, p. 6.) But that is a non-sequitur. All tort liability (except vicarious liability) is based upon personal conduct of the tortfeasor, something he, she or it did or did not do, some breach of a duty owed to the plaintiff. But the important question to ask is where did that duty come from; what is its basis? In the case at bar, it is the ownership of the farm. Except as

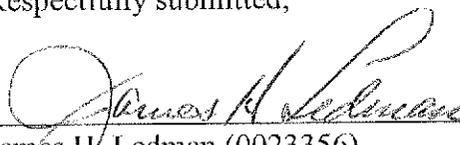
owners of the farm where the accident occurred, the Whickers have no colorable claim against Terrell's grandparents for damages for Terrell's injuries, regardless of whether they did or did not know of Ashley Arvin's negligent tendencies.

Insurance involves the transfer of risk from insured to insurer. Here Westfield agreed to assume the risk of injuries occurring at, flowing from, having their origin in, or having a causal connection with the Hunters' Hamilton, Ohio residence. It was paid money to assume those risks. Grinnell agreed to assume similar risks of injuries occurring at, flowing from, having their origin in, or having a causal connection with the Hunters' Indiana farm and was paid money to assume those risks. It was paid money to assume these risks. Westfield was not paid to assume risks associated with the Indiana farm, and Grinnell's effort to impose these risks on Westfield should fail.

CONCLUSION

Westfield respectfully submits that Grinnell has failed to sustain its burden of showing that this case is one of public or great general interest. Westfield urges the Court to decline to entertain Grinnell's appeal. Westfield further urges the Court to find there is no conflict between the Court of Appeals decision in this case and the decision of the Second District Court of Appeals in the *Guillermín* case.

Respectfully submitted,



James H. Ledman (0023356)

jhl@isaacbrant.com

J. Stephen Teetor (0023355)

jst@isaacbrant.com

ISAAC, BRANT, LEDMAN & TEETOR LLP

250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
(614) 221-2121 (phone)
(614) 365-9516 (fax)
Attorneys for Plaintiff-Appellee Westfield
Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular U.S. Mail, postage prepaid, this 6th day of January, 2010 upon the following:

James J. Englert, Esq.
Lynne M. Longtin, Esq.
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202-3688
Attorneys for Defendant-Appellant Grinnell Mutual
Reinsurance Company

Daniel J. Temming, Esq.
Jarrod M. Mohler, Esq.
ROBBINS, KELLY, PATTERSON & TUCKER
7 West Seventh Street, Suite 1400
Cincinnati, OH 45202
Attorney for Defendants-Appellees Terrell Whicker,
Vince Whicker, and Tara Whicker

Steven A. Tooman, Esq.
MILLIKIN & FITTON LAW FIRM
6900 Tylersville Road, Suite B
Mason, OH 45040
Attorney for Defendants-Appellees Michael Hunter and
Marilyn Hunter


James H. Ledman