ORIGINAL

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. **09-2214** consolidated with **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

MERIT BRIEF OF APPELLANT
GRINNELL MUTUAL REINSURANCE COMPANY

James J. Englert (#51217)
Lynne M. Longtin (#71136)
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202-3688
(513) 381-9200
(513) 381-9206 (facsimile)
jje@rendigs.com
llongtin@rendigs.com
Counsel for Appellant
Grinnell Mutual Reinsurance Company

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CLERK OF COURT
SUPREME COURT OF OHIO

James H. Ledman (#23356)
J. Stephen Teetor (#23355)
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, OH 43215-3742
(614)221-2121
(614)365-9516
jhl@isaacbrant.com
jst@isaacbrant.com
Counsel for Appellee
Westfield Insurance Company

Daniel J. Temming (#30364)
Jarrod M. Mohler (#72519))
ROBBINS, KELLY, PATTERSON & TUCKER
7 West Seventh Street, Suite 1400
Cincinnati, OH 45202
(513)721-3300
(513)721-5001
dtemming@RKPT.com
Jmohler@RKPT.com
Counsel for Appellees
Terrell Whicker, Vince Whicker, and Tara Whicker

Steven A. Tooman (#66988)
MILLIKIN & FITTON LAW FIRM
6900 Tylersville Road, Suite B
Mason, OH 45040
(513)336-6363
(513)336-9411 (fax)
tooman@mfitton.com
Counsel for Appellees Michael Hunter and Marilyn Hunter

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STATEMENT OF FACTS

This case concerns the meaning of language in an insurance policy exclusion which became relevant to an accident that occurred on "other premises" owned by a policyholder. The issues are before this Court on a consolidation of an appeal where the Court accepted jurisdiction, and of a certification of a conflict. See Entry, March 3, 2010, Case No. 2009-2214 and Entry, March 3, 2010, Case No. 2010-24. The certified question to be briefed by the parties presents the central issue in the jurisdictional appeal as well:

> When construing an insurance policy exclusion, does an injury 'arise out of' 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 a premises?

In the underlying incident, Terrell Whicker and his cousin, Ashley Arvin, both minors at the time, were riding all-terrain vehicles (ATVs) on farm property belonging to their grandparents, Michael and Marilyn Hunter, in Indiana. (Supp. 1, Stip. Facts at ¶¶ 1, 4) Terrell was injured in the July 7, 2001 accident. (Supp. 1, Stip. Facts at ¶ 4) The Hunters' Indiana farm property included a house with electricity and running water. (Supp. 1, Stip. Facts at ¶ 2) The Hunters did not reside on the farm property, but in a residence in Hamilton, Ohio; neither Terrell nor Ashley nor their parents were residents of the Hunters' household. (Supp. 1-2, Stip. Facts at ¶¶ 3, 8) The ATV which Terrell was riding was owned by his grandfather, Michael Hunter, and was purchased specifically for Terrell to ride; the ATV was garaged in a shed on the farm property and was repaired and maintained by Michael Hunter. (Supp. 1, Stip. Facts at ¶ 5) Ashley's ATV was owned by her parents and was not owned, garaged or maintained by the Hunters; on the day of the accident it was brought to the farm for Ashley to ride there. (Supp. 1, Stip. Facts at ¶ 6) The ATVs being ridden

by Terrell and Ashley were motorized land conveyances and vehicles designed and used for recreational use and non-agricultural, leisure-time activities off public roads, were not subject to motor vehicle registration, and were not being used in an agricultural operation. (Supp. 1-2, Stip. Facts at ¶ 7)

Terrell and his parents sued Ashley and her parents, and, most relevantly for this appeal, his grandparents, the Hunters. See *Terrell Whicker, et al. v. Ashley Arvin*, Hamilton County Court of Common Pleas Case No. A0700215, hereinafter "Underlying Lawsuit." (Supp. 2, 69-74, Stip. Facts at ¶ 11 and Ex. C thereto) The Whickers' claims against the Hunters, as well as against Ashley's parents, are based on their alleged tortious conduct. Count Three of the Whickers' Complaint alleges that (1) the Hunters knew of Ashley Arvin's reckless and/or negligent tendencies; (2) the Hunters had the ability and duty to exercise control over Ashley Arvin; and (3) the Hunters breached that duty by not exercising control over Arvin. (Supp. 69-74, Stip. Facts, Ex. C thereto) Both Westfield and Grinnell have provided a defense to the Hunters to the claims asserted against them in Hamilton County Case No. A0700215. (Supp. 2, Stip. Facts at ¶ 12)

While the Hunters resided in Hamilton, Ohio, the July 7, 2001 accident occurred on the Indiana farm property. The Hunters have two insurance policies at issue. (Supp. 1, Stip. Facts at ¶ 1) Grinnell Mutual Reinsurance Company ("Grinnell") insured the Indiana farm property under Farm Policy No. 0000 137863 for the policy period August 17, 2000 to August 17, 2001. (Supp. 2, Stip. Facts at ¶ 10 and Ex. B thereto)

Westfield Insurance Company insured the Hunters' Hamilton, Ohio residence under Homeowner's Policy No. HOP2849481 for the period June 10, 2001 to June 10, 2002. (Supp. 2, 4-51, Stip. Facts at ¶ 9 and Ex. A thereto)

This appeal tests whether an exclusion in the Westfield Homeowner's Policy precludes coverage for the ATV accident claims against the Hunters which occurred on their farm property. The Westfield Policy lists the Hunters' primary residence in Hamilton, Ohio in the declarations page. (Supp. 11, Stip. Facts, Ex. A thereto) In addition to Property Coverages, the Westfield Policy provides personal liability coverage as follows:

> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which the insured is legally liable. . . .
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. ...

(Supp. 25, Stip. Facts, Ex. A thereto, Section II)

and the Westfield Policy contains the following exclusion:

> **Coverage E - Personal Liability** and **Coverage F - Medical Payments to Others** do not apply to **bodily injury** or **property damage**:
>
> e. Arising out of a premises:
>
> (1) Owned by an insured; ****
>
> that is not an **insured location**.

(Supp. 25, Stip. Facts, Ex. A thereto, Section II)

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

> 4. **Insured location** means:
>
> a. The **residence premises;**
> b. The part of other premises, other structures and grounds used by you as a residence and:
> (1) Which is shown in the Declarations; or

(2) Which is acquired by you during the policy period for your use as a residence;

c. Any premises used by you in connection with a premises in 4.a. or 4.b above;

d. Any part of a premises:

1. Not owned by an **insured**; and

2. Where an **insured** is temporarily residing;

e. Vacant land, other than farm land, owned by or rented to an **insured**;

f. Land owned by or rented to an insured on which a one or two family dwelling is being built as a residence for an insured.

(Supp. 14, Stip. Facts, Ex. A thereto, Definitions)

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

8. **Residence premises** means:

a. The one family dwelling, other structures, and grounds; or

b. That part of any other building;

where you reside and which is shown as the **residence premises** in the Declarations.

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

(Supp. 14, Stip. Facts, Ex. A thereto, Definitions) (all emphasis original)

Westfield filed a declaratory judgment action in the Court of Common Pleas, Butler County, Ohio against defendants Hunters, Whickers, and Grinnell Mutual Reinsurance Company. *Westfield Insurance Co. v. Michael Hunter*, Butler County Case No. CV 2008 05 2295. (Td. 4) Westfield asked that the trial court declare that it had no duty to defend or indemnify the Hunters for the claims asserted against them in the underlying lawsuit, relying on the "other owned premises" exclusion in its policy. (Td. 4) Grinnell filed an Answer, Counterclaim and Crossclaim requesting in part that the trial court declare that Westfield and Grinnell were each obligated to provide coverage to the

Hunters in the underlying lawsuit on a pro rata basis. (Td. 28) The parties entered into a Stipulation of Facts, to which were attached the Westfield and Grinnell policies, and the Underlying Complaint. (T.d. 52, Supp. 1-74) Westfield and Grinnell filed cross motions for summary judgment on the issue of Westfield's obligations to the Hunters in the Underlying Lawsuit. (T.d. 53, 55) The Trial Court granted summary judgment to Westfield and denied summary judgment to Grinnell. (T.d. 62) After the remaining claims of the parties were dismissed, Grinnell filed a Notice of Appeal in Butler County Court of Appeals, Twelfth Appellate District, on May 18, 2009, Case No. CA 2009 05 134. (T.d. 65, Appellate docket ("A.d.") 3) The plaintiffs in the underlying lawsuit, the Whickers, who were named as defendants in the Westfield declaratory judgment action, also appealed from the trial court's grant of summary judgment to Westfield, in Butler County Twelfth District Court of Appeals Case No. CA 2009 06 0157. (T.d. 66, A.d. 3) Those two appeals were consolidated and jointly briefed in the Butler County Court of Appeals.

The Twelfth District Court of Appeals issued an Opinion and Judgment Entry on October 26, 2009. (A.d. 30; Appx. 39) The Court of Appeals affirmed the grant of summary judgment to Westfield, finding that there was no coverage under the Westfield Policy for the claims averred against the Hunters. The Courts below applied the "causal connection" meaning to the phrase "arising out of" in Exclusion (e) such that the accident and injury did, under the Court's finding, arise out of/have a causal connection to premises owned by the insureds that is not an "insured location" under the policy. The Courts below rejected the "proximate cause" meaning of "arising out of" under which some dangerous condition exists on the premises that caused or contributed to the injury. (A.d. 30, T.d. 62; Appx. 39, 52)

In addition, the Courts below found that the farm properly was not "an insured location" under Exclusion (e) and according to the defined meaning in the policy of that term, confirming that the exclusion applies to the claims against the Hunters and bars coverage for that claim.

After the October 26, 2009 Judgment Entry in the Court of Appeals, appellant Grinnell moved in the Court of Appeals on November 4, 2009 to certify a conflict (A.d. 37), and appellants Whicker similarly moved on November 5, 2009. (A.d. 38) On December 8, 2009, the Butler County Court of Appeals issued an Entry certifying a conflict under Article IV, Section 3(b) of the Ohio Constitution and Appellate Rule 25 in the consolidated appeal. (A.d. 40) Grinnell timely filed its Notice of Appeal from the Judgment Entry of the Butler County Court of Appeals on December 8, 2009. (Appx. 1) The discretionary appeal is Supreme Court Case No. 09-2214. On January 6, 2010, Grinnell filed a Notice of Certified Conflict in the Supreme Court (Appx. 5), Supreme Court Case No. 10-0024.

On March 3, 2020, the Supreme Court issued Entries in the discretionary appeal and the certified conflict. The Entry in 2009-2214 accepted the jurisdictional appeal; the Entry in 2010-0024 determined that a conflict exists and ordered the parties to brief the question certified by the Butler County Court of Appeals quoted above. The Supreme Court consolidated briefing in the two cases.

The standard of review of judgments granting motions for summary judgment is *de novo*; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St. 3d 102, 105, 1996-Ohio-336, 671 N.E. 2d 241; *Andersen v. Highland House Co.* (2001), 93 Ohio St. 3d 547, 548, 757 N.E.2d 329.

ARGUMENT

Proposition of Law No. 1:
When construing an insurance policy "other premises" exclusion, an injury "arises out of premises" only if a condition exists on the premises that caused or contributed to the injury, and does not "arise out of" premises if the injury only originates in or occurs on a premises.

A. Introduction.

The Westfield Policy extends coverage to the Hunters for the claim for damages brought by the Whickers. Section II, "Liability Coverages," provides Personal Liability coverage "[i]f a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** . . . caused by an **occurrence** to which this coverage applies." (Supp. 25, Stip. Facts, Ex. A at 12 of 17) There is no dispute (for purposes of this matter) that the Hunters are "insureds," that Terrell Whicker suffered "bodily injury," or that the injury was caused by "an occurrence."

The Westfield Policy has an exclusion for bodily injury "arising out of" property owned by the insured, when the property is not an "insured location." (Supp. 25, Stip. Facts, Ex. A, Section II, Exclusions, Article (1)(e). That exclusion should not be construed so as to deny coverage to the Hunters for the accident which occurred on their Indiana farm property. Their status as landowners should not trigger the exclusion where the claim against them was based on their alleged tortious conduct — their knowledge of Ashley's reckless or negligent tendencies and their alleged failure to control their granddaughter, leading to the accident – which has no necessary connection to any given property. The allegations in the Complaint go to the Hunters' conduct and status as people able to control a minor tortfeasor, not to their status as landowners.

Ohio courts have examined the meaning of "arising out of" in this exclusion and have come to opposite conclusions. One construction results in a narrow exclusion in the approach taken by the Second District Court of Appeals in *American States Ins. Co. v. Guillermin* (1996), 108 Ohio App. 3d 547, 671 N.E.2d 317; another construction results in a very broad exclusion in the approach followed by the Eighth District Court of Appeals in *Nationwide Mutual Fire Ins. Co. v. Turner* (1986), 29 Ohio App. 3d 73, 503 N.E. 2d 212, while construing "arising out of ownership, maintenance or use of the real property" in a coverage provision.

Language in an insurance policy is construed against the insurer. "An exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded." *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St. 3d 186, 846 N.E.2d 833, 2006-Ohio-2180, ¶ 6, quoting *Hybud Equip. Corp. v. Sphere Drake Insurance Co., Ltd.* (1992), 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, cert. denied (1992), 507 U.S. 987, 113 Sup.Ct. 1585, 123 L.Ed. 2d 152. The concept of strict interpretation of a policy provision 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 (discretionary appeal denied in 1995), 71 Ohio St. 3d 1458. Of course, it remains true that "the rule of strict construction does not permit a court to change the obvious intent of a provision just to impose coverage." *Hybud Equip Corp.* supra, 64 Ohio St. 3d at 665. However, it is well-established that "in construing exceptions, 'a general presumption arises to the effect that that which is not clearly excluded from the operation of [the] contract is included' in its operation." *Weaver v. McIntosh Plymouth* (1945), 146 Ohio St. 96, 64 N.E. 248, syllabus.

The construction followed by *Turner* virtually eliminates all claims that occur on an uninsured premises owned by a policyholder. That would be the logical result and proper result had

the policy employed language limiting the geographic scope of its coverage for personal tortious acts: for example, the exclusion could have excluded "bodily injury . . . occurring on a premises owned by an insured." But, as the drafter of the policy, Westfield must be held to the language it chose. The majority of courts in the country have followed the approach of the *Guillermin* court in applying the exclusion only to a condition of the uninsured premises. See *Marshall v. Allstate Ins. Co.* (W.Va. 1992), 187 W.Va. 109, 111-112, 416 S.E.2d 67, 69-70 (reviewing "overwhelming authority" of other jurisdictions); *Guillermin*, 108 Ohio App. 3d at 565 ("the weight of authority").

B. *Guillermin*: Second Appellate District holds that "arising out of" language in exclusion relates to condition of the land, not to tortious acts committed on the land.

American States Ins. Co. v. Guillermin (1996), 108 Ohio App. 3d 547, 671 N.E.2d 317, was issued a decade after the *Turner* decision and properly rejected the reasoning that "arising out of" in an exclusion requires only some connection with the premises. The Second District in *Guillermin* focused on the exclusion's application to the allegations of tortious conduct, not on whether the accident occurred on the premises, quoting the apt conclusion of the Kentucky Supreme Court construing the identical provision: "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." *Eyler v. Nationwide Mut. Fire Ins. Co.* (Ky. 1992), 824 S.W.2d 855, 857, quoted in *Guillermin,* supra, 108 Ohio App. 3d at 562. In the present matter, the ATV accident occurred on land owned by the Hunters, but according to the allegations of the Complaint, it arose out of their knowledge of and failure to control Ashley's reckless tendencies. Had this accident occurred on premises owned by the Whickers, or by Ashley's parents,

or on third party land, or park land, this exclusion would be irrelevant, even while the allegations of tortious conduct against the Hunters would be identical, and there would be no basis to deny coverage. The *Guillermin* court properly focused on the allegations of tortious conduct. The exclusion is not rendered meaningless: the exclusion would be effective under the *Guillermin* test if the alleged tortious conduct had been tied to the premises, as, for example, if the Hunters had excavated a pit into which the ATVs fell.

In *Guillermin*, American States issued a homeowner's policy of insurance to Alverda Guillermin for her residence. Alverda also owned a farm in Brown County, Ohio that was not listed as an insured premises on the policy. Alverda permitted her sons to stay at the farm, where they kept horses and other animals. A lion escaped and attacked two minors. Their parents filed suit against Alverda and her sons, alleging that the sons, with Alverda's permission, harbored the lion on the farm. They alleged that Alverda and her sons were negligent for allowing the lion to remain unattended on the premises without sufficient precautions to prevent it from leaving the premises. Alverda and her sons sought a defense and indemnification from American States under the homeowner's policy. Id. at 549-550.

The language of the policy exclusion in *Guillermin* is identical to the language of the exclusion in the Hunters' Westfield Policy. Alverda's American States policy excluded payment for personal liability for "'bodily injury' *** arising out of a premises *** owned by an 'insured' *** that is not an 'insured location.'" Id. at 551.

The court reviewed numerous cases from other jurisdictions interpreting the phrase, and concluded that the exclusion in the American States policy "refers to the condition of the uninsured premises and does not exclude coverage for the insured's alleged tortious acts on the uninsured

premises." Id. at 566. The *Guillermin* court also reviewed *Nationwide Mut. Fire Ins. Co. v. Turner*, which involves similar, but not identical, language which appeared in the coverage provision rather than an exclusion: "arising out of the ownership, maintenance or use of the real *** property." *Turner*, 29 Ohio App. 3d at 77, discussed in *Guillermin*, 108 Ohio App. 3d at 560. The Second District stated: "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.'" Id. at 565, quoting *Eyler*, supra, 824 S.W.2d at 857. The jurisdictions cited by the Second District found that the "key factor" which determines "the applicability of this exclusion '*relates to the condition* of the uninsured premises and not to tortious acts committed thereon.' Id. at 565, quoting *Marshall v. Allstate Ins. Co.* (1992), 187 W.Va. 109, 112, 416 S.E.2d 67 (emphasis original).[1] Looking at the facts before it, the Second District concluded that the allegation of negligently harboring the lion "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." Id. at 565.

C. *Turner:* Eighth Appellate District holds that language in coverage provision, "arising out of ownership, maintenance, or use of the real property" indicates a causal connection with the insured premises, not a proximate causal connection.

In *Nationwide Mutual Fire Ins. Co. v. Turner* (1986), 29 Ohio App. 3d 73, 503 N.E.2d 212, the policyholders seeking coverage had allowed their son-in-law to live in their residence. After the Turners gave an ultimatum that the son-in-law either get a job or move out of the Turners' house,

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[1]The court cited cases from the jurisdictions of Missouri, Minnesota, Kentucky, West Virginia, New York , California, Florida, Illinois, Louisiana, Rhode Island and Wisconsin.

the son-in-law called everyone in the house together and shot the Turners, killing his father-in law. 29 Ohio St. 3d at 73-74. Mrs. Turner sought liability coverage under the homeowner's policy for the action of their son-in-law in shooting them. The Court of Appeals found that there was coverage for the Turners as to the damages caused by the shooting. In doing so, the court interpreted not an exclusion (as in *Guillermin)*, but rather the basic liability coverage provision:

> Section II of this Homeowner's Policy insures those named in the Declarations against loss from damages for negligent personal acts or damages for negligence arising out of the ownership, maintenance or use of real or personal property, subject to the provisions and conditions stated herein and subject to the limit of liability stated in the Declarations for liability.

29 Ohio App. 3d at 74.

The Eighth District had to pass three hurdles in order to find coverage. First, looking at the policy coverage for "the named insured and members of his family . . . residing in the same household," the court found that the son-in-law was a member of the family and therefore an insured. Id. at 74-75. Second, in construing the basic coverage provision for *negligent* acts, the court found that by virtue of the son-in-law's possible insanity, there was an issue of fact as to whether the shooting was intentional and excluded from coverage, or, negligent and included within coverage. Id. at 75-77. Finally, and most relevant to the present matter, the court had to construe whether the shooting was a negligent personal act "arising out of the ownership, maintenance or use of real or personal property."

The court devoted less than a single page to its analysis in finding that there was coverage, and concluded: "The shootings in the case at bar arose out of a dispute over the use of the property and occurred on the insured premises." Id. at 77. In reaching this conclusion, the Eighth District

cited the Sixth Circuit case *Insurance Co. of North America v. Royal Indemnity Co.* (6th Cir. 1970), 429 F.2d 1014, 1017-18, for the proposition that the phrase "arising out of" means generally "flowing from" or "having its origin in." *Insurance Co. of North America*, 429 F.2d 1017-18, cited in *Turner*, 29 Ohio App. 3d 77. While the policy in *Insurance Co. of North America* was a motor vehicle policy, it is significant that the policies in both *Insurance Co. of North America* and in *Turner* concerned the basic liability coverage provision and in both the "arising out of" language was tied to the immediately-following phrase "ownership, maintenance or use."[2] Thus, in *Insurance Co. of North America*, the court construed the words "arising out of *** use" in an automobile policy such that it "does not require a finding that the injury [] was directly and proximately caused by the use of the trailer" but only that there be "a causal connection with the accident." 429 F.2d at 1018.

D. The language "arising out of the ownership, maintenance or use of premises" in a coverage provision is not equivalent to the language "arising out of the premises" in an exclusion.

Both the Trial Court and the Court of Appeals in this matter erroneously followed *Turner* rather than *Guillermin*, without paying sufficient attention to the facts of the case, or the actual language of the provisions and the context in which they occurred. Neither of the courts below observed that the "arising out of the premises" language in the Hunters' Westfield Policy is different from the phrasing "arising out of the ownership, maintenance or use of" the premises or automobile that occurs in the *Turner* and *Insurance Co. of North America* cases on which the courts below relied. Nor did the courts below observe that the *Turner* and *Insurance Co. of North America*

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[2]The liability coverage provision in *Insurance Co. of North America v. Royal Indemnity Co.* provided: "INA will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, *caused by an occurrence and arising out of (1) the ownership, maintenance, or use, including loading and unloading of any automobile . . .*" 429 F.2d at 1016, fn. 6 (emphasis added).

language occurs in a coverage provision, whereas the "arising out of the premises" language in the Westfield Policy and in *Guillermin* occurred in an exclusion.

The *Turner* "arising out of the ownership, maintenance or use" language is more defined and restricted than the more general "arising out of the premises" language. When the courts in *Turner* and *INA* state that "arising out of" means originating from, growing out of, or flowing from, the language ultimately means "growing out of/originating from/flowing from" the ownership/ maintenance/or use of the car or property.

In a coverage provision, the *Turner* language ("arising out of the ownership, use or maintenance of property") language narrows the scope of coverage more than would the very general "arising out of the premises." Both the Eighth District in *Turner* and the Sixth Circuit in *Insurance Co. of North America* were obviously concerned that requiring a proximate causal connection, rather than merely a flowing-from connection in a coverage provision, would restrict and limit coverage to an undesirable degree. Rather, those courts gave broader scope to the coverage provision.

In *Guillermin* and the present case, the general "arising out of the premises" language appears in an exclusion where the effect of the broad "flowing from" construction is to greatly expand the exclusion and exclude coverage where there is any remote connection to a non-insured premises. "Although Ohio courts have let stand broad coverage provisions, they have not allowed broad exclusions to bar indemnification for claims otherwise covered." *Owens Corning v. National Union Fire Ins. Co. of Pittsburgh* (6th Cir.) 1998 WL 774109. See *Beacon Ins. Co. of America v. Kleoudis* (Ohio App. 1995), 100 Ohio App. 3d 79, 652 N.E.2d 1 (coverage existed where the exclusion for "bodily injury" did not apply to the same category of claims as did the coverage grant for "personal injury").

In actuality, under its facts, *Turner* does not stand for the proposition for which it was cited by the courts below. In *Turner*, it was not simply a matter of the shooting and the bodily injury occurring on the premises – as the ATV accident occurred on the Hunter farm land – but, rather that the dispute "arose out of the use of the premises." The son-in-law in that case shot the Turners when he was informed that he would have to either get a job or move out of the premises. One might call this "arising plus" since it is not simply a matter of bodily injury occurring on the premises, but rather of tortious conduct which arose out of whether or not the son-in-law would have continued "use" of the premises.

Hence, the *Turner* case, usually cited for the simple proposition that "arising out of "simply means "flowing from" or "originating out of," strongly suggests under its facts that if the same language is employed in an exclusion, that something more in the nature of causation is required to tie the tortious conduct to the land. Nothing in the facts in the ATV accident suggests that there is any tortious conduct related to the farm land; rather, the alleged tortious conduct relates to the failure to control the children's conduct.

E. In the present matter, the alleged facts regarding the ATV accident do not originate in or flow from the land.

The Second Appellate District in *Guillermin,* as well as the majority of jurisdictions interpreting the off premises exclusions have recognized the "dichotomy of causation between negligent personal conduct and dangerous condition of the premises." *Guillermin*, 108 Ohio App. 3d at 565, citing *Eyler v. Nationwide Mut. Fire Ins. Co.*, 824 S.W.2d at 857. In the present matter, it is important to recognize the distinction between the alleged tortious conduct of the Hunters and any causal condition of the premises.

The ATV accident between Ashley and Terrell merely occurred *on* the land. But, when the allegations of the Complaint are considered, it cannot accurately be said that the damages originated in or flowed from the land. There is not even a causal connection, except in the meaningless sense that ATVs must operate on some stable surface. Rather, the Complaint clearly alleges that the accident and damages flowed from, originated in, and arose out of the alleged negligent failure of the Hunters to control their granddaughter's dangerous ATV operating tendencies.

This distinction has been recognized by numerous cases in other jurisdictions. In *Lititz Mut. Ins. Co. v. Branch* (Mo. App. 1978), 561 S.W.2d 371, the court construed identical language in an other premises exclusion and held that a dog bite did not "arise out of" the uninsured business premises so as to fall within that exclusion. The court held: "Liability for injuries caused by an animal owned by an insured arises from the insured's personal tortious conduct for harboring a vicious animal, not from any condition of the premises upon which the animal may be located." Id. at 371. See also, *Callahan v. Quincey Mut. Fire Ins. Co.* (Mass. App. 2000), 736 N.E.2d 857, 868-69 (distinguishing between injury that "arises out of" premises and injury that "occurs on" premises, held that dog bite did not arise out of premises because a dog is not a part of premises, but out of personal tortious conduct of policyholder in harboring vicious animal).

Similarly, in *Lanoue v. Fireman's Fund American Ins. Cos.* (Minn. 1979), 278 N.W.2d 49, the Minnesota Supreme Court considered the identical "arising out of" language in an other premises exclusion. The court held that the insured's negligence in permitting a minor to gain access to whiskey on uninsured business premises did not arise out of the uninsured premises. The court agreed that the "arising out of" language implies causation. 278 N.W.2d at 54. The court reasoned: "[T]he premises must bear some causal relationship to the liability. Such a relationship is apparent

when a claimant trips over improperly maintained steps. . . . The fact that something occurs at a place is not sufficient by itself to imply causation as to that place. It is more appropriate under the facts of this case to focus on the personal property – the whiskey as being allegedly carelessly possessed by [the insured] at his office. *Thus, the liability is causally related to the whiskey, not the premises involved."* Id. (internal citations omitted) (emphasis added).

In *Hanson v. General Acc. Fire & Life Ins. Corp., Ltd.* (Fla. App. 1984), 450 So.2d 1260, the court held that the phrase "arising out of" in an other premises exclusion "indicates an intention to narrow the scope of an exclusion to incidents that have a causal relationship to the premises, as opposed to incidents that merely occur on such premises." Id. at 1262, citing *General Acc. Fire & Life Ass. Corp. v. Appleton* (Fla. App. 1978), 355 So. 2d 1261 and *St. Paul Fire & Marine Ins. Co. v. Thomas* (Fla. App. 1973), 273 So. 2d 117. In *Hanson*, the insurer asserted the other premises exclusion where the insured sought coverage under his homeowner's policy for injuries sustained by a third party who received an electrical shock while helping the insured remove an antenna from the roof of a store that the insured had been renting. Id. at 1261. The Florida court concluded: "Because the insurance excludes accidents 'arising out of' rather than 'occurring on' other premises, the insurance should not be read to blanketly exclude such accidents. . . . The accidental touching of the antenna to the un-insulated wire was totally unrelated to the condition of the premises. Indeed, if Hanson is to be held liable at all, it would be because of his alleged personal negligence in handling the antenna after it was detached from the roof. Thus, in our view, coverage cannot be denied under this exclusion." Id. at 1262. See also *Marshall v. Allstate Ins. Co.* (W.Va. 1992), 187 W.Va. 109, 416 S.E.2d 67 (finding that "under the 'overwhelming authority' addressing the scope of the uninsured premises exclusion, the key factor relates to the *condition* of the uninsured premises

and not to tortious acts committed thereon"). See also, *Economy Fire & Cas. v. Green* (1985), 139 Ill. App. 3d 147, 47 N.E.2d 100, 104 (coverage not excluded where defendant was allegedly negligent in caring for child who was struck by automobile on uninsured premises, that bodily injury did not arise out of defects of premises so as to preclude coverage of personal liability away from the insured premises); *Kitchens v. Brown* (La. App. 1989), 545 So. 2d 1310, 1312 (plaintiff injured while clearing brush at uninsured premises; exclusion held not to apply because bodily injury not a result of defect in said premises); *Newhouse v. Laidig, Inc.* (Wis. App. 1988), 145 Wis. 2d 236, 426 N.W.2d 88, 90 (coverage not excluded where child's bodily injury from accident involving a silo unloader was caused by alleged negligence of child's guardian leaving him unattended and exclusion was inapplicable because "alleged tortious conduct of [child's guardian] caused the injuries.").

F. The courts below misapplied the "arising out of" causal connection test employed by this Court in *Kish* and *Lattanzi.*

The causal connection test established by this court in *Kish v. Central National Ins. Group* (1981), 67 Ohio St. 2d 41, 421 N.E.2d 288 and *Lattanzi v. Travelers Ins. Co.* (1995), 72 Ohio St. 3d 350, 650 N.E.2d 430, was discussed by the *Turner* court, and properly applied in that case, which involved a coverage grant rather than an exclusion, and which involved different "arising out of" language than appears in the Westfield Policy. The Butler County Court of Appeals below cited to a Sixth Circuit case construing "arising out of" language appearing in an exclusion, *Owens Corning v. National Union Fire Ins. Co. of Pittsburgh, PA* (6th Cir.) 1998 WL 774109.[3] Grinnell believes that

[3]The Court of Appeals incorrectly cited to an earlier ruling in the same case, that is, *Owens Corning v. National Union Fire Ins. Co. of Pittsburgh* (6th Cir. 1997), 257 F.3d 484. The 1997 Sixth Circuit ruling does not address the "arising out of" issues relevant to this appeal, while the 1998 decision does address those issues.

the Court of Appeals misunderstood the import of this case. The Butler County Court of Appeals stated: "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." (Appx. 43-44, ¶ 17) Owens Corning sought coverage from National Union under a directors and officers policy for a shareholder derivative lawsuit alleging that Owens Corning's SEC filings had "misrepresented the company's future financial exposure to asbestos claims." 1998 WL 774109 at *1. The District Court agreed with National Union that an asbestos exclusion precluded coverage. The exclusion at issue provided that there was no coverage for claims "arising out of or related to *** asbestos or any asbestos related injury or damage." Id.

However, Owens Corning, seeking coverage, claimed that the allegations in the complaint regarding the officers' acts did not "arise out of asbestos." Rather, Owens Corning pointed to the basic grant of coverage for "loss arising from any claim or claims which are first made against the Directors or Officers . . . for any alleged Wrongful Act in their respective capacities as Directors or Officers of the Company" and pointed to the definition of "Wrongful Acts" as including "any breach of duty, neglect, error, misstatement, misleading statement, omission or act" by directors and officers. Id. The Sixth Circuit reversed on a very instructive basis. It found that the exclusion for claims "arising out of or related to asbestos" was inapplicable even though the underlying complaint alleged that the company had "misrepresented the company's future financial exposure to *asbestos* claims." Id. at *1 (emphasis added). Instead, the Sixth Circuit held that the underlying lawsuit was "not based upon the use of asbestos" and was rather a securities class action suit where "the key

allegation was that the directors and officers deceived investors regarding the financial security of the corporation " and did not relate to the products liability issues involving asbestos that were the subject of the exclusion. Id. at *4. The Sixth Circuit looked at the nature of the exclusion. Even though the exclusion had broad "arising out of . . . asbestos" language, the exclusion by nature had to do with asbestos products liability. Id. at *4. The loss arose out of the alleged SEC misrepresentation, not out of asbestos.

The parallels between the exclusion language in *Owens Corning* and in the Westfield Policy are clear. The plain language of the Westfield Policy excludes coverage for "bodily injury arising out of a *premises*" while the similarly plain language of the National Union policy excluded coverage for claims "arising out of or related to *asbestos* or any asbestos related injury or damage."

The Sixth Circuit's reasoning is especially apposite given that it cited and relied upon Ohio Supreme Court cases interpreting the term "arising out of" in insurance contracts to signify a causal connection, i.e., *Kish v. Central National Ins. Group*, supra, and *Lattanzi v. Travelers Ins. Co.*, supra, Id. at *4-5. The *Kish* test asks "whether the chain of events resulting in the accident was unbroken by the intervention of any event unrelated to the use of the vehicle." *Kish*, 67 Ohio St. 2d at 50, discussed in *Owens Corning*, Id. at *4.

In *Kish*, the Supreme Court examined a coverage clause for "an accident arising out of ownership, maintenance or use of the uninsured vehicle." 67 Ohio St. 2d at 50. This Court rejected a "but for" analysis to determine whether recovery should be allowed for a fatal shooting prompted by an automobile accident. Instead, applying the causal connection test, this Court found that the intentional shooting was an intervening cause of injury unrelated to the accident.

The Sixth Circuit also looked at *Lattanzi v. Travelers Ins. Co.* (1995), 72 Ohio St. 3d 350, 650 N.E.2d 430, where the Supreme Court again applied the *Kish* causal connection test in the context of an automobile policy which provided coverage for injuries "caused by accident" and "arising out of ownership, maintenance or use of the insured motor vehicle." Id. at 352. In the case, Mrs. Lattanzi's car was struck in a collision, after which the driver of the other car entered Mrs. Lattanzi's car, kidnapped her and raped her. 72 Ohio St. 3d at 351. Applying the *Kish* test, the court held that the insured's injuries did not arise out of the use of an uninsured motor vehicle, but rather as a result of the intervening act of kidnapping and rape which occurred after the collision. Id. at 353.

In *Owens Corning*, the Sixth Circuit applied the standard used in *Kish* and *Lattanzi* and held "that the alleged misrepresentations by the directors and officers broke the chain of causation linking the [underlying derivative] claim to asbestos. In other words, the use of asbestos is not causally related to the harm alleged in the [underlying derivative] complaint." *Owens Corning,* supra, at *5. Rather, the Sixth Circuit looked to the allegations of the complaint which identified the directors' and officers' wrongful acts as the alleged misrepresentations hiding the fact that the company was suffering financially from asbestos litigation. Id. at *5. Hence, the asbestos exclusion did not preclude coverage for the officers' wrongful acts alleged in the complaint, even though the injury, under a but-for analysis, flowed from asbestos. Under the *Kish-Lattanzi* causal connection test, the alleged misrepresentations were intervening acts which broke the chain of events ultimately going back to asbestos-related issues. Id. See also *Danis v. Great American Ins. Co.*, 159 Ohio App. 3d 119, 2004-Ohio-6222, 823 N.E.2d 59 (discussing and following *Owens Corning, Kish* and *Lattanzi).*

The *Kish* causal connection test is simply not equivalent to the "arising out of/flowing from" meaning employed by the lower courts in the present matter, even though those courts referred to it as a "causal connection." In effect, they merely applied a but-for test under which the injury had to occur on the land, that is, without the land it would not have occurred. That is of course true, since ATV riding must occur on real property, in this case the uninsured farm property of the Hunters. But *Kish* requires something more than a simple but-for analysis. Under the allegations of the Complaint, there is no unbroken chain of events leading from ATV riding on the property to the accident. The Complaint alleges nothing with regard to any condition or quality of the land which caused the accident. Rather, the Complaint alleges that the Hunters' knowledge of and failure to control their granddaughter's driving was the cause. In analyzing "arising out of" insurance policy language, this Court has not simply required the parties to substitute "flowing from" or "originating in" as the meaning for "arising out of," such that if the injury *occurred on* the premises, it is said to "arise out of" so as to trigger the exclusion. Rather, the actual causal connection test to be applied to "arising out of" language looks for the existence of intervening events which break the "arising out of" chain. In this instance, the allegations of negligence against the Hunters are unrelated to the occurrence of the accident on the premises.

G. The intent of the policy is given effect where the exclusion applies to the condition of the uninsured premises.

The intent of the exclusion becomes clear when the insurance policy is read as a whole, including the various coverages and the relationship of exclusions to the coverages. In determining the meaning of an insurance contract, a court is directed to read the contract as a whole, giving meaning to every provision contained therein. *Helberg v. National Union Fire Ins. Co.* (1995), 102

Ohio App. 3d 679, 657 N.E.2d 832. In *Lititz Mut. Ins.* discussed above, a Missouri court cogenttly addressed the interplay of the various elements of a homeowner's policy:

> The personal liability insured against is of two kinds: first, that liability which may be incurred because of the *condition* of the premises insured; secondly, that liability incurred by the insured personally because of his *tortious personal conduct*, not otherwise excluded, *which may occur at any place on or off* of the insured premises. The insurance company may well limit (and has by [the uninsured premises exclusion]) its liability for *condition* of the premises to the property insured for which a premium has been paid. It is reasonable that the company may not provide for liability coverage on *"conditions"* which cause injury on *other uninsured land*. It would be a rare case where an insured was liable for the condition of premises which he did not own, rent or control. It is to be expected, therefore, that the company's liability for condition of the premises would be restricted to accidents happening on or in close proximity to the insured premises, and that premiums would be charged with that in mind. It would be unreasonable to allow an insured to expand that coverage to additional land and structures owned, rented or controlled by him which are unknown and not contemplated by the company.
>
> The company has not chosen to geographically limit the coverage provided for tortious personal conduct of the insured. If it had so intended, it could simply have provided that the exclusion ran to an accident "occurring on" other owned premises. There appears to be little reason to exclude personal tortious conduct occurring on owned, but uninsured land, as little correlation exists between such conduct and the land itself.

561 S.W.2d at 374 (emphasis added).

Thus, the policy insures for liability arising out of conditions of known, insured premises. It also provides coverage for tortious acts of the insureds. The policy reasonably denies coverage for liability for the condition of the uninsured premises, as to which the insured, who owns and controls the other insured premises, has the ability to eliminate any such dangerous conditions, e.g.,

an insured who negligently fails to cover or fill in a pit, or fails to repair rotting steps, will not be covered.

The Florida court in *Hanson,* supra, also addressed the insurer's legitimate interest in the exclusion: "The homeowner's insurance provides general coverage for conditions of the specifically insured premises and for the personal conduct of the insured wherever he may be located. *The exclusion for damages arising out of other premises owned, rented or controlled by the insured logically protects the insurer from liability from unsafe conditions in those specified premises in which the insured has an interest, but for which he has not secured coverage under the homeowner's policy."* Id. (emphasis added). That distinction recognizes that the insurer will not be liable for bodily injury that is related to the condition of the uninsured premises, but will be liable for tortious conduct of the insured which merely occurs on the uninsured premises, but is not related to the condition of those premises.

But in excluding coverage for torts related to conditions on the land, the policy does not thereby intend to deny coverage for tortious acts not related to a condition of the uninsured premises, simply because they occur on an uninsured premises. That would be illogical in terms of the policy coverage. If the Hunters had taken their grandchildren to a park or to some other land that they did not own and similarly failed to supervise, under the allegations of the Complaint, their tortious acts would not be excluded. The other premises exclusion logically relates to the condition of those premises, rather than to their location. "Arising out of" does not mean "occurring on." An insurer may include language which restricts coverage from a geographical location. Thus, for example, in *California Cas. Ins. Co. v. American Family Mut. Ins. Co.* (Ariz. App. 2004), 208 Ariz. 4016, 4020, 94 P.3d 616, 620, the homeowner's policy included an exclusion for "bodily injury or property

damage arising out of any act or omission occurring on or in connection with any premises owned . . . by any insured other than an insured premises." The Westfield Policy did not contain such language.

Proposition of Law No. 2:
Allegations in a complaint which allege liability based on conduct are not excluded from coverage by a policy exclusion based on the policyholder's status as a landowner.

In order for the other premises exclusion to apply, Westfield must not only prove that the injury "arose out of" the Indiana farm property, but it must also prove that the farm was not an "insured location" under the Westfield policy. "[T]he insurance company trying to enforce an exclusion in the insurance policy has the burden of proof to show that the exclusion applies." *Kuss v. U.S. Fidelity & Guaranty Co.* (Ohio App. 2d Dist.), 2003 WL22110376; *Continental Ins. Co. v. Louis Marx Co., Inc.* (1980), 64 Ohio St. 2d 399, 401, 415 N.E.2d 315 (holding that a "defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it"), quoting *Arcos Corp. v. American Mut. Liability Ins. Co.* (E.D. Pa. 1972) 350 F. Supp. 380, 384. In addition, Westfield has the burden of proof under Civ.R. 56.

The Trial Court found, and the Court of Appeals affirmed, that there was sufficient evidence to establish that the Hunters' farm was not an insured location under the policy. T.d. 62 , Appx. 56-59; A.d. 30, Appx. 45-50) The relevant section of the definition of insured location is section c, which defines an insured location as any premises used "in connection with the residence premises." (Supp. 14) The courts below, in finding that the farm was not an insured location, relied on *Pierson v. Farmers Ins. of Columbus, Inc.* (Ottowa App. No. OT-06-031), 2007-Ohio-1188, 2007 WL 778954. The *Pierson* court noted three factors to determine whether premises are used in connection

with insured premises: (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. Id. at ¶ 18.

There is no evidence in the Stipulated Facts establishing the proximity of the Hunters' residence in Hamilton, Ohio to the farm in Indiana. The Court of Appeals thought it significant that the farm is located across the state border in Indiana (Opinion, 8); of course, the city of Hamilton is close to the Indiana border. Nevertheless, the Court of Appeals concluded that "[a] farm miles away and across state lines is not in proximity to the Hunters' Ohio home." (A.d. 30, Appx. 46, ¶ 26)

Regarding the type of the use of the premises, the Trial Court found that "there is no evidence before the court establishing . . . how the farm property was actually used." (T.d. 62, Appx. 58) The Court of Appeals, pointing to the stipulation that "The farm property included a house with electricity and running water, and the land was used and purchased to provide a place to ride ATVs," (A.d. 30, Appx. 48, ¶ 31), found that "These facts establish the Hunters' use of their farm and that the farm was not used in connection with their Ohio residence." (A.d. 30, Appx. 48-49, ¶ 31) These sparse facts are not sufficient to establish that it was not used in connection with the insured premises.

Westfield failed to meet its burden of proof, both under Civ.R.56 and as a matter of proving an exclusion in an insurance policy The Court of Appeals quoted *Newhouse v. Sumner* (Ohio App. 1st Dist.) 1986 WL 8516 for the proposition, "[W]here, 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." (A.d. 30, Appx. 48, ¶ 30, quoting *Newhouse* at *2)

Newhouse v. Sumner does not properly state the law with regard to the relationship between stipulations of fact and material issues of fact. The Eleventh District Court of Appeals reached a contrary conclusion in *Cottrell v. Mayfield* (Ohio App. 11th Dist.), 1987 WL 10758, where the court found, with regard to a stipulation of fact: "Simply stated, the parties' stipulations in this matter gave rise to material issues of fact which were not a proper subject for the trial court's determination, rendering this exercise in summary judgment inappropriate as a matter of law." Id. at *1.

However, the failure of Westfield in the Trial Court was not so much with regard to a material issue of fact as it was a simple failure to meet its burden of proof. Nowhere in the Stipulated Facts does Grinnell stipulate that the facts are sufficient to meet Westfield's burden of proof. Rather, Grinnell simply stipulated that the facts that were presented were true. In *Cottrell*, the parties entered into joint stipulations of fact and filed cross-motions for summary judgment on the issue of plaintiff's participation in the Ohio Workers' Compensation Fund. In denying summary judgment, the Court of Appeals found, "While the record demonstrates that the parties stipulated to certain relevant facts, they did not stipulate all the necessary factual conclusions to determine under applicable law whether or not the appellees were entitled to participate in the workers compensation fund." Id. at *1. The Stipulated Facts in the present matter are simply insufficient to establish that farm was not used in connection with the Hamilton residence.

Finally, the factor of the purpose of the policy does not, in the absence of other facts regarding the use of the farm and proximity, speak to the connection between the two properties. The Court of Appeals looked to the declaration page of the policy as failing to mention coverage for

any location other than the Hamilton residence. (A.d. 30, Appx. 49, ¶ 32) But that reasoning is not determinative, since under the definition of insured location, premises shown in the declaration are expressly defined as insured locations. (Supp. 14, Declarations, section 4(b)(1)). Section 4(c), providing one of the additional meanings of "insured location,', i.e., "any premises used by you in connection with a premises in 4a and 4b above," clearly contemplates that additional premises not shown in the declaration can nevertheless be an insured location under the definition.

Westfield's failure to prove that the Indiana farm was not used in connection with the insured premises is an additional and independent basis under which the other premises exclusion is not effective so as to deny coverage for the ATV accident.

CONCLUSION

Appellant Grinnell asks that this Court determine that an injury "arises out of a premises" in the context of an other premises exclusion in a homeowner's policy, only if a condition on the premises proximately caused or contributed to the injury. This Court should resolve the certified conflict in favor of the approach taken by the Second District Court of Appeals in *American States v. Guillermin*, rather than the approach of the Eighth District Court of Appeals in *Nationwide Mut. Fire Ins. Co. v. Turner*.

Under the *Guillermin* test, the exclusion in the Westfield Policy would not be applicable and the Whickers' claim against the Hunters in the Underlying Lawsuit would be covered, since the factual record is devoid of any allegations or evidence that a condition on the Hunters' Indiana farm property caused or contributed to the injury. If this Court follows the *Guillermin* test and finds the exclusion inapplicable on the grounds above, it need not reach Proposition of Law No. 2, since there would be coverage whether or not the farm property is an "insured location" under the Westfield

Policy. Therefore, Grinnell asks that this Court (1) reverse the grant of summary judgment to Westfield, (2) enter summary judgment in favor of Grinnell on its cross-motion for summary judgment, and (3) remand the matter to the Butler County Court of Common Pleas for determination of the pro-rata shares to be indemnified by Westfield and Grinnell.

Should this Court affirm the courts below as to the construction of "arising out of" in the other premises exclusion, Grinnell asks that this Court reverse the finding below that the farm property is not "an insured location," as briefed in Proposition of Law No. 2. If the Court so acts, the grant of summary judgment to Westfield should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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

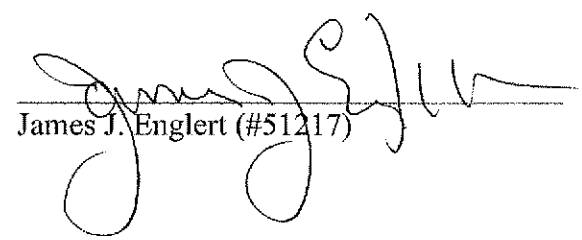
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant Grinnell Mutual Reinsurance Company was served by ordinary US mail upon the following counsel of record on this the 4th day of June, 2010:

James H. Ledman (#23356)
J. Stephen Teetor (#23355)
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, OH 43215-3742
Counsel for Appellee
Westfield Insurance Company

Daniel J. Temming (#30364)
Jarrod M. Mohler (#72519))
ROBBINS, KELLY, PATTERSON & TUCKER
7 West Seventh Street, Suite 1400
Cincinnati, OH 45202
Counsel for Appellees
Terrell Whicker, Vince Whicker, and Tara Whicker

Steven A. Tooman (#66988)
MILLIKIN & FITTON LAW FIRM
6900 Tylersville Road, Suite B
Mason, OH 45040
Counsel for Appellees
Michael Hunter and Marilyn Hunter



James J. Englert (#51217)

APPENDIX

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.

09-2214

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 APPEAL OF APPELLANT GRINNELL MUTUAL REINSURANCE COMPANY

John F. McLaughlin (#83228)
Lynne M. Longtin (#71136)
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202-3688
(513) 381-9200
(513) 381-9206 (facsimile)
JFM@rendigs.com
llongtin@rendigs.com
Counsel for Defendant/Appellant, Grinnell Mutual Reinsurance Company

FILED
DEC 16 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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

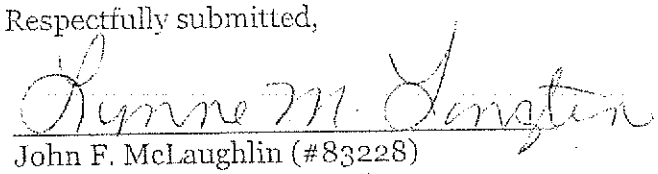
Daniel J. Temming
ROBBINS, KELLY, PATTERSON & TUCKER
7 West Seventh Street, Suite 1400
Cincinnati, OH 45202
(513)721-3300
(513)721-5001
DTemming@RKPT.com
Counsel for Defendants/Appellees
Terrell Whicker, Vince Whicker, and Tara Whicker

Steve A. Tooman
MILLIKIN & FITTON LAW FIRM
6900 Tylersville Road, Suite B
Mason, OH 45040
(513)336-6363
(513)336-9411 (fax)
tooman@mfitton.com
Counsel for Defendants/Appellees Michael Hunter and Marilyn Hunter

Appellant Grinnell Mutual Reinsurance Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Cases No. CA2009-05-134 and CA2009-06-157, on October 26, 2009.

This case is one of public or great general interest.

Respectfully submitted,



John F. McLaughlin (#83228)
Lynne M. Longtin (#71136)
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202-3688
(513) 381-9200
(513) 381-9206 (facsimile)
JFM@rendigs.com
llongtin@rendigs.com
Counsel for Defendant/Appellant, Grinnell Mutual Reinsurance Company

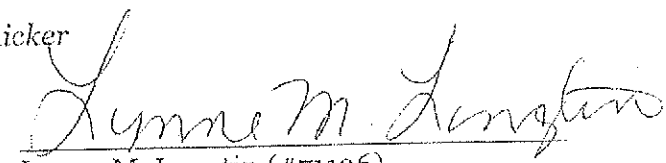
CERTIFICATE OF SERVICE

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

James H. Ledman
J. Stephen Teetor
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, OH 43215-3742
Attorneys for Plaintiff/Appellee Westfield Insurance Company

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

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



Lynne M. Longtin (#71136)

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

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

FILED
JAN 06 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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

Daniel J. Temming (0030364)
ROBBINS, KELLY, PATTERSON & TUCKER
7 West Seventh Street, Suite 1400
Cincinnati, OH 45202
(513)721-3300
(513)721-5001
DTemming@RKPT.com
Counsel for Defendants/Appellees
Terrell Whicker, Vince Whicker, and Tara Whicker

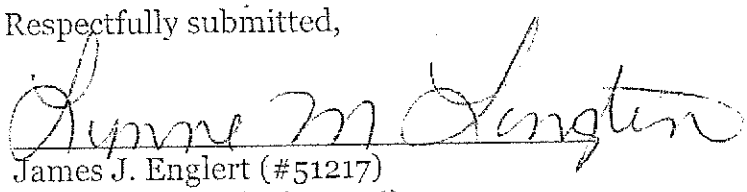
Steve A. Tooman (0066988)
MILLIKIN & FITTON LAW FIRM
6900 Tylersville Road, Suite B
Mason, OH 45040
(513)336-6363
(513)336-9411 (fax)
tooman@mfitton.com
Counsel for Defendants/Appellees Michael Hunter and Marilyn Hunter

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,



James J. Englert (#51217)
Lynne M. Longtin (#71136)
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202-3688
(513) 381-9200
(513) 381-9206 (facsimile)
jenglert@rendigs.com
llongtin@rendigs.com
Counsel for Defendant/Appellant, Grinnell Mutual Reinsurance Company

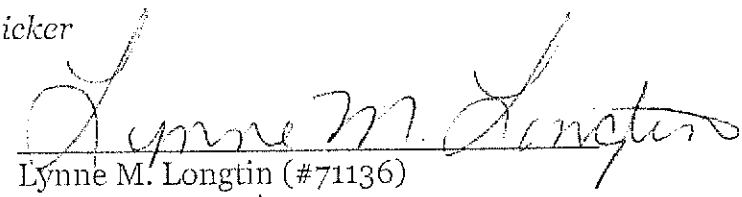
CERTIFICATE OF SERVICE

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:

James H. Ledman
J. Stephen Teetor
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, OH 43215-3742
Attorneys for Plaintiff/Appellee Westfield Insurance Company

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

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



Lynne M. Longtin (#71136)

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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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Butler County Clerk of Courts
Becky Henry Deputy

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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CINDY CARPENTER
Butler County Clerk of Courts
By Becky Deputy

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

WESTFIELD INSURANCE COMPANY,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-05-134 CA2009-05-157
	:	OPINION 10/26/2009
- vs -	:	
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."

---

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.

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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.

Ohio App. 2 Dist.,1996.
Am. States Ins. Co. v. Guillermin
108 Ohio App.3d 547, 671 N.E.2d 317

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BUTLER COUNTY
CLERK OF COURTS

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 - JUDGMENT ENTRY

FILED BUTLER CO.
COURT OF APPEALS
OCT 26 2009
CINDY CARPENTER
CLERK OF COURTS

MICHAEL HUNTER, et al.,

Defendants-Appellants. :

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

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

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

William W. Young, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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

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

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."

---

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

FILED BUTLER CO.
COURT OF COMMON PLEAS

CINDY CARPENTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

WESTFIELD INSURANCE COMPANY,

Plaintiff

vs.

MICHAEL HUNTER, et al.,

Defendants

Case No. CV2008 05 2295

(Charles L. Pater, Judge)

ORDER GRANTING MOTION OF PLAINTIFF WESTFIELD INSURANCE COMPANY FOR SUMMARY JUDGMENT AND DENYING MOTION OF DEFENDANT GRINNELL MUTUAL REINSURANCE COMPANY FOR SUMMARY JUDGMENT

This matter is before the court on the motion for summary judgment filed by plaintiff Westfield Insurance Company ("Westfield") and the motion for summary judgment filed by defendant Grinnell Mutual Reinsurance Company ("Grinnell"). Both motions address the issue of whether the Westfield homeowner's insurance policy issued to Michael and Marilyn Hunter provides coverage for the claims asserted against them in a separately filed lawsuit. Upon consideration of the motion, the pleadings and the other matters of record, the motion of Westfield is GRANTED, and the motion of Grinnell is DENIED.

The pertinent facts are not in dispute. On July 7, 2001, Terrell Whicker was operating an all terrain vehicle ("ATV") on property located in the State of Indiana and owned by his grandparents, Michael and Marilyn Hunter. His ATV collided with an ATV operated by his cousin, Ashley Arvin, causing Terrell to sustain bodily injuries. A lawsuit was filed in Hamilton County, Ohio by Terrell and his parents against Ashley, her parents and the Hunters.

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

The Hunters reside in Hamilton, Ohio, and their home is insured by Westfield. Their property in Indiana is insured by Grinnell. This declaratory judgment action was filed by Westfield against the Hunters and Grinnell, seeking a declaration that it has no duty to defend or indemnify the Hunters for the claims and damages asserted in the Hamilton County lawsuit. Grinnell filed a counterclaim, seeking a declaration that Westfield and Grinnell are obligated on a *pro rata* basis to share in the costs of the Hunters' defense and any indemnity of the Hunters.

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. When construing the provisions of an insurance policy, the court is mindful that, generally, words in a policy must be given their plain and ordinary meaning. *Myers v. Encompass Indemn. Co.* (12th Dist. 2006), 2006-Ohio-6076, par. 9. Only in situations where the contract is ambiguous and thus susceptible to more than one meaning should 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.

Westfield's policy provides liability coverage to the Hunters for damages and a defense to a lawsuit under Section II – Liability Coverages, Coverage E – Personal Liability. That provision states:

> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which the **insured** is legally liable. . . .
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. . . .

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

Westfield and Grinnell agree that Terrell Whicker's claims are "because of bodily injury." The question is whether the ATV collision is an occurrence to which the coverage of the Westfield policy applies. Simply put, the coverage provided by the Westfield policy insures the Hunters against claims having to do with occurrences taking place on their property in Hamilton, Ohio, but not their property located in another state. Thus, the collision of the ATVs on land in Indiana owned by the Hunters is not an occurrence covered by the Hunters' homeowners' policy, which covers the Hunters' residential real estate.

The Westfield policy declares that its coverage does not apply to bodily injury "arising out of a premises: (1) owned by an insured; . . . that is not an insured location." See Sec. II(1)(e) of the policy. This exclusion of coverage applies here, contrary to the assertions of Grinnell that the ATV collision did not arise out of the Indiana property and, alternatively, that the Indiana property was an insured location.

A. "Arising out of a premises."

There are two opposing interpretations of the phrase "arising out of a premises." In *Nationwide Mut. Fire Ins. Co. v Turner* (8th Dist. 1986), 20 Ohio App.3d 73, the Eighth District Court of Appeals stated:

> "Arising out of" means generally "flowing from" or "having its origin in." [Citation omitted.] The phrase generally indicates a causal connection with the insured property, *not that the insured premises be the proximate cause of the injury*. [Emphasis added.]

Id. at 77. On the other hand, in *American States Ins. Co. v. Guillermin* (2nd Dist. 1996), 108 Ohio App.3d 547, the Second District Court of Appeals concluded that for

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

the exception to apply, there must exist some dangerous condition of the premises that caused or contributed to the bodily injury at issue. Id. at 565.

After reviewing the numerous cases cited by the parties in their memoranda, all but the above two of which are from other states, and after conducting its own research, this court agrees with the conclusion of the Eighth District in *Turner* above: for Westfield's exclusion to apply, there must be some causal link between the alleged injury and the land on which the injury occurred, but the *condition* of the land need not be the proximate cause of or contribute to the injury.

To reiterate, when construing the provisions of an insurance policy, words in the policy must be given their plain and ordinary meaning. *State Farm Auto Ins. Co. v Rose*, supra at 531-532. Moreover, a court must presume that the parties' intent is reflected in the policy language. *Merz v. Motorists Mut. Ins. Co.* (12th Dist. 2007), 2007-Ohio-2293, par. 72. This court understands the word "arising" and the phrase "arising out of" to mean "originating from" some source, as supported by the definition set forth in the Merriam-Webster on-line dictionary. This court also believes that "premises" in common parlance contemplates land and permanently affixed structures contained thereon, like buildings. Thus, "arising out of a premises" means originating from a premises, or occurring on or connected with a premises.

There is nothing in the ordinary meaning of the phrase "arising out of a premises" that connotes the need for an injury to be a direct consequence of some condition of the land. Therefore, the injuries at issue here did arise out of a premises. However, such a conclusion does not end the court's inquiry.

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Common Pleas Court
Butler County, Ohio

B. "Insured location."

Even if Terrell suffered bodily injury "arising out of a premises," for the exclusion to apply to bar coverage, it must still be shown that the Indiana property was not an "insured location." Here, the evidence before the court is sufficient for an ordinarily reasonable person to reach the conclusion that the Hunters' farm was, indeed, not an "insured location."

Westfield's policy defines "insured location" as follows:

4. **Insured location** means:

   a. The **residence premises;**

   b. The part of other premises, other structures and grounds used by you as a residence and:

      (1) Which is shown in the declarations; or
      (2) Which is acquired by you during the policy period for your use as a residence;

   c. Any premises used by you in connection with a premises in 4.a and 4.b above;

   d. Any part of a premises:

      (1) Not owned by an **insured**; and
      (2) Where an **insured** is temporarily residing;

   e. Vacant land, other than farm land, owned by or rented to an **insured**;

   f. Land owned or rented to an **insured** on which a one or two family dwelling is being built as a residence for an **insured.**

The Hunters' Indiana farm does not fit any of the above definitions of an "insured location."

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The farm was not the Hunters' "residence premises" under paragraph 4(a). The policy defines "residence premises" to mean a dwelling or other building where the named insured resides and which is also shown in the Declarations as the residence premises. The Hunters resided at their Hamilton residence and the farm was not listed in the policy Declarations at all.

The farm also does not meet the definition contained in paragraph 4(b) because it was not used by the Hunters as a residence, was not shown in the Declarations, and was not acquired during the policy period.

The only definition of "insured location" that could even arguably apply to the facts of this case is that contained in paragraph 4(c). The Hunters' Hamilton, Ohio home was clearly their "residence premises," but despite its arguments to the contrary, Grinnell has provided no evidence to suggest that the Indiana property was used in connection with the Hunters' home in Hamilton.

In the only Ohio case cited by either party, *Pierson v. Farmers Ins. of Columbus, Inc.* (6th Dist. 2007), 2007-Ohio-1188, the Sixth District Court of Appeals was asked to consider and interpret policy language similar to that at issue here. There, the plaintiff's son was injured on property not the residence of the insured. The insured had a policy of insurance on his primary residence issued by defendant Farmers Insurance. Farmers denied coverage for the accident on the basis that the accident occurred on property that was not an "insured location," as defined by the policy. At issue was whether the property on which the accident occurred was used "in connection with" the insured premises. Citing cases from several jurisdictions outside Ohio, the Sixth district stated:

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> In determining whether the premises are used "in connection with" insured premises, courts generally consider the proximity of the premises, the type of use of the premises, and the purpose of the insurance policy, as a whole. [Citations omitted.]

Here, there is no evidence before the court establishing the proximity of the Hunters' residence in Hamilton, Ohio to the farm in Indiana, or how the farm property was actually used. However, the purpose of the Westfield policy, as a whole, is clear from the policy language. In interpreting insurance policies, the court must look to the wording of the policy to determine the intention of the parties concerning coverage. *Robinson v. Allstate Ins. Co.* (8th Dist. 2004), 2004-Ohio-7032, par. 33. The only premises the policy states that is covered was the Hunters' home in Hamilton, Ohio. There is no reference whatsoever to any other premises. Additionally, the Hunters, themselves, clearly believed that the Westfield policy covered only their Hamilton residence because, otherwise, they would not have had a reason to obtain a separate policy from Grinnell to cover their Indiana farm. Thus, the "purpose of the [Westfield] insurance policy as a whole" is to cover the Hunters' Hamilton property only.

Moreover, the court, being mindful that words in an insurance contract must be given their plain and ordinary meaning (see, *Whitaker v. Grange Mut. Cas. Co.* (2nd Dist. 2004), 2004-Ohio-5270, par. 9), concludes that the plain meaning of the policy language "in connection with" requires there to be some sort of link or relationship between the Indiana farm and the Hamilton residence beyond the fact that the Hunters owned both premises. Here there is no evidence of any such link or relationship. Therefore, an ordinary reasonable person could only conclude that the farm was not used "in connection with" the Hunters' home in Hamilton.

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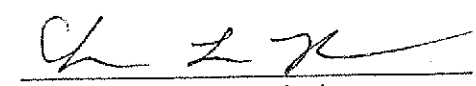
The definition contained in paragraph 4(d) only applies to property not owned by an insured, and the farm was owned by the Hunters. Thus, it is inapplicable.

The definition in paragraph 4(e) is clearly inapplicable because the farm was not vacant land but, rather, improved with a house, running water and electricity.

Finally, since the farm was not land owned or rented to the Hunters on which a one or two family dwelling was being built as a residence for them, the definition in paragraph 4(f) does not apply. Therefore, the farm was not an "insured location."

To summarize, the evidence establishes that the injuries sustained by Terrell Whicker in his unfortunate accident with Ashley Arvin did arise out of a premises owned by Westfield's insureds, the Hunters. However, it was not an insured location. Therefore, the exclusion contained in Section II(1)(e)(1) of the Westfield policy applies to bar coverage. Westfield's motion for summary judgment is well-taken, while Grinnell's motion for summary judgment must be denied.

ENTER



Charles L. Pater, Judge

cc: John F. McLaughlin, Esq.
Lynne M. Longtin, Esq.
James H. Ledman, Esq.
J. Stephen Teetor, Esq.
Steven A. Tooman, Esq.
Daniel J. Temming, Esq.

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