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, *et al*,

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 05 134 and
CA 2009 06 157

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STATEMENT OF THE CASE AND FACTS

I. UNDERLYING ACCIDENT

Terrell Whicker, a minor, was injured on July 7, 2001, a Saturday, while riding a small all-terrain vehicle ("ATV"). (Supp. 1, Stip. Facts, ¶ 1). He collided with a much larger ATV being operated by his cousin, Ashley Arvin, also a minor. (Supp. 1, Stip. Facts, ¶ 4). Terrell's ATV was owned by his step-grandfather, Michael Hunter. (Supp. 1, Stip. Facts, ¶ 5). Ashley's ATV was owned by her parents, Ben and Jennifer Lee. (Supp. 1, Stip. Facts, ¶ 6).

The accident occurred on a small Indiana farm owned by Michael and Marilyn Hunter. The Hunters bought the Indiana farm in 1999. (Supp. 2, Stip. Facts, ¶ 1). They insured that property under a Farm-Guard Policy, providing property and personal liability protection, through Defendant Grinnell Mutual Reinsurance Company ("Grinnell"). (Supp. 2, Exhibit B to Stip. Facts, ¶ 10, Grinnell Policy).

The Hunters lived in Hamilton, Ohio at the time. (Supp. 1, Stip. Facts, ¶ 3). They insured their home in Hamilton, Ohio with Westfield, under a Homeowners' Policy that provided property coverage for their home and personal possessions and also personal liability coverage. (Supp. 2, Exhibit A to Stip. Facts, ¶ 9, Westfield Policy). Both the Grinnell and Westfield policies were in effect on July 7, 2001 when Terrell was injured. (Supp. 2, Stip. Facts, ¶¶ 9-10).

At the time of the accident, Ashley's parents were present at the Hunters' Indiana farm, as was the mother of the injured child, Terrell Whicker. (Supp. 2, Stip. Facts, ¶ 13). Ashley Arvin's parents owned the ATV she was riding when the accident occurred, and brought it to the farm for Ashley to ride there. (Supp. 1, Stip. Facts, ¶ 6).

Terrell and his parents sued the Hunters, Ashley Arvin and her parents to recover damages they sustained as a result of Terrell's injuries. (Supp. 2, Stip. Facts, ¶ 11). In their

Complaint, the Whickers allege that the collision and Terrell's injuries were caused by Ashley Arvin's negligent operation of her ATV on the Indiana farm property. (Supp. 71, Exhibit C to Stip. Facts, ¶¶ 11-12). Their only allegation against the Hunters is that they "knew of Arvin's reckless and/or negligent tendencies" (Supp. 72, Exhibit C to Stip. Facts, ¶23) and that they "had the ability *and duty* to exercise control over Arvin" (Supp. 73, Exhibit C to Stip. Facts, ¶24, emphasis added) and failed to do so (Supp. 73, Exhibit C to Stip. Facts, ¶25). There is no claim that the Hunters were negligent in any respect in allowing Terrell to operate the small ATV. Since the Hunters were neither Ashley's parents nor the owner of the ATV she was riding, nor were they acting *in loco parentis* towards either Ashley or Terrell, that alleged duty could only exist because the Hunters owned the property where the accident occurred. No other basis for imposing liability upon them is alleged. (Supp. 69, Exhibit C to Stip. Facts, generally).

When the Hunters received service of the Complaint, they notified Grinnell. Grinnell provided defense for the Hunters and caused the Hunters to notify Westfield in order to also seek a defense under the Westfield Policy. After initially denying any obligation to defend the Hunters, Westfield agreed to do so under a reservation of rights and initiated a declaratory judgment action on May 19, 2008 to obtain a judicial determination whether or not it was required to do so. (See Grinnell's Counterclaim, ¶ 15; Westfield's Reply, ¶ 10).

II. WESTFIELD'S POLICY

Westfield's policy provides liability coverage for their insureds. The Westfield Policy lists the Hunter's residence in Hamilton, Ohio in the declaration's page, and, for an additional premium, an additional residence rented to others that is attached to the Hunter's Hamilton, Ohio residence. (Supp. 13, Exhibit A to Stip. Facts). The Hunters are the only insureds pertinent to

this coverage action. Ashley Arvin and the Lees were not residents of the Hunters' household (Supp. 2, Stip. Facts, ¶ 8) and are, therefore, not insureds.

Relevant to this case, Westfield's policy excludes coverage as follows:

SECTION II – EXCLUSIONS

1. **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**;

"Insured location" is defined 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 by or rented to an **insured** on which a one or two family dwelling is being built as a residence for an **insured**;

"Residence location" is defined as:

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.

In the Declarations, the Westfield Policy lists the Hunter's residence at 141A Cottonwood Drive, Hamilton, Ohio, as the residence premises, as well as "141B Cottonwood Drive Hamilton Ohio[,]" which is an additional Ohio residence rented to others and attached to the Hunter's Hamilton, Ohio residence premises. (Supp. 13, Exhibit A to Stip. Facts). The Hunters paid an additional premium to insure their personal liability with respect to the rental property. (Supp. 10, Exhibit A to Stip. Facts).

Grinnell's policy insuring liability relating to the Indiana farm property is essentially the mirror image of Westfield's Homeowners' policy. That is, Grinnell's policy also covers sums which "insured persons" [the Hunters are "insured persons"] become legally obligated to pay as damages "because of bodily injury . . . covered by this policy." Grinnell is obligated to defend "if a claim is made or suit is brought against any 'insured person' for liability covered by this policy . . . ." (Supp. 58, Exhibit B to Stip. Facts, COVERAGES – Liability to Public – Coverage A, at p. 3 of form GMRC 2210P 7-97).

Grinnell's policy also contained an "other owned premises" exclusion which pertinently stated:

> "We" do not cover "bodily injury" . . . arising out of any premises:
>
> a. owned by any "insured person";
>
> * * *
>
> which is not an "insured premises."

Grinnell's policy defined "insured premises" somewhat more broadly than did Westfield's policy; it stated:

> 10. "Insured premises" means:
>
> a. the farm premises which "you" own, rent or operate and other locations "you" maintain as a "residence premises";
>
> b. any other premises acquired by "you" in the policy period which "you" intend to use as a "residence premises";
>
> c. any part of premises which are not owned by an "insured person" but where the "insured person" may be temporarily residing or which an "insured person" may occasionally rent for non-business purposes;
>
> d. vacant land, other than farmland, owned by or rented to an "insured person";
>
> e. cemetery plots or burial vaults owned by an "insured person";
>
> f. any structures or grounds used by "you" in connection with "your" "residence premises"; or
>
> g. land on which a single family or two family residence is being built for "you", if the land is owned by or rented to "you".

(Supp. 57, Exhibit B to Stip. Facts).

Thus, both insurers exclude coverage for bodily injuries arising out of premises owned by the insured and which do not fit within their policies' definitions of "insured locations" or

"insured premises." The reason is obvious; the more premises that an insured owns, the greater the risk being assumed by the insurer and the more premium the insured must pay to cover his liability arising out of those additional premises.

III. PROCEDURAL POSTURE

Westfield filed a declaratory judgment action in the Butler County Court of Common Pleas against the Hunters, Whickers, and Grinnell, in which it asked the trial court to declare that it had no duty to defend or indemnify the Hunters in the underlying action based on the "other owned premises" exclusion in its policy. See *Westfield Insurance Co. v. Michael Hunter*, Butler County Case No. CV 2008 05 2295. On July 21, 2008, Grinnell filed an Answer, Counterclaim and Cross-claim, in which it asked the trial court to declare that Westfield and Grinnell were both obligated to provide coverage to the Hunters in the underlying action on a pro rata basis. The Whickers filed a separate Answer and Counterclaim on July 25, 2008. Westfield filed Replies to both Counterclaims on July 30, 2008. The Hunters subsequently filed their Answer and Counterclaim, to which Westfield filed its Reply on August 13, 2008.

On February 17, 2009, Westfield filed a Motion for Summary Judgment based on the "Other Owned Property" exclusion in its policy. On March 6, 2009, Grinnell filed its own Motion for Summary Judgment and Memorandum in Opposition to Westfield's Motion for Summary Judgment. Westfield filed its Reply in Support of its Motion for Summary Judgment on March 24, 2009. The Whickers then filed their Motion for Summary Judgment and Memorandum in Opposition to Westfield's Motion for Summary Judgment. Grinnell filed its Reply in Support of its Motion for Summary Judgment on April 2, 2009. The Hunters filed a Memorandum in Support of the Whicker's and Grinnell's Motions for Summary Judgment, and in Opposition to Westfield's Motion for Summary Judgment. On April 13, 2009, Westfield filed

a Memorandum Contra to the Whicker's Motion for Summary Judgment. The Whickers filed a Reply in Support of their Motion for Summary Judgment on April 24, 2009.

On April 16, 2009, the trial court issued an Order Granting Westfield's Motion for Summary Judgment and Denying Grinnell's Motion for Summary Judgment. (Appx. 52, 04/16/09 Order). The trial court held that the ATV collision was a bodily injury that "arose out of" the Indiana property, which was not an insured location, and thus, the exclusion in Sec. II(1)(e) of Westfield's policy applied. (Appx. 59, 04/16/09 Order). On May 5, 2009, the trial court issued an Order Denying the Whickers' Motion for Summary Judgment of Westfield's claims on the same basis as in its April 16, 2009 Order.

On May 18, 2009, Grinnell filed its Notice of Appeal to the Twelfth District Court of Appeals. On June 4, 2009, the Whickers filed their Notice of Appeal. The Hunters did not appeal. The Twelfth District Court of Appeals consolidated these two appeals and issued one opinion on both appeals. (Appx. 40, 10/26/2009 Opinion, p. 2, fn.1). Both Grinnell and the Whickers argued that the trial court misconstrued two terms in Westfield's policy: "arising out of a premises" and "insured location."

In its October 26, 2009 Opinion, the Twelfth District unanimously affirmed the trial court. It held that the term "arising out of a premises" indicates a causal connection to the premises, not that a condition on the premises must be the proximate cause of the accident. (Appx. 42, 10/26/2009 Opinion, p. 4). Further, it held that the Indiana farm was not an "insured location" under the Westfield policy. (Appx. 48, 10/26/2009 Opinion, p.10).

Grinnell and the Whickers filed a Motion to Certify Conflict and a Memorandum in Support of Jurisdiction for a discretionary appeal. Westfield filed its Memorandum in Opposition to Certification on November, 16, 2009, and its Memorandum in Opposition to

Jurisdiction on January 6, 2010. On December 8, 2009, the Twelfth District granted the motion and certified the following question: "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." The Appellate Court held that its decision, though consistent with a decision out of the Eighth District Court of Appeals, *Nationwide Mut. Ins. Co. v. Turner* (1986), 29 Ohio App.3d 73, was in direct conflict with a case from the Second District Court of Appeals, *American States Ins. Co. v. Guillermin* (1996), 108 Ohio App.3d 547. The Ohio Supreme Court also granted the Memorandum in Support of Jurisdiction, accepting Grinnell's sole proposition of law in a discretionary appeal, which this Court consolidated with the certified question.

ARGUMENT

Summary Of The Argument:

Westfield insured the Hunter's Hamilton, Ohio home and rental property, and Grinnell insured the Hunter's Indiana farm. Both Westfield's and Grinnell's policies contained an exclusion for bodily injuries "arising out of a premises owned by an insured...that is not an insured location." The very existence of the two policies, each covering its respective premises, makes clear the parties' intent to exclude coverage for injuries occurring at uninsured premises or premises that are not insured.

The trial court, appellate court, Eighth District Court of Appeals, and various decisions from this Court are correct in that coverage is excluded if there is a causal connection or nexus to the injury and when the policy does not specify that a condition of the premises was the "but for" or proximate cause of the injury. Where the policy's language clearly and unambiguously states

that coverage is excluded when the bodily injury is one "arising out of" premises owned by an insured that is not the insured premises, the policy should be read with the plain and ordinary meaning of the phrase "arising out of." It should not be re-written in one portion of the policy to suit the insurer of the premises where the bodily injury occurred.

<u>Restated Proposition of Law No. 1:</u> When construing an insurance policy's "other owned premises" exclusion, an injury "arises out of a premises" when it has a causal connection with that premises; the premises does not need to be the proximate cause of the injury for the exclusion to apply.

A. Introduction

There is no dispute that under the Westfield policy, the Hunters are insureds, Terrell suffered "bodily injury" and that his injuries were caused by an "occurrence." Absent an applicable exclusion, the Westfield policy provides coverage to the Hunters. However, the Westfield policy contains an exclusion for bodily injuries "arising out of a premises owned by an **insured**... that is not an **insured location**." The sole issue on appeal is whether to apply the exclusion; that is, whether the phrase "arising out of a premises" requires only a causal connection to the premises, or whether it requires proof that some dangerous or defective condition on the premises was the proximate cause of the bodily injury. Grinnell seeks to engraft an additional requirement onto the phrase "arising out of," which appears repeatedly in liability insurance policies. That phrase does not say that the exclusion applies only if the injury arises out of a dangerous or defective condition of the premises. Based on previous decisions of this Court, this Court should not engraft that additional language.

"Arising out of" or "arise out of" are phrases that appear in both insuring agreements and exclusions in liability insurance policies. For example it appears in the insuring agreement of uninsured/underinsured motorist policies, e.g., "arise out of the ownership, maintenance or use

of" an un- or under-insured motor vehicle. *Kish v. Central National Insurance Group* (1981), 67 Ohio St.2d 41, 424 N.E.2d 288. The phrase also appears in exclusions. In the Hunters' Westfield policy it appears in numerous exclusions. (Supp. 25-26, Exhibit A to Stip. Facts, Westfield Policy, liability exclusions 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.j., 1.k., and 1.l.). It also appears in an exception to many of these exclusions. (Supp. 27, Exhibit A to Stip. Facts, Westfield Policy).

Courts have adopted one of two interpretations for this commonly-used phrase. In the interpretation that gives the phrase its plain meaning, courts have interpreted this phrase to mean "flowing from" or "having its origin in." *Nationwide Insurance Company v. Turner* (1986), 29 Ohio App.3d 73; *Ins. Co. of North America v. Royal Indem. Co.* (6th Cir. 1970), 429 F.2d 1014 (applying Ohio law). Other courts have added language, interpreting this phrase to mean "arising out of a <u>condition</u> <u>of</u> a premises." *American States Ins. Co. v. Guillermin* (1996), 108 Ohio App.3d 547.

Generally, language in an insurance contract is to be given its ordinary or plain meaning. *Bobier* v. *National Cas. Co.* (1944), 143 Ohio St. 215. Where the language is doubtful or ambiguous, then it should be interpreted in favor of the insured. *Id.* See also, *Great American Mut. Indemn. Co.* v. *Jones* (1924), 111 Ohio St. 84. In interpreting insurance contracts, though, "the most critical rule is that which stops this court from rewriting the contract when the intent of the parties is evident, *i.e.*, if the language of the policy's provisions is clear and unambiguous, this court may not 'resort to construction of that language.'" *Hybud Equip. Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St.3d 657, 665, citing *Karabin v. State Auto. Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 167. As this Court stated in *Hybud Equip. Corp.*:

> "Thus, in reviewing an insurance policy, words and phrases used therein 'must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined.'" (Quoting *Gomolka v. State Auto. Mut. Ins. Co.* [1982], 70 Ohio St.2d 166, 167-168, 24 O.O.3d 274, 275-276, 436 N.E.2d 1347, 1348).
>
> In reaching its decision, the *Buckeye Union* court aptly noted that under the case law of this state, an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded. See, *e.g., Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St.3d 20, 21, 4 OBR 17, 19, 445 N.E.2d 1122, 1124. However, the rule of strict construction does not permit a court to change the obvious intent of a provision just to impose coverage.

Grinnell attempts to re-write and limit Westfield's exclusion to read "arising out of a condition of a premises," and Grinnell does this by relying on the Second District Court of Appeals decision in *Guillermin*, 108 Ohio App.3d 547. The *Guillermin* decision is distinguishable, though, and such a re-write would create an illogical reading of the other places in which "arising out of" or "arise out of" is used. Further, *Guillermin* ignores the plain fact that another section in the Westfield policy expressly imposes that condition, and would ignore the obvious intent of the parties.

B. This Court And The Eighth District Court Of Appeals In *Turner* Have Interpreted "Arising Out Of" To Mean A Causal Connection, Not A "But For" Or Proximate Cause Of The Injury.

The Eighth District has held that the phrase "arises out of" means having a causal relation or connection with. *Turner*, 29 Ohio App.3d 73. The term "arising out of" means "flowing from" or "having its origin in." *Ins. Co. of North America v. Royal Indem. Co.* (6th Cir. 1970), 429 F.2d 1014, applying Ohio law. See also, *Smith v. Ohio Bar Liability Ins. Co.*, 9th Dist. No. 24424, 2009-Ohio-6619, at ¶ 18, 2009 Ohio App. LEXIS 5551 (citing and following *Turner* and

Royal Indem. in holding that "arises out of" means "flowing from" or "having its origin in" in its interpretation of the business enterprise exception in a professional liability policy.); and *Am. Chemical Soc'y v. Leadscope, Inc.*, 10th Dist. No. 04AP-305, 2005-Ohio-2557, at ¶ 29, 2005 Ohio App. LEXIS 2428 ("The term 'arising out of' in a liability insurance policy has been found to afford very broad coverage and has been defined to mean 'originating from,' 'growing out of,' 'flowing from,' or 'having its origin in.'"), citing *Stickovich v. Cleveland* (2001), 143 Ohio App.3d 13, 37, 2001 Ohio 4117, citing *Turner* (1986), 29 Ohio App.3d at 77; and *Nationwide Ins. Co. v. Auto-Owners Mut. Ins. Co.* (1987), 37 Ohio App.3d 199, 202 (causal relation or connection, not proximate cause, must exist between injury and ownership, maintenance, or use of the insured's vehicle when construing an insurance policy covering damages "arising out of the ownership, maintenance, or use" of the insured's vehicle).

This Court has held that the relevant inquiry for the term "arising out of" in the context of uninsured motorists policy exclusion 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." *Kish v. Central Nat. Ins. Group of Omaha* (1981), 57 Ohio St.2d 41, 51. See also, *Lattanzi v. Travelers Ins. Co.*, 72 Ohio St.3d 350, 1995-Ohio-189; and *Estate of Nord v. Motorists Mut. Ins. Co.*, 105 Ohio St.3d 366, 2005-Ohio-2165, at ¶ 12.

In *Lattanzi*, this Court applied the causal connection test from *Kish* when interpreting an uninsured motorist policy. In *Lattanzi*, the plaintiff was kidnapped from her vehicle at gunpoint, taken to another location and raped. This Court held that the policy did not cover the insured's injuries because they were the result of the kidnapper's criminal conduct, and therefore, there was a break in the connection between kidnapper's use of his car and the Plaintiff's injuries. *Id.* at 354.

In *Nord*, this Court held that "[w]here an automobile policy limits uninsured-motorist coverage to damages from accidents that 'arise out of the ownership, maintenance or use of the uninsured motor vehicle,' coverage applies only when an uninsured motor vehicle caused the accident." Citing *Kish* and *Lattanzi*, this Court stated that the determinative factor was a lack of causal nexus between the injury and the uninsured vehicle. Where coverage is limited to "damages that 'arise out of the ownership, maintenance or use of the uninsured motor vehicle,'" damages caused by an event unrelated to such ownership, maintenance, or use is not covered. *Id.* at ¶ 13.

Appellant seeks to distinguish cases such as *Turner* and *Nationwide v. Auto-Owners* because the phrase "arising out of" appears in a different clause or even in a different type of policy (auto policy versus homeowners policy). This argument falls short because there is no meaningful difference in context; "arising out of" should mean the same thing when used in the insuring agreement of an auto policy as in an exclusion in a homeowners policy. It means having a "causal relation or connection with," not "proximately caused by."

Though there is nothing in the ATV accident that suggests a problem with the condition of the Indiana farm, the only basis for the duty that the Whickers claim the Hunters breached stems from the Hunters' ownership of the land where the accident occurred. Without that duty, there can be no arguable liability on the part of the Hunters. There has been no break in causal nexus, and Terrell's injuries "arose out of" the Indiana farm.

C. The Second District's Decision In *Guillermin* Is Plainly Distinguishable From The Instant Case.

At the trial court, the court of appeals, and in this Court, Grinnell relies heavily upon *Guillermin*, 108 Ohio App.3d 547, which holds that "other owned property" exclusions in homeowners-type insurance policies apply only if the injury is caused by some defect in, or

dangerous condition of, the premises. Admittedly, the Whickers do not claim that any dangerous condition of the Indiana farm property caused the two children to collide. But *Guillermin* is nonetheless plainly distinguishable from the instant case.

In *Guillermin*, the insurer, American States, issued a homeowners policy to the insured, Guillermin, for her residence, which was located in Dayton, Ohio. Guillermin also owned a farm in Brown County which was not listed as an insured location on the American States policy. Guillermin allowed her sons to stay at the farm, where they kept various animals. A lion escaped and mauled two minors who were on a property owned by minors' parents. In *Guillermin*, the insured's duty toward the injured plaintiff stemmed from her status as harborer of a dangerous animal (a lion), <u>not</u> as owner of the premises from which it escaped. The Appellant argued, and the Second District accepted, that an exclusion for bodily injuries "arising out of a premises...that is not an insured location" is not effective when the injury can be attributed directly to the insured's negligence, and is not attributable to a condition on the land. *Id.* at 560.

In the instant case, the only possible duty of the insureds to the injured boy, Terrell, arises solely through their ownership of the land. In *Guillermin*, the insurer attempted to demonstrate a causal connection to the property based solely on the fact that the lion was allegedly kept on the property; though not dispositive, the attack did not even occur on the property owned by Guillermin. Unlike in *Guillermin*, in the case *sub judice*, the causal connection is not a sole allegation that the ATVs were kept at the Indiana farm. Instead, the ATVs were used on the Indiana farm, the Hunters owned the ATV operated by Terrell, and the accident occurred on that property.

Moreover, in *Guillermin*, the insured's only policy was her homeowners policy on her Dayton home. There was no separate policy covering her Brown County farm, comparable to

Grinnell's policy in the instant case. Thus, the obvious intent of the parties present in this case did not exist in the *Guillermin* case.

Grinnell proposes that had the accident occurred on premises owned by a third party, not the Hunters, the exclusion would be inapplicable. While true, if the accident occurred on premises owed by some third party rather than the Hunters, then there would be no basis for a claim against the Hunters as they would owe no duty to the Whickers. Their alleged duty here stems solely from their ownership of the land; they did not participate directly in the accident. There is no general duty on the part of one person to prevent another from injuring a third party. Such a duty is not based on mere knowledge that another may act negligently or intentionally and cause injury to another. If A knows that his neighbor B is a careless driver, he is under no legal duty to prevent B from driving, merely because of that knowledge. A duty to act may exist for other reasons, such as the duty of the owner of an automobile not to entrust its operation to a known careless driver; or the duty of one standing *in loco parentis* to either the actor or the victim to prevent the injuries; or in this case, the duties imposed by law upon the owners of land.

Further, subsequent to its decision in *Guillermin*, in interpreting an automobile liability policy, the Second District Court of Appeals has held that the phrase "arise out of" means "originating from," "growing out of," and "flowing from." *Grange Mut. Cas. Co. v. Darst* (1998), 129 Ohio App.3d 723, 727, citing *State Auto. Mut. Ins. Co. v. Rainsberg* (1993), 86 Ohio App.3d 417, 421. In *Darst*, a mother left her two year old twin boys in the car by themselves. One of the boys found a match, struck it, and ignited the entire car, which resulted in the death of one boy, and injuries to the other. *Id.* at 724. The mother, father and boys were insureds under an automobile policy from Grange, which also provided uninsured/underinsured motorist coverage. *Id.* The father filed suit against the mother both in his capacity as executor of his

son's estate and individually. *Id.* The Second District, contrary to its decision in *Guillermin* and Grinnell's assertions in this case, held that:

> [t]he issue is not whether the vehicle itself was the instrumentality of the underlying injuries. Rather, the issue is whether the operator's ownership, maintenance and use of the vehicle was. It was if the injuries arose out of any of those factors.
>
> The phrase "arising out of" has been defined by courts as "originating from," "growing out of," and "flowing from." *State Auto. Mut. Ins. Co. v. Rainsberg* (1993), 86 Ohio App. 3d 417, 421, 621 N.E.2d 520, 522. Although the phrase implies that there must be a causal connection between the ownership, maintenance, or use of the uninsured motor vehicle and the insured's injuries, courts have stressed that the issue is not one of proximate cause. *Id.* Rather, "it is sufficient if the [ownership, maintenance, or] use is connected with the accident or the creation of a condition that caused the accident * * * [and that] there be a factual connection growing out of or originating with the [ownership, maintenance, or] use of the vehicle.'"
>
> [*Plessinger v. Cox* (Dec. 31, 1997), 2d Dist. No. 1428 and 1429,] 1997 Ohio App. LEXIS 5963 at *20-21 [unreported].
>
> The damages that Bruce Darst claims grew out of or originated with Kendra Darst's ownership, maintenance, or use of the vehicle. The *control* which those factors imply charged her with responsibility for the condition of the vehicle, which includes its contents. The matches were among its contents. The fact that one of them was ignited to create the fire which resulted in the injuries that form the basis for Bruce Darst's damage claims demonstrate that those claims *arose out of* Kendra Darst's ownership, maintenance or use of the vehicle.

Id. at 727.

The *Guillermin* court and the other courts that hold that the phrase "arising out of" is limited to allegations of dangerous conditions or defects in the premises find coverage where none was intended by the parties. Despite the fact that *Darst* interprets an automobile policy while *Guillermin* interprets a homeowners policy, absent any indication of an intent otherwise, the same phrase should have the same meaning. In cases such as this, where an insured insures

separate properties with separate insurers, courts which apply the reasoning of *Guillermin* ascribe intent to the insured to double-cover his liability without any evidence of such intent. They also impose additional risk and liability upon insurers that have not received a premium to cover that additional risk. In fact, such a re-write would: 1) ignore the intent of the parties; and 2) create an illogical reading of the other places in which "arise out of" is used.

1. The Parties Never Intended That The Westfield Policy Cover Injuries Occurring At The Indiana Farm.

When a court construes an insurance policy and its provisions, it should not interpret a policy to be contrary to the intent of the parties. In fact, this Court has held that:

> ...**the role of the 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, at ¶¶ 11-12 (emphasis added). The very existence of the Grinnell policy purchased to cover the Hunters' Indiana farm serves as further evidence of the intent of the parties to the Westfield policy — that that policy not cover injuries occurring at the Indiana farm where a breach of duty is claimed due to the Hunters' ownership of that farm, which is insured with another insurer.

Insurance involves the transfer of risk from insured to insurer. Here Westfield agreed to assume the risk of injuries occurring at, flowing from, having their origin in, or having a causal

connection with the Hunters' Hamilton, Ohio residence o r the neighboring rental property. Westfield was paid premium money to assume those risks. Grinnell agreed to assume similar risks of injuries occurring at, flowing from, having their origin in, or having a causal connection with the Hunters' Indiana farm and was paid premium money to assume those risks. Westfield was *not* paid to assume risks associated with the Indiana farm, and Grinnell's effort to impose these risks on Westfield should fail.

2. Limiting The Phrase "Arising Out Of" To A Dangerous Condition Or Defect On The Premises Creates An Illogical Reading Throughout The Rest Of The Policy.

The phrase "arising out of" is used multiple times throughout the Westfield policy. Yet, Grinnell would have this Court re-write the phrase "arising out of," solely when used in the context of the "other owned premises" exclusion, and not in the other places in which this phrase is also used throughout the policy. By reading the phrase "arising out of" to require proof that a dangerous condition on the land was the proximate cause of damage, Grinnell renders this phrase meaningless where used elsewhere in the policy. In fact, this term is used to introduce the following exclusions in Westfield's policy: business engaged in by the insured; a rental of premises by an insured; rendering of or failure to render professional services; ownership, maintenance, or use of a motorized vehicle, watercraft, or aircraft; transmission of a communicable disease; sexual molestation, corporal punishment, or physical or mental abuse; or the use, sale or manufacture of a controlled substance.

An interpretation of the term "arising out of" to mean "arising out of a dangerous condition" creates an illogical result for these other exclusions. The result would be that the auto exclusion is limited to situations involving a condition of the auto and the business exclusion would be limited to situations involving the condition of the insured's business. An

interpretation of the term to simply require a causal connection creates a logical application of the term in the context of the other exclusions, as well as in the context of the "other owned premises" exclusion.

Moreover, the Westfield policy expressly and explicitly limits its medical payments coverage to conditions of the premises. (Supp. 25, Exhibit A to Stip. Facts, Westfield Policy). In the policy's Medical Payments Coverage, on the very same page of the policy where the "other owned premises" exclusion appears, the policy provides:

> "As to others, this coverage applies only:
>
> 2. To a person off the **insured location,** if the **bodily injury**:
>
> a. Arises out of a condition on the **insured location** or the ways immediately adjoining;...

Grinnell's argument that the phrase "arising out of a premises" must be read as "arising out of a condition of a premises" is belied by the parties' use of the phrase "arises out of a condition on the **insured location**" elsewhere in the policy. As the language is clear and there is no ambiguity, this Court must acknowledge the difference and its intent to achieve a different result. Simply equating the two phrases as Grinnell would have this Court do, does violence to the cardinal principles that ordinary words are to be given their plain and ordinary meaning unless an unreasonable result ensues, and that polices are to be read as a whole in determining the parties' intent. Westfield's policy has meaning without adding the words "a condition of" to the exclusion at issue. Therefore, the Court should decline to re-write the phrase "arising out of" for this one exclusion in Westfield's policy when the intent is clear and reasonable from the documents as a whole, and in the circumstances of this case.

D. A Causal Connection Exists Between Terrell's Injuries And The Indiana Farm.

Westfield does not dispute that the language "arising out of" requires a causal connection, as this Court has held in *Kish*, supra, and *Lattanzi*, supra. In fact, the Sixth Circuit has followed this Court's analysis in *Kish* and *Lattanzi* in interpreting the language "arising out of" to require a causal connection in application of an asbestos exclusion in a directors and officers policy. *Owens Corning v. National Union Fire Ins. Co. of Pittsburgh* (6th Cir. 1998), Case No. 97-3367, 1998 U.S. App. LEXIS 26233. In *Owens Corning*, the company sought coverage under the director and officer policy for a shareholder derivative suit that claimed that the directors and officers misrepresented the company's financial exposure in relation to asbestos claims. The Sixth Circuit held that the asbestos exclusion, which stated that the claim must "arise out of the use" of asbestos, was inapplicable because the directors and officers, in misrepresenting the company's financial exposure, broke the chain of causation linking the shareholders' claims to the asbestos.

In interpreting this Court's opinions in *Kish* and *Lattanzi*, the Sixth Circuit held that:

> The Ohio Supreme Court has interpreted the terms "arising out of" in insurance contracts to signify a causal connection. For example, in *Kish v. Central Nat'l Ins. Group*, 67 Ohio St. 2d 41, 424 N.E.2d 288, 293 (Ohio 1981) the Ohio Supreme Court held that this language required more than a "but for" analysis to determine whether recovery should be allowed for a fatal shooting prompted by an automobile accident. Instead, the court stated that the proper test 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." 424 N.E.2d at 294.
>
> More recently, in *Lattanzi v. Travelers Ins. Co.*, 72 Ohio St. 3d 350, 650 N.E.2d 430, 431-32 (Ohio 1995), the Ohio Supreme Court addressed a claim by an insured on her automobile insurance, which provided coverage for injuries "caused by accident" and "arising out of ownership, maintenance or use of the uninsured motor vehicle." The court applied its holding in *Kish*,

> concluding that the insured's injuries did not arise out of an automobile accident with an uninsured driver, but were sustained when the uninsured motorist subsequently kidnaped the insured at gunpoint and raped her. *See* 650 N.E.2d at 432.
>
> Relying on the standard set forth in *Kish* and *Lattanzi*, we find that the alleged misrepresentations by the directors and officers broke the chain of causation linking the *Lavalle* claim to asbestos. In other words, the use of asbestos is not causally related to the harm alleged in the *Lavalle* complaint. The complaint alleges that the named directors and officers were responsible for filing misleading financial-disclosure statements, resulting in an artificially inflated stock price. Only the alleged misrepresentations can be considered the cause of the artificially inflated prices. This is unchanged by the possibility that the motive behind the alleged misrepresentations was to hide the fact that the company was suffering financially from asbestos litigation. Thus, any negligence or wrongful act by the directors and officers with regard to the use of asbestos is irrelevant here.

Id. at *12-14. *Kish*, *Lattanzi*, and *Owens Corning* renounce use of a proximate cause, or "but for" test; instead, when interpreting the phrase "arising out of," there must only be a causal connection or nexus.

There was most certainly a causal connection or nexus between Terrell's injuries and the Hunter's Indiana farm because the accident occurred there while both Terrell and Ashley Arvin were riding ATVs on those premises. Moreover, the only basis for seeking to impose liability on the Hunters is their ownership and control of the Indiana farm. Only as landowners of the site where the accident occurred can they have had any conceivable duty to protect Terrell from injury at the hands of his older cousin. The Hunters did not own the ATV Ashley was operating; her parents did. The Hunters were not acting *in loco parentis* toward either Ashley or Terrell when the accident occurred; Ashley's parents and Terrell's mother were present at the farm on the date of the accident. In these circumstances, it is plain that Terrell's injury did "arise out of" the Indiana farm property.

<u>Restated Proposition of Law No. 2:</u> There is no evidence that the Hunter's Indiana farm was used in connection with their Hamilton, Ohio residence, and therefore, it is not an "insured location" under the Westfield Policy.

A. Introduction.

The other owned property exclusion in Westfield's policy applies only if the involved location is owned by an insured and is not an "insured location." Whether the evidence is sufficient, though, to determine that the Indiana farm is not an "insured location," is not a proposition that has been accepted by this Court for review, nor should it have been. Further, even if this issue were properly before this Court, Grinnell stipulated to all of the pertinent facts and, as there is no evidence that the Indiana farm was used in connection with the Hunter's Hamilton, Ohio, residence, it is not an "insured location" under the Westfield Policy.

B. Grinnell's Second Proposition Of Law Has Not Been Accepted For Review.

This case is before this Court on a certified question, Case No. 2010-0024, and a discretionary appeal, Case No. 2009-2214. The Court consolidated the certified question and discretionary appeal. The Entry Granting Motions To Certify Conflict certified only one question to this Court: "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." (Appx. 10, Entry Granting Motions To Certify Conflict). The Appellant's Memorandum in Support of Jurisdiction contained only one proposition of law: "An exclusion in an insurance policy for injuries 'arising out of a premises owned by an insured that is not an insured location" requires the injuries to arise out of a defect or condition of the premises." (Appellant's Memorandum in Support of Jurisdiction, p. 6). The sufficiency of the evidence on the question of whether the Indiana farm is an "insured location" was not mentioned in either the

certified question or in the Memorandum in Support of Jurisdiction or in the proposition of law accepted in the discretionary appeal.

When this Court does not accept a proposition of law for review, the Court of Appeals decision on that issue "stands as conclusively established and is not within the scope of [the] appeal." *Meyer v. United Parcel Serv., Inc.*, 122 Ohio St.3d 104, 2009-Ohio-2463, at ¶ 8, fn. 3. In the instant appeal, the issue regarding whether the Indiana farm is an "insured location" under the Westfield policy was never presented to this Court in Appellant's Memorandum in Support of Jurisdiction as a potential proposition of law. This Court should not, and did not, accept it for review.[1] Thus, the Twelfth District's decision that the Indiana farm is not an "insured location" must stand.

C. The Indiana Farm Is Not An "Insured Location" Under The Westfield Policy.

The policy defines "insured location" as follows:

> **4.** **Insured location** means:
>
> **a.** The **residence premises;**[2]
>
> **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;

---

[1] Even if it had been presented to this Court as a potential proposition of law for review, as this Court may ascertain from Appellant's Merit Brief on the issue, it is nothing more than a request for a reversal on what Grinnell views to be an error of fact. It is not an issue of public or great general interest. Further, Grinnell stipulated to all of the facts on which the trial court and Court of Appeals based their decisions on this issue. Thus, Grinnell has acquiesced to all of the pertinent facts necessary to determine that the Indiana farm is not an "insured location."

[2] The term **residence premises** refers to the Hunters' Hamilton, Ohio home identified as such in the Declarations, not to the Indiana farm property.

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 by or rented to an **insured** on which a one or two family dwelling is being built as a residence for an **insured**;

In its Merit Brief, Grinnell asserts that it was Westfield's duty to prove the negative, i.e., to show that the Indiana farm was not used in connection with the Hunters' Hamilton residence, and that Westfield did not so prove.

But courts look to those claiming coverage to show that the uninsured property was used in connection with the insured location. See, e.g. *Safeco Insurance Co. of America v. Clifford* (D. Oregon 1995), 896 F.Supp. 1032 (An ATV accident occurring on property owned by a relative adjoining the insureds' residence was held not to be on an "insured location," defined as in the Hunters' Westfield policy, when those asserting coverage do not state that the property is used routinely in any manner connected with the insured property, nor do they indicate that they have an easement for the use of the property of [the relative]."); and *State Farm Fire & Cas. Co. v. Comer* (N.D. Miss. 1996), Case No. 3:95 CV 041, 1996 U.S. Dist. LEXIS 21312 (A connected pasture was held not to be an "insured location," defined as in the Hunters' Westfield policy where "[t]he court fails to see how a pasture could be used in connection with the residence premises. The defendants have failed to present any facts which would tend to show a connection between the cattle operation on Highway 7 and either of the premises located on Old

Taylor Road."). Other cases interpreting the same language as, or language similar to, that in the Hunters' policy have consistently required a connection. See, *Massachusetts Property Insurance Underwriting Ass'n v. Wynn* (Mass. Ct. App. 2004), 60 Mass.App.Ct. 824, 806 N.E.2d 447; *Illinois Farmers Insurance Co. v. Coppa* (Minn. Ct. App. 1992), 494 N.W.2d 503, 1992 Minn. App. LEXIS 1279; *Federal Kemper Insurance Co. v. Derr* (Pa. Sup. Ct. 1989), 386 Pa.Super. 382, 563 A.2d 118; *Hanson v. North Star Mutual Ins. Co.* (D. SD 1999), 71 F.Supp.2d 1007.

In filing its own Motion for Summary Judgment on this issue, Grinnell conceded that the Stipulated Facts contain sufficient evidence for the trial court to determine whether the Indiana farm was or was not an "insured location." In the instant appeal, as Grinnell is claiming coverage for the Hunters under the Westfield Policy, it must demonstrate such a connection, which it has failed to do. The Indiana property obviously does not provide ingress to or egress from the Hamilton residence. The Hunters made no claim they used the Indiana property "in connection with" their Hamilton residence. Indeed, since it was stipulated that that the Indiana farm property contained a house with electricity and running water, it may be inferred that the Hunters used the farm in lieu of their Hamilton residence premises, not "in connection with" it. The evidence is that the Hunters used it to entertain family members on a Saturday in July.

When the Westfield and Grinnell policies are examined side by side, it is obvious what the parties intended and equally obvious what they did not intend. With two policies issued by different insurers covering separate properties, the Hunters contemplated covering their potential liability arising out of the Indiana farm property only under Grinnell's policy and their Ohio residence and rental property under Westfield's policy. As there is absolutely no indication that the Hunters used their Indiana farm in connection with their Hamilton residence, it is not an "insured location" under Westfield's policy.

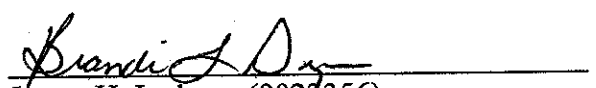
II. CONCLUSION

When given its plain and unambiguous meaning, the language "arising out of" means "flowing from" or "to originate in." It requires a causal connection or nexus to the premises, not that a dangerous condition on the premises be the proximate cause of the injuries.

Thus, Appellee Westfield urges this Court to follow the approach of the Eighth District Court of Appeals in *Nationwide Mut. Ins. Co. v. Turner*. The Second District's decision in *American States v. Guillermin* is distinguishable from the instant case, and application of *Guillerman* ignores the intent of the parties and creates an illogical result throughout the Westfield policy. Under *Turner*, there is a clear causal connection between Terrell's injuries and the Indiana Farm.

Therefore, this Court should affirm the Twelfth District's decision finding only Grinnell, not Westfield, obligated to defend and indemnify the Hunters in respect to Terrell Whicker's injuries.

Respectfully submitted,



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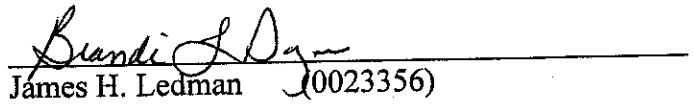

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