ORIGINAL

IN THE SUPREME COURT OF OHIO

GRINNELL MUTUAL REINSURANCE COMPANY Defendant/Appellant, v. 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 Nos. 09-2214 & 10-0024 (consolidated) ON APPEAL FROM THE BUTLER COUNTY COURT OF APPEALS, TWELFTH APPELLATE DISTRICT COURT OF APPEALS CASE NOS. CA 2009 05 0314 & CA 2009-06-157

FILED
JUL 26 2010
CLERK OF COURT
SUPREME COURT OF OHIO

MERIT BRIEF OF APPELLEES TERRELL WHICKER, A MINOR, AND VINCE AND TARA WHICKER

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STATEMENT OF THE FACTS

Defendants/Appellees Terrell, Vince, and Tara Whicker ("the Whickers") submit that their interests are aligned with the interests of Defendant-Appellant Grinnell Mutual Reinsurance Company ("Grinnell") and accordingly incorporate by reference the arguments Grinnell made in its previously-submitted merit brief. The Whickers submit this brief to provide further support for Grinnell's position.

This appeal concerns the interpretation of an insurance policy exclusion. This Court accepted jurisdiction and accepted the case on the basis of a certified conflict, and consolidated the appeals. See, Entry, March 3, 2010, Case No. 2009-2214, and Entry, March 3, 2010, Case No. 2010-24.

Plaintiff/Appellee Westfield Insurance Company ("Westfield") filed a Complaint seeking a declaration ("Dec Action") that it had no duty to defend Michael and Marilyn Hunter ("the Hunters"), Westfield's insureds under a homeowner's policy ("Westfield Policy"), for claims asserted against them by the Whickers in a personal injury case now pending in Hamilton County ("Underlying Lawsuit"). *Westfield Insurance Co. v. Michael Hunter, et al.,* Butler Co. Case No. CV 2008 05 2295. (T.d. 4). Westfield named the Hunters, the Whickers, and Co-Appellant Grinnell Mutual Reinsurance Company ("Grinnell") as Defendants. (T.d. 4).

The claims asserted in the Underlying Lawsuit arose on July 7, 2001, when Terrell Whicker, a minor, was severely injured while riding a child-sized motorized all terrain vehicle ("ATV") owned by the Hunters on an Indiana farm property ("Farm Property") owned by the Hunters. (Supp. 1, Stip. Facts, at ¶ 1).[1] Terrell was injured when the ATV he was riding was

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1 References to "Supp." and "Appx." refer to documents contained in the Supplement and Appendix Grinnell submitted with its Brief.

struck by an adult-sized ATV being operated by Ashley Arvin ("Arvin"), also a minor. (Supp. 1, Stip. Facts, at ¶ 4). Terrell and his parents Vince and Tara Whicker sued Arvin and her parents and the Hunters for damages due to the bodily injuries Terrell suffered in the July 7, 2001 accident. *See, Terrell Whicker, et al. v. Ashley Arvin, et al.,* Hamilton County Case No. A0700215 (Supp. 2, 69-74, Stip. Facts, at ¶ 11 and Ex. C).

Westfield insured the Hunters under a homeowner's policy, No. HOP 2849481, issued to Michael Hunter for the policy period June 10, 2001 to June 10, 2002. (Supp. 2, 4-51, Stip. Facts, at ¶ 9 and Ex. A). Grinnell insured the Hunters and their Indiana farm property under a 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).

Westfield's policy provides liability coverage to the Hunters 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, Section II).

Westfield did not dispute that the policy's liability provisions include the claims asserted by the Whickers in the Underlying Lawsuit, so Westfield's policy covers the Whickers' claims against the Hunters unless a policy exclusion applies.

Westfield relied on the following exclusion:

> **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.**

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

In the Westfield policy "Insured location" is defined as:

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.**

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

In the Westfield policy "Residence premises" 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.

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

Through the Dec Action, Westfield sought a declaration that it had no duty to defend the Hunters in the Underlying Lawsuit because of this "other owned premises" exclusion in its policy. (T.d. 4). The Whickers filed an Answer and Counterclaim against Westfield, seeking a declaration that Westfield was obligated to defend the Hunters. (T.d. 31). Grinnell also filed an Answer and Counterclaim against Westfield, seeking the same relief. (T.d. 28). Westfield, the Whickers, and Grinnell filed cross-motions for summary judgment, and the trial court granted Westfield's motion and denied the motions brought by the Whickers and Grinnell. (T.d. 62, 64).

In a consolidated appeal, the Twelfth District Court of Appeals affirmed the trial court's decision, finding that the "other owner premises" exclusion precluded coverage. (A.d. 30, Appx. 39). Noting a split of authority, the Court of Appeals applied the "causal connection" meaning to the phrase "arising out of" contained in the exclusion, and not the "proximate cause" meaning of that phrase. (A.d. 30, Appx. 39). The Court of Appeals also held that the Indiana Farm was not an "insured location." (A.d. 30, Appx. 39). This appeal followed.

This Court reviews a decision granting summary judgment *de novo*, applying the same standard as the trial court. *Andersen v. Highland House Co.* (2001), 93 Ohio St.3d 547, 548, 2001-Ohio-1607, 757 N.E.2d 329.

ARGUMENT

Appellant's 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 or occurs on a premises.

Insurance policies are generally interpreted by applying rules of contract law. *Burris v. Grange Mutual Cos.* (1989), 46 Ohio St.3d 84, 545 N.E.2d 83. Language in an insurance policy is to be construed strictly against the drafter, the insurance company, and liberally in favor of the insured. *Ohio Farmers Ins. Co. v. Wright* (1969), 17 Ohio St.2d 73, 78, 246 N.E.2d 552. If the language of the insurance policy is doubtful, uncertain, or ambiguous, the language will be construed strictly against the insurer and liberally in favor of the insured. *Faruque v. Provident Life and Accident Insurance Company* (1987), 31 Ohio St.3d 34, 508 N.E.2d 949, at syllabus. Moreover, the insurer bears the burden to prove that a particular claim is precluded by an exclusion provision. *Moorman v. Prudential Insurance Co. of America* (1983), 4 Ohio St.3d 20, 445 N.E.2d 1122.

The general presumption giving liberal construction of an insurance policy in favor of the insured carries over to policy exceptions. "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. Motorists Mut. Ins. Co.,* 62 Ohio App.3d 836, 839, 577 N.E.2d 703, motion to certify record overruled (1989), 45 Ohio St.3d 711, 545 N.E.2d 906, citing *Home Indemn. Co. v. Plymouth* (1945), 146 Ohio St. 96, 64 N.E.2d 248, at paragraph two of the syllabus. Where two interpretations of an exception clause in a policy are possible with equal fairness, the one which gives the greater indemnity to the insured must prevail under the

rule that exception clauses will be strictly construed against those for whose benefit they are introduced. *City Coal and Supply Co. v. American Automobile Insurance Company* (1954), 70 Ohio Law Abstract 189, 128 N.E.2d 264. The duty is upon the insurance company to plead any exception and prove the facts necessary to bring the case within the exception. *Order of United Commercial Travelers v. Watkins* (1931), 38 Ohio App. 420, 176 N.E. 469; *John Hancock Mutual Life Insurance Company v. Hicks* (1931), 43 Ohio App. 242, 183 N.E. 93.

The exclusion upon which Westfield relies is not applicable to the conduct which gave rise to the Whickers' claim. Westfield's policy covers the Hunters because the Hunters' liability does not arise out of the premises. Terrell Whicker was injured when Arvin's ATV collided with his. The Hunters' negligence arose out of their duty to exercise control over Arvin when they were aware of her reckless and/or negligent tendencies. (Supp. 2, 69-74, Stip. Facts, at ¶ 11 and Ex. C, at Count 3). The Hunters' negligence does not arise because they are landowners; such exclusion only applies where the *condition* of the premises is at issue.

As Grinnell argued in its Brief, the Court of Appeals in *American States Ins. Co. v. Guillermin* (1996), 108 Ohio App.3d 547, 671 N.E.2d 317, considered identical policy language. There the insurer sought declaratory judgment regarding its duty to defend and indemnify the insured when her son's lion escaped from the insured's farm, at which neither she nor her children resided, and subsequently injured a child. The property from which the animal escaped from was owned by the insured, but was not included within the terms of the policy's coverage. The insurer argued that the other owned property exclusion applied. The Court rejected the insurer's argument, finding that it was the condition of the other location which triggered the exclusion.

> The [injured parties] allege that [the insured] negligently harbored [the insured son's] lion. This assertion does not implicate any condition upon the land as a

> direct, causal link to the injury; rather, it looks to [the insured's] alleged tortuous conduct in not taking adequate precautions to prevent the lion's escape.
>
> Therefore, we hold that the exclusion of coverage for "'bodily injury' * * * arising out of a premises * * * owned by an 'insured' * * * that is not an 'insured location'" refers to the ***condition of the uninsured premises*** and does not exclude coverage for the insured's alleged tortuous acts on the uninsured premises.

Id. at 565-66 (emphasis added).

The same analysis applies here – the Whickers allege that the Hunters owed a duty to control the tortfeasor and prevent her from inflicting harm on others, and their breach of said duty resulted in the injury at issue. This claim has nothing to do with the condition on the premises. A premises-based exclusion, therefore, does not apply.

Construing the terms of the policy and the policy exclusions in favor of the insured, it is evident that under Ohio law the exception upon which Westfield relies does not apply to this factual scenario. More importantly, the term "arising out of a premises" is subject to the interpretation the Whickers argue here and was found by *Guillermin* to not exclude coverage. Since it is a reasonable interpretation to apply, that interpretation must be resolved in the favor of the insured. The accident could have happened anywhere other than the farm property and the claims against the Hunters would still be the same. The location of the accident was irrelevant to the Whickers' claims. Accordingly, Westfield was not entitled to a declaration that the other owned premises exclusion applied.

Homeowners policies are "personal liability" policies. *Nationwide Insurance Company v. Auto Owners Mutual Insurance Company* (1987), 37 Ohio App.3d 199, 525 N.E.2d 508. Once the policy is put in place, using language selected by the insurer, it is the language which must control, construed most strongly against the insurer as the author of the language. The Westfield policy is a "personal liability" policy. It covers the Hunters' personal liability, not only the

premises. In fact, the coverage provided for this occurrence is specifically referred to as "personal liability coverage." It does not refer to coverage for injuries occurring on the "insured premises." The claims in this case address the Hunter's personal action/inaction, not any conditions on the farm property. Indeed, the Whickers would have made the claim against the Hunters in the underlying case even if the incident occurred somewhere other than on the Hunters' Indiana property. Additionally, it has long been the law in Ohio that, even where there is doubt as to whether or not a theory of recovery within the policy coverage has been pleaded, an insurer must accept and defend the claim on behalf of the named insured. *City of Willoughby Hills v. Cincinnati Insurance Company* (1984), 9 Ohio St.3d 177, 459 N.E.2d 555.

The courts below relied on *Nationwide v. Turner* (1986), 29 Ohio App.3d 73, 503 N.E.2d 212. The *Turner* case is distinguishable, however, because it involved a completely different policy provision -- one that provided coverage for acts or damage "arising out of the ownership, maintenance or use of real or personal property." *Id.* at 74. Additionally, the Turner language is found in a coverage provision, not a policy exclusion like in *Guillermin* and this case. Unlike *Turner,* the policy provision at issue here does not expressly exclude coverage for bodily injury arising out of the insured's conduct or use of the property, but rather excludes coverage for bodily injury arising out of a premises. The *Guillermin* court construed an almost identical policy exclusion, and concluded that it applied only where liability arises out of a condition of the land.

The mere fact that the courts below found that there were two different reasonable interpretations of the language (the *Guillermin* and *Turner* interpretations), requires a finding of coverage since the Court must utilize the one that favors the insured. *Faruque,* 31 Ohio St.3d 34, at syllabus.

The most logical and consistent reading of the exclusion at issue here is that it applies to a condition of the uninsured premises. The courts below erred when they held otherwise and should be reversed.

Appellant's Proposition of Law No. 2:

Allegations in a complaint which allege liability based on contract are not excluded from coverage by a policy exclusion based on the policyholder's status as a landowner.

The courts below also found that Westfield established that the Hunters' farm was not an "insured location" under the Westfield's policy language. The policy states that an insured location is any premises used "in connection" with the residence premises. (Supp. 14, Stip. Facts, Ex. A., Definitions). As noted above, an insurer bears the burden of proving the applicability of an exclusion. Westfield offered no evidence as to how the property was used, however. A genuine issue of fact remains on this issue.

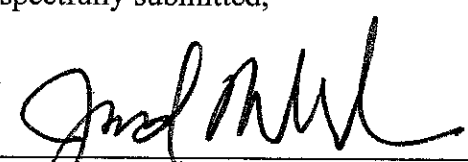
The case relied on below by the lower courts and Westfield, *Pierson v. Farmers Ins. of Columbus*, 2007-Ohio-1188, actually supports the fact that Westfield has not met its burden under Rule 56(C). The *Pierson* court set forth three factors that courts generally consider when determining whether a premises is used in connection with an insured premises: "the proximity of the premises, the type of use of the premises, and the purpose of the insurance policy as a whole." *Id.*, ¶ 18. In making this determination, the court considered testimony concerning the fact that the residence was vacant 90% of the time that the insured owned it, the items he kept there (it was mainly used for storage), and how often he visited. *Id.*, ¶ 19. In contrast, Westfield presented no evidence of this sort to support its contention that the Hunters did not use the Indiana farm in connection with the insured premises.

Westfield failed to meet its burden of proof, under Rule 56(C) and as a matter of proving the applicability of the exclusion. This is yet another reason that the "other owned premises" exclusion should not be the basis of a denial of coverage.

CONCLUSION

For the reasons stated by Grinnell in its merit brief and for the reasons stated above, the Whickers respectfully request that the Court find that an injury that "arises out of a premises" where the premises proximately caused or contributed to the injury, and therefore reverse the decisions below. In the alternative, the Whickers respectfully request that the Court reverse the findings below that the Farm Property is not an "insured location" and remand the case for further determination.

Respectfully submitted,



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