[Cite as *Westfield Ins. Co. v. Hunter,* 2009-Ohio-5642.]

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 -	:	O P I N I O N 10/26/2009
MICHAEL HUNTER, et al.,	:	
Defendants-Appellants.	:	

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

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HENDRICKSON, J.

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

{¶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

2. This action was filed in the Hamilton County Common Pleas Court prior to Westfield filing the instant

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

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declaratory judgment action.

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 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

3. Because the issue is one of contract interpretation, we do not address any tort claims or analyze any possible

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

liability the Hunters may have had because of the accident.
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.

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 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 Assn. 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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