STATE OF WISCONSIN
SUPREME COURT

MARSHALL SCHINNER,

Plaintiff-Appellant,

Appeal No. 2011AP0000564
Circuit Court Case No.: 2009CV000870

v.

MICHAEL GUNDRUM,

Defendant, and

WEST BEND MUTUAL INSURANCE COMPANY,

Defendant-Respondent-Petitioner.

# BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER WEST BEND MUTUAL INSURANCE COMPANY

**APPEAL FROM THE COURT OF APPEALS, DISTRICT II, FOLLOWING APPEAL FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE JAMES G. POUROS, PRESIDING, CIRCUIT COURT CASE NO. 2009CV870**

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## I. ISSUES PRESENTED FOR REVIEW, HOW IT WAS RAISED AND DECIDED BY THE CIRCUIT COURT AND COURT OF APPEALS.

1. Is the intentional act of giving alcoholic beverages to underage persons at a party, encouraging them to drink and become intoxicated, knowing they were likely to become belligerent and cause injury, and then injury happening, all as specifically alleged in the Second Amended Complaint an "occurrence" or "accident" as those terms are used in a homeowner's liability insurance policy?

Answered by the Circuit Court: No.

Answered by the Court of Appeals: Yes.

2. Does the intentional act of hosting the party in a secluded shed on separate business property have some connection with that real property where it happened so as to constitute a "claim arising out" of a business location that was not the insured home?

Answered by the Circuit Court: Yes, by implication.

Answered by the Court of Appeals: No.

3. Does the storage of some personal property, including snowmobiles and other recreational vehicles, on undisputedly business property that is not listed or defined as an insured location on a homeowner's insurance liability policy convert the business location to an insured location under the homeowner's insurance liability

policy?

Answered by the Circuit Court: No.

(Issue Identified but not addressed by the Court of Appeals.)

## II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

West Bend respectfully requests the opportunity to present oral arguments before this Court. Furthermore, West Bend respectfully requests the Court's decision in this matter be published as publication would clarify the law on the "occurrence" definition in insurance policies, a frequently litigated insurance issue. Further, the Court of Appeals Decision suggests there is an existing conflict in this Court's decisions on this issue. Further, the exclusion at issue on appeal has not been the subject of a published Supreme Court decision.

## III. INTRODUCTION.

This appeal concerns whether a homeowner's liability insurance policy applies to an injury claim arising from an allegedly foreseeable fight at an underaged drinking party on business property. Michael Gundrum (hereinafter "Gundrum") hosted this party at a secluded shed located on corporate business property. Gundrum had hosted underaged parties at the shed before, and encouraged underaged kids to drink, despite its illegality and knowing they were

likely to become belligerent and fight. The underaged Matthew Cecil (hereinafter "Cecil") assaulted and injured underaged plaintiff-appellant Marshall Schinner (hereinafter "Schinner") at the party.

West Bend Mutual Insurance Company (hereinafter "West Bend") issued a homeowner's liability policy to Michael Gundrum's parents. Schinner contends this policy should be read to cover liability for the injuries sustained in this assault, despite it happening at a business property rather than at the home, in a non-accidental event.

The Circuit Court in Washington County Circuit Court granted West Bend's motion for summary judgment, holding that it had no duty to defend Gundrum because there was no "occurrence" triggering coverage under the West Bend policy. Additionally, the Circuit Court held that the business shed where the assault took place was not an "insured location" under the West Bend homeowner's policy and therefore coverage could not apply.

The Wisconsin Court of Appeals, District II, reversed the Circuit Court's grant of summary judgment. Saying that Wisconsin Supreme Court decisions conflicted on how to interpret the term "occurrence" in an insurance policy, the Court of Appeals chose an interpretation that viewed the assault as "accidental" from Schinner's perspective,

thereby triggering the West Bend policy. The Court of Appeals refused to apply an exclusion that excluded coverage for injury arising out of premises other than the home, concluding the injuries did not arise from a premises condition at the business shed, stating: "no particular condition of the premises correlates to the basis of liability for the injury." (App. 14; *Decision* ¶28).

## IV. STATEMENT OF CASE: NATURE, PROCEDURAL STATUS, AND FACTS.

### A. The Second Amended Complaint Allegations.[1]

Michael Gundrum hosted underage drinking parties at a secluded shed located on corporate property of Gundrum Trucking, his family's business property on real estate located away from the family residence. (App. 37; R3-5; *Second Amended Complaint* ¶¶5, 6).[2] The Gundrum Trucking

[1] Initially "[a]n insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy." *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶20, 311 Wis. 2d 548, 560, 751 N.W.2d 845, 850. Information obtained in discovery is relevant where, as here, the insurer is providing a defense under a reservation of rights to dispute coverage. "Where the insurer has provided a defense to its insured, a party has provided extrinsic evidence to the court, and the court has focused in a coverage hearing on whether the insured's policy provides coverage for the plaintiff's claim, it cannot be said that the proceedings are governed by the four-corners rule." *Estate of Sustache*, 2008 WI 87 at ¶29, 311 Wis. 2d at 563-64, 751 N.W.2d at 852. ). If discovery shows there will be no duty to indemnify, the "court need not confine itself to the 'four corners' of a plaintiff's complaint when deciding whether an insurance policy requires an insurer to defend the policyholder." *Baumann v. Elliott*, 2005 WI App 186, ¶ 1, 286 Wis. 2d 667, 672, 704 N.W.2d 361, 363 (2005).

[2] Gundrum undoubtedly chose to use the shed for both this party and a previous party because he knew many of the party attendees would be underage, and the location was secluded. The party spot was so well hidden that responding law

machine shed was undisputedly on business property, not the Gundrum residence. The Gundrum residence is located at 4518 HWY 144, Slinger, Wisconsin (R14–54; *Policy*, p. 17 of 22), while Gundrum Trucking is located on an entirely separate parcel of land at 4925 Arthur Road, Slinger, Wisconsin. (App. 23–24; R25–6–7; *Circuit Court Decision* p. 6–7). Gundrum was 21 at the time, while Schinner was only 19. (App. 37, 38; R.3–5, 6; *Second Amended Complaint* ¶¶4, 13).

Gundrum, the Second Amended Complaint alleged, knew the underaged drinkers could become so intoxicated as to be belligerent, (App. 38; R3–6; *Second Amended Complaint* ¶12), and he also knew that party attendee Cecil specifically had a "history of becoming aggressive when inebriated." (Appellant's Ct. App. Br. p. 9). Yet Gundrum still "encouraged, advised, and assisted" Cecil to drink, despite his knowledge that it was illegal and could lead to a fight and injury. (App. 39; R3–7; *Second Amended Complaint* ¶22)

The Second Amended Complaint also alleged the liability of Gundrum for providing alcoholic beverages to

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enforcement had an extremely difficult time finding it, as the deputy sheriff's report indicated: "...at an underage alcohol party located in the machine shop...[at] the grounds of Gundrum Trucking...[officers] were already canvassing the area attempting to locate the victim, Schinner, in the specific outbuilding where this was alleged to be occurring...initial attempt[s] to make contact at what was believed to be "the shop" was unsuccessful, with no one answering the door. There were no windows available to peer into..." (R. 14–169).

the underaged in violation of law, (App. 39; R3-7; *Second Amended Complaint* ¶21), and that this violation was the cause of plaintiff's injuries. (*Id.* at ¶24). Gundrum was prosecuted and convicted for selling alcohol to an underage person, a violation of Wis. Stat. § 125.07(1)(a). (R14-240, 241).

Gundrum's intent and knowledge were all very specifically alleged in the Second Amended Complaint:

> 6. Defendant Gundrum **knew and expected**, based on a similar party held there months earlier, that individuals he invited would invite other **youths**, who in turn would invite others.
>
> 7. Defendant Gundrum **knew and expected** that a substantial number of individuals, 40% - 50% of those in attendance, would be **under the legal drinking age.** …
>
> …
>
> 12. Defendant Michael Gundrum **realized** that the number of attendees, **their age**, and their intoxication level **could lead to fights.**
>
> …
>
> 22. Further, on December 14th and 15th, 2008, Gundrum committed affirmative acts which **encouraged**, advised and assisted **Cecil in his consumption of alcohol.**
>
> 23. On December 14, 2008, Gundrum **knew** that **Cecil had not attained the legal drinking age.**
>
> 24. On December 14th and 15th 2008, the consumption of beer by Cecil was a substantial factor in causing injury to plaintiff Marshall Schinner.

(bold added)(App. 37-39; R3-5-7; *Second Amended Complaint*, ¶¶6, 7, 12, 22-24).

The Second Amended Complaint further alleged that tensions rose and the fight developed slowly throughout the course of the evening, and that Gundrum was aware of the circumstances giving rise to the fight:

> 14. Mr. Cecil, as he was drinking that evening, became belligerent and argumentative, especially toward another parson attending the party, then 19 year old plaintiff Marshall Schinner.
>
> 15. Mr. Cecil continued to taunt and ridicule Schinner, to the point where Schinner approached Gundrum, as the party host, asking him to intervene.
>
> 16. Gundrum did intervene, requesting Cecil to "back off" in his taunting of Schinner. The taunting and aggressive behavior by Cecil stopped for a short while, but then resumed, to a point where Schinner and several of his friends decided to leave the party.
>
> 17. As Schinner and his friends were leaving the party and were outside the shed, Cecil followed them to their car. Schinner entered the vehicle that he arrived in, but then exited briefly to let another acquaintance enter the vehicle and sit in the center position.
>
> 18. As Schinner exited the vehicle, he was immediately punched in the face by Cecil. Cecil appeared to be ready to strike again, when Schinner, acting in self-defense, wrapped his arms around the torso of Cecil. The two fell to

> the ground.
>
> 19. Schinner remained on the ground, having been made unconscious, and Cecil then stood up and kicked him in the head, causing permanent paralysis.

(App. 38-39; R3-6-7; *Second Amended Complaint* ¶¶14-19).

Finally, the location of the drinking party and fight, the Gundrum Trucking machine shed, was undisputedly on business property, not the Gundrum home:

> 4. On December 14, 2008 and December 15, 2008, then 21-year-old defendant Michael Gundrum resided with his parents Scott and Teri Gundrum at their family home at 4925 Arthur Road, Slinger, WI.
>
> 5. On December 14, 2008, defendant Michael Gundrum invited several friends via text message and otherwise to a party which was to be held in a shed located on property owned by his parents.

(App. 37; R3-5; *Second Amended Complaint* ¶¶4, 5). Discovery showed that the Second Amended Complaint erroneously alleged the Gundrum family home to be located at 4925 Arthur Road, Slinger, Wisconsin. This is the address of Gundrum Trucking, not the Gundrum home, which is located at 4518 HWY 144, Slinger, Wisconsin. (R14-54; *Policy*, p. 17 of 22). This shed was the trucking company's machine shed, secluded, windowless and hard to find as described by responding law enforcement. (R14-169).

**B. The West Bend Policy.**

The West Bend Home and Highway policy issued to the Gundrums contained Personal Liability Coverage. The Personal Liability coverage, subject to terms and exclusions, applied to an "occurrence," defined to mean an "accident:"

> A. Coverage E – Personal Liability
>
> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" ... caused by an "occurrence" to which this insurance applies, we will:
> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable ...
> 2. Provide a defense at our expense by counsel of our choice ...

(R14–118; *Policy*, p. 15 of 22).

> "Occurrence" means an accident..."

(R14–105; *Policy Special Coverage Form*, p. 2 of 22).

The policy also contains an exclusion for injury liability arising from a premises that is not an "insured location:"

> Coverages E and F do not apply to the following: ...
>
> "Bodily injury" or "property damage" arising out of a premises:
>
> a. Owned by an "insured"
> b. Rented to an "insured"; or
> c. Rented to others by an "insured";

That is not an "insured location";

(R14-120; *Policy*, p. 17 of 22)[3].

### C. Circuit Court and Court of Appeals Procedural History.

Schinner commenced this action against Michael Gundrum and West Bend Mutual Insurance Company in Washington County Circuit Court. The Second Amended Complaint alleged, as quoted above, that Gundrum had a history of hosting underage drinking parties, encouraged illegal drinking, knew it would make youthful party-goers intoxicated and become belligerent, and knew that injuries could result from it. The Second Amended Complaint specifically alleged Gundrum's conduct violated Wisconsin law, and that he committed "affirmative acts" to encourage, advise, and assist Cecil to drink. (App. 38-39; R3-6-7; *Second Amended Complaint* ¶¶15-16, 22).

West Bend moved for and was granted bifurcation and stay to have insurance coverage issues addressed. (R11-1-3). West Bend moved for summary judgment, arguing that its duty to defend and indemnify had not been triggered – there

[3] Further, because there is no coverage under the Home and Highway policy, there can be no coverage under the Umbrella Policy, because, as Schinner conceded to the Court of Appeals, (Appellant's Ct. App. Br. p. 37), the Home and Highway and Umbrella policies have the same "occurrence" and same "arising out of" language. Further, the Umbrella Policy plainly states that "coverage under this form will be no broader than the "underlying insurance."" (R14-154; *Policy Umbrella Coverage Form* p. 6 of 10)

was no "accident," and therefore no "occurrence" under the policy. (R15-12-16, R16-1-2). West Bend further argued that there was no coverage based on the policy exclusion precluding coverage for injury arising out of a non-insured location. (R15-18-20).

The Washington County Circuit Court granted West Bend's motion for summary judgment, holding that the policy of insurance issued to Gundrum's parents provided no coverage, defense or indemnity, to Michael Gundrum for Schinner's allegations, and therefore West Bend had no liability to Schinner for his injuries. (App. 24; R25-7; *Circuit Court Decision* p.7). The Circuit Court held that the intentional act of procuring alcoholic beverages for an underage individual who was alleged to have caused injury to another as a result of the intoxication was not an "occurrence" as that term is used in the homeowner's liability insurance policy:

> Based on the undisputed facts in this case, there is simply no "occurrence." The home and highway policy defines occurrence as an accident. There is no allegation of any accidental conduct. [The acts of Cecil are intentional acts --- punching Schinner twice and kicking Schinner in the head.] Further, any acts on the part of Michael Gundrum were intentional, namely his providing of alcoholic beverages to underaged persons.

(App. 23; R25-6; *Circuit Court Decision* p. 6)(internal citation omitted).

Additionally, the Circuit Court held that the "non-insured location" exclusion applied:

> It is also undisputed that the location of the intentional punching and kicking by Cecil was 4925 Arthur Road, Slinger, Wisconsin. Those premises are not the insured location. They are the premises of Gundrum Trucking. The home address of Michael Gundrum is 4518 Hwy. 144, Slinger, Wisconsin.

(*Id.* at 23-24; R25-6-7; *Circuit Court Decision* p. 6-7) (internal citation omitted). Relying on the plain language of the insurance policy, the Circuit Court was unpersuaded by the argument that storage of some personal property, including snowmobiles and other recreational vehicles, should stretch the Gundrums' homeowner's insurance policy to cover the business property:

> There is no ambiguity here. The home owner's policy is inapplicable because the injury did not occur at an insured location.

(App. 24; R25-7; *Circuit Court Decision*, p. 7).

The Court of Appeals reversed the Circuit Court on both the "occurrence" issue and the "non-insured location" exclusion. (App. 12, 17; *Court of Appeals Decision* ¶¶24, 35, 36). The Court of Appeals found an occurrence because, it said, "the assault is "accidental" [when viewed] from

the standpoint of the injured party. . . ." (App. 7; *Court of Appeals Decision* ¶15). The Court of Appeals relied on this Court's decisions in *Fox Wisconsin Corp. v. Century Indem. Co., 219 Wis.* 549, 263 N.W.2d 567 (1935) and *Tomlin v. State Farm Mut. Ins. Co.,* 95 Wis.2d 215, 290 N.W.2d 285 (1980), which analyzed "occurrence" from the perspective of the injured party. However, the Court of Appeals also noted *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845 instructing the Court to conduct the "occurrence" analysis from the perspective of the insured tortfeasor:

> ". . . *Estate of Sustache* does seem to conflict with *Fox* and *Tomlin* on the question of whose vantage point—the injured party's or the insured's—courts should use to determine whether an event is an "accident" qualifying as an "occurrence."

(App. 8; *Court of Appeals Decision* ¶16.) The Court of Appeals then said *Sustache* could be read in two ways, and it chose to read it to require the insured to have intended bodily injury for there to be no occurrence. (App. 9; *Court of Appeals Decision* ¶19). The Court did not focus on the allegations of Gundrum's knowledge of the consequences of encouraging underaged kids to drink, and intentional encouragement to them to drink, like the Circuit Court did.

Instead, it focused on whether Gundrum intended an injury to Schinner. (App. 10; *Court of Appeals Decision* ¶21).

Next, the Court of Appeals turned to an examination of the "non-insured location" exclusion. The Court of Appeals held that Schinner's injuries did not "arise out of" the shed because no particular "condition" of the premises correlated to the basis of liability for the injury. (App. 14; *Court of Appeals Decision* p. 14, ¶28). Because it found the injuries did not "arise out of" the shed, the Court concluded that it need not address whether the Gundrums used the shed "in connection with" their residence. *Id.*

## V. ARGUMENTS.

### A. There Was No "Occurrence" Triggering Coverage Under The West Bend Policy.

The Gundrums' homeowner's policy defines "occurrence" as "an accident ... which results, during the coverage period, in … "bodily injury" ..." (R14-105; *Policy* p. 2 of 22). The Second Amended Complaint alleged two causes of action against Gundrum. (App. 39, 40; R3-7-8; *Second Amended Complaint ¶¶20-30*). The allegations against Mr. Gundrum all arise from the intentional, unlawful acts of both Gundrum and Cecil, not accidents. *Id.* The Second

Amended Complaint alleged that Gundrum knowingly procured and served alcoholic beverages to underaged persons, including Cecil, in violation of Chapter 125 of the Wisconsin Statutes. (App. 39; R3-7; *Second Amended Complaint*, ¶¶21-23). For this, he was found guilty by way of a no contest plea to selling alcohol to underaged persons. (R14-240-241; (CCAP printout of Gundrum's citation); (R14-233; *Gundrum Deposition Trans.*, p. 68, Lines 13-21). The Second Amended Complaint alleged Gundrum "encouraged, advised and assisted" Cecil to drink, and that Cecil's drinking caused injury to Schinner. (App. 39; R3-7; *Seconded Amended Complaint,* ¶¶22, 24). These allegations do not describe an accident.

The second cause of action contained in the Second Amended Complaint alleged that Gundrum assumed a duty to Schinner to supervise and protect those attending the party. (App. 40; R3-8; *Second Amended Complaint,* ¶¶26-30). The Second Amended Complaint specifically alleged Gundrum hosted parties at the shed, knew half the attendees would be underaged, took "affirmative acts" to get them intoxicated, including Cecil, (App. 39; R3-7; *Second Amended Complaint,* ¶22), knowing it "created a reasonable possibility of injury to those attending," (App. 40; R3-8; *Id.* at ¶27) and "realized" that their young age and level

of intoxication "could lead to fights." (App. 38; R3-6; *Second Amended Complaint* ¶12.) As Mr. Cecil "became belligerent" toward Schinner, (*Id.* at ¶14,) Gundrum merely asked Cecil to "back off", (*Id.* at ¶16,) but the taunting and confrontation briefly stopped and then escalated. (*Id.* at ¶¶16-18). Gundrum's serving the kids caused Schinner's injuries, the Second Amended Complaint alleged. (*Id.* at ¶24). Again, these allegations do not describe an accident.

The Court of Appeals erroneously focused its analysis on whether Cecil's assault on Schinner could be characterized as "accidental," when viewed from the victim's perspective, instead of the insured's perspective as required by *Sustache* and a long line of this Court's decisions. Even before *Sustache,* this Court and the Court of Appeals had consistently applied "occurrence" from the stand point of the insured, considering whether the insured acted with a lack of intention in an unforeseen incident. *See, e.g., Everson v. Lorenz,* 2005 WI 51, ¶15, 280 Wis. 2d 1, 12, 695 N.W. 2d 298, *303; American Family Mut. Ins. Co., v. American Girl,* 2004 WI 2, ¶44, 268 Wis. 2d 16, 41-2, 673 N.W. 2d 65, 77-78; *Smith v. Katz*, 226 Wis. 2d 798, 820-821, 595 N.W.2d 345 (1999); *Doe v. Archdiocese of Milwaukee,* 2010 WI App 164, ¶7, 330 Wis. 2d 666, 675,

794 N.W. 2d 468, 472; *Kalchthaler v. Keller Constr. Co.*, 224 Wis. 2d 387, 397, 591 N.W.2d 169, 173 (Ct. App. 1999); *Bruner v. Heritage Cos.*, 225 Wis. 2d 728, 737-38, 593 N.W. 2d 814, 818 (Ct. App. 1999). The Court of Appeals should have concentrated on whether Gundrum's conduct, viewed from his perspective, was "accidental."

The facts determine the duty to defend, *School Dist. of Shorewood v. Wausau Ins. Cos.* 170 Wis. 2d 347, 364-365, 488 N.W.2d 82, 87-88 (1992), not theories of recovery. As this Court stated in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶ 36, 311 Wis.2d 492, 514, 753 N.W. 2d 448, 458-59:

> . . . the longstanding rule [is] that we "must focus on the incident or injury that gives rise to the claim, not the plaintiff's theory of liability." *Berg v. Schultz*, 190 Wis. 2d 170, 177, 526 N.W.2d 781 (Ct. App. 1994).

The allegations of affirmative acts to get underaged kids drunk, knowing they could fight, takes this case outside the "occurrence" definition. For example, in *Everson v. Lorenz,* 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298, this Court held that the developer's negligent misrepresentations could not be considered an "accident" for the purpose of liability insurance coverage:

> [The developer's] misrepresentation can be defined as an "act of making a false or misleading statement about something…" To be liable, [the developer] must have asserted a false statement, and **such an assertion requires a degree of volition inconsistent with the term accident**… More specifically: "injury that is caused by negligence must be distinguished from injury that is caused by a deliberate and contemplated act initiated at least in part by the actor's negligence at some earlier point.

*Everson*, 2005 WI 51 ¶19, 280 Wis. 2d at 14, 695 N.W.2d at 304 (internal citations omitted; bold added). Like the analysis in *Everson*, the Court in the instant case should examine whether the allegations against Gundrum described a degree of volition inconsistent with the term accident. Gundrum's affirmative intentional acts of encouraging, advising, and assisting underaged partygoers to drink illegally, knowing that some had the propensity to become belligerent, and then watching that belligerence develop and cause injury, all demonstrate significantly more "volition" than that seen in *Everson*.

Similarly, in *Doe v. Archdiocese of Milwaukee*, 2010 WI App 164, ¶¶1-2, 330 Wis. 2d 666, 670-671, 794 N.W.2d 468, 470, the Wisconsin Court of Appeals was presented with the issue of whether CGL insurance coverage existed for the Archdiocese of Milwaukee where the plaintiff-victim alleged

that a priest employed with the Archdiocese molested him and that the Archdiocese committed negligent misrepresentation in employing the tortfeasor priest. The Archdiocese's CGL policy provided "occurrence" based coverage for accidents. *Id*. at ¶4, 330 Wis. 2d at 673, 94 N.W.2d at 471.

Applying the analysis articulated in two decisions of this Court, *Smith v. Katz*, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), and *Everson v. Lorenz*, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298, *Doe* concluded that the Archdiocese' acts were volitional, not accidental, and denied coverage, even though the plaintiff's complaint alleged the Archdiocese did not intend the injury. *Doe*, 2010 WI App 164, ¶2, ¶7, 330 Wis. 2d at 672, 675-76, 794 N.W.2d at 470-71, 472. Importantly, *Doe* examined the underlying acts of the Archdiocese, not the tortious acts of the priest that injured the plaintiff and not whether the victim believed the insured's act was accidental:

> **[T]he focus for purposes of this appeal is not the ultimate injury the plaintiffs suffered, but rather the underlying acts of the Archdiocese that led to the plaintiffs' injuries…**
>
> The underlying act that led to plaintiffs' injury, therefore, is the misrepresentation that the plaintiffs would be safe in the presence of the priests. **The proper focus for**

> **determining coverage, then, is on the misrepresentation leading to the molestation.**

*Doe*, 2010 WI App 164, ¶10, 330 Wis. 2d at 678, 794 N.W.2d at 473–74 (footnote omitted) (bold added). Though the Archdiocese may not have anticipated the plaintiff would be harmed, the focus in determining whether events are accidental for insurance purposes is not on whether a specific result was accidental, but rather whether the cause of the injury was accidental. *Doe* concluded that "[t]he cause of the plaintiffs' injuries, the misrepresentation by the Archdiocese, cannot be characterized as accidental." *Doe*, 2010 WI App 164, ¶12, 330 Wis. 2d at 680, 794 N.W.2d at 474. Similarly here, the alleged cause of injury for which Gundrum is liable, the purposeful encouragement of underaged, belligerent kids to drink knowing of their violent predispositions, cannot be called accidental.

Contrary to *Doe* and *Everson*, the Court of Appeals here focused on the assault, not Gundrum's "underlying" purposeful actions leading to it. Compounding the error, the Court of Appeals looked to whether Gundrum "intended bodily harm." (App. 9; *Court of Appeals Decision* ¶19). This approach was expressly rejected in *Doe*, relying on

this Court's decision in *Stuart v. Weisflog*, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 449:

> Both of the Archdiocese's arguments put forth a proposition that *Stuart II* expressly rejected--the notion that if an unintended result is accidental from the standpoint of the insured, it is covered under a CGL policy that defines "occurrence" as "accident." Though the Archdiocese may not have anticipated harm to befall the plaintiffs, *Stuart II* is clear that the focus in determining whether events are accidental for insurance purposes is not on whether a specific result was accidental, but rather "what matters is whether the cause of the damage was accidental." *Stuart II*, 2008 WI 86, 311 Wis. 2d 492, P40, 753 N.W.2d 448 (emphasis added). Therefore, "to determine whether an act is accidental within the meaning of [this CGL policy], we need only determine whether the occurrence giving rise to the claims was an unintentional act in the sense that it was not volitional." (*Id.* p. 37). The cause of the plaintiffs' injuries, the misrepresentation by the Archdiocese, cannot be characterized as accidental. The affirmative representation of safety by the Archdiocese did not occur by chance, nor was it unforeseen or unintended, as *Stuart II* would require.

*Doe*, 2010 WI App 164, ¶ 12, 330 Wis. 2d at 679-80, 794 N.W.2d at 474. Similarly here, the illegal underaged drinking party hosted by Gundrum, who "realized . . . it could lead to fights," (*Second Amended Complaint* ¶12; R.3-

5-7; App. 38) did not occur by chance and the injury was allegedly foreseeable.

The Court of Appeals here relied heavily on *Fox* and *Tomlin*, both of which are contrary to the more recent weight of authority as described above, but they are also factually distinct in an important way. Neither *Fox* nor *Tomlin* involved two distinct actors contributing to a causal chain leading to a plaintiff's injuries. In both decisions the only allegedly liable actor was the assaulter. Further, in *Tomlin*, over 30 years ago, this Court addressed insurance coverage for a state patrol officer who been stabbed following a traffic stop. The court stated that in order to determine whether the injury had been accidentally sustained it would adopt the viewpoint of the injured person because:

> "The majority of Courts, including this Court, when considering the question have held and recognized that the determination of whether injuries resulting from an assault were caused "by accident" or "accidently sustained" must be made from the standpoint of the injured party, rather than that of the person committing the assault. (footnote omitted)

95 Wis. 2d at 219, 290 N.W.2d at 288.[4] However, with the

[4] For this proposition, *Tomlin* cited an annotation entitled *Liability insurance: assault as an "accident," or injuries therefrom as "accidentally" sustained*, within coverage clause, 72 ALR 3d 1090 (1976). The current version of this annotation describes no majority rule, but instead says "the

passage of time this Court has clearly and repeatedly determined "occurrence" looking to the conduct and intent of the insured, not the injured party. We respectfully submit *Tomlin* is just not reflective of the current state of Wisconsin law.

Similarly, *Fox*, over 75 years old, concerned liability coverage for a theater where an employee assaulted a patron. The Court held that determining whether the injury was accidental was to be determined from the standpoint of the person injured, without citation to any law or authority of any kind. 219 Wis. at 551, 262 N.W. at 568. Neither *Fox* nor *Tomlin* are representative of the current state of law in Wisconsin.

The Court of Appeals also cited to *Sustache* for its alternative proposition that the assault be viewed from the standpoint of the insured and whether the insured intended bodily injury to determine whether an accident has occurred. However, *Sustache*, too, concerned only the assaulter and the victim.

Of note, other states' Courts have viewed supplying alcohol to a minor and any resultant injuries to not be "occurrences" that merit insurance coverage. In *Illinois*

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courts have taken or adopted two divergent positions as to from whose perspective the assault is to be viewed in determining whether it constitutes an accident...." 72 ALR 3d 1090, §2 (2012).

*Farmers Insurance Co. v. Duffy*, 618 N.W. 2d 613, 615 (Minn. Ct. App. 2000) the Minnesota Appellate Court decided that a fatal car accident caused by an alleged insured providing alcohol to a minor at a party was not covered by Illinois Farmer's homeowner's insurance policy. The Court's rationale was that the wrongful or tortious act that caused the accident was the intentional furnishing of alcohol to minors at a party on Michael Duffy's property. *Id.* Due to the intentional aspect of Duffy's actions, the wrongful or tortious act causing the fatal accident could not be considered an "occurrence," and therefore could not be covered under the homeowner's insurance policy.

The Michigan Court of Appeals also has helpful guidance, which similarly suggests no coverage here. In *Morton,* a social host, Morton, was sued by Moore. *Allstate Ins. Co. v. Morton*, 657 N.W.2d 181, 184 (Mich. Ct. App. 2002). Morton hosted underage drinkers at her home and provided them with alcohol. *Id.* Moore, one of the underage drinkers, passed out after drinking and was raped. *Id.* Allstate argued no occurrence because the underlying acts, providing alcohol and rape, were not occurrences under the policy, and the court agreed. *Id.* at 185. The Court stated:

"Where a direct risk of harm is

> intentionally created, and property damage or personal injury results, there is no liability coverage even if the specific result was unintended. It is irrelevant that the character of the harm that actually results is different from the character of the harm intended by the insured." [*Id.* at 481, *quoting Frankenmuth Ins. Co. v. Piccard*, 440 Mich. 539, 557; 489 N.W.2d 422 (1992) (Cavanagh, C.J., dissenting).]
>
> Under *Nabozny,* no accident giving rise to coverage occurred in this case because Morton reasonably should have expected that giving minors enough alcohol to allow them to pass out would result in harm. The fact that the specific harm that occurred was Stringer's intentional act of rape rather than alcohol poisoning is irrelevant to the determination whether the occurrence was an accident.

*Id.* at 184.

In the same way here, it is irrelevant that Gundrum may not have intended his acts to result in a fight that caused Schinner's injuries. Gundrum created a direct risk of harm by intentionally serving minors enough alcohol to allow them, particularly Cecil, to become aggressive knowing Cecil "became aggressive when inebriated." (*Appellant's Ct. App. Brief*, p. 9). "[E]ven if the specific result was unintended," there is no coverage. *Id.* at 184.

The West Virginia Supreme Court of Appeals reached the

same result in *American Modern Home Insurance Co. v. Corra*, 222 W. Va. 797, 798, 671 S.E.2d 802, 803 (W. Va. 2008). Several underage people attended a party at the Corra's residence at the invitation of Mr. Corra's daughter. Mr. Corra was present at the time of the party. *Id.* Several hours later the underage teenagers left the party and were involved in an auto accident that killed two of them. *Id.* Mr. Corra was convicted of knowingly providing alcohol to underage persons. *Id.* at 799, 671 S.E.2d at 804. The wrongful death suit against Mr. Corra was tendered to his homeowners insurer. *Id.* The insurer moved for summary judgment arguing the injuries to the teenagers were not caused by an "occurrence" under the policy's language. *Id.* In ruling for the insurer, the Court held:

> [A]bsent policy language to the contrary, a homeowner's insurance policy defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in … bodily injury or property damage," does not provide coverage where the injury or damage is allegedly caused by the homeowner's conduct in knowingly permitting an underage adult to consume alcoholic beverages on the homeowner's property.

*Id.* at 801–02, 671 S.E.2d at 806–07. The Court further held that simply framing claims as arising in negligence is

insufficient to constitute an "occurrence" as defined by a homeowner's policy. *Id.* at 802, 671 S.E.2d at 807.

In the same way here, Schinner's labeling the acts as "negligence" is irrelevant. There is no occurrence or accident in Gundrum's "knowingly permitting an underage adult to consume alcohol beverages" knowing it will increase risk of fights. *Id.*

Similarly, the Ohio Appellate Court ruled that the furnishing of alcohol to minors and any subsequent events resulting in harm cannot be considered an accident or occurrence. In *Sheely v. Sheely*, 2012 Ohio 43 (Ohio Ct. App. 2012) the mother of Ivy Sheely, a deceased girl, filed wrongful death and survivorship actions against the father who had purchased the minor daughter a bottle of vodka at her request. The daughter then took the vodka to a party in the next door house and drank the majority of it in a short period of time, causing her death by acute alcohol toxicity. In its decision, the appellate court cited in part *Illinois Farmers v. Duffy* and *American Modern Home Ins. Co. v. Corra,* stating that the furnishing of alcohol to minors and resultant harm cannot be considered an accident:

> Moreover, even though our review

> of Ohio case law did not reveal a case which addressed this particular issue, other jurisdictions have determined that the unintended harm resulting from an adult furnishing alcohol to a minor is not an "occurrence" covered by an insurance policy, where "occurrence" is defined as an "accident" as in this case...
>
> Based on the foregoing, we conclude that Ivy's death from acute alcohol toxicity as a result of her consuming liquor furnished to her by Dan cannot be classified as an accident within the meaning of the insurance policy in this case. As a result, Ivy's death is not an insurable event as an "occurrence" under Dan's homeowner's policy with Lightning Rod.

*Sheely*, 2012 Ohio 43 at ¶37-¶38

**B. In The Alternative, The Non-Insured Location Exclusion Precludes Coverage Under the West Bend Policy.**

The policy plainly excludes liability arising from a location that is owned by the insured but is not an insured location, by the following exclusion:

> Coverages E and F do not apply to the following: …
> "Bodily injury" or "property damage" arising out of a premises:
>
> a. Owned by an "insured";
> b. Rented to an "insured"; or
> c. Rented to others by an "insured";
>
> that is not an "insured location";

(R14-120; *Policy* p. 17 of 22). An "insured location" is

defined by the policy to mean the residence, vacant land and cemetery plot:

> 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 coverage period for your use as a residence;
>
> c. Any premises used by you in connection with a premises described in a. and 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”;
>
> g. Individual or family cemetery plots or burial vaults of an “insured”; or
>
> h. Any part of a premises occasionally rented to an “insured” for other than “business” use.

(R14-105).

> "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.
>
> . . .

(R14-105).

The exclusion's plain language precludes coverage because Schinner's injuries arose out of the shed and the Gundrums did not use the shed in connection with their residence. It is undisputed that the West Bend homeowner's policy was issued to the Gundrums at their "residence premises," their home where they reside, for their home, which the policy plainly states on its face is 4518 HWY 144, Slinger, WI. (R14-54; *Policy Automobile* p. 1). The party at issue in this case did not take place at the Gundrum's home. It is undisputed that the party was held in a business storage shed for Gundrum Trucking, a business owned by Gundrum's parents.

1. **Gundrum's act of selecting the shed for his underage drinking parties is sufficiently connected to the shed so that the bodily injury claim constitutes a claim for injury "arising out" of that uninsured location.**

The words "arising out of" in the context of a liability insurance policy, are very broad, general and comprehensive, and are ordinarily understood to mean "originating from, growing out of, or flowing from." *Garriguenc v. Love*, 67 Wis. 2d 130, 137, 226 N.W. 2d 414, 418 (1975). Michael Gundrum chose the shed to host an underage drinking party, undoubtedly for its seclusion to conceal the illegal activity, because of its size, 40' x 60', (R14-197), and so the partygoers could play "beer pong" (R14-208) there, among other things and not get caught. In fact, the shed was such an ideal location to host illegal underaged drinking parties that, when law enforcement officers were called to the scene, they still had an extremely difficult time finding it. (R14-169). As instructed by *Garriguenc*, the injuries alleged here by Mr. Schinner originated, grew, or flowed from the party hosted at the Gundrum Trucking premises shed. Therefore, the non-uninsured location exclusion is clearly applicable.

The Court of Appeals relied upon *Newhouse v. Laidig*, 145 Wis. 2d 236, 239-40, 426 N.W.2d 88, 90-91 (Ct. App. 1988), to rewrite the policy exclusion to include the word "condition:"

> Stated another way, the exclusion applies when liability arises *because of* some condition of the premises....

(italics in original)(App. 15; *Court of Appeals Decision* ¶31). The policy exclusion does not use the word condition. Instead, it confines coverage to the insured premises, not to a condition of the premises.

This use of "condition" departs from the plain language of the policy, and from longstanding Wisconsin Supreme Court precedent on policy interpretation. Wisconsin Courts have historically been instructed to interpret the terms of the policy according to the insured's reasonable view and the plain language. *Acuity v. Bagadia*, 2008 WI 62, ¶13, 310 Wis. 2d 197, 208, 750 N.W.2d 817, 822-23 ("We interpret undefined words and phrases of an insurance policy as they would be understood by a reasonable insured.... If the policy language is unambiguous, we interpret the policy in accordance with the plain meaning of its provisions".) The Court of Appeals decision said it was following the maxim that exclusions in an insurance policy are ordinarily construed against the insurer if the exclusion is ambiguous or uncertain. (App. 13, *Court of Appeals Decision* ¶¶25, 34, citing *Day v. Allstate Indem. Co*. 2011 WI 24, ¶29, 332 Wis. 2d 571, 585, 798 N.W.2d. 199, 206). However, the Court of Appeals' decision did not say the exclusion was ambiguous or its

application uncertain. Its cited authority, *Day*, also states that "a Court will enforce exclusions that are clear from the face of the policy." *Id.* *Day* relied upon *Whirlpool Corp. v. Ziebert* 197 Wis. 2d 144, 539 N.W.2d 883 (1995), where this Court plainly stated that this asserted maxim of construction does not allow the Court to ignore plain language:

> Furthermore, the principle of construing exclusions narrowly does not allow a Court to completely eviscerate an exclusion which is clear from the face of the policy. Rules of construction cannot be used to rewrite the clear and precise language of a contract.

*Id.* 197 Wis. 2d at 152, 559 N.W.2d at 886.[5]

Here the exclusion is not ambiguous, nor is its effect uncertain. The plain language excludes from coverage injury arising from the business premises, not from a condition of the premises. The injury arose on and from the business's shed. Further, the West Bend policy was a homeowners policy and, as the Court said in *Day,* it interprets policy terms "not in isolation but rather in the context of the policy as a whole . . . giv[ing] undefined

[5] Numerous decisions of this Court have led a treatise writer to summarize the applicable rule as follows: "exclusions are narrowly or strictly construed against the insurer if their effect is uncertain." Anderson Vol. 1, *Wisconsin Insurance Law* §1.41 (State Bar of Wisconsin 2004).

words and phrases their common and ordinary meaning...." *Day,* ¶28, 332 Wis. 2d. at 585, 798 N.W.2d at 206. The homeowners policy is not written or understood by insurers or reasonable insureds to encompass business properties, and events occurring on business properties, particularly where the site of the event was chosen because of the very nature of the business property.

Other courts have rejected the importation of the word "condition" into this exclusion. The court rejected the interpretation ". . . that a condition of the premises which has resulted from negligence must form the basis of the insureds' liability for the exclusion to apply" in *St. Paul Fire & Marine Ins. Co. v. Insurance Co. of North America*, 501 F. Supp. 136, 139 (W.D. Va. 1980), because:

> "[t]hat interpretation . . . reads a term into the exclusion not put there by the insurer. Had INA intended to exclude only bodily injury or property damage resulting from a condition of the premises, it could have so stated. Instead, INA used the more encompassing phrase–"arising out of," and the court is constrained to give the phrase its established meaning."

*Id.* *Newhouse* distinguished *St. Paul* by noting *St. Paul* involved "a causal nexus between the premises and the insured's negligence giving rise to liability", 145 Wis. 2d

at 241–42, 426 N.W. 2d at 91, and *Newhouse* instead relied on a Missouri decision that endorsed the imposition of the "condition" of the premises qualification because of "... Wisconsin's policy of strictly interpreting exclusionary clauses .... [and] [p]ublic policy in Wisconsin favors finding coverage where the insurance policy terms permit it." *Id.* at 242, 426 N.W. 2d at 91. *Newhouse's* rationale is contrary to *Day* and *Whirlpool's* direction that plain language governs first, with strict construction appropriate only upon ambiguity or uncertainty.

In *Newhouse*, a child was left unsupervised in a farm silo and was injured. *Newhouse*, 145 Wis. 2d at 238 426 N.W.2d at 88–89. The defendant's homeowner's insurance policy excluded "bodily injury ... arising out of any premises owned or rented to any insured which is not an insured location," and the farm was not an insured location. *Id.* at 239, 426 N.W.2d at 90. *Newhouse* held there was no correlation between the defendant's alleged negligent act and the premises: "The silo unloader had no ... connection to the tortious act allegedly causing the injury." *Id.* at 241, 426 N.W.2d at 91. Consequently, *Newhouse* held that the exclusion did not apply.

By contrast here, there is ample correlation between the Gundrum Trucking shed and Gundrum's affirmative act of

hosting an underage drinking party there. The shed's location, size, and seclusion made it the ideal location for Gundrum to host an illegal underage drinking party, and the Second Amended Complaint alleged "the consumption of beer by Cecil [and provided by Gundrum] was a substantial factor in causing injury to plaintiff Marshall Schinner." (App. 39; R3–7; *Second Amended Complaint* ¶24).

Further, the Court of Appeals decision wrongly focused on Cecil's tortious conduct, rather than Gundrum's conduct, when it said no condition of the shed was a cause of the assault or Schinner's injuries. (App. 16; *Court of Appeals Decision* ¶32). This focus ignores the alleged "negligence giving rise to liability," *Newhouse, supra*, which for Mr. Gundrum was the act of hosting the party and assisting underaged kids to drink illegally and possibly become belligerent, something facilitated by his choosing the secluded shed as the location for the party.

**1. The storage of personal property, including snowmobiles and other recreational vehicles, on undisputedly business property does not place the property under the coverage of the homeowner's insurance policy.**

The Circuit Court rightly rejected the proposition that persons storing personal property at the business shed converted the business property and its shed into an

insured location under the homeowner's policy. Because the Court of Appeals decision rested on the "claim arising out of" prong of the exclusion, it did not conduct this analysis.

The fact that the Gundrum's uncle and some friends stored personal property items at the business shed (R14-197) did not transform the business property into an "insured location" covered by its homeowner's insurance policy. If it did, then this would require a homeowner's insurance policy to cover every location where any insured stores personal property, including a vehicle, public warehouse, or business -- an absurd result. Schinner's argument would render the "insured location" designation superfluous, effectively reading it out of the policy. Wisconsin law does not allow such an interpretation. *Bulen v. West Bend Mut. Ins. Co.*, 125 Wis. 2d 259, 263, 371 N.W. 2d 392, 394 (Ct. App. 1985) ("interpretations which render insurance contract language superfluous are to be avoided..."). In addition, business owners would not need to purchase business insurance if they could secure business coverage under a homeowner's policy just by storing personal belongings on a business property.

## VI. CONCLUSION.

For all these reasons, this Court should reverse the Court of Appeals' decision and remand to the Circuit Court with direction to enter judgment of dismissal for West Bend Mutual Insurance Company.

Dated this 13th day of July, 2012.

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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 38 pages.

Dated this 13th day of July, 2012.

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## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the Circuit Court and Court of Appeals; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of July, 2012.

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)-(13)**

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19 (13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 13th day of July, 2012.

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STATE OF WISCONSIN
SUPREME COURT

---

MARSHALL SCHINNER,

Plaintiff-Appellant,

Appeal No. 2011AP0000564
Circuit Court Case No.: 2009CV000870

v.

MICHAEL GUNDRUM,

Defendant, and

WEST BEND MUTUAL INSURANCE
COMPANY,

Defendant-Respondent-Petitioner.

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**APPENDIX TABLE OF CONTENTS**

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APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

*This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.*

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP564 Cir. Ct. No. 2009CV870

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

---

MARSHALL SCHINNER,

PLAINTIFF-APPELLANT,

V.

MICHAEL GUNDRUM,

DEFENDANT,

WEST BEND INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

---

APPEAL from a judgment of the circuit court for Washington County: JAMES G. POUROS, Judge. *Reversed and cause remanded.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. Marshall Schinner appeals a summary judgment dismissing West Bend Insurance Company from his suit against West Bend and its insured, Michael Gundrum. Schinner alleges that he sustained serious injuries after being assaulted by an underage guest at a party Gundrum hosted on family business property. Schinner argues that the circuit court erred in concluding that there was no "occurrence" under the Gundrums' homeowner's insurance policy and, separately, that an exclusion pertaining to non-insured locations bars coverage. We agree with Schinner on both points. We apply case law addressing when a physical assault qualifies as an "accident" for purposes of insurance coverage and, in doing so, conclude that the assault here was an "occurrence." We also conclude that the non-insured location exclusion does not apply, because Schinner's injuries did not "arise out of" the family business property. Accordingly, we reverse the judgment and remand for further proceedings.

## BACKGROUND

¶2 The dispositive facts are undisputed based on the summary judgment record. Twenty-one-year-old Gundrum was covered under his parents' West Bend homeowner's insurance policy as a resident of their household.[1] Gundrum hosted a party in a shed on his family's business property. The Gundrums had been using the shed, at least in part, to store personal property, including snowmobiles explicitly listed in the homeowner's policy.

[1] To be precise, the policy is labeled a "home and highway" policy, and includes automobile coverage. However, the automobile portion of the policy is not relevant here, so, in the interest of brevity, we refer to the policy as a "homeowner's" policy.

¶3 It is alleged that, during the party, Gundrum provided alcohol to Matthew Cecil, who was under the legal drinking age. Cecil became belligerent and assaulted Schinner, who suffered serious injuries as a result. The parties agree that this was an intentional assault, and that the injuries did not result from inadvertent or merely reckless conduct by Cecil. The parties also agree that there is no allegation that Gundrum personally participated in or assisted Cecil in the assault.

¶4 Schinner sued Gundrum for negligence, alleging that Gundrum's conduct, which included providing alcohol to Cecil, was a cause of the assault and thus of Schinner's injuries. West Bend was added to the suit and moved for summary judgment, arguing that it should be dismissed from the action because there was no "accident," and therefore no "occurrence," under the policy. West Bend also argued that there was no coverage based on a policy exclusion barring coverage for harm arising out of a non-insured location. The circuit court agreed with West Bend on both points and dismissed West Bend from the case. Schinner appealed. We reference additional facts as necessary below.

## DISCUSSION

¶5 This case involves the interpretation and application of insurance policy terms to undisputed facts, which is a question of law that we review de novo, while benefitting from legal analysis provided by the circuit court. *See American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶22, 268 Wis. 2d 16, 673 N.W.2d 65. We construe the terms of an insurance policy as a reasonable insured would understand them. *Id.*, ¶23.

¶6 We first address whether the undisputed facts establish an "occurrence." Because we conclude that they do, we also address the non-insured location exclusion.

*A. Existence of an "Occurrence"*

¶7 The primary issue is whether, given the undisputed facts here, there is an "occurrence" for purposes of coverage under the Gundrums' homeowner's policy. The policy includes personal liability coverage that applies to a claim or suit against an insured "for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence.'" "Occurrence" is defined in the policy as follows:

> "Occurrence" means an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the coverage period, in:
>
> a. "Bodily injury"; or
>
> b. "Property damage."

(Emphasis added.)

¶8 Our focus is on the term "accident." The policy does not define "accident." In prior cases, when this term is undefined in an insurance policy, courts have looked to the following dictionary definitions:

- "[A]n event or condition occurring by chance or arising from unknown or remote causes."
- "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though

> unexpected, is not an accident; the means or cause must be accidental."

*American Girl*, 268 Wis. 2d 16, ¶37 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 11 (2002); BLACK'S LAW DICTIONARY 15 (7th ed. 1999)); *see also* ***Doyle v. Engelke***, 219 Wis. 2d 277, 289, 580 N.W.2d 245 (1998) ("'accident' is defined as '[a]n unexpected, undesirable event' or 'an unforeseen incident; which is characterized by a 'lack of intention.'" (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 11 (3rd ed. 1992))).

¶9 Schinner argues, in part, that the act of the insured, Gundrum, in providing alcohol to an underage guest, who then caused injuries, was an act of negligence and, therefore, an "accident." Schinner also argues that the assault was an occurrence because, although Cecil intentionally assaulted Schinner, the assault was an "accident" from Gundrum's standpoint.

¶10 For the reasons that follow, we agree with Schinner that the assault was an "accident" from Gundrum's standpoint, and it was also an "accident" from Schinner's standpoint. We therefore conclude that the assault was an "occurrence," at least for purposes of determining an initial grant of coverage under the Gundrums' policy. Although it may seem counterintuitive to think of an assault as accidental, we rely on Wisconsin case law that has addressed whether an assault is an "accident" for purposes of insurance coverage.

¶11 Our analysis begins with a line of cases in which the supreme court has concluded that, for purposes of determining whether an assault is an "accident" or "accidental" under an insurance policy, the assault and resulting injuries must be viewed from the standpoint of the person injured. *See* ***Tomlin v.***

***State Farm Mut. Auto. Liab. Ins. Co.***, 95 Wis. 2d 215, 219, 222, 290 N.W.2d 285 (1980); ***Fox Wisconsin Corp. v. Century Indem. Co.***, 219 Wis. 549, 551, 263 N.W. 567 (1935); ***Button v. American Mut. Accident Ass'n***, 92 Wis. 83, 85, 65 N.W. 861 (1896). The court reasons that, when viewed from the standpoint of the injured party, the assault and resulting injuries are an "accident" or "accidental" because the injured party did not intend, expect, or anticipate the assault or resulting injuries. *See* ***Tomlin***, 95 Wis. 2d at 219, 222; ***Fox***, 219 Wis. at 551; ***Button***, 92 Wis. at 85.

¶12 To illustrate further, we briefly summarize the two most pertinent cases, ***Fox*** and ***Tomlin***.

¶13 In ***Fox***, an employee of the insured, which was a theater, assaulted a patron. ***Fox***, 219 Wis. at 549-50. The policy provided coverage for "bodily injuries ... accidentally sustained by any person or persons." ***Id.*** at 551. The court stated that "whether or not an injury is accidental ... is to be determined from the standpoint of the person injured." ***Id.*** The court explained as follows:

> The facts show that the injury to the patron came to him through force not of his own provocation. *From his standpoint, then, the injuries were "accidentally sustained."* In the absence of some provision in the policy which excludes liability for such injuries, the meaning of "accidentally sustained" becomes plain and controlling.... The patron, whose injury gave rise to the liability, was assaulted, and, in a sense, the act was unlawful and intentional; still, *considered objectively, it occurred without the agency of the patron,* and, so far as these particular parties are concerned, the act may be, and legally is to be, termed accidental.

***Id.*** (emphasis added) (citations omitted).

¶14 In ***Tomlin***, an individual insured under an automobile insurance policy stabbed a police officer who had stopped his vehicle. ***Tomlin***, 95 Wis. 2d

App. 6

at 216-17, 219-22. The policy covered bodily injury "caused by accident." *Id.* at 218. The court explained:

> In determining whether an injury is "caused by accident" or "accidentally sustained" within the coverage afforded by a liability insurance policy, the courts have been primarily concerned with the question of *whether the occurrence is to be viewed from the standpoint of the injured person or the insured.* The majority of courts, including this court, when considering the question, have held or recognized that the determination of whether injuries resulting from an assault were caused by "accident" or "accidentally sustained" *must be made from the standpoint of the injured party*, rather than from that of the person committing the assault.

*Id.* at 219 (emphasis added). The court concluded that, "[f]rom the standpoint of [the officer], the events giving rise to his injuries were neither expected nor anticipated by him, and his injuries were therefore 'caused by accident' within the meaning of the policy." *Id.* at 222; *see also* ***Button***, 92 Wis. 83 at 85 ("It seems quite well settled that an injury intentionally inflicted on the insured person by another is an 'accidental injury,' when such injury is unintentional on the part of the insured." (citation omitted)).

¶15 Here, unlike in ***Fox*** and ***Tomlin***, the assault was committed by a third party (Cecil) instead of by an insured under the policy at issue. However, so far as we can discern, this should not affect whether the assault is viewed as an "accident." Regardless of whether the assailant is the insured, the assault is "accidental" from the standpoint of the injured party under the rationale as explained in ***Fox*** and ***Tomlin.*** There is no claim that Schinner provoked or caused the assault. Accordingly, under ***Fox*** and ***Tomlin***, the assault here is an "accident," and therefore an "occurrence," for purposes of coverage under the Gundrums' policy.

¶16 West Bend argues that we should reach the opposite conclusion under a more recent supreme court case, *Estate of Sustache v. American Family Mutual Insurance Co.*, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845. We disagree, although as we explain, *Estate of Sustache* does seem to conflict with *Fox* and *Tomlin* on the question of whose vantage point—the injured party's or the insured's—courts should use to determine whether an event is an "accident" qualifying as an "occurrence." Here, the outcome of the analysis is the same when viewed from either vantage point.

¶17 *Estate of Sustache* involved a definition of "occurrence" identical to the one in this case and, as here, an assault at an underage drinking party. *See id.*, ¶¶5-6, 9, 30-31. The difference is that the individual who committed the assault in *Estate of Sustache* was, as in *Fox* and *Tomlin*, an insured under the policy at issue. *See id.*, ¶¶3, 5. The court in *Estate of Sustache* concluded that the insured's actions in committing the assault were not "accidental" and, therefore, did not give rise to an "occurrence." *Id.*, ¶56. Thus, *Estate of Sustache* seems to conflict with *Fox* and *Tomlin* insofar as the court in *Estate of Sustache* did not view the assault from the standpoint of the injured party, as the courts in *Fox* and *Tomlin* did.

¶18 We set forth the central reasoning of *Estate of Sustache* in some detail before continuing our analysis:

> Considering the discussion of "accident" in *Doyle*, we cannot conclude that an allegation that [the insured] "intentionally caus[ed] bodily harm to [Sustache]" could reasonably be "characterized by a 'lack of intention.'" *Doyle*, 219 Wis. 2d at 289 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 11 (3d ed. 1992)). The *Doyle* court noted that an "accident" might be viewed as "an unintentional occurrence leading to undesirable results." *Id.* at 290. [The insured's] alleged decision to intentionally "punch out" Sustache may have

> produced unexpected results [Sustache's death], but this intentional act did not constitute an "accident." *One cannot "accidentally" intentionally cause bodily harm.*
>
> ....
>
> Like the allegation of a pre-sale misrepresentation of fact in ***Everson*** [***v. Lorenz***, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298], the allegations of intentional battery here evince a degree of volition inconsistent with the term "accident." *See* ***Everson***, 280 Wis. 2d 1, ¶19....
>
> ....
>
> We conclude that no reasonable person would regard the alleged intentional battery perpetrated by [the insured] against Sustache as an "unexpected ... event," or an "unforeseen incident ... characterized by a lack of intention," or "an event ... occurring by chance or arising from unknown or remote causes." ... *[The insured] intentionally caused bodily harm to Sustache.* Accordingly, we hold that the ... policy does not cover the plaintiffs' claims because [the insured's] actions were not accidental and, thus, did not give rise to an "occurrence."

***Estate of Sustache***, 311 Wis. 2d 548, ¶¶52-56 (emphasis added) (footnotes omitted).

¶19 Based on this reasoning, it appears that there are two ways to read ***Estate of Sustache***. One is that the court reasons that there was no "accident," and therefore no "occurrence," because an assault is by definition an intentional act when viewed from the point of view of the assailant, regardless of whether the assailant is the insured under the insurance policy at issue. The other is that the court reasons that the assault was not accidental because *the insured* intended the assault and intended bodily harm. We conclude that the second reading is the more reasonable one. In effect, the court views the assault from the standpoint of the insured and, viewed from that standpoint, the court concludes that the assault was not accidental.

¶20 Our reading of ***Estate of Sustache*** is supported by the court's reliance on a section of a leading insurance law treatise, which addresses the circumstances under which an assault may or may not be deemed an "accident" or "occurrence." *See* ***id.***, ¶53 n.13 (quoting LEE R. RUSS & THOMAS F. SEGALLA, 9 COUCH ON INSURANCE § 127:21 (3d ed. 2000)). Although the court in ***Estate of Sustache*** quoted the treatise section only partially, the court relied on a portion of the treatise section explaining that many courts determine whether an event is an accident from the standpoint of the insured. *See* ***id.***; 9 COUCH ON INSURANCE § 127:21.

¶21 Because the court in ***Estate of Sustache*** viewed the assault from the standpoint of the insured instead of the injured party, without addressing ***Fox*** and ***Tomlin*** or further discussing the treatise section, we are uncertain whether courts in Wisconsin should now view an assault, in the context of insurance policy "occurrence" or "accident" terminology, from the standpoint of the injured party or from the standpoint of the insured. However, for purposes of this case, it does not matter. Regardless of which way we view it, the result is the same because the assault was an accident from *both* the standpoint of the injured party (Schinner) and the insured (Gundrum). Neither Schinner nor Gundrum could be said to have intended the assault or an injury to Schinner.

¶22 West Bend argues that there is no occurrence because, in hosting the party and providing the alcohol, Gundrum took actions that were "intentional" and "non-accidental." In support of this argument, West Bend relies on cases cited in ***Estate of Sustache*** in which the court concluded that certain types of "volitional" acts by an insured cannot form the basis for an occurrence. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶¶1, 27-32, 311 Wis. 2d 492, 753 N.W.2d 448; ***Everson v. Lorenz***, 2005 WI 51, 280 Wis. 2d 1, ¶¶1, 18-20, 695

N.W.2d 298; *see also* ***Doe 1 v. Archdiocese of Milwaukee***, 2010 WI App 164, ¶¶1, 3, 10-13, 330 Wis. 2d 666, 794 N.W.2d 468. However, we conclude that this argument is misplaced, because it goes to whether *Gundrum's* actions are an "occurrence," not to whether the *assault* is an occurrence. We do not address whether Gundrum's actions could be deemed an "occurrence"; it is not necessary for us to do so, given our conclusion that the assault constituted an "occurrence."

¶23 West Bend also argues that the situation here is "on point" with the one in ***James Cape & Sons Co. v. Streu Construction Co.***, 2009 WI App 154, 321 Wis. 2d 604, 775 N.W.2d 117. We disagree. ***James Cape & Sons*** involved allegations of damages caused by a criminal bid-rigging conspiracy undertaken by certain insured parties. ***Id.***, ¶¶1, 7, 18. The court concluded that the insurers had no duty to defend the insureds' intentional, criminal acts. ***Id.***, ¶¶4, 18. The court relied on the "principle of fortuity," under which "insurance covers fortuitous losses[,] and [] losses are not fortuitous if the damage is *intentionally caused by the insured*." ***Id.***, ¶15 (quoting ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 483-84, 326 N.W.2d 727 (1982) (emphasis added)). Here, as we have already discussed, it is not alleged that Gundrum, the insured, intentionally caused Schinner's injuries.[2]

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[2] We recognize that our analysis suggests overlap between how courts determine whether there is an accidental "occurrence" and how courts determine whether, if there is an "occurrence," coverage may be barred by an exclusion found in some policies for harm that is "expected or intended by the insured." *See* ***Loveridge v. Chartier***, 161 Wis. 2d 150, 166-70, 468 N.W.2d 146 (1991); ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 706, 708-10, 278 N.W.2d 898 (1979); ***Poston v. United States Fid. & Guar. Co.***, 107 Wis. 2d 215, 217-23, 320 N.W.2d 9 (Ct. App. 1982). However, to the extent there is overlap, it seems unavoidable, given the courts' reasoning in ***Estate of Sustache v. American Family Mutual Insurance Co.***, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845, and ***James Cape & Sons Co. v. Streu Construction Co.***, 2009 WI App 154, 321 Wis. 2d 604, 775 N.W.2d 117. In addressing whether there was an "occurrence" in each of those cases, the court considers whether the insured intended to cause harm. *See* ***Estate of Sustache***, 311 Wis. 2d 548, ¶¶52-56; ***James Cape & Sons***, 321 Wis. 2d 604, ¶15.

(continued)

¶24 In sum, for the reasons stated, we conclude that the assault was an "accident," and therefore an "occurrence," under the Gundrums' policy.[3]

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Confusion among litigants and authorities in this area may result, in part, from changes over time in the definition of "occurrence" in some standard form insurance policies. Treatises explain that there was a period of time during which the definition of "occurrence" in policies incorporated what is now broken out separately in the "expected or intended by the insured" exclusion. *See* 3 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 18.02[6][a] (Jeffrey E. Thomas & Francis J. Mootz, III eds., 2009); LEE R. RUSS & THOMAS F. SEGALLA, 9 COUCH ON INSURANCE § 127:21 (3d ed. 2000). Thus, an "occurrence" was defined during the earlier period as "an accident ... which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *See* 3 NEW APPLEMAN ON INSURANCE § 18.02[6][a]; 9 COUCH ON INSURANCE § 127:21.

We note that, in ***Estate of Sustache***, the portion of COUCH ON INSURANCE that the court relies on addresses how courts interpret the definition of "occurrence" when it includes the "expected or intended" language, even though the policy definition in ***Estate of Sustache*** did *not* include that language. *Compare* ***Estate of Sustache***, 311 Wis. 2d 54, ¶¶32, 53 n.13, *with* COUCH ON INSURANCE, § 127:21.

Because the extent of the overlap we have identified is unclear, and because West Bend does not argue here that the "expected or intended by the insured" exclusion applies, we do not rely on the case law that addresses the "expected or intended by the insured" exclusion. Similarly, we do not rely on ***Patrick v. Head of the Lakes Cooperative Electric Ass'n***, 98 Wis. 2d 66, 295 N.W.2d 205 (1980), which Schinner cites, because the policy definition of "occurrence" in ***Patrick*** included the "expected or intended" language. *See id.* at 68.

[3] For the following reasons, we decline to address a separate argument Schinner makes, based on an exclusion, to support his position that a reasonable insured would believe there is an initial grant of coverage. Schinner points out that the Gundrums had a separate, CGL policy with West Bend that used the same definition of occurrence but, unlike the Gundrums' homeowner's policy, contains a "liquor liability" exclusion barring coverage for

> "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person;
>
> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; ....

Schinner argues that the presence of this liquor liability exclusion in the CGL policy, but not in the homeowner's policy, would lead the Gundrums to reasonably expect that they were covered under their homeowner's policy for a situation like the one here. We decline to discuss this argument further because Schinner does not present us with argument supported by legal

(continued)

### *B. Non-insured Location Exclusion*

¶25 We turn next to the exclusion for non-insured locations. "[E]xclusions in an insurance policy are narrowly construed against the insurer." *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶29, 332 Wis. 2d 571, 798 N.W.2d 199 (citation omitted). "[I]f the effect of an exclusion is ambiguous or uncertain, it will be construed in favor of coverage." *Id.*

¶26 As previously indicated, the Gundrums' homeowner's policy includes a broad grant of personal liability coverage that applies to a claim or suit against an insured "for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence.'" The policy also includes "property coverage" for the Gundrums' residence. However, the non-insured location exclusion bars coverage for "'[b]odily injury' or 'property damage' arising out of a premises ... [o]wned by an insured ... that is not an 'insured location.'" "Insured location" is defined to include the "residence premises" as well as "[a]ny premises used by you in connection with" the residence premises.[4]

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authority on the question of whether or under what circumstances it is appropriate for courts to interpret one insurance policy by reference to another policy.

[4] "[I]nsured location" is defined more fully in the policy, in relevant part, as follows:

> 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 coverage period for your use as a residence;
>
> c. Any premises used by you in connection with a premises described in a. and b. above[.]

¶27 The parties dispute the applicability of this exclusion in two respects. First, citing *Newhouse v. Laidig, Inc.*, 145 Wis. 2d 236, 426 N.W.2d 88 (Ct. App. 1988), they dispute whether Schinner's injuries "aris[e] out of" the shed, where the party took place. Second, they dispute whether the shed was used by the Gundrums "in connection with" their residence. As previously noted, although the shed was located on family business property, the Gundrums used it, at least in part, to store personal property, including snowmobiles listed in their homeowner's policy. The exclusion bars coverage only if Schinner's injuries "aris[e] out of" the shed *and* the Gundrums did not use the shed "in connection with" their residence.

¶28 We conclude for the reasons explained below that, under *Newhouse*, Schinner's injuries do not "aris[e] out of" the shed under the terms of the policy because, while it was the undisputed physical situs of injury, no particular condition of the premises correlates to the basis of liability for the injury. Therefore, the exclusion does not apply. For this reason, we need not address whether the Gundrums used the shed "in connection with" their residence.

¶29 In *Newhouse*, a minor plaintiff was injured in a silo unloader and alleged that the defendants negligently caused his injuries by leaving him alone in the silo while the unloader was operating. *Id.* at 237-38. One of the defendants was an insured under a homeowner's insurance policy that, like the one here, included a broad grant of personal liability coverage as well as provided coverage for the insured's residence. *See id.* at 238-39. The policy contained an exclusion, similar to the one here, providing that the personal liability coverage would not apply to "bodily injury or property damage ... *arising out of* any premises owned or rented to any insured which is not an insured location." *Id.* at 239 (emphasis added). The court concluded that the exclusion did not apply. *Id.* at 237.

¶30 The court in *Newhouse* did not address whether the silo was part of premises "owned [by] or rented to" the insured, but focused instead on the "arising out of" language. *Id.* at 239-40, 242-43. The court explained as follows, adopting the reasoning of *Lititz v. Mutual Insurance Co. v. Branch*, 561 S.W.2d 371 (Mo. Ct. App. 1977):

> The court in *Lititz* held that in order to arise out of such premises, the specific tortious conduct "originates from, grows out of, or flows from" such premises. [*Lititz*, 561 S.W.2d] at 373. The court reasoned that the exclusion related to *conditions of the premises* on which an accident or occurrence takes place but that it did not apply to insureds' tortious acts occurring on uninsured lands....
>
> ....
>
> We agree with the reasoning in *Lititz*. It makes no difference whether the insured owns the premises on which his tortious act takes place. Under the policy's terms, there is floating coverage for the insured's tortious personal acts wherever he might be. *The dispositive issue therefore is whether there is some correlation between the negligence giving rise to liability and a condition of the premises.* In the present case, there is no evidence that the alleged negligence in leaving [the injured plaintiff] unattended in the silo *was related to the condition of any premises as required under the exclusion.* Rather, it was the alleged tortious conduct of [the defendants] that caused [his] injuries. Accordingly, the exclusion is inapplicable.

*Newhouse*, 145 Wis. 2d at 239-40 (emphasis added).

¶31 Thus, under *Newhouse*, the question is whether there is "some correlation between the negligence giving rise to liability and *a condition* of the premises." *Id.* at 240 (emphasis added). And, to show this correlation, the insurer must present evidence that the alleged negligence is "related to the condition of" the premises. Stated another way, the exclusion applies when liability arises *because of* some condition of the premises. *See* 46 C.J.S. INSURANCE § 1359 (2007) ("Where the exclusionary clause excludes coverage for injury or damage

arising out of premises, coverage is excluded where the liability is incurred *because of the condition of uninsured premises*, but is not excluded where the liability is incurred because of tortious personal conduct occurring on uninsured premises." (emphasis added) (footnotes omitted)).

¶32 Applying *Newhouse* here, the exclusion does not apply because there is no evidence of a correlation between the alleged tortious conduct and any condition of the shed. That is, there is no evidence that Gundrum's liability arises because of some condition of the shed; no condition of the shed was a cause of the assault or Schinner's injuries.

¶33 West Bend asserts there is evidence that Gundrum chose the shed for the underage drinking party based on its size and secluded location. West Bend argues that those features of the shed made it conducive to an illegal underage drinking party and, therefore, the necessary "correlation" exists. We are not persuaded.

¶34 West Bend's argument interprets the exclusion broadly, instead of narrowly as is required. *See Day*, 332 Wis. 2d 571, ¶29. And, it expands the "correlation" concept beyond what is supported by the facts and reasoning in *Newhouse*. The silo unloader in *Newhouse* had at least as much of a connection to the alleged negligence in *Newhouse* as does any feature of the shed to Gundrum's allegedly tortious conduct. The unloader was the direct instrument of the injury in *Newhouse*. Yet the court in *Newhouse* saw no "correlation" between the unloader and the defendants' negligent acts of leaving the minor plaintiff unattended with the unloader. Based on this standard, even assuming that the shed was in some respects an especially attractive location for an illegal underage drinking party that presented dangers of various kinds to participants, including

potentially violent conduct by inebriated, youthful attendees, this does not constitute the type of "correlation" that *Newhouse* requires.

¶35 In sum, the non-insured location exclusion does not apply because Schinner's injuries do not "arise out of" the shed.

## CONCLUSION

¶36 For all of the reasons stated, we reverse the circuit court judgment dismissing West Bend from this case and remand for further proceedings.

*By the Court.*—Judgment reversed and cause remanded.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

MARSHALL SCHINNER,
Plaintiff,
vs.
MICHAEL GUNDRUM and WEST BEND MUTUAL INSURANCE COMPANY,
Defendant.

Case No. 09CV870

**DECISION ON WEST BEND MUTUAL'S MOTION FOR SUMMARY JUDGMENT**

The defendant, West Bend Mutual Insurance Company, has moved the Court for summary judgment. It argues that it has no coverage under policies that it issued.

The Court has received substantial briefs on behalf of the defendant, West Bend Mutual Insurance Company, and the defendant Michael Gundrum individually.

The Court also had the benefit of oral argument on November 12, 2010.

## THE FACTS ARE UNDISPUTED

The facts, as alleged in the second amended complaint, as referred to in the briefs and oral argument, are undisputed. The plaintiff, Marshall Schinner, was seriously injured in a fight at an underaged drinking party. It is alleged that a person named Matthew Cecil, not a party to this action, also an underaged drinker, punched Marshall Schinner in the face. While Schinner was on the ground, not moving, Cecil kicked Schinner in the head. Schinner was seriously injured. Attached to an Affidavit of Attorney Keith R. Stachowiak, dated September 22, 2010, is the transcript of the preliminary hearing in the criminal case which arose out of this same incident, State of Wisconsin v Matthew A. Cecil, Washington County Circuit Court case 09CF79.

There were two witnesses at the preliminary hearing. One of the witnesses was the plaintiff in this civil case, Marshall Schinner. Attached hereto and made a part hereof as Exhibit 1 to this decision, is part of the testimony of Marshall Schinner, under oath, at the preliminary hearing, namely part of page 30 and part of page 31 thereof.

Attached hereto and made a part of this decision and incorporated by reference the portion of the testimony at the preliminary hearing by the witness, Matthew Bogues, namely part of page 11 as well as pages 12, 13, 14 and page 15 of the preliminary hearing. (See Exhibit 2.)

In plain English, Marshall Schinner was beat up by Matthew Cecil.

(See also the amended complaint of the plaintiff, which outlines the above events.)

## COMMERCIAL POLICY

There is a commercial general liability policy which was issued to H.J.S.G. Enterprises, Howard, Jan, Scott and Guy Gundrum, DBA. All of the briefs in this case stipulate that this policy is not relevant to this case. Further, the Court was so advised by attorneys for the plaintiff and the defense during the oral argument on the motion on November 12, 2010. Accordingly, the Court grants summary judgment to West Bend Mutual Insurance Company with regard to the commercial general liability policy.

## HOME AND HIGHWAY POLICY LANGUAGE

The two main issues in this case at summary judgment concern the language of the so called "home and highway policy." The policy itself is in evidence as an attachment to the affidavit of Timothy L. Pagel. (See Exhibit 2 to that Affidavit.)

The policy excludes coverage for personal injury liability arising from alcoholic beverages:

c. **Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance, or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

(See Policy, page 2 of 16.)

The Personal Liability coverage in the Home and Highway Homeowners Special Coverage Form, subject to terms and exclusions, applies to accidents:

**A. Coverage E-Personal Liability**

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" ...caused by an "occurrence" to which this insurance applies, we will:

1. Pay up to our limit of liability for the damages for which an "insured" is legally liable...
2. Provide a defense at our expense by counsel of our choice...

"Occurrence" means an accident...." (See page 2 of 22.) The complaint here does not allege accidentally caused bodily injury.

The policy also excludes coverage for injury liability arising from a location that is not an insured location:

"Bodily injury" or "property damage" arising out of a premises:

a. Owned by an "insured"

b. Rented to an "insured"; or

c. Rented to others by an "insured";

that is not an "insured location";

(See page 17 of 22.)

The property on which the incident occurred is alleged to be owned by Michael Gundrum's parents, but it is not an "insured location." "Insured Location" is defined by the policy to mean:

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;

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

c. Any premises used by you in connection with a premises described in a. and 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";

g. Individual or family cemetery plots or burial vaults of an "insured"; or

h. Any part of a premises occasionally rented to an "insured" for other than "business" use.

(See page 2 of 22.)

"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.

The fight and injury occurred on non-residence preises.

The Home and Highway policy also includes a Personal Liability Umbrella Coverage Form, which states:

> "We" will pay up to "our" "limit", compensatory damages for which an "insured" becomes legally liable for "injury" caused by an "occurrence" covered by this coverage form. This coverage applies only to damages in excess of the "primary limit."

(See page 4 of 10.)

HOWEVER, "WE" ARE NOT OBLIGATED TO DEFEND IF:

1. THE "OCCURRENCE" IS COVERED BY OTHER INSURANCE AVAILABLE TO AN "INSURED"; OR
2. THERE IS NO APPLICABLE "UNDERLYING INSURANCE" IN EFFECT AT THE TIME OF THE "OCCURRENCE" AND THE AMOUNTN OF DAMAGES CLAIMED OR INCURRED IS LESS THAN THE APPLICABLE "PRIMARY LIMIT".

"Primary Limit" means:

a. If the loss is covered by "underlying insurance", the total of:

(1) The applicable "limits" of that insurance; and

(2) The amount recoverable under any other insurance available to the "insured"

b. If the loss is not covered by "underlying insurance", the greater of:

(1) The amount recoverable under any other insurance available to the "insured";

or

(2) The Self-Insured Retention listed in the Declarations.

(See page 3 of 10.)

The policy also provides the following condition:

**Other Insurance.** This insurance afforded by this coverage form is excess over any other insurance available to an "insured", except insurance written specifically as an umbrella or excess liability insurance policy.

(See page 7 of 10.)

## THERE IS NO OCCURRENCE

Based on the undisputed facts in this case, there is simply no "occurrence." The home and highway policy defines occurrence as an accident. There is no allegation of any accidental conduct. The acts of Cecil are intentional acts---punching Schinner twice and kicking Schinner in the head.

Further, any acts on the part of Michael Gundrum were intentional, namely his providing of alcoholic beverages to underaged persons. (See, e.g. Estate of Sustache v American Family Mutual Ins. Co., 311 Wis.2d 548, 751 N.W.2d 845 (2008)).

## WHERE DID THE FIGHT OCCUR?

It is also undisputed that the location of the intentional punching and kicking by Cecil was 4925 Arthur Road, Slinger, Wisconsin. (See e.g., Deposition of Michael Gundrum, page 4, liens 4-7.)

Those premises are not the insured location. They are the premises of Gundrum Trucking (See also Gundrum Affidavit, paragraph 2.) The home address of Michael Gundrum is 4518 Hwy. 144, Slinger, Wisconsin (See policy, Declaration page.)

One interesting argument on behalf of the plaintiff relies on the Wisconsin Court of Appeals case *Newhouse v Laidig, Inc.*, 145 Wis.2d 236, 426 N.W.2d 88 (1988). The plaintiff argues that the location exclusion did not apply and that the home and highway policy provides liability coverage for the insured whereever the insured may be located. The plaintiff as per paragraph 3 the Affidavit of Michael Gundrum, dated September 22, 2010, alleges:

> The shed is used, in part, to store personal property, such as snowmobiles, trailers and recreational vehicles. These vehicles are not owned or used by Gundrum Trucking or any other business. The snowmobiles, for example are insured under my parents' West Bend Mutual Home and Highway Policy.

There is no ambiguity here. The home owner's policy is inapplicable because the injury did not occur at an insured location. (See definition of "insured location" above.)

SUMMARY

As stated above the Court finds that summary judgment is granted to West Bend Mutual Insurance Company with regard to the commercial general liability policy.

The Court also grants summary judgment to the defendant, West Bend Mutual Insurance Company, with regard to the Home and Highway Policy.

Finally, for the same reasons discussed in the section above with regard to the Home and Highway Ppolicy, the Court finds that there is no coverage under the Umbrella Liability Policy because there is no occurrence.

The Motion of the West Bend Mutual Insurance Company is granted in all respects and the Court does find that West Bend Mutual Insurance Company has no duty to defend or indemnify any party to this action.

The Attorney for the West Bend Mutual Insurance Company shall prepare an Order consistent with this decision, all in accordance with the five day rule.

Dated at West Bend, Wisconsin this 27th day of January, 2011.

BY THE COURT:

James G. Pouros
Circuit Court Judge, Branch I

A Matt Dickey, Matt Bogues, and Dusty Mann and myself walked out to the car together. We were in the car waiting for John Michael to come out then after that.

Q And do you have a recollection of that?

A Yes.

Q Where did you go when you got to the car?

A I got into the back seat behind the driver.

Q And who went into the driver's seat?

A Dusty Mann.

Q And how about Matthew Bogues? Do you know where he went?

A I believe he was sitting in the passenger front.

Q Okay. And Mr. Dickey was also with you?

A Yeah. He was in the back seat next to me.

Q And what, if anything, do you recall happening next?

A Matt came out of -- Matthew Cecil came out of the building, and he stuck his head through the driver's window, said, see you later, faggot. And then my friend, John Michael, was getting out of the car at this point, and those two were in each other's faces. And I had not wanted to fight that whole evening, so I had opened the car door to get out to get John Michael into the car, and after I



25.9

Exhibit 1 (Preliminary Hearing Testimony of Michael Schinner)

opened the car door, I got punched in the face. It knocked me out, and then I woke up on the couch paralyzed.

Q Did you see who it was that actually struck you, or did you not know who struck you?

A It was Matthew standing a few feet away from the car.

Q Okay. After you were struck, do you remember anything else about the fight that night?

A When I got hit in the face the first time, everything went black, and I felt my head bounce around a couple times. Then after that I was completely out.

THE COURT: Yeah. Just tell us what you know. Okay?

A All right. Marshall got out of the car and then -- to make sure that John Michael wasn't going to get





25-11 (Preliminary Hearing Testimony of Matthew Boaues.)
Exhibit 2

into a fight with Matthew Cecil, and then --

BY MR. BENSEN:

Q Where was Matthew Cecil and John Michael Hair at that point?

A John Michael was at the rear of the car by the trunk, and Matthew was by the driver's window still. And when Marshall got out, he was talking to John Michael looking towards him and that's when he was struck twice by Matthew Cecil.

Q So when -- I just want to get the -- what happened straight in my head. When Marshall got out of the car, he got out of which part of the -- of the car?

A The back left, the driver's side rear.

Q Driver's side rear?

A Yeah.

Q Where he was sitting?

A Yeah.

Q And he walked back to where?

A He just stepped outside the car to talk to John Michael. He didn't walk anywhere. He was just -- he took one step.

Q And about how long was he out of the car before something happened to him?

A It was about five to ten seconds.

Q And what, if anything, did you observe after that

five or ten seconds when Marshall got out of the car?

A When he got out of the car, I was just getting out of the car, and I observed that he was hit twice from Matthew Cecil, and they started wrestling up in the air.

Q Let's just take it a step at a time. Where was he hit?

A He was hit in the eye. He was hit twice in the face.

Q How was he hit?

A He -- was like, he was punched with his -- with Matthew's fist. I don't know.

Q So Matthew punched him with his fist?

A Yeah.

Q To Marshall's face?

A Yeah.

Q Right by his eye?

A Yes.

Q Prior to Mr. Cecil striking your friend Marshall, did Marshall ever strike him?

A No.

Q Did Marshall ever say any words to Mr. Cecil prior to Mr. Cecil striking him?

A No.

Q After Marshall got punched twice in the face, then what happened?
A Then they continued -- Matthew and Marshall were wrestling up in the air kind of and slipped on the ice and Marshall hit his head on the concrete. And they both went down. Matthew had him in a head lock and everyone was yelling.
Q When you said Matthew had "him," Matthew had who in a headlock?
A Marshall.
Q Okay.
A Had Marshall in a headlock, and everyone was saying, stop, he is not moving, he is blacked out. And after a while --
Q Let's stop for a second. I don't care about what everybody else says. What did you observe when Marshall fell to the ground? Was he moving after he fell to the ground and hit his head?
A No.
Q Was Mr. Cecil moving after he fell to the ground?
A Yes.
Q And it's your testimony that Mr. Cecil, after he and Marshall fell to the ground, that he had Matthew in a headlock?
A Matthew had Marshall in a headlock, yes.

Q Matthew had Marshall in a headlock?
A Yes.
Q And then what happened?
A Then Matthew proceeded to stand up, took a step back, and drop-kicked him in the head.
Q When you say "drop-kicked him in the head," what do you mean?
A Like, he is pretty much trying to kick a soccer ball across the field.
Q And where did he -- where in the head, if you know, did Mr. Cecil kick -- kick Matt -- Marshall Schinner?
A I believe it was on the side of the head.
Q And on a scale of one to 15, one being light tap and ten being the hardest that you have seen somebody kick some -- an object, where would you place this kick that you observed Mr. Cecil kick Mr. Schinner?
A At least a nine.
Q It was a hard kick?
A Yes.
Q Prior to Mr. Schinner being kicked in the head, was he moving at any point?
A No.
Q After Mr. Schinner was kicked, what happened next?

STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

FILED
2010 JAN 12 AM 8:58
WASHINGTON COUNTY
CLERK OF COURT

MARSHALL SCHINNER
W2140 Highway NN
Neosho, WI 53059

Plaintiff,

-vs-

ABC Insurance Company,
a fictitious insurer,

and

MICHAEL GUNDRUM
4484 HWY 144
Slinger, Wisconsin 53086,

Defendants.

**SECOND AMENDED SUMMONS**
**Case No.: 2009CV000870**
Personal Injury-Other: 30107

THE STATE OF WISCONSIN

To each person named above as a defendant:

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The amended complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this amended summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the amended complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 432 E. Washington Street, West Bend, Wisconsin, and to plaintiff's attorney,

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whose address is 330 East Kilbourn Avenue, Suite 1200, Milwaukee, Wisconsin. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the amended complaint, and you may lose your right to object to anything that is or may be incorrect in the amended complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 11 day of January, 2010.


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STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

FILED

2010 JAN 12 AM 8:58

WASHINGTON COUNTY
CLERK OF COURT

MARSHALL SCHINNER
W2140 Highway NN
Neosho, Wisconsin 53059

Plaintiff,

-vs-

**SECOND AMENDED COMPLAINT**
**Case No.: 2009CV000870**
Personal Injury-Other: 30107

ABC Insurance Company,
a fictitious insurer,

and

MICHAEL GUNDRUM
4484 HWY 144
Slinger, Wisconsin 53086,

Defendants.

Plaintiff complains of defendants as follows:

1. Plaintiff Marshall Schinner is an adult resident of the State of Wisconsin, residing therein at W2140 Highway NN, Neosho, Wisconsin 53059.

2. Defendant Michael Gundrum is an adult resident and citizen of the state of Wisconsin, residing therein at 4484 HWY 144, Slinger, Wisconsin 53086.

3. Defendant, ABC Insurance Company, is a foreign or domestic corporation, that provided a policy of liability insurance to the parents of Michael Gundrum, covering resident relatives of their household such as Michael Gundrum. Plaintiffs at this time do not know the true identity of the ABC Insurance Company, and hereby designates it by this fictitious name until such time as its identity may become known.

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4. On December 14, 2008 and December 15, 2008, then 21-year-old defendant Michael Gundrum resided with his parents Scott and Teri Gundrum at their family home at 4925 Arthur Road, Slinger, WI.

5. On December 14, 2008, defendant Michael Gundrum invited several friends via text message and otherwise to a party which was to be held in a shed located on property owned by his parents.

6. Defendant Gundrum knew and expected, based on a similar party held there months earlier, that individuals he invited would invite other youths, who in turn would invite others.

7. Defendant Gundrum knew and expected that a substantial number of individuals, 40%-50% of those in attendance, would be under the legal drinking age. The underage attendees at the party also knew that alcoholic beverages would be available for their consumption.

8. Defendant Gundrum knew and expected that the majority, if not all, of the attendees at this party would be consuming alcoholic beverages.

9. Defendant Michael Gundrum purchased two cases of Busch Light beer, in cans, for the party, and placed both of them in a refrigerator in the shed.

10. Defendant Michael Gundrum cleared an area of the shed and set up tables, garbage cans, and monitored all music for the benefit and use by the party attendees.

11. Defendant Michael Gundrum set up a ping pong table to be used by the party attendees to play "beer pong".

12. Defendant Michael Gundrum realized that the number of attendees, their age, and their intoxication level could lead to fights or arguments, and undertook the responsibility to monitor and supervise the party.

13. Mr. Matthew Cecil, then age 19, was one of the attendees at the party. Mr. Cecil was seen taking cans of Busch Light from the shed refrigerator, and was also seen consuming Busch Light in a can. He participated in beer pong with other attendees of the party.

14. Mr. Cecil, as he was drinking that evening, became belligerent and argumentative, especially toward another person attending the party, then 19 year old plaintiff Marshall Schinner.

15. Mr. Cecil continued to taunt and ridicule Schinner, to the point where Schinner approached Gundrum, as the party host, asking him to intervene.

16. Gundrum did intervene, requesting Cecil to "back off" in his taunting of Schinner. The taunting and aggressive behavior by Cecil stopped for a short while, but then resumed, to a point where Schinner and several of his friends decided to leave the party.

17. As Schinner and his friends were leaving the party and were outside the shed, Cecil followed them to their car. Schinner entered the vehicle that he arrived in, but then exited briefly to let another acquaintance enter the vehicle and sit in the center position.

18. As Schinner exited the vehicle, he was immediately punched in the face by Cecil. Cecil appeared to be ready to strike again, when Schinner, acting in self defense, wrapped his arms around the torso of Cecil. The two fell to the ground.

19. Schinner remained on the ground, having been made unconscious, and Cecil then stood up and kicked him in the head, causing permanent paralysis.

## First Claim - Dram Shop

20. Reallege each of the above paragraphs.

21. On December 14th and 15th, 2008, Gundrum "procured" alcohol beverages for Cecil as that term is used in Chapter 125 of the Wisconsin Statutes or sold, dispensed or gave away alcohol beverages to Cecil at those terms are used in Chapter 125 of the Wisconsin Statutes. As such, Gundrum is considered negligent as a matter of law.

22. Further, on December 14th and 15th, 2008, Gundrum committed affirmative acts which encouraged, advised and assisted Cecil in his consumption of alcohol.

23. On December 14, 2008, Gundrum knew that Cecil had not attained the legal drinking age.

24. On December 14th and 15th, 2008, the consumption of beer by Cecil was a substantial factor in causing injury to plaintiff Marshall Schinner.

25. As a result of the negligence as alleged above, Marshall Schinner sustained injuries believed to be permanent in nature; he incurred medical treatment, which will continue into the future, he sustained a loss of earning capacity, which will continue into the future, and endured pain, suffering and disability, which will continue in the future. As a result of these injuries, the plaintiff claims damages against all defendants in an unspecified amount.

## Second Claim - Assumed Duty

26. Reallege each of the above paragraphs.

27. On December 14th, 2008, and December 15th, 2008, Gundrum assumed a duty to supervise the attendees of the party, realizing that their young age and the consumption of alcohol by these created a reasonable possibility of injury to those attending the party.

28. On December 14th, 2008, Gundrum assumed a duty to Schinner to provide protection, based on Schinner's request for assistance with Cecil.

29. Gundrum was negligent in performing these assumed duties, and his negligence was a cause of injury to Schinner.

30. As a result of the negligence as alleged above, Marshall Schinner sustained injuries believed to be permanent in nature; he incurred medical treatment, which will continue into the future, he sustained a loss of earning capacity, which will continue into the future, and endured pain, suffering and disability, which will continue in the future. As a result of these injuries, the plaintiff claims damages against all defendants in an unspecified amount.

Dated this 11 day of January, 2010.

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STATE OF WISCONSIN
SUPREME COURT

MARSHALL SCHINNER,
Plaintiff-Appellant,

Appeal No: 2011AP0000564

v.

MICHAEL GUNDRUM,
Defendant
and

WEST BEND MUTUAL INSURANCE CO.,
Defendant-Respondent-Petitioner

# PLAINTIFF-APPELLANT MARSHALL SCHINNER RESPONSE BRIEF

APPEAL FROM THE COURT OF APPEALS, DISTRICT II, FOLLOWING APPEAL FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE JAMES G. POUROS, PRESIDING, CIRCUIT COURT CASE NO. 2009CV870

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August 6, 2012

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## INTRODUCTION

The Plaintiff-Respondent, Marshall Schinner, has taken the position throughout these proceedings that the liability of a social host who serves alcohol to an underage individual, who then becomes intoxicated and injures another is grounded in negligence, and the court of appeals agreed. The amended complaint in this case alleges negligence. The evidence submitted on the summary judgment motion demonstrates negligence, and the West Bend policy covers negligence.

The term "occurrence," as used in a homeowner's policy, covers volitional acts that result in unintended damages. In discussing the term, this Court has stated:

> Its use affords coverage for an intended act and intended result if they cause damage unintended from the standpoint of the insured.

*Kremers-Urban Co. v. Am. Employers Ins. Co.*, 119 Wis. 2d 722, 742, 351 N.W.2d 156, 166-67 (1984) *citing Patrick v.*

*Head of the Lakes Co-op. Elec. Ass'n*, 98 Wis. 2d 66, 69-70, 295 N.W.2d 205, 207 (Ct. App. 1980).

West Bend sets forth a distorted interpretation of the "occurrence" clause in its policy to retroactively create an exclusion which it could have included in the policy, but chose not to. It is not at all unusual for a homeowner's policy to contain liquor liability exclusions (*see e.g. Anderson v. American Family* 2002 WI App 315, 259 Wis. 2d 413, 655 N.W.2d 531, *aff'd*, 2003 WI 148, 267 Wis. 2d 121, 671 N.W.2d 651). Indeed, West Bend itself included just such a provision in a business policy it issued on the very property where these events unfolded. (R14:28). If West Bend had chosen to write a similar exclusion in Gundrum's homeowner's policy, none of us would be here today.

West Bend's policy provides personal coverage to its insured, Michael Gundrum, no matter where he is, if he negligently causes injury to another. To be fair, it does

exclude injuries that "arise out of premises" that are not insured under the policy. For instance, had an underage drinker been injured that night by falling through a rotted floor, the homeowner's policy would not have afforded coverage because, in that situation, the injury would have been directly attributable to the condition of the premises itself.

Here, there was nothing about the location or building itself which caused or contributed to Schinner's injuries. It follows that the "arise out of" exclusion does not apply.

Conversely, the policy could have excluded injuries that occur at a location other than the insured location—the Gundrum residence—but it did not. By its plain terms, the policy extends coverage to places used in connection with the insured location. The shed, although not located at Gundrum's residence, qualifies under this expanded location definition because it was used to store the

Gundrum family's personal property, such as their ATVs (which are specifically covered under the homeowner's policy).

## FACTS

Schinner takes issue with several statements in West Bend's brief which misstate the record. First, attempting to cast Gundrum as a *de facto*, quasi-intentional actor, West Bend states that he knew that "[the underage drinkers] were **likely to become** belligerent and cause injury" or "**likely to become** belligerent and fight." (Petitioner's Brief, at 1, 2) (Emphasis added). There is no support in the record for these statements. The complaint alleged that:

> 12. Defendant Michael Gundrum realized that the number of attendees, their age, and their intoxication level **could lead to fights** or arguments, and took responsibility to monitor and supervise the party. (App. 38) (Emphasis added).

Gundrum's sworn statement indicates that he did not expect anyone to get hurt in any fashion and did not intend

harm to anyone. (R21). Indeed, he had hosted similar parties in the past with no reported problems. (R14:196).

Gundrum is a physically imposing individual, 6 feet 4 inches tall and weighing 260-270 pounds. (R14:222). He thought he could control the situation, but the party turned into something larger than he anticipated. (R14:196-97; R14;222; R14-229-30, 231; R21). In response to that that change in atmosphere, he decided to stop drinking and keep a closer watch over the party and the partygoers, intervening if necessary. *Id.* Gundrum felt that everything was going well, right until the end of the party. (R14:231). Neither the complaint nor the evidence suggests anything more than the possibility, or "foreseeability," of harm to anyone.

Schinner also takes issue with statements by West Bend that the shed where the party occurred was "isolated," "secluded," or "hidden." (Petitioner's Brief, at 1, 2, 4). The implied but unstated purpose here is to support

West Bend's suggestion that the location was somehow itself inherently dangerous. In reality, the property is located at a triangle formed by the intersection of two major roadways: US 41 and Hwy 144. This is not a building in the middle of nowhere. Indeed, the police report, which West Bend cites for its assertions, establishes that the police and EMS knew where to go, and the only difficulty they encountered at the scene resulted from the partygoers' refusal to open the door and then running and hiding. (R14:166). No matter where the party was held, that conduct would be expected of underage drinkers.

At the time of the incident giving rise to this lawsuit, Michael Gundrum was 21 years old, living with his parents at their family home. (R14:197, 233) He decided to host a party in the family shed, which was a short distance from the residence, located on adjacent business property also owned by his parents. (R21, R14:166,195) He sent text messages and spoke to some of his friends inviting them to

the party. (R14:200-201) Gundrum knew that a substantial number of people that would be attending were under the legal drinking age. (R14:201) He also knew that some people were bringing alcoholic beverages with them. Gundrum also brought a couple of cases of beer. (R14:203-204)

Cecil, who had not yet reached the legal drinking age, attended the party and drank the beer that was provided by Gundrum. (R3:2-3). Cecil became intoxicated, and he had a history of becoming aggressive when inebriated. (R14:220-221)

Schinner was also a guest at the party. As the party went on, Cecil began calling Schinner offensive and derogatory names. (R14:219-221) As the night wore on, it escalated to a point where Schinner approached Gundrum, as the party host, and asked Gundrum to intervene. (R14:219) Gundrum did so, and he approached Cecil and told him to "back off." (R14:221)

Gundrum's admonition to Cecil helped, but only temporarily. (R14:224, R3:3) The taunting and name calling by Cecil again escalated to the point where Schinner and his friends decided to leave. (R14:224, R3:3) On the way out, Cecil punched and kicked Schinner in the neck. Schinner fell, causing damage to his spinal cord. (R3:3-4) Schinner is an incomplete quadriplegic. (R18:34-35)

Schinner filed suit against Gundrum. The complaint alleges that Gundrum was a provider of alcohol to Cecil, an underage individual, and that Cecil's intoxication led to the taunting and the ultimate pummeling of Schinner. (R:3)

At the time of the incident, Gundrum resided with his parents at their family home at 4518 Highway 144, Slinger, Wisconsin. (R14:233). The location of the party in question was a shed situated on nearby property located at 4925 Arthur Road, Slinger. (R21) While this shed is on the Gundrum's family's trucking company land, half of the shed is used to store personal property of the Gundrums,

including boats, trailers, snowmobiles and a camper. (R14:196; R21). Gundrum estimated this shed is about 50% business and 50% personal. (R14:196). The Home and Highway policy issued to the Gundrums specifically lists several snowmobiles. (R21) These snowmobiles were stored in the shed where the party took place. (R:21)

## STANDARD OF REVIEW

This issue arose from a summary judgment motion. (R16). This Court reviews a circuit court's grant of summary judgment de novo. *Everson v. Lorenz*, 2005 WI 51, 280 Wis. 2d 1, 8, 695 N.W.2d 298, 301.

This Court recently restated summary judgment guidelines in *Affeldt v. Green Lake County*, 2011 WI 56, 335 Wis. 2d 104, 130, 803 N.W.2d 56, 69:

- "[T]he court decides whether there is a genuine issue of material fact; the court does not decide the fact;"
- "The moving party bears the burden of establishing the absence of a genuine, that is, disputed, issue of material fact;"
- "Summary judgment materials [are viewed] in the light most favorable to the non-moving party;" and

- "[S]ummary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy." (Internal citations omitted)."

## ARGUMENT

### I. Procuring alcohol for an underage person, who becomes intoxicated and causes injury to a third party, is negligence and an "occurrence" under the policy.

The court of appeals properly characterized Schinner's claim as a negligence claim, noting that there was no assertion that "Gundrum personally participated in or assisted Cecil in the assault." (Court of Appeals Decision, ¶¶3-4.) The court stated quite plainly that the suit against Gundrum was based on the theory of negligence. (*Id*., ¶4.) And even West Bend acknowledges in its brief that the law on social host liability for serving alcohol to a minor is clear and, as the court of appeals noted, the dram shop law is based on negligence, not intentional conduct. *Sorenso12n by Kerscher v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); *Koback v. Crook*, *123 Wis. 2d 259, 366 N.W.2d 857 (1985);* Wis. Stat. §125.035.

Until 1984, there was a common law rule of non-liability for vendors or others furnishing alcoholic

beverages when an intoxicated person caused injury to a third party. Beginning with the holding in *Sorensen v. Jarvis*, the Supreme Court abrogated the non-liability rule, noting that such a sale would be negligence *per se*--although subject to defenses such as the purchaser's false representation of age, or appearing to be of age, or the provider's good faith in the transaction. The Court also recognized that the provider's negligence would be subject to Wisconsin's comparative negligence law.

Shortly thereafter, in *Koback v. Crook*, *123 Wis. 2d 259, 266, 366 N.W.2d 857 (1985)*, this Court extended that liability to social hosts:

> We hold that, where there is sufficient proof at trial, a social host who negligently serves or furnishes intoxicating beverages to a minor guest, and the intoxicants so furnished cause the minor to be intoxicated or cause the minor's driving ability to be impaired, shall be liable to third persons in the proportion that the negligence in furnishing the beverage to the minor was a substantial factor in causing the accident or injuries, as may be determined under the rules of comparative negligence.

*Id.* at 276, 366 N.W.2d 857, 865.

The essence of this Court's holdings in *Sorenson* and *Koback* was codified into Wis. Stat. §125.035, which provides in part that a person is immune from civil liability for providing alcohol to another person unless he or she:

> ... knew or should have known that the ... person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party. In determining whether a provider knew or should have known that the underage person was under the legal drinking age, all relevant circumstances surrounding the procuring, selling, dispensing or giving away of the alcohol beverages may be considered ...

The statute thus retains the common law standards that are generally applicable to negligence actions—foreseeability and cause.

The case law and the statute on this topic could not be more clear. Furnishing alcohol to a minor in Wisconsin is negligent, not intentional, conduct.

## A. The injury to Mr. Schinner was an "occurrence" from the standpoint of either the injured party, Schinner, or West Bend's insured, Gundrum[1].

The court of appeals noted a discrepancy in the case law pertaining to how the assault is viewed, whether from the standpoint of the injured party or from the standpoint of the insured party. (Court of Appeals Decision, ¶16). However, under either interpretation, the court of appeals found that the result would be the same. (*Id.*, ¶21).

### 1. The *Tomlin-Fox-Button* trilogy.

There is no dispute that Schinner did not intend or expect the assault or injury. When he became the brunt of Cecil's aggressive behavior, Schinner sought assistance

---

[1] The West Bend homeowner's policy defines "occurrence" as "an accident ... which results ... in bodily injury." (R14-05, p. 2). And it defines the "Insured" as follows:

> a. "You" and residents of "your" household who are
>
> 1. Your relatives; or
>
> 2. Other persons under the age of 21 and in the care of any person named above. (R14:104).

The "you" would be the named insured, listed as Scott & Teri Gundrum. Michael Gundrum is their son, and resided with them. Since Michael is a relative of the named insured who resided with them at the time of the event, he is an "insured" under the policy.

from Gundrum. (R14:219). When Cecil's conduct resumed after Gundrum's intervention, Schinner decided to leave, and that is when the assault occurred. (R3:¶16-17).

In the three Wisconsin cases directly considering whether an intentionally inflicted injury is covered as an accident under a homeowner's insurance policy, this Court has held that the issue is determined from the standpoint of the injured party rather than some other person or entity. In *Tomlin v. State Farm Mut. Auto Liab. Ins.,* 95 Wis. 2d 215, 290 N.W.2d 285 (1980), an individual insured under an automobile liability policy fatally stabbed a police officer who had stopped his vehicle. In a subsequent lawsuit, the insurance company argued, as West Bend does here, that the stabbing was not an "occurrence" or an "accident" as those terms are used in the policy and that, as a result, there was no coverage. In rejecting the argument, this Court noted:

> In determining whether an injury is "caused by accident" or "accidentally sustained" within the coverage afforded

> by a liability insurance policy, the courts have been primarily concerned with the question of whether the occurrence is to be viewed from the standpoint of the injured person or the insured. The majority of courts, including this court, when considering the question, have held or recognized that the determination of whether injuries resulting from an assault were caused by "accident" or "accidentally sustained" must be made from the standpoint of the injured party, rather than from that of the person committing the assault.

*Id.* at 219, 290 N.W.2d 285, 288. To the same effect, *see Fox Wis. Corp v. Century Ind. Co*., 219 Wis. 549, 263. N.W. 567 (1935); *Button v. American Mutual Accident Association*, 92 Wis. 83, 85, 65 N.W. 861 (1896) ("It seems quite well settled that an injury intentionally inflicted on the insured person by another is an 'accidental injury' when such injury is unintentional on the part of the insured.").

Under these cases, an injury that is intentionally inflicted by another can be negligent as to an injured party. While Cecil's act was intentional, he is not an insured and no coverage is sought for him. The issue is not determined

from his viewpoint, but rather as between Gundrum and Schinner.

### 2. The *Sustache*, *Stuart*, and *Archdiocese* line of cases.

*Estate of Sustache v. American Family Mut. Ins. Co.*, 2008 WI 87, 311 Wis. 2d 548, 751 N.W. 2d 845 involved similar facts—an underage drinking party—but in that case the assaulter was the insured himself, leaving this Court no choice other than to note: "we cannot conclude that an allegation that [the insured] intentionally caus[ed] bodily harm to [Sustache] 'could reasonably 'be characterized by a "lack of intention."'" *Id.* ¶*52.* In the instant case, coverage is sought not for the assaulter, Cecil, but for Gundrum, the person who negligently provided the alcohol to an underage individual.

The court of appeals opinion in the instant case is completely consistent with this Court's opinion in *Sustache* when the conduct is examined from the standpoint of the insured—which is the law under *Tomlin*, *Fox* and *Button.*

West Bend criticizes the court of appeals decision for "choosing" one of two possible readings of *Sustache*. The argument is unavailing. The actions of the insured in *Sustache* were intentional; the actions of the insured in this case were not.

*Stuart* and the *Archdiocese of Milwaukee* cases both looked at the conduct from the standpoint of the insured, rather than the injured party, but are not otherwise helpful because they are misrepresentation cases, which are treated differently than other types of negligence in liability policies. *See, Stuart v. Weisflog,* 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448; *Doe 1 v. Archdiocese of Milwaukee,* 2010 WI App 164, 330 Wis. 2d 666, 794 N.W.2d 468. We discuss that issue, and the cases, in sec. I A 5, below.

This Court should retain the *Tomlin-Fox-Button* trilogy for three reasons:

1. The rationale for viewing this issue from the standpoint of the injured party remains the same as when these cases were decided. The insurance company did not specify in its policy how the conduct is to be viewed. Given the dispute in the case law over how this issue is to be addressed, the insurance company could have expressly answered that in its policy. In the event that there is ambiguity, a court will construe these ambiguities in favor of coverage. *Dowhower ex rel Rosenberg v. West Bend Mut. Ins. Co.*, 2000 WI 73, ¶ 34, 236 Wis. 2d 113, 129, 613 N.W.2d 557, 565.

2. An insurer can exclude conduct intentionally caused by an insured, or it may even exclude coverage for liability for serving liquor to an underage person. *See Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.*, 95 Wis. 2d 215, 223, 290 N.W.2d 285, 289 (1980); *Anderson v. Am. Family*

*Mut. Ins. Co.*, 2002 WI App 315, 259 Wis. 2d 413, 427, 655 N.W.2d 531, 538 *aff'd*, 2003 WI 148, 267 Wis. 2d 121, 671 N.W.2d 651. The activities at issue here could have been addressed by including exclusions in the policy, but none were.

3. Limiting coverage to an "unforeseen incident," as promoted by West Bend on page 16 of its brief, would make insurance coverage worthless in a negligence case. Forseeability is a key element in negligence cases. *See Rolph v. EBI Cos.,* 159 Wis.2d 518, 464 N.W.2d 667 (1991), where this Court stated, "A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable." *Id.* at 532, 464 N.W.2d at 672 (*quoting Schuster v. Altenberg,* 144 Wis.2d 223,

235, 424 N.W.2d 159, 164 (1988)); *see also Lloyd v. S.S. Kresge Co.,* 85 Wis.2d 296, 305, 270 N.W.2d 423, 427 (Ct. App.1978). The argument that an occurrence must be an unforeseen event, if adopted, would render all such coverage illusory.

**3. Even if the court views this from the perspective of the insured, it is still an accident.**

Schinner's injuries were "accidental" from the perspective of the insured, Gundrum. This is true even if the act was intentional from Cecil's standpoint. Because, as indicated—and as we will discuss in more detail in sec. I A 5 below—misrepresentation cases are *sui generis*; this portion of the argument will focus primarily on negligence cases, such as *Doyle v. Engelke*, 219 Wis. 2d 277, 580 N.W. 2d 245 (1998).

*Doyle* involved an anti-abortion demonstration outside a clinic. After the demonstration one of the demonstrators sued Doyle, claiming that she had cursed at

and kicked his daughter. Subsequently, two employees of one of the corporate demonstrators, Wisconsin Voice of Christian Youth (WVCY), filed a false security agreement with the state, thereby encumbering Doyle's assets. Doyle then sued WVCY, claiming, among other things, that WVCY had been negligent in failing to properly supervise its employees. WVCY's insurer denied coverage, arguing, among other things, that WVCY's alleged negligent supervision of its employees did not constitute an "event" within the meaning of the policy—which defined the term as "an accident."

Considering that issue, this Court employed the common definition of "accident" as "'an unforeseen incident' which is characterized by a 'lack of intention,'" and held that coverage existed, reasoning as follows:

> As we have recognized in the past, comprehensive general liability policies are "designed to protect an insured against liability **for negligent acts resulting in damage to third-parties."** Accordingly, we have little trouble concluding that a reasonable insured would expect the policy provision defining "event" to include negligent acts.

*Id.* at 290, 580 N.W.2d at 250. (Citations omitted; emphasis added.)

This Court saw the issue as not whether the insurer was required to defend the individual employees for their intentional acts against Doyle, but rather whether WVCY, as an employer, was covered as an insured under the policy. The event was thus viewed from the standpoint of the insured, WVCY, rather than the alleged wrongdoers, WVCY's employees. The claim against WVCY centered on its alleged negligence in supervising its employees regardless of whether those employees committed the underlying wrong intentionally.

In *Patrick v. Head of the Lakes Co-op. Elec. Assoc.*, 98 Wis. 2d 66, 295 N.W.2d 205 (Ct. App. 1980), the action was based on a cooperative's intentional acts of cutting down trees that were owned by another party. The arborists did not realize at the time that several of the trees

were not located on the Cooperative's easement. When the adjoining property owner sued the Cooperative, its insurer denied coverage on the basis that the cutting was intentional and thus could not constitute an "occurrence" or "accident" under the policy. This Court held that, while the cutting of trees was an intentional act, the damages caused by the unauthorized trimming were unintended.

> The employees ... did not intend to cut or trim trees located outside of the Cooperative's easement. As a cause of action existing only for damages due to the unauthorized trimming and cutting, any damage was in fact unintended. Under these circumstances, Patrick's action claims an occurrence covered by the policy.

*Id.*, at 70, 295 N.W.2d at 208.

*Doyle* and *Patrick* are thus consistent with the development of the "occurrence" clause, which this Court explained as follows:

> The term 'occurrence' originally came into use in insurance policies because a restrictive construction of the term 'accident' proved unsatisfactory to the insured, the public, and the courts. The purpose of using 'occurrence' rather than 'accident' was to expand coverage. 7A Appleman, *Insurance Law and Practice,*

> sec. 4492 (1979). Its use permits consideration of the state of mind of the actor as it relates to the resultant damage, rather than only as it relates to causation. 7A Appleman, *supra* sec. 4492.02. Its use affords coverage for an intended act and intended result if they cause damage unintended from the standpoint of the insured.

*Patrick*, 98 Wis. 2d 66, 69-70, 295 N.W.2d 205, 207; *see also Kremers-Urban Co. v. Am. Employers Ins. Co.*, 119 Wis. 2d 722, 742, 351 N.W.2d 156, 166-67 (1984).

Gundrum did not intend any harm to anyone, and when he recognized more people were going to be attending the party than he had originally envisioned, he abstained from alcohol to take care of his guests. (R14:198; R21). From his standpoint, the injuries to Schinner constituted an accident, and it follows that they are covered by the West Bend policy.

#### 4. The fact that Gundrum intentionally provided alcohol to an underage individual does not negate coverage.

Almost all acts of negligence involve intentional conduct. Like the filing of a false lien, or the cutting of

trees, depressing an accelerator to beat a yellow light is an intentional act, yet coverage exists if that act causes an accident. The Idaho Supreme Court, construing a similar exclusion, put it this way:

> On an exclusion such as this one, the company would have no liability for the baseball intentionally thrown which accidentally breaks the neighbor's window, the intentional lane change which forces another driver into the ditch, or the intentionally started trash fire which spreads to the adjacent lot. Countless other examples are imaginable, in all of which an insurance company could rely on such an exclusion to avoid liability because the course of conduct of the insured involved intentional acts.

*Farmers Ins. Group v. Sessions,* 607 P.2d 422, 425 (1980).

Many Wisconsin cases have reached a similar conclusion with respect to intentional actions on the part of an insured that created foreseeable harm to another. Most of these cases are analyzed under the intentional acts exclusion. But, as we discuss in more detail below (*See* sec. I A 7), in order to reach the exclusion, the conduct would still need to be deemed an "occurrence" or "accident" under the policy and Wisconsin law.

The following cases would have been decided differently if West Bend is correct in its assertion that an intentional act creating the forseeability of harm is not an "accident" or "occurrence" under standard homeowner's policies.

- *Loveridge v. Chartier*, 161 Wis. 2d 150, 468 N.W.2d 146 (1991). Coverage was found where an adult transmitted herpes to a 16-year-old girl.
- *Prosser v. Leuck*, 196 Wis. 2d 780, 539 N.W.2d 466 (1995). Several juveniles intentionally broke into a building without the owner's consent, and, in the course of their horseplay, a fire was started, burning down the warehouse. While playing with fire was an intentional act, the court held that burning down the entire building was not substantially certain to follow and found coverage.
- *Beahm v. Pautsch*, 180 Wis. 2d 574, 510 N.W.2d 702 (Ct. App. 1993). Coverage was found where a fire set by the insured to burn off winter grass obscured the vision of a motorist on an adjoining highway, causing an accident. Even though the insured was convicted of arson to land, the court ruled that coverage was not precluded for injuries suffered in the automobile accident.

- *Becker by Kasieta v. State Farm Mutual Auto Ins. Co.*, 220 Wis. 2d 321, 582 N.W.2d 499 (Ct. App. 1998). A passenger in a car, who, along with others, broke into a gas station and stole alcohol, became intoxicated and caused a accident. Coverage was found in spite of the criminal activity initiating the event.
- *Gouger v. Hardtke*, 167 Wis. 2d 504, 482 N.W.2d 84 (1992). Coverage was found where a student in a high school shop class intentionally threw a piece of soapstone at another student, injuring him.

As demonstrated by the above cases, interpreting the term "occurrence" in the manner sought by West Bend would mark a significant change in Wisconsin insurance law.

Underage drinking parties, unfortunately, occur with some frequency, but there is no evidence that physical injury resulting from these parties is a foreordained, or even a frequent, occurrence. Nor is there any evidence that Gundrum intended to cause any harm to Schinner by supplying alcohol to Cecil—or that he realized that harm

was virtually certain to occur. To the contrary, Gundrum stated in an affidavit that he did not expect anyone to be injured in any fashion at the party and did not intend harm to anyone. (R21). This was an "accident" plainly covered by West Bend's policy.

### 5. The Wisconsin Cases Relied on by West Bend are distinguishable.

West Bend relies on three Wisconsin misrepresentation cases in its "occurrence" argument (pages 17-21): *Everson v. Lorenz*, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298; *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448; and *Doe 1 v. Archdiocese of Milwaukee*, 2010 WI App 164, 330 Wis. 2d 666, 794 N.W.2d 468. Each of these cases involved an intentional misrepresentation. In *Everson*, the claim was that a seller of real estate falsely represented to the plaintiff purchaser that the parcel was suitable for building a residence. This Court concluded that misrepresentation

cases are different from negligence cases, noting that prior case law left open the question on whether "strict responsibility and/or negligent misrepresentation ... are sufficiently different from other kinds of negligence to preclude their categorization as 'accidents' in insurance liability policies." *Everson v. Lorenz*, 2005 WI 51, ¶18, 280 Wis. 2d 1, 13-14, 695 N.W.2d 298, 304. This Court explained its reasoning as follows*:*

> Lorenz's misrepresentation can be defined as an "act of making a false or misleading statement about something...." *Black's Law Dictionary* 1016 (7th ed.1999). To be liable, Lorenz must have asserted a false statement, and such an assertion requires a degree of volition inconsistent with the term accident.

*Id*. at ¶19.

*Stuart,* relying on *Everson*, concluded that a contractor's misrepresentation about his qualifications—made in order to induce the plaintiffs to enter into a home improvement contract with him—was not an "occurrence" under the policy. *Stuart* 2008 WI 86, ¶28.

*Archdiocese of Milwaukee* reached a similar result with respect to the Archdiocese's misrepresentations that

children would be safe in the presence of certain priests despite the knowledge of diocesan officials that each of the priests had a history of sexual abuse. *Doe 1 v. Archdiocese of Milwaukee,* 2010 WI App 164, ¶2. Relying on *Everson* and *Stuart*, the court determined there was no occurrence because of the misrepresentation.

The *Everson* court's rationale applies the following definition to the particular class of misrepresentation cases it was discussing: " 'something that does not occur in the usual course of events or that could not be reasonably anticipated' ... Additionally, we have defined accident to mean "'[a]n **unexpected**, undesirable event'" or "'an **unforeseen** incident.'" *Everson v. Lorenz*, 2005 WI 51, ¶15. (Emphasis added). And it is clear that this definition could never apply in an ordinary negligence action because negligence requires foreseeability of harm. *Hoida, Inc. v. M & I Midstate Bank*, 2006 WI 69, 291 Wis. 2d 283, 717 N.W.2d 17. Indeed, application of the *Everson*

misrepresentation standard to ordinary negligence cases would effectively nullify liability insurance coverage in those cases.

### 6. Foreign Cases Cited by West Bend

*Illinois Farmers Ins. Co. v. Duffy*, 618 N. W. 2d 613 (Minn Ct. App. 2000) appears to support West Bend's position. But, only a year later, the Minnesota Supreme Court, recognizing the confusion in their cases, issued a clarifying statement:

> … [I]n applying the *Hauenstein* definition of accident to a coverage provision, particularly the *unexpected, unforeseen or undesigned consequence* aspect, our cases interpreting intentional act exclusions are instructive; that is, where there is specific intent to cause injury, conduct is intentional for purposes of an intentional act exclusion, and not accidental for purposes of a coverage provision. As was the case under the *Hauenstein* definition, where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional.

*Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 612 (Minn. 2001).

The court went on to conclude:

> "Rather, we conclude that in analyzing whether there was an accident for purposes of coverage, lack of specific intent to injure will be determinative, just as it is in an intentional act exclusion analysis.

*Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 612 (Minn. 2001).

West Bend also cites *Allstate Ins. Co. v. Morton*, 657 N.W.2d 181 (Mich. App. 2002), which, as here, involved an underage drinking party. In that case, a host served so much alcohol to a guest that she passed out and was then raped by another attendee. The court noted that serving enough alcohol so as to induce poisoning was sufficiently harmful to render the conduct intentional. The fact that the rape occurred later, and was a different type of harm, was irrelevant. In the instant case, there was no evidence that Gundrum anticipated any harm to any person. Nor does this case concern coma-inducing amounts of alcohol or anything similar.

A third case, *American Modern Home Ins. Co. v. Corra,* 222 W. Va. 797, 671 S.E.2d 802 (2008), was decided

under West Virginia law, which requires an injury to be "unexpected and unforeseen" from the perspective of an insured in order for coverage to exist. As discussed above, this conflicts with Wisconsin law, which has long recognized that forseeability of harm is the hallmark of negligence cases. *See*, *Osborne v. Montgomery,* 203 Wis. 223, 234 N.W. 372 (1931). The West Virginia case would bar coverage for negligent acts, which, again, is plainly contrary to Wisconsin law. This Court has stated, for example: " '[W]e have little trouble concluding that a reasonable insured would expect the Policy provision defining 'event' to include negligent acts.' " *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.,* 2004 WI 2, ¶45, 268 Wis. 2d 16, 42, 673 N.W.2d 65, 78, *quoting Doyle v. Engelke,* 219 Wis. 2d 277, 580 N.W.2d 245 (1998).

The final case, *Sheely v. Sheely*, 2012-Ohio-43 *appeal not allowed*, 2012-Ohio-2025, 131 Ohio St. 3d 1541, 966 N.E.2d 895, an Ohio Court of appeals case, is also grounded

on a law, like that in *Corra, supra*, stating that "occurrence" when defined as "an accident" is "intended to mean just that – an unexpected, unforeseeable event." Again, Wisconsin courts have consistently held that insurance covers negligent acts because, by definition, negligent acts are reasonably foreseeable. *See*, cases cited above; *Rolph v. EBI Cos.,* 159 Wis. 2d 518, 532, 464 N.W.2d 667 (1991); *Schuster v. Altenberg,* 144 Wis. 2d 223, 235, 424 N.W.2d 159, 164 (1988); *Lloyd v. S.S. Kresge Co.,* 85 Wis. 2d 296, 305, 270 N.W.2d 423, 427 (Ct.App.1978).

### 7. West Bend could have explicitly excluded this coverage in its policy.

West Bend issued two policies to Gundrum, a commercial policy and a homeowner's policy. Both provide coverage for: "'bodily injury' . . . caused by an 'occurrence'. . ." (R14:27, R14:118). The commercial policy contains a liquor liability exclusion, which states that coverage is not provided for "bodily injury . . . for which any insured may

be held liable for by reason of . . . [t]he furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol." (R14:21, 28). The homeowner's policy does not contain such an exclusion.[2]

The presence of the exclusion in the commercial policy would lead a reasonable person to conclude that the coverage grant would include social host liability in the first instance. Otherwise, why else would the exclusion be present?

And, homeowner's policies frequently contain liquor liability exclusions. *See*, eg, *Anderson v. American Family* 2002 WI App 315, 259 Wis. 2d 413, 655 N.W.2d 531, *aff'd*, 2003 WI 148, 267 Wis. 2d 121, 671 N.W.2d 651. West Bend could have, but chose not to, include such an exclusion in its homeowner's policy.

[2] The trial court stated that Gundrum's homeowner's policy contained a liquor liability exclusion. That is not so. The court cited page 2 of 16 of the policy as the reference to this exclusion. The business policy is 16 pages and contains a liquor liability exclusion at page 2. The homeowners' policy consists of 22 pages, beginning at R14:105, and does not contain a liquor liability exclusion.

Additionally, under *American Family Mut. Ins. Co. v. American Girl*, 2004 WI 2, ¶47, 268 Wis.2d 16, 43, 673 N.W.2d 65, 78, courts may look to exclusions to assist in determining the scope of the coverage clause. The question in *American Girl* was whether the coverage grant in a commercial general liability policy could cover contractual losses. This Court looked to the exclusions to clarify the grant of coverage:

> If, as American Family contends, losses actionable in contract are never CGL "occurrences" for purposes of the initial coverage grant, then the business risk exclusions are entirely unnecessary. The business risk exclusions eliminate coverage for liability for property damage to the insured's own work or product-- liability that is typically actionable between the parties pursuant to the terms of their contract, not in tort. If the insuring agreement never confers coverage for this type of liability as an original definitional matter, then there is no need to specifically exclude it.

*Id.* ¶47.

Because of the presence of the exclusion in the commercial policy, West Bend obviously anticipated coverage for liquor liability under the coverage grant of

that commercial policy. The coverage grant, which is the same for both policies, would therefore be expected to cover liquor liability under the homeowner's policy as well, in the absence of an exclusion.

West Bend's homeowner's policy contains another exclusion which would have applied if Gundrum's party had involved illegal drugs, instead of alcohol. (R14:122). What would be the purpose of such an exclusion if that activity was not covered under the "occurrence" in the first place? The presence of the exclusion would lead a reasonable person in the position of the insured to believe that similar conduct involving illegal drugs would be covered as an "occurrence" in the first instance. Why else exclude it? And if conduct involving controlled substances would be an occurrence, it follows that conduct regarding alcohol would be as well.

Finally, *Loveridge v. Chartier,* 161 Wis. 2d 150, 184, 468 N.W.2d 146, 158 (1991) plainly disallows what West Bend is attempting to do here.

> Although [an insurance company] in hindsight may prefer to have limited what events or occurrences trigger insurance coverage, when it has failed to do so in the insurance contract itself, this court will not rewrite the contract to create a new contract to release the insurer from a risk it could have avoided through a more foresighted drafting of the policy.

*Id.* at 187, 468 N.W.2d at 158 (*quoting Kremers-Urban Co. v. American Employers Co.,* 119 Wis. 2d 722, 743-44, 351 N.W.2d 156 (1984)) (citations omitted). West Bend, in hindsight, may have wanted to limit its liability coverage to exclude liability for supplying alcohol to an underage individual, and certainly could have done so. But it did not. And this Court cannot create an exclusion for such acts where one does not exist, in order to release West Bend from a risk it could have avoided through a more "foresighted drafting" of its policy. *Id.*

## II. The non-insured location exclusion does not apply because the claim involves negligent conduct of an insured that did not arise out of any property.

The non-insured location exclusion applies only when an accident "arises out of" the non-insured location. *Corpus Juris Secundum* explains the distinction between an injury "arising out of" the premises, and one arising out of the tortious conduct of the insured:

> Where the exclusionary clause excludes coverage for injury or damage arising out of premises, coverage is excluded where the liability is incurred because of the condition of uninsured premises, but is not excluded where the liability is incurred because of tortious personal conduct occurring on uninsured premises.

46 C.J.S. Insurance § 1359.

West Bend Mutual relies on the following exclusion to deny coverage and a duty to defend:

> 4. Coverages E and F do not apply to the following: ... "Bodily injury" or "property damage" arising out of a premises:
>
> a. Owned by an "insured",
> b. Rented to an "insured", or
> c. Rented to others by an "insured";
>
> that is not an "insured location" (R14:120).

West Bend conflates an event which transpires at a noninsured location, with an event "arising out of" that location. Setting aside that personal property insured under the homeowner's policy was stored at the shed (and that the shed should thus be considered an insured location), the claim did not "arise out of" the location. Rather, the claim arose out of the personal conduct of an insured—Gundrum's hosting of the party.

*Newhouse by Skow v. Laidig, Inc.,* 145 Wis.2d 236, 426 N.W.2d 88 (Ct.App. 1988), a case involving a similar policy exclusion, is instructive. There, a child left in the care of an uncle, Floyd Omann, was injured by a piece of farm machinery. While Omann was cleaning the bottom of a silo at a farm owned by his parents, the child was left alone in the vicinity of a mechanical silo unloader, while it was still running, and was injured when he came into contact with the machine. The child's guardian sued Omann for negligence. *Id.* at 238, 426 N.W.2d 88, 89.

Omann lived at a separate residence with his parents and was covered under their homeowner's policy. As indicated, the accident did not occur at his parents' residence, but at a neighboring farm which they also owned. The policy provided personal liability coverage obligating the insurer to pay all sums the insured became legally obligated to pay as damages for bodily injury. The policy also contained an exclusion that denied coverage for bodily injuries "arising out of any premises owned or rented to an insured which is not an insured location." *Id.* at 239, 426 N.W.2d 88, 90. Because the accident occurred on premises other than the insured's residence, the insurer, relying on the exclusion, denied coverage.

The court of appeals concluded that the exclusion did not apply and that the homeowner's policy provided personal liability coverage for an insured wherever he or she may be. The court stated:

> The personal liability insured against is of two kinds: first, that liability which may be incurred because of the condition of the premises insured; secondly, that

> liability incurred by the insured personally because of his tortious personal conduct, not otherwise excluded, which may occur at any place on or off the insured premises.... The company has not chosen to geographically limit the coverage provided for tortious personal conduct of the insured. If it had so intended, it could simply have provided that the exclusion ran to an accident "occurring on" other owned premises. There appears to be little reason to exclude personal tortious conduct occurring on owned but uninsured land, as little correlation exists between such conduct and the land itself.

*Id.* at 239-40, 426 N.W.2d 88, *citing Lititz Mut. Ins. Co v. Brandy*, 561 S.W.2d 371, 374 (Mo. Ct. App. 1977).

That the accident in *Newhouse* occurred in a silo, and involved a farm implement used to unload the silo, did not implicate the clause at issue, for both were incidental to the direct cause of injury. Just as there was nothing about the silo or the machine that caused the accident in *Newhouse*, there was nothing about Gundrum's shed—or its condition—that played any causal role in this case. It is a case about Gundrum's negligence, just as *Newhouse* was a case about Omann's negligence.

*Newhouse* relied on *Lititz Mut Ins. Co. v. Branch,* 561 S.W.2d 371 (Mo Ct. App. 1977), where a dog who, having

been left at business property owned by the insured, caused injury to another person, who sued the owner. The owner's insurer argued lack of coverage based on a similar "arising out of" exclusion in its policy, and the court rejected the argument, noting that the injury did not occur out of any condition of the premises, and that the location of the animal was merely incidental.

The rationale underlying *Newhouse* (and the cited C.J.S. note) applies equally here: "The dispositive issue therefore is whether there is some correlation between the negligence giving rise to liability and a condition of the premises." *Newhouse* at 240, 426 N.W.2d 88, 90. As indicated, the accident in this case did not arise because of the condition of Gundrum's shed, but rather from his own allegedly negligent conduct. And that conduct was wholly independent of the condition of the shed and could have occurred anywhere. The exclusion does not apply.

Other cases support that result, requiring that the injury must be caused by some "defect" in the uninsured property in order for the exclusion to apply. And that makes sense, as an insurer should not be required to provide coverage for injuries arising out of defects in an uninsured piece of property. In *Economy Fire & Cas. Co. v. Green,* 139 Ill.App.3d 147, 93 Ill.Dec. 656, 487 N.E.2d 100 (1985), for example, coverage was not excluded where the defendant was allegedly negligent in caring for a child who was struck by an automobile on uninsured premises. The rationale was that if the plaintiff's "injuries did not arise out of any defects of premises owned, rented or controlled by [the insured], [then] [the insurer's] other premises exclusion is inapplicable and does not operate to preclude coverage of [defendant's] personal liability away from the insured premises." *Id*., 139 Ill.App.3d at 660, 487 NE2d at 104.

Similarly, in *Kitchens v. Brown*, 545 So.2d 1310, 1312 (La.Ct.App. 1989), the plaintiff was injured while clearing brush at the defendant's personal residence. The court held that the uninsured premises exclusion in defendant's policy did not apply because "the only manner of bodily injury or property damage that can arise out of premises is that which results from a defect in said premises." *Id.; See*, *also, Marshall v. Fair*, 187 W. Va. 109, 112, 416 S.E.2d 67, 70 (1992) ("[U]nder the overwhelming authority addressing the scope of the uninsured premises exclusion, as stated above, the key factor relates to the *condition* of the uninsured premises and not to tortious acts committed thereon.")

## III. Alternatively, the shed was an "insured location" as defined in the policy.

The policy defines "insured location" as follows:

6. "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 declaration; or

2. Which is acquired by your during the coverage period for your use as a residence;

c. Any premises used by you in connection with a premises described in a. and b. above; (R14:105).

Gundrum stored the family's personal snowmobiles and other personal property, such as boats and a camper, at the shed, which was sometimes referred to as the "toy shed" because of the recreational "toys" that were stored there. (R14:196; R21). The snowmobiles were specifically listed on the West Bend homeowners policy. (R21) As such, the shed would come under subsection 2c, above, as being used in connection with premises described in the policy; namely, the residence.

Even if there is disagreement as to whether storage of personal recreational items in a shed on adjoining

property constitutes using that property "in connection with" the residence, the exclusion should not be enforced. "Because the insurer is the party best situated to eliminate ambiguity in the policy, the policy's terms should be interpreted as they would be understood from the perspective of a reasonable person in the position of the insured." *Donaldson v. Urban Land Interests, Inc.,* 211 Wis. 2d 224, 230, 564 N.W.2d 728, 731 (1997) (*citing General Casualty Co. of Wisconsin v. Hills,* 209 Wis. 2d 167, 175, 561 N.W.2d 718, 722 (1997)).

An exclusion "is a clause that *subtracts* from coverage and puts a reasonable person on notice that coverage will be limited." *Muehlenbein v. West Bend Mut. Ins. Co.,* 175 Wis. 2d 259, 265-66, 499 N.W.2d 233, 235 (Ct. App. 1993) (emphasis in the original). As a result, exclusions in insurance policies are "narrowly construed against the insurer," with any and all ambiguities resolved against the insurer and in favor of coverage. *Cardinal v. Leader Nat'l*

*Ins. Co.,* 166 Wis. 2d 375, 382, 480 N.W.2d 1, 3 (1992) (citations omitted); *See also Donaldson v. Urban Land Interests, Inc.,* 211 Wis. 2d 224, 230, 564 N.W.2d 728, 731. Gundrum's shed should be considered an insured location.

### IV. Since the underlying home policy provides coverage to Gundrum for the acts alleged, the excess policy would similarly provide coverage.

While there may not be any issue about the umbrella policy, the trial court dismissed West Bend as to the umbrella policy as well. The umbrella has the same "occurrence" language as the underlying home policy (R14:152) and has the same "arising out of" language regarding the insured location. (R14:154). For the same reasons that the West Bend homeowners policy provides coverage, the umbrella policy provides coverage as well.

## CONCLUSION

This is a negligence case against someone who is alleged to have procured alcohol for an underage

individual, who became intoxicated and injured the plaintiff. Liability insurance is meant to cover negligent acts. "Occurrences" in insurance policies cover negligent acts. Matthew Cecil, who delivered the injury-causing kick, is not a defendant in this case and is not an insured person under the policy. Schinner does not seek coverage for Cecil's intentional acts.

Finally, the exclusion for activities "arising out of" a non-insured location does not apply because the event was not "premises related." Alternatively, the storage shed where the accident occurred was used to store personal property belonging to the insured, and is thus considered part of the insured premises under the terms of the policy.

Dated this _____ day of August, 2012.

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8305 words.

Dated this _____ day of August, 2012

Signed:

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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**CERTIFICATION AS TO CONFIDENTIAL PORTIONS OF THE RECORD**

I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically included juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of August, 2012

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STATE OF WISCONSIN
SUPREME COURT

MARSHALL SCHINNER,

Plaintiff-Appellant,

Appeal No. 2011AP0000564
Washington County Circuit
Court Case No.: 2009CV000870

v.

MICHAEL GUNDRUM,

Defendant, and

WEST BEND MUTUAL INSURANCE COMPANY,

Defendant-Respondent-Petitioner.

# REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER WEST BEND MUTUAL INSURANCE COMPANY

**APPEAL FROM THE COURT OF APPEALS, DISTRICT II, FOLLOWING APPEAL FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE JAMES G. POUROS PRESIDING, CIRCUIT COURT CASE NO. 2009CV870**

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August 17, 2012

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**Wisconsin Decisions**



**Non-Wisconsin Authorities**

## I. The Historical Development Of Dram Shop Common Law Into Statutory Law And Whether It Is Based On Negligence Or Intentional Conduct, A Focus Of The Respondent's Brief, (See Resp.11-13) Is Irrelevant.

Schinner's assertion, without citation or authority of any kind, that "[f]urnishing alcohol to a minor in Wisconsin is negligent, not intentional, conduct," (*Resp. 13*), is irrelevant to an insurer's duty to defend. The facts as alleged in the complaint determine duty to defend. *Olson v. Farrar*, 2012 WI 3, ¶31, 338 Wis. 2d 215, 229, 809 N.W.2d 1, 8.

Here, the complaint unambiguously alleged the purposeful furnishing of alcohol to underaged drinkers known to get belligerent and cause injury. This was no accident. The complaint alleged "Gundrum "procured" alcohol beverages for Cecil." (R3-7). There is no allegation that Gundrum bought this alcohol by accident, or accidentally served it to Cecil. The complaint alleged that "Gundrum knew that Cecil had not attained the legal drinking age" (R3-7) and yet Gundrum "encouraged, advised and assisted Cecil in his consumption of alcohol," (R3-7), knew it exposed party goers to harm, "created a reasonable possibility of injury" (R3-8), and Cecil's consumption of the alcohol provided by Gundrum caused Schinner's injury. (R3-7). Schinner admits that Gundrum knew Cecil had a history of becoming aggressive when inebriated. (*Resp. 7).*

Schinner's argument relies on *Koback v. Crook,* 123 Wis. 2d. 259, 366 N.W.2d 857 (1985), which is no longer good law because "the statute [Wis. Stat. §125.035] eliminated the holding of *Koback* that such actions were negligence *per se*." *Nichols v. Progressive N. Ins. Co*. 2008 WI 20, ¶9, n.5, 308 Wis. 2d 17, 26,

746 N.W.2d 220, 224. Schinner's argument that the furnishing is negligence *per se* is not the law in Wisconsin and must be rejected.

Further, neither *Koback* nor *Sorenson v. Jarvis,* 119 Wis. 2d 627, 350 N.W.2d 108 (1984) dealt with insurance coverage. The question presented in those decisions was viability of common-law claims against social hosts and retailers.

**II. Schinner Incorrectly Asserts That "The West Bend Policy Covers Negligence." (Resp. 1). Policies Do Not Cover Negligence – By Their Plain Language They Cover Liability For Occurrences That Cause Bodily Injury.**

Schinner's argument is contrary to two deeply imbedded principles of Wisconsin law. First, the duty to defend is determined by the ***facts*** alleged in the complaint. *Olson, supra*. This Court has consistently stated for decades that alleged facts determine duty to defend. *See, e.g., Doyle v. Engelke,* 219 Wis. 2d 277, 284-285, 580 N.W.2d 245, 248 (1998). Second, liability policies cover ***facts***, not theories of liability like negligence or strict liability:

> the longstanding rule [is] that we "must focus on the incident or injury that gives rise to the claim, not the plaintiff's theory of liability." *Berg v. Schultz*, 190 Wis. 2d 170, 177, 526 N.W.2d 781 (Ct. App. 1994).
>
> ....
>
> An occurrence is defined as an accident. This is what is insured against--not theories of liability. *Bankert*, 110 Wis. 2d at 480 (emphasis added).

*Stuart v. Weisflog's Showroom Gallery, Inc*., 2008 WI 86, ¶ 36, 311 N.W.2d 492, 514, 753 N.W.2d 448, 458-59.

Negligence is a theory of liability, and alleging negligence does not automatically trigger coverage. This Court rejected the idea of equating

negligence with occurrence, or contract breach with no occurrence, in *Am. Family Mut. Ins. Co. v. Am. Girl, Inc*., 2004 WI 2, ¶¶44-46, 268 Wis. 2d 16, 41-42, 673 N.W.2d 65, 77-78.

Schinner cursorily dismisses comparable decisions from Ohio and West Virginia because, he says, they are counter to Wisconsin's "rule" that negligent acts are *ipso facto* covered. (*Resp. 33-35*). Wisconsin has no such rule, and these decisions remain strong support for the proposition that intentional encouragement of the underaged to drink, leading to injury, is not an occurrence.

Longstanding law is not the only reason to reject Schinner's arguments. A lawyer's choice of theories of recovery should not be determinative for duty to defend. The policy language, which reflects what the insured purchased, does not refer to theories of recovery. The policy language describes facts in its insuring agreement and exclusions. Resting on the facts respects the bargain between insurer and insured.

## III. Schinner Incorrectly Argues That West Bend Was Required To Anticipate This Case And Have An Exclusion For Liquor Liability.

Schinner repeatedly asserts West Bend should be required to defend because it could have used a liquor liability exclusion. *(Resp. 1, 19, 35-39).* This argument, that the absence of language creates coverage, is contrary to Wisconsin law. The facts must first fit into the insuring agreement and if they do not fit into the insuring agreement no exclusion is necessary. *Olson*, 2012 WI 3, ¶41, 338 Wis. 2d at 232, 809 N.W.2d at 9. If an exclusion were required for every

unwanted risk, then policies would be multi-volume book sets. Policies must be interpreted by their language, not by what other policies say. The commercial policy's use of a liquor liability exclusion is meaningless to the language of the homeowner's policy.

**IV. Schinner Wrongly Asserts That "The Three Wisconsin Cases Directly Considering Whether An Intentionally Inflicted Injury Is Covered As An Accident Under A Homeowner's Insurance Policy" Have Held It Is Determined From The Standpoint Of The Injured Party. (Resp. 15).**

*Tomlin v. State Farm*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980) concerned an automobile liability policy on much different facts, a stabbing of an officer in a traffic stop and whether there was coverage for it. *Fox* concerned a commercial liability policy for a theater in an assault by a theater employee against a patron. *See Fox Wis. Corp. v. Century Industrial Co*., 219 Wis. 549, 550, 263 N.W.2d 567, 567 (1935). *Button v. America Mutual Accident Ass'n*, 92 Wis. 83, 65 N.W. 861 (1896) concerned first-party coverage for a shooting, not liability coverage and "[t]he policy insured the plaintiff against death or injuries through "external, violent, and accidental means,. . . ." 92 Wis. at 84, 65 N.W. at 861. *Button* relied on a life insurance treatise for the proposition that "an injury intentionally inflicted on the insured person by another is an "accidental injury," when such injury is unintentional on the part of the insured." *Id.* This supposed "rule" was transplanted into the liability policy context first by *Fox*, 219 Wis. at 551, 263 N.W.2d at 568, and then *Tomlin*, 95 Wis. 2d at 221, 290 N.W.2d at 288 ("The rule ... is derived from *Button* ....").

So at its root, and carefully read, the *Button* "rule" requires viewing the injury from the insured's perspective, who just happened to also be the injured party in *Button.*[1] Negligence was not at issue in *Button.* Schinner's request that this Court "retain the *Tomlin-Fox-Button* trilogy" (*Resp. 18*) and view occurrence from the injured party's perspective is asking the Court to compound the error because *Button* did not endorse adoption of the injured party's viewpoint, contrary to later pronouncements in *Tomlin* and *Fox*.

The viewpoint of Schinner on "occurrence" should also be irrelevant because he is a non-party to the policy. For over a century, this Court has held the policy is a contract under Wisconsin law, interpreted according to its plain language. *RTE Corp. v. Maryland Casualty Co.*, 74 Wis. 2d 614, 620-621, 247 N.W.2d 171, 174-75 (1976) (cases cited therein). When viewpoints are used to aid in interpretation it is always the viewpoint of an objectively reasonable insured, *see, e.g., Wadzinski v. Auto-Owners Ins. Co.*, 2012 WI 75, ¶11 ____ Wis. 2d ____, ____ N.W.2d ____; *Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis. 2d 437, 447, 492 N.W.2d 131, 134 (1992), not the viewpoint of the plaintiff suing the insured.

Further, "occurrence" has been held unambiguous, s*ee, e.g., Voigt v. Riesterer*, 187 Wis. 2d 459, 465, 523 N.W.2d 133, 135 (Ct. App. 1994)("The term

[1] For comparison, in workers compensation cases the "accident" is "viewed from the perspective of the injured person" because worker's compensation "is an insurance for the benefit of the insured – the injured person. Here however, the liability policy was not purchased to insure the injured plaintiffs, but to give liability protection to the defendant..." *Olsen v. Moore*, 56 Wis. 2d 340, 350-51 202 N.W.2d 236, 241 (1972).

occurrence is at issue, which has been held to be unambiguous by the Wisconsin Supreme Court"), and therefore plain on its face and not in need of construction from a viewpoint, or extrinsic evidence.

### V. *Everson, Stuart, And Doe* Properly Define Occurrence As An Insured's Acting With Lack Of Intention In An Unforeseen Incident, And That Definition Compels The Conclusion That There Is No Occurrence Here.

Schinner's brief complains that the definition of occurrence (*Resp. 27*) stated by this Court in *Everson v. Lorenz*, 2005 WI 51, ¶15, 280 Wis. 2d 1, 12, 695 N.W.2d 298, 303, "could never apply in an ordinary negligence action because negligence requires foreseeability of harm." (*Resp. 31*). However, *Everson* was a negligence action, and it relied on *Doyle's* definition of occurrence, and *Doyle* was also a negligence action. Both decisions have been used to define occurrence without criticism or question. *See, e.g., Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶54, 311 Wis. 2d 548, 574, 751 N.W.2d 845, 857; *American Girl, supra; Bruner v. Heritage*, 225 Wis. 2d 728, 737-38, 593 N.W.2d 814, 818 (Ct. App. 1999). Further, these decisions are not misrepresentation actions. Schinner's argument that the *Everson* "occurrence" definition is "treated differently," "*sui generis*" and appropriate only to misrepresentation actions (*Resp. 18, 21, 29-32*) is wrong.

Schinner vainly attempts to distinguish *Sustache*. Schinner says that the "actions of the insured in *Sustache* were intentional; the actions of the insured in this case were not." (*Resp. 18*). This assertion is made again without citation to any authority of law or fact. It is also contrary to the undisputed allegations of the

complaint, that Gundrum purposely hosted this party, encouraging Cecil to drink illegally, knowing it had a foreseeability of producing injury. Schinner similarly attempts to distinguish away *Allstate Ins. Co. v. Morton,* 657 N.W.2d 181 (Mich Ct. App. 2002) by asserting that "there was no evidence that Gundrum anticipated any harm to any person." (*Resp. 33*). This assertion ignores these alleged facts.

Schinner relies heavily on *Doyle*, (*Resp. 21-24*) for its statement that a policy covering bodily injury caused by an "event" would be expected by an insured to cover negligent acts. (*Resp. 22*). However, subsequent decisions have clarified that *Doyle* does not mean that an allegation of negligence is the equivalent of an occurrence:

> *Doyle* did not, however, equate the term "accident," as used in the CGL policy, with negligence as a form of legal liability; we simply held that negligent acts were "accidental" within the meaning of the CGL's definition of "event." *Id*.

*American Girl*, 2004 WI 2, ¶45, 268 Wis. 2d at 42, 673 N.W.2d at 78. *See also, James Cape & Sons Co. v. Streu Constr. Co.*, 2009 WI App 154, ¶¶13-14, 321 Wis. 2d 604, 613-14, 775 N.W.2d 117, 121-22.

*Doyle* is also different on its facts, where the employer neglected to supervise a wayward employee, which an objectively reasonable insured could see as an occurrence or accident. No objectively reasonable insured could view hosting an illegal drinking party knowing it could lead to injury as an accident. *Patrick v. Head of Lakes Coop. Electric Assoc.*, 98 Wis. 2d 66, 295 N.W.2d 205 (Ct. App. 1980) also does not help Schinner. *Patrick* held the act of cutting down someone else's trees was an accident because the tree-cutter thought the trees were

his via easement, and that he was entitled by law to cut them. 98 Wis. 2d at 70, 295 N.W.2d at 208. Here by contrast, Gundrum admitted intentionally violating the law, (R14-203, 205), and the complaint alleges he expected that almost half of his partygoers would be illegally drinking. (R3-5).

Schinner quotes an Idaho decision for its discussion of the exclusion for intentional injury, sometimes misnamed the intentional acts exclusion. (*Resp. 26*) However, the exclusion is not at issue on this appeal, and the analysis the exclusion mandates is different from the question of occurrence. Schinner also quotes Minnesota's Supreme Court concluding that lack of intent to injure "will be determinative [for occurrence], just as it is in an intentional act exclusion" (*Resp. 33, quoting Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, (Minn. 2001). This statement renders the occurrence definition superfluous, converting it to the intentional injury exclusion, an interpretation contrary to Wisconsin interpretation rules.

Schinner flatly asserts without developing argument that a handful of decisions "would have been decided differently" under the occurrence definition found in *Everson.* (*Resp. 27*). Schinner's first cited decision is *Loveridge v. Chartier,* 161 Wis. 2d 150, 468 N.W.2d 146 (1991), but it rested on the intentional injury exclusion, not occurrence definition. Similarly inapplicable are *Prosser v. Leuck,* 196 Wis. 2d 780, 539 N.W.2d 466 (Ct. App. 1995) and *Becker by Kasieta v. State Farm,* 220 Wis. 2d 321, 582 N.W.2d 499 (Ct. App. 1998)(*Resp. 28*) which rested on common law fortuity, not occurrence definition. *Beahm v. Pautsch*, 180

Wis. 2d 574, 510 N.W.2d 702 (Ct. App. 1993)(Resp. 27) rested on the pollution exclusion and intentional injury exclusion, not occurrence definition. Lastly, *Gauger v. Hardtke*, 167 Wis. 2d 504, 482 N.W.2d 84 (1992)(*Resp. 28*) did not address insurance coverage at all, but rather the statute of limitations, dependent on whether the claim alleged a negligence theory or intentional tort. In sum, none of these decisions are applicable at all here. Schinner is simply wrong when he argues based on them that "interpreting 'occurrence' in the manner sought by West Bend would mark a significant change in Wisconsin insurance law." (*Resp. 28*).

## VI. The Claim For Injury Arises Out Of An Uninsured Location, The Business's Machine Shed, And It Is Therefore Excluded From Coverage.

Contrary to Schinner's argument, (*Resp. 5*), the bodily injury arose from the shed, undisputedly a secluded and windowless venue chosen to conceal the illegal drinking. The illegal drinking caused the bodily injury, the complaint alleges. (R3-7 at ¶24). The police reports do establish that it was a difficult location to find, and not just that the difficulty was only the partygoers' refusal to open the door. The responding officer's report said officers were "canvassing the area" to find the victim, and the machine shed. They were uncertain initially whether they'd found it because it had "no windows available to peer into." (R14-169).

Schinner argues the exclusion only applies if a "condition," and specifically a defect in the premises caused the injury. (*Resp. 44-46*). This rewrites the policy, which does not require that a condition or defect cause the injury. Instead, the

injury must arise from the premises, a far broader standard. Schinner relies on other states' decisions that import the word "defect" into the exclusion, requiring that the injury must arise from a premises "defect." *See, e.g.*, *Economy Fire and Cas. Co. v. Green,* 487 N.E.2d 100, 104 (Ill. App. 1985)(*Resp. 45-46*).

Other Courts have recognized the meaning of "arising out of a premises" to require a causal connection, not a premises defect. In *National Farmers Union Property & Casualty Co. v. Western Casualty & Sur. Co.*, 577 P.2d 961, 964 (Utah 1978), plaintiff alleged negligent supervision of horses, one of which escaped through an open gate, causing injury in a horse-car collision. The Court applied the exclusion in a homeowner's policy because:

> To confine the animal to the drill field, there was an enclosure around the uninsured premises. Captain Story's alleged negligence was his failure to close the gate and thus prevent the escape. The alleged acts arose from, originated, and were connected with the uninsured premises, and the exclusion in his homeowner's policy was applicable.

*Id.* Similarly here, Schinner alleges Gundrum hosted a drinking party in the business shed, risking injury to all and failed to control it.

Schinner does not argue the exclusion is ambiguous or uncertain, and consequently strict construction of it would not be proper. *See Whirlpool Corp. v. Ziebert*, 197 Wis. 2d 144, 152, 559 N.W.2d 883, 886 (1995). This is the view of courts where the exclusion is enforced, for example:

> the phrase "arising out of is not ambiguous it.. .. mean[s] .... "incident to or having connection with .... the phrase is certainly broad enough to encompass a fire which spreads from a building on the [uninsured location] premises to adjoining land. Accordingly, the insureds' liability arose out of their [uninsured location] premises.

*St. Paul Fire & Marine Ins. Co. v. Insurance Co. of North America*, 501 F. Supp.

136, 138-9 (W.D. Va. 1980).

**VII. The Storage Of Some Personal Recreational Vehicles Of Various Persons Did Not Make The Shed An Insured Location Under The Homeowner's Policy.**

Schinner incorrectly asserts that half of the shed was used to store personal property of the Gundrums including boats, trailer, snowmobiles, and a camper. (R.14-96, 21). These assertions show only that others in the extended family of the Gundrum's, not insureds under the West Bend policy, might have stored their personal recreational toys there. Gundrum testified the shed was half semis and the other half storage of various people's "stuff" -- "My dad's got stuff, my uncles there, a couple of his friends ..." (R14-197). Gundrum's affidavit merely stated the shed stored some personal property "such as snowmobiles, trailers and recreational vehicles" but only the snowmobiles, he said, were insured under the Gundrum's homeowners policy with West Bend. (*Resp. 21*). Accepting this as true, the storage of family, friends' and uncles' recreational vehicles in a shed is not use by Gundrum "in connection" with a home and does not convert the business shed into an "insured location." Schinner argues this provision need be interpreted from the reasonable insured's perspective. (*Resp. 48*). No reasonable insured would buy a business policy, and a homeowners policy, and think the liability section of the homeowners would cover events on the business property just because some relatives and friends stored recreational vehicles at the business.

Dated this 17th day of August, 2012

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CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (d), for a reply brief produced with a proportional serif font. The length of this reply brief is 2,995 words.

Dated this 17th day of August, 2012.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)-(13)

I hereby certify that I have submitted an electronic copy of this reply brief, which complies with the requirements of Wis. Stat. § 809.19 (12)-(13). I further certify that this electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the Court and served on all opposing parties.

Dated this 17th day of August, 2012.

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MARSHALL SCHINNER,
Plaintiff-Appellant,
v. Appeal No. 2011AP564
MICHAEL GUNDRUM,
Defendant,
and
WEST BEND MUTUAL INSURANCE COMPANY,
Defendant-Respondent-Petitioner.

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APPEAL FROM A DECISION OF THE COURT OF APPEALS OF WISCONSIN, DISTRICT II, REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HON. JAMES G. POUROS, PRESIDING
CASE NO. 2009-CV-870

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# NON-PARTY BRIEF OF THE WISCONSIN INSURANCE ALLIANCE

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**STATUTES**



**OTHER AUTHORITIES**

## INTRODUCTION

The Wisconsin Insurance Alliance ("WIA"), by its attorneys, Godfrey & Kahn, S.C., submits this non-party brief, pursuant to Wis. Stat. § (Rule) 809.19(7) and the Court's August 20, 2012 order.

The material facts of this case are straight-forward and undisputed. Defendant Michael Gundrum, then 21 years old, decided to host a party in a shop building at his parents' business property on Saturday, December 13, 2008. Gundrum previously had hosted one or two parties in the same building, which was furnished with couches, a table, chairs, a refrigerator and a CD player and was used to house both trucks for the business and snowmobile trailers and other personal property for Gundrum's father, his friends, and relatives. R.14:169, 206, 206-09. Gundrum's father was aware that Gundrum used the shop building for social gatherings. R.14:233.

Gundrum anticipated and was aware that a substantial number of the people attending the party and consuming alcohol were under the legal drinking age. R.14:214-15. Gundrum also knew that one of those individuals, Matthew Cecil, was underage and had a history of becoming aggressive when intoxicated. R.14:220-22. Nonetheless, Cecil was encouraged to consume alcohol provided by Gundrum. R.3:2-3. Cecil became belligerent toward and, ultimately, assaulted Marshall Schinner, who suffered serious injuries. R.3:3-4.

The primary issue in this case is whether Schinner's injuries result from a covered "occurrence" under the homeowners policy issued by West Bend Mutual Insurance Company ("West Bend") to Gundrum's parents, where those injuries resulted from an admittedly intentional assault that

was fueled by alcohol Gundrum intentionally and illicitly provided to Cecil. Only if that question is answered "yes" would a second question arise; namely, whether coverage nonetheless is excluded because Schinner's injuries arose out of the use of an uninsured premises.

The WIA has a unique perspective on this appeal because it represents the interests of a broad spectrum of the insurance industry in the State of Wisconsin and elsewhere, including numerous insurers who write homeowners insurance policies similar to the West Bend policy at issue here. The WIA asks the Court to reaffirm the Court's well-established precedent governing what constitutes an "occurrence" for purposes of liability coverage and reinstate the circuit court's dismissal of Marshall Schinner's claims.

## ARGUMENT

### I. NEITHER GUNDRUM'S ILLICIT FURNISHING OF ALCOHOL TO CECIL, NOR CECIL'S SUBSEQUENT "ASSAULT" OF SCHINNER CONSTITUTES AN "OCCURRENCE" FOR PURPOSES OF LIABILITY COVERAGE.

This Court frequently has addressed the interpretation of coverage under insurance policies. Its procedure is straightforward: First, the Court "examine[s] the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 24, 268 Wis. 2d 16, 673 N.W.2d 65. If, and only if, the claim triggers the initial grant of coverage, the court next examines the various exclusions to see whether any apply to preclude coverage. *Id*. If a particular exclusion applies, the Court then determines whether an exception to that exclusion reinstates coverage. *Id*. If, however, it is clear that the policy's insuring

agreement was not intended to cover the claim asserted, the Court's analysis ends with the first step. *Id*.

So it is here. The homeowners policy issued by West Bend provides personal liability coverage for claims against an insured for "damages because of 'bodily injury' … caused by an 'occurrence.'" R.14:118. An "occurrence" is defined, in relevant part, as "an accident." R.14:105.

This Court has construed the term "accident" in liability insurance policies numerous times, turning to dictionary definitions for guidance:

> The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." *Webster's Third New International Dictionary of the English Language* 11 (2002). *Black's Law Dictionary* defines "accident" as follows: "The word 'accident,' in accident policies means an event which takes place without one's foresight or expectation. **A result, though unexpected is not an accident: the means or cause must be accidental.**" *Black's Law Dictionary* 15 (7th ed. 1999).

*Am. Girl, Inc.*, 268 Wis. 2d 16, ¶ 37 (bold emphasis added); *see also Doyle v. Engelke*, 219 Wis. 2d 277, 289-90, 580 N.W.2d 245 (1998) (An "accident" is "an unintentional occurrence leading to undesirable results."). In short, the proper inquiry does not focus on the injury itself, but on its underlying causes. *Stuart v. Weisflog's Showroom Gallery, Inc*., 2008 WI 86, ¶ 40, 311 Wis. 2d 492, 753 N.W.2d 448.

Wisconsin courts have followed this line of inquiry and declined to find an "accident" for purposes of liability coverage in such volitional actions as, for example, an intentional punch which resulted in unanticipated and unintended death, *Sustache v. Am. Fam. Mut. Ins. Co*., 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845; the intentional provision of a real estate condition report which mistakenly and unintentionally reported that the property was not located in a 100-year flood plain, *Everson v. Lorenz*, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298; and the intended (although incorrect) representations that certain priests did not pose a risk which led to the unanticipated abuse and molestation of children. *Doe 1 v. Archdiocese of Milwaukee*, 2010 WI App 164, 330 Wis. 2d 666, 794 N.W.2d 468; *cf. Doyle*, 219 Wis. 2d at 286-91 (defendant employer's negligent failure to supervise its employees, who intentionally caused the plaintiff severe emotional distress and disabling injuries through their filing of a false security agreement against her assets, is an accident for purposes of liability coverage).

Schinner seeks to distinguish *Everson*, *Archdiocese of Milwaukee*, and *Stuart*, asserting that "[e]ach of these cases involved an intentional misrepresentation." Resp. Br., 29. Thus, according to Schinner, the cases cannot be considered applicable to "an ordinary negligence action." *Id*. at 31. Schinner improperly conflates volitional acts with intentional torts. Indeed, at issue in *Everson* and *Archdiocese of Milwaukee* were negligent misrepresentation claims including, in the case of *Everson*, a misrepresentation based solely on a typographical error.

What's more, although it found that the defendants knew of the falsity of their statements at the time they were made, the Court in *Stuart* made clear that its holding did not turn "on the relative mens rea requirements of various misrepresentation causes of action." 311 Wis. 2d 492, ¶ 37.

Rather, the Court stated, to determine whether an act is accidental within the meaning of a liability policy, "we need only to determine whether the occurrence giving rise to the claims was an unintentional act in the sense that it was not volitional." *Id*. (footnote omitted); *see also Sustache*, 311 Wis. 2d 548, ¶¶ 38-46, 54-56 (discussing *Everson* and *Stuart* at length and holding that an insured's intentional assault of plaintiff, leading to unanticipated death, was not the type of "unexpected event" to which homeowner's liability coverage responds).

The Court's approach in this regard is consistent with the principle of fortuity underlying insurance contracts: "insurance covers fortuitous losses and that losses are not fortuitous if the damage is intentionally *caused* by the insured." *Hedtcke v. Sentry Ins. Co*., 109 Wis. 2d 461, 483-84, 326 N.W.2d 727 (1982) (emphasis added).

> Even where the insurance policy contains no language expressly stating the principle of fortuitousness, courts read this principle into the insurance policy to further specific public policy objectives[,] including (1) avoiding profit from wrongdoing; (2) deterring crime; (3) avoiding fraud against insurers; and (4) maintaining coverage of a scope consistent with the reasonable expectations of the contracting parties on matters as to which no intention or expectation was expressed.

*Id*. at 484. Thus, a person who negligently fails to provide aid to someone whom he or she had previously rendered helpless through an intentional act is not entitled to liability coverage for damages flowing from the failure to aid. *Haessly v. Germantown Mut. Ins. Co*., 213 Wis. 2d 108, 569 N.W.2d 804 (Ct. App. 1997).

The Court of Appeals' decision here disregards this well-established principle – and this Court's precedent. Indeed, there is no factual dispute that Cecil's actions in assaulting Schinner were intentional and not accidental. *Schinner v. Gundrum*, 2012 WI App 31, ¶ 3, 340 Wis. 2d 195, 811 N.W.2d 431. The Court of Appeals nonetheless determined that, for purposes of coverage, Cecil's assault of Schinner *was* an accident and, therefore, an "occurrence" under the terms of West Bend's policy. *Id*., ¶ 24.

In reaching its decision, the Court of Appeals questioned whether, for coverage purposes, the assault should be viewed from the standpoint of the injured party or the insured. It observed that there is an apparent conflict between this Court's decision in *Sustache*, which viewed the events giving rise to injury from the standpoint of the insured, and earlier precedent in which the Court took the standpoint of the injured party. *Id*., ¶ 17, citing for such earlier precedent *Tomlin v. State Farm Mut. Auto. Liab. Ins. Co*., 95 Wis. 2d 215, 290 N.W.2d 285 (1980); *Fox Wisconsin Corp v. Century Indemn. Co*., 219 Wis. 549, 263 N.W. 567 (1935); *Button v. Am. Mut. Accident Ass'n*, 92 Wis. 83, 65 N.W. 861 (1896). Ultimately, however, the Court of Appeals concluded that the result would be the same because "[n]either Schinner nor Gundrum could be said to have intended the assault or an injury to Schinner" and, thus, it was an accident regardless which perspective one used *Id*., ¶ 21.

As an initial matter, to the extent *Tomlin* and *Fox* hold that a determination of whether injuries resulting from an assault were caused by an "accident" for purposes of liability coverage must be made from the standpoint of the injured party, those holdings are contrary to the principle of fortuity underlying insurance contracts, as well as public policy, and they should be overturned.

Indeed, as Wisconsin courts previously have recognized, there is certain conduct, including assault, for which a reasonable person would not expect his or her homeowners policy to provide liability coverage. *Haessly*, 213 Wis. 2d at 117-18. More particularly, "the average person purchasing homeowner's insurance would cringe at the very suggestion that [he or she] was paying for such coverage. And certainly [he or she] would not want to share that type of risk with other homeowner's policyholders." *Id.* at 119 (internal quotes omitted).

This Court upheld this basic premise when it found there are "compelling policy consideration[s] … precluding insurance recovery" in certain cases. *N.N. v. Moraine Mut. Ins. Co.*, 153 Wis. 2d 84, 94, 450 N.W.2d 445 (1990) (discussing policy considerations supporting preclusion of insurance recovery for victims of sexual assault). Among those considerations is the effect of such recovery on the wrongdoer, who is permitted to escape having to personally compensate his or her victim for the harm inflicted. *Id*. at 95. Because it rarely can be said that a person wishes or intends the injuries inflicted upon him or her, an approach that views the injury-causing events from the injured party's perspective is necessarily contrary to such public policy concerns.

Neither *Tomlin* nor *Fox* address public policy considerations, much less the fortuity principle, in adopting the injured-party perspective previously articulated in *Button*. Yet there is an important distinction in this regard between accident policies, such as that in *Button*, and liability policies, such as the automobile and public liability policies at issue in *Tomlin* and *Fox*, respectively. That distinction is in the risk covered: Accident policies, unlike liability policies, insure against injuries *suffered by the insured*. Accordingly, viewing the injury-causing events from the standpoint of the

injured-party is functionally indistinguishable from viewing it from the standpoint of the insured.

Indeed, *Button* recognized that the risk covered by the accident policy "should be one which the insured cannot, by intent or consent, or by his own act, produce or hasten." 92 Wis. 2d at 83; *cf. Fox*, 219 Wis. 551 (citing *Button*, without analysis, and holding that injury must be viewed from standpoint of the person injured). Because it leads to the opposite result in the liability policy context, the Court should make clear that the injured-party perspective followed in *Tomlin* and *Fox* is inconsistent with and no longer the law in Wisconsin.

Of course, even if one views the events leading to Schinner's injury from Gundrum's standpoint, there still is no accident and, therefore, no "occurrence" under West Bend's policy, for one simple reason: Gundrum's provision of alcohol to the under aged Cecil, who Gundrum knew to be aggressive when intoxicated, was entirely volitional. R.3:2-3; R.14:220-22.

Schinner asks that this Court, like the Court of Appeals, to ignore this inconvenient fact and narrow its inquiry only into whether Gundrum intended the actual assault. *See* Resp. Br. 25 (Gundrum did not intend any harm to anyone and, thus, from his standpoint, Schinner's injuries were an accident); *see also Schinner*, 340 Wis. 2d 195, ¶ 22 ("We do not address whether Gundrum's actions could be deemed an 'occurrence'; it is not necessary for us to do so, given our conclusion that the assault constituted an 'occurrence.'"). Yet Schinner does not explain how the Court may do so when the only potential basis for liability in this action is not the assault, but Gundrum's actions in providing alcohol to Cecil. *See id.*, ¶ 4 ("Schinner sued Gundrum for negligence, alleging that *Gundrum's conduct*, which included

providing alcohol to Cecil, was a cause of the assault and thus of Schinner's injuries.") (emphasis added).

As this Court's precedent makes clear, however, whether Gundrum intended the result of his acts, here Cecil's alcohol-fueled assault of Schinner, is immaterial.

> "A result, though unexpected, is not an accident"; rather, it is the causal event that must be accidental for the event to be an accidental occurrence.

*Stuart*, 311 Wis. 2d 492, ¶ 40, citing *Am. Girl*, 268 Wis. 2d 16, ¶ 37. Gundrum's conduct simply is not "an event or condition occurring by chance or arising from unknown or remote causes." *Sustache*, 311 Wis. 2d 548, ¶ 53; *cf. Becker v. State Farm Mut. Auto. Ins. Co.*, 220 Wis. 2d 321, 582 N.W.2d 499 (Ct. App. 1998) (principle of fortuity did not bar liability coverage for injuries resulting from reckless driving where separate acts of operating motor vehicle without a license, using vehicle without owner's permission and transporting stolen beer and liquor did not cause the injuries at issue).

Accordingly, West Bend's policy does not cover Gundrum for Schinner's claims.

## II. COVERAGE IS ALSO PRECLUDED BY THE UNINSURED PREMISES EXCLUSION IN WEST BEND'S POLICY.

Even if Schinner's injuries were caused by an "occurrence" (they were not), coverage under West Bend's policy is precluded by the exclusion for injuries "arising out of [an uninsured] premises." R.14:120.

As West Bend has explained, the term "arising out of" in liability insurance policies is interpreted broadly and understood to mean "originating from, growing out of, or flowing from." Initial Br., 31, citing *Garriguenc v. Love*, 67 Wis. 2d 130, 137, 226 N.W.2d 414 (1975) (also stating that "[a]ll that is necessary is some causal relationship between the injury and the event not covered").

That causal relationship exists here. The shop building at issue was furnished with couches, a table, chairs, a refrigerator and a CD player. R.14:169, 206, 206-09. Thus, not only was the shop building suitable for hosting social gatherings; it was anticipated such gatherings would take place. Indeed, Gundrum had previously hosted one or two parties in the same building, a fact of which even Gundrum's father was aware. R.14:233. The party and related events for which Schinner now seeks to hold Gundrum liable, thus, "flowed from" the shop building and its intended uses.

Schinner's efforts to evade the exclusion's application, asserting that the shop building was, in fact, an "insured location," are easily rejected. According to Schinner, because the Gundrums and others stored snowmobiles and other personal property there, the Court should determine that shop building was "used by [the Gundrums] in connection with" their residence, as required by the policy. Resp. Br., 47. Schinner's assertion relies on the maxim that exclusions in insurance policies should be narrowly construed against the insurer. Resp. Br., 48. That maxim is irrelevant here, where the Court is asked to interpret not an exclusion, but a coverage-granting definition.

Furthermore, Schinner's assertion also is contrary to common sense – and the clear expectations of the parties to the insurance contract. Indeed, if an insured could create coverage merely by storing personal property at any given

number of locations, without notice to the insurer, the policy's provisions which define an "insured location" to include premises, other than the insured's residence, that are shown in the declarations would be rendered meaningless. *Inter-Ins. Exch. of Chicago Motor Club v. Westchester Fire Ins. Co.*, 25 Wis. 2d 100, 106, 130 N.W.2d 185 (1964) ("A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent."). That absurd construction would permit insureds to create coverage for additional properties simply by storing personal belongings at those additional properties. That cannot be the intent of the policy.

## CONCLUSION

For the reasons set forth above, the WIA joins West Bend in asking the Court to reverse the Court of Appeals' decision and remand the cause to the circuit court with direction to enter judgment in favor of West Bend.

Dated this 4th day of September, 2012.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c)(2) for a brief produced with a proportional serif font. The length of this brief is 2,875 words.

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**CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated: September 4, 2012.

*s/ James A. Friedman*
James A. Friedman

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**STATE OF WISCONSIN**
**SUPREME COURT**

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MARSHALL SCHINNER
Plaintiff-Appellant,

v. Appeal No. 2011AP00564

MICHAEL GUNDRUM,
Defendant,

and

WEST BEND INSURANCE COMPANY,
Defendant-Respondent-Petitioner.

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APPEAL FROM A DECISION OF THE COURT OF APPEALS OF WISCONSIN, DISTRICT II, REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HON. JAMES G. POUROS, PRESIDING, CASE NO. 2009-CV-870

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# AMICUS BRIEF OF THE WISCONSIN ASSOCIATION FOR JUSTICE

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## INTRODUCTION

Marshall Schinner was a guest at a party hosted by West Bend's insured, Michael Gundrum. Another guest who happened to be underage, Cecil, was also at the party and became intoxicated, calling Schinner offensive and derogatory names. (R14: 219-221) Schinner approached his host, Gundrum, and asked Gundrum to intervene who then approached Cecil and told him to "back off." (R14: 219-221) Cecil initially modified his behavior, however when Schinner and his friends decided to leave the party, Cecil assaulted Schinner causing severe injuries. (R14: 224, R3:3-4)

Reviewing and applying this Court's prior precedent, the Court of Appeals correctly concluded that West Bend's homeowner's policy provided coverage to Gundrum. To hold otherwise would constitute a sea change, but not one for the better. In Wisconsin, insurance law that has long held that reasonable insureds would expect their liability coverage to "include negligent acts," like Gundrum's. This Court should affirm.

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT AN OCCURRENCE TRIGGERED COVERAGE UNDER WEST BEND'S HOMEOWNER'S POLICY

This case provides this Court with another opportunity to clarify the scope of liability coverage for claims against an insured "for damages because of 'bodily injury'…caused by an 'occurrence,'" (R:14:118) when the definition of an "occurrence" means an "accident," yet fails to define "accident." (R14:15) As such, this case involves the interpretation of an insurance contract, a question of law that this Court reviews de novo. Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 2004 WI 2 ¶23, 268 Wis.2d 16, 33, 673 N.W. 2d 65, 73. The West Bend policy at issue is to be "construed as [it] would be understood by a reasonable person in the position of the insured." Id. (citing Kremers-Urban Co. v. American Employers Ins. Co., 119 Wis.2d 722, 735, 351 N.W. 2d 156 (1984)). Moreover, this Court has been very clear that it does "not interpret insurance policies to provide coverage for risks that the insurer did not contemplate or underwrite and for which it has not received a premium." Id. The Court's starting point is to examine "the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." Id., ¶24.

Moreover, this Court "assumes the existence of all facts alleged in the complaint, and construes those allegations liberally in favor of coverage. Doyle v. Engelke, 219 Wis.2d 277, 290, 580 N.W. 2d 245, 250 (1998).

Where a policy fails to define "accident", this Court requires that the "words used be given their common, everyday meaning." Id., In Doyle, this Court stated:

> Turning then to the common definition, we discover that "accident" is defined as "[a]n unexpected, undesirable event" or "an unforeseen incident" which is characterized by a "lack of intention." The American Heritage Dictionary of the English Language 11 (3rd ed. 1992). Similarly, "negligence" is defined as "failure to exercise the degree of care considered reasonable under the circumstances.
>
> It is significant that both definitions center on an unintentional occurrence leading to undesirable results. As we have recognized in the past, comprehensive liability policies are "designed to protect an insured against liability for negligent acts resulting in damage to third-parties."… Accordingly we have little trouble concluding that a reasonable insured would expect the Policy provision defining "event" to include negligent acts.

Doyle, 219 Wis.2d at 290, ¶¶23-24. (Citations omitted).

Doyle reminds us that in this case in defining "an occurrence" meaning an "accident," the term "accident" must necessarily include "negligent acts" as well. Implicitly, the Court has held that negligent acts, unlike an insured's intentional acts, see Estate of Sustache v. American Family Mut. Ins. Co., 2008 WI 87, 311 Wis.2d 548, 751 N.W. 2d 845, result in "events",

"occurrences" or "accidents" giving rise to liability coverage "designed to protect an insured 'against liability'".

Consistent with this fundamental approach, the Court of Appeals construed the definition of an "accident" in determining that coverage existed under a CGL policy, holding:

> First, we look at the language of the policy to decide if there is initial coverage. The policy applies to property damage caused by an occurrence. Property damage, as defined by the policy, means physical injury to tangible property. Here, water entering leaky windows, wrecked drapery and wallpaper. This is physical injury to tangible property. An occurrence, as defined by the policy, is an accident. **An accident is an "event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result."** Webster's Third New International Dictionary 11 (1993). Here, the parties have stipulated that fifty percent of the damages were due to Keller's negligence. Furthermore, there is no question that an event occurred: the windows leaked. This is an accident. So we have property damage caused by an occurrence and the policy applies.

Kalchthaler v. Keller Const. Co., 224 Wis.2d 387, 398, 591 N.W. 2d 169, 173-174 (Wis. 1999)(emphasis added). Implicitly, the court recognized that negligent acts involving carelessness, unawareness, ignorance, or a combination of causes producing an unfortunate result trigger liability coverage.

Here, as in many negligence action – including those against drunk drivers – the facts involve an insured's volitional carelessness, recklessness and even acts involving knowing violations of the law. West Bend argues that because Gundrum hosted a party where an underage guest consumed alcohol and

became intoxicated, Gundrum's liability coverage is not triggered because there never was an accident. Gundrum's negligence should not be construed in this way. To adopt West Bend's formulation of an accident will open the door to insurance carriers to argue that any drunk driver's conduct, i.e. the volitional act of driving in violation of the law while knowing one is intoxicated, does not constitute an event, or occurrence, or an accident. It will leave the victims, other insurers, and any others making payments for injuries sustained, including those funded by tax payers, to carry the burden. And the burden is potentially substantial.

There is no question that under well-established Wisconsin common law, driving while under the influence of an intoxicant supports an award of punitive damages. Lievrouw v. Roth, 157 Wis.2d 332, 343, 459 N.W.2d 850 (1990). Wisconsin law is also clear that punitive damages may be awarded in automobile accident cases regardless of whether the driver was intoxicated. Franz v. Brennan, 146 Wis.2d 541, 431 N.W.2d 711 (Ct. App. 1988); aff'd, 150 Wis.2d 1, 440 N.W.2d 562 (1989). In these drunk driving cases, the fact that the insured knowingly violated the law, similar to West Bend's assertions regarding Gundrum,

does not remove the drunk driver from receiving the protection provided to him or her by his or her liability carrier.

According to the latest statistics from the Centers for Disease Control and National Highway Traffic Safety Administration,[1]

- Every day almost 30 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 48 minutes.
- The annual cost of alcohol-related crashes totals more than $51 billion.
- In 2009, 10,839 people were killed in alcohol-impaired driving crashes, accounting for nearly one-third (32%) of all traffic-related deaths in the United States.
- In 2009, over 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics.

Sadly, Wisconsin has the highest rate of drunken driving in the nation.[2] In our state, alcohol remains the single greatest driver contributing cause of fatal crashes. According to the Wisconsin Department of Transportation, there are over 9,000 alcohol-related crashes in Wisconsin annually.[3] This equates to an average of one person dying or being injured in an alcohol-related crash every 1.9 hours on Wisconsin roadways.[4]

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[1] Found at Centers for Disease Control and Prevention: National Center for Injury Prevention and Control, www.cdc.gov/ncipc/factsheets. This Court can take judicial notice of these statistics. Wis. Stat. §902.01.
[2] Wisconsin Department of Transportation: http://www.dot.wisconsin.gov/safety/motorist/drunkdriving.
[3] Id. at http://www.dot.wisconsin.gov/safety/motorist/drunkdriving/crash.htm.
[4] Id.

To adopt West Bend's argument and hold that Gundrum's conduct in hosting a party involving underage drinking is "volitional," and therefore such conduct is beyond the scope of coverage, is no different than holding that all drunk drivers who purchased liability coverage will not be covered in the event their volitional conduct results in injuries and deaths. The Court of Appeals should be affirmed.

## II. THE COURT OF APPEALS' FINDING OF COVERAGE IN THIS CASE IS CONSISTENT WITH EVERSON AND ITS PROGENY

West Bend argues that Everson v. Lorenz, 2005 WI 51, 280 Wis.2d 1, 695 N.W. 2d 298 applies in this case, see e.g. Reply Brief 6, and that Gundrums' conduct demonstrates "more 'volition' than that seen in Everson." WAJ submits that West Bend is wrong.

Relying on Doyle, this Court specifically distinguished Doyle, involving the factual allegations of negligent supervision, by noting that the operative factual allegations involving "Lorenz's misrepresentation," in that case precluded coverage. Id., ¶18. The Court held that such "misrepresentation[s] cannot be considered an 'accident.'" Id. What West Bend ignores is that this Court specifically noted that prior to Everson, it "specifically left the question open"…, to determine if strict responsibility and/or

negligent misrepresentation "are sufficiently different from other kinds of negligence to preclude their categorization as 'accidents' "in insurance policies" Id., ¶18. Because "[to] be liable, Lorenz must have asserted a false statement, and such an assertion requires a degree of volition inconsistent with the term accident," this Court concluded that "that act removes it from coverages as an 'occurrence' under the liability insurance policy." Id., ¶20. In Everson, it was the volitional act of asserting a false statement that distinguished the tort of misrepresentation from "other kinds of negligence so as to categorize them as 'accidents'" Id., ¶18. See also Stuart v. Weisflog, 2008 WI 86, 311 Wis.2d 492, 253 N.W. 2d 448 ("WSGI's false assertions to the Stuarts reflect a similar degree of volition, rendering the misrepresentations, along with the damage they caused, inapplicable for coverage as an accidental occurrence."); Doe I v. Archdiocese of Milwaukee, 2010 WI App 164, 330 Wis.2d 666, 794 N.W. 2d 468 (involving the Archdiocese's misrepresentations that children were safe with certain priests when the Archdiocese knew of the priests' past history of predatory sexual abuse).

A fair and careful reading of these decisions reveals that the "volitional" act that distinguished the torts of misrepresentation was the false representations. Gundrum made no such

representations here. Such "volitional" acts are nothing like the volitional carelessness or recklessness associated with negligence actions, even those giving rise to claims for punitive damages against drunk drivers, long covered by liability policies in Wisconsin. To adopt West Bend's reasoning regarding the use or definition of "volitional acts" to reverse the Court of Appeals here will open Pandora's box. Not only will insurers attempt to argue that drivers knowingly driving while intoxicated in violation of the law be precluded from coverage, so too will any negligent act involving any "volition," leaving coverage for only negligence claims based on omissions. Such a holding would implicitly reverse this Court's long standing rule that liability policies are "designed to protect an insured against liability for negligent acts resulting in damage to third-parties." The Court of Appeals finding of coverage in this case is wholly consistent with Everson and this Court's prior precedent.

## CONCLUSION

For the reasons set forth above and in Plaintiff-Appellant's Brief, WAJ respectfully requests that this Court affirm.

Dated at Brookfield, Wisconsin this 7th day of September, 2012.

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