[Cite as *Hicks v. Mennonite Mut. Ins. Co.*, 2011-Ohio-499.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

MATTHEW HICKS, et al.	:	
	:	Appellate Case No. 10-CA-17
Plaintiff-Appellants	:	
	:	Trial Court Case No. 09-CV-563
v.	:	
	:	
MENNONITE MUTUAL INSURANCE CO., et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendants-Appellees	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 4th day of February, 2011.

. . . . . .

JOHN D. SMITH, Atty. Reg. #0018138, and MARK D. WEBB, Atty. Reg. #0085089, 140 North Main Street, Suite B, Springboro, Ohio 45066
Attorneys for Plaintiffs-Appellants, Matthew & Melissa Hicks, et al.

BRIAN D. SULLIVAN, Atty. Reg. #0063536, Reminger Co., L.P.A., 101 Prospect Avenue, West, 1400 Midland Building, Cleveland, Ohio 44114
Attorney for Defendant-Appellee, Mennonite Mutual Insurance Co.

STEPHEN FREEZE, Atty. Reg. #0012173, and KEVIN CONNELL, Atty. Reg. #0063817, One Dayton Centre, 1 South Main Street, Suite 1800, Dayton, Ohio 45402-2017
Attorneys for Defendant-Appellee, Mennonite Mutual Insurance Co.

JOHN P. PETRO, Atty. Reg. #0059604, 338 South High Street, Second Floor, Columbus, Ohio 43215
Attorney for Defendant-Appellee, Fast Insurance Agency, Inc., et al.

. . . . . .

FAIN, J.

{¶ 1} Plaintiffs-appellants Matthew and Melissa Hicks appeal from a summary judgment rendered in favor of defendants-appellees Mennonite Mutual Insurance Company, Fast Insurance Agency (Fast), and Annette Bucher. The Hickses voluntarily dismissed their appeal against Fast and Bucher, so only arguments applicable to Mennonite will be considered.

{¶ 2} The Hickses contend that the trial court erred in rendering summary judgment in favor of Mennonite, because genuine issues of material fact exist regarding whether Matthew Hicks resided at the insured premises as of the date of loss. The Hickses further contend that the trial court erred in failing to render summary judgment in their favor.

{¶ 3} We conclude that the insurance policy is ambiguous. We further conclude that the trial court erred in rendering summary judgment, because there are genuine issues of material fact regarding whether Matthew Hicks resided at the insured premises at the time of the loss. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 4} The issue in this case is whether insurance coverage exists for a fire loss sustained by a residence owned by Matthew Hicks. The facts, construed most strongly in favor of Matthew and Melissa Hicks, against whom summary judgment was rendered, are as follows:

{¶ 5} The residence in question is located at 461 Riverside Drive in Piqua, Ohio, and has been in the Hicks family for more than 35 years. After Matthew's father, Franklin, died,

ownership of the property was transferred in July 1983, to Alice Hicks, who was Matthew's mother. In September 2000, Alice transferred her interest in the property to Matthew and his sister, Vicki Willis, in anticipation of Alice's death, after Alice was diagnosed with cancer. Alice continued to reside in the property without paying rent, until she died in October 2005. Alice treated the property as her own, and the parties agreed that Alice was free to do whatever she wanted with the property.

{¶ 6} In September 2003, Matthew and Melissa moved into the residence at 461 Riverside, in order to help take care of Alice. They were also in the process of constructing a new home. Matthew and Melissa continued to live there full-time until their home was completed in November 2004.

{¶ 7} At Alice's request, Vicki signed her interest in the residence over to Matthew in February 2004. Vicki was having marital problems at the time, and Vicki and Alice did not think it would be wise to keep ownership in Vicki's name. Vicki's spouse, Charles Willis, also signed the warranty deed giving ownership to Matthew, and knew why Vicki had signed the deed transferring her interest. Matthew, Vicki, and her mother all agreed that Matthew would hold Vicki's share of the property in trust. However, the parties did not sign any trust documents.

{¶ 8} When Matthew became an owner of a half-interest in the Riverside property, he did not speak to anyone about how the property was insured. After the ownership interest was transferred in 2000, Alice continued to pay for the house insurance until she passed away.

{¶ 9} Prior to September 22, 2004, the property was insured through Erie Insurance Company. Erie wanted Alice to put a new roof on the house, and she did not believe a new

roof was needed. Alice therefore contacted Fast Insurance Agency to obtain other homeowners' insurance. Alice was a realtor and had used Fast previously. Neither Matthew nor Vicki had any involvement in obtaining insurance from Fast. Matthew did drop off his mother's check to Fast for the first premium payment.

{¶ 10} Annette Bucher is the agent from Fast who handled the transaction for Alice Hicks. The application for insurance lists Matthew and Melissa Hicks as the insured parties, and contains a box that can be checked for either "primary" or "secondary" residence. "Primary" is checked, and the listed residence address is 461 Riverside Drive. There is no dispute that this information was correct when the policy was taken out – Matthew and Melissa were residing at the premises full-time when the application was made. Matthew also never saw the application for the policy, did not sign the application, and had no awareness of what the application stated regarding the status of the residence.

{¶ 11} The application lists Fifth Third Bank as the mortgagee, and contains the loan number for the mortgage. Matthew had obtained a loan from Fifth Third Bank in the amount of $50,000 in order to purchase the land upon which his home was being constructed.

{¶ 12} Fast obtained a policy of insurance for the Hickses from Mennonite, which issued Policy No. HO 66327, with the following coverages: A. Dwelling, $115,000; B. Other Structures, $11,500; C. Personal Property, $23,000; D. Loss of Use, $23,000; I. Personal Liability, $100,000; and M. Medical Coverages, $1,000. The initial policy period was from September 23, 2004, to September 23, 2005, and the policy was subsequently renewed from September 23, 2005 through September 23, 2006. The named insureds listed on the declarations page are Matthew and Melissa Hicks, and the described location is 461

Riverside Drive, Piqua, Ohio.

{¶ 13} Mennonite's insuring agreement provides that:

{¶ 14} "This policy, subject to all of its 'terms,' provides property and liability insurance and other described coverages during the policy period. In return, 'you' must pay the required premium. Each of the Principal Coverages described in the policy applies only if a 'limit' is shown on the 'declarations' for that coverage." Mennonite Policy No. HO 66327, AAIS Form 3, Ed 2.0, p. 1 of 29.

{¶ 15} The Definitions Section of the policy states that:

{¶ 16} "1. The words 'you' and 'your' mean the persons or persons named as the insured on the 'declarations.' This includes 'your' spouse if a resident of 'your' household.

{¶ 17} "2. The words 'we,' 'us,' and 'our' mean the company providing this insurance. "* * * *

{¶ 18} "7. 'Insured' means:

{¶ 19} "a. 'you';

{¶ 20} "b. 'your' relatives if residents of 'your' household;

{¶ 21} "c. persons under the age of 21 residing in 'your' household and in 'your' care or in the care of 'your' resident relatives; and

{¶ 22} "d. 'your' legal representative, if 'you' die while insured by this policy. This person is an 'insured' only for liability arising out of the 'insured premises.' An insured at the time of 'your' death remains an 'insured' while residing on the 'insured premises.' " Id. at p. 2.

{¶ 23} Paragraph 8 of the Definitions Section defines the Insured Premises as follows:

{¶ 24} "a. Described location: If 'you' own and reside in the 'residence' shown on the 'declarations' as the described location, the 'insured premises' means:

{¶ 25} "1. that 'residence'; and

{¶ 26} "2. related private structures and grounds at that location." Id. at p. 3.

{¶ 27} The policy further defines "Residence" as "a one- to four-family house, a townhouse, a row house, or a one- or two-family mobile home used mainly for family residential purposes." Id. at p. 4. The policy does not define the term "reside."

{¶ 28} Coverage "A" pertains to the "residence" and states, in pertinent part, that:

{¶ 29} " 'We' cover the 'residence' on the 'insured premises.' This includes additions and built-in components and fixtures, as well as building materials and supplies located on the 'insured premises' for use in the construction, alteration or repair of the 'residence.' " Id. at p. 4.

{¶ 30} Under "Perils Insured Against," the policy states that:

{¶ 31} "Coverage A - Residence and Coverage B - Related Private Structures – 'We' insure property covered under Coverages A and B for risks of direct physical loss, unless the loss is excluded under the Exclusions Applying to Coverages A and B under the Exclusions That Apply to Property Coverages." Id. at p. 10.

{¶ 32} In November 2004, Matthew and Melissa Hicks moved into their completed home. Affidavits of Matthew Hicks and Vicki Willis were filed in connection with summary judgment, and indicate that Matthew left many personal effects at the Riverside residence. Matthew knew that if his mother's condition worsened, he would have to move back. By November 2004, both Vicki and Matthew maintained a daily presence at the residence. They

continued this daily presence, assisting with their mother's medical needs and managing daily upkeep of the residence. Both Vicki and Matthew would often spend the night at the insured premises.

{¶ 33} Vicki moved into the residence in April 2005, to care for her mother, Alice, on a full-time basis. After Vicki moved in, Matthew continued to maintain a daily presence, often spending the night and regularly eating meals there. Alice continued to live in the residence until her death in October 2005. Even after Alice passed away, Matthew continued to maintain a presence at the house at least four days per week, often spending the night. Matthew continued to pay the utilities, insurance, and home loan, and did not charge his sister rent.

{¶ 34} In September 2005, prior to Alice's death, the policy was renewed for another year. In early February 2006, a severe fire occurred at the property. There is no question that the loss would have been a covered peril under the policy. However, Mennonite denied coverage for the property loss, based on its contention that Matthew did not reside in the premises. Mennonite did pay Matthew for loss to personal property located on the premises.

{¶ 35} The Hickses subsequently filed suit against Mennonite, alleging breach of contract and bad faith. They also filed suit against Fast and Bucher, alleging negligence and breach of fiduciary duty. In addition, the Hickses asked for a declaratory judgment as to the issue of insurance coverage under the policy. After all parties filed motions for summary judgment, the trial court granted the summary judgment motions filed by Mennonite, Fast, and Bucher, and overruled the Hickses' motion for summary judgment. The trial court concluded that residency at the time of the fire was determinative, not residency at the time of the

application. The court also held that the policy was unambiguous, and that Matthew and Melissa Hicks did not reside at the house at the time of the fire.

{¶ 36} The Hickses appealed from the judgment, but voluntarily dismissed their appeal of the summary judgment rendered in favor of Fast and Bucher. Therefore, the only matters at issue are those relating to the summary judgment rendered in Mennonite's favor.

II

{¶ 37} The Hickses' First Assignment of Error is as follows:

{¶ 38} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO MENNONITE WHEN THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER MATTHEW HICKS RESIDED AT RIVERSIDE AS OF THE DATE OF LOSS."

{¶ 39} Under this assignment of error, the Hickses contend that the trial court erred in rendering summary judgment in Mennonite's favor, because there is a genuine issue of material fact concerning whether Matthew Hicks resided at 461 Riverside at the time of the loss. The Hickses point out that while Ohio only allows people to have one "domicile," it does permit dual residency for purposes of insurance coverage. In response, Mennonite argues that the policy is unambiguous and that the facts do not indicate that Matthew Hicks resided in the home at the time of the fire. Mennonite does not address the presence of the factual issues outlined by the Hicks.

{¶ 40} The standard for rendering summary judgment is that:

{¶ 41} "A trial court may grant a moving party summary judgment pursuant to Civ. R.

56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760. "We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007-Ohio-2722, ¶ 16.

{¶ 42} In rendering summary judgment in favor of Mennonite, the trial court concluded that the insurance policy is unambiguous, and that the Hickses did not reside at 461 Riverside at the time of the fire. We disagree, and conclude that the policy is ambiguous. We also conclude that there are genuine issues of material fact regarding whether Matthew Hicks resided at the insured premises at the time of the fire.

{¶ 43} We noted above that the insurance policy does not define the word "reside." Contrary to the trial court's holding, numerous courts in Ohio have concluded that the word "reside" is ambiguous. For example, in *Prudential Prop. & Cas. Ins. Co. v. Koby* (1997), 124 Ohio App.3d 174, the Eleventh District Court of Appeals noted that:

{¶ 44} " ' "[T]he word 'residing' is an ambiguous, elastic, or relative term, and includes a very temporary, as well as a permanent abode[.]" ' * * * Another court has opined:

{¶ 45} " '[T]he words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. "Residence" has many shades of meaning, from mere temporary presence to the most permanent abode. It is difficult to give an exact or even satisfactory definition of the term "resident," as the term is flexible, elastic,

slippery and somewhat ambiguous. * * * Definitions of "residence" include "a place of abode for more than a temporary period of time" and "a permanent and established home" and the definitions range between these two extremes. This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection.' " Id. at 177 (Citations omitted).

{¶ 46} Like the policy in the case before us, the insurance policy in *Koby* did not define the words "reside" or "resident." Id. The Eleventh District Court of Appeals concluded that the word "resident" was ambiguous, and that it must be strictly construed against the insurer and liberally in favor of the insured. Id. at 178. Furthermore, the court stressed that "This is particularly true with exemptions and exclusions which are not expressed plainly and without ambiguity. * * * It is, therefore, presumed that 'that which is not clearly excluded from the contract is included.' " Id., quoting from *Home Indemn. Co. v. Plymouth* (1945), 146 Ohio St. 96, 32 O.O. 30, 64 N.E.2d 248, paragraph two of the syllabus.

{¶ 47} The factual situation in *Koby* involved a thirty-two year old man who had entered the military seven years before an accidental shooting incident that occurred at his parent's home in Ohio, giving rise to the request for insurance coverage. Id. at 175 and 179. There were several factors that led the Eleventh District Court of Appeals to conclude that the serviceman had established a separate residence in Texas. These included the fact that he kept his personal effects at an off-duty base in Texas, that he had a checking account in Texas, that he had registered his vehicle and as a driver in Texas, and that he said that he intended to make the military his permanent career. Id. at 179-80. The court noted that the serviceman

spent a "considerable amount of time away from his parents' residence, their home being the location to which he returns to enjoy visits." Id. at 180. In addition, the court stated that some factors indicated an intention to return to the parents' home following the end of the serviceman's term of enlistment. Citing *Farmers Ins. of Columbus, Inc. v. Taylor* (1987), 39 Ohio App.3d 68, the court commented that:

{¶ 48} "pursuant to a policy provision such as the one at issue here, 'there [was] no requirement * * * that, in order for a person to be a resident of the named insured's household, such residence must be the sole or exclusive residence of the person[.]' (Emphasis added.) Id., 39 Ohio App.3d at 70, 528 N.E.2d at 970. It has been held that '[r]esidence is a privilege, unlike domicile, and one can have several residences if he chooses.' " *Koby*, 124 Ohio App.3d at 180 (citations omitted).

{¶ 49} In *Koby*, the Eleventh District Court of Appeals observed that dual residency most often involves children of divorced parents. While there were certain distinctions between that situation and the case before it, the Eleventh District Court of Appeals concluded that:

{¶ 50} "Notwithstanding those distinctions, in our considered opinion the facts of the instant case, involving an emancipated adult who spends time in two households, also lend themselves to the application of the dual residency rule. Initially, we observe that adults occasionally maintain multiple residences, e.g., 'snow belt' residents who also maintain residences in the 'sun belt,' or entertainers who maintain homes in New York and Los Angeles. Thus, it is reasonable that an emancipated serviceman could maintain two or more residences, while having only one legal domicile." Id. at 181.

{¶ 51} The Eleventh District Court of Appeals further stressed that "It is also important to recognize that appellant could have more precisely defined the term 'resident,' but failed to do so." Id. at 182. Accordingly, the Eleventh District Court of Appeals held that the trial court did not abuse its discretion in rendering summary judgment against the insurer on the coverage issue. Id. at 182. Accord, *e.g., Auto-Owners Ins. Co. v. Merillat,* 167 Ohio App.3d 148, 2006-Ohio-2491, ¶ 38 (finding issues of fact regarding residency. The court noted that the term resident was not defined in the policy, and that "insurance policies ' "may be written so as to preclude dual coverage if that be the intent of the insurer." ' ".)

{¶ 52} We agree with these observations. It is reasonable that an individual in Matthew Hicks's position would maintain dual residences. Mennonite failed to define "reside" in the policy, and failed to require that the insured premises be the named insured's exclusive residence. In this regard, we note that Mennonite's own underwriting guidelines allow homeowner's policies to be endorsed to cover the insurable interests of others in the covered property, "*at no additional premium charge*." Deposition of John Todd Neville, p. 150. (Italics added.)[1] Therefore, Mennonite was not subjected to an unanticipated risk by virtue of Matthew Hick's alleged dual residency.

{¶ 53} In arguing that summary judgment was proper, Mennonite relies on our prior decision in *Whitaker v. Grange Mut. Cas. Co.*, Montgomery App. No. 20474, 2004-Ohio- 5270. In *Whitaker*, we affirmed a summary judgment rendered in favor of an insurer on the issue of coverage. We found no ambiguity in the policy, and concluded that

[1]Neville was the vice-president of claims for Mennonite at the time of the loss.

the policy required the insured to be residing in the premises at the time of the fire in order for the dwelling to be covered. Id. at ¶ 15. Based on the facts of that case, we held that the parties were living elsewhere and were using the dwelling as rental property, not as their residence. Id.

{¶ 54} The facts of *Whitaker* are distinguishable from the facts of the case before us. In *Whitaker*, a husband and wife had moved from the insured premises and each, in fact, maintained their own separate residences, apart from the insured premises. At the time of the fire, the wife lived in Lexington, Kentucky, and her husband lived in an apartment in Dayton, Ohio. Id. Moreover, more than a year before the fire, the insured premises had been rented to unrelated third-parties, who were paying rent to the husband and wife. The renters were also paying the utilities on the property. Id.

{¶ 55} Furthermore, the husband and wife in *Whitaker* had sent a change of address notice to their insurance agent before the fire, advising the agent that they were renting out the insured premises and no longer lived there. They were informed by the agent that their homeowner's policy would not cover losses due to fire if the insured premises were not their primary residence. The agent also told the husband and wife to cancel the policy and apply for a dwelling-fire policy, but they declined to do so. Id. at ¶ 3. These facts indicate unquestionably that the husband and wife did not live in the insured premises. *Whitaker,* therefore, is factually distinguishable from the case before us, in which Matthew Hicks avers that he frequently spent the night at the Riverside property even after his mother's death.

{¶ 56} In *Whitaker*, we also considered only the term "residence premises," which was defined as the family dwelling where the insured resided. Id. at ¶13, We interpreted this to

mean the place that an insured actually resides. Id. at ¶ 14. However, we did not discuss the issue of dual residence in *Whitaker*, nor did we review or consider other cases that had found policies ambiguous where the word "reside" is not defined. In addition, *Whitaker* did not consider the policy's failure to require that the insured premises be the named insured's exclusive residence. Because the insured premises in *Whitaker* were being rented to unrelated parties, it seems unlikely that the owners were staying overnight at the residence during the time leading up to the fire loss, and there is nothing in the opinion in *Whitaker* to suggest that they were. For these reasons, *Whitaker* is distinguishable and does not control the result in the case before us.

{¶ 57} Mennonite also cites *Heniser v. Frankenmuth Mut. Ins. Co.* (1995), 449 Mich. 155, 534 N.W.2d 502, as an example of a situation in which courts have upheld the requirement that an insured own and reside in a structure. We have reviewed *Heniser*, and find it distinguishable. The named insured in *Heniser* had sold a vacation property by land contract prior to the fire. The Supreme Court of Michigan upheld the denial of coverage, noting, among other things, that law had created ambiguity in the term "resides." The court commented that "In some contexts, the legal term means something more than actual physical presence; it includes the intent to live at that location at sometime in the future, a meaning similar to the legal concept of domicile. * * * In other contexts, the term requires actual physical presence." 534 N.W.2d at 505-06. The court concluded, however, that under any definition of residence, the named insured "did not and could not have resided in the property," because he had sold the property before the loss. The insured also admitted that he did not live there, and had no intention of living there at any point in the future. Id. at 506.

The court stated that it "might be faced with a different situation if the insured has not affirmatively engaged in behavior that indicates an intent to no longer reside at the insured premises * * *." Id at 504, n. 5. In addition, the court concluded that the insured must have understood that his policy would not cover his loss after sale, because he had inserted a provision in the land contract requiring the purchaser to obtain insurance protecting the insured, as seller, against loss during the continuance of the land contract. Id. at 505.

{¶ 58} These facts differ from those in the case before us, and are similar to the facts in *Whitaker*, supra. In the case before us, genuine issues of material fact exist regarding whether Matthew Hicks resided in the insured premises at the time of the fire. Accordingly, the trial court erred in rendering summary judgment in Mennonite's favor.

{¶ 59} The Hickses' First Assignment of Error is sustained.

III

{¶ 60} The Hickses' Second Assignment of Error is as follows:

{¶ 61} "THE TRIAL COURT ERRED IN REFUSING TO GRANT SUMMARY JUDGMENT TO THE PLAINTIFF."

{¶ 62} Under this assignment of error, the Hickses contend that the trial court should have granted their summary judgment motion. They contend first that the policy language does not require the named insured to reside on the premises. Next, the Hickses contend that even if residency is required, it should be construed as requiring residency at the time of application, not at the time of loss. And finally, the Hickses contend that R.C. 3929.25 requires payment of the policy proceeds when total loss occurs to a structure covered by an

insurance policy when the policy was issued.

{¶ 63} Mennonite has not responded to these arguments in its brief, but has focused on the unambiguous nature of the policy. We have already rejected that theory.

{¶ 64} In contending that the policy does not require the named insured to reside in the premises, the Hickses concentrate on the definition of "Insured Premises" in paragraph 8, which states if the named insured owns and resides in the residence shown on the declarations as the described location, the insured premises includes that residence, as well as related private structures and grounds at that location. The Hickses argue that this provision indicates that additional coverage (to related private structures and the grounds) applies when the insured owns and resides in the dwelling. Thus, where the owner does not own and reside in the dwelling, the dwelling itself would be covered, but not the related private structures and grounds.

{¶ 65} We disagree with this interpretation. The Mennonite policy could have been drafted more clearly. Nonetheless, the most reasonable interpretation is that the definition contemplates situations where residential property may have a detached garage or other outbuildings; it does not add further coverage for these items only where the named insured both owns and resides in the residence shown on the declarations page.

{¶ 66} As support for their contention that the named insured need only reside in the premises at the time coverage is obtained, the Hickses rely on *Reid v. Hardware Mut. Ins. Co. of Carolinas* (1969), 252 S.C. 339, 166 S.E.2d 317, which held that designating a residence as "owner-occupied" is an affirmative warranty, rather than a continuing warranty, and does not preclude the named insured from recovering under the policy after the premises is sold to

another party. In *Reid*, the named insured purchased insurance, and subsequently sold the property to another party, who renovated and rented it to a third party. The named insured remained obligated on a mortgage secured by the property. In considering whether the named insured could collect under the policy, the Supreme Court of South Carolina first concluded that the named insured had an insurable interest because she remained liable on the mortgage secured by the property. 166 S.E.2d at 320. The court therefore affirmed the trial court's decision to award the named insured the amount due under the mortgage. In addition, the court considered whether the representation that the premises was "owner-occupied" was a continuing warranty that the house would be occupied by the owner. In this regard, the court stated that:

{¶ 67} "A warranty, in the law of insurance, is a statement, description, or undertaking on the part of the insured, appearing in the policy of insurance or in another instrument properly incorporated in the policy, relating contractually to the risk insured against. Generically, warranties are either affirmative or promissory. An affirmative warranty is one which asserts the existence of a fact at the time the policy is entered into, and appears on the face of said policy, or is attached thereto and made a part thereof. A promissory warranty may be defined to be an absolute undertaking by the insured, contained in a policy or in a paper properly incorporated by reference, that certain facts or conditions pertaining to the risk shall continue, or that certain things with reference thereto shall be done or omitted. * * * While it is generally recognized that a warranty may be ' "promissory" ' or ' "continuing," ' the tendency is to construe a statement in the past or present tense as constituting an affirmative rather than a continuing warranty. Thus, a description of a house in a policy of

insurance, as ‘ “occupied by” ’ the insured, is a description merely and is not an agreement that the insured should continue in the occupation of it. * * * A statement in an insurance policy that the property is occupied by the insured as a dwelling for himself and family, is not a warranty that it shall continue to be so occupied but is only a warranty of the situation at the time the insurance is effected.” Id. at 321 (citations omitted).

{¶ 68} The Supreme Court of South Carolina went on to note that:

{¶ 69} “There is no provision in the policy contract that the dwelling would be ‘ “owner occupied” ’ during the term of the insurance contract nor any requirement that if the premises are otherwise occupied than by the owner, notice of such change of occupancy or use would be given to the insurer.

{¶ 70} “The insurance contract here involved contained a description of the dwelling insured as being ‘ “owner occupied.” ’ This was an affirmative warranty, not a continuing warranty, by the respondent that the dwelling was so occupied by him at the time the contract of insurance was made.” Id.

{¶ 71} Accordingly, the Supreme Court of South Carolina affirmed the decision of the trial court, which had awarded the named insured damages in the amount of the mortgage still owed on the property.

{¶ 72} We find the discussion in *Reid* inapplicable, because there is no indication that the definition of “insured premises” in the Mennonite policy is a “warranty.” Normally, non-fulfillment of express warranties vitiates the insurance contract. *Wisden v. American Ins. Co.* (1964), 9 Ohio App.2d 48, 49. In *Wisden*, the insured had specifically warranted, in order for a jeweler’s block insurance policy to be issued, that 60% by value of the property

would be kept in locked safes, and 40% by value would be kept out of safes. Id. The insured closed the shop but left the safe unlocked, and a theft occurred. Id. We concluded that the insured's promises were "expressly and without qualification made and designated warranties," id. at 50, and that the insured was barred from recovery because he had breached the warranty by leaving the safe unlocked. Id. at 51. See, also, *Allstate Ins. Co. v. Boggs* (1971), 27 Ohio St.2d 216, 219 ("A warranty is a statement, description or undertaking by the insured of a material fact either appearing on the face of the policy or in another instrument specifically incorporated in the policy.")

{¶ 73} Warranties would generally, therefore, be used by insurers to avoid obligations under a policy of insurance; they would not typically be used by insured parties to require that judgment be rendered in their favor as a matter of law. Furthermore, in *Whitaker*, we construed the insurance policy to require that the insured party be residing in the premises at the time of the fire. 2004-Ohio-5270, ¶ 15. Although *Whitaker* did not consider the issue of warranties as set out in *Reid*, evaluating residency at the time of loss is an appropriate approach. We have found nothing in Ohio law to suggest otherwise. Accordingly, while genuine issues of material fact exist in connection with the residency issue, the Hickses are not entitled to summary judgment simply because they resided in the premises at the time the application for insurance was made.

{¶ 74} We do agree that Matthew Hicks had an insurable interest in the property. We also note that there is no suggestion that Matthew Hicks attempted to mislead or deceive Mennonite.

{¶ 75} The Hickses' final argument is that R.C. 3929.25 requires Mennonite to pay the

claim unless there is either a change increasing the risk without the insurer's consent, or intentional fraud. The Hickses contend that once the insurer inspects and fixes the value of a structure, and issues a policy, the structure should remain covered unless the policy is non-renewed or canceled, or unless the insured defrauded the insurer or increased the risk.

{¶ 76} R.C. 3929.25 states as follows:

{¶ 77} "A person, company, or association insuring any building or structure against loss or damage by fire or lightning shall have such building or structure examined by his or its agent, and a full description thereof made, and its insurable value fixed, by such agent. In the absence of any change increasing the risk without the consent of the insurers, and in the absence of intentional fraud on the part of the insured, in the case of total loss the whole amount mentioned in the policy or renewal, upon which the insurer received a premium, shall be paid. However, if the policy of insurance requires actual repair or replacement of the building or structure to be completed in order for the policyholder to be paid the cost of such repair or replacement, without deduction for depreciation or obsolescence, up to the limits of the policy, then the amount to be paid shall be as prescribed by the policy."

{¶ 78} R.C. 3929.25 is referred to as "the 'valued policy statute.' " *Horak v. Nationwide Ins. Co.*, Summit App. No. CA 23327, 2007-Ohio-3744, ¶ 66. The statute "prevents insurers from over-insuring property, in an attempt to collect increased premiums, and then paying less than the policy limit if a building burns down and results in a total loss." Id., citing *McGlone v. Midwestern Group* (1991), 61 Ohio St.3d 113, 115. Courts construing the statute and its predecessor have concluded that the provisions in the statute relate only to the amount recoverable under the policy, and do not waive policy conditions. See *Altman v.*

Central Mfrs. Mut. Ins. Co. of Van Wert (App. 1949), 56 Ohio Law Abs. 509, 93 N.E.2d 28 (discussing substantially similar predecessor to R.C. 3929.25). Accordingly, R.C. 3929.25 does not establish an automatic right to recovery, nor does it preclude policy provisions that exclude coverage in certain situations.

{¶ 79} The Hickses' Second Assignment of Error is overruled.

IV

{¶ 80} The Hickses' First Assignment of Error having been sustained, and their Second Assignment of Error having been overruled, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

. . . . . .

DONOVAN and FROELICH, JJ., concur.

Copies mailed to:

John D. Smith
Mark D. Webb
Brian D. Sullivan
Stephen V. Freeze
Kevin Connell
John P. Petro
Hon. Jeffrey M. Welbaum / Hon. Christopher Gee