EVELEIGH, J., with whom, VERTEFEUILLE, J., joins, dissenting. I respectfully dissent. I disagree with the majority's conclusion that there is no possibility that the injuries sustained by the underlying plaintiff, Sarah Middeleer, "arose out of" her use of the premises leased to Church Hill Tavern, LLC (tavern) and, thus, the defendant, Travelers Property Casualty Company of America,[1] did not have a duty to defend. Specifically, I disagree with the majority's restriction of its analysis to the allegations contained in the complaint and its consequent rejection of the stipulated facts that suggest that the claim falls within the scope of coverage. Instead, I would adhere to our well settled standard of review that requires us to consider, not only the allegations contained in the four corners of the complaint, but also any facts known by the insurer that suggest that the claim falls within the scope of coverage when determining whether the insurer has a duty to defend. See *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, 274 Conn. 457, 467, 876 A.2d 1139 (2005). After analyzing the stipulated facts, it is clear, in my view, that the defendant was aware that Middeleer suffered her injuries shortly after leaving the tavern. Thus, I would conclude that the possibility exists that Middeleer's injuries arose out of her use of the leased premises and, thus, the defendant had a duty to defend. Accordingly, I respectfully dissent.

The majority accurately states the background facts and procedural history, and I will not repeat them extensively here. Because I disagree with the majority on what facts may be considered, however, I will provide additional facts as necessary that, in my opinion, may properly be considered in determining whether there is a duty to defend in the present case.

I agree with the standard of review stated by the majority with respect to rulings on summary judgment, as well as the legal principles that inform our analysis of the present issue. I emphasize, however, that I analyze this matter through the lens of our law which counsels that there exists a significant distinction between a duty of an insurer to defend and a duty to indemnify. "As we repeatedly have stated, the duty to defend is considerably broader than the duty to indemnify. . . . [A]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint. . . . The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within

the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. . . . [I]f an allegation of the complaint falls even *possibly* within the coverage, then the insurance company must defend the insured. . . . In contrast to the duty to defend, the duty to indemnify is narrower: while the duty to defend depends only on the allegations made against the insured, the duty to indemnify depends upon the facts established at trial and the theory under which judgment is actually entered in the case." (Citations omitted; emphasis in original; internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 687–88, 846 A.2d 849 (2004). "Thus, the duty to defend is triggered whenever a complaint alleges facts that *potentially* could fall within the scope of coverage . . . ." (Emphasis in original.) Id., 688. In addition to the facts as alleged in the complaint, a duty to defend will arise when the insurer has "actual knowledge of facts [outside of the complaint] establishing a reasonable possibility of coverage." (Internal quotation marks omitted.) *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, supra, 274 Conn. 467. We will not, however, predicate the duty to defend on "a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, 256 Conn. 343, 374, 773 A.2d 906 (2001).

I further agree with the majority that whether the defendant had a duty to defend the named plaintiff, Misiti, LLC (Misiti),[2] in the underlying action is determined by the language of the additional insured endorsement. The endorsement to the insurance policy provided coverage to Misiti "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the tavern] . . . ."[3] The central issue in this matter is, therefore, this court's interpretation of the phrase "arising out of" and whether there were sufficient facts, contained within the complaint or known to the defendant, to trigger its duty to defend. This court has stated that " '[i]t is generally understood that for liability for an accident or an injury to be said to "arise out of" [an occurrence or offense for the purpose of determining coverage under the appropriate provisions of a liability insurance policy], it is sufficient to show only that the accident or injury "was connected with," "had its origins in," "grew out of," "flowed from," or "was incident to" [that occurrence or offense], in order to meet the requirement that there be a causal relationship between the accident or injury and [that occurrence or offense].' " *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 256 Conn. 374, quoting *Hogle* v. *Hogle*, 167 Conn. 572, 577, 356 A.2d 172 (1975). Accordingly, the term "arising out of" is given a broad interpretation by Connecticut courts.

In determining whether there was a possibility that

the Middeleer's injuries arose out of the use of the leased premises, the majority confines its analysis to the allegations contained in the complaint and, thus, declines to consider any of the stipulated facts. The majority states that the stipulated facts "tend to undermine, rather than support, [the defendant's] duty to provide a defense in the underlying action. For this reason [the plaintiffs] object to the consideration of such facts as inconsistent with our precedent." Accordingly, the majority concludes that, because there was no specific reference to the tavern in the complaint, the facts alleged in the complaint do not justify an inference that the injury arose out of the use of the leased premises. This, in my view, is not the plaintiffs' claim and is a departure from our well established precedent. Contrary to the majority's assertion, the plaintiffs do not object to this court's consideration of facts outside of the complaint. Rather, the plaintiffs claim that this court "is limited to looking at the allegations of the complaint, *supplemented by additional facts known to the insurer that support the existence of a covered claim*, *but not permitting reference to facts outside the pleading*[*s*] *that might defeat coverage*." (Emphasis added.) The plaintiffs' view is in accord with our precedent. See *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, supra, 274 Conn. 466–67. Accordingly, I am of the opinion that the majority should not have limited its analysis strictly to the facts alleged in the complaint. Instead, I would consider any facts known to the defendant that suggest that the claim falls within the scope of coverage in determining whether the defendant had a duty to defend.[4]

The interpretation of the term "arising out of" in the context of a claim against an additional insured for injuries that occurred outside of the leased premises is an issue of first impression in this court. I would adopt the view, taken by a number of courts throughout the country, which holds that an additional insured is entitled to coverage when there is a minimal causal relationship between the liability of the additional insured and the business of the named insured without regard as to who was allegedly at fault or whether the incident occurred within the leased premises. For example, in *Harrah's Atlantic City*, *Inc.* v. *Harleysville Ins. Co.*, 288 N.J. Super. 152, 671 A.2d 1122 (App. Div. 1996), the plaintiff was an additional insured under a general liability policy issued by the defendant insurer to the plaintiff's tenant, a fashion boutique (boutique). Id., 154. In *Harrah's*, two customers had parked their car in a parking garage owned by the plaintiff. Id. The parking garage was not part of the leased premises and was separated from the hotel and casino by a public street. Id., 154–55. After shopping in the boutique, which was located in the plaintiff's hotel, the customers walked out onto the sidewalk in front of the plaintiff's casino and began to cross the public road to return to

the garage. Id., 155. Upon stepping onto the public street, the customers were struck by an automobile operated by one of the plaintiff's parking valets. Id. They subsequently filed an action against the plaintiff and the plaintiff, in turn, sought coverage from the boutique's insurer. Id.

The boutique's lease required it to obtain comprehensive general liability insurance and to name the plaintiff on the policy as an additional insured. Id., 156. Like the tavern's policy in the present case, the boutique's policy provided coverage to the plaintiff "only with respect to liability arising out of . . . use of [the leased premises]." Id., 156. The court held that the plaintiff was entitled to indemnification under the boutique's general liability policy, because the injury "arose out of" the customers' use of the leased premises, despite the fact that the injury did not occur on the leased premises. Id., 159–60. Thus, the court stated that the relevant inquiry was "whether the occurrence which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the leased premises and, thus, a risk against which they may reasonably expect those insured under the policy would be protected." (Internal quotation marks omitted.) Id., 158. The court therefore concluded that "where the landlord can trace the risk creating its liability directly to the tenant's business presence, it is not unreasonable for the landlord to expect coverage, inasmuch as it can be truly said that the accident originated from or grew out of the use of the leased premises." Id., 158–59. Accordingly, the court concluded that there did not need to "be any degree of physical proximity between the leased premises and the scene of the accident" for a " 'substantial nexus' " to exist between the accident and the leased premises. Id., 158; see also *Franklin Mutual Ins. Co.* v. *Security Indemnity Ins. Co.*, 275 N.J. Super. 335, 341, 646 A.2d 443 (App. Div.) (additional insured entitled to coverage for injury that occurred outside of leased premises on exterior steps of restaurant), cert. denied, 139 N.J. 185, 652 A.2d 173 (1994).

The case of *National Fire Ins. Co.* v. *Federal Ins. Co.*, 843 F. Sup. 2d 1011 (N.D. Cal. 2012), is also instructive. In that case, the decedent, a three year old girl, was attending a party that was held in two of the ballrooms located in the hotel. Id., 1012. The party was being catered by an on-site restaurant at the hotel, which was entitled to use the ballrooms under the terms of its lease with the hotel. Id. The ballrooms were not, however, part of the leased premises. Id., 1013. At some point during the party, the decedent wandered away from the ballrooms and took an elevator to a second floor balcony. Id. The balcony was neither part of the leased premises nor part of the ballrooms. Id. The decedent climbed onto the railing and then fell, suffering

fatal injuries. Id. The hotel was an additional insured under the restaurant's policy, but only "with respect to liability arising out of the ownership, maintenance or use of [the leased premises]." (Internal quotation marks omitted.) Id., 1014–15. The court concluded that the hotel was entitled to coverage under the restaurant's policy as an additional insured because, although the accident did not occur on the leased premises, it was "reasonably foreseeable that guests at restaurant events would be on portions of the premises outside the confines of the restaurant itself and the ballrooms it was entitled to use." Id., 1016. Accordingly, the court concluded that the accident "[arose] out of" the use of the leased premises. Id.; see also *Hartford Casualty Ins. Co.* v. *Travelers Indemnity Co.*, 110 Cal. App. 4th 710, 720, 2 Cal. Rptr. 3d 18 (2003) (landlord entitled to coverage as additional insured after employee was killed after falling off of deck that was not part of leased premises).

Moreover, it is well settled that, in Connecticut, a possessor of land must exercise reasonable care to keep its premises reasonably safe for the use of business invitees. " 'A business invitation includes an invitation to use such part of the premises as the visitor reasonably believes are held open to him as a means of access to or egress from the place where his business is to be transacted.' " *Knapp* v. *Connecticut Theatrical Corp.*, 122 Conn. 413, 416, 190 A. 291 (1937), quoting 2 Restatement, Torts § 343, comment (b), p. 942 (1934). Thus, a landowner can be liable in tort for an injury to a business invitee that occurs off of the leased premises if the invitee had an implied invitation to use that portion of the premises, or if the invitee reasonably believed that the area was open to him. See, e.g., *Frankovitch* v. *Burton*, 185 Conn. 14, 20, 440 A.2d 254 (1981) ("[t]he measure of duty owed the plaintiff by the defendant with respect to the condition of the premises was the exercise of reasonable care to have and keep them reasonably safe for the reasonably to be anticipated uses which he would make of them" [internal quotation marks omitted]); *Ford* v. *Hotel & Restaurant Employees & Bartenders Union*, 155 Conn. 24, 35, 229 A.2d 346 (1967) (possessor had duty to take reasonable steps to prevent invitees from encountering defect that possessor knew existed on neighboring property); *Dickau* v. *Rafala*, 141 Conn. 121, 124, 104 A.2d 214 (1954) ("[w]here it is customary for customers or patrons to be free to go to certain parts of the premises, the customer or patron is a business visitor thereon unless the possessor exercises reasonable care to apprise him that the area of invitation is more narrowly restricted"); *Knapp* v. *Connecticut Theatrical Corp.*, supra, 416–17 ("[i]f the owner of premises to which the public is impliedly invited [had] negligently misled a business visitor into the reasonable belief that a passageway or door is an appropriate means of reaching a portion of the premises to which he is invited, he is

entitled to the protection of a business visitor in using such passageway or door").

When taking into account facts outside of the complaint that were known by the defendant and that suggest that the claim falls within the scope of coverage, in addition to the allegations in the underlying complaint, I would conclude that there is a sufficient causal connection between Middeleer's injuries and the use of the tavern to justify the grant of summary judgment in favor of the plaintiffs. In the present case, the defendant stipulated that, prior to sustaining her injuries, Middeleer "ate food and drank wine at the tavern" with her supervisor. Furthermore, the defendant stipulated that, after Middeleer and her supervisor left the tavern, they walked down a path toward the parking area. The defendant was further aware that, as the two approached the parking area, they did not take the branch of the path that led directly to where the car was parked, but instead they continued to walk along the river in a park like area located next to the tavern in order to look at the river and a waterfall. Middeleer was injured after the wood fence that was located on the top of the riverbank collapsed, causing her to fall. Thus, after taking into account the stipulated facts, there clearly is an allegation tying the injury to the particular premises leased to the tavern.

Moreover, the allegations in the complaint, taken together with the stipulated facts, indicate that there is a possibility that Middeleer maintained the status of a business invitee when she suffered her injuries. The complaint alleges that Middeleer was a business invitee upon Misiti's premises, which it defines as all of 1, 3 and 5 Glen Road, Sandy Hook. The Red Brick Tavern was located at 1 Glen Road, Sandy Hook. Misiti was listed as an additional insured on the defendant's insurance policy issued to "Church Hill Tavern LLC d/b/a Red Brick Tavern." The lease between Misiti and the tavern provided that the tavern leased the first floor of 1 Glen Road, together with the right to use a parking area in common with others. The location of Middeleer's fall was between the parking area and the tavern in a location near the water. Additionally, although the area where the injury occurred was not part of the premises leased to the tavern, it was a part of the real property owned by Misiti, which, as the underlying complaint alleges, had the general purpose of attracting people to conduct business with Misiti's commercial tenants. The complaint further alleges that the area along the river is an area where customers of the tavern are expected to be visiting.

Thus, in my view, the facts as alleged in the complaint, together with the facts known by the defendant that tend to support coverage, show that there is at least a possibility that it was reasonably foreseeable that Middeleer would have stopped to look at the river and

waterfall on her way back to the parking lot after leaving the tavern. See *Dickau* v. *Rafala*, supra, 141 Conn. 124. The facts therefore indicate that there was a possibility that Middeleer had an implied invitation to access the area along the river as a means of egress from the tavern and return to the parking area, and that Middeleer reasonably believed that the area overlooking the river was open to her as a patron of the tavern. See *Knapp* v. *Connecticut Theatrical Corp.*, supra, 122 Conn. 416. Hence, it is possible that, at the time of her injury, Middeleer maintained the status of a business invitee, and thus Misiti, as the additional insured on the tavern's policy, owed her the duty to take reasonable precautions to make the property reasonably safe. Accordingly, I would conclude that the facts give rise to a duty to defend on the part of the defendant because the possibility exists that Middeleer's injuries originated from or grew out of her use of the leased premises. See *Harrah's Atlantic City, Inc.* v. *Harleysville Ins. Co.*, supra, 288 N.J. Super. 158–59.

I further note that if an insurer wished to exclude from its coverage liability based on the type of injury that occurred in the present case—namely, one that occurs off of the leased premises—it would be free to do so. An insurer could simply omit the "arising out of" language from the policy and specifically limit coverage for injuries that occur on the leased premises. In the present case, however, the defendant chose to provide coverage for injuries "arising out of" the use of the leased premises. Thus, in my view, the defendant breached its obligation to defend Misiti from a claim that was connected with or incidental to the use of the leased premises identified in the additional insured endorsement of the defendant's policy. I would, therefore, reverse the judgment of the Appellate Court and remand the case to that court with direction to affirm the trial court's award of summary judgment in favor of the plaintiffs.

Accordingly, I respectfully dissent.

[1] For the sake of simplicity, I refer to Travelers Property Casualty Company of America as the defendant. See footnote 1 of the majority opinion.

[2] Misiti's insurer, Netherlands Insurance Company, is also a plaintiff in the present action. Hereinafter, I refer to Misiti and Netherlands Insurance Company collectively as the plaintiffs.

[3] As the majority correctly points out, the parties have agreed that it is only the use of the leased premises that is at issue in this appeal. We have held that the term "use" is a "general catch-all of the insuring clause, designed and construed to include all proper uses . . . not falling within one of the previous terms of definition." (Internal quotation marks omitted.) *Hogle* v. *Hogle*, 167 Conn. 572, 578 n.1, 356 A.2d 172 (1975).

[4] I also disagree with the majority's decision not to consider the stipulated facts to the extent that decision rests on the majority's determination that, as a whole, the stipulated facts "tend to undermine, rather than support, [the defendant's] duty to provide a defense in the underlying action." The majority provides no explanation why, in its view, the stipulated facts tend to cut against a duty to defend in the underlying action. Furthermore, even assuming, arguendo, that the stipulated facts as a whole undermine the plaintiffs' claim, that does not prevent this court from considering those stipulated facts that suggest that the claim falls within the scope of coverage. See *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, supra,

274 Conn. 466–67. I would, therefore, consider all of the facts known to the defendant that tend to support coverage, regardless of whether there exist other facts that indicate that the claim may be meritless. See id., 464.