

ORIGINAL

CASE NO. 14 – 1161

In the SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE NO. 13AP-290

WORLD HARVEST CHURCH,
Plaintiff-Appellee-Cross Appellant,

v.

GRANGE MUTUAL CASUALTY COMPANY,
Defendant-Appellant-Cross Appellee,

**APPELLEE / CROSS-APPELLANT WORLD HARVEST CHURCH'S
COMBINED MEMORANDUM OPPOSING GRANGE'S APPEAL AND IN SUPPORT
OF WORLD HARVEST CHURCH'S CROSS APPEAL**

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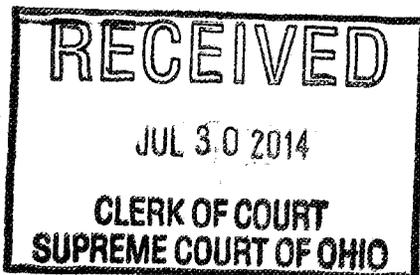
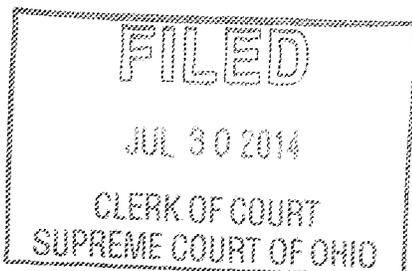


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**APPELLEE WORLD HARVEST CHURCH'S MEMORANDUM
OPPOSING JURISDICTION**

1. APPELLEE'S POSITION ON WHETHER GRANGE'S APPEAL INVOLVES A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST.

Grange's position does not turn on an interpretation of the Abuse and Molestation Exclusion, although Grange argues as if it did. In fact, the court of appeals sided with Grange and held—contrary to well-established rules of insurance policy construction—that the term “abuse” should be given a broad meaning instead of a narrow meaning as urged by World Harvest Church (WHC). This resulted in the court of appeals equating “abuse” with “battery” (Grange App. 25, ¶46-48), and wiping out the entire compensatory damage award with one exception—the direct award of \$82,365 against Vaughan for which WHC was vicariously liable.

WHC agrees that this case presents an issue of public or great general interest as discussed in WHC's cross-appeal. The critical issue, however, is the scope of the Abuse and Molestation Exclusion, which is an Insurance Services Office (ISO) form that has been used broadly across the country for over 20 years. In that time, only one court has ever interpreted the exclusion as did the Tenth District Court of Appeals and held that “abuse” means “to treat in a harmful or injurious way.” Even that court subsequently expressed misgivings about its own decision. See Grange App. 24-25, ¶45-46 discussing *Cincinnati Ins. Co. v. Hall*, Mich. Ct. App. No. 297600, 2011 WL 2342704 (June 14, 2011), which was cited by the court of appeals, and the later decision in this same case, *Cincinnati Ins. Co. v. Hall*, Mich. Ct. App. No. 308002, 2013 WL 3107640 (June 20, 2013), which was not discussed by the court of appeals. More on this case below.

All other cases that counsel could find dealt with “abuse” in the context of sexual abuse.

The position espoused by the court of appeals is a radical expansion of the scope of the Abuse and Molestation Exclusion, and should be reversed by this Court as discussed in WHC's cross-appeal. The danger of such an expansive definition was pointed out by the dissenting judge in the second *Hall* case. *Id* (Fitzgerald, J. dissenting):

Both bodily injury and property damage require an injury to person or property, and because this Court has defined "abuse" to include "treatment in a harmful or injurious way [to person or property]," any act that results in injury would arguably be encompassed within the definition of "abuse" and would exclude every potential claim under any reasonable set of circumstances.

As discussed further in WHC's Memorandum in Support of Jurisdiction, this is why the decision of the court of appeals is so significant. But this is an issue in WHC's cross-appeal; it is not an issue in Grange's appeal. Although Grange expresses its appeal in terms of the importance of properly interpreting the Abuse and Molestation Exclusion, its appeal has nothing to do with the construction of this exclusion because the court of appeals accepted Grange's argument on construction. Grange's appeal turns on overruling—or at least severely restricting—*Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426.

On this issue, Grange's appeal does not present an issue of public or great general interest. All that the court of appeals did was apply the clear language of *White* and hold that the Abuse and Molestation Exclusion must be construed from the standpoint of the insured seeking coverage. WHC was liable for Vaughan's direct liability by virtue of respondeat superior; not because of any act done by its ownership or managerial personnel. Therefore, the exclusion did not apply. This had nothing to do with the construction of the exclusion, and everything to do with the application of the law clearly set forth in *White*.

Grange's second assignment of error is only relevant if its first assignment is accepted, which it should not be. This assignment, standing alone, presents no genuine issue for this Court's consideration.

Grange's third assignment of error asks this Court to adopt a position that is (1) contrary to the clear language of the Supplementary Payments provision; (2) contrary to established Ohio law; (3) contrary to near-uniform decisions across the country over the past 40 years, and (4) contrary to the construction advocated by the insurance industry itself when the provision was amended in the 1950's to clarify that the position currently being advocated by Grange was incorrect. This assignment of error does not present a substantial issue.

2. STATEMENT OF FACTS

2.1 The Facts as Established in the Underlying Trial.

The facts of this case are adequately set forth in the opinions issued by Judge Bessey and the court of appeals. WHC adds the following comments to Grange's Statement of the Case and Facts.

2.2 Grange Did Not Intervene in the Jury Trial.

First, Grange considered intervening to ask special interrogatories for the purpose of determining if the jury's verdict was for counts that Grange believed were covered or non-covered; however, Grange did not intervene. Most of Grange's complaints can be laid at its own feet. If it had intervened and asked the proper questions at the proper time, then we would *know* what the jury intended by its verdict instead of being left to argue about what we *think* the jury intended by its verdict.

2.3 Only the Jury Can Determine Facts, Not the Trial Court or the Court of Appeals.

Second, Grange argued that the “facts necessary to decide this appeal were established as a matter of law in the underlying lawsuit which facts are binding in this coverage action.” Grange is right. The factual findings of the jury bind both parties. Both *Howell v. Richardson*, 45 Ohio St.3d 365, 544 N.E.2d 878 (1989) and *Grange Mutual Cas. Co. v. Uhrin*, 49 Ohio St.3d 162, 550 N.E.2d 950 (1990) held that factual determinations made in the underlying tort case are binding in subsequent coverage litigation.

Where Grange errs is in arguing that certain “factual determinations” made by the trial and appellate courts are also binding. In various parts of its appellate briefs, Grange argued “The trial court found that WHC engaged in a cover up to hide the abuse.”; “The trial court found that WHC spread false information.”; “The trial court ruled the evidence at trial had proved Andrew Faieta’s injuries were solely the result of ‘abuse.’”

The court of appeals accepted Grange’s argument, at least to some degree. See Grange App. 25, ¶48, wherein the court of appeals, in discussing the trial court’s post-trial decision stating that the marks on the child’s body “were a result of abuse” by Vaughan, held “it was conclusively determined in the personal-injury case that Vaughan’s battery constituted abuse of the Faieta’s minor child”

The court of appeals’ conclusion is incorrect. Where there is a jury trial there is no such thing as a factual determination made by a trial or appellate court. It is axiomatic that only the jury can determine facts, not the trial or appellate courts. The function of the courts is to examine the record and, after construing the facts most strongly in favor of the non-moving party, determine if a reasonable jury could have reached the factual conclusion reached by the jury. These courts, however, do not make factual findings.

Accordingly, the court of appeals erred when it cited to the opinions of the trial court in the personal injury case to support its position that certain “facts” have been established that are binding on the parties to this appeal. The only facts in this case that are binding on the parties are the facts found by the jury in their answers to interrogatories. Other evidence may be in the record, but there is no way of knowing what evidence the jury accepted and what evidence it rejected. All we know is how the jury answered the interrogatories, and those factual determinations are the only ones binding on the parties.

The court of appeals’ statement (Grange App. 25, ¶48) that the jury “conclusively determined” that Vaughan abused Andrew Faieta, as that term is used in the Abuse and Molestation Exclusion, is wrong. The jury made no such factual determination; rather, its determination, as shown by the answer to Interrogatory 1.A., is that “Vaughan intentionally harmed Andrew Faieta.”

The jury never decided whether this “intentional harm” constituted “abuse” as that term is used in Grange’s Abuse or Molestation Exclusion or whether Grange had sustained its burden of proving the application of the Abuse or Molestation Exclusion to the facts of this case.

In ruling on WHC’s JNOV, the trial court was assessing the state of the record to determine if the jury’s factual finding that Vaughan intentionally harmed Andrew was supported by the record. Judge Brown merely determined that the record contained evidence from which a reasonable jury could reach this conclusion and that the evidence that Andrew had a rash was not conclusive. Judge Brown properly ruled that the evidence was conflicting and that the jury had made a factual determination that was within its rights. The court’s remarks, however, do not create “facts”; only the jury can determine facts, and its determination was not “abuse”, but “battery”.

2.4 The Jury Award and Apportionment.

Third, the jury answered several interrogatories and concluded (1) that Vaughan had intentionally harmed Andrew, (2) that WHC had negligently supervised Vaughan, and (3) that either Vaughan or WHC had inflicted intentional emotional distress (IIED) on the Faietas. The compensatory awards were not segregated by cause of action or by defendant, but were lump-sum verdicts as follows:

Non-economic Damages—Andrew	\$ 600,000
Non-economic Damages—Parents	\$ 147,000
Economic Damages—Parents	\$ 152,100

The verdict forms apportioned the compensatory damages—\$764,235 (85%) from WHC and \$134,865 (15%) from Vaughan. The jury awarded the Faietas punitive damages of \$5,000,000 from WHC and \$100,000 from Vaughan, and also awarded the Faietas their attorney fees, but only from WHC.

The jury verdict was subject to post-trial proceedings. The trial court modified the verdict by applying the statutory caps to Andrew's non-economic loss award and to the punitive damage awards so that the final judgment was as follows:

Non-economic Damages—Andrew	\$250,000	
Non-economic Damages—Parents	\$147,000	
Economic Damages—Parents	<u>\$152,100</u>	
Total Compensatory Damages	\$549,100	
WHC's share (85%)		\$ 466,735
Vaughan's share (15%)		\$ 82,365
Punitive Damages—WHC (direct)		\$1,528,470
Punitive Damages—WHC (for Vaughan)		\$ 100,000
Punitive Damages—Vaughan		\$ 0
Attorney Fees		<u>\$ 693,861</u>
TOTAL		\$2,871,431

The trial court found that WHC was solely liable for \$2,789,066.87 and that Vaughan was primarily liable and WHC only secondarily liable for the remaining \$82,365. The verdict

was unanimously affirmed on appeal, whereupon WHC settled the case with the Fajetas for the amount of the judgment plus post-judgment interest for a total settlement of \$3,101,147. WHC sought indemnity from Grange, which refused. This lawsuit followed.

2.5 The Relevant Policy Provisions.

The Primary Coverage Form, CG 00 01 10 01

This is a standard Commercial General Liability (CGL) form prepared by ISO. It provides that Grange will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” caused by an “occurrence.”

“Bodily injury” is a defined term and means “bodily injury, sickness or disease sustained by a person.”

“Occurrence” is also a defined term and means an accident.

Damages is not a defined term.

The form contains an exclusion for bodily injury “expected or intended from the standpoint of the insured.”

The CGL form does not contain a punitive damages exclusion; however, the Commercial Umbrella (CU) policy, also issued by Grange clearly states “this insurance does not apply to punitive or exemplary damages.” The presence of a specific punitive damages exclusion in the CU policy, and the lack of such an exclusion in the GCL policy, lends credence to WHC’s argument that the CGL form provides coverage for punitive damages.

The Abuse or Sexual Molestation Exclusions, CG 21 46 10 93 and 21 46 07 98

The policy contains an additional exclusion to those listed in the primary coverage form:

ABUSE OR MOLESTATION EXCLUSION

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of:

1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or
2. The negligent:
 - a. Employment;
 - b. Investigation;
 - c. Supervision;
 - d. Reporting to the proper authorities, or failure to so report;
or
 - e. Retention;of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

Significantly, “abuse” is not a defined term.

**The Corporal Punishment Endorsements, CG 22 67 10 93
and 22 30 07 98**

The Corporal Punishment (CP) endorsement replaces the expected or intended exclusion of the primary coverage form with this exclusion:

This insurance does not apply to:

- a. “Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

This exclusion does not apply to “bodily injury” resulting from:

- (1) The use of reasonable force to protect persons or property;
or
- (2) Corporal punishment to your student administered by or at the direction of any insured.

The purpose of this endorsement is to remove corporal punishment from consideration as bodily injury “expected or intended from the standpoint of the insured.” However, the CP endorsement does not say anything about negligent hiring, supervision, or retention claims. Contrast this with the Abuse or Molestation Exclusion, which specifically addresses and excludes related claims for negligent hiring, supervision, or retention.

3. ARGUMENT

Grange's Proposition of Law Number 1:

A commercial liability policy containing an Abuse or Molestation exclusion which excludes damages arising out of abuse “by anyone” of any person in the care, custody or control of any insured, as well as the negligent employment or supervision of an abuser, eliminates coverages of sums awarded based on the insured’s vicarious liability for its employee’s abuse of a child in the insured’s care and custody.

Grange’s appeal to the Tenth District centered on the issue of which party had the burden of proving the allocation of the general verdicts to the three causes of action—battery, IIED, and negligent supervision. Both parties acknowledged that whoever had this burden would fail to meet it because the jury’s answers to interrogatories provided no basis for any allocation.

Grange lost on this issue in both the trial court and the court of appeals. It has not appealed this issue in this appeal. Accordingly, the law set forth by the court of appeals stands. Since Grange bears the burden of proving the allocation of the general verdict—and cannot do so—WHC has full coverage for all compensatory damages if Grange covers *any* of the three causes of action. WHC’s position, as set forth in its cross-appeal, is that Grange covers all three causes of action. If WHC is correct and there is coverage for any of the three causes of action, then Grange’s assignment of error number one is moot because vicarious liability will no longer be the sole basis for coverage.

Therefore, in deciding whether or not to accept jurisdiction on Grange’s first assignment of error, the Court must simultaneously consider whether or not to accept jurisdiction of WHC’s first assignment of error.

The simple answer to Grange’s first assignment of error is that the Abuse or Molestation Exclusion does not apply to vicarious liability because no language in the exclusion addresses vicarious liability. Exclusions are strictly construed against the insurer. In order to apply,

exclusions must be clear and exact. *Moorman v. Prudential Ins. Co.*, 4 Ohio St.3d 20, 445 N.E.2d 1122 (1983). “An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded.” *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992).

The first section of the Abuse and Molestation Exclusion deals with the direct liability of the guilty actor. This section does not address—and, therefore, does not exclude—vicarious liability.

The second section of the exclusion deals with the direct liability of employers for their own misconduct, *i.e.*, negligent employment, negligent supervision, etc. This section, similarly, does not address—and, therefore, does not exclude—vicarious liability.

Since neither section of the exclusion addresses vicarious liability, the exclusion does not *clearly* and *unambiguously* exclude vicarious liability. This result is perfectly consistent with the result in *White*, especially with the manner in which *White* dealt with the policy’s intentional acts exclusion. Recall that in *White*, a teenager stabbed a young girl. The teenager was sued for battery and his parents were sued for negligent supervision. The jury found that the teenager had committed battery—an intentional tort.

This Court held that the stabbing was an “occurrence” from the viewpoint of the parents. The Court went on to address the intentional acts exclusion and held that it could not be applied to the negligent supervision claim. The Court stressed that its approach was consistent with the “examine each act on its own merits” approach established in *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243 (2000). The Court quoted with approval, the following language from *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F.Supp. 1151 (W.D. Ark. 1994):

The ultimate effect of [those opinions denying coverage] leads to a metamorphosis in which certain negligent actions are transformed by the court

into intentional actions for the purposes of deciding negligent hiring cases involving sexual abuse. Such a decision effectively dissolves the distinction between intentional and negligent conduct, allowing the intentional act to devour the negligent act for the purpose of determining coverage.

Doe at 393.

Similarly, in order to establish vicarious liability, the injured party must establish additional elements than those proven against the guilty actor, including an employment relationship, an act committed within the scope of employment, or ratification of the tortious act by the employer. *See 39 O.Jur.3d*, Employment Relations, §382.

Since the torts have different elements and are directed at different parties, the Abuse or Molestation Exclusion cannot be used to lump all of the actions and parties together. The cause of action against WHC, as Vaughan's employer, cannot be lumped with the action against Vaughan, the employee. Each cause of action and each coverage analysis must be viewed from the standpoint of the insured and must stand or fall on its own merit.

The court of appeals recognized this and found coverage for Vaughan's intentional conduct, IIED, for which WHC was vicariously liable. Since Grange did not clearly exclude coverage for vicarious liability for abuse, this was the correct decision.

Grange's Proposition of Law Number 2:

When attorney's fees are awarded solely in conjunction with non-covered conduct, "compensatory" attorney's fees are not covered damages under liability insurance policies. (*Neal-Petit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, construed.)

If the Court rejects jurisdiction on Grange's first assignment of error, then this assignment should be rejected as well.

If the Court accepts jurisdiction on Grange's first assignment of error, and later adopts Grange's position and holds that none of the compensatory damages awarded for battery, IIED, or negligent supervision are covered, then the Court and the parties will be left with an issue not

addressed by *Neal-Petit*—that is, can attorney fees constitute covered “damages” under a CGL policy even if there are no other covered damages. For this reason, WHC believes that if the Court accepts jurisdiction of Grange’s first assignment of error, it should likewise accept jurisdiction of this one.

Grange’s Proposition of Law Number 3:

A liability insurance policy’s supplementary payments clause cannot be reasonably construed as an agreement to pay post-judgment interest on non-covered claims.

The court of appeals initially awarded post-judgment interest only on the covered portion of the underlying judgment (Grange App. 29, ¶60), but changed its position upon WHC’s motion for reconsideration. (Grange App. 5, ¶15-23).

The CGL policy issued to WHC contains a section entitled SUPPLEMENTARY PAYMENTS—COVERAGES A AND B, which provides coverage under our facts for *all* post-judgment interest, regardless of whether such interest is assessed on a covered claim or a non-covered claim:

We will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend:

* * *

- g. All interest on the full amount of any judgment that accrues after entry of judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

Grange defended the underlying Faieta lawsuit. However, Grange never paid, offered to pay, or deposited in court the portions of the Faieta judgment for which the court of appeals found Grange liable. Therefore, Grange is liable for *all* post-judgment interest on the full award, not just the post-judgment interest on the \$82,365 for which WHC was secondarily liable and the \$693,861 in attorney fees.

Grange does not dispute what the policy says. Instead, it argues that the plain meaning of the SUPPLEMENTARY PAYMENTS provision is unreasonable and illogical, and that, therefore, the Court should “interpret” the provision to mean something other than what it says. However, the provision is not illogical. It is, in fact, a standard CGL provision that the vast majority of courts have held to mean exactly what it says:

Most liability policies provide that the carrier, in addition to the policy limits, is obligated to pay all interest on any judgment that accrues before the company pays or deposits into the court that part of the judgment covered by the policy. Under such policies, therefore, the insurer will be liable for post-judgment interest on the entire judgment, including any portion of it which is outside or in excess of the policy coverage.

Windt, *Insurance Claims and Disputes*, §6:17.

Windt cites 15-20 cases for this statement. There are many others, including *River Valley Cartage Co. v. Hawkeye-Security Ins. Co.*, 17 Ill.2d 242, 161 N.E.2d 101 (1959), the lead case for the primary treatise on the subject, which appears at 76 *ALR2d* 976. Interestingly, *River Valley* reviews the history of the supplementary payments form and notes that The National Bureau of Casualty Underwriters adapted the present language in the 1950’s to clarify that carriers were intended to be liable for interest on the full amount of a judgment and not just the covered portion:

The National Bureau of Casualty Underwriters formerly included the clause now before us in its form of standard policy. It has now changed its form to read ‘all interest on the entire amount of any judgment therein which accrues after entry of the judgment.’ In announcing the change, it said: “Several court cases have held that an insurer’s obligation to pay interest extends only to that part of the judgment for which the insurer is liable. *The respective rating committees have agreed that this is contrary to the intent.* As a result, the wording with respect to payment of interest in the new Family Automobile Policy has been restated, in order that it be entirely clear that all interest on the entire amount of any judgment, which accrues after entry of the judgment, is payable by the insurer until the insurer has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the insurer’s liability thereon.” (Emphasis added.)

Ramsey, *Interest on Judgments under Liability Insurance Policies*, Insurance Law Journal No. 414 (July, 1957), p. 407, at p. 411.

Ohio cases are in accord. In *Coventry v. Steve Koren, Inc.*, 1 Ohio App.2d 385, 205 N.E.2d 18 (8th Dist. 1965), a judgment was returned against the insured for \$60,000; the insured's policy limit was only \$10,000. The issue was whether the insurer was liable only for post-judgment interest on the covered amount of \$10,000 or on the whole amount of the judgment. The policy language required the insurer to pay "all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon."

Notice that this is the older language and not as broad as Grange's provision, which specifically says "all interest *on the full amount* of any judgment." (Emphasis added.) Nevertheless, the court in *Coventry* found that the insurer was obligated to pay all post judgment interest. The case was certified to the Ohio Supreme Court based on a conflict with another district, and the supreme court held that the "judgment of the Court of Appeals is affirmed for the reasons stated in its opinion." *Coventry v. Steve Koren, Inc.*, 4 Ohio St.2d 24, 211 N.E.2d 833 (1965). See also *Rader v. Carroll*, 12th Dist. Preble No. CA92-06-011, 1992 WL 379315 (Dec. 21, 1992).

Grange is advocating that this Court reject a majority position that has been entrenched in the case law and treatises for over 40 years, as evidenced by the language used by the Kansas Supreme Court in *Stamps v. Consolidated Underwriters*, 208 Kan. 630, 493 P.2d 246 (1972):

That which now appears to be the majority view is the clause creates liability for interest on the entire judgment awarded so as to render the insurer liable for such interest until the amount of the policy limit, plus interest on the whole judgment, has been tendered, offered or paid.

The minority view is that liability is limited to interest on the amount of the policy limit.

* * *

We are persuaded the language in the interest clause means what it says and means what a substantial segment of the insurance industry says it means, that is, irrespective of principal policy limits, the term judgment refers to the entire or whole judgment and not something less.

Grange advocates a position that was the minority view even 40 years ago before the SUPPLEMENTARY PAYMENTS language was broadened to include the words “full amount of the judgment.” This assignment of error lacks any merit and should be rejected.

**WORLD HARVEST CHURCH’S MEMORANDUM
IN SUPPORT OF JURISDICTION**

1. EXPLANATION OF WHY WORLD HARVEST CHURCH’S APPEAL IS OF GREAT AND GENERAL PUBLIC INTEREST.

This Court should accept jurisdiction of WHC’s appeal for three reasons. First, it presents an issue of first impression on the proper scope of the standardized Abuse and Molestation Exclusion. Courts across the country have uniformly agreed that this exclusion relates to *sexual* abuse, but there is a dearth of authority in the cases or the treatises on whether “abuse” goes beyond sexual abuse and covers all kinds of physical mistreatment, as believed by the court of appeals. If “abuse” means mere battery, physical abuse, or injurious mistreatment, then the law of unintended consequences teaches us that creative insurance companies will expand the reach of this exclusion to all sorts of factual scenarios.

Second, this appeal presents an issue of first impression on the proper interplay between the standardized Abuse and Molestation Exclusion and the standardized Corporal Punishment Endorsement. If a policy contains specific coverage for corporal punishment, even excessive

corporal punishment, then “abuse”, as that term is used in the more general Abuse and Molestation Exclusion, cannot include corporal punishment.

Third, this appeal presents an issue of first impression on whether Ohio companies can protect themselves by purchasing insurance for intentional torts and punitive damages when their liability arises vicariously. This Court has never held that punitive damages are uninsurable under all circumstances. On the contrary, it held in *Hutchinson v. J.C. Penney Cas. Ins. Co.*, 17 Ohio St.3d 195, 478 N.E.2d 1000 (1985) that punitive damages *are* insurable. See also *Lumbermens Mutual Cas. Co. v. SW Industries, Inc.*, 39 F.3d 1324, 1329 (6th Cir. 1994), (noting that “To date, the Ohio Supreme Court has not ruled directly on the question of whether Ohio’s public policy forbids indemnification of punitive damage awards.”) Moreover, a recent survey of the state of the law on this issue found that Ohio is one of only seven remaining states to not allow organizations to insure against punitive damages for vicarious liability. Randy Maniloff, *Punitive Damages: Insurable in 38 States, The Sometimes Oversimplified Issue*, Coverage Opinions, (June 4, 2014), <http://coverageopinions.info/Vol3Issue9/PunitiveDamages>.

2. ARGUMENT

WHC’s Proposition of Law Number 1: When an undefined term in an insurance policy has more than one plain and ordinary meaning, the term must be construed using the meaning that provides the broadest coverage.

This is probably the most basic tenet of insurance policy construction. It is known as the doctrine of *contra proferentum*, and is the rule, not only in Ohio, but everywhere. *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 311 N.E.2d 844 (1974) held in its syllabus:

Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.

The court of appeals did not follow this basic tenet. Instead, it surveyed the various definitions of “abuse” and picked the broadest definition; when, since the term is contained in an exclusion, it should have picked the narrowest definition. (Grange App. 25, ¶45-46). This was error. WHC contends that the trial court got it right when it found coverage for all of the \$549,100 in compensatory damages awarded against WHC, not just coverage for the \$82,365 awarded against Vaughan for which WHC is vicariously liable. (Grange App. 25, ¶39-40).

WHC agrees that, as a general proposition, courts should give undefined words in an insurance policy their plain and ordinary meaning. However, this rule of interpretation is trumped by a more specific rule—one that this Court has utilized and endorsed on countless occasions. When a word in an insurance policy has more than one meaning, the term must be construed broadly in favor of the insured and narrowly against the insured.

Under the doctrine of *contra proferentum*, ambiguities within a policy are always resolved in favor of the insured. *Bobier v. Natl. Cas. Co.*, 143 Ohio St. 215, 54 N.E.2d 798 (1944). Furthermore, when a policy can be reasonably interpreted in more than one way, the reviewing court should not review the choices and pick the most reasonable interpretation. Rather, as stated in Kalis, *Policyholders Guide to Insurance Coverage*, § 20.02, the doctrine of *contra proferentum* requires the court to adopt the most liberal interpretation of the policy that is reasonably possible:

Under this interpretive principle, a policyholder must show only that its interpretation of the ambiguous policy language is not unreasonable. On the other hand, the insurer must show both (i) that the policy is capable of the interpretation it favors; and (ii) that its interpretation is the only fair interpretation of the language. The insurer cannot meet this burden by merely showing that its interpretation is more reasonable than the policyholder’s. If the insurer fails to meet its burden, the doctrine of *contra proferentum* will operate to *require* a coverage-enhancing interpretation of the policy. (Emphasis added.)

See also *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 757 N.E.2d 329 (2001), “[I]n order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question.”

Accordingly, the court must adopt *any* reasonable interpretation of the policy resulting in coverage for the insured. *Butche v. Ohio Casualty Ins. Co.*, 174 Ohio St. 144, 187 N.E.2d 20 (1962); *Akins v. Harco Insurance Company*, 158 Ohio App.3d 292, 2004-Ohio-4267, 815 N.E.2d 686 (6th Dist.) (“[A]ny reasonable construction which results in coverage of the insured must be adopted by the trial court.”); *Sterling Merchandise Co. v. Hartford Insurance Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192 (9th Dist.1986). The test to be applied by the court in determining whether there is an ambiguity is not what the insurer intended the words to mean, but what a reasonably prudent person would have understood when applying for insurance. Thus, the standard for ambiguity is from a layman’s perspective, not a lawyer’s. *Snedegar v. Midwestern Ind. Co.*, 64 Ohio App.3d 600, 582 N.E.2d 617 (10th Dist.1988). Accordingly, *Black’s Law Dictionary*, which is not the dictionary of choice for consumers, must yield to Mr. Webster and the like.

The rule of liberal construction applies with “greater force to language that purports to limit or to qualify coverage.” *Watkins v. Brown*, 97 Ohio App.3d 160, 164, 646 N.E.2d 485 (2nd Dist.1994). Therefore, exclusions are strictly construed against the insurer. In order to apply, exclusions must be clear and exact. *Moorman v. Prudential Ins. Co.*, 4 Ohio St.3d 20, 445 N.E.2d 1122 (1983). “An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded.” *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992).

According to *Webster's Unabridged Dictionary of the English Language* (2001), "abuse"

has several definitions:

1. to use wrongly or improperly; misuse: *to abuse one's authority.*
2. to treat in a harmful, injurious, or offensive way: *to abuse a horse; to abuse one's eyesight.*
3. to speak insultingly, harshly, and unjustly to or about; revile; malign.
4. to commit sexual assault upon.

Grange argued, and the court of appeals agreed, that the second definition applied. Why?

Because all of the witnesses agreed that there was no evidence in the trial of sexual abuse or molestation. According to trial counsel Dave Orlandini, the plaintiffs "were not pursuing this as a sexual matter, and they didn't at trial either." Rather, "they just referred to it as him being spanked." Grange representative Brad Histed similarly testified that there was no evidence at trial of sexual molestation.

Since there was no evidence that Andrew was sexually abused, Grange argues that "abuse" means more than sexual assault. Of course, Grange does not get to pick the definition that it wants, i.e., the broadest definition. The court picks the definition that applies, and in so doing, must pick the *narrowest* definition. In this case, the narrowest definition is the fourth definition—sexual assault. This definition is also the most logical choice since the exclusion deals with "abuse and molestation" and "molest" is defined in the same dictionary as:

1. to bother, interfere with, or annoy;
2. to make indecent sexual advance to.

The first definition of "molest" is clearly inapposite. The second definition of "molest" deals with sexual situations. It follows that "abuse" similarly deals with sexual situations, thus making the fourth definition of "abuse" the most consistent with the remainder of the exclusion.

Since, for purposes of applying this exclusion, “abuse” must be construed to mean sexual assault, and since all of the witnesses agree that there was no evidence of sexual assault, Grange has not proven the application of this exclusion.

Furthermore, “abuse” does not mean to inflict IIED or to batter. Similarly, the definitions of “batter” and “battery” do not include the term “abuse.” In common parlance, these words do not mean the same thing.

The court of appeals cited one case in support of its position, *Cincinnati Ins. Co. v. Hall*, Mich. Ct. App. No. 297600, 2011 WL 2342704 (June 14, 2011). However, the court of appeals did not cite or discuss the later decision in that same case, *Cincinnati Ins. Co. v. Hall*, Mich. Ct. App. No. 308002, 2013 WL 3107640 (June 20, 2013). It is apparent in the second *Hall* case that the court of appeals had reservations about the earlier decision made by a different panel of judges. However, the second panel was bound by the law of the case doctrine. A perusal of Judge Fitzgerald’s dissent will clarify and illuminate the issues much better than anything counsel can say.

The insured in the second *Hall* decision tried to get around the law of the case by arguing that the court’s construction of “abuse” rendered the policy illusory. The court of appeals rejected this argument, but this ignores the real problem and solution. The first *Hall* decision was wrong—abuse cannot be interpreted broadly to mean any injurious conduct. It must be given its narrowest possible meaning, and sexual assault is that meaning. The second *Hall* court could have avoided doing legal gymnastics if it had not been bound by the ruling of the earlier panel.

In any event, the problem and solution are clear, and this Court can address both. But for the Abuse and Molestation Exclusion, the entire compensatory award would be covered—and this is the correct result.

WHC's Proposition of Law Number 2: Where an insurance policy provides specific coverage for corporal punishment, then a general exclusion for "abuse" cannot be construed to exclude corporal punishment.

WHC's Proposition of Law Number 3: When an insurance company, pursuant to Ohio Civ. R. 30(B)(5), designates a representative to give testimony on its behalf, the insurer is bound by the testimony of its representative.

The scope of the Abuse and Molestation Exclusion must be determined by examining the policy as a whole. WHC's policy provides specific coverage for corporal punishment. Under these circumstances, it is illogical to interpret the general term "abuse" as excluding the same conduct that another section of the policy specifically covers.

Significant evidence at trial indicated that Vaughan committed his intentional harm or battery of Andrew during the course of corporal punishment gone awry:

- Andrew told his father "that Mr. Vaughan spanked him with a knife";
- Andrew later identified the knife as actually being a ruler;
- The marks on Andrew contained linear patterns consistent with being struck with an object such as a ruler;
- Dr. Lori Frasier testified that "The pattern was consistent with an object striking his buttocks and thighs, and I did not feel that this was a dermatologic condition";
- Andrew told Dr. Thersa Diserio that "he had been spanked on the bottom by a man named Mr. Vaughan";
- During the argument on the motion for a directed verdict on the battery count, counsel for both sides phrased their arguments around the issue of spanking; and
- Witnesses were questioned about the use of corporal punishment at WHC and the school's policy on corporal punishment.

The evidence presented at trial in support of the battery claim all indicated that Vaughan spanked Andrew. Based on the evidence and arguments of counsel, the jury could have reasonably concluded that Vaughan's administration of excessive corporal punishment

intentionally harmed Andrew. Brad Histed, Grange's designated Civ. R. 30(B)(5) representative, admitted that corporal punishment could constitute a battery:

Q. Is spanking a child corporal punishment? Could that constitute a battery?

A. Spanking can constitute a battery, sure.

Grange admits that its policy covers bodily injury caused by "Corporal punishment to your student administered by or at the direction of any insured." As admitted by Mr. Histed and confirmed by Grange's Case Notes:

- "Coverage would be afforded as long as alleged "spanking" due to CG 2267 Corporal Punishment gives coverage back, CH 2230 takes away coverage PH [policyholder] is paying a prem would cover."
- "There is no coverage for abuse or corporal punishment, but the CG2267 buys back coverage for corporal punishment that was administered at the direction of the named insured."
- "This form appears to restore coverage for BI arising out of corporal punishment to a student administered by or at the direction of any insured."

Brad Histed agreed in his deposition with the policy construction advanced in the case notes:

The corporal—under this endorsement, corporal punishment such as the—the spanking of a student under normal circumstances would be covered.

"A specific policy provision controls over a general [provision]." *Monsler v. Cincinnati Cas. Co.*, 74 Ohio App.3d 321, 330, 598 N.E.2d 1203 (10th Dist.1991); *Edmondson v. Motorists Mut. Ins. Co.*, 48 Ohio St.2d 52, 356 N.E.2d 722 (1976). The policy specifically covers corporal punishment, so the term "abuse" cannot be construed to include corporal punishment. Since there was ample evidence that the jury could have found that the battery arose during the administration of corporal punishment gone awry, there is coverage for the battery.

The policy does not define "corporal punishment", so its ordinary meaning must be used. According to *Webster's Unabridged Dictionary of the English Language* (2001), "corporal

punishment” means “physical punishment, as spanking, inflicted on a child by an adult in authority.”

Spanking a child with a ruler is corporal punishment; the jury certainly could have construed such conduct to constitute corporal punishment. The fact that Vaughan’s actions may have been unauthorized, excessive, or even illegal does not change the fact that the jury could have construed his actions to constitute a manner of corporal punishment.

Despite the clarity with which Grange expressed its coverage position on corporal punishment, the court of appeals reached its own construction, which totally ignored Grange’s admitted position. (Grange App. 27, ¶52). This was error. WHC is entitled to rely on the coverage position acknowledged by Grange in the Civ. R. 30(B)(5) deposition. At the very least, the testimony of Grange’s own representative demonstrates the ambiguity of the corporal punishment form.

As pointed out above, there is no coverage for the negligent supervision of abuse or molestation because negligent supervision is specifically excluded in the Abuse and Molestation Exclusion. However, the Corporal Punishment endorsement does not contain similar language excluding coverage for negligent supervision of corporal punishment.

Since the policy includes specific exclusionary language in the Abuse and Molestation Exclusion and omits such language in the Corporal Punishment endorsement, it is logical to assume that Grange intended to cover negligent supervision committed in connection with corporal punishment. Accordingly, the jury verdict for negligent supervision was covered under Grange’s policy, as was the verdict for Vaughan’s intentional harm (battery).

WHC's Proposition of Law Number 4: When an entity is a named insured, an exclusion for the intentional acts of an insured only applies to the entity when the intentional acts were committed by a person who has a significant ownership or managerial role within the entity.

WHC also has coverage for Vaughan's battery and IIED because WHC, as an entity, did not intentionally injure the Faietas. A legal entity such as a corporation, LLC, partnership, etc. can only be denied coverage based on an intentional acts exclusion if an officer, director, or dominant partner or principal committed the act. See, for example, *McLeod v. Tecorp Inter., Ltd.*, 117 Or.App. 499, 844 P.2d 925 (1992); *Seminole Point Hospital Corp. v. Aetna Cas. & Sur. Co.*, 675 F.Supp. 44 (D.N.H.1987); *K&T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171 (6th Cir.1996).

Grange has no evidence that any director or officer battered Andrew or, in the words of the policy, "expected or intended" to inflict bodily injury on Andrew. Since Grange has the burden of proving the application of the intentional acts exclusion and cannot do so, coverage falls back to the general insuring agreement, which states that:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . to which this insurance applies.

The jury's verdict, affirmed by the court of appeals, rendered WHC legally obligated to pay the Faietas damages because of Andrew's bodily injury. The trial court and the court of appeals both agreed that, based on the rationale of *Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, Vaughan's conduct constituted an "occurrence" from WHC's point of view, so that the policy covered any damages awarded for battery or IIED. (Grange App. 25, ¶40-41).

Of course, since the jury was never asked to segregate the damages awarded by cause of action, there is no way to determine how much the jury awarded for battery, how much for IIED,

and how much for negligent supervision. Accordingly, the party with the burden of proof on this issue must lose.

Both the trial court and the court of appeals held that Grange had the burden of proving the apportionment of the damage award. Since both parties agree that this is not possible, WHC is entitled to full indemnity of the compensatory damages if the policy covers *any* of the three causes of action. Grange has not appealed this ruling, so it stands: “Grange had the burden to establish the specific allocation of the general verdict for covered and noncovered claims.” (Grange App. 20, ¶29).

All of the compensatory damages could have flowed from the IIED, and no managerial employee of WHC was involved directly in the intentional battery. Therefore, the intentional acts exclusion cannot be used to preclude coverage for WHC as an entity for battery or IIED.

WHC’s Proposition of Law Number 5: When an insurance policy provides coverage for punitive damages, the insured is entitled to be indemnified for a punitive damage award returned against it even if such coverage was issued in violation of R.C. 3837.182.

WHC’s Proposition of Law Number 6: The public policy of Ohio allows for insurance coverage for punitive damages when an insured entity is found liable for punitive damages not because of the conduct of a person with a significant ownership or managerial role, but because of the insured’s legal responsibility for the acts of another.

Traditional wisdom is that punitive damages are not insurable; however, the problem is more complex than it appears at first blush. Today’s world of corporations, LLCs, LLPs, partnerships, and other forms of legal entities is a far different world than existed 100 years ago when the dogma against the insurability of punitive damages first appeared.

In today’s world, the target of a punitive damage award is usually an entity, not a person, and the entity may be responsible for punitive damages because of the acts of a lower level employee. For example, a front-line claim adjuster who badly mistreats an insured, an engineer at General Motors who does not take steps to correct a faulty ignition switch, an assistant

football coach who sexually abuses children over the course of several decades, or a field supervisor who removes a safety guard from a piece of construction equipment in order to complete a job on time.

In all of these examples, the entity may rightly be subject to punitive damages, but is there any sound public policy reason for why the entity cannot seek to protect itself, through insurance, from such actions when it knows that such occurrences are possible? Nobody buys auto insurance expecting to rear-end somebody, but we all know it is possible, so we seek to protect ourselves from such an eventuality. Insurance coverage for punitive damages, at least from the perspective of an entity, is no different. The larger the entity, the more likely the need for protection.

How does an entity buying insurance coverage for punitive damages square with the public policy of Ohio? In *Neal-Petit*, the Court stated “public policy prevents insurance contracts from insuring against claims for punitive damages *based upon an insured’s* malicious conduct.” (Emphasis added.) *Id* at ¶21.

This language, and the language in cases such as *Casey v. Calhoun*, 40 Ohio App.3d 83, 531 N.E.2d 1348 (8th Dist.1987) and *Hutchinson v. J.C. Penney Cas. Ins. Co.*, 17 Ohio St.3d 195, 478 N.E.2d 1000 (1985), strongly suggests that Ohio public policy is only violated when a defendant seeks insurance coverage to escape from the consequences of his *own* malicious acts. Insurance coverage that merely insulates a vicariously liable defendant that has not personally acted maliciously does not violate Ohio public policy. In such instances, it is proper to provide insurance coverage for punitive damage awards.

This appears to be the majority rule outside of Ohio. See the numerous cases cited in Windt, *Insurance Claims and Disputes*, §6:18, footnote 6 (4th Ed. 2001), in support of the following statement:

[A]lthough coverage for punitive damages is ordinarily against public policy, *it will be allowed when the insured was only vicariously liable*. Those courts have reasoned that, if the insured did not participate in the wrong, the policy of preventing the tortfeasor from escaping the penalties for his or her wrong is inapplicable. (Emphasis added.)

In such instances—that is, when the defendant has been ordered to pay punitive damages not because of its *own* malicious conduct, but rather because of a doctrine such as respondeat superior—permitting the defendant to obtain insurance coverage does not insulate the “bad actor” from the consequences of his own wrongful conduct, and, therefore, does not weaken the punishment and deterrent effect intended by the award.

In *Pennbank v. St. Paul Fire and Marine Ins. Co.*, 669 F. Supp. 122, 125-26 (W.D.Pa.1987), a corporation was found liable for punitive damages as the result of a repossession plan that was “conceived, approved and implemented” by the highest rank of its management. Although the court found the corporation to be directly liable by its own wrongful conduct, it recognized the fact that “Pennsylvania does not preclude recovery of punitive damages from an insurer where the insured is only vicariously liable for such damages.” *Id* at 126.

Likewise, Kentucky, also allows the insurability of punitive damages for vicarious liability. “It is unreasonable in such a case not to allow the master to insure against his liability for punitive damages whether the servant’s act was an intentional one or was an act of gross negligence.” *Contl. Ins. Companies v. Hancock*, 507 S.W.2d 146, 151 (Ky.App.1973). In *Continental*, the employer, a nightclub, was held to be vicariously liable for an altercation

between its employees and a patron. The court noted in its analysis of the insurability of punitive damages for vicarious liability that “most states which permit assessment of punitive damages against a master for the acts of his servant . . . do not find it against public policy . . . to permit the master to insure against liability for punitive damages.” *Id* at 151. The court affirmed that the public policy goal of punitive damages is to punish and deter. Further, the court did not “deem it against public policy to allow liability . . . to be insured against when the punitive damages are imposed for a grossly negligent act of the insured rather than an intentional wrong of the insured.” *Id* at 151.

Indiana law similarly draws a distinction between liability for punitive damages directly imposed and such liability when vicariously imposed:

It would contravene public policy to allow the corporation to shift to an insurer the deterrent award imposed on account of the corporation's own wrongful acts . . . it would *not* be inconsistent with public policy to allow the corporation to shift to an insurer the punitive damage award when that award is placed upon the corporation *solely* as a matter of vicarious liability. (Emphasis added.)

Stevenson v. Hamilton Mut. Ins. Co., 672 N.E.2d 467, 474 (Ind.App.1996). The court stated that this approach is “is not contrary to the public policy principles underlying implied exceptions for intentional torts, and these decisions certainly are in harmony with the desire to assure innocent victims a source of indemnification.” *Id* at 475.

Although Ohio has not directly addressed this issue, recent rulings demonstrate an inclination to follow this growing trend. In *Lumbermens Mut. Cas. Co. v. S-W Industries, Inc.*, 39 F.3d 1324 (6th Cir.1994), the court applied Ohio law and specifically stated that “we think it clear, and now hold, that Ohio law prohibits the indemnification of monies paid pursuant to an award of punitive damages arising out of the *insured's own conduct*.” (Emphasis added.) *Id* at 1329. In discussing the legislature’s insurability of punitive damages policy, the *Casey* court

stated “it is clear that with the passage of this bill the General Assembly has assumed its role as policymaker and has firmly expressed its intention that an individual must be *prohibited from insuring against his own intentional or malicious acts.*” (Emphasis added.) *Id* at 1351.

Likewise, *Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426 dealt with an analogous situation; that is, coverage for negligent acts predicated upon an intentional tort of another person. The Court held that coverage must be determined “from the perspective the person seeking coverage.” *Id* at ¶26. Further, the fact that one insured acted intentionally, and thus was not entitled to coverage, does not negate coverage to another insured that acted with a different and lesser degree of culpability.

In the case at hand, Vaughan may have acted maliciously, and thus should not be entitled to coverage for the punitive award entered against him. However, the award against WHC could have been based solely on WHC’s vicarious liability for Vaughan’s acts. As such, since the acts of WHC itself were not malicious, WHC is not precluded by public policy from being indemnified for the punitive damage award entered against it.

This gets us to the effect of R.C. 3937.182, which was the basis of the holding of both the trial court and the court of appeals. Both courts said, in essence, that since the statute prohibits an insurance company from issuing a policy covering punitive damages, then even though Grange’s policy covers punitive damages, the courts would negate the coverage by operation of law to conform with Ohio law. This course of action makes sense when an insurance policy provides *less* coverage than required by Ohio law—recall the UM/UDM decisions finding coverage “by operation of law” even when policies did not explicitly provide UM/UDM coverage.

However, the reverse is not logical. If Grange’s policy, by its clear terms, provides coverage for punitive damages, then why should the courts “save” Grange from its own breach

of the law by altering the contract to reduce coverage, and thus benefit Grange? The lawbreaker thus is rewarded.

WHC believes that it makes more sense to hold Grange to its promise—it promised to provide indemnity for all ‘damages’ that WHC is found legally liable for arising from bodily injury. Punitive damages are part of those damages. Most cases outside of Ohio have held that the undefined term ‘damages’ means both compensatory and punitive damages. See *Fluke v. Hartford Acc. & Ind. Co.*, 145 Wash.2d 137, 34 P.3d 809 (2001) and *Medical Liability Mut. Ins. Co. v. Alan Curtis Enterprises*, E.D.Ark. No. 4:05–CV–01317, 2006 WL 3542986 (Dec. 8, 2006) among many others. Certainly, a liberal interpretation of the term allows for this construction, especially when the corresponding umbrella policy contains an express exclusion for punitive damages.

In *Neal-Petit v. Lahman*, 125 Ohio St.3d 327, 330, 2010-Ohio-1829, 928 N.E.2d 421, the Ohio Supreme Court dealt with a similar issue, and held that the undefined term ‘damages’ included attorney fees awarded to the plaintiff.

There is coverage for punitive damages under the insuring agreement in Grange’s CGL policy. No exclusion applies; neither Judge Bessey or the court of appeals even discussed an applicable exclusion. Rather, coverage turns solely on Ohio’s public policy. The issue then becomes—does insurance coverage for punitive damages, *under the facts of this case*, violate Ohio public policy? WHC believes that it does not, and urges the Court to accept jurisdiction to clarify the protection available to Ohio businesses.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served on July 29, 2014 per S.Ct.Prac.R. 3.11(B) by mailing
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