

ORIGINAL

No. 2014-1161

In the Supreme Court of Ohio

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

FILED
AUG 28 2014
CLERK OF COURT
SUPREME COURT OF OHIO

WORLD HARVEST CHURCH,
Plaintiff-Appellee/Cross-Appellant,

v.

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

MEMORANDUM OF CROSS-APPELLEE GRANGE MUTUAL CASUALTY COMPANY OPPOSING WORLD HARVEST CHURCH'S CROSS-APPEAL

Robert P. Rutter (0021907)
One Summit Office Park, Suite 650
4700 Rockside Road
Cleveland, OH 44131
TEL: 216-642-1425
FAX: 216-642-0613
brutter@ohioinsurancelawyer.com

*Attorney for Plaintiff-Appellee
World Harvest Church*

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
TEL: 216-592-5000
FAX: 216-592-5009
ikeyse-walker@tuckerellis.com

James R. Gallagher (0025658)
GALLAGHER, GAMS, PRYOR
TALLAN & LITRELL L.L.P.
471 East Broad St., 19th Floor
Columbus, OH 43215-3872
TEL: 614-228-5151
FAX: 614-228-0032
jgallagher@ggptl.com

*Attorneys for Defendant-Appellant
Grange Mutual Casualty Company*

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PROOF OF SERVICE

I. **WORLD HARVEST CHURCH'S CROSS-APPEAL IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

Grange Mutual Casualty Company (Grange) and World Harvest Church (WHC) agree that “the proper scope of the standardized Abuse or Molestation Exclusion” presents an issue of first impression which should be considered by this Court. (See WHC’s Combined Mem., p. 15.) But WHC’s proposition of law regarding the Exclusion does not support jurisdiction of its cross-appeal. Nor do any other of WHC’s six propositions of law present an issue of public or great general interest for this Court’s review.

1. WHC’s first proposition of law asks this Court to declare the standardized, subject-matter Abuse or Molestation Exclusion to be ambiguous, without any support from any court or other authority. Compare *Community Action for Greater Middlesex Cty., Inc. v. Am. Alliance Ins. Co.*, 757 A.2d 1074, 1083 (Conn. 2000) (“Plaintiff has not identified any case, and we are aware of none, in which a policy exclusion for abuse or molestation has been deemed ambiguous”). Further, WHC asks this Court to resolve the non-existent ambiguity by limiting the Exclusion to “sexual” abuse, contrary to its purpose, plain language, and the contracting parties’ mutual expectations.

As recently explained by the First Circuit in *Valley Forge Ins. Co. v. Field*, 670 F.3d 93 (1st Cir. 2012), the Abuse or Molestation Exclusion appears in policies issued to insureds responsible for vulnerable populations – “medical or therapeutic care providers, healthcare centers, summer camps, schools and preschools, job

training programs, churches” – for “the very purpose” of eliminating coverages “where the damages flow from sexual or physical abuse by another of someone in the care of the insured.” *Id.* at 105 (emphasis added). For that reason, the Exclusion has been uniformly applied to physical abuse. *See, e.g., Valley Forge, supra* (Abuse or Molestation Exclusion applied to claims for bodily injury arising out of the beating of a child); *Neff ex rel. Landauer v. Alterra Healthcare Corp.*, 271 Fed. Appx. 224 (3d Cir. 2008) (Abuse or Molestation Exclusion applied to claims of bodily injury arising out of the beating of an assisted living patient); *American Empire Surplus Lines Ins. Co. v. Chabad House of North Dade, Inc.*, 450 Fed. Appx. 792 (11th Cir. 2011) (Abuse or Molestation Exclusion applied to allegations that a special needs child was “tormented and abused” by defendant’s employees); *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 588 S.E.2d 643 (S.C. App. 2003)¹ (Abuse or Molestation Exclusion applied to claims for bodily damage arising out of “shaken baby” syndrome); *Mt. Vernon Fire Ins. Co. v. Hicks*, 910 F.Supp. 316 (E.D. Mich. 1995) (Abuse or Molestation Exclusion barred claims for bodily injury arising out of physical assault on patient by nursing home employee and/or co-resident). WHC’s self-limiting and cherry-picked definition of “abuse” has no other purpose than to achieve a specific result in this case and provides no basis for this Court’s exercise of jurisdiction.

¹ At page 10 of Grange’s Memorandum in Support of Jurisdiction, undersigned counsel mistakenly referenced this case as a case from the South Carolina Supreme Court – it is an appellate decision.

2. WHC's claim that this appeal presents an issue on "the proper interplay" (Combined Mem., p. 15) between the Abuse or Molestation Exclusion and the Corporal Punishment exception to the intended acts exclusion, fails to present an issue of public or great general interest for a simple reason – corporal punishment has nothing to do with this case. *See Howell v. Richardson*, 45 Ohio St.3d 365 (1989), syllabus at paragraph one ("Where a determination is made in an initial action against a tortfeasor relative to his culpable mental state, collateral estoppel precludes relitigation of the determination in a subsequent proceeding brought against the tortfeasor's insurer pursuant to R. C. 3929.06").

The cited endorsement (set forth at ¶ 51 of the Appellate Opinion) provides that the policy's expected or intended acts exclusion is inapplicable to corporal punishment administered by or on behalf of the insured. The endorsement enables an insured with an internal school policy permitting the use of corporal punishment to obtain coverages that might otherwise be excluded by the intended acts exclusion. The plaintiffs' Complaint in the underlying action here, however, did not allege corporal punishment; it alleged "the painful and horrific physical assault" on a 2 ½ year old child. The evidence showed an assault that "left red marks, welts, linear stripes, and abrasions on the child's back, buttocks, upper thighs, and penis." *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶ 10. Neither WHC nor its teacher has ever claimed that the child was misbehaving or was subjected to discipline. To the contrary, they assert to this day that the teacher had

no contact at all with the minor and that the physical marks left by the beating were a skin rash.

3. WHC's argument that this Court should consider whether companies may "purchase insuranc[e] for * * * punitive damages" when their liability for punitive damages "arises vicariously," fails to raise an issue of great or general interest for several reasons. First, it bears noting that the only punitive damage award for which WHC was held to be "vicariously" liable, was the \$100,000 punitive damage award against the WHC teacher who committed the abuse. The jury's separate award of punitive damages against WHC was for its "direct" (not vicarious) liability, for its own, post-abuse intentional tort against the parents of the abused child. *See* WHC's Combined Mem., p. 6; Tr. Op. (Grange Appendix), at Appx. 40. Second, WHC was not found to be vicariously liable for the \$100,000 punitive damage award due to any factual finding or rule of law. Rather, WHC was vicariously liable because it made a strategic litigation decision, as part of its "all or nothing" defense, to stipulate without reservation that the acts of its teacher were within the scope of employment. *See* App. Op., ¶ 35; Tr. Op., Grange Appendix at Appx. 42. It was WHC's own litigation strategy that made it vicariously liable for a savage beating that otherwise would have been completely outside the scope of employment. Unusual litigation strategies that fail do not constitute legal issues of public or great general interest.

WHC's proposed Propositions of Law 5 and 6 also lack merit. WHC asks this Court to adopt a rule of law that contravenes the public policy of Ohio established by the General Assembly in R.C. 3927.182, and long recognized by this Court. Regardless of what common law rule other jurisdictions may adopt, Ohio's General Assembly has conclusively determined, as a public policy of Ohio, that no policy of casualty or liability insurance issued in this state "shall provide coverage for judgment or claims against an insured for punitive or exemplary damages." That statute is unambiguous, unequivocal, and without exception.

II. SUMMARY OF THE PERTINENT PROCEEDINGS AND DECISIONS

A brief recap of the allegations and jury findings in the underlying case, the coverage holdings on appeal, and what the parties are now asking this Court to do, will put WHC's six propositions of law into their proper context.

In the underlying action, Michael and Lacey Faieta, individually and on behalf of their minor son, Andrew, sought compensatory and punitive damages for (1) Andrew's savage beating by WHC teacher Richard Vaughan; and (2) WHC's post-abuse, stonewalling, cover-up, and threats against them. Several causes of action were asserted to address these two claims:

1. Vaughan's liability for the beating. The Faietas sought damages from Vaughan for the beating under two legal theories – battery and intentional infliction of emotional distress (IIED).
2. WHC's liability for the beating. The Faietas sought damages from WHC for Vaughan's abuse under two legal theories – vicarious, respondeat superior liability and negligent supervision.

3. WHC's liability for its own post-abuse misconduct. The Faietas sought damages for WHC's separate, post-abuse misconduct under the legal theory of IIED.

The jury in the underlying trial found for the Faietas on all counts and awarded:

1. \$82,365 in compensatory and \$100,000 in punitive damages against Vaughan for Andrew's beating. Pursuant to its pretrial admissions that Vaughan was at all times acting in the scope of his employment, WHC was vicariously liable for these damages.
2. \$466,735 in compensatory and \$1,528,470 in punitive damages (after applying statutory cap) against WHC for its independent tortious and malicious acts.

The Tenth District Court of Appeals affirmed the awards in 2008. *Faieta v. World Harvest Church, supra*, 2008-Ohio-6959. In this ensuing declaratory judgment action, the Tenth District Court of Appeals held:

1. No coverages for the beating. The Abuse or Molestation Exclusion in the CGL and umbrella policies (CG 21 46, CUP 64 (09-96)) barred coverages for damages awarded for Vaughan's beating and WHC's negligent supervision of Vaughan. (App. Op., ¶¶ 52-55.)
2. Coverages for WHC's vicarious liability for Vaughan's IIED. For reasons that are not clear, the Court concluded that WHC's vicarious liability for Vaughan's beating of Andrew was not excluded by the Abuse or Molestation Exclusion when those damages were labeled "IIED" as opposed to battery. (App. Op., ¶¶ 55.)
3. No coverage for WHC's post-abuse IIED. Damages awarded against WHC for its own IIED did not constitute a covered occurrence under the Grange policies; Grange demonstrated that all compensatory damages other than the \$82,365 awarded against Vaughan were either for WHC's negligent supervision (barred by the Abuse or Molestation Exclusion) or for WHC's independent IIED (which is not a covered occurrence). (App. Op., ¶¶ 40, 55-57.)
4. No coverage for punitive damages. Both R.C. 3937.182(B) and Ohio common law preclude coverages of either of the punitive damage awards. (App. Op., ¶¶ 64-65)

WHC's cross-appeal asks this Court to hold, contrary to uniform authority, that the term "abuse" in the standardized Abuse or Molestation Exclusion is ambiguous, and must be limited to "sexual" abuse; that WHC is not bound by the underlying record and judgment of physical abuse; and that this Court should disregard a legislative mandate and a long history of its own cases precluding insurance of punitive damage awards. None of WHC's six Propositions of Law challenge the conclusions above that: (1) the jury allocated the bulk of its damages to the Faietas' direct claims against WHC; and (2) WHC's independent IIED against Andrew's parents is not a covered occurrence under the policies.

If this Court accepts Grange's appeal and finds that all of the underlying judgments are barred by the Abuse or Molestation Exclusion, it need not address any other issue raised by either party. *See, e.g., Mt. Vernon Fire Ins. Co. v. Hicks, supra*, 910 F.Supp. at 322 ("because the claims are excluded under the molestation and abuse provisions, this court need not decide whether the acts alleged in those Counts constitute occurrences under the policy"); *Prudential Prop. & Cas. Ins. Co. v. Russell*, 9th Dist. No. 16762, 1994 WL 709644 (declining to address other assignments of error where a non-standard abuse or molestation exclusion was dispositive); *S.C. Farm Bureau, supra*, 588 S.E.2d at 384, fn. 2 (the court "need not address" whether allegations constituted an "occurrence" where claims fell within the plain meaning of an abuse or molestation exclusion).

III. ARGUMENT

WHC's Proposition of Law No. 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.

WHC's first Proposition of Law is premised on a non-existent ambiguity and ignores principles of law governing the interpretation of insurance contracts.

To determine whether an ambiguity exists, “[a] contract of indemnity should be construed in the light of the subject matter with which the parties are dealing and the purpose to be accomplished.” *Bobier v. Nat. Cas. Co.*, 143 Ohio St. 215, 219 (1944). The standardized, ISO Abuse or Molestation Exclusion is often included in policies issued to institutions responsible for the care or custody of the young, aged, sick, or other vulnerable populations. *Valley Forge Ins. Co. v. Field*, *supra*, 670 F.3d at 98 (citing cases). The subject matter exclusion expresses the clear expectations of the contracting parties that when the insured abuses *or* molests that vulnerable population, no coverages will be provided for the resulting bodily injuries. Physical and emotional attacks, beatings, and sexual molestation are the very types of depraved acts and unconscionable exercise of authority to which there would be no expectation of coverage and no coverages provided. WHC's allegation that the exclusion somehow applies *only* to molestation/sexual assault is belied by the very use of the “or” in the title – Abuse *or* Molestation Exclusion. It is thus not surprising that courts uniformly apply the exclusion to beatings. *See cases, supra* at 2.

As WHC concedes, the only case it cites in support of its first Proposition of Law – *Cincinnati Ins. Co. v. Hall*, Mich. Ct. App. No. 297600, 2006 WL 2342704 (June 14, 2011) – holds that the term “abuse” *unambiguously* excludes coverage for physical abuse – i.e., bodily injury resulting from a social service employee’s blow to the face of a developmentally disabled adult in the care and custody of the agency. *Id.* at *4. The court specifically rejected the insured’s argument that “the policy exclusion does not apply because nothing of an even arguably sexual nature occurred.” *Id.* WHC claims that the court of appeals later expressed “reservations” about that decision, but in fact, the later panel confirmed that the policy language was *not* ambiguous and applied to physical abuse. *See* 2013 WL 3107640 at *4. The “problem” noted with the prior panel decision was that because the panel utilized poor word choice in explaining its remand, the trial court failed to understand that its sole duty upon remand was to determine whether the unambiguous exclusion rendered policy coverages “illusory.” *Id.* at *6. The second panel held that coverages were not illusory. *Id.* Similarly, the appellate panel in this case determined that the Abuse or Molestation Exclusion did not render coverages “illusory” (App. Op. at ¶ 53), and WHC does not challenge that finding in its cross-appeal.

WHC's Proposition of Law No. 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 No. 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.

WHC's second and third Propositions of Law assert that the CGL policy Grange issued to WHC does not "exclude corporal punishment" and that a Grange representative admitted as much in deposition. But no court has held that the CGL policy "excludes corporal punishment." There has never been any such holding because corporal punishment was never alleged, shown, presented to the jury, or contained in any judgment below, and has no relevance to this case.

As the court of appeals points out, "[b]y its very terms," the corporal punishment endorsement in the CGL policy² "provides an exclusion *only to the exclusion for bodily injury or property damage expected or intended from the standpoint of the insured.*" (App. Op., ¶ 51, emphasis added.) In other words, it "applies only to permit coverage that would otherwise have been excluded under the 'expected or intended from the standpoint of the insured' exclusion." (*Id.* at ¶ 52.) Such an endorsement enables an insured with an internal school policy

² The Grange Commercial Umbrella Policy only contains a full corporal punishment exclusion (CUP 41 (09-96)) without the additional endorsement.

permitting the use of corporal punishment (WHC's internal policies permit corporal punishment when administered by a parent), to obtain coverages that might otherwise be excluded by the expected or intended acts exclusion. It "does not purport to limit" the Abuse or Molestation Exclusion that applies here. (*Id.*)

Here, there was no corporal punishment administered by parents per school policy; there was no allegation of any disciplinary action at all on the part of the teacher (or anyone else). The Faietas' complaint alleged a "horrific beating." WHC and its teacher denied that there was any physical contact at all. The jury had only two choices – Andrew Faieta was severely beaten for no given reason or had a skin rash. The evidence, pleadings, and instructions allowed for no other finding. See App. Op., ¶ 48:

As the trial court in *Faieta* held in ruling on the post-trial motions in that case, the jury, in effect, determined that the marks on the child's body "were a result of abuse" by Vaughan. *Faieta*, 2008-Ohio-3140, ¶ 39.

Grange's representative's deposition testimony that the policy provides coverage for corporal punishment offers no support for WHC's speculation that a jury could find corporal punishment in this case. Rather, it is the record of the underlying case, as enforced by the trial and appellate courts, and the parties' intent as expressed in the clear and unambiguous language of the contract, that controls. See, e.g., App. Op. at ¶ 52 ("Because the language of the policy controls our analysis, WHC's citation of Grange notes and deposition testimony of a Grange representative to the effect of what they thought was covered by the policy does not change this result").

WHC's Proposition of Law No. 4:

When an entity is a named insured, an exclusion for 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's fourth proposition of law asserts no error in the decision of the court of appeals, which does not even address the expected or intended acts exclusion and *agrees* with WHC's arguments that its vicarious liability for its teacher's savage beating was an "occurrence" for purposes of coverage. (App. Op., ¶ 37.) From this flawed premise, WHC proceeds to the curious conclusion that an unnamed error regarding an unaddressed exclusion somehow requires full indemnity of all compensatory damages.

In addition to asserting no error, WHC's arguments ignore two key points. First, the Abuse or Molestation Exclusion excludes bodily injuries arising out of abuse "by anyone" of any person in the care and custody of WHC. (*See App. Op. at ¶ 51.*) As explained more fully in Grange's Memorandum in Support of Jurisdiction, that broad language was intended to (and does) encompass all bodily injury arising from abuse regardless of how framed, *including* vicarious liability. *See Harper v. Gulf Ins. Co.*, U.S.D.C. No. 01-CV-201-J (D.Wyo.) 2002 WL 32290984 at *6, fn. 9 and W. Jeffrey Woodward, etc., *Commercial Liability Insurance* (IMRI Publication), 17th reprint (Nov. 2012), Ch. VII, P.10). Ohio's Third Appellate District and numerous cases in other jurisdictions have applied the subject matter exclusion to include vicarious liability for an employee's abuse or molestation. *See Crow v. Dooley*, 3d

Dist. No. 1-11-59, 2012-Ohio-2565, *appeal not allowed*, 133 Ohio St.3d 1424 (2012), and cases cited at p. 12 of Grange's Supporting Memorandum. Second, WHC does not challenge the application of the "intentional acts" exclusion to an insured's own intentional acts, and does not challenge the appellate court's holding (App. Op. at ¶ 56) that the jury allocated \$82,365 in compensatory damages for WHC's vicarious liability. WHC's compensatory damage indemnity claim for vicarious liability is thus necessarily limited to \$82,365, assuming there was coverage under the policy.

WHC's Proposition of Law No. 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 No. 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.

Both the trial and appellate courts rejected WHC's argument that the General Assembly's prohibition against insuring punitive damages should be ignored by Ohio courts. This Court should likewise reject WHC's invitation.

First, it should be noted that WHC's claim, again, is limited. The jury in this case made separate punitive damage awards against Vaughan and WHC, and WHC concedes that public policy prevents insuring punitive damages for an insured's

own malicious conduct (Combined Mem., p. 26). The “direct” award of punitive damages against WHC is unaffected by its Propositions of Law.

Second, WHC’s argument that its vicarious liability for the \$100,000 punitive damage award against Vaughan should be covered, is in direct contravention of R.C. 3937.182(B) and without merit. As the Tenth District explained: (1) R.C. 3937.182(B) broadly precludes coverages “for judgments or claims against an insured for punitive or exemplary damages”; (2) the prohibition includes commercial liability insurance; and (3) the Grange CGL and umbrella policies are commercial liability policies. (App. Op., ¶ 64.) Neither the plain language of the statute nor its legislative history support a “vicarious liability” exception. The statute bars coverages for “judgments or claims” for punitive damages, regardless of whose conduct gives rise to the judgment or claim. The legislative history explains that the General Assembly “assumed that the legal principles opposed to authorization for insurance that would indemnify a person for conduct leading to the award of punitive damages was so well established that it was unnecessary to negate such an intention.” Section 3, Am. S.B. No. 249 (141 Ohio Laws, Part 1, 537). Those principles apply to *all* sources of malicious conduct.

The Tenth District’s holding also accords with other districts. *See, e.g., Stephens v. Grange Mut. Ins. Co.*, 2d Dist. No. 2011CA102, 2012-Ohio-4980, ¶ 19 (“punitive damages are not insurable, and the use of insurance proceeds to satisfy an award of punitive damages is against public policy”); *Stickovich v. City of*

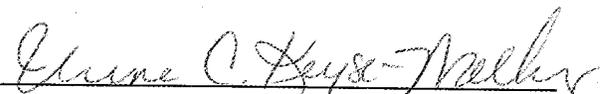
Cleveland, 143 Ohio App.3d 13, 28 (2001) (citing R.C. 3937.182 as an example of “[w]hen the General Assembly intends to announce the statutory policy limiting recovery on liability insurance contracts, it knows how to do so with clarity”). WHC offers no basis for this Court to adopt a proposition of law that disregards public policy clearly and unequivocally established by the General Assembly.

IV. CONCLUSION

The parties agree that the proper application of the standardized Abuse or Molestation Exclusion presents an issue of first impression for this Court. But WHC’s request that this Court become the first in the nation to construe this widely used exception as ambiguous and limited to “sexual” abuse is unsupported by law or policy. WHC’s remaining propositions of law are both ill-founded and rendered irrelevant by the proper application of the Abuse or Molestation Exclusion. Jurisdiction of WHC’s cross-appeal should therefore be denied.

Respectfully submitted,

James R. Gallagher (0025658)
GALLAGHER, GAMS, PRYOR
TALLAN & LITTRELL L.L.P.
471 East Broad St., 19th Floor
Columbus, OH 43215-3872
TEL: 614-228-5151
FAX: 614-228-0032
jgallagher@ggptl.com


Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
TEL: 216-592-5000
FAX: 216-592-5009
ikeyse-walker@tuckerellis.com

Attorneys for Cross-Appellee Grange Mutual Casualty Company

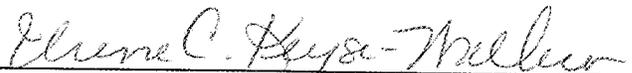
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A copy of the foregoing was served on August 27, 2014 per S.Ct.Prac.R.

3.11(B) by mailing it by United States mail to:

Robert P. Rutter
One Summit Office Park, Suite 650
4700 Rockside Road
Cleveland, OH 44131

*Attorney for Plaintiff-Appellee
World Harvest Church*


*One of the Attorneys for Cross-Appellee
Grange Mutual Casualty Company*