

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,

v.

GRANGE MUTUAL CASUALTY COMPANY,
Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii, iii, iv
I. INTRODUCTION	1
II. STATEMENT OF THE CASE AND FACTS	1
III. STATEMENT OF INTEREST	3
IV. LAW AND ARGUMENT	4
Proposition of Law No. 1	4
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	
V. CONCLUSION	21
VI. CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Alexander v. Buckeye Pipe Line Co.</i> , 53 Ohio St.2d 241, 374 N.E.2d 146 (1978)	6
<i>Atlantic Cas. Ins. Co. v. Harris</i> , S.D. Ill. No. 08-cv-647, 2010 WL 624198, *7 (Feb. 18, 2010)	8
<i>Carter v. Adams</i> , 173 Ohio App.3d 195, 2007-Ohio-4322, 877 N.E.2d 1015	7
<i>Cincinnati Specialty Underwriters Ins. Co. v. Larschied</i> , 2014-Ohio-4137	10
<i>Colter v. Spanky's Doll House</i> , 2nd Dist. Montgomery No. 21111, 2006-Ohio-408	7, 12
<i>Crow v. Dooley</i> , 2012-Ohio-2565 (3rd Dist. 2012)	15, 16, 17, 21
<i>Employers' Liab. Assur. Corp. v. Roehm</i> , 99 Ohio St. 343, 124 N.E. 223	5, 6
<i>Essex Ins. Co. v. Mirage on the Water, Inc.</i> , 8th Dist. Cuyahoga No. 87507, 2006-Ohio-5023	7
<i>Farmer v. Allstate Ins. Co.</i> (C.D. Cal. 2004), 311 F.Supp.2d 884, 887	8
<i>Georgacarakos v. United States of America</i> , 420 F. 3d 1185, 1187 (10th Cir. 2005)	8
<i>Gulf Ins. Co. v. Burns Motors, Inc.</i> , 22 S.W.3d 417, 423 (Tex.2000)”)	6
<i>Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.</i> , 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999)	5
<i>Harper v. Gulf Ins. Co.</i> , 2002 WL 32290984 (D. Wyo.)	9, 14
<i>Hawk v. Stocklin</i> , 2014-Ohio-2335	10, 11, 13, 14, 16, 21
<i>Hingham Mut. Fire Ins. Co. v. Smith</i> (2007), 69 Mass. App. Ct. 1, 3-4, 865 N.E.2d 1168	9
<i>Kelly v. Med. Life Ins. Co.</i> , 31 Ohio St.3d 130, 509 N.E.2d 411(1987)	6
<i>Monticello Insurance Company v. Hale</i> , 114 Fed.Appx. 198, 202 (6th Cir. 2004)	8
<i>Mouton v. Thomas</i> , 924 So. 2d 394, 395, 2005-926 (La. App. 3 Cir. 2006)	9
<i>Mt. Vernon Fire Ins. Co. v. Creative Housing Ltd.</i> , 88 N. Y. 2d 347, 668 N. E. 2d 404 (N. Y. App. 1996)	9, 12

<i>Nationwide Mut. Fire Ins. Co. v. Mr. & Mrs. K</i> (W.D. Pa. Dec. 13, 2005), No. Civ. A. 05-569, 2005 WL 3434081	9
<i>Northwest G.F. Mut. Ins. Co. v. Norgard</i> (N.D. 1994), 518 N. W.2d 179, 180	9
<i>Philbrick v. Liberty Mut. Fire Ins. Co.</i> 156 N.H. 389, 391, 934 A.2d 582 (2007)	9
<i>Prudential Prop. & Cas. Ins. Co. v. Emmert</i> , 10th Dist No. 96APE01-76, 1996 WL 362064 ...	8
<i>Prudential Prop. & Cas. Ins. Co. v. Russell</i> , 9th Dist. No. CIV.A. 16762, 1994 WL 709664	8
<i>Safeco Ins. Co. of Am. v. White</i> , 2009-Ohio-3718	6, 16
<i>Sauer v. Crews</i> , 140 Ohio St. 3d 314, 2014-Ohio-3655, 18 N.E. 3d 410	4, 6, 13, 14, 16, 20, 21
<i>Snyder v. Am. Family Ins. Co.</i> , 114 Ohio St.3d 239, 871 N.E.2d 574, 2007 -Ohio- 4004	5
<i>Sphere Drake Ins. Co. v. Ross</i> , 80 Ohio App.3d 506 609 N.E.2d 1284 (9th Dist. 1992)	8
<i>United Ohio Ins. Co. v. Myers</i> , 3rd Dist. No. 11-02-08, 2002-Ohio-6596	8
<i>West. Am. Ins. Co. v. Embry</i> (W.D. Ky. Apr. 25, 2005), No. 3:04CV-47-H, 2005 WL 1026185	9
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003 -Ohio- 5849	5, 6
<i>Westfield Ins. Co. v. Hunter</i> , 2011-Ohio-1818	6, 15
<i>Winnacunnet Cooperative School District v. National Union Fire Ins. Co. of Pittsburgh, PA</i> , 84 F. 3d 32 (1st Cir. 1996)	8, 17, 18, 20
<i>World Harvest Church v. Grange Mut. Cas. Co.</i> , 2013 -Ohio- 5707	2, 7, 13, 16
<i>Wright v. Harry Lee Larschied, individually and d.b.a., Harry's Hide-A-Way and Patio</i> , 2014-Ohio-3772	10, 11, 12, 14, 16-19, 21
<i>Zelda, Inc. v. Northland Ins. Co.</i> , 56 Cal. App. 4th 1252, 66 Cal. Rptr. 2d 356 (Cal. App. 1997)	9
Other Authorities	
Section 28, Article II, Ohio Constitution	5, 6
9 Couch on Ins. § 127:28	10

Serritella, Insurance Coverage Issues in Cases of Clergy Misconduct (1999), 39
Cath. Law. 55, 62 10

57A Am. Jur. 2d Negligence Section 142.....19

I. INTRODUCTION

Insurers often struggle to find language that addresses the coverages they want to provide to their insureds. But when they find language that is upheld as unambiguous by the vast majority of courts, such language should also be uniformly upheld by Ohio courts which consider the same language.

Here, Grange attempted to preclude coverage for any sort of abuse committed by insureds to whom Ohio children have been entrusted but Grange's attempt was thwarted by the Tenth District's decision to rewrite the insurance contract and insert policy language that not only was not intended by either party but also works a hazard to both parties because it makes it difficult for Grange to comply with Ohio public policy and also to charge a fair and honest premium for certain coverages in the policy.

Further, because the Tenth District's decision muddies the waters of what exactly is being covered and what is not, this decision works a hazard for insureds because they cannot predict what coverages they are purchasing and, in fact, may not be able to purchase certain coverages in the future that they need to conduct their business because these coverages will either be too expensive or insurers will refuse to write them.

II. STATEMENT OF THE CASE AND FACTS

OACTA adopts the statement of facts set forth in Grange's Brief and in the Tenth District's Opinion below and, for the sake of economy, will not repeat them here, except to point out that the jury found in favor of the Plaintiffs for causes of action related to Battery, Intentional Infliction of Emotional Distress and Negligent Supervision. Further, the Tenth District recognized that Grange's "Abuse" Exclusion was not ambiguous and applied to preclude coverage for damages awarded by the jury arising out of the battery and this will

be the focus of this Brief. See *World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 13AP-290, 2013-Ohio-5707, appeal allowed by *World Harvest Church v. Grange Mut. Cas. Co.*, 140 Ohio St.3d 1521, 20 N.E.3d 729, 2014-Ohio-5251 (Ohio Dec 03, 2014) (Table, NO. 2014-1161) at ¶ 55.

Further, in arriving at its Decision, the Tenth District recognized the following definitions of “abuse”:

The plain and ordinary meaning of the word “abuse,” which is not defined in the CGL and CU policies, is, as pertinent here, physical maltreatment. [Footnote omitted] Citing Black’s Law Dictionary 10 (9th Ed.2009), defining “abuse” as “[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury”; Webster’s Encyclopedic Unabridged Dictionary 7 (1996), defining “abuse” as “bad or improper treatment; maltreatment”; Discover Property & Cas. Ins. Co. v. Scudier, D.Nevada No. 2:12-CV-836 JCM (CWH), 2013 WL 2153079 (May 16, 2013) (stating that “abuse,” which was undefined in the insurance policies, meant according to the definition in the Oxford Dictionaries to “ ‘use or treat in such a way as to cause damage or harm’ ” or to “ ‘treat with cruelty or violence, especially regularly or repeatedly’ ”); and State v. Eagle Hawk, 411 N.W.2d 120, 123 (S.D.1987), fn. 5 (noting that “abuse” is defined in Webster’s New Collegiate Dictionary 5 (1980) as “improper use or treatment” and “physical maltreatment”).

Id. at ¶ 45.

And so the purpose of this Amicus Brief is to try to persuade the Court that the important insurance coverage issues being addressed here merit this Court’s careful consideration so that a rule of law may be crafted which provides certainty and guidance with respect to what have come to be known as “subject matter exclusions” (we will use this term to refer to Policy exclusions like the Abuse or Molestation Exclusion at issue here which exclude certain very defined and limited conduct and generally employ the phrase, “arising out of,” which defines the conduct and limits the exclusion’s application) and which form a part of many Ohio insurance contracts.

Because this issue is so vitally important to insurers and insureds alike, OACTA seeks to convince this Court that parties to an insurance contract should not have to endure protracted litigation and incur exorbitant attorney fees to find out what they agreed to when the insurance contract was entered into. Rather, it should be clear before the insured makes its first insurance premium payment whether particular conduct by an insured and its employees/other insureds is covered under the policy or not.

III. STATEMENT OF INTEREST

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a statewide organization of civil defense attorneys and employees of various Ohio businesses and organizations and, according to its current Mission Statement, is dedicated to promoting “fairness, excellence, and integrity in the civil justice system by providing resources and education to attorneys and others dedicated to the defense of civil actions.”

OACTA seeks to represent the interests of businesses and insurance companies by advocating on behalf of both interests in order to secure fair and impartial policy language in insurance contracts. For this reason, this Brief will address only Proposition of Law No. 1. OACTA has no opinion respecting Propositions of Law Nos. 2 and 3.

OACTA submits that the issue addressed by Proposition of Law No. 1 is just such an important issue for which OACTA’s input is particularly suited.

IV. LAW AND ARGUMENT

Proposition of Law No. 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

- A. **This Court should devise a consistent approach for interpreting subject matter exclusions that focuses on the damages and the particular conduct excluded by the policy language rather than ancillary concerns such as the negligence or mental states of the parties or the relationships between them.**

As a starting point, this Court determined recently in *Sauer v. Crews*, 140 Ohio St. 3d 314, 2014-Ohio-3655, 18 N.E. 3d 410 that some common sense is needed when courts review insurance policies and make law on coverage issues and that words and phrases within an insurance policy should be looked at within the context of the meaning of the whole policy.

In that case, which is also an appeal from the Tenth District, this Court considered a situation wherein the plaintiff’s decedent ran her car into a flatbed trailer being used for paving work. *Sauer v. Crews*, 140 Ohio St. 3d 314, 2014-Ohio-3655, 18 N.E. 3d 410, ¶ 2. The owner of the trailer sought coverage under a commercial general liability (CGL) insurance policy issued by Century Surety Company (“Century”). Century made the point that auto policies are designed to insure motor vehicles and trailers, not CGL policies and, in fact, the CGL policy issued by Century excluded coverage for autos and trailers.

The insured seized upon the word, “cargo,” in the policy language and tried to argue that this single word made the policy “ambiguous” and transformed an otherwise clear CGL

policy into an auto policy. *Id.* at ¶ 15. The trial court and the Tenth District agreed and found coverage under the CGL policy for what was otherwise auto coverage. *Id.* at ¶ 1.

This Court, however, did not fall into the trap and reversed, holding that, “[I]n determining whether a policy provision is ambiguous, courts must consider the context in which the specific language of the provision is used.” *Id.* Here, because the trailer “was not of the same subclass as the land vehicles identified in” the class of mobile equipment (mobile equipment was not subject to the exclusion), the trailer was excluded and “the precise definition of the word ‘cargo’ as used in that section is irrelevant to our analysis.” *Id.* at ¶ 23 (emphasis added).

Regarding the Abuse or Molestation Exclusion at issue here, Ohio law holds that insurers are constitutionally allowed to contract for whatever coverage they want as long as it is not contrary to public policy or prohibited by a statute. See e.g. *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 871 N.E.2d 574, 2007 -Ohio- 4004, at ¶ 24 (“Absent a specific statutory or common-law prohibition, parties are free to agree to the contract’s terms”); *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003 -Ohio- 5849, ¶¶ 10 and 11 (“The Ohio Constitution also protects the freedom of contract. ‘The general assembly shall have no power to pass . . . laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intentions of parties . . . by curing omissions, defects, and errors, in instruments . . . , arising out of their want of conformity with the laws of this state.’ **Section 28, Article II, Ohio Constitution.** . . . When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. Citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999), *Employers’ Liab. Assur.*

Corp. v. Roehm, 99 Ohio St. 343, 124 N.E. 223, syllabus (1919), and **Section 28, Article II, Ohio Constitution**. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. Citing *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411(1987), paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. Citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. Citing *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex.2000)”).

Which is why if an insurer like Grange does not want to provide coverage to a church or daycare (or World Harvest does not want to purchase such coverage) for conduct involving abuse or molestation of children on their premises, for whatever reason, it should be allowed to do so since nothing in the law prohibits such a contract.

Further, consistent with this Court’s recent jurisprudence in such cases as *Galatis* and *Sauer*, *supra*, and using common sense, where a “subject matter” exclusion seeks to preclude coverage for all bodily injury arising out of such abuse, the language should be upheld and not reinterpreted to find “loopholes” such as coverage for “vicarious liability” using reasoning from caselaw that was never meant to apply to cases involving “subject matter” exclusions. (Here, the Tenth District applied the reasoning from cases such as *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 913 N.E.2d 426, 2009-Ohio-3718 and *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 948 N.E.2d 931, 2011-Ohio-1818 -- neither of which considered the “Abuse or Molestation” Exclusion at issue here -- to carve out an

exception for “vicarious liability” where none was intended by the drafters of the policy language or expected by the insured).

OACTA would suggest that within the context of the Court’s recent jurisprudence, such subject matter exclusions should be interpreted to establish clear boundaries regarding the extent to which an insurer and insured are willing to go in order to provide certain coverages for agreed-upon premiums. Obviously the insurer needs to use language that makes sense to the average reader, but assuming the language in the subject matter exclusion is not overtly ambiguous (which is what the Tenth District recognized in *World Harvest* at ¶ 47 as far as the Grange policy language was concerned), such agreements should be upheld by the courts and this Court has here a remarkable opportunity to provide guidance and clarification regarding such subject matter exclusions.

B. A clear, precise rule by this Court regarding the future interpretation of subject matter exclusions will greatly enhance a more consistent interpretation of these important policy provisions.

Fortunately, the vast majority of courts which have considered such subject matter exclusions have properly interpreted them and find no coverage for such ancillary claims as negligent supervision, vicarious liability, and other related conduct by employees, volunteers and patrons of the named insured establishment. *See, e.g.:*

- *Essex Ins. Co. v. Mirage on the Water, Inc.*, 8th Dist. Cuyahoga No. 87507, 2006-Ohio-5023 (“The plain language of the endorsement to the policy excludes coverage for injuries such as those sustained by appellee because the actor’s intent is irrelevant”);
- *Carter v. Adams*, 173 Ohio App.3d 195, 2007-Ohio-4322, 877 N.E.2d 1015 at ¶33 (1st Dist.) (The assault-or-battery exclusion applies to any bodily injury arising out of an assault or battery. It does not matter, for example, how the assault or battery occurred or who may or may not have contributed to its occurrence);
- *Colter v. Spanky’s Doll House*, 2nd Dist. Montgomery No. 21111, 2006-Ohio-408 (holding that bar patron’s bodily injury claims arising out of a shooting were not covered under a similar “Assault or Battery” exclusion);

- *Monticello Insurance Company v. Hale*, 114 Fed.Appx. 198, 202 (6th Cir. 2004) (same);
- *Sphere Drake Ins. Co. v. Ross*, 80 Ohio App.3d 506 609 N.E.2d 1284 (9th Dist. 1992) (Interpreting similar “Assault or Battery” exclusion and stating that, “Under this type of exclusionary clause, Sphere does not have to show that Ross’ injuries were expected or intended by Froggies. Sphere has to show only that the injuries resulted from an assault and battery perpetrated by ‘the insured, his employees, patrons or any other person’”);
- *Prudential Prop. & Cas. Ins. Co. v. Russell*, 9th Dist. No. CIV.A. 16762, 1994 WL 709664, at * 1-2 (enforcing exclusion for damage “which results from the actual or attempted: (1) abuse, molestation, exploitation, assault or other mistreatment of any person; or (2) rape, sexual assault, or other sexual abuse of any person”);
- *Prudential Prop. & Cas. Ins. Co. v. Emmert*, 10th Dist No. 96APE01-76, 1996 WL 362064, at *1-2 (same);
- *United Ohio Ins. Co. v. Myers*, 3rd Dist. No. 11-02-08, 2002-Ohio-6596, at ¶¶27-28 (enforcing exclusion for coverage for damage arising out of the actual or threatened physical or mental abuse or sexual molestation by anyone of any person while in the care, custody or control of an insured, or by the negligent employment, supervision, or reporting to the proper authorities, or failure to report, or any person for who the insured is or ever was legally responsible”).

For a sample of non-Ohio cases please *see e.g.*:

- *Winnacunnet Cooperative School District v. National Union Fire Ins. Co. of Pittsburgh, PA*, 84 F. 3d 32 (1st Cir. 1996) (see discussion *infra*);
- *Georgacarakos v. United States of America*, 420 F. 3d 1185, 1187 (10th Cir. 2005) (discussing an “arising out of” clause in a federal statute related to the U.S. Postal Service, comparing this clause and the resulting analysis with similar clauses in insurance cases, and observing that in the insurance context, “The majority rule is that policy language excluding the losses arising out of some event excludes losses caused by that event even when they are also caused by other events”);
- *Farmer v. Allstate Ins. Co.* (C.D. Cal. 2004), 311 F.Supp.2d 884, 887 (enforcing exclusion for damages arising out of sexual molestation or physical or mental abuse “inflicted upon any person by or at the direction of an insured person, an employee of an insured person or any other person involved in any capacity in the home day care business”);
- *Atlantic Cas. Ins. Co. v. Harris*, S.D. Ill. No. 08-cv-647, 2010 WL 624198, *7 (Feb. 18, 2010) (“The Exclusion encompasses ‘any claims or “suits” for “bodily injury” . . . arising in whole or in part out of: a) the actual or threatened assault or battery whether caused by or at the instigation or direction of any insured, his employees, patrons or any other person; and b) the failure of any insured or anyone else for whom any insured is legally responsible to prevent or suppress assault or battery . . .”);

- *West. Am. Ins. Co. v. Embry* (W.D. Ky. Apr. 25, 2005), No. 3:04CV-47-H, 2005 WL 1026185, at *1-4 (enforcing exclusion for damage arising out of sexual molestation or physical or mental abuse);
- *Nationwide Mut. Fire Ins. Co. v. Mr. & Mrs. K* (W.D. Pa. Dec. 13, 2005), No. Civ. A. 05-569, 2005 WL 3434081, at *2 (enforcing exclusion for damages that "result[] from acts or omissions relating directly or indirectly to sexual molestation, physical or mental abuse, harassment, including sexual harassment, whether actual, alleged or threatened");
- *Harper v. Gulf Ins. Co.*, 2002 WL 32290984 (D. Wyo.) (Abuse or Molestation exclusion upheld and recognizing that, "[n]o court that has interpreted this exclusion has found it ambiguous");
- *Zelda, Inc. v. Northland Ins. Co.*, 56 Cal. App. 4th 1252, 66 Cal. Rptr. 2d 356 (Cal. App. 1997) (Disagreeing that a plea of self-defense could negate the "Assault or Battery" exclusion's effect, reasoning that even if a plea of self-defense negated the intent element of the battery, the plea itself automatically admits of an "assault" component because it necessitates the fact that the batterer was first assaulted by the plaintiff, thereby invoking the Endorsement's "Assault" exclusion);
- *Mouton v. Thomas*, 924 So. 2d 394, 395, 2005-926 (La. App. 3 Cir. 2006) (" While self-defense is a valid defense to a battery, in that it provides justification for the act, the assertion of the claim of self-defense does not mean that a tort, i.e., a battery, as is alleged in this case, did not occur. . . . [T]herefore, under the facts of this case, whether Boxie committed the act in self-defense is not a genuine issue of fact that is material to the question of whether an assault and battery occurred, or to the consequential question of whether Scottsdale's assault and battery exclusion applies");
- *Hingham Mut. Fire Ins. Co. v. Smith* (2007), 69 Mass. App. Ct. 1, 3-4, 865 N.E.2d 1168 (enforcing exclusion for damages that arise out of the actual, alleged or threatened sexual molestation of "a person");
- *Houg v. State Farm Fire & Cas. Co.* (Minn. App. 1994), 509 N. W.2d 590, 593 (enforcing exclusion for "liability resulting from any actual or alleged conduct of a sexual nature");
- *Northwest G.F. Mut. Ins. Co. v. Norgard* (N.D. 1994), 518 N. W.2d 179, 180 (enforcing exclusion for damages arising out of sexual molestation or physical or mental abuse "inflicted upon any person by or at the direction of an insured, an insured 's employee or any other person involved in any capacity in the day care enterprise");
- *Philbrick v. Liberty Mut. Fire Ins. Co.* 156 N.H. 389, 391, 934 A.2d 582 (2007) (enforcing exclusion for damages arising out of sexual molestation or physical or mental abuse);
- *Mt. Vernon Fire Ins. Co. v. Creative Housing LTD.*, 88 N.Y. 2d 347, 668 N.E. 2d 404 (N.Y. App. 1996) ("If no cause of action would exist 'but for' the assault, it is immaterial whether the assault was committed by the insured or an employee of the insured on the one hand, or by a third party on the other. Moreover, the language of the exclusion clause provides that there will be no coverage for any

suit based on assaults 'whether or not committed by or at the direction of the insured.' That language encompasses claims based on assault committed by employees of insured or unrelated third parties. Coverage is excluded on either ground");

- *See also* the following commentaries and legal journals: **9 Couch on Ins. § 127:28** ("Coverage for sexually-related claims will be excluded if the policy language is the clear and unambiguous language"); **J. Serritella, Insurance Coverage Issues in Cases of Clergy Misconduct (1999), 39 Cath. Law. 55, 62** ("[S]ome policies expressly exclude coverage for claims 'arising out of abuse or molestation . . . While such a policy provision will, of course, preclude any coverage for clergy committing misconduct, claims for negligent hiring, supervision or retention of the abuse are also commonly excluded as "arising from" the act of abuse . . .").

While this list is certainly not exhaustive, it gives the Court an idea of how many other judges have considered such language and have upheld the exclusions.

But the problem still persists even in Ohio, and there is perhaps no better example of the need for a concerted effort to systematically and uniformly approach these types of exclusions than three cases recently decided by the Third District Court of Appeals, all of which involve the same insured (a tavern in Lima), the same insurance policy (issued by The Cincinnati Specialty Underwriters Ins. Co., or "CSU"), but three separate "bar fights" in that tavern. See *Hawk v. Stocklin*, 3d Dist. Allen No. 1-13-56, 2014-Ohio-2335; *Wright v. Larschied*, 3d Dist. Allen No. 1-14-02, 2014-Ohio-3772; and *Cincinnati Specialty Underwriters Ins. Co. v. Larschied*, 3d Dist. Allen No. 1-14-01, 2014-Ohio-4137.

In all three of these cases, the trial judges from Allen County Common Pleas courts upheld the exclusion and found no coverage, awarding summary judgment to the insurer. See *Hawk* at ¶11; *Wright* at ¶ 13; and *Cincinnati* at ¶ 5. The Third District affirmed summary judgment in two of the cases but amazingly overruled the third on the basis that since the tortfeasor pled self-defense, the subject-matter "Assault or Battery" Exclusion did

not preclude coverage because the self-defense component “negated” the “battery” element of the exclusion. See *Hawk* at ¶¶ 22 and 29.

The exclusion at issue in all three cases stated, in relevant part, as follows:

“This insurance does not apply to ‘bodily injury,’ ‘property damage’ or ‘personal and advertising injury’ arising out of . . . an actual or threatened assault or battery whether caused by or at the instigation or direction of any insured, their employees, patrons or any other person, . . . the failure of any insured or anyone else for whom any insured is legally responsible to prevent or suppress assault or battery; or . . . the negligent . . . employment . . . investigation or reporting or failure to report any assault or battery to proper authorities . . . supervision . . . training . . . [or] retention . . . of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by” the provisions of the preceding paragraph.

See e.g. *Wright* at ¶ 18.

Granting summary judgment in favor of CSU in all three cases, the trial court found that, “The assault-and-battery exclusion in the endorsement obviated any duty on the part of the insurer to defend against or to cover any damages that arose from this altercation at Harry’s Hide-A-Way.” *Id.* at ¶ 13. This would include, as a matter of law, no duty to defend as a result of any conduct that led to or resulted from the assault or battery and any damages that arose out of the assault or battery.

Comparing this analysis to the Third District’s analysis in *Hawk*, wherein the court overly scrutinizes what constitutes an “assault” or “battery” and improperly rationalizes that whether particular conduct constitutes an “assault” or “battery” (neither of which terms were defined in the insurance policy and both of which, the court agrees, are defined in dictionaries) necessarily depends on “a specific legal connotation” which itself depends on whether the tortfeasor’s use of force was “wrongful under the law.” *Hawk* at ¶29.

OACTA submits that this is the wrong type of analysis. Rather, the approach that must be used is a “but for” test to determine coverage in such cases: If the excluded act (of

assault or battery) had not occurred, there would be no coverage under the policy for any type of legal theory, including affirmative defenses, vicarious liability, or ancillary claims. See e.g. *Mt. Vernon Fire Ins. Co. v. Creative Housing Ltd.*, 88 N. Y. 2d 347, 668 N. E. 2d 404 (N. Y. App. 1996).

Under the “but for” test, the question asked at the outset is whether “but for” the occurrence of the excluded conduct, would the questioned liability (eg. vicarious liability of the Church) have resulted? Another way of phrasing the question is whether the civil lawsuit would have been filed if the conduct excluded in the policy exclusion would not have occurred. If the answer is no, then the exclusion applies to preclude a duty to defend or indemnify against any allegations in that complaint, whether for bodily injury or property damage, negligent supervision, vicarious liability for intentional infliction of mental distress damages, etc. As the Third District stated in *Wright* at ¶ 29, “When the allegations in a claimant’s complaint make clear that the cause of the injuries for which the claimant is seeking damages is an assault or battery, coverage under the CGL policy is barred because the excluded act of assault and battery caused the claimant’s injuries. . . . In other words, based on the CGL policy’s broad exclusion of any bodily injury arising out of an actual or threatened assault or battery, whether the insured failed to prevent or suppress an assault or battery is irrelevant if the claimant is attempting to recover for injuries caused by the assault or battery.” Citing *Colter* at paragraph 41, *supra*.

Unfortunately, however, some courts use an “except for” test (the coverage exclusion applies “except for” where some legal theory like self-defense or vicarious liability appears to create an exception to the exclusion) instead, which misconstrues the

intent of the contract itself and winds up turning CGL policies into auto policies, homeowner policies into business policies, and defeats the purpose of the policy language.

This is what the Tenth District did in *Sauer v. Crews* (See *Sauer v. Crews*, 2012 -Ohio-6257, appeal allowed by *Sauer v. Crews*, 135 Ohio St.3d 1458, 988 N.E.2d 578, 2013-Ohio-2285 (Ohio Jun 05, 2013) (Table, NO. 2013-0283) and judgment reversed by *Sauer v. Crews*, 140 Ohio St.3d 314, 18 N.E.3d 410, 2014-Ohio-3655 (Ohio Sep 02, 2014) (No. 2013-0283)) when it attempted to turn a CGL policy into an auto policy to create coverage where none existed, and what it did here in *World Harvest* when, instead of using a “but for” test to say that this policy covers all conduct “but for” [child] abuse or molestation, it instead applied its own test to say that this policy excludes all abuse or molestation “except for” intentional infliction of emotional distress damages for which the Church is vicariously liable. See *World Harvest*, 2013-Ohio-5707, at ¶¶ 51-53.

The *Sauer* and *Hawk* appellate courts are not alone in the overwhelming temptation to rewrite insurance contracts to reach a result not intended by the drafters of the policy and which does not fit in with the overall insuring purpose of the policy. But as this Court recognized in *Sauer*, Ohio courts must not fall into the temptation of myopically honing in on only certain parts of a policy or certain language within the policy when trying to interpret what the policy is attempting to cover.

The point here is that when it comes to “subject matter exclusions” like the Abuse or Molestation Exclusion now before this Court, such ancillary concerns as the state of mind of the abuser, number of prior incidents at the insured location, which party was the first aggressor, vicarious liability issues between the insured and its employees/volunteers, and

whether the insured pleads self-defense or some other affirmative defense, should not matter and most courts, including most Ohio courts, have recognized this.

As the Third District recognized in *Wright*, “The Wrights in their suit could have asserted any claim they wished against Larschied, and it still would have been excluded by the assault-or-battery exclusion so long as the Wrights were attempting to recover for injuries arising out of assault or battery.” Hawk’s self-defense “except-for” analysis therefore is an anomaly because, again, such a “rewrite” of the policy is unnecessary and unsupported by the policy language.

Fortunately, cases like *Hawk* and *Sauer* seem to be anomalous exceptions rather than the rule. Still, guidance by this Court will go a long way to promote consistency in the interpretation and enforcement of such exclusions.

C. **Overwhelming caselaw from non-Ohio courts and writings from academic journals all conclude that such subject matter exclusions should be applied according to the language in the insurance contract, not based on ancillary concerns irrelevant to the contract analysis.**

From a drafter’s perspective, courts often cite to legal and professional journals authored by such organizations as the International Risk Management Institute (“IRMI”) and other sources to show that the intent of the Abuse or Molestation Exclusion is to eliminate coverage for an insured organization’s liability in connection with the excluded conduct (i.e. abuse or molestation). See e.g. IRMI’s discussion of the Abuse or Molestation Clause in *Harper v. Gulf Ins. Co.*, 2002 WL 32290984 (D. Wyo.), at fn. 9.

IRMI’s literature on this subject makes clear that CGL insurance policies generally provide coverage for vicarious liability of insureds and that the policy’s more general “Intentional Acts” exclusion is designed to not interfere with such coverage.

On the other hand, when a subject matter exclusion like the Abuse or Molestation Exclusion is added to the CGL policy, the exclusion eliminates coverage for any injury arising out of an abuse or molestation, including vicarious liability claims and, as IRMI explains, “other related claims that are sometimes brought against an organization as alternative grounds of action when an incident of abuse or molestation has occurred,” such as claims for negligent hiring of employees or negligent supervision claims (which IRMI recognizes as “different from purely vicarious liability claims”).

In *Crow v. Dooley*, 2012-Ohio-2565 (3rd Dist.), the Third District considered an Abuse or Molestation Exclusion and admirably concluded, consistent with the purpose of the Exclusion, that the Exclusion should be upheld under a “but for” analysis adopted by other courts as illustrated above.

In *Crow*, the Third District distinguished this Court’s *Westfield Ins. Co. v. Hunter*, 2011-Ohio-1818, decision (which dealt primarily with the interpretation of “arising out of” language where the predicate following that particular phrase creates a very narrow coverage application—i.e. if the policy only covers “bodily injury” “arising out of” a “premises . . . owned by an insured . . . that is not an insured location,” then the exclusion does not extend to bodily injury arising out of a named insured’s failure to properly supervise his grandchildren) and held that the Sexual Molestation exclusion in that policy excluded coverage (both duty to defend and to indemnify) for a daycare operator and her son against allegations that the son sexually abused a child in the daycare.

The Third District in its *Crow* analysis properly recognized that, “According to the plain language of this provision, the policy excludes coverage for all bodily injury arising out of acts of sexual molestation, irrespective of the mental state of the defendant.” See

Crow, 2012-Ohio-2565 at ¶15. One wonders why the mental state of the defendant is not an issue as far as coverage is concerned in *Crow* but it was an issue in *Hawk*. Even more quizzical is how the Tenth District in *World Harvest* could use vicarious liability as the *deus ex machina* when the Third District in *Crow* was unfazed by a “respondeat superior” charge in the Complaint it was considering there. Further, the *Crow* Court went out of its way to distinguish this Court’s decision in *Safeco Ins. Co. of Am. v. White*, 2009-Ohio-3718 (wherein this Court held that because of the severability clause in most homeowners policies, an “Intentional Acts” exclusion in such policies will apply separately to a secondary tortfeasor for coverage for an intentional act (eg. negligent supervision) from its application to another insured (i.e. the primary tortfeasor) for allegations of physical assault against the other insured) and held that such an analysis should not apply to a subject matter exclusion like the Abuse or Molestation Exclusion before it.

The analysis in *Crow* is instructive for our purposes here: “In the instant case, any language regarding the necessary knowledge or intent of the insured is remarkably absent from the Sexual Molestation exclusion. Therefore, the Sexual Molestation exclusion precludes coverage for any bodily injury arising out of sexual molestation **without regard to** the specific causal connection to the molester or the requisite mental state of the tortfeasor.” *Id.* at ¶20 (emphasis in the original).

Thus, while this Court’s conclusion in *Hunter* is perfectly logical, the Third District’s *Hawk/Wright/Dooley* analysis, the Tenth District’s *Sauer* analysis, and the Tenth District’s *World Harvest* analysis now on appeal before this Court cannot be supported on any legal, contractual or logical basis.

Again, Ohio insurers and insureds look to this Court to provide some needed guidance and OACTA submits that when subject matter exclusions are properly included within insurance contracts, such language should be read to exclude the conduct following the phrase, “arising out of” and, in the words of the *Wright* and *Crow* courts, should be found to apply “to any bodily injury arising out of” the excluded conduct, no matter “how the [conduct] occurred or who may or may not have contributed to its occurrence” and “irrespective of the mental state of the defendant.”

D. Other state and federal courts have overwhelmingly upheld subject matter exclusions and have applied them uniformly to preclude coverage for the excluded conduct.

In *Winnacunnet Cooperative School District v. National Union Fire Ins. Co. of Pittsburgh, PA*, 84 F. 3d 32 (1st Cir. 1996), the First Circuit interpreted a National Union insurance policy which contained exclusions for, inter alia, “any claims arising out of . . . assault or battery”; and “any claim arising out of bodily injury to . . . or death of any person.”

The facts of that case were rather bizarre. National Union insured a school district and school administrative unit (we will refer to these insureds collectively as “Winnacunnet”) under a “School Leaders Errors and Omissions” policy. 84 F. 3d at 34.

Winnacunnet was sued for negligently hiring, training and supervising a school media director, Pamela Smart (“Smart”), when Smart convinced several of her students to murder her husband because she was having an affair with one of the students. Another student, Cecelia Pierce, a former student intern who had known about the murder plot before it was carried out but who assisted the authorities in securing information leading to Smart’s arrest after the murder occurred, and the boys who murdered Mr. Smart along with their parents, sued Winnacunnet under various legal theories, including negligence in

hiring, training and supervision of Smart, claiming that Winnacunnet's alleged negligence caused their "loss of education, loss to past, present and future earnings, loss of reputation and standing in the community, and mental anguish." *Id.* at 33.

Winnacunnet filed an insurance claim with National Union, which denied any duty to defend or indemnify based on the aforementioned exclusions.

Upholding summary judgment in favor of National Union, the First Circuit focused solely on the damages alleged in the civil complaint and concluded that, "If the underlying Plaintiffs cannot prevail on their negligence claims without showing how the murder of Gregory Smart affected them, then their claims must 'arise out of' the excluded acts of assault, battery, bodily injury and death." *Id.*

Thus, like the *Wright* Court, the First Circuit engaged in a proper coverage analysis under this contract language by placing the emphasis where it belongs – i.e. on the damages and the excluded conduct. This case is instructive for our purposes because, although this is an "older" exclusionary policy, the exclusion does not limit its application only to "an" or "any insured," but rather, like the exclusion now before this Court, broadens its application to include "any claim" arising out of the bodily injury to or death of "any person." Thus, like the Grange exclusion here, the exclusion in *Winnacunnet* was not limited to "an insured" but rather applied to "any person" and there was no need for plaintiffs to engage in artful pleading to try to qualify or disqualify the tortfeasor as an "insured."

The school argued that the exclusions did not apply because the underlying complaint alleged only negligence and did not even mention the death of Gregory Smart. Therefore, recovery under the civil cause of action was not tied to and did not depend upon

the death of Mr. Smart, but rather solely on the negligence of Winnacunnet's actions in hiring, training and supervising Pamela Smart.

The First Circuit disagreed, concluding that if the plaintiffs could not prevail on their negligence claims in the absence of any general reference to the murder of Gregory Smart and how the murder affected their claims, then their claims must 'arise out of' the excluded acts of assault, battery, bodily injury and death. Further, the court was seemingly impressed by the testimony of many of the plaintiffs in the case, who admitted that "if Gregory Smart had not been murdered, [they] would not have sued." *Id.* (Cecilia Pierce testified that "if Gregory Smart had not been murdered, [I] would not have sued." One of the boy plaintiffs testified that, "[i]f I never got caught for killing Greg Smart, I would have never brought a lawsuit").

Thus this court recognized, like the Third District in *Wright*, that the proper focus should be on the damages in reference to the policy's excluded conduct or, as some courts have analyzed it, on whether or not the plaintiffs would have filed a civil suit had the excluded conduct never occurred. *Id.* See also **57A Am. Jur. 2d Negligence Section 142**, at 202-03 (1989).

Further, as to the cornucopia of ancillary claims the plaintiffs and the insured tried to argue in the case in order to create coverage, including one for "vicarious liability," the Tenth Circuit rejected all of these as well.

Likewise here, OACTA submits that the Ohio Tenth District made a critical error in its coverage analysis by over-analyzing whether the primary tortfeasor (Vaughan) was acting within or without the scope of his employment at the time of the act which was the

impetus for the subject lawsuit and by losing its analytical focus in the face of the Church's trial strategy (admitting Vaughan was an employee at the time of the abuse).

Rather, as the First Circuit recognized, where the insurance contract states that there is no coverage for, "Bodily injury' or 'property damage' arising out of abuse or . . . sexual molestation," that should be enough for the Tenth District. No need to get into the mental state of the primary tortfeasor, the negligence of the secondary tortfeasor, or anything regarding the relationship between the two (i.e. respondeat superior and vicarious liability issues). All of these are **IRRELEVANT** as far as the contract (i.e. "coverage") analysis is concerned.¹

Rather, the focus needs to be on the insurance policy language itself and only that, which directs the inquiry to the damages and the excluded conduct.

Failure to place the emphasis where it belongs, as the First Circuit recognized, results in a misinterpretation of the insurance contract and can even result in an absurd result: Under a misguided policy analysis the estate of Gregory Smart would clearly be barred from coverage under the school's liability insurance policy while his murderers would be entitled to coverage! See discussion in *Winnacunnet* at 84 F.3d at 38. Thus, by over-analyzing irrelevant aspects of the claim, such as whether the primary tortfeasor is acting within or without the scope of his employment when he commits the abuse, etc., the courts arrive at a coverage destination never intended by the parties when they entered into the contract.

¹ "Irrelevant" is the same word used by this Court in *Sauer*. See 2014-Ohio-3655 at ¶30 ("Because we conclude that the trailer does not belong to the subclass of land vehicles set forth in Section V(12) of the CGL policy, the precise definition of the word "cargo" as used in that section is irrelevant to our analysis") (emphasis added).

Certainly, this is not the result intended by the policy language and not what the courts want to promote as public policy in Ohio.

V. CONCLUSION

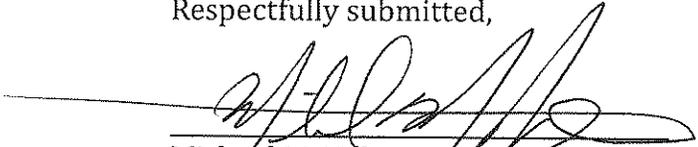
In conclusion, Grange, through its policy language, sought to be consistent with Ohio public policy and Ohio caselaw by including an exclusionary endorsement in its policy provided to church daycares that would preclude coverage for bodily injury arising out of any abuse or molestation by anyone connected to the insured while a child was in the care, custody or control of the daycare providers.

Rather than being thwarted in its endeavor, Grange should be commended for promoting Ohio public policy through its insurance program. Further, affirming the Tenth District's decision here would actually promote an injustice by increasing coverage for more heinous conduct by an insured's employees or volunteers, a result certainly not intended by the policy's drafters.

Finally, consistent with its mission statement, OACTA encourages the Court to adopt a rule which would eliminate the confusion that is evident in the Third District's *Hawk/Wright/Crow* analysis, the Tenth District's *Sauer* analysis, and which could be applied to similar "subject matter" exclusions in the future in order to promote "fairness, excellence, and integrity in the civil justice system" going forward.

This would benefit all Ohio insurers and insureds.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Curiae Brief of the Ohio Association of Civil Trial Attorneys in Support of Appellants was served via e-mail pursuant to S.Ct.Prac.R. 3.11(B)(1) and by regular U.S. Mail, postage prepaid, this 6th day of February, 2015, on the following:

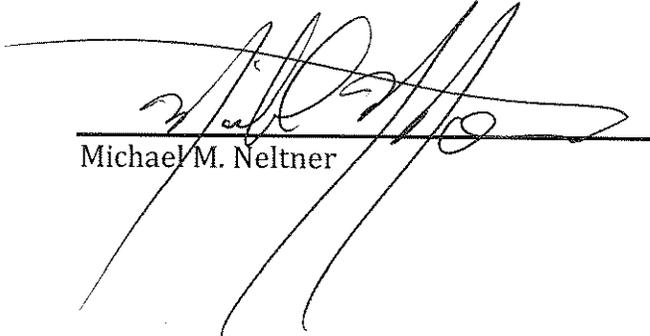
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