

ORIGINAL

IN THE SUPREME COURT OF OHIO

WORLD HARVEST CHURCH,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14-1161
	:	
v.	:	
	:	
GRANGE MUTUAL CASUALTY COMPANY,	:	On Appeal from the Tenth Appellate
	:	District, Franklin County, Ohio
Defendant-Appellant.	:	(C.A. Case No. 13AP-290)

**MERIT BRIEF OF AMICI CURIAE
OHIO INSURANCE INSTITUTE AND PROPERTY CASUALTY
INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF
APPELLANT GRANGE MUTUAL CASUALTY COMPANY**

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STATEMENT OF INTEREST OF AMICI CURIAE

The issues raised by this appeal are extremely important to amici curiae Ohio Insurance Institute (“OII”) and Property Casualty Insurers Association of America (“PCI”) and to their members.

The Court of Appeals held that a commercial general liability insurance policy purchased by appellee World Harvest Church (“WHC”) from appellant Grange Mutual Casualty Company (“Grange”) covers WHC’s vicarious liability for damages awarded against a WHC employee who intentionally abused a student – even though the insurance policy limits coverage to liability for accidental injuries and expressly excludes coverage for abuse. The Court of Appeals compounded that error by holding that the insurance policy also covers attorney fees and post-judgment interest awarded in connection with damages that were not covered by WHC’s insurance policy. OII and PCI support appellant Grange in asking the Court to reverse these rulings, which are inconsistent with the terms of the policy. As explained below, all policyholders ultimately pay the price when coverage is extended to risks that neither they nor the insurer intended to cover.

OII and PCI are uniquely qualified to provide this Court with a broad perspective on the principles of insurance law relevant to this appeal, as well as practical insight into the negative consequences for insurers and insureds alike if the ruling below is not reversed. OII is the professional trade association for property and casualty insurance companies in the State of Ohio, and its members include dozens of domestic insurers as well as reinsurers and foreign insurance companies. OII provides a wide range of services to its members and to the public, media, and government officials in three primary areas: education and research, legislative and regulatory affairs, and public information. In connection with these activities, OII closely

monitors judicial decisions in Ohio that address important issues of insurance law, and it has participated as an amicus in several landmark insurance cases that have been decided by this Court.

PCI represents the broadest cross-section of insurers of any national trade association in the United States, with nearly 1,000 member companies. Its members write over \$183 billion in annual premiums, which is more than one-third of this country's property casualty insurance. In Ohio, PCI members insure 37.6 percent of the commercial property and casualty insurance market and 39.8 percent of the personal lines market. PCI actively promotes and protects the viability of a competitive private insurance marketplace for the benefit of consumers and insurers by, *inter alia*, appearing as amicus curiae in especially important insurance litigation in appellate courts around the country.

Amici are particularly concerned about the Court of Appeals' ruling in this case because it fails to recognize the effect of a subject-matter exclusion on the coverage provided by an insurance policy. Courts have long struggled with the question of whether injuries are "accidental," and thus within the coverage of a liability insurance policy, or whether they are "expected" or "intended," and thus outside the scope of coverage. WHC's policy limits coverage to accidental injuries, but it also includes an ISO Abuse or Molestation Exclusion. This is a standardized and widely used subject-matter exclusion that expressly excludes coverage for injuries arising from specified physical conduct – abuse or failure to prevent abuse – without regard to psychological intentions or expectations.

Insurers have increasingly used subject-matter exclusions in their insurance policies because they streamline the resolution of coverage disputes. Policyholders, insurers, and courts know whether a policy provides coverage for an injury by simply examining the physical

conduct that led to the injury, without parsing anyone's motivations or legal relationships. By clearly defining the scope of the risks that are covered by the policy, the Abuse or Molestation Exclusion allows policyholders to exclude coverage they do not want or need and pay premium rates that reflect the limited coverage.

The ISO Abuse or Molestation Exclusion excludes coverage of liability for all injuries arising from physical acts of abuse. Since it was adopted in 1987, this subject-matter exclusion has been enforced according to its plain terms by every court that has considered it. *See Harper v. Gulf Ins. Co.*, D. Wyo. No. 01-CV-201, 2002 U.S. Dist. Lexis 24492, at *23, *30 (holding that the ISO Abuse or Molestation Exclusion “makes it crystal clear that no coverage is provided to employers” for injuries arising from abuse; “[n]o court that has interpreted this exclusion has found it ambiguous”). In this case, there is no need to evaluate the intentions of WHC or its employee, or the nature of their legal relationship, in order to determine that the policy provides no coverage for liability for damages arising from the physical abuse of the student.

The Court of Appeals properly recognized that the Abuse or Molestation Exclusion in WHC's insurance policy precluded coverage of its employee's liability for abuse and its own liability for negligent supervision of the employee. However, the “crystal clear” language in the policy excluding coverage for injuries arising from abuse was ignored by the Court of Appeals in one important respect. It held that the policy covers WHC's vicarious liability for the emotional distress that the employee inflicted on the abused student. As this case proves, these damages can be very high in cases involving intentional abuse of a child – a risk that the parties expressly excluded from coverage and for which WHC paid no premium to Grange.

The Court of Appeals erroneously relied upon a previous ruling by this Court to conclude that WHC's vicarious liability for intentional acts of its employee is covered by the insurance

policy. In *Safeco Ins. Co. of America v. White*, 122 Ohio St.3d 562, 2009 Ohio 3718, 913 N.E.2d 426, the parties' insurance policy limited coverage to accidental injuries and excluded injuries arising from intentional acts. The Court held that the policy did not cover intentional acts of abuse by the insured's son but did provide coverage for the insured's own unintentional conduct – negligent supervision – that was a contributing cause of the injuries.

The Court of Appeals in the present case went far beyond the limited facts and ruling in *Safeco* when it found coverage of WHC's vicarious liability for injuries arising from intentional abuse. That case did not involve vicarious liability; the insured's liability was solely for its own negligence in contributing to the injuries. It is inconceivable that WHC, Grange, or any other parties to insurance policies who limit coverage to liability for accidental injuries would simultaneously agree to an unwritten exception to that limitation if the liability happens to be vicarious rather than direct. In either event, the liability is for injuries arising from intentional conduct that is expressly excluded by the policy. An insurance provision that excludes coverage of liability for intentional injuries necessarily excludes coverage of all liability for intentional injuries, whether the liability is direct or vicarious.

Moreover, the Abuse or Molestation Exclusion in WHC's policy was not in the policy that was before this Court in *Safeco, supra*. The Court therefore approached the question of whether the insured's negligence in not preventing the injuries was covered by the policy from the perspective of the insured. There is no need to undertake that analysis and evaluate the insured's intentions and expectations about the injuries in the present case because the Abuse or Molestation Exclusion is triggered by physical abuse, not by psychological motivations. WHC and Grange agreed to exclude coverage of liability for all injuries arising from physical abuse, which necessarily excludes coverage of vicarious liability for those injuries.

In addition to clarifying the scope of coverage, subject-matter exclusions also allow insurers and insureds to tailor insurance policies to meet the special liability and financial needs of a business. The standardized Abuse or Molestation Exclusion is often used by churches, schools, hospitals, and other institutions that are responsible for the care or custody of others, while the standardized Assault and Battery Exclusion is available to entertainment venues, bars, and other businesses where people socialize. These subject-matter exclusions allow institutions and businesses to limit coverage for the specified risks and pay premium rates commensurate with that limited risk. Ohio should endorse this approach and follow other states in encouraging this increased flexibility and niche pricing.

Insurance makes modern life possible by spreading risks of losses that an individual or business could not bear alone. If a court expands the coverage of an insurance policy by interpreting its provisions to cover risks that the parties intended to exclude, as the Court of Appeals did in this case, the premium that the insured paid for the insurance no longer corresponds to the risks of loss that the insurer is required to indemnify. In other words, the insurer must pay losses for which the insured paid no premium. This ultimately requires an adjustment in the rates that other policyholders must pay for the judicially expanded coverage, even though the policyholders do not want or need that coverage.

The resulting uncertainty, inefficiency, and unnecessary costs can be prevented if courts enforce the clear language of insurance policy provisions. Subject matter exclusions make the scope of coverage clear to everyone and should be enforced according to their terms.

The issues raised by this appeal are thus extremely important to amici OII and PCI. An insurance policy that excludes coverage of liability for injuries caused by intentional conduct necessarily excludes coverage of direct and vicarious liability for those injuries. This Court's

decision in *Safeco, supra*, addressed the insured's negligence liability, not vicarious liability for intentional conduct, and it does not support the ruling below. OII and PCI therefore support appellant Grange in this appeal and ask the Court to reverse that ruling.

STATEMENT OF FACTS

The few facts that are relevant to this appeal are not complicated. In a previous action, Michael and Lacey Faieta sued appellant World Harvest Church ("WHC") and one of its pre-school teachers, Richard Vaughn, and alleged that Vaughn had intentionally abused their son. The jury returned a verdict in favor of the Faietas and awarded substantial compensatory and punitive damages after finding that: (1) Vaughn committed a battery; (2) Vaughn "and/or" WHC intentionally inflicted emotional distress; and (3) WHC negligently supervised Vaughn.

WHC then filed the present action against appellant Grange Mutual Casualty Company ("Grange") and sought indemnification for the damages under its commercial general liability and commercial liability umbrella insurance policies. The relevant provisions of both policies are nearly identical, and they are referred to hereafter collectively as "the policy." Both limit coverage to liability for accidental injuries and include a standard ISO Abuse or Molestation Exclusion that expressly excludes coverage of liability for injuries caused by acts of abuse or negligent supervision. The trial court nevertheless held that the policy covers all of the Faietas' compensatory damages (*i.e.*, the damages awarded against Vaughn for intentional battery, the damages awarded against Vaughn and WHC for intentional infliction of emotional distress, and the damages awarded against WHC for negligent supervision of Vaughn). The trial court also held that the policy covers the attorney fees and post-judgment interest awarded in connection with the damages, but it found that the policy does not cover the punitive damages awarded against WHC and Vaughn.

Grange and WHC both appealed, and the trial court's judgment was affirmed in part and reversed in part. First, the Court of Appeals considered the insuring language of the Grange policy, which limits coverage to liability for injuries caused by an "accident." (CGL Form, Suppl. at 14, 27.) It held that this precludes coverage of Vaughn's liability for intentional battery and of Vaughn's and WHC's liability for intentional infliction of emotional distress. However, it found that this language does not exclude coverage for WHC's vicarious liability for Vaughn's intentional infliction of emotional distress.

Second, the Court of Appeals considered the Abuse or Molestation Exclusion of WHC's insurance policy, which excludes coverage for injuries "arising out of . . . abuse" or "negligent . . . supervision" of anyone who commits abuse. (CGL Form, Suppl. at 35, 46.) It held that this provision excludes coverage of the damages awarded against Vaughn for battery and the damages awarded against WHC for negligent supervision of Vaughn, but does not exclude coverage of WHC's respondeat superior liability for the damages for emotional distress awarded against Vaughn.

In short, the Court of Appeals held: (1) that the policy provision limiting coverage to accidental injuries precludes coverage of WHC's liability for its intentional infliction of emotional distress and Vaughn's liability for intentional battery and intentional infliction of emotional distress, but does not preclude coverage of WHC's vicarious liability for the emotional distress damages awarded against Vaughn, and (2) that the Molestation or Abuse Exclusion also excludes coverage of Vaughn's liability for intentional battery, as well as WHC's liability for negligent supervision, but does not exclude coverage of WHC's vicarious liability.

This Court exercised its discretionary jurisdiction to review the three rulings Grange has challenged in this appeal: whether the insurance policy covers WHC's vicarious liability for

intentional injuries by its employee, even though it excludes coverage of liability for intentional injuries (Proposition of Law No. 1); whether the attorney fees awarded to the Faietas are covered by the policy (Proposition of Law No. 2); and whether the post-judgment interest awarded to the Faietas is covered by the policy (Proposition of Law No. 3). Amici curiae Ohio Insurance Institute and Property Casualty Insurers Association of America submit this brief in support of appellant Grange and ask the Court to reverse the ruling below.

ARGUMENT

Proposition of Law No. 1:

A commercial liability insurance policy that limits coverage to accidental injuries and excludes coverage for damages arising from abuse, including claims for negligent supervision of the abuser, provides no coverage for an insured's vicarious liability for injuries arising from its employee's intentional abuse.

The Court of Appeals held that WHC's liability insurance policy covers compensatory damages WHC paid for emotional injuries that were intentionally inflicted by a WHC employee, Richard Vaughn. It correctly recognized that the insurance policy limits coverage to accidental injuries, and thus excludes Vaughn's liability for battery and Vaughn's and WHC's liability for intentional infliction of emotional distress. It also properly found that the policy expressly excludes coverage of injuries arising from abuse (which excludes coverage for Vaughn's liability) or from negligent supervision that contributes to those injuries (which excludes coverage for WHC's liability for negligently supervising Vaughn). However, the Court of Appeals erroneously held that the policy covers WHC's vicarious liability for Vaughn's intentional infliction of emotional distress.

The Court of Appeals reasoned that WHC's vicarious liability for its employee's intentional conduct is covered by the insurance policy in this case because this Court previously

found that an insured's negligence liability, for its own negligent conduct in failing to prevent another's intentional conduct, was covered by a liability insurance policy that excluded coverage of intentional conduct. *Safeco Ins. Co. of America v. White*, 122 Ohio St. 3d 562, 2009 Ohio 3718, 913 N.E. 2d 426, paragraph 2 of the syllabus. The insurance policy at issue in *Safeco* limited coverage to liability for accidental injuries, and thus precluded coverage of an intentional assault committed by the insured's son, but the insured had been found liable for negligence for failing to supervise him, a concurrent cause of the injuries. The policy covered the insured's liability for negligent supervision because negligence is not an intentional act, and the injuries were therefore accidental from the insured's perspective. In other words, the liability of the person who intentionally caused the injuries is not covered because the injuries were not accidental from his point of view, but the liability of the insured for negligently failing to prevent those injuries is covered because they were accidental from the insured's point of view. *See also Doe v. Shaffer*, 90 Ohio St. 3d 388, 393-94, 2000 Ohio 186, 738 N.E. 2d 1243 ("employers who make negligent hiring decisions clearly do not intend the employees to inflict harm"), *quoting Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151, 1163 (W.D. Ark. 1984), *affirmed*, 33 F.3d 1476 (8th Cir. 1994).

The ruling in *Safeco* is not relevant to the issue presented by this case. The insurance policy in that case did not have an Abuse or Molestation Exclusion, which specifically excludes coverage of liability for negligent supervision. More importantly, the insured in *Safeco* was not vicariously liable for the intentional acts that caused the injury, so this Court never considered whether an insurance policy that excludes liability for intentional injuries nevertheless covers vicarious liability for intentional injuries. The Court of Appeals' erroneous application of *Safeco* in this case, which involves coverage of the insured's vicarious liability for its employee's

intentional acts, rather than coverage of the insured's direct liability for its own negligent acts, led to two errors of law.

1. A liability insurance policy that limits coverage to liability for accidental injuries does not cover an insured's vicarious liability for non-accidental injuries caused by intentional acts of its employee.

The Court of Appeals began its analysis by acknowledging that WHC's insurance policy – like other liability insurance policies – limits coverage to liability for accidental injuries. It properly found that this language precludes coverage of Vaughn's liability for intentional battery and Vaughn's and WHC's liability for intentional infliction of emotional distress. However, the Court of Appeals erroneously relied upon *Safeco, supra*, to find that it does not preclude coverage of WHC's vicarious liability for Vaughn's intentional infliction of emotional distress.

The Court should reverse that ruling and clarify that an insurance policy that precludes coverage of liability for intentional injuries necessarily precludes coverage of direct and vicarious liability for those injuries. The liability of the insureds in *Safeco, supra*, was not vicarious; they had been held directly liable for negligent supervision. Nothing in the *Safeco* decision suggests that vicarious liability for injuries is covered when direct liability for the injuries is not.

As noted above, this Court relied upon the opinion in *Silverball Amusement, supra*, decided under Arkansas law, when it first held that Ohio public policy permits – but does not require – insurance coverage of an insured's negligence liability for injuries from an employee's intentional conduct. *See Doe, supra*, 90 Ohio St. 3d at 393. The Arkansas Supreme Court has now addressed the precise issue that is presented here and held that a liability insurance policy does not cover an insured's vicarious liability for injuries from an employee's intentional conduct. *Kolbek v. Truck Exchange*, 431 S.W.3d 900, 909-910 (Ark. 2014).

In this case, the Court of Appeals correctly found that the insurance policy does not cover Vaughn's liability for the injuries caused by his battery because they were not accidental. Intentional injuries are not covered by the policy whether coverage is based on Vaughn's direct liability for the injuries or on WHC's vicarious liability for the injuries. Unlike the insured's direct liability for his own negligent conduct in *Safeco*, WHC's vicarious liability is not based on anything WHC did or failed to do; it is based on Vaughn's intentional acts.

In fact, WHC's Answer in this case pled that Vaughn's actions were "deemed to be the actions of [WHC]." The resulting injuries were therefore intentional from the perspective of Vaughn and from the perspective of WHC. The insurance policy does not cover liability for injuries arising from Vaughn's actions and thus does not cover WHC's vicarious liability for the same injuries arising from what are now deemed to be WHC's actions.

This Court's decision in *Safeco*, which addressed coverage of an insured's direct liability for its own negligent acts, does not support the ruling by the Court of Appeals in this case, which involves coverage of an insured's vicarious liability for its employee's intentional acts. The injuries resulting from Vaughn's intentional conduct were not accidental and therefore are not covered by the policy, and that is true whether the liability for those injuries is direct or vicarious. The Court of Appeals erred when it held that WHC's insurance policy covers its vicarious liability for intentional, non-accidental injuries.

2. **A liability insurance policy that excludes coverage of liability for injuries arising from abuse or molestation does not cover an insured's vicarious liability for injuries arising from acts of abuse by its employee.**

The Court of Appeals' ruling should also be reversed for a second reason. In addition to the policy provisions limiting coverage to accidental injuries, discussed above, the insurance policy contains a standard ISO Abuse or Molestation Exclusion that excludes coverage of

liability for all claims for injuries arising from abuse, including the insured's negligent supervision of the abuser:

This insurance does not apply to [injuries] 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...supervision...of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

See Crow v. Dooley, 3rd App. Dist. No. 1-11-59, 2012 Ohio 2565, ¶ 13, *appeal denied*, 2012 Ohio 4902, 976 N.E.2d 915 (holding that a liability insurance policy that limited coverage to accidental injuries and also contained a molestation exclusion did not provide coverage for injuries that were excluded by either provision).

This subject-matter exclusion has not been considered by the Court in previous cases. In *Crow, supra*, at ¶ 20, the Court of Appeals for the Third Appellate District held that a slightly different subject-matter exclusion, for “any bodily injury arising out of sexual molestation” without regard to whether the liability was for intentional or negligent conduct, excluded a daycare center’s liability for injuries arising from molestation of a child. In the present case, the Court of Appeals recognized that the Abuse or Molestation Exclusion precludes coverage of Vaughn’s liability for the injuries caused by his intentional abuse and of WHC’s liability for those injuries based on its negligent supervision of Vaughn. It nevertheless held that the insurance policy provides coverage for WHC’s vicarious liability for those injuries.

The Court should reverse that ruling. The Abuse or Molestation Exclusion expressly excludes coverage of liability for all injuries arising from abuse, and WHC was found vicariously liable for those injuries. As a matter of law and logic, the policy excludes liability for injuries caused by abuse whether the liability is characterized as direct or vicarious. *See*

Kolbek v. Truck Insurance Exchange, 431 S.W.3d 900, 907, 910 (Ark. 2014) (holding that the Abuse or Molestation Exclusion excludes coverage of the insured's vicarious liability for abuse by its employee).

The Abuse or Molestation Exclusion in WHC's policy is not unique. It is a standard ISO provision that has been used for almost thirty years to exclude coverage of all liability that might be imposed on churches and other organizations for abuse committed by their employees. *See Valley Forge Ins. Co. v. Field*, 670 F.3d 93, 97-98 (1st Cir. 2011). It is specifically intended to eliminate coverage of an insured's liability for "abuse or molestation committed by someone other than [the] insured," including vicarious liability for abuse by "the insured's employee." *See Harper v. Gulf Ins. Co.*, D. Wyo. No. 01-CV-201-J, 2002 U.S. Dist. Lexis 24492, at *19, fn. 9.

Courts that have considered the ISO Abuse or Molestation Exclusion have uniformly agreed that it excludes all liability for injuries arising from abuse. The Court of Appeals erred as a matter of law when it held that WHC's vicarious liability for Vaughn's intentional conduct is not excluded from coverage in this case.

Proposition of Law No. 2:

Attorney fees that are awarded solely in connection with damages for conduct that is not covered by a liability insurance policy are also not covered by the policy.

Amici curiae also agree with Grange that the \$693,861 attorney fee award against WHC is not covered by the insurance policy. At a minimum, there must be an award by the jury on some covered claim before any attorney fees can be awarded and, as set forth above, none of the damages awarded against WHC in the Fаетas' lawsuit are covered by the policy. Accordingly, the Court need not address this Proposition of Law if it finds, in connection with Proposition of Law No. 1, that the policy does not cover WHC's vicarious liability for Vaughn's intentional acts. Moreover, attorney fees that are awarded on punitive damages are covered by an insurance policy when the underlying act that caused the compensatory damages is covered by the policy, as in *Neal-Pettit v. Laham*, 125 Ohio St. 3d 327, 2010 Ohio 1829, 928 N.E.2d 421, but in the present case the policy does not cover Vaughn's intentional acts or WHC's negligent or intentional acts. The Court of Appeals erred as a matter of law when it concluded that the attorney fees awarded against WHC are covered by WHC's insurance policy.

Proposition of Law No. 3:

A supplementary payments clause of a liability insurance policy does not provide payment for post-judgment interest on damage awards that are not covered by the policy.

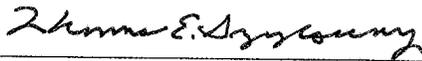
Finally, this Court should also reverse the portion of the Court of Appeals' decision that held that WHC's insurance policy covers the post-judgment interest that was awarded to the Faietas in the underlying lawsuit. This issue is also moot if the Court adopts Proposition of Law No. 1 and finds that the policy does not cover WHC's vicarious liability for Vaughn's intentional acts. Even if it did, Grange is not obligated to pay post-judgment interest on the other damages awarded by the jury that are not covered by the policy. The ruling by the Court of Appeals expanded coverage for post-judgment interest so that it included a substantial financial risk – \$230,000 in this case – when neither party had intended that Grange would pay post-judgment interest on damages that are not covered by the policy. This ruling should also be reversed by the Court.

CONCLUSION

Amici curiae Ohio Insurance Institute and Property Casualty Insurers Association of America support appellant and endorse the three propositions of law presented by this appeal. Insurance policy provisions that unambiguously limit coverage to liability for non-accidental injuries, and that expressly exclude coverage of liability for injuries caused by abuse, do not cover an insured's liability for those injuries, whether direct or vicarious. Moreover, attorney fees and post-judgment interest that are awarded in connection with damages for these non-covered injuries are similarly not covered by the insurance policy.

The decision of the Court of Appeals in this case is inconsistent with the unambiguous language of the insurance policy, with the undisputed intentions of the parties at the time they entered into the policy, and with the self-evident legal principle that an insurance policy that excludes coverage for liability for non-accidental injuries and intentional abuse does not provide coverage for vicarious liability for non-accidental injuries and intentional abuse. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amici Curiae Ohio Insurance Institute and Property Casualty Insurers Association of America in Support of Appellant Grange Mutual Casualty Company was served via e-mail pursuant to S.Ct.Prac.R. 3.11(B)(1) this 9th day of February, 2015 to:

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