Supreme Court of Ohio Clerk of Court - Filed March 24, 2015 - Case No. 2014-1161

CASE NO. 14 – 1161

In the SUPREME COURT OF OHIO

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

WORLD HARVEST CHURCH,
Plaintiff-Appellee,

v.

GRANGE MUTUAL CASUALTY COMPANY,
Defendant-Appellant,

MERIT BRIEF OF APPELLEE WORLD HARVEST CHURCH

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 & 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
Attorneys for Defendant-Appellant
Grange Mutual Casualty Company

Michael M. Neltner (0063555)
Ohio Association of Civil Trial Attorneys
17 S. High Street, Suite 200
Columbus, Ohio 43215
TEL: 513-603-5082
FAX: 513-870-2900
mneltner@staffdefense.com
Counsel for Amicus Curiae Ohio Association for Civil Trial Attorneys

Thomas E. Szykowny (0014603)
VORYS, SATER, SEYMOUR and PEASE
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216
TEL: 614-464-5686
FAX: 614-719-4905
teszykowny@vorys.com
Counsel for Amici Curiae Ohio Insurance Institute and Property Casualty Insurers Association of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES…….. iv

SUMMARY OF ARGUMENT……..... 1

STATEMENT OF FACTS…….…….. 5

GRANGE'S PROPOSITION OF LAW NUMBER 1……. 11
A commercial liability policy containing an Abuse or Molestation exclusion which excludes damages arising out of abuse "by anyone" of any person in the care, custody or control of any insured, as well as the negligent employment or supervision of an abuser, eliminates coverages of sums awarded based on the insured's vicarious liability for its employee's abuse of a child in the insured's care and custody.

GRANGE'S PROPOSITION OF LAW NUMBER 2…… 26
When attorney's fees are awarded solely in conjunction with non-covered conduct, "compensatory" attorney's fees are not covered damages under liability insurance policies. (*Neal-Petit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, construed)

GRANGE'S PROPOSITION OF LAW NUMBER 3…… 33
A liability insurance policy's supplementary payments clause cannot be reasonably construed as an agreement to pay post-judgment interest on non-covered claims.

CERTIFICATE OF SERVICE…….. 40

TABLE OF AUTHORITIES

CASES

Andersen v. Highland House Co.
93 Ohio St.3d 547, 549, 757 N.E.2d 329 (2001)…… 13

Atlantic Employers Ins. Co. v. Chartwell Manor School
280 N.J. Super. 457, 655 A.2d 954 (N.J. Super Ct. App. Div. 1995)……. 19, 20

Auto-Owners Ins. Co. v. Illinois Nat. Ins. Co.,
510 Fed. Appx. 445 (6th Cir.2013)……. 20

Bohrer v. Curch Mutual Ins. Co.
12 P.3d 854 (Colo. App. 2000)…….. 37

Buckeye Union Ins. Co. v. Price
39 Ohio St.2d 95, 311 N.E.2d 844 (1974)…….. 12

Butche v. Ohio Casualty Ins. Co.
174 Ohio St. 144, 187 N.E.2d 20 (1962)…… 13

Centennial Ins. Co. v. Liberty Mutual Ins. Co.
69 Ohio St.2d 50, 430 N.E.2d 925 (1982)……. 28

Cincinnati Ins. Co. v. Hall
Mich. Ct. App. No. 297600, 2011 WL 2342704 (June 14, 2011)…….. 15, 16

Cincinnati Ins. Co. v. Hall
Mich. Ct. App. No. 308002, 2013 WL 3107640 (June 20, 2013)……. 15, 16

Coventry v. Steve Koren, Inc.
4 Ohio St.2d 24, (1965)…… 36

Coventry v. Steve Koren, Inc.
1 Ohio App.2d 385, 205 N.E.2d 18 (1965)…… 36

Doe v. Shaffer
90 Ohio St.3d 388, 738 N.E.2d 1243 (2000)…….. 23, 26

Employers Mut. Cas. Co. v. Donnelly
154 Idaho 499, 300 P.3d 31 (2013)…… 29

GEICO General Ins. Co. v. Hollingsworth
2015 WL 376406 (Fla. App.)……. 32

GEICO General Ins. Co. v. Rodriguez
2014 WL 4435956 (Fla. App.)…… 32

Gen. Direct Marketing, Inc. v. Lexington Ins. Co.
410 F.Supp.2d 387 (M.D.Pa.2006)……. 25

Grange Mutual Cas. Co. v. Uhrin
49 Ohio St.3d 162, 550 N.E.2d 950 (1990)……. 6

Groom v. Home-Owners Ins. Co.
2007 WL 1166050 (Mich. App. 2007)…….. 31

Howell v. Richardson
45 Ohio St.3d 365, 544 N.E.2d 878 (1989)……. 6

Hybud Equip. Corp. v. Sphere Drake Ins. Co.,
64 Ohio St.3d 657, 597 N.E.2d 1096 (1992)..…… 13, 21

King v. Nationwide Ins. Co.
35 Ohio St.3d 208, 519 N.E.2d 1380, 1380-81 (1988)…… 30

Lager v. Miller-Gonzalez
120 Ohio St. 3d 47, 49, 2008-Ohio-4838, 896 N.E.2d 666, 669, ¶15 (2008)……. 30

Littlefield v. McGuffey
979 F.2d 101 (7th Cir.1992)…….. 31

Malanga v. Manufacturers Ca. Ins. Co.
28 N.J. 220, 227. 146 A.2d 105, 109 (1958)…… 25

McLeod v. Tecorp International, Ltd.
117 Or.App.499, 684 P.2d 925 (1992) *rev'd on other grounds*, 865 P.2D 1283……. 24

Moorman v. Prudential Ins. Co.
4 Ohio St.3d 20, 445 N.E.2d 1122 (1983)……. 13, 21

Mutual of Enumclaw v. Harvey
115 Idaho 1009, 1013, 772 P.2d 216, 220 (1989)…… 30

Neal-Petit v. Lahman
125 Ohio St.3d 327, 330, 2010-Ohio-1829, 928 N.E.2d 421,424 ¶ 18 (2010)……. 26, 37

Northland Cas. Co. v. HBE Corp.
160 F. Supp.2d 1348, 1362 n. 10 (M.D.Fla.2001)…… 25

Pasco v. State Auto. Mut. Ins. Co.
1999 WL 1221633…… 32

Prichard v. Liberty Mutual Ins. Co.
84 Cal App 4th 890, 101 Cal.Rptr.2d 298 (Cal.App.2000)…….. 31

Property Cas. Co. of MCA v. Conway
147 N.J. 322, 687 A.2d 729 (1997)…….. 25

Rader v. Carroll
1992 WL 379315 (12th District)…… 36

River Valley Cartage Co. v. Hawkeye-Security Ins. Co.
17 Ill.2d 242, 161 N.E.2d 101 (1959)…… 35

Safeco Ins. Co. v. White
122 Ohio St.3d 562, 913 N.E.2d 426, 2009-Ohio-3718…… 11, 20, 22, 26 37

S.C. Farm Bureau Mutual Ins. Co. v. Oates
588 S.E.2d 643 (S.C. App. 2003)…….. 15

Schmidt v. Smith
294 N.J. Super. 569, 684 A.2d 66 (N.J. Super Ct App. Div. 1996) aff'd,
155 N.J. 44, 713 A.2d 1014 (1998)……. 24

Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.
842 F.Supp. 1151 (W.D. Ark. 1994)…… 23

Snedegar v. Midwestern Ind. Co.
(1989), 64 Ohio App.3d 600, 582 N.E.2d 617……. 28

St. Paul Fire & Marine Ins. Co. v. Hebert Const., Inc.
450 F.Supp.2d 1214 (W.D.Wash.2006)……. 32

Stamps v. Consolidated Underwriters
208 Kan. 630, 493 P.2d 246 (1972)……. 37

Watkins v. Brown
97 Ohio App.3d 160, 164, 646 N.E.2d 485 (2nd Dist.1994)…….. 13

Westfield Ins. Co. v. Galatis
100 Ohio St. 3d 216, 224, 2003-Ohio-5849, 797 N.E.2d 1256, 1265,
¶34 (2003)…… 30, 34

Westfield Ins. Co. v. Hunter
128 Ohio St. 3d 540, 948 N.E.2d 931, 2011-Ohio-181……..4, 22

OTHER AUTHORITIES

39 *O.Jur.3d*, Employment Relations, §382…… 23

Commercial General Liability Coverage Guide, 11th Edition…… 33

French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts of Damages*
8 Hastings Bus. Law Journal 65, 90 (2012)……. 24

Ramsey, *Interest on Judgment Under Liability Insurance Policies*
Insurance Law Journal No. 414 (July, 1957), p. 407, at p. 411…… 36

Webster's Unabridged Dictionary of the English Language (2001)……13, 14, 28

Windt, *Insurance Claims and Disputes,* §6:2, p.6-51 (5th Edition, 2007)…… 28

Windt, *Insurance Claims and Disputes*, §6:17…….. 35

Windt, *Insurance Claims and Disputes,* §11.9 (5th Edition)…… 24

Windt, *Insurance Claims and Disputes,* §11.23B…… 16

SUMMARY OF ARGUMENT

World Harvest Church ("WHC") believes that the trial judge correctly ruled that WHC had coverage for the full amount of the non-punitive damages awarded in the *Faieta* case—the compensatory award of $549,100, the attorney fee costs of $693,861, and the post-judgment interest (at the time of settlement) of $220,716 for a total of $1,472,677. The court of appeals found coverage for only part of the compensatory award—$82,365, but in all other respects agreed with Judge Bessey.

The lower courts' combined rationales for coverage are set forth on the next page.

Cause of Action	Basis for Coverage
WHC's vicarious liability for Vaughan's battery	Per trial court: Intentional acts exclusion does not apply per *Safeco*. Abuse exclusion does not apply since no sexual assault. Corporal punishment endorsement could apply even if corporal punishment excessive. Per court of appeals: Intentional acts exclusion does not apply per *Safeco*, but still no coverage since abuse exclusion applies—means physical mistreatment not just sexual assault. Policy excludes all forms of corporal punishment including negligent supervision so this endorsement does not apply.
WHC's vicarious liability for Vaughan's IIED	Same as above per trial court. Abuse exclusion does not apply to vicarious liability per court of appeals.
WHC's direct liability for IIED	Excluded by intentional acts exclusion.
WHC's direct liability for negligent supervision, etc.	Per trial court: Intentional acts exclusion does not apply per *Safeco*. Abuse exclusion does not apply since no sexual assault. Corporal punishment endorsement could apply even if corporal punishment excessive. Per court of appeals: Intentional acts exclusion does not apply per *Safeco*, but still no coverage since abuse exclusion applies—means physical mistreatment not just sexual assault. Policy excludes all forms of corporal punishment including negligent supervision so this endorsement does not apply.
Attorney fees	Covered per *Neal-Pettit*.
Post-judgment Interest	Covered per Supplementary Payments section.

The court of appeals made two mistakes that impacted their coverage analysis and are relevant to Grange's Proposition of Law Number 1. First, the court of appeals broadly construed the undefined term "abuse" contained in the Abuse or Molestation Exclusion to mean any physical mistreatment. Although this is one definition of "abuse," it is not the only definition; nor is it the narrowest definition. Courts are bound to construe undefined terms in an exclusion narrowly—not broadly.

"Abuse," as that word is used in the Abuse or Molestation Exclusion, should be construed to mean sexual assault, not mere physical mistreatment. Applying the correct definition of "abuse" to the facts of this case results in the same conclusions reached by Judge Bessey since there was no evidence of a sexual nature in the underlying trial. Rather, all of the evidence points to excessive—greatly excessive—corporal punishment of the victim.

The evidence of excessive corporal punishment relates to the second mistake made by the court of appeals. The court of appeals ignored the evidence of excessive corporal punishment and the policy endorsement that Grange agreed was intended to provide coverage to WHC for corporal punishment. Even if the court of appeals was correct and the endorsement excluded direct liability of the "bad actor" for corporal punishment, it is clear that the policy covers WHC for its negligent supervision/hiring/retention resulting in corporal punishment.

If this Court decides to ignore the mistakes made by the court of appeals, it should still affirm the decision since the court of appeals correctly held that the Abuse or Molestation Exclusion must be construed narrowly and per the rationale set forth in *Safeco*. Under this rationale, the exclusion does not apply to WHC's vicarious liability for Vaughan's direct intentional tort of IIED.

The "arising out of" language of the exclusion must be construed narrowly and, following the rationale of *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-181, 948 N.E.2d 931, the term must be construed to mean "caused directly by."

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

Since the Abuse or Molestation Exclusion does not apply to defeat coverage for WHC's vicarious liability, WHC is covered for its vicarious liability for Vaughan's IIED.

Since there is coverage for at least part of the underlying judgment, there is also coverage for the attorney fees award. However, even if there is no coverage for the underlying judgment, there is still coverage for the attorney fees award since the SUPPLEMENTARY PAYMENTS provision—which is triggered by Grange's duty to defend and not its duty to indemnify—provides coverage for "all costs taxed against the insured in the suit." Numerous cases outside of Ohio have construed the word "costs"—when viewed as it must be from the perspective of a layperson—to include attorney fees.

Finally, there is coverage for post-judgment interest on the full amount of the judgment, and not just on the covered portion of the judgment, because that is what the policy says. All of the authorities—including the insurance industry itself—agree that the policy means exactly what it says. ISO changed the provision in 2007 to restrict coverage in the manner advocated by Grange. The provision (with the new language in italics) now obligates the insurer to pay only:

> All *court* costs taxed against the insured in the "suit". *However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.*

Grange acts as though its policy contained this new language, but it does not.

STATEMENT OF FACTS

The Facts as Established in the Underlying Trial.

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

Grange Did Not Intervene in the Jury Trial.

Grange considered intervening to ask special interrogatories for the purpose of determining if the jury's verdict was for counts that Grange believed were covered or non-covered; however, Grange did not intervene. (Histed Dep. p. 53-56 R. 75; Stipulated Exhibit 31 R. 84 and CD of Exhibits).

Many of the complications that exist in this appeal can be laid at Grange's own feet. If it had intervened and asked the proper questions at the proper time, then we would *know* what the jury intended by its verdict instead of being left to argue about what we *think* the jury intended by its verdict.

For example, the jury could have been asked the nature of Vaughan's battery. Was it a sexual assault? Was it corporal punishment gone awry? Or was it unconnected to either of these theories?

Grange could have asked the jury which defendant committed the IIED, Vaughan or WHC, and what this tort consisted of. Was it the battery itself? Or the nature of the investigation? Or the alleged cover-up? Or barring the Faietas from the grounds? Did it actually "arise" from the battery or not?

Armed with answers to these questions, the issues in this coverage dispute would be clearer and the Court's job much easier. Instead, Grange hands the Court an incomplete puzzle and asks it to guess at the contents of the missing pieces.

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

Grange has persistently argued—and will probably argue again in its Reply Brief—that certain "factual determinations" made by the trial and appellate courts are binding on the parties in this action. WHC agrees that the factual findings of the *jury* bind both parties. Both *Howell v. Richardson*, 45 Ohio St.3d 365, 544 N.E.2d 878 (1989) and *Grange Mutual Cas. Co. v. Uhrin*, 49 Ohio St.3d 162, 550 N.E.2d 950 (1990) held that factual determinations made in the underlying tort case are binding in subsequent coverage litigation.

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

Accordingly, the court of appeals erred when it cited to the opinions of the trial court in the underlying case to support its position that certain "facts" have been established that are binding on the parties to this appeal. The court of appeals' statement (Grange App. 30, ¶48) that the jury "conclusively determined" that Vaughan abused Andrew Faieta, as that term is used in the Abuse or Molestation Exclusion, is wrong. The jury made no such factual determination; it was never even asked to do so. Rather, its determination, as shown by the answer to Interrogatory 1.A., is that "Vaughan intentionally harmed Andrew Faieta."

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

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

The Jury Award and Apportionment.

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

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

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

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

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

The trial court found that WHC was solely liable for $2,789,066.87, and that Vaughan was primarily liable and WHC only secondarily liable for the remaining $82,365. The verdict was unanimously affirmed on appeal, whereupon WHC settled the case with the Faietas for the amount of the judgment plus post-judgment interest for a total settlement of $3,101,147. WHC sought indemnity from Grange, which refused. This lawsuit followed.

The Relevant Policy Provisions.

The Primary Coverage Form, CG 00 01 10 01

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

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

"Occurrence" is also a defined term and means an accident.

Damages is not a defined term.

The form contains an exclusion for bodily injury "expected or intended from the standpoint of the insured." This exclusion is modified by the Corporal Punishment endorsement, CG 2267, discussed below.

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

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

> **ABUSE OR MOLESTATION EXCLUSION**
>
> This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:
>
> 1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or
>
> 2. The negligent:
>
> a. Employment;
> b. Investigation;
> c. Supervision;
> d. Reporting to the proper authorities, or failure to so report; or
> e. Retention;
>
> of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

Significantly, "abuse" is not a defined term.

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

The Corporal Punishment endorsement (CG 2267; Grange Supplement 13) replaces the expected or intended exclusion of the primary coverage form with this exclusion:

> This insurance does not apply to:
>
> a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.
>
> This exclusion does not apply to "bodily injury" resulting from:

(1) The use of reasonable force to protect persons or property; or

(2) Corporal punishment to your student administered by or at the direction of any insured.

The purpose of this endorsement is to remove corporal punishment from consideration as bodily injury "expected or intended from the standpoint of the insured."

To complicate matters, the policy also contains a Corporal Punishment Exclusion (CG 2230; Grange Supplement 12):

> This insurance does not apply to "bodily injury" . . . to your student arising out of any corporal punishment administered by or at the direction of any insured.

So which endorsement controls—the one extending coverage for corporal punishment or the one excluding it? Grange's 30(b)(5) representative, Brad Histed, agreed that Grange intended for the endorsement extending coverage to control. His testimony is explained below in more detail on pages 17-18.

The court of appeals, however, disregarded Grange's intent [another cardinal sin of contract interpretation], and decided that the exclusion trumped the endorsement. (Grange Appendix 31-32, ¶51-52) Regardless of which position is correct, one fact remains clear. The Corporal Punishment Exclusion does not say anything about negligent hiring, supervision, or retention claims. Contrast this with the Abuse or Molestation Exclusion, which specifically addresses and excludes related claims for negligent hiring, supervision, or retention. Accordingly, regardless of whether corporal punishment *itself* is covered or non-covered, there is coverage for negligent hiring/supervision in connection with corporal punishment.

Grange's Proposition of Law Number 1:

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

1.1 Grange's arguments on a lack of an occurrence and the application of the intentional acts exclusion are misplaced.

Grange begins its argument on pages 14-18 by asserting that the acts of Vaughan and WHC do not constitute an "occurrence" and, if they do, they are excluded by the intentional acts exclusion contained in the CGL policy, i.e., bodily injury expected or intended from the standpoint of the insured.

First, with respect to WHC's direct liability for negligent supervision and WHC's vicarious liability for Vaughan's battery and IIED, this argument was put to rest in *Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, and the court of appeals so held in ¶30-41 of its opinion. *Safeco* held:

> When a liability insurance policy defines an "occurrence" as an "accident," a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, e.g., negligent hiring or negligent supervision, qualifies as an "occurrence."
>
> Insurance-policy exclusions that preclude coverage for injuries expected or intended by an insured, or injuries arising out of or caused by an insured's intentional or illegal acts, do not preclude coverage for the negligent actions of other insureds under the same policy that are predicated on the commission of those intentional or illegal acts, e.g., negligent hiring or supervision.

Safeco is dispositive of the issues raised by Grange regarding no occurrence and the intentional acts exclusion contained in the primary CGL form. *Safeco* had not yet been decided when Grange took its initial position on this claim; the decision was announced while WHC's

declaratory judgment action was pending in the trial court, and it was relied on by both Judge Bessey and the court of appeals. Nothing has changed.

Second, these arguments do not fall within the scope of Grange's assignment of error. These arguments deal with issues under the primary CGL form, not the Abuse or Molestation endorsement, and the assignment of error accepted by this Court only concerns coverage arguments under the Abuse or Molestation Exclusion. Accordingly, Grange's arguments are not even properly before the Court and should be disregarded on that basis as well.

1.2 Abuse = Sexual Assault; Abuse ≠ Battery.

The initial step in determining whether Grange's first proposition is valid is deciding whether the Abuse or Molestation Exclusion even applies to the facts of this case. WHC contends that it does not apply for two reasons:

1) "abuse" is an undefined term so it must be given its narrowest meaning—sexual assault; and

2) "abuse" should not be given one of its broader meanings—physical mistreatment—because Grange's policy specifically covers corporal punishment, clearly indicating that not all forms of physical mistreatment are excluded.

Grange is correct that this Court must "identify the damage-causing act and construe the policy as a whole to determine whether the parties intended coverages for that act." (*See* Grange's Merit Brief, p. 13). The applicable rules of insurance policy construction are clear. "Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer." *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 313 N.E.2d 844 (1974).

"[I]n order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can

fairly be placed on the language in question." *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 757 N.E.2d 329 (2001).

Accordingly, the court must adopt any reasonable interpretation of the policy resulting in coverage for the insured. *Butche v. Ohio Casualty Ins. Co.,* 174 Ohio St. 144, 187 N.E.2d 20 (1962).

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

1.3 "Abuse," as that term is used in the Abuse or Molestation Exclusion, means sexual assault.

The Abuse or Molestation Exclusion does not define "abuse" or "molestation." According to *Webster's Unabridged Dictionary of the English Language* (2001), which can be found at www.dictionary.reference.com/browse/abuse, "abuse" has several definitions:

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

Several other dictionaries contain similar definitions that include sexual assault as one of the multiple meanings of the term "abuse." See:

- www.oxforddictionaries.com/us/definition/American_english/abuse ("assault (someone, especially a woman or child) sexually");
- www.thefreedictionary.com/abuse ("to force sexual activity on; rape or molest"); and
- www.macmillandictionary.com/us/dictionary/American/abuse, ("forced sexual activity with someone who cannot prevent it");

Grange argues that *Webster's* second definition applies. Why? Because all of the witnesses agreed that there was no evidence in the trial of sexual assault or molestation. According to WHC's retained trial counsel, Dave Orlandini, the plaintiffs "were not pursuing this as a sexual matter, and they didn't at trial either." Rather, "they just referred to it as him being spanked." (Orlandini Dep., p. 50—R. 73). Grange representative Brad Histed confirmed that there was no evidence at trial of sexual molestation. (Histed Dep., p. 23-24, 63—R. 75; Stipulated Exhibit 31, p. BRAD 214).

Since there was no evidence that Andrew was sexually assaulted, Grange argues that "abuse" means more than sexual assault—it means to mistreat another or to commit battery, which is the offense that the jury determined Vaughan committed.

Of course, Grange does not get to pick the definition that it wants, i.e., the *broadest* definition. The Court picks the definition that applies, and in so doing, must pick the *narrowest* definition. In this case, the narrowest definition is the fourth definition—sexual assault. This definition is also the most logical choice since the exclusion deals with "abuse or molestation" and "molest" is defined in the same dictionary as:

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

The first definition of "molest" is clearly inapposite. The second definition of "molest" deals with sexual situations. It follows that "abuse" must similarly deal with sexual situations,

thus making the fourth definition of "abuse" the most consistent with the remainder of the exclusion.

Logically, and according to well-established rules of insurance policy construction, the exclusion deals with sexual assault and indecent sexual advances. It does not deal with battery. The intentional acts exclusion handles battery. The inapplicability of this exclusion is addressed above.

Since, for purposes of applying the Abuse or Molestation Exclusion, "abuse" must be construed to mean sexual assault, and since all of the witnesses agreed that there was no evidence of sexual assault, Grange has not proven the application of this exclusion.

This is an issue of near-first impression. As such, it is a critical issue for the Court to address. There are numerous cases construing the Abuse or Molestation Exclusion, but counsel could only find a couple dealing with the application of the exclusion to non-sexual situations. See *S.C. Farm Bureau Mutual Ins. Co. v. Oates*, 588 S.E.2d 643 (S.C. App. 2003), (exclusion applied to case of shaken baby syndrome); *Cincinnati Ins. Co. v. Hall*, Mich. Ct. App. No. 297600, 2011 WL 2342704 (June 14, 2011).

However, see a later decision in this same case, *Cincinnati Ins. Co. v. Hall*, Mich. Ct. App. No. 308002, 2013 WL 3107640 (June 20, 2013). It is apparent in the second *Hall* case that the court of appeals had reservations about the earlier decision made by a different panel of judges. However, the second panel was bound by the law of the case doctrine. A perusal of Judge Fitzgerald's dissent will clarify and illuminate the issues much better than anything counsel can say.

The insured in the second *Hall* decision tried to get around the law of the case by arguing that the court's construction of "abuse" rendered the policy illusory. The court of appeals

rejected this argument, but this ignores the real problem and solution. The first *Hall* decision was wrong—abuse cannot be interpreted broadly to mean any injurious conduct. It must be given its narrowest possible meaning, and sexual assault is that meaning. The second *Hall* court could have avoided doing legal gymnastics if it had not been bound by the ruling of the earlier panel.

See also Windt, *Insurance Claims & Disputes*, §11:23B—"the exclusion should be held to apply to any unwanted or improper sexual activity."

The problem and solution are clear, and this Court can address both. But for the Abuse or Molestation Exclusion, the entire compensatory award would be covered—and this is the correct result since no sexual assault occurred.

1.4 In construing the entire insurance policy, the Court must reconcile the Corporal Punishment endorsement with the Abuse or Molestation Exclusion.

The second reason for construing "abuse" to mean sexual assault involves the Corporal Punishment endorsement. The jury did not label Vaughan's acts as "abuse"—that is Grange's label. Rather, the jury found that Vaughan had committed battery. In reaching this verdict, the jury heard that:

- Andrew told his father "that Mr. Vaughan spanked him with a knife." (Stipulated Exhibit 9, Trial Transcript, Volume 2, testimony of Michael Faieta, p. 126—R. 84);

- Andrew later identified the knife as actually being a ruler. (Stipulated Exhibit 9, Trial Transcript, Volume 2, testimony of Michael Faieta, p. 130—R. 84);

- The marks on Andrew contained linear patterns consistent with being struck with an object such as a ruler. (Stipulated Exhibit 9, Trial Transcript, Volume 3, testimony of Dr. Lori Frasier, p. 63-64—R. 84);

- "The pattern was consistent with an object striking his buttocks and thighs, and I did not feel that this was a dermatologic condition." (Stipulated Exhibit 9, Trial Transcript, Volume 3, testimony of Dr. Lori Frasier, p. 68—R. 84);

- Andrew told Dr. Thersa Diserio that "he had been spanked on the bottom by a man named Mr. Vaughan." (Stipulated Exhibit 9, Trial Transcript, Volume 3, testimony of Dr. Theresa Diserio, p. 94—R. 84);

- During the argument on the motion for a directed verdict on the battery count, counsel for both sides phrased their arguments around the issue of spanking. (Stipulated Exhibit 9, Trial Transcript, Volume 5, p. 13.13, 15.13, 16.15, 25.7, 28.16, 31.8.—R. 84);

- Witnesses were questioned about the use of corporal punishment at WHC and the school's policy on corporal punishment. (Stipulated Exhibit 9, Trial Transcript, Volume 4, p. 57; Volume 5, p. 48; Volume 5, p. 72-73; Volume 6, p. 86); and

- There would have been more testimony on corporal punishment but for WHC's admission that Vaughan was at all times acting within the scope of employment. (Stipulated Exhibit 9, Trial Transcript, Volume 6, p. 141).

The evidence presented at trial in support of the battery claim *all* indicated that Vaughan spanked Andrew. Spanking a child with a ruler certainly sounds like corporal punishment. There was absolutely no evidence of a sexual nature. Based on the evidence and arguments of counsel, the jury could have reasonably concluded that Vaughan's administration of excessive corporal punishment intentionally harmed Andrew. Brad Histed, Grange's designated Civ. R. 30(B)(5) representative, admitted that corporal punishment could constitute a battery:

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

A. Spanking can constitute a battery, sure.

(Histed Dep., p. 37—R. 75).

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

- "Coverage would be afforded as long as alleged "spanking" due to CG 2267 Corporal Punishment gives coverage back, CH 2230 takes away coverage PH

> [policyholder] is paying a prem would cover." (Stipulated Exhibit 15, Grange Case Notes, p. 833—R. 84);

- "There is no coverage for abuse or corporal punishment, but the CG2267 buys back coverage for corporal punishment that was administered at the direction of the named insured." (Stipulated Exhibit 15, Grange Case Notes, p. 836—R. 84);

- "CG 2267 would give coverage back if the allegations were spanking, but the Complaint alleges that Vaughan beat Andrew with a knife." (Stipulated Exhibit 15, Grange Case Notes, p. 836—R. 84); and

- "This form appears to restore coverage for BI arising out of corporal punishment to a student administered by or at the direction of any insured." (Stipulated Exhibit 15, Grange Case Notes, p. 868—R. 84).

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

> The corporal—under this endorsement, corporal punishment such as the—the spanking of a student under normal circumstances would be covered. (Histed Dep., p. 46—R. 75).

Grange asks this Court to construe the policy as a whole, but to disregard the Corporal Punishment endorsement and how it interplays with the Abuse or Molestation Exclusion. Significantly, none of the 43 cases cited by Grange in its brief contains a policy with a corporal punishment endorsement. Grange, instead, tries to infuriate our minds with cases involving horrendous acts of sexual abuse, despicable incidents of rape, and just about any other non-corporal punishment case one can imagine that would distort this case from what it really is—an act of corporal punishment gone awry.

The trial evidence is uncontroverted that the injury was a result of excessive corporal punishment—the very kind of incident that WHC contracted with Grange to be covered against. Under these circumstances, it is illogical to interpret the general term "abuse" to exclude the same conduct that another endorsement specifically covers.

Moreover, the Corporal Punishment endorsement does not contain language excluding coverage for negligent supervision of corporal punishment. This stands in stark contrast to the Abuse or Molestation Exclusion, which specifically excludes negligent supervision, etc.

Since the policy includes specific exclusionary language in the Abuse or Molestation Exclusion and omits such language in the Corporal Punishment endorsement, it is logical to assume that **Grange intended to cover, at the very least, negligent supervision committed in connection with corporal punishment**. Accordingly, the jury verdict for negligent supervision was covered under Grange's policy.

1.5 The Corporal Punishment endorsement is broadly construed so as to apply and provide coverage whenever there is even the slightest hint that corporal punishment may have been involved.

As with the proper definition of "abuse," this Court will be writing on a near-blank slate since there are few cases construing the interplay between an abuse exclusion and a corporal punishment endorsement.

Atlantic Employers Ins. Co. v. Chartwell Manor School, 280 N.J.Super. 457, 655 A.2d 954 (N.J. Super. Ct. App. Div.1995) is closely analogous in that it dealt with the interplay between a Corporal Punishment Endorsement and an intentional acts exclusion, i.e., holding a boy's genitals while spanking him. Despite the Corporal Punishment Endorsement, the insurer sought to avoid coverage via the intentional acts exclusion or the illegal acts exclusion (the insurer argued that the paddling was battery, which was illegal). Moreover, the insurer argued that the "alleged acts were sexual and therefore intentional." *Id.* However, the court noted that "[t]he holding of [the boy's] genitals need not have been a sexual act if, as urged by [teacher], the action was merely to protect the boy from harm to his genitals during a paddling." The court held "the administering of corporal punishment is here accepted as a covered cause of a potential

injury. By the policy definition of corporal punishment, it is an intentional act, but it is a covered intentional act." *Id.*

What is striking about *Atlantic* is that the allegations of "abuse" were so much more than the allegations here. The employee even pled guilty to 15 counts of criminal charges of endangering the welfare of a child. However, the insurers were not permitted by the court to strike down coverage for the injuries resulting from what could have been construed as corporal punishment.

The same holds true here. This Court must construe the Abuse or Molestation Exclusion in a manner that gives affect to the Corporal Punishment endorsement, and this means construing "abuse" to mean sexual assault and not just any injurious conduct. The Court's inquiry could and should end right here for the reasons stated in the trial court's opinion on pages 6-9:

- WHC has coverage for Vaughan's battery because WHC did not intend the act. *Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426 (Grange Appendix 45);

- WHC has coverage for IIED because the interrogatory asked "do you find from a preponderance of the evidence that Richard Vaughan and/or World Harvest intentionally inflicted serious emotional distress on the Faietas." Since the question was worded as "and/or' the jury could have found that only Vaughan was at fault. As above, WHC has coverage since it did not intend the act. (Grange Appendix 45-46); and

- WHC has coverage for the negligent supervision award under the rationale of *Safeco* and since no other exclusion applies. (Grange Appendix 46-48).

In a somewhat related case, the Sixth Circuit Court of Appeals recently dealt with a policy that included both an Abuse or Molestation *Exclusion* and an Abuse or Molestation *Endorsement*. *Auto-Owners Ins. Co. v. Illinois Nat. Ins. Co*., 510 Fed.Appx. 445 (6th Cir. 2013). The case involved an insurer-vs-insurer subrogation claim and revolved around a situation where adoptive caregivers "forced children to sleep in cage-like enclosures." *Id* at 446. As in our case,

there was no evidence of sexual abuse. Significantly for our purposes, the court found that in construing the Abuse or Molestation Exclusion, the court had to consider the presence of, and give affect to, the Abuse or Molestation Endorsement. The court found coverage for these acts of "abuse" irrespective of the Abuse or Molestation Exclusion because the presence of the Abuse or Molestation Endorsement [read here: our Corporal Punishment endorsement] indicated that not all forms of "abuse" were excluded.

1.4 The Abuse or Molestation Exclusion excludes direct liability of the guilty actor and direct liability of employers, but does not exclude vicarious liability.

If the Court determines that Vaughan committed "abuse" as that term is used in the Abuse or Molestation Exclusion, then the Court must address how this impacts the jury awards for battery, IIED (both WHC and Vaughan), direct negligent supervision, and vicarious liability.

WHC agrees that if the jury found that WHC itself committed IIED, then coverage would be negated by the Expected or Intended Injury exclusion.

If the Court finds that the Abuse or Molestation Exclusion applies, then WHC does not have coverage for the direct negligent supervision award. This leaves WHC's vicarious liability for Vaughan's battery and IIED, which the trial court determined to be $82,365.

The Abuse or Molestation Exclusion does not apply to vicarious liability because no language in the exclusion addresses vicarious liability. As discussed above, exclusions must be strictly construed against the insurer. In order to apply, exclusions must be clear and exact. *Moorman v. Prudential Ins. Co.*, 4 Ohio St.3d 20, 445 N.E.2d 1122 (1983). "An exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded." *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992).

These rules require the Court to construe the exclusion's "arising out of" language narrowly to mean "caused directly by." See *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-181, 948 N.E.2d 931 (holding in ¶20 that "arising out of" language when used in an exclusion must be narrowly construed and requires "the need for a direct consequence or responsible condition.").

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

The second section of the exclusion deals with the direct liability of employers for their own misconduct, i.e., negligent employment, negligent supervision, etc. This section, similarly, does not address—and, therefore, does not exclude—vicarious liability. If Grange intended this exclusion to be all-inclusive, and thus exclude vicarious liability, it could have simply omitted the entire second section since Grange argues that the first section of the exclusion removes liability for all abuse or molestation. However, it did not. Reading the insurance policy as a whole, it is apparent that Grange intended to carve out the specific categories of abuse that were to be excluded and not merely reiterate the general subject matter to be excluded.

Since neither section of the exclusion addresses vicarious liability, the exclusion does not clearly and unambiguously exclude vicarious liability. This result is perfectly consistent with the result in *Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, especially with the manner in which *Safeco* dealt with the policy's intentional acts exclusion. Recall that in *Safeco*, a teenager stabbed a young girl. The teenager was sued for battery, and his parents were sued for negligent supervision. The jury found that the teenager had committed battery—an intentional tort.

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

> The ultimate effect of [those opinions denying coverage] leads to a metamorphosis in which certain negligent actions are transformed by the court into intentional actions for the purposes of deciding negligent hiring cases involving sexual abuse. Such a decision effectively dissolves the distinction between intentional and negligent conduct, allowing the intentional act to devour the negligent act for the purpose of determining coverage.

Doe at 393.

Similarly, in order to establish vicarious liability, the injured party must establish additional elements than those proven against the guilty actor, including an employment relationship, an act committed within the scope of employment, or ratification of the tortious act by the employer. See 39 *O.Jur.3d*, Employment Relations, §382. The fact that WHC stipulated that Vaughan's acts satisfied these additional elements does not change the fact that they must exist.

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

The Tenth District recognized this and found coverage for Vaughan's intentional conduct, IIED, for which WHC was vicariously liable. Since Grange did not clearly exclude coverage for vicarious liability for abuse, this was the correct decision. The same rationale applies to WHC's vicarious liability for Vaughan's battery.

Although there is not a lot of precedential case law on this issue, the precedent that exists favors WHC's position. Two good starting points include the article cited by the court of appeals, French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages*, 8 Hastings Bus. Law Journal 65, 90 (2012), and a leading insurance treatise, Windt, *Insurance Claims & Disputes*, §11:9 (5th Edition), which states:

> [T]he intentional wrongdoing of an employee will be treated as intentional wrongdoing by the corporation for the purposes of insurance coverage only if the employee was part of management, or if an employee's action was consistent with a corporate policy.

Windt cites and discusses numerous cases that support this statement, including those relied on by the court of appeals including *McLeod v. Tecorp International, Ltd.*, 117 Or. App. 499, 684 P.2d 925 (1992), *rev'd on other grounds*, 865 P.2d 1283 (employer had insurance coverage for intentional sexual harassment committed by non-managerial employee).

Windt gives the following rationale for the rule:

> Although the employer is answerable for the damage caused by its employee, the employer did not itself commit an intentional tort. Accordingly, although the employer will be answerable for the damages caused by its employee's intentionally wrongful conduct, the employer did not itself engage in any intentionally wrongful conduct.

In *Schmidt v. Smith*, 294 N.J.Super. 569, 684 A.2d 66 (N.J. Super. Ct. App. Div.1996) aff'd, 155 N.J. 44, 713 A.2d 1014 (1998), an employer was found to be vicariously liable when ones of its employees sexually harassed another employee. The insurance policy excluded coverage for "[d]amages arising out of . . . harassment . . . against . . . any employee . . .." *Id* at

581. The court noted that the employee had committed the intentional acts and that the employer's liability was vicarious. The court found coverage and held that the "exclusion does not specifically exclude coverage for vicarious liability resulting from hostile workplace sexual harassment." *Id* at 582. Moreover, the court held that it was reasonable for the employer "to expect coverage for its vicarious liability resulting from the intentional torts of an employee." *Id* at 583.

Other jurisdictions similarly have found insurance coverage for vicarious liability as well:

- *Gen. Direct Marketing, Inc. v. Lexington Ins. Co*., 410 F.Supp.2d 387 (M.D.Pa.2006) (Insured brought indemnity claim against insurer for an underlying discrimination suit in which the insured was found vicariously liable. The insurer denied coverage under the Intentional Discrimination Exclusion but the Court found coverage as "construing the exclusion narrowly . . . [and] resolving all ambiguity in favor of coverage . . . the exclusion does not apply to the vicarious liability claims.");

- *Malanga v. Manufacturers Ca. Ins. Co.*, 28 N.J. 220, 227. 146 A.2d 105, 109 (1958) ("[I]n determining the extent of this coverage we must distinguish between an agent who is guilty of willful wrongdoing and his principal who is only vicariously responsible. * * * Where there is no intentional commission of a wrong by the principal, it is entitled to be indemnified.");

- *Northland Cas. Co. v. HBE Corp.,* 160 F.Supp.2d 1348, 1362, n. 10 (M.D.Fla.2001) (Court found coverage for vicarious liability, even though, the insurer originally claimed there was no coverage as a result of an exclusion for the underlying event); and

- *Property Cas. Co. of MCA v. Conway*, 147 N.J. 322, 687 A.2d 729 (1997) (Court found coverage for parents' vicarious liability for their son's intentional vandalism of school property even though insurer argued that the intentional acts exclusion negated coverage).

These jurisdictions and others find that the insurance companies, the drafters of the policies, are in a better position than the insured to remove ambiguities and avoid cases such as these. The court in *Gen. Direct Marketing, Inc. v. Lexington Ins. Co* summed it up the best in a footnote:

> We will not interpret the exclusion to apply to vicarious liability for intentional discrimination. First, such an interpretation would expand the plain language and violate the rule requiring courts to interpret exclusions narrowly. Second, although this matter appears to be a matter of first impression in Pennsylvania, we are persuaded by the various other courts that have reached the same conclusion . . .Third, as the drafter of the exclusion, [the insurer] could have easily clarified that the exclusion applied to injuries arising from the intentional discrimination of the insured and individuals for whom the insured may be legally responsible. Indeed, the Hotel and Professional Services Endorsement specifically included coverage for vicarious liability, and the exclusion could have just as easily specifically excluded it.

The rationale of this line of cases is consistent with the insurance coverage analyses utilized by this Court in *Safeco* and *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243, which both stress a coverage analysis from the perspective of the insured seeking coverage.

In our case, Vaughan acted intentionally; WHC was only vicariously liable. As such, WHC did not act intentionally and did not abuse Andrew. WHC asks this Court to affirm the decision of the Tenth District in granting coverage for WHC's vicarious liability for Vaughan's IIED.

Grange's Proposition of Law Number 2:

When attorney's fees are awarded solely in conjunction with non-covered conduct, "compensatory" attorney's fees are not covered damages under liability insurance policies. (*Neal-Pettit v. Laham*, 125 Ohio St.3d 327 (2010), construed.).

WHC believes that this proposition is a moot point since there is already coverage for compensatory damages for either (1) WHC's vicarious liability for Vaughan's IIED, (2) WHC's vicarious liability for Vaughan's battery, or (3) WHC's liability for all of the underlying damages through the Corporal Punishment endorsement (*see* argument against Grange Proposition of Law 1 above). As such, Grange is required to indemnify WHC for the attorney fee

award. *See Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 330, 2010-Ohio-1829, 928 N.E.2d 421, 424, ¶ 18 (2010).

However, if this Court finds no coverage under the Grange policy, then the parties are left with an issue not addressed by *Neal-Pettit*—can an insured recover attorney fees assessed against the insured even if there are no other covered damages?

WHC disagrees with Grange's assertion that the punitive damage award could only be based on WHC's malicious acts. (Grange's Merit Brief, p. 34). Rather, the Court's charge allowed the jury to award punitive damages as a result of WHC's vicarious liability for Vaughan's malicious acts. WHC asked this Court to accept its Proposition of Law Number 6 to address the insurance coverage issues arising from the award of punitive damages against an entity because of its legal liability for the acts of non-managerial employees, but this Court declined. WHC accepts, therefore, that it does not have coverage for the punitive damages awarded against it. That does not mean, however, that it agrees with Grange's argument about the reason such an award was necessarily rendered.

Regardless of the reason the jury returned a punitive damage award against WHC, the issue for purposes of this Proposition of Law is coverage for the compensatory attorney fees awarded against WHC, not coverage for the punitive award.

2.1 Grange's policy provides supplementary coverage for "costs."

As with many insurance coverage issues, the coverage inquiry begins with the policy language. Grange's policy contains a SUPPLEMENTARY PAYMENTS section (Grange Supplement, p. 20-21) that provides:

> We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
>
> * * *

e. all costs taxed against the insured in the "suit".

Payment under the Supplementary Payments provision is not dependent on the presence of "bodily injury" or an "occurrence." Rather, by its terms, payment is triggered by the investigation or defense of a "suit." Grange defended the underlying *Faieta* lawsuit, so payment under this provision is triggered.

2.2 The definition of "costs."

The term "costs" is not defined in the policy, so it must be given its ordinary meaning from the perspective of a layperson, not a lawyer or judge. *Snedegar v. Midwestern Ind. Co.* (1989), 64 Ohio App.3d 600, 582 N.E.2d 617. Windt, *Insurance Claims & Disputes*, §6:2, p. 6-51 (5th Edition, 2007) gives the following general rules for insurance policy construction:

> As a general matter, an ambiguity arises if the language used is susceptible of more than one meaning to a reasonably prudent layperson * * * and the fact that the policy provision would be unambiguous to one trained in the law or insurance is of no significance.

Webster's Unabridged Dictionary of the English Language gives a number of definitions of "cost," but only one dealing with legal costs:

> **4.** costs, *Law*. **a.** money allowed to a successful party in a lawsuit in compensation for legal expenses incurred, chargeable to the unsuccessful party. **b.** money due to a court or one of its officers for services in a cause. (see www.dictionary.reference.com/browse/cost).

Merriam-Webster defines the term as "expenses incurred in litigation, especially those given by the law or the court to the prevailing party against the losing party." (www.merriam-webster.com/dictionary/cost).

Notice that the common dictionary meaning of "costs" is somewhat at odds with the technical legal definition of costs. See *Centennial Ins. Co. v. Liberty Mutual Ins. Co.*, 69 Ohio St.2d 50, 430 N.E.2d 925 (1982), ("Costs are generally defined as the statutory fees to which

officers, witnesses, jurors and others are entitled to for their services in an action and which the statutes authorize to be taxed and included in the judgment."). However, the rules for interpreting undefined terms in an insurance policy differ from the rules applicable to construing the undefined words in a statute or the Civil Rules. These latter sources are never construed from the viewpoint of a layperson, and this makes all the difference.

2.3 Cases construing the term "costs" from a layperson's viewpoint have consistently held that it can reasonably be construed to include attorney fees.

From the point of view of a layperson, legal expenses include attorney fees, so it is reasonable to construe costs as including attorney fees awarded to the prevailing party. Although this Court has not addressed this specific issue (another near-blank slate), a myriad of other States has weighed in on the interpretation of this provision and agreed.

Only two years ago, the Supreme Court of Idaho, in *Employers Mut. Cas. Co. v. Donnelly*, 154 Idaho 499, 300 P.3d 31 (2013), was faced with a situation where the insured, in the underlying suit, was found liable for faulty workmanship. The insurer defended the insured under a reservation of rights and the court later determined that the insurer had no duty to indemnify as there was no coverage under the CGL for the underlying claim. However, the policy had a provision for supplementary payments that was almost identical to the provision in Grange's policy. It stated, "We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend . . . [a]ll costs taxed against the insured in the suit." *Id.* at 502. The court held that the insured had coverage for the attorney fees awarded the plaintiff in the underlying suit since the fees "emanate[d] from the duty to defend as provided in the supplementary payments section of the policy." *Id.* at 503. The court concluded that although "awarded damages [were] excluded from coverage under the applicable insurance policy," the

insurance company was "required to pay costs and attorney fees taxed against [the insured] in the underlying action." *Id.* at 507.

In its analysis, the Idaho Supreme Court used the same rationale that this Court has used on many occasions. First, the drafter "never set forth any specific language in its policy that ties its promise to pay costs on a finding that there is coverage." Likewise, this Court has recognized that the insurance company, as the drafter of the document, could have easily excluded attorney fees through specific policy language. "In the insurance context, we have assumed that the insurer, as the drafter of the policy, is always in a stronger bargaining position than is the insured." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 224, 2003-Ohio-5849, 797 N.E.2d 1256, 1265, ¶ 34 (2003).

Second, the Idaho Supreme Court recognized "any ambiguity in this provision of the policy contract should be construed strongly against [the insurer] and in favor of the [the insured]." Likewise here, it has been a longstanding tenet that "[w]here provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380, 1380-81 (1988).

Finally, the Idaho Supreme Court articulated in a separate case that:

> The [dictionary] definition represents the common understanding of the term 'costs.' The plain, ordinary and popular meaning of 'costs' is the expense of litigation which includes attorney fees.

Mutual of Enumclaw v. Harvey, 115 Idaho 1009, 1013, 772 P.2d 216, 220 (1989).

Likewise, this Court has long recognized that "[c]ontract terms are to be given their plain and ordinary meaning." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 49, 2008-Ohio-4838, 896 N.E.2d 666, 669, ¶ 15 (2008). This Court has historically enforced coverage for an insured's

reasonable expectations based on the clear language of the insurance contract. Here, it is clear that the supplementary payments clause of the CGL covers attorney fees regardless of whether coverage exists for other damages.

In *Prichard v. Liberty Mut. Ins. Co*., 84 Cal.App.4th 890, 101 Cal.Rptr.2d 298 (Cal.App.2000), as modified on denial of reh'g (Dec. 6, 2000), the court was faced with a situation similar to the one here where a supplementary payments provision promised to "pay, with respect to any claim or suit we defend . . . [a]ll costs taxed against the insured in the suit." *Id* at 312. The court separated the issue of coverage and attorney costs and held "[t]he cost claim is not . . . a substantive replay of the indemnity issue. The policy . . . obligates the insurer to pay the costs in any lawsuit it defends." *Id*. Moreover, the court held that "there is no reason that there should be any per se immunity from the supplementary payments obligation, particularly given that such payments (unlike the classic indemnification obligation but like defense costs), are independent of actual coverage." *Id* at 313. Likewise here, the issue of coverage is a moot point in terms of the underlying attorney fee award. Did Grange defend the underlying suit? Yes. Were attorney fee costs taxed against WHC in the underlying suit? Yes. Did Grange promise to pay these costs? Yes.

Many other jurisdictions agree with this approach. *See e.g.:*

- *Groom v. Home-Owners Ins. Co*., 2007 WL 1166050 (Mich. App. 2007) (court held that there was no coverage for any other damages to insured in an underlying suit but held that the insurance company was still "obligated to pay an award of attorney fees" based upon the supplementary payments clause.);

- *Littlefield v. McGuffey,* 979 F.2d 101 (7th Cir.1992) (court held that the insurer had "defended" insured, and therefore it had to fulfill its obligations under the policy's supplementary payments provision to pay costs, including an award of attorney fees.);

- *St. Paul Fire & Marine Ins. Co. v. Hebert Const., Inc*., 450 F.Supp.2d 1214 (W.D.Wash.2006) (court held that coverage of underlying damages was a factual question to be sent to the jury, but that supplementary payments clause in the "policies includes attorneys' fees" from the underlying suit against the insured.);

- *GEICO General Ins. Co. v. Hollingsworth*, 2015 WL 376406 (Fla. App.), (finding coverage since "GEICO could have provided a definition of "court costs" that explicitly excluded attorney's fees"); and

- *GEICO General Ins. CO. v. Rodriguez*, 2014 WL 4435956 (Fla. App.), (finding coverage even for attorney fees in the form of a sanctions judgment against the insured arising from discovery dispute).

2.4 There is little Ohio law on the issue, but the little that exists supports WHC's position.

Ohio law on this issue is sparse, but what little exists supports WHC's position. In *Pasco v. State Auto. Mut. Ins. Co.*, 1999 WL 1221633, the underlying plaintiff was awarded attorney fees of $10,000 in a CSPA case. The defendant/insured requested that State Auto pay this award pursuant to the supplementary payments provision of the policy, which covered "all costs taxed against the insured in any suit defended by the company." State Auto argued—and the trial court agreed—that since the CSPA violations were not covered by the policy, the attorney fee award was similarly not covered.

The court of appeals disagreed:

> [T]he provision's use of the language "*all* costs taxed in any *suit* defended by the company" (as opposed to "those costs taxed against the insured and associated with a covered claim") indicates that no such requirement exists.
>
> * * *
>
> Given the requirement that we construe ambiguous language strictly against the insurer and liberally in favor of the insured, we find that the primary policy's "supplementary payments" provision does cover the costs (including attorney fees) under the specific facts of this case assessed against [State Auto's] insured in the Ottowa County litigation.

2.5 The insurance industry reacts—and predictably restricts coverage.

Significantly, the insurance industry has reacted to this wave of cases and ISO has now redrafted the supplementary payments provision at issue. Effective with the 2007 CGL form the provision now states that the insurer will pay (new language in bold):

> All **court** costs taxed against the insured in the "suit". **However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.**

See *Commercial General Liability Coverage Guide, 11th Edition* and National Underwriter Company, FC&S Online, Commercial General Liability Insurance, 2007 CGL Form Revisions.

This is a significant change, and it was done for a reason. Since ISO has changed its wording to now specifically exclude coverage for attorney fees, it stands to reason that one reasonable interpretation of the older language—which is the language in WHC's policy—is that attorney fees *were* intended to be covered as 'costs.'

2.6 Conclusion.

Affirming the Tenth District's ruling that WHC is entitled to indemnity of the underlying suit's attorney fees follows not only this Court's previous rulings, but also the trend in other jurisdictions to provide coverage to policyholders in the face of ambiguous language that has now been clarified.

Grange's Proposition of Law Number 3:

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

The Tenth District was correct in holding "that the supplementary payments section of the CGL policy plainly obligates Grange to pay WHC for the post-judgment interest assessed on the full amount of the judgment." (Recon. App. Op., ¶ 23, Grange Appendix 13). As with attorney fees, the trigger of coverage is Grange defending the lawsuit, not a covered or partially

covered judgment, although the *Faieta* judgment was at least partially covered for the reasons stated above.

The clear language of the contract controls. The contract provides that Grange "will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend . . . all interest earned on the full amount of any judgment that accrues after entry of the judgment . . .." (Grange Supplement p. 20-21). There was a suit—*Faieta v. World Harvest Church*. Grange defended that suit. There was a judgment against WHC. Therefore, the clear language of the policy requires Grange to pay "all interest earned on the full amount of any judgment that accrues after entry of judgment and before we have paid, offered to pay, or deposited in court that part of the judgment that is within the applicable limits of insurance."

Grange does not dispute what the policy says. Instead, it argues that the plain meaning of the SUPPLEMENTARY PAYMENTS provision "is not only unreasonable and illogical, but contrary to public policy" (Grange's Merit Brief, p. 39) and that, therefore, the Court should "interpret" the provision to mean something other than what is says. However, the provision is not absurd. It is, in fact, a standard CGL provision that the vast majority of courts have held means exactly what it says.

Grange's argument ignores Ohio's well-established rules of insurance policy construction. The court must look to the plain and ordinary meaning of the language used in the policy, and when the language is clear, the court may look no further than the writing itself to find the intent of the parties. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, 797 N.E.2d 1256. The court must enforce the agreement that the parties made, and not make a new agreement for them.

The SUPPLEMENTARY PAYMENTS section of Grange's policy clearly states that Grange will pay "all interest earned on the full amount of any judgment" that accrues prior to Grange proffering the part of the judgment covered by the policy. The court of appeals determined that the covered part of the judgment consisted of the award for Vaughan's IIED and the award for attorney fees, which together total $776,226. Grange did not proffer these amounts, so Grange is liable for post-judgment interest on the entire award.

This SUPPLEMENTARY PAYMENTS provision is standard, and the vast majority of cases that have construed it—at least for the last 50 years—have held that it means exactly what it says:

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

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

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

> The National Bureau of Casualty Underwriters formerly included the clause now before us in its form of standard policy. It has now changed its form to read 'all interest on the entire amount of any judgment therein which accrues after entry of the judgment.' In announcing the change, it said: "Several court cases have held that an insurer's obligation to pay

> interest extends only to that part of the judgment for which the insurer is liable. **The respective rating committees have agreed that this is contrary to the intent.** As a result, the wording with respect to payment of interest in the new Family Automobile Policy has been restated, in order that it be entirely clear that all interest on the entire amount of any judgment, which accrues after entry of the judgment, is payable by the insurer until the insurer has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the insurer's liability thereon."

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

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

Notice that this is the old language and that this provision is not as broad as Grange's provision, which specifically says "all interest **on the full amount** of any judgment." Nevertheless, the court in *Coventry* found that the insurer was obligated to pay *all* post-judgment interest. The case was certified to the Ohio Supreme Court based on a conflict with another district, and the supreme court held that the "judgment of the Court of Appeals is affirmed for the reasons stated in its opinion." *Coventry v. Steve Koren, Inc.*, 4 Ohio St.2d 24 (1965). See also *Rader v. Carroll*, 1992 WL 379315 (12th District).

The court of appeals adopted the majority position that has been entrenched in the case law and treatises for over 50 years, as evidenced by the language used by the Kansas Supreme Court in *Stamps v. Consolidated Underwriters*, 208 Kan. 630, 493 P.2d 246 (1972):

> That which now appears to be the majority view is the clause creates liability for interest on the entire judgment awarded so as to render the insurer liable for such interest until the amount of the policy limit, plus interest on the whole judgment, has been tendered, offered or paid.
>
> The minority view is that liability is limited to interest on the amount of the policy limit.
>
> * * *
>
> We are persuaded the language in the interest clause means what it says and means what a substantial segment of the insurance industry says it means, that is, irrespective of principal policy limits, the term judgment refers to the entire or whole judgment and not something less.

Grange espouses a position that was the minority view even 50 years ago before the SUPPLEMENTARY PAYMENTS language was broadened to include the words "full amount of the judgment." The only case cited by Grange—*Bohrer v. Curch Mutual Ins. Co.*, 12 P.3d 854 (Colo. App. 2000)—arrived at its decision by refusing to enforce the clear language of the policies based on public policy considerations, not based, as Grange suggests, on policy construction.

Moreover, Grange's reliance on *Bohrer* is completely misplaced. The *Bohrer* plaintiff obtained a judgment against a minister who was the guilty actor and then attempted to collect post-judgment interest from the minister's liability insurer. The court concluded: "post-judgment interest on punitive damages and damages for intentional torts is against [Colorado] public policy." Here, it is not Vaughn, but World Harvest Church that is collecting from the insurer. In addition, this Court has strongly indicated in both *Safeco* and *Neal-Petit* that it does not share Colorado's same public policy concerns in the areas of intentional loss and punitive damages.

Grange also argues that the payment of all post-judgment interest does not fall within the scope of the policy's general coverage grant, which states that Grange is liable for damages awarded against WHC "because of 'bodily injury' . . . to which this insurance applies." (Grange's Merit Brief, p. 36).

However, this argument misses the point. Grange's liability for post-judgment interest is *not* controlled by the CGL policy's general coverage grant, but by the SUPPLEMENTARY PAYMENTS section, which, as the title of this section clearly indicates, is coverage that supplements (i.e., is in addition to) the coverage extended by the main coverage section.

Finally, Grange, the drafter of the contract, knew how to limit the Supplementary Payments Section of the CGL. The Tenth District said it best:

> If Grange wanted to limit its liability for postjudgment interest, it could have done so. For example, in the CU [commercial umbrella] policy, Grange stated it agreed to pay its insured for: "All interest earned *on that part of any judgment within the Limit of Insurance* after entry of the judgment and before we have paid the insured, offered to pay, or deposited in *court that part of any judgment that is within the applicable Limit of Insurance*." (Emphasis added.) (R. 28, exhibit A, CU Policy, at 7.) As evidenced by this provision, Grange knew how to limit its liability for postjudgment interest. Grange chose not to do so in the CGL policy.

(Recon. App. Op., ¶ 22; see policy provision at Grange Supplement p. 48)

The Tenth District ruled correctly that "the supplementary payments section of the CGL policy plainly obligates Grange to pay WHC for the post-judgment interest assessed on the full amount of the judgment." (Grange Appendix 13, ¶23) This Court should affirm the Tenth District's holding that Grange is required to indemnify WHC for all post-judgment interest.

Respectfully Submitted,

/s/ Robert P. Rutter

Robert P. Rutter (0021907)
One Summit Office Park, Suite 650
4700 Rockside Road
Cleveland, Ohio 44131
Telephone: (216) 642-1425
Email: brutter@OhioInsuranceLawyer.com
Attorney for Plaintiff/Appellee
World Harvest Church

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by ordinary U.S. mail this 23rd day of March, 2015 to the following:

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 & LITTRELL L.L.P.
471 East Broad St., 19th Floor
Columbus, OH 43215-3872
TEL: 614-228-5151
jgallagher@ggptl.com
Attorneys for Defendant-Appellant
Grange Mutual Casualty Company

Michael M. Neltner (0063555)
Ohio Association of Civil Trial Attorneys
17 S. High Street, Suite 200
Columbus, Ohio 43215
TEL: 513-603-5082
mneltner@staffdefense.com
Counsel for Amicus Curiae Ohio
Association of Civil Trial Attorneys

Thomas E. Szykowny (0014603)
VORYS, SATER, SEYMORE AND PEASE LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216
TEL: 614-464-5686
teszykowny@vorys.com
Counsel for Amici Curiae Ohio Insurance Institute
and Property Casualty Insurers Assoc. of America

/s/ Robert P. Rutter
ROBERT P. RUTTER (0021907)
Attorney for Plaintiff/Appellee
World Harvest Church