

No. 14-1161

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Tenth Appellate District
Case No. 13AP-290

WORLD HARVEST CHURCH
Plaintiff-Appellee

v.

GRANGE MUTUAL CASUALTY COMPANY
Defendant-Appellant

**MERIT BRIEF OF AMICUS CURIAE
THE OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF APPELLEE**

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STATEMENT OF INTEREST¹

OAJ is a frequent contributor to this Court on issues affecting the rights of injured persons and small businesses. Among our abiding interests is the stability afforded by privately-negotiated contracts for the provision of liability insurance. General and commercial liability policies are the most effective means by which individuals and small businesses can protect themselves from the financial risks associated with their endeavors, and absent which the ventures would often be too risky to undertake.

OAJ chose to write on this case because neither Appellant Grange Mutual Casualty Company (“Grange”) nor its amici curiae have adequately examined two critical issues *predicate to* the consideration of Grange’s proposition of law: (1) whether the harsh spanking of student Andrew Fiaeta by his teacher, Mr. Vaughn, an employee of Appellee World Harvest Church (the “Church”), constitutes the sort of “abuse” which is excluded from the coverage otherwise afforded to Mr. Vaughn and the Church under a liability policy issued by Grange; and (2) whether the spanking constitutes “corporal punishment,” which is specifically endorsed as covered under the Grange policy, such that the policy *as a whole* provides coverage to Mr. Vaughn and the Church.

ARGUMENT

Proposition of Law No. 1: A commercial liability policy containing an Abuse or Molestation Exclusion which excludes damages arising out of abuse “by anyone” of any person in the care, custody or control of any insured, as well as the negligent employment or supervision of an abuser, eliminates coverages of sums awarded based on the insured’s vicarious liability for its employee’s abuse of a child in the insured’s care and custody.

Grange’s first proposition (on which its other propositions turn) makes an assumption that this Court should not: namely, that the Abuse or Molestation Exclusion *does* exclude damages arising out of Mr. Vaughn’s spanking of Andrew while employed and supervised by the Church. Given that “[t]his Court has yet to interpret a standardized Abuse or Molestation

¹ Amicus Curiae The Ohio Association for Justice (OAJ) defers to the Appellee’s Statement of Facts. Also, throughout this brief, all emphasis is added, and all internal citations and quotations are omitted, unless otherwise noted.

Exclusion,” *see* Appellant’s Merit Brief, p. 13, this Court should first determine *whether or not* the Abuse or Molestation Exclusion applies to Mr. Vaughn’s spanking of Andrew, especially in light of the policy’s Primary Coverage Form and its Corporal Punishment Endorsement. By following its precedents on how to interpret insurance agreements, this Court should find that Mr. Vaughn’s acts were *not* excluded, and that any claims against him and/or against the Church (for respondeat superior liability and/or negligent employment or supervision) are covered.

I. When Undefined Words in an Insurance Policy Exclusion Are Susceptible to More than One Meaning, They Must Be Construed in Favor of Coverage

The Abuse or Molestation Exclusion does not define “abuse” or “molestation”; therefore, this Court must determine the words’ “plain and ordinary meanings” in the context of a liability insurance agreement. *See Nationwide Mut. Fire. Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995), *citing Miller v. Marrocco*, 28 Ohio St.3d 438, 439 (1986).

Abuse and *molestation* are both elastic words capable of being used in different ways in different contexts. For example, the Macmillan Dictionary has five very different definitions of “abuse”: (1) cruel, violent, or unfair treatment, especially of someone who does not have the power to prevent it; (2) forced sexual activity with someone who cannot prevent it; (3) the use of something in a bad, dishonest, or harmful way; (4) the use of alcohol or illegal drugs in a way that is harmful to one’s health; and (5) angry offensive comments.² Thus, the word *abuse* is reasonably susceptible or more than one meaning, depending on the context in which it is used.

“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, 99 (1974); *see also Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, at ¶ 8. Indeed, “in 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.” *Anderson v.*

² *See* www.macmillandictionary.com/us/dictionary/american/abuse_1. It almost goes without saying that the modern, online dictionary is almost certainly the most common resource for the ordinary person to consult for the generally-accepted meanings of words.

Highland House Co., 93 Ohio St.3d 546, 549, 2001-Ohio-1607. That is, courts must adopt any reasonable interpretation that results in coverage for the insured, and must construe the language employed “most favorably for the insured.” *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 168 (1982), quoting *Batche v. Ohio Cas. Ins. Co.*, 174 Ohio St. 144, 146 (1962).

In sum: “It is a fundamental rule of law that a contract of insurance prepared by an insurer and in language selected by the insurer must be construed liberally in favor of the insured and strictly against the insurer if the language used is doubtful, uncertain or ambiguous. This is especially true where an exception or exclusion from liability is contained in the policy... [A]n exclusion [] must be clear and exact in order to be given effect.” *American Financial Corp. v. Fireman’s Fund Ins. Co.*, 15 Ohio St.2d 171, 174 (1968) (because the insurer did not define the word “insured” in an exclusion, the Court had to give that term a definition which would result in coverage, if reasonable).

II. Mr. Vaughn’s Spanking of Andrew Is Not “Abuse” or “Molestation” When Those Words Are Given Reasonable Definitions Favorable to the Insured

This appeal can be boiled down to one question: are there reasonable definitions of “abuse” and “molestation” which do *not* include a teacher’s spanking of a student with a ruler? If so, the Abuse or Molestation Exclusion does not apply to preclude coverage for Mr. Vaughn and the Church (and Grange’s Proposition of Law is rendered moot or inapposite).

One of the accepted definitions of “abuse” mentioned above (“forced sexual activity”) obviously does not include Mr. Vaughn’s spanking of Andrew. Nor does one of the accepted definitions of “molestation”: unwanted sexual touching.³

Indeed, when the Connecticut Supreme Court looked at the uniform Abuse or Molestation Exclusion, it found “[t]he words ‘abuse’ and ‘molest’ are commonly used to describe unwanted sexual contact.” *Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co.*, 254 Conn. 387, 401, n.15, 757 A.2d 1074 (2000).

³ <http://dictionary.cambridge.org/us/dictionary/american-english/molest>.

Other courts looking at the Abuse or Molestation Exclusion have found that forced sexual activity or unwanted sexual touching are appropriate ways to define “abuse” or “molestation” as used in the exclusion. *E.g.*, *Erie Ins. Exch. v. First United Methodist Church*, 690 F. Supp. 2d 410, 415 (W.D.N.C. 2010) (the conduct of a child who acted-out sexually was “abuse or molestation” under the exclusion).

And still more courts have found that “abuse or molestation” in an insurance policy exclusion refers to inappropriate sexual contact. *See McAuliffe v. Northern Ins. Co. of New York*, 69 F.3d 277, 279 (8th Cir. 1995) (inappropriate sexual relationship between parishioner and priest); *Jones v. Doe*, 673 So.2d 1163, 1164-66 (La. App. 1996) (sexual assault of student by older student); *New World Frontier, Inc. v. Mount Vernon Fire Ins. Co.*, 253 A.D.2d 455, 456 (N.Y.S.2d 1998) (sexual molestation by a boy of a girl).

Unwanted sexual contact is not the only way to define “abuse” or “molestation,” but it is one reasonable way to define those words. Given this Court’s precedents on using definitions that will result in a finding of coverage for the insured wherever reasonable, this Court should find that Mr. Vaughn’s non-sexual spanking of Andrew with a ruler does *not* constitute “abuse or molestation,” since those words can be reasonably defined as unwanted sexual contact.

III. Broad Definitions of “Abuse” or “Molestation” Would Undermine the Central Intent of the Parties to Enter into a Liability Insurance Arrangement

“[P]rovisions in [a] policy must be examined in the context of the overall policy and with respect to the policy’s purpose... The intention of the parties must be derived ... from the instrument *as a whole*, and not from detached or isolated parts thereof.” *Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-3655, at ¶ 13. The manifest intentions of Grange and the Church were set forth in the Primary Coverage Form: namely, to insure the Church from “occurrences” that resulted in “bodily injury.” But a broad interpretation of the Abuse or Molestation Exclusion would render the Primary Coverage Form illusory.

To see how, suppose “abuse” were given a more general definition: misuse resulting in injury. This is the sense in which the word was used by Madison in *Federalist 63* (“[L]iberty

may be endangered by the abuses of liberty, as well as by the abuses of power.”). And it is the definition implicitly advocated by Grange: to treat in a harmful or injurious way.

In the context of this insurance policy, “abuse” cannot possibly have been intended to have so general a meaning. To give it so broad a sense would entirely eliminate coverage, since any accident caused by an insured that results in bodily injury is ‘treatment that results in harm.’ Thus, the exception (the Exclusion) would swallow the rule (the Primary Coverage)—and the entire policy would be rendered illusory. Thus, “abuse” cannot mean something so general as ‘mistreatment that causes injury’ or the like; in the context of a liability insurance agreement, an exclusion for ‘abuse’ must mean something narrower. Since ‘unwanted sexual contact’ is one of the reasonable meanings for “abuse or molestation,” that is the appropriate definition to use in this context.

IV. The Corporal Punishment Endorsement Is a Part of the Insurance Policy and Supports the Finding that Spanking a Student Does Not Constitute “Assault or Molestation”

“The meaning of a contract is to be gathered from a consider *of all its parts.*” *Marusa*, 2013-Ohio-1957 at ¶ 8. The Corporal Punishment Endorsement is one of the parts of the Church’s insurance agreement with Grange. The Endorsement modifies the ‘intentional acts exclusion’ by providing coverage for “corporal punishment to your student administered by or at the direction of any insured.”

“Corporal punishment” is not defined in the Grange policy, but has been defined as “striking a student with a paddle, stick or hand or using any physical force against a student” in a similar endorsement. *See Atlantic Employers Ins. Co. v. Chartwell Manor School*, 280 N.J. Super. 457, 468, 471, 655 A.2d 954 (1995) (holding that paddling would be covered under the endorsement unless the jury were to find that the incidents were “of a sexual nature” or “were intended to injury *beyond* the normal sequelae of corporal punishment”).

Indeed, Merriam-Webster defines *corporal punishment* as that “administered by an adult (as a parent or a teacher) to the body of a child, ranging in severity from a slap to a spanking.”⁴ This was certainly the sense in which Orwell used it in *Such, Such Were the Joys* (even if we strenuously disagree with his sentiment): “I doubt whether classical education ever has been or can be successfully carried out without corporal punishment.” When we Googled “corporal punishment” in late October 2015, the fourth highest-ranking result was a Christian Science Monitor cover story from a year earlier entitled “To spank or not to spank: Corporal punishment in the US,” which discusses adults spanking children, going so far as to “whup” them with anger and severity, using a switch or stick, leaving cuts and bruises.⁵

As “corporal punishment” is popularly-defined in the modern American mind, it certainly includes an authority figure like Mr. Vaughn striking a student like Andrew with a ruler, even if the spanking is savage and causes injury. The Church chose to purchase—and Grange chose to sell—an endorsement to cover this very situation. Indeed, a spanking gone awry is precisely the risk the Church and other entities like it run when they take custody of children and place them under the supervision of employees.

The Endorsement reinforces the notion that “abuse or molestation” must have a narrower meaning in the Exclusion than ‘mistreatment which causes injury.’ Since ‘unwanted sexual contact’ is a reasonable meaning of “abuse or molestation,” and one which would not conflict with the Corporal Punishment Exclusion, it is the meaning which should be given to the Exclusion.

CONCLUSION

When terms in an insurance policy exclusion are not defined, they must be given the reasonable meaning most favorable to the insured—and they must be understood in the context of the insuring agreement and in harmony with the other parts of that agreement. In this

⁴ <http://www.merriam-webster.com/dictionary/corporal%20punishment>.

⁵ <http://www.csmonitor.com/USA/Society/2014/1019/To-spank-or-not-to-spank-Corporal-punishment-in-the-US>.

instance, the words “abuse or molestation” in the Exclusion must be given a narrow meaning that is in harmony with the Primary Coverage Form as well as the Corporal Punishment Endorsement.

Since the Exclusion should not exclude Mr. Vaughn’s spanking of Andrew, Grange should provide Mr. Vaughn coverage for his own acts, and Grange should provide the Church with coverage for its respondeat superior liability as well as its own liability for its negligent employment or supervision of Mr. Vaughn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was served by email on Robert P. Rutter, Irene C. Keyse-Walker, Benjamin C. Sasse, James R. Gallagher, Michael M. Neltner, and Thomas E. Szykowny, on March 30, 2015, pursuant to S.Ct.Prac.R. 311(B)(1).

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