

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,

APPELLANT GRANGE MUTUAL CASUALTY COMPANY'S MEMORANDUM IN RESPONSE TO MOTION FOR RECONSIDERATION

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This case – and this Court’s unanimous resolution of it – is straightforward. An exclusion in the insurance policy Grange Mutual Casualty Company issued to World Harvest Church excised coverages for all damages arising out of abuse. When the Faietas filed a complaint alleging damages arising out of a horrific beating of their young son by a WHC teacher, Grange provided a reservation of rights defense. A jury found that the beating occurred; WHC was therefore not entitled to reimbursement of any of the monies it paid to satisfy the judgment on that verdict.

WHC has now filed a motion for partial reconsideration. The motion does not challenge this Court’s conclusion that the abuse exclusion precludes coverages for *all* liability for abuse – derivative as well as direct. Rather, WHC repeats the flawed argument it made in opposition to propositions of law nos. 2 and 3 (Opp. Br. 4, 27, 28, 33-34) – i.e., that it is entitled to be reimbursed for \$1 million in attorney fees and postjudgment interest even in the absence of any covered bodily injury damages.

This Court should deny the motion because: (1) it fails to comply with the mandate of S.Ct.Prac.R. 18.02(B) that “[a] motion for reconsideration shall not constitute a reargument of the case * * *”; and (2) this Court correctly refused WHC’s invitation to hold that WHC and Grange intended to provide coverages for liabilities excluded by the insurance contract.

I. WHC'S MOTION FOR RECONSIDERATION RECYCLES PAGES 29 THROUGH 33 OF ITS MERIT BRIEF.

This Court's Rules of Practice do not provide for unlimited motions for reconsideration: "A motion for reconsideration shall not constitute a reargument of the case***." S.Ct.Prac.R. 18.02(B). WHC's motion fails this fundamental requirement. Compare page 4 of WHC's Opposing Brief ("Even if" there are no coverages, the policy's Supplementary Payments provision obligates Grange to pay attorney fees and postjudgment interest) and page 1 of WHC's Motion for Reconsideration. Indeed, headings 2.2 and 2.3 and the argument at pages 3 through 8 of WHC's Motion for Reconsideration are lifted wholesale from pages 29 through 33 of WHC's Merit Brief. For that reason alone, WHC's motion should be denied.

II. MOREOVER, THIS COURT'S OPINION IS NOT PREMISED UPON "AN INCORRECT FACT."

WHC's reworked arguments are also without merit. WHC asserts that: (1) this Court's "sole justification" for denying coverages for attorney fees and postjudgment interest is the "fact" that "the Faietas' suit is not one that alleges bodily injury to which the insurance applies", and (2) that "fact" is "incorrect" (Mot. for Recon. at 1, quoting slip op. at ¶ 42). WHC's argument misses the mark in both scope and substance.

First, paragraph 42 of the slip opinion addresses only postjudgment interest. The entire sentence excerpted by WHC reads: "Because the Faietas' suit is not one that alleges bodily injury to which the insurance applies, *it is not one for which*

Grange must pay interest on a judgment.” (Slip op. ¶ 42, emphasis added.) When addressing WHC’s claim to indemnity for attorney fees, this Court held:

[T]he appellate court concluded that Grange was obligated to indemnify WHC for the entire amount of attorney fees awarded because the fees could not be allocated between the covered and noncovered claims. 2013-Ohio-5707, ¶ 59.

Because the result of our decision is that no claims are covered by the insurance policies, allocation between covered and noncovered claims is unnecessary.

Slip op. ¶¶ 38-39. WHC neither challenges nor seeks reconsideration of this Court’s holding and rationale on that issue.¹

Second, whether applied to WHC’s claim for attorney fees, postjudgment interest or both, this Court’s interpretation of the Supplementary Payments provision is amply supported by law and fact.

WHC relies on the Supplementary Payment provision’s agreement to pay costs and postjudgment interest awarded in “‘any suit’ against an insured we defend” to claim entitlement to \$1 million even in the absence of a covered claim. But as this Court’s unanimous decision points out, “suit” is a defined term – “a civil proceeding in which damages because of ‘bodily injury’ * * * *to which this insurance*

¹ As noted in Grange’s Reply Brief (pp. 14-16), WHC’s argument that attorney fees are “costs” owed under the Supplementary Payments provision is not only contrary to clear Ohio law, but also was asserted for the first time in this Court. That argument was therefore properly disregarded by this Court. *See, e.g., Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 123, ¶ 86 (2006) (“[T]his issue was neither raised by Akron in the court of appeals nor addressed by the court of appeals and may not be raised in this Court for the first time in this appeal”).

applies are alleged.” (Slip op., ¶ 41, emphasis added by court.) Here, there is no predicate “suit” to trigger any obligation under the Supplemental Payments provision:

As discussed above, pursuant to the abuse exclusion, the policy does not apply to bodily injury arising out of abuse. Because the Faietas’ suit is not one that alleges bodily injury to which the insurance applies, it is not one for which Grange must pay interest on a judgment. Accordingly, we conclude that Grange is not obligated to pay any amount of postjudgment interest awarded to the Faietas.

Slip op., ¶ 42. This Court’s holding accords with treatises and numerous jurisdictions holding that the Supplementary Payments provision supplements payments for *covered* claims and has no application to uncovered claims. *See* Grange’s Reply Brief at pp. 17-19; *Borer v. Church Mut. Ins. Co.*, 12 P.3d 854, 857 (Colo.App.2000) (distinguishing authorities upon which WHC relies because those cases “involved money judgments *that were covered* by the provisions of the insurance policy but exceeded the insured’s limits.” (Emphasis added)).

WHC nevertheless argues that: (1) the Supplementary Payments provision “is triggered merely by the duty to defend,” and (2) Grange must have had a duty to defend because it provided a defense. (Mot. for Recon. at 1). WHC is incorrect in both respects. As noted above, the provision is triggered by a “suit” Grange defends, not a “duty” to defend, and the Faietas’ action does not meet the policy definition of “suit.” Further, even if the provision were triggered by a duty to defend, WHC has its facts wrong – Grange did not have a duty to defend. Grange provided a *reservation*

of rights defense *because* the Faietas' complaint did not allege damages for bodily injury to which the insurance applied.

The first sentence of the Faietas' Complaint states:

This action arises out of the painful and horrific physical assault of plaintiff Infant Doe, a minor child just 2-1/2 years old.

(Compl., Supp. at 68.) Every factual allegation of the Complaint seeks damages arising out of a horrific beating. WHC claims that because "simple negligence" was part of the cornucopia of legal theories asserted to recover for damages arising out abuse, the complaint alleged bodily injury damages for contact dermatitis. But "skin rash" was WHC's defense – its basis for claiming no beating occurred – not a claim for bodily injury damages. No facts asserted in the complaint can be remotely construed as seeking damages for a skin rash.

In light of the alleged facts, Grange sent a letter to its insureds reserving all rights regarding any obligation to defend or indemnify the Faietas' suit. (*See* Appendix 1 to Grange's Corrected Br., 10th Dist. App. No. 13 AP-290.²) WHC relies on deposition testimony taken out of context to claim Grange nevertheless conceded a duty to defend. Mr. Histed's deposition testimony immediately preceding the

² In the Idaho case upon which WHC relies heavily, in contrast, the insurer issued a letter reserving rights only for specific claims, while expressly acknowledging a duty to defend and potentially indemnify other claims. *Employers Mut. Cas. Co. v. Donnelly*, 154 Idaho 499, 503, 300 P.3d 31 (Idaho 2013)

quoted portion, however, makes it clear that he is referring to facts outside of the Complaint and not to any claim that was part of the Faietas' suit:

Well, it was Grange's position the Complaint itself alleged a severe beating several places in the Complaint, *and so it was defended under a reservation of rights*. At some point in the early investigation, one of the doctors *** said there might have been a dermatology condition. The early information from the Church was possibly cleaning chemicals in the Church had caused a rash among other students *and we gave a reservation of rights defense*.

(Histed Depo., p. 60, emphasis added.) The trial testimony confirmed that "rash" was WHC's defense to liability for abuse – not a claim for damages by the Faietas – and the jury's conclusion that the abuse occurred confirmed that the suit was not one to which the insurance applied.

In the end, WHC is left with the wholly untenable argument that because WHC convinced Grange to provide a reservation of rights defense for an uncovered claim based on its contact dermatitis defense, Grange is obligated to pay \$1 million in attorney fees and postjudgment interest. WHC's claim that it can ignore an express reservation of rights and self-trigger the Supplementary Payments provision does not support reconsideration of this Court's unanimous decision.

III. CONCLUSION

The motion for reconsideration should be denied at the outset because it fails to comply with the mandate of S.Ct.Prac.R. 18.02(B) that motions for reconsideration "shall not constitute a reargument of the case ***." Moreover, even

if this Court were to allow the improper reargument, WHC's arguments are no more valid now than when first asserted.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Appellant Grange Mutual Casualty Company's Memorandum in Response to Motion for Reconsideration** was served on May 31, 2016, per S.Ct.Prac.R. 3.11(B), by sending it by regular U.S. Mail to:

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