

ORIGINAL

No. 14-1161

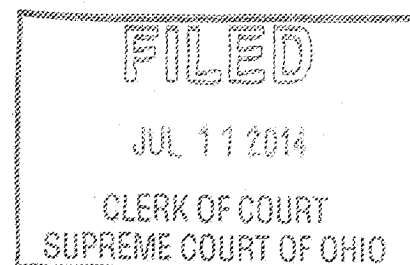
In the Supreme Court of Ohio

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 SUPPORT OF JURISDICTION

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
ikseyse-walker@tuckerellis.com

James R. Gallagher (0025658)
GALLAGHER, GAMS, PRYOR
TALLAN & LITRELL 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*

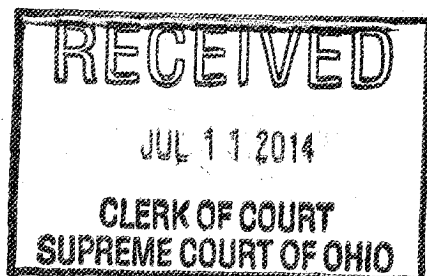


TABLE OF CONTENTS

	<u>Page</u>
I. EXPLANATION OF WHY THIS IS A CASE OF GREAT AND GENERAL PUBLIC INTEREST	1
II. STATEMENT OF THE CASE AND FACTS	6
A. The Underlying Trial and Appeal.	6
III. ARGUMENT	11
Proposition of Law No. 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.	11
Proposition of Law No. 2.....	13
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. (<i>Neal-Pettit v. Laham</i> , 125 Ohio St.3d 327 (2010), construed.)	13
Proposition of Law No. 3.....	13
A liability insurance policy’s supplementary payments clause cannot be reasonably construed as an agreement to pay post-judgment interest on non-covered claims.	13
IV. CONCLUSION.....	15
PROOF OF SERVICE	

APPENDIX

Appx. Page

Memorandum Decision on Applications for Reconsideration, Court of Appeals for the Tenth Appellate District, Case No. 2013AP-290 (May 29, 2014)	1
Judgment Entry, Court of Appeals for the Tenth Appellate District, Case No. 2013AP-290 (Jan. 6, 2014)	9
Decision, Court of Appeals for the Tenth Appellate District, Case No. 2013AP-290 (Dec. 24, 2013)	11
Decision Denying in Part and Granting in Part Plaintiff's Motion for Summary Judgment Filed Sept. 1, 2011 and Decision Denying in Part and Granting in Part Defendant's Motion for Summary Judgment Filed Sept. 2, 2011, Franklin County Common Pleas Court, Case No. 09CV-11327 (Dec. 16, 2012)	32

I. EXPLANATION OF WHY THIS IS A CASE OF GREAT AND GENERAL PUBLIC INTEREST

This Court should accept jurisdiction of this appeal because:

- It presents an issue of first impression for this Court on the application of a standardized, subject matter exclusion utilized in thousands of commercial general liability policies issued to Ohio schools, day care centers, hospitals, churches and a host of other organizations responsible for the safety and well-being of children within their care and custody.
- The Tenth District's analysis of that exclusion conflicts with the analysis of the Third District in *Crow v. Dooley*, 3d Dist. No. 1-11-59, 2012-Ohio-2565, *appeal not allowed*, 133 Ohio St.3d 1424 (2012), as well as the uniform construction of the ISO endorsement by federal and state courts across the country.
- This case will clarify the application of *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562 (2009) to policies with applicable subject matter exclusions.

In the case from which this coverage action arose, the plaintiffs alleged that a church day care teacher savagely beat their 2 ½ year old child. The church and its teacher jointly asserted an "all or nothing" defense, admitting that the teacher was acting in the scope of his employment but denying that anything occurred – the marks on the child were a skin rash. The jury rejected that defense. The church satisfied the resulting \$3 million judgment and demanded indemnity from its liability insurer. The insurer declined on several grounds, including a standardized Abuse or Sexual Molestation Exclusion that eliminated coverages for (1) any damages arising out of abuse by anyone of any person in the custody and care of the insured, and (2) any damages for the negligent employment, retention, or supervision of an employee or agent committing such abuse. The Tenth District Court of Appeals held that the

Exclusion did not apply to the church's vicarious liability for certain damages caused by its teacher's abuse, even though those damages indisputably arose out of the abuse incident.

This Court has yet to construe the standardized, ISO Abuse or Molestation Exclusion. By focusing on a subject matter (abuse or molestation) as opposed to a state of mind (i.e., acts intended to cause injury), the endorsement provides insurers and their insureds with clear, mutual expectations of contracted-for coverages, regardless of how a cause of action is framed. The Tenth District's analysis of the Exclusion merits this Court's review for several reasons.

First, a rule of law describing the proper analysis of any subject matter exclusion will streamline coverage disputes and litigation. Subject matter exclusions address the reality that "[i]t is impossible for [an insurer] to anticipate every claim that creative counsel will craft in order to draft a complaint that will trigger coverage." *Harper v. Gulf Ins. Co.* U.S.D.C. No. 01-CV-201-J (D.Wyo.), 2002 WL 32290984, *9. Instead of having to determine whether an insured's intent to injure must be "inferred" from certain causes of action, for example, courts simply look to whether the damages arise out of excluded conduct. Compare *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34 (1996) (sexual molestation is not a covered "occurrence" because intent to harm is inferred) with *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, ¶ 61 (distinguishing and enforcing broad exclusionary language that eliminates coverages for an "act" as opposed to an "injury" expected or intended by the

insured) and *Jackson-Brown v. Monford*, 10th Dist. No. 12 AP-542, 2013-Ohio-607, ¶ 18 (“Whether or not the shooting was an occurrence for purposes of the policy does not matter” when subject matter exclusions precluded coverages). Because such exclusions are commonly used to eliminate categories of coverages in commercial policies – pollution, asbestos, employment practices, etc. – this Court’s guidance on their proper application aids the bench, the bar, and Ohio businesses.

Second, the Tenth District’s analysis of the subject matter exclusion at issue here – the ISO Abuse or Molestation Exclusion – merits this Court’s review. The Exclusion provides certainty and predictability in that both the insured and insurer have clear expectations that no claims arising out of the abuse or molestation by anyone, of any person in the insured’s care, will be covered. Numerous state and federal courts have addressed this standardized exclusion in insurance policies issued to “medical or therapeutic care providers, healthcare centers, summer camps, schools and preschools, job training programs, churches, and the like” and held that the Exclusion unambiguously bars coverages for damages that arise out of physical abuse or sexual molestation, regardless of the legal cause of action asserted. *Valley Forge Ins. Co. v. Field*, 670 F.3d 93, 98 (1st Cir. 2011) (citing cases). As *Valley Forge* explains, “the very purpose for the Abuse or Molestation Exclusion since its creation” has been to eliminate coverages “on the limited occasions where the damages flow from sexual or physical abuse by another of someone in the care of the insured.” *Id.* at 105. Accord *Holiday Hospitality Franchising, Inc. v. Amco Ins. Co.*, 983

N.E.2d 574, 578 (Ind. 2013) (“We think it obvious that the plain and ordinary meaning of the abuse/molestation exclusion as a whole is that both parties intended to exclude from coverage those claims arising from conduct like Forshey’s”). Here, the Tenth District Court of Appeals engaged in the very type of legalistic hair-splitting the Abuse or Molestation Exclusion was drafted to prevent – the Court concluded that the Exclusion eliminated coverages for abuse framed as battery, intentional infliction of emotional distress, and negligent supervision, but did not eliminate coverages for the church’s vicarious liability for its teacher’s abuse. (App. Op., Appx. at 28, ¶ 55.) That holding illustrates the need for this Court to provide guidance on this issue of first impression.

Third, in addition to being out of step with state and federal authority, the decision below creates confusion as to the scope of this Court’s decision in *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562 (2009), and conflicts with a decision of the Third District Court of Appeals (*Crow v. Dooley*, 3d Dist. No. 1-11-59, 2012-Ohio-2565, *appeal not allowed*, 133 Ohio St.3d 1424 (2012)) that found no coverage for respondeat superior claims under an Abuse or Molestation Exclusion.

This Court’s *Safeco* decision held that negligence claims separate from an intentional tort could be accidental from the perspective of the insured, and thus a covered “occurrence” under a policy of insurance. But *Safeco* did not consider a policy with a subject matter endorsement excluding all claims arising out of abuse or molestation “by anyone.” The Third District appropriately distinguished *Safeco*

when considering such an exclusion in a policy issued to the operator of a home daycare. Noting that “all of the *** alleged injuries *** arose out of” the alleged sexual molestation of a child within the care and custody of the insured, the Third District held that the insurer had no duty to defend *any* of the claims asserted. *Crow* at ¶ 23, quoting *Westfield Ins. Co. v. Porchervina*, 11th Dist. No. 2008-L-025, 2008-Ohio-6558, ¶ 32. Those claims included “respondeat superior.” *Id.*, ¶ 3.

Insurance contracts construed by the Tenth District Court of Appeals should be subject to the same rule of law applied in the Third District and every other district in Ohio. This Court should accept jurisdiction to establish a uniform rule of construction.

Even if this Court were to conclude that the ISO Abuse or Molestation Exclusion does not apply to “vicarious” liability, two issues resolved on reconsideration merit this Court’s review.

First, in addition to ordering indemnity for “vicarious” liability for excluded conduct, the Tenth District concluded that nearly \$700,000 in “compensatory” attorney’s fees were also covered under the policy, pursuant to this Court’s decision in *Neal Pettit v. Lahman*, 125 Ohio St.3d 327 (2010). But the undisputed record showed that the jury only awarded fees for conduct that the Tenth District agreed was not covered by the policy. This Court should grant jurisdiction to clarify that *Neal Pettit* does not contemplate the payment of attorney’s fees assessed exclusively in conjunction with non-covered conduct.

Second, the Tenth District concluded that the policy's "supplementary payments" provision required the payment of post-judgment interest on non-covered awards (the original opinion limited post-judgment interest to the damages for which the policy provided coverages) – a total of about \$230,000. This Court has not addressed the standard supplementary payment provision found in commercial liability policies. The Tenth District improperly construes the provision in isolation, contrary to the fundamental insuring agreement that the insurer will pay sums the insured is legally obligated to pay "because of bodily damages to which this insurance applies." Such misinterpretations of fundamental Ohio law set an unwise and improper precedent on a policy provision this Court has yet to address.

II. STATEMENT OF THE CASE AND FACTS

A. The Underlying Trial and Appeal.

The underlying complaint in this litigation alleged that a teacher at the preschool operated by Plaintiff World Harvest Church ("WHC") severely beat a 2 ½-year-old child enrolled in the preschool. The child's parents sued the teacher and WHC, seeking compensatory and punitive damages for themselves and their son based on battery, intentional infliction of emotional distress (IIED), and negligent supervision. WHC and its teacher sought a defense and indemnity under a Comprehensive General Liability (CGL) and umbrella policy issued by Defendant-Appellant Grange Mutual Casualty Company ("Grange"). The policies only provided coverages for accidental "occurrences" and excluded coverages for "intentional acts"

by an insured. Further, both policies contained a standardized "Abuse or Molestation Exclusion" that modified the insurance as follows:

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 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.

Notwithstanding the limited scope of coverages, Grange agreed to defend WHC and its employee under a reservation of rights. WHC and its teacher were also represented by personal counsel, who actively participated in every phase of the defense.

The defense team pursued an "all or nothing" litigation strategy that the incident never happened – the marks left by the beating were caused by contact dermatitis. To implement that strategy, WHC filed an answer admitting that its teacher acted within the scope of employment at all times and the acts of the teacher

should be “deemed to be the actions of WHC,” effectively stipulating to both respondeat superior liability and ratification of any abuse found by the jury.

The jury rejected the “contact dermatitis” theory and awarded approximately \$6 million in compensatory and punitive damages – reduced to about \$3 million following the application of punitive damage caps – and signed interrogatories stating that WHC alone was responsible for attorney’s fees. The jury separated the damages caused by the teacher and WHC itself. It returned a verdict that the teacher had caused \$82,365 in compensatory damages (for which WHC was vicariously liable) and WHC had separately caused \$2,789,066.87 for which it was primarily liable. (App. Op., Appx. 13, ¶ 6.) The Tenth District affirmed the verdicts in *Faleta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959. After satisfying the judgments, WHC filed this action seeking indemnity under the Grange CGL and umbrella policies.

The Tenth District concluded that a combination of an intentional acts exclusion and the Abuse or Molestation Exclusion unambiguously precluded coverages for battery, negligent supervision, the teacher’s IIED and WHC’s independent, post-abuse IIED, but that WHC’s vicarious liability for the teacher’s IIED was covered. (*Id.*, Appx. 28, ¶ 55.) Since the jury awarded \$82,365 in compensatory damages against the teacher for his battery and IIED, WHC’s vicarious liability for those amounts could be no greater than \$82,365. (*Id.*, ¶ 56.) Based on the finding of some coverage, the court further held that Grange was

required to indemnify WHC for the \$693,861 attorney fee award, and post-judgment interest attributable to the covered, \$82,365 judgment. (*Id.*, Appx. 29, ¶¶ 58-61.)

A proper application of the Abuse or Molestation Exclusion to all claims arising out of abuse ends the case – WHC’s claim for indemnity must be denied. A proper application of the Exclusion by this Court would thereby moot two other issues of law erroneously resolved by the Tenth District.

First, the Tenth District held that Grange, not WHC, had the burden of demonstrating how the jury verdicts were allocated between covered and non-covered claims. (App. Op., Appx. 15-20, ¶¶ 17-29.) While error, the error is harmless, since the Tenth District also held that “Grange has met that burden here.” (App. Op., Appx. 28, ¶ 56.) Moreover, burdens of proof are irrelevant when a subject matter exclusion eliminates coverages for all claims.

Second, “before determining whether any exclusion is applicable,” the Tenth District concluded that WHC’s scope-of-employment stipulation and resulting vicarious liability constituted an accidental “occurrence.” (App. Op., Appx. 21-22, ¶¶ 35-37.) As a result, “Grange’s policies provided coverages for WHC’s vicarious liability for its employee’s intentionally tortious conduct.” (*Id.*, Appx. 23, ¶ 41.) Grange respectfully disagrees with the Tenth District’s “occurrence” analysis. Compare *Randolf v. Grange Mut. Cas. Co.*, 57 Ohio St.2d 25, 27 (1979) (damages awarded against parents based on their statutory, vicarious liability for their son’s intentional vandalism were not “caused by an ‘occurrence’”). But that erroneous

analysis is obviated by application of the Abuse or Molestation Exclusion. *See, e.g., S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 588 S.E.2d 378, 384, fn. 2 (S.C. 2003), where the South Carolina Supreme Court concluded that it “need not address” whether “shaken baby syndrome” allegations against a daycare center and its employee constituted an “occurrence” where claims fell within the plain meaning of an abuse or molestation exclusion.

Both parties filed motions for reconsideration. Grange argued: (1) that if there were no coverage for the teacher for his own actions, there could be no coverage for WHC’s vicarious liability for such actions; and (2) even if there were coverage for the vicarious liability, the attorney’s fees could not be covered because there were no attorney’s fees awarded against the teacher. WHC sought post-judgment interest for both covered *and* non-covered claims. The Tenth District confirmed its rulings finding coverages for vicarious liability damages and attorney’s fees, but reversed its earlier limitation of post-judgment interest to the covered judgment, concluding that the language of Grange’s “supplementary payment” provision required the payment of post-judgment interest on both covered and uncovered claims. (Recon. App. Op., Appx. 4, 8, ¶¶ 12, 23.)

III. 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.

This Court has long recognized that “[a] contract of indemnity should be construed in the light of the subject matter with which the parties are dealing and the purpose to be accomplished.” *Bobier v. Nat. Cas. Co.*, 143 Ohio St. 215, 219 (1944). “Subject matter” exclusions establish and define the contracting parties’ purpose and expectations for commercial liability coverages. When courts construe insurance policies in light of that purpose, policy construction is simplified.

The Abuse or Molestation Exclusion is a subject matter exclusion. It was first promulgated by the Insurance Service Office, Inc. (“ISO”) in 1987 for the purpose of eliminating “all coverage for abuse or molestation incidents.” *Harper v. Gulf Ins Co.*, *supra*, 2002 WL 32290984 at *6. More specifically, the Exclusion was drafted to eliminate vicarious liability for abuse or molestation as well as separate negligence claims related to abuse or molestation. *Id.*, fn. 9, quoting Commercial Liability Insurance, a multi-volume reporter published by International Risk Management Institute (“IMRI”). See also W. Jeffrey Woodward, etc., Commercial Liability Insurance (IMRI publication), 17th Reprint (Nov. 2012), Ch. VII, p. 10, explaining that the second part of the exclusion eliminates coverages for “other related” claims

that are “different from” the direct and vicarious liability eliminated by the first part of the endorsement.

Here, the jury verdict affirmed by the Tenth District indisputably confirms bodily injury falling within the Abuse or Molestation Exclusion. *See* App. Op., Appx. 22-23, ¶¶ 38-39 (the Grange policies define “bodily injury” as including mental injury); and Appx. 25-26, ¶¶ 47-48 (“abuse” is unambiguous and was “conclusively” determined in the underlying action). Neither direct nor vicarious/respndeat superior claims arising out of that conduct were covered and the Tenth District erred in finding otherwise. *See, e.g., Crow v. Dooley*, 3d Dist. No. 1-11-59, 2012-Ohio-2565, ¶ 3 (claims excluded by abuse or molestation endorsement included “respndeat superior”); *Doe v. Lenarz*, Conn.Sup.Ct. No. CV0540129705, 2007 WL 969610 (applying abuse or molestation exclusion to “derivative liability”); *Mount Vernon Fire Ins. Co. v. Hicks*, 871 F.Supp. 947, 952 (E.D. Mich. 1994) (insurer had no duty to defend or indemnify claims against nursing home after aide beat patient into a comatose state while acting in the course and scope of his employment: “The claim of assault and each of the claims that are derivative of it are directly excluded by the molestation and abuse provisions of the insurance policy”); *Neff v. Alterra Healthcare Corporation*, 271 Fed. Appx. 224, 226 (3d Cir. 2008) (under Pennsylvania, Wisconsin or Massachusetts law, abuse or molestation exclusion precluded defense or indemnity of claims against insured assisted living facility where claims arose out of employee’s abuse of patient).

Proposition of Law No. 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.)

Propositions of Law 2 and 3 are only relevant should this Court conclude that the Tenth District properly found that the Grange policies provided coverages for damages representing WHC's vicarious liability for its employee's abuse.

In *Neal-Pettit v. Laham*, 125 Ohio St.3d 327 (2010), this Court held that attorney's fees predicated on an award of punitive damages could be considered additional compensatory damages arising out of a covered bodily injury. In that case, however, it was agreed that the underlying bodily injury was covered by the policy. Here, the only coverage ordered by the Tenth District was for WHC's vicarious liability for its *teacher's* actions. According to the jury interrogatories and final judgment, no attorney's fees were awarded against the teacher. *Neal-Pettit* does not require coverage of attorney's fees where none of the conduct giving rise to the fees is covered.

Proposition of Law No. 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 Grange CGL policy provides:

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

g. all interest earned on the full amount of any judgment that accrues after entry of the 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.

This “supplementary payment” provision must be construed in the context of the policy as a whole and in a manner consistent with the risk insured against. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶¶ 11, 14, 20; *Davale v. Ferraro*, 5th Dist. No. 2011CA00135, 2012-Ohio-Ohio 446, ¶ 19. The policies Grange issued to WHC agree to pay “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ *to which this insurance applies.*” (Emphasis added.) Grange can only agree to pay post-judgment interest for a “covered” judgment because the insurance only applies to covered liabilities. Any other interpretation is unreasonable and increases the scope of coverages to which the parties agreed. *Perez v. Otero*, 415 So.2d 101 (Fla.App. 1982). Moreover, accepting an argument that the insurer’s agreement to pay “all interest on the entire amount of the judgment” obligates the insurer to pay post-judgment interest on uncovered claims “would produce the illogical result of penalizing the insurance company for not paying a judgment it is not legally obligated to pay.” *Bohrer v. Church Mut. Ins. Co.*, 12 P.3d 854, 857 (Colo.App. 2012).

An interpretation of the supplementary payments provision that would punish Grange for providing a defense for uncovered claims is not only unreasonable and illogical, but contrary to public policy that encourages broadly

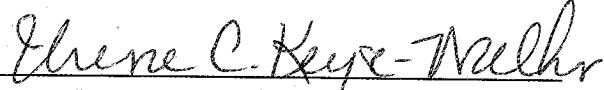
construing an insurer's duty to defend. The Tenth District erred when it declined to limit post-judgment interest to those amounts representing covered claims.

IV. CONCLUSION

Subject matter exclusions like the ISO Abuse or Molestation Exclusion construed by the courts below are approved by regulators and widely used. They are necessary for effective insurance underwriting and pricing of insurance policies and, because they allow Ohio businesses to seek the insurance they want (and only the insurance they want), subject matter endorsements foster competition and niche markets in the insurance industry. This Court should accept jurisdiction to provide guidance to courts on the application of subject matter exclusions generally, and the Abuse or Molestation Exclusion specifically. Because the standardized Abuse or Molestation Exclusion eliminates all coverages for abuse or molestation incidents, this Court should reverse the decision of the Tenth District Court of Appeals and enter judgment for Grange Mutual Casualty Company.

Respectfully submitted,

James R. Gallagher (0025658)
GALLAGHER, GAMS, PRYOR
TALLAN & LITRELL L.L.P.
471 East Broad St., 19th Floor
Columbus, OH 43215-3872
TEL: 614-228-5151
FAX: 614-228-0032
jgallagher@ggptl.com


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

Attorneys for Defendant-Appellant Grange Mutual Casualty Company

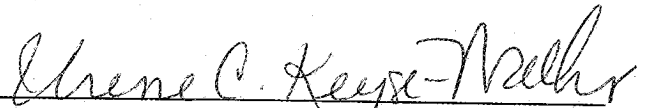
PROOF OF SERVICE

A copy of the foregoing was served on July 10, 2014 per S.Ct.Prac.R. 3.11(B)

by mailing it by United States mail to:

Robert P. Rutter
One Summit Office Park, Suite 650
4700 Rockside Road
Cleveland, OH 44131

*Attorney for Plaintiff-Appellee
World Harvest Church*


*One of the Attorneys for Defendant-
Appellant Grange Mutual Casualty
Company*

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

World Harvest Church,	:	
	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
v.	:	No. 13AP-290
	:	(C.P.C. No. 09CV-11327)
Grange Mutual Casualty Company,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant/ Cross-Appellee.	:	

MEMORANDUM DECISION

Rendered on May 29, 2014

Rutter & Russin, LLC, Robert P. Rutter and Robert A. Rutter,
for appellee/cross-appellant.

Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., and
James R. Gallagher; Tucker Ellis, LLP, and Irene C. Keyse-
Walker, for appellant/cross-appellee.

ON APPLICATIONS FOR RECONSIDERATION

O'GRADY, J.

{¶ 1} Defendant-appellant/cross-appellee, Grange Mutual Casualty Company ("Grange"), and plaintiff-appellee/cross-appellant, World Harvest Church ("WHC"), filed applications under App.R. 26(A) asking this court to reconsider our prior decision in *World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. No. 13AP-290, 2013-Ohio-5707.

{¶ 2} When presented with an application for reconsideration, an appellate court must consider whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews*,

5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus; *Columbus v. Dials*, 10th Dist. No. 04AP-1099, 2006-Ohio-227, ¶ 3. An appellate court will not grant "[a]n application for reconsideration * * * just because a party disagrees with the logic or conclusions of the appellate court." *State v. Harris*, 10th Dist. No. 13AP-1014, 2014-Ohio-672, ¶ 8, quoting *Bae v. Dragoo & Assocs., Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶ 2.

{¶ 3} This litigation stems from a lawsuit filed in 2006 by Michael and Lacey Faieta and their minor son, A.F., alleging Richard Vaughan, an employee of the preparatory school operated by WHC, physically abused A.F. when the child was in Vaughan's care in WHC's daycare program. *World Harvest* at ¶ 2. The Faietas alleged claims of battery and intentional infliction of emotional distress ("IIED") against Vaughan and claims of negligent supervision and IIED against WHC. *Id.* After a jury trial, the trial court entered a final judgment of \$2,871,431.87 in favor of the Faietas. *Id.* at ¶ 3, 6. The court found WHC solely liable for \$2,789,066.87 of the judgment and found Vaughan primarily liable and WHC secondarily liable for the remaining \$82,365. *Id.* at ¶ 6. We affirmed this judgment in *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959. Subsequently, the Faietas settled the case with interest in the total amount of \$3,101,147. *World Harvest* at ¶ 8.

{¶ 4} WHC had two insurance policies through Grange pertinent to the Faietas' lawsuit, a commercial general liability ("CGL") policy and a commercial umbrella ("CU") policy. *Id.* at ¶ 32. Grange refused to indemnify WHC for any part of the judgment under these policies, so WHC filed a complaint seeking, among other things, a declaration that it was entitled to indemnification for all or some of the amount paid to resolve the Faietas' case. *Id.* at ¶ 8. The trial court found Grange had to indemnify WHC in the amount of \$1,472,677 (plus statutory interest), which represented the Faietas' compensatory damages (\$549,100), attorney fees award (\$693,861), and postjudgment interest (\$229,716). *Id.* at ¶ 9-10. Grange did not have to indemnify WHC for the \$1,628,000 in punitive damages awarded to the Faietas. *Id.* Grange and WHC appealed. *Id.* at ¶ 1.

{¶ 5} In *World Harvest*, we agreed WHC did not have coverage for the punitive damages award. *Id.* at ¶ 69. Regarding the compensatory damage award, we found WHC only had coverage for \$82,365 awarded because of Vaughan's IIED for which WHC was

secondarily liable. *Id.* at ¶ 55, 69. We reversed the trial court's judgment to the extent it found Grange had to indemnify WHC for the other \$466,735 in compensatory damages and postjudgment interest assessed on those damages. *Id.* at ¶ 69. We affirmed the finding that Grange had to indemnify WHC for the entire attorney fees award. *Id.*

Insurance Coverage for Vaughan's IIED

{¶ 6} In its application for reconsideration, Grange contends we erred in finding WHC had a right to indemnification for the compensatory damages awarded for Vaughan's IIED for which WHC was vicariously liable. Grange correctly notes, in *World Harvest* we stated "unless corporate management committed the intentionally wrongful conduct, the corporate insured will not be denied coverage on the basis of an employee's intentional tort." *Id.* at ¶ 37. Grange interprets this statement to mean if a member of corporate management committed the IIED at issue instead of Vaughan, we would have found no right to indemnification for damages from that IIED because, in effect, the act of the manager would have been the act of WHC itself. Grange argues in the underlying action, WHC made a judicial admission that "Vaughan's actions are deemed to be the actions of [WHC]." *Faieta* at ¶ 46. Grange argues in *Faieta*, we found WHC admitted to more than just vicarious liability under respondeat superior, and Grange suggests WHC effectively admitted it committed Vaughan's IIED and/or Vaughan was a member of WHC's corporate management.

{¶ 7} However, as we explained in *World Harvest*, the issue of whether Vaughan's IIED constituted an "occurrence," i.e., an accident, entitled to coverage under the policies hinged on whether his IIED was intentional from the perspective of the person seeking coverage, i.e., WHC. *Id.* at ¶ 34. We found no such intent by WHC. *See id.* at ¶ 34-37. Additionally, we did not create a bright-line rule that any time corporate management commits an intentionally wrongful act, that act is intentional from the perspective of the corporation. Instead, we suggested that a finding of corporate intent could be warranted if a corporate manager committed the intentionally wrongful conduct.

{¶ 8} In the underlying litigation, WHC did admit Vaughan's actions were deemed to be its own, and we treated that statement as a judicial admission in *Faieta*. However, "[a] judicial admission is binding only in the lawsuit in which such admission is made." *In re Regency Village Certificate of Need Application*, 10th Dist. No. 11AP-41,

2011-Ohio-5059, ¶ 33, citing *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, 106 (1884). Even if WHC's prior admission was binding in this context, WHC made the admission in response to the allegations in the Faietas' complaint and amended complaint, which did not involve insurance coverage. See *Faieta* at ¶ 46. WHC did not make the admission in response to allegations that Vaughan was a member of corporate management or that WHC intended Vaughan's IIED.

{¶ 9} Additionally, in *Faieta*, we did construe WHC's admission as an admission to more than just vicarious liability under respondeat superior. Specifically, we found, based on the admission, the trial court did not have to instruct the jury to determine if WHC "knowingly authorized, participated in or ratified" Vaughan's actions for purposes of awarding punitive damages. *Id.* at ¶ 49. We implied that, through its statement about Vaughan's actions, WHC ratified those actions, i.e., WHC approved them after the fact. See *id.* at ¶ 48. It would be inconsistent to now construe WHC's ratification of Vaughan's acts as an admission that WHC intended those acts in the first instance. Likewise, such a construction would appear to be inconsistent with the jury's finding that WHC negligently supervised Vaughan.

{¶ 10} We note, in its application for reconsideration, Grange states it "respectfully believes that its definition of 'occurrence' and its Abuse or Molestation exclusion are subject matter provisions which ought to preclude coverage for WHC regardless of its intent. *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186 (2010), at P. 61." (Grange's Application for Reconsideration, at 1.) Grange makes no effort to expound on this statement, and, without further explanation, it is unclear whether Grange is attempting to reiterate an argument it previously made or raising a new argument, which is inappropriate in an application for reconsideration. *Waller v. Waller*, 7th Dist. No. 04 JE 27, 2005-Ohio-5632, ¶ 3. For these reasons, we do not address Grange's statement.

{¶ 11} For the foregoing reasons, we find no error in our decision that WHC has coverage for its vicarious liability for Vaughan's IIED.

Attorney Fees

{¶ 12} Next, Grange asks this court to reconsider our decision finding WHC had coverage for the attorney fees award. In *World Harvest*, Grange argued it should not have to indemnify WHC for attorney fees because "there was no proof that any of the

claims were covered." *Id.* at ¶ 59. We disagreed because WHC had coverage for the claim of IIED against Vaughan for which WHC was vicariously liable. *Id.* Because the attorney fees could not be allocated between covered and noncovered claims, we found Grange liable for the entire amount. *Id.* Additionally, we stated "even if the attorney fees were awarded solely because of the punitive damages assessed against WHC, '[a]ttorney fees are distinct from punitive damages, and public policy does not prevent an insurance company from covering attorney fees on behalf of an insured when they are awarded solely as a result of an award for punitive damages.'" *Id.*, quoting *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, syllabus.

{¶ 13} In its application for reconsideration, Grange contends attorney fees must stem from a covered bodily injury in order for it to have a duty to indemnify WHC for such fees. Grange argues the only covered bodily injury in this case was injury from Vaughan's IIED for which WHC is vicariously liable. However, the jury did not award any attorney fees against Vaughan in the underlying action. Therefore, Grange argues the attorney fees award could not stem from a covered bodily injury.

{¶ 14} Again, an application for reconsideration is not a mechanism for a party to raise new arguments the party simply neglected to make in earlier proceedings. *Waller* at ¶ 3. In its appellate brief, Grange argued that if any of the claims against WHC were covered by the insurance policies, there was no way to apportion the attorney fees award between covered and uncovered claims. Grange cannot now argue for the first time that such apportionment is possible. Therefore, we reject Grange's argument.

Postjudgment Interest

{¶ 15} Finally, WHC asks us to reconsider our decision on postjudgment interest. In *World Harvest*, we found WHC could recover postjudgment under the CGL and CU policies. *Id.* at ¶ 60. However, we reversed the trial court's judgment to the extent it found Grange had to indemnify WHC for postjudgment interest assessed on the uncovered \$466,735 in compensatory damages. *Id.* at ¶ 69.

{¶ 16} In its application for reconsideration, WHC directs this court's attention to the "SUPPLEMENTARY PAYMENTS—COVERAGES A AND B" section of the CGL policy, which states:

1. We will pay, with respect to * * * any "suit" against an insured we defend:

* * *

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

(R. 28-29, exhibit B, CGL policy, at 7-8.) Under the CGL policy, "suit" means "a civil proceeding in which damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged." (R. 28-29, exhibit B, CGL policy, at 15.)

{¶ 17} The Faietas' lawsuit was a "suit," i.e., a proceeding in which damages because of bodily injury to which the insurance applied were alleged, against an insured, i.e., WHC. Grange does not dispute WHC's contention that Grange defended against that suit and never paid, offered to pay, or deposited in court the part of the judgment within the applicable limit of insurance. WHC argues that because Grange agreed to pay postjudgment interest on the full amount of "any judgment" under these circumstances, Grange must pay all postjudgment interest from the underlying litigation regardless of whether the interest was assessed on portions of the judgment that were covered or not covered under the terms of the CGL policy. As WHC points out, it made this argument in its brief opposing appeal, and we did not address it in *World Harvest*.

{¶ 18} As we stated in *Nationwide Mut. Ins. Co. v Pinnacle Baking Co., Inc.*, 10th Dist. No. 13AP-485, 2014-Ohio-1257, ¶ 14:

An insurance policy is a contract whose interpretation is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. *See also Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665 (1992) (noting that "insurance contracts must be construed in accordance with the same rules as other written contracts"). Contract terms are to be given their plain and ordinary meaning. *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 167-68 (1982). If provisions in an insurance contract are susceptible of more than one interpretation, they "will be construed strictly against the insurer and liberally in favor of insured." *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208 (1988), syllabus. *See also Butche v. Ohio Cas. Ins. Co.*, 174 Ohio St. 144, 146 (1962) (noting that "[p]olicies of insurance, which are in language selected by the

insurer and which are reasonably open to different interpretations, will be construed most favorably for the insured"). However, when the language used is clear and unambiguous, a court must enforce the contract as written, giving words used in the contract their plain and ordinary meaning. *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 607 (1999).

{¶ 19} Here, supplementary payments provision 1.g. plainly states Grange will pay postjudgment interest on the full amount of *any* judgment under the circumstances described therein. In its brief opposing WHC's application for reconsideration, Grange argues this provision must be construed in the context of the policy as a whole and in a manner consistent with the risks it insured WHC against. Specifically, Grange points to Section I, 1.a. of the CGL policy, where it only agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (R. 28-29, exhibit B, CGL Policy, at 1.) Grange argues the insurance applies only if the bodily injury or property damage is caused by an occurrence and is not subject to a policy exclusion. Thus, Grange argues the judgment for which it agreed to pay postjudgment interest is necessarily a "covered" judgment since the insurance only applies to liabilities within policy coverages.

{¶ 20} Even if we broadly read Grange's appellate brief to encompass such an argument, the argument ignores the following additional language in Section I, 1.a. of the CGL policy: "No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B." (Emphasis sic.) (R. 28-29, exhibit B, CGL Policy, at 1.) Thus, Section I, 1.a.'s limitation on the type of covered damages does not limit the explicit coverage for postjudgment interest provided in the supplementary payments section of the policy.

{¶ 21} Next, Grange argues postjudgment interest assessed on damages awarded for uncovered claims is uninsurable as a matter of public policy and that it would be absurd for Grange to have to pay interest on portions of a judgment it has no obligation to pay. However, Grange never made these arguments in its appellate brief. Logic dictates that if one cannot use an application for reconsideration to make new arguments, a party opposing such an application cannot use its brief in opposition to make new arguments. Thus, we will not address Grange's contentions.

{¶ 22} If Grange wanted to limit its liability for postjudgment interest, it could have done so. For example, in the CU 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.

{¶ 23} In sum, the supplementary payments section of the CGL policy plainly obligates Grange to pay WHC for the postjudgment interest assessed on the full amount of the judgment. *See Coventry v. Steve Koren, Inc.*, 1 Ohio App.2d 385, 388 (8th Dist.1965), *aff'd*, 4 Ohio St.2d 24 (1965) (finding where insurer agreed 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," insurer was liable for postjudgment interest on \$60,000 judgment against insured even though policy limits were \$10,000 to \$20,000). Accordingly, the trial court correctly rendered judgment against Grange for \$229,716 in postjudgment interest, and we modify our decision in *World Harvest* to affirm that portion of the trial court's judgment.

Conclusion

{¶ 24} For the foregoing reasons, we deny Grange's application for reconsideration and grant WHC's application for reconsideration. We modify our judgment in *World Harvest* in accordance with this memorandum decision.

*Application for reconsideration by Grange denied.
Application for reconsideration by WHC granted
and judgment modified in part.*

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired from the Tenth Appellate District,
assigned to active duty under authority of the Ohio
Constitution, Article IV, Section 6(C).

World Harvest Church, :
 :
 Plaintiff-Appellee/ :
 Cross-Appellant, :
 :
 v. : No. 13AP-290
 : (C.P.C. No. 09CV-11327)
 :
 Grange Mutual Casualty Company, : (REGULAR CALENDAR)
 :
 Defendant-Appellant/ :
 Cross-Appellee. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 24, 2013, Grange Mutual Casualty Company's assignment is error is sustained in part and overruled in part. World Harvest Church's cross-assignments of error are overruled. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with said decision. Costs assessed to World Harvest Church.

O'GRADY,

By /S/ JUDGE
Judge Amy O'Grady

Tenth District Court of Appeals

Date: 01-06-2014
Case Title: WORLD HARVEST CHURCH -VS- GRANGE MUTUAL
CASUALTY COMPANY
Case Number: 13AP000290
Type: JEJ - JUDGMENT ENTRY

So Ordered

Amy  *Amy C. O'Grady*

/s/ Amy C. O'Grady

Electronically signed on 2014-Jan-06 page 2 of 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

World Harvest Church,	:	
	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
v.	:	No. 13AP-290 (C.P.C. No. 09CV-11327)
	:	
Grange Mutual Casualty Company,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on December 24, 2013

Robert P. Rutter, for appellee/cross-appellant.

Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., and *James R. Gallagher; Tucker Ellis, LLP*, and *Irene C. Keyse-Walker*, for appellant/cross-appellee.

APPEAL from the Franklin County Court of Common Pleas

O'GRADY, J.

{¶ 1} Defendant-appellant/cross-appellee, Grange Mutual Casualty Company ("Grange"), and plaintiff-appellee/cross-appellant, World Harvest Church ("WHC"), appeal from a judgment entered by the Franklin County Court of Common Pleas holding that Grange must indemnify WHC for \$1,472,677, representing \$549,100 in compensatory damages, \$693,861 in attorney fees, and \$229,716 in postjudgment interest, plus statutory interest, and that Grange is not obligated to indemnify WHC for punitive damages awarded in a prior case. Because we find that Grange is not obligated to indemnify WHC for that portion of the compensatory damage award for which WHC was found to be directly liable, we reverse that portion of the judgment as well as the part of the postjudgment interest award attributable to these damages. Finding no error in the

remainder of the judgment, including the denial of coverage for punitive damages, we affirm that portion of the judgment.

I. BACKGROUND¹

{¶ 2} On May 30, 2006, Michael and Lacey Faieta and their minor son, A.F., filed a complaint alleging that Richard Vaughan, an employee of the preparatory school operated by WHC, physically abused A.F. in January 2006 while the two and one-half-year-old boy was in Vaughan's care in WHC's daycare program. According to the Faietas, Vaughan struck and severely beat A.F. with an object that left plainly visible marks, cuts, and contusions on the child's back, buttocks, and thighs. The Faietas raised claims of battery and intentional infliction of emotional distress ("IIED") against Vaughan and claims of negligent supervision and IIED against WHC.

{¶ 3} On October 18, 2007, after a seven-day trial, the jury returned general verdicts in favor of the Faietas against both Vaughan and WHC. The jury awarded the Faietas compensatory damages of \$134,865 and punitive damages of \$100,000 against Vaughan, and compensatory damages of \$764,235 and punitive damages of \$5,000,000 against WHC. The jury also found that the Faietas were entitled to attorney fees against WHC.

{¶ 4} The jury interrogatory forms indicated they found, by a preponderance of the evidence, that: (1) Vaughan committed a battery against A.F. that was the proximate cause of damages to the Faietas (Interrogatory 1); (2) Vaughan and/or WHC intentionally inflicted serious emotional distress on the Faietas that proximately caused damages to them (Interrogatory 2); and (3) WHC was negligent in supervising its employee Vaughan, and its negligent supervision was the proximate cause of damages to the Faietas (Interrogatory 3).

{¶ 5} After the trial, on May 6, 2008, the trial court denied the parties' post-trial motions, but after applying statutory caps to the damage awards, reduced the noneconomic compensatory damages award by \$350,000 and limited the punitive damages award to \$1,628,470. *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶ 4. The trial court further determined that a statute exempted Vaughan from paying the \$100,000 in punitive damages awarded against him, and the

¹ Some of these preliminary facts are taken from this court's opinion in *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶ 1-4, 8.

court assessed all the punitive damages against WHC under its joint and several liability. *Id.* The trial court ordered WHC to pay the Faietas attorney fees in the amount of \$693,861.87. *Id.*

{¶ 6} On May 23, 2008, the trial court entered a final judgment of \$2,871,431.87 in favor of the Faietas. WHC was held to be solely liable for \$2,789,066.87 of the judgment, and Vaughan was held to be primarily liable, and WHC secondarily liable, for the remaining \$82,365 in compensatory damages against Vaughan.

{¶ 7} WHC and Vaughan appealed, and on December 31, 2008, this court affirmed the judgment of the trial court. *Id.*

{¶ 8} The Faietas then settled the case with interest in the total amount of \$3,101,147. After Grange refused to indemnify WHC for any portion of the judgment pursuant to its insurance policies, WHC, on July 29, 2009, filed a complaint in the Franklin County Court of Common Pleas for indemnification against Grange. WHC sought, among other things, a declaration that it is entitled to payment from Grange of all or some of the amount it paid to resolve the Faietas' case. Following its answer, Grange filed a motion to dismiss or, in the alternative, for judgment on the pleadings. The common pleas court denied the motion. WHC filed a motion for partial summary judgment and declaratory relief on the issue of Grange's duty to indemnify, i.e., that Grange is contractually obligated by its policy language to pay the entire amount of the judgment. Grange filed a motion for summary judgment on all of WHC's claims and sought dismissal of the case.

{¶ 9} On December 16, 2012, the common pleas court issued a decision granting and denying in part both motions for summary judgment. The trial court determined that the \$3,101,147 award could be roughly separated into \$549,100 in compensatory damages, \$1,628,000 in punitive damages, \$694,000 in attorney fees, and \$230,000 in postjudgment interest. The trial court determined that Grange is obligated to provide coverage for and reimburse WHC for the entire compensatory damages award of \$549,100, Grange is under no duty to provide coverage for the punitive damages award, and Grange is obligated to provide coverage to WHC for the attorney fees and postjudgment interest awards. The trial court determined there remained a genuine issue of material fact on WHC's bad-faith claim against Grange.

{¶ 10} On March 11, 2013, the trial court entered judgment in favor of WHC against Grange in the amount of \$1,472,677 plus statutory interest, which represents the compensatory award of \$549,100, the attorney fees award of \$693,861, and the postjudgment interest award of \$229,716. The trial court rendered judgment in favor of Grange and against WHC on the issue of indemnification for the punitive damages award of \$1,528,470 directly against WHC and \$100,000 against Vaughan for which WHC is secondarily liable. The trial court determined, pursuant to Civ.R. 54(B), that the judgment fully resolved the declaratory judgment claim, and there was no just reason for delay of an appeal from the judgment.

{¶ 11} Grange filed a timely appeal, and WHC filed a timely cross-appeal.

II. ASSIGNMENTS OF ERROR

{¶ 12} In Grange's appeal, it assigns the following error:

THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT GRANGE'S MOTION FOR SUMMARY JUDGMENT IN ITS ENTIRETY; BY GRANTING SUMMARY JUDGMENT IN FAVOR OF WHC; AND, BY ENTERING A DECLARATORY JUDGMENT OBLIGATING GRANGE TO INDEMNIFY WHC FOR DAMAGES, INTEREST AND ATTORNEY FEES.

{¶ 13} In WHC's cross-appeal, it assigns the following errors:

Assignment of Error Number One: The trial court erred in holding that Grange was not obligated to indemnify WHC for the \$1,528,470 in punitive damages awarded directly against WHC.

Assignment of Error Number Two: The trial court erred in holding that Grange was not obligated to indemnify WHC for the \$100,000 in punitive damages awarded directly against Vaughan and secondarily against WHC.

III. STANDARD OF REVIEW AND GENERAL PRINCIPLES

{¶ 14} Appellate courts apply the de novo standard of review to a decision granting or denying summary judgment based on interpretation of an insurance contract. *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, ¶ 12. Summary judgment is appropriate when the party moving for summary judgment establishes that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to only one conclusion, and that

conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 24; *Miller v. J.B. Hunt Transport, Inc.*, 10th Dist. No. 13AP-162, 2013-Ohio-3892, ¶ 20.

{¶ 15} The meaning of an insurance policy is gathered from a consideration of all its parts, and the intent of the parties is presumed to be reflected by the language used. *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, ¶ 8. In the absence of an explicit contractual definition, we will construe words and phrases contained in an insurance policy in accordance with their plain and ordinary meaning. *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, ¶ 17. Ambiguities in the policy are construed strictly against the insurer and liberally in favor of the insured. *Id.* at ¶ 18. The court must thus adopt any reasonable construction that results in coverage for the insured. *Royal Paper Stock Co. v. Robinson*, 10th Dist. No. 12AP-455, 2013-Ohio-1206, ¶ 29.

IV. ANALYSIS

A. Grange's Appeal

{¶ 16} In Grange's sole assignment of error, it claims the trial court erred by failing to grant its motion for summary judgment in its entirety, by granting summary judgment in favor of WHC, and by entering a declaratory judgment obligating Grange to indemnify WHC for damages, interest, and attorney fees.

1. Burden of Proof

{¶ 17} The trial court determined that for the three causes of action on which the jury entered a general verdict in favor of the Faietas—battery, IIED, and negligent supervision—Grange "bears the burden of proof to demonstrate that coverage does not apply to each of the causes of action and will need to establish exclusions for the other portions of the award, if any," and that because "it is not possible to allocate the proportions of the general compensatory verdicts," "if [WHC] establishes coverage for any of the three causes of action, then [Grange] must indemnify [WHC] for the entire compensatory amount of the award." (R. 102, at 5.)

{¶ 18} Grange argues that WHC should have the burden of proof as to the allocation of the verdict between Vaughan's battery, WHC's negligent supervision, and the IIED by Vaughan "and/or" WHC, and that "[s]ince the verdict cannot be allocated, WHC's

action against Grange [for compensatory damages, attorney fees, and interest] must fail." (Corrected Grange brief, at 31.) WHC counters that Grange has the burden of allocating a general verdict to prove that some or all of the award represents damages for non-covered claims. WHC asserts that "[s]ince it is not possible to allocate the general compensatory verdicts, if WHC can establish coverage under *any* one of these three causes of action—battery, IIED, or negligent supervision—then Grange must indemnify WHC for the entire compensatory portion of the verdict." (Emphasis sic.) (WHC's brief opposing appeal, at 25.)

{¶ 19} In general, the insured has the burden of proving a loss and demonstrating coverage under the policy. *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, ¶ 19; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 35, quoting *Inland Rivers Serv. Corp. v. Hartford Fire Ins. Co.*, 66 Ohio St.2d 32, 34 (1981). "Where a complaint alleges both covered and non-covered claims and a general verdict is entered against the insured, the insurer should only have an obligation to indemnify the insured for those damages, if any, that are covered, which is all that is required by the policy. * * * The majority view of the cases outside Ohio that have addressed the issue is that the burden rests upon the insured to allocate a judgment and that the insured also bears the burden of demonstrating in the first instance that all or some portion of the judgment is, in fact, covered." Young, Bekeny & Mesko, *Ohio Insurance Coverage*, Section 10:16 (2013); see generally 2 Windt, *Insurance Claims & Disputes*, Section 6:27 (6th Ed.2013), and cases cited in fn. 5 ("[m]ost courts have held that the burden is on the insured" to allocate the verdict to ascertain the amount of damages for which the insurer is responsible); *Morris v. Western States Mut. Auto. Ins. Co.*, 268 F.2d 790, 793 (7th Cir.1959), citing *Gen. Acc. Fire & Life Assur. Corp. v. Clark*, 34 F.2d 833 (9th Cir.1929) ("Where the judgment includes elements for which the insurer is liable and elements outside the range of coverage, apportionment of damages to the respective causes of action is a burden on the party seeking to recover from the insurer.").

{¶ 20} WHC asserts the trial court's placement of the burden on Grange to allocate the general verdict was correct pursuant to Ohio law. *Lavender v. Grange Mut. Casualty Co.*, 4th Dist. No. 1417 (Aug. 27, 1979). In that case, however, the appellate court expressly cautioned that it did "not find that the issue presented is actually one concerning which party has the burden of proving the allocation of a general verdict

rendered in a prior proceeding." *Id.* Therefore, reliance on *Lavender* is misplaced. Instead, this is an issue that has not yet been definitively decided in Ohio. See *Bank One, N.A. v. Echo Acceptance Corp.*, 522 F.Supp.2d 959, 978 (S.D.Ohio 2007) (Ohio law has not established a method of allocation, and the issue has not yet been addressed by the Supreme Court of Ohio).

{¶ 21} "[M]ost courts to have considered the question have held that while the insured generally bears the burden of allocating between covered and noncovered claims, that burden shifts to the insurer when the insurer had an affirmative duty to defend and fails to fulfill its duty," including the duty not to prejudice an insured's rights by failing to request special interrogatories or a special verdict to clarify coverage or damages. See *Automax Hyundai South, L.L.C. v. Zurich Am. Ins. Co.*, 720 F.3d 798, 808 (10th Cir.2013); 2 Windt, *Insurance Claims & Disputes*, at Section 6:27 (exception to general rule placing burden of allocating verdict on the insured "should be made to that rule in those cases in which the circumstances surrounding the defense of the underlying action were such that the insurer was obligated to seek an allocated verdict or advise the insured of the need for one" so that the burden should be placed on the insurer); *Duke v. Hoch*, 468 F.2d 973, 978-79 (5th Cir.1972) (a case in which the insurer did not specifically advise its insured of the insured's interest in an allocated verdict, insured was relieved of the burden to prove allocation of a verdict between covered and noncovered claims unless the insurer could prove that the verdict represented, in whole or in part, noncovered claims).

{¶ 22} This rule sensibly avoids any conflict of interest and places the burden on the party in the best position to discern and correct it—the insurer:

As an initial matter, we note that an insurer who undertakes the defense of a suit against its insured must meet a high standard of conduct. The right to control the litigation carries with it certain duties. One of these is the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages. The reason for this is that when grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises between the insurer and the insured. If the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. The insurer is in the best position to

see to it that the damages are allocated; therefore, it should be given the incentive to do so.

(Citations omitted.) *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491, 1498-99 (10th Cir.1994); see also *MedMarc Cas. Ins. Co. v. Forest Healthcare, Inc.*, 359 Ark. 495, 199 S.W.3d 58, 62 (2004).

{¶ 23} Therefore, the court should apply what appears to be the general rule that an insured has the burden to prove entitlement to coverage, including the burden of allocating a prior general award into covered and noncovered claims, but that where an insurer has a duty to defend the insured and fails to seek an allocated verdict or advise the insured of the need for one, the burden shifts to the insurer.

{¶ 24} Grange asserts that the burden of proving allocation of the verdict did not shift from WHC to Grange because it sent a reservation of rights letter to WHC, WHC engaged its own private counsel in addition to the counsel that Grange provided to it in the personal-injury trial, Grange advised WHC of its divergence of interests, and WHC's private counsel controlled the litigation.

{¶ 25} The record establishes, however, that Grange, pursuant to its insurance policies issued to WHC, retained a law firm to represent WHC in the Faietas' personal-injury case. Grange sent WHC a reservation of rights letter informing WHC that there were questions as to whether claims alleged in the case were covered by their insurance policies and that WHC may wish to consult with its private attorney. WHC engaged its own counsel in the matter to jointly defend it with the counsel provided by Grange in the case, and WHC, Vaughan, and their counsel entered into a joint defense agreement. The attorneys represented WHC and Vaughan in the trial and on appeal. See *Faieta v. World Harvest Church*, 147 Ohio Misc.2d 51, 2008-Ohio-3140, and *Faieta*, 2008-Ohio-6959. The counsel that Grange provided to WHC and Vaughan was shown the proposed jury interrogatories and was given the opportunity to review and comment on them, and Grange did not propose any interrogatories.

{¶ 26} Although the record indicates that Grange informed WHC there may be coverage issues and that Grange's provided counsel expressed concern that a reply brief in support of their motion for judgment notwithstanding the verdict and new trial did not include an argument "concerning the global or cumulative nature of the jury's verdict," Grange never advised WHC of the specific apportionment issue and of the need for special

interrogatories allocating damages. Grange's most specific notification about this issue came after the verdict had been returned and was provided only in the context of what to include in a reply brief in support of WHC's and its employee's post-trial motion. See *State ex rel. Kolcinko v. Ohio Police & Fire Pension Fund*, 131 Ohio St.3d 111, 2012-Ohio-46, ¶ 10 (new argument in reply brief is forbidden). Further, notification was based on the contention of Grange's provided counsel that the general verdict violated WHC's and Vaughan's due process rights because it was so confusing and uncertain that the trial court could not properly apply statutory caps to the jury's award. Ultimately, Grange was satisfied with providing its insured, which it was defending in the case, with only the most general and vague statements concerning their divergent interests.

{¶ 27} Under these circumstances, the presence of WHC's independent counsel and Grange's notification to WHC of its reservation of rights did not constitute a discharge of Grange's duty to fully disclose the precise situation concerning the necessity of seeking an allocated verdict in the personal-injury case. See *Duke* at 979. If Grange truly believed that intervening in the case to submit special interrogatories would have compromised WHC and its employee's ability to advance their agreed upon joint defense, Grange or its provided counsel could have still discharged any duty by precisely advising WHC of the need for an allocation of the damages and the consequences of not obtaining one. *Id.* ("At the merits trial [the insurance company's] counsel was required to make known to the insured the availability of a special verdict and the divergence of interest between them and the insurer springing from whether damages were or were not allocated."). Neither Grange's reservation of rights nor the presence and participation of WHC's independently retained counsel during the Faietas' personal-injury case discharged Grange's duty. See *Arnett v. Mid-Continent Cas. Co.*, M.D. Florida No. 8:08-CV-2373-T-27EAJ, 2010 WL 2821981 (July 16, 2010), citing *Duke*.

{¶ 28} Moreover, notwithstanding Grange's claim to the contrary, its provided counsel sufficiently participated in the litigation for WHC so as to require it to properly notify WHC of the need for an allocated verdict or to seek the allocated verdict itself. In fact, it has been held that, even when the insurance company does not control the litigation, but monitors it and remains in regular contact with the insured's private counsel, the insurance company retains the burden because it remains "the most informed party concerning coverage issues and the potential difficulties of parsing a

general verdict as between covered and uncovered claims." *Pharmacists Mut. Ins. Co. v. Myer*, 187 Vt. 323, 993 A.2d 413, ¶ 15 (2010).

{¶ 29} Accordingly, the trial court did not err in finding that Grange had the burden to establish the specific allocation of the general verdict for covered and noncovered claims.

2. Coverage for WHC's Vicarious Liability for Employee's Intentional Torts

{¶ 30} The trial court determined that the parties' insurance policies provided coverage for the battery committed by Vaughan and the IIED committed by Vaughan and/or WHC. More specifically, the trial court found that, from WHC's perspective, the battery committed by its employee, Vaughan, constituted a covered occurrence, i.e., an accident, because the battery was not committed by an officer, director, or other principal of WHC. As to the IIED claim against Vaughan and WHC, the trial court found that if the tort was committed by Vaughn, the act would be a covered occurrence for the same reason underlying its finding on the battery issue. The trial court further found that if the tort was committed by WHC, it would be excluded from coverage under the policies' intentional-injury exclusion. The trial court concluded that, because Grange's counsel failed to submit special interrogatories that would have separated responsibility for the IIED claim, Grange had a duty to indemnify WHC for all the compensatory damages incurred under the IIED claim.

{¶ 31} Grange asserts that its insurance policies with WHC do not cover damages that may have been assessed for IIED or battery because: (1) an intentional tort is not an "occurrence" as required by the policies, and (2) there is no coverage for purely emotional injuries because they do not constitute a "bodily injury" as defined by the policies. (Corrected Grange Brief, at 40.)

{¶ 32} The parties entered into two insurance policies that are pertinent here, a commercial general liability ("CGL") policy and a commercial umbrella ("CU") policy. Section I, 1. a. of the CGL policy provides that Grange "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (R. 29, exhibit B, CGL Policy, at 1.) "This insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory.'" Section I, 1. b. of the CGL Policy. (CGL Policy, at 1.) "Occurrence" is defined at Section V,

13. of the CGL policy as "an accident." (CGL Policy, at 14.) "Bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Section V, 3. of the CGL Policy. (CGL Policy, at 13.)

{¶ 33} Similarly, Section I, A. 1. a. of the CU policy provides that Grange "will pay on behalf of the insured the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' or 'property damage' to which this insurance applies." (R. 29, exhibit A, CU Policy, at 1.) The "bodily injury" or "property damage" "must be caused by an 'occurrence.'" Section I, A. 1. b. 3 of the CU Policy. (CU Policy, at 1.) "Occurrence" means "an accident." Section VI, 14. a. of the CU Policy. (CU Policy, at 14.) Section VI, 4. of the CU policy defines "[b]odily injury" as "bodily injury, sickness or disease sustained by a natural person" and specifies that the definition "includes death, shock, fright, mental anguish, mental injury or disability which results from any of these at any time." (CU Policy, at 13.)

{¶ 34} Grange first contends that the definition of "occurrence" in both the CGL and CU policies as an "accident" precludes coverage for Vaughan's battery or IIED against the Faietas. The issue of liability coverage "hinges on whether the act is intentional from the perspective of the person seeking coverage." *Safeco* at ¶ 24. "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.'" *Id.* at paragraph one of the syllabus.

{¶ 35} WHC's liability under the insurance policies for Vaughan's intentional actions underlying his battery and IIED rested on its vicarious liability for the acts of its employee—Vaughan—that WHC admitted in the personal-injury case were committed within the scope of his employment with it. *See Faieta*, 2008-Ohio-6959, at ¶ 46. In general, a principal is vicariously liable for the torts of its employees under the doctrine of respondeat superior. *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, ¶ 20.

{¶ 36} Despite Grange's claim that, for insurance coverage purposes, the intentional conduct of Vaughan should be imputed to his employer, WHC, it has been determined that "[o]ne of the most common situations in which courts have found coverage for vicarious liabilities is where an employer is held liable for the intentional

injuries or damage(s) caused by one of its employees under the theory of respondeat superior." French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages*, 8 Hastings Bus.L.J. 65, 90 (2012). Claims of negligence or vicarious liability against employers for intentional acts by employees constitute an "occurrence" under liability insurance policies. See *TIG Ins. Co. v. Travelers Ins. Co.*, D.Or. No. CV-00-1780-ST, 2003 WL 24051560 (Mar. 24, 2003); *McLeod v. Tecorp Internatl., Ltd.*, 117 Or.App. 499, 503, 844 P.2d 925, 927 (1992), *rev'd on other grounds*, 865 P.2d 1283 ("Vicarious liability is imposed as a risk allocation between the employer and an innocent plaintiff and, therefore, does not require any degree of fault on the employer's part."); compare *K & T Ents., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 179 (6th Cir.1996) (insured corporation denied fire insurance coverage when arson was committed by president, sole officer, and 50 percent shareholder in the corporation, who is married to the other 50 percent shareholder).

{¶ 37} Therefore, unless corporate management committed the intentionally wrongful conduct, the corporate insured will not be denied coverage on the basis of an employee's intentional tort. See generally 3 Windt, *Insurance Claims & Disputes*, Section 11:9 (6th Ed.2013). WHC's corporate management did not commit Vaughan's intentionally wrongful conduct. Grange's contention that WHC is precluded from recovering for Vaughan's IIED and battery because of the definition of "occurrence" in its insurance policies consequently lacks merit.

{¶ 38} Grange secondly claims there is no coverage for purely emotional injuries because they do not constitute "bodily injury" as required by the policies. Grange's claim fails, however, because the CU policy expressly includes "mental anguish, mental injury or disability" resulting from any bodily injury at any time.

{¶ 39} Moreover, both policies provide coverage for damages incurred "because of 'bodily injury.'" It is true that nonphysical harms, like emotional distress, are not "bodily injury" as commonly defined in many insurance policies. See, e.g., *Bernard v. Cordle*, 116 Ohio App.3d 116, 120-21 (10th Dist.1996); *Johnson v. Am. Family Ins.*, 160 Ohio App.3d 392, 2005-Ohio-1776, ¶ 25-29 (6th Dist.). However, even in those jurisdictions in which emotional distress damages do not qualify as "bodily injury" for insurance coverage, these damages "may nevertheless be covered as damages 'because of' bodily injury or property damage." Turner, *Insurance Coverage of Construction Disputes*, Section 2:53 (2d

Ed.2013); see also Young, Bekeny & Mesko, *Ohio Insurance Coverage*, Section 3:1 (2013) (CGL policies that provide coverage for damages "because of 'bodily injury' or 'property damage' (to which the insurance applies)" covers the resulting damage flowing from the "bodily injury" or "property damage" even if it consists of something other than "bodily injury" or "property damage"). (Emphasis sic.) The pertinent portions of the CGL and CU policies do not state that the insured or the primary victim of the insured's conduct must be the one who suffered the bodily injury—for example, the CGL policy requires only that the insured be legally obligated to pay damages (including mental suffering) for what could be someone else's bodily injury. See *Willett v. Geico Gen. Ins. Co.*, 10th Dist. No. 05AP-1264, 2006-Ohio-3957, ¶ 9 (insurance policy's statement providing coverage for "damages for bodily injury caused by accident which the insured is legally entitled to recover" did not preclude coverage for mental suffering); *Allstate Ins. Co. v. Teel*, 100 P.3d 2, 4 (Alaska 2004) (negligent infliction of emotional distress claim covered under policy providing coverage to "any other person who is legally entitled to recover because of bodily injury to [the insured]"). *Bernard* and *Johnson* are distinguishable because the policies considered therein included different policy language than that at issue here.

{¶ 40} Therefore, Grange's contention that the trial court erred in ruling that WHC is entitled to coverage for Vaughan's IIED and battery lacks merit. Grange's suggestion that the trial court also erred in determining that the policies covered WHC's own IIED is incorrect. The trial court held that "if the jury found that [WHC] committed the intentional infliction of emotional distress, it would be an intentional tort committed by [WHC], and therefore would fall under the intentional injury exclusion of the insurance policy." (R. 102, at 6-7.) Thus, WHC's own IIED, assuming that the jury determined any, was not covered by the insurance policies.

{¶ 41} Consequently, before determining whether any exclusion is applicable, Grange's policies provided coverage for WHC's vicarious liability for its employee's intentionally tortious conduct.

3. Abuse or Molestation Exclusion

{¶ 42} The trial court determined that a coverage exclusion for abuse or molestation in both the CGL and CU policies was ambiguous and, thus, did not bar WHC from coverage for Vaughan's battery and WHC's negligent supervision of Vaughan.

{¶ 43} Grange claims that the trial court erred in so concluding. The CGL and CU policies contained identical language entitled "Abuse or Molestation Exclusion":

This insurance does not apply to "bodily injury", "property damage", "personal injury" or "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:

c. Supervision;

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by 1. above.

(R. 29, exhibits A and B.)

{¶ 44} When an insurer denies coverage based on an exclusion, it bears the burden of demonstrating that the exclusion applies. *Sauer v. Crews*, 10th Dist. No. 12AP-320, 2012-Ohio-6257, ¶ 30. Insurance coverage is determined by the policy language. *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, ¶ 10; *Reed v. Davis*, 10th Dist. No. 13AP-15, 2013-Ohio-3742, ¶ 10. Courts give undefined words in an insurance policy their plain and ordinary meaning. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995).

{¶ 45} The plain and ordinary meaning of the word "abuse," which is not defined in the CGL and CU policies, is, as pertinent here, physical maltreatment.² See *Black's Law Dictionary* 10 (9th Ed.2009), defining "abuse" as "[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury"; *Webster's Encyclopedic Unabridged Dictionary* 7 (1996), defining "abuse" as "bad or improper treatment; maltreatment"; see also *Discover Property & Cas. Ins. Co. v. Scudier*, D.Nevada No. 2:12-CV-836 JCM (CWH), 2013 WL 2153079 (May 16, 2013) (stating that

² Although both parties cite the R.C. 2151.031 definition of "abused child," this statutory definition is inapplicable because that definition is limited, by its own terms, to application of the phrase in R.C. Chapter 2151, i.e., "[a]s used in this chapter."

"abuse," which was undefined in the insurance policies, meant according to the definition in the Oxford Dictionaries to " 'use or treat in such a way as to cause damage or harm' " or to " 'treat with cruelty or violence, especially regularly or repeatedly' "; *State v. Eagle Hawk*, 411 N.W.2d 120, 123 (S.D.1987), fn. 5 (noting that "abuse" is defined in *Webster's New Collegiate Dictionary* 5 (1980) as "improper use or treatment" and "physical maltreatment").

{¶ 46} WHC's narrow construction of the term "abuse" as only "sexual abuse" is, thus, belied by the above authorities which define the term more broadly to include physical abuse. WHC cites no authority holding that an abuse or molestation exclusion does not preclude coverage for injuries arising from nonsexual assault, and our independent research has revealed no such authority. To the contrary, in *Cincinnati Ins. Co. v. Hall*, Mich.App. No. 297600, 2011 WL 2342704, the court held, in an appeal involving a declaratory judgment action concerning insurance coverage, that an "abuse or molestation exclusion" precluded coverage for injuries arising from nonsexual assault because "there is no reason why 'abuse' or 'molestation' *must* be sexual in nature" so that "the plain meanings of the words encompass a broader range of possible acts and behaviors, and we find no authority requiring their use in an insurance policy to be artificially restricted to only sexual acts or behaviors." (Emphasis sic).

{¶ 47} Moreover, the exclusion is not ambiguous. "The mere absence of a definition of a term in a contract does not make the term ambiguous." *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 152 Ohio App.3d 345, 2003-Ohio-1654, ¶ 37 (10th Dist.). See, e.g., *Community Action for Greater Middlesex Cty., Inc. v. Am. Alliance Ins. Co.*, 254 Conn. 387, 402, 757 A.2d 1074, 1083 (2000), and cases cited therein ("plaintiff has not identified any case, and we are aware of none, in which a policy exclusion for abuse or molestation has been deemed ambiguous").

{¶ 48} The jury in the personal-injury trial expressly found in its answers to interrogatories that Vaughan "intentionally harmed" the Faietas' minor child and that Vaughan's battery directly and proximately caused damages to the Faietas. (R. 3, exhibit No. 3.) As the trial court in *Faieta* held in ruling on the post-trial motions in that case, the jury, in effect, determined that the marks on the child's body "were a result of abuse" by Vaughan. *Faieta*, 2008-Ohio-3140, ¶ 39. Therefore, it was conclusively determined in the personal-injury case that Vaughan's battery constituted abuse of the Faietas' minor child,

which was excluded from coverage under Section 1 of the abuse or molestation exclusion of the CGL and CU policies. See *Howell v. Richardson*, 45 Ohio St.3d 365 (1989), paragraph one of the syllabus ("Where a determination is made in an initial action against a tortfeasor relative to his culpable mental state, collateral estoppel precludes relitigation of the determination in a subsequent proceeding brought against the tortfeasor's insurer pursuant to R.C. 3929.06.").

{¶ 49} Moreover, Section 2(c) of the abuse or molestation exclusion precluded coverage for WHC's negligent supervision of Vaughan's intentionally tortious conduct under the CGL and CU policies. Contrary to WHC's contention, the Supreme Court of Ohio's decision in *Safeco* does not require a different result because that case did not involve such a specifically worded exclusion. That case merely held that "[i]nsurance-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 negligent supervision." *Id.* at paragraph two of the syllabus. *Safeco* did not involve the construction of an abuse or molestation exclusion.

{¶ 50} In *Crow v. Dooley*, 3d Dist. No. 1-11-59, 2012-Ohio-2565, the court ruled that a sexual-molestation exclusion applied to preclude coverage for all bodily injury arising out of acts of sexual molestation, irrespective of the mental state, including negligence, of the insured. The court averred that its holding was not at odds with *Safeco* because both of the exclusions at issue in that case included specific language that did not preclude coverage for injuries predicated on an allegation of negligence. In contrast to the pertinent policy provisions in *Safeco*, the exclusion at issue here specifically precluded coverage based on WHC's negligent supervision.

{¶ 51} WHC further claims that a 1993 corporal-punishment endorsement in the CGL policy renders the abuse or molestation exclusion inoperable. We disagree. By its very terms, the corporal punishment endorsement provides an exclusion only to the exclusion for bodily injury or property damage expected or intended from the standpoint of the insured:

CORPORAL PUNISHMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion a. of paragraph 2., Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages) is replaced by the following:
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.

(Emphasis added.) (R. 29, exhibit B.)

{¶ 52} The manifest language of this endorsement applies only to permit coverage that would otherwise have been excluded under the "expected or intended from the standpoint of the insured" exclusion. It does not purport to limit, for example, the 1998 endorsement for the "abuse or molestation exclusion" in the CGL policy. Moreover, an additional 1998 endorsement to the CGL policy sets forth a "corporal punishment" exclusion that specifies that the insurance provided by the policy "does not apply to 'bodily injury', 'property damage' or 'personal and advertising injury' to your student arising out of any corporal punishment administered by or at the direction of any insured." (R. 29, exhibit B.) Therefore, the 1993 corporal punishment endorsement does not change the fact that claims concerning Vaughan's battery and WHC's negligent supervision are excluded under the policy's CGL abuse or molestation exclusion. Because the language of the policy controls our analysis, WHC's citation of Grange notes and deposition testimony of a Grange representative to the effect of what they thought was covered by the policy does not change this result.

{¶ 53} Nor are we persuaded that interpreting the abuse or molestation exclusion as broadly as its plain language dictates would—as WHC argues—render the insurance coverage provided by the policies illusory. Where there is some benefit to an insured through an insurance policy, it is not illusory. See *Ward v. United Foundries*, 129 Ohio St.3d 292, 2011-Ohio-3176, ¶ 24. The policies' exclusion is limited to abuse or molestation occurring to "any person while in the care, custody or control of any insured," while the insurance coverage encompasses circumstances beyond harm to people in the "care, custody or control" of WHC or any of its employees. The policies are not illusory.

{¶ 54} Therefore, Grange's argument has merit. The trial court erred in ruling that claims involving Vaughan's battery and WHC's negligent supervision of him were covered under the insurance policies. They were excluded under the abuse or molestation provisions.

{¶ 55} The Faietas' claims for compensatory damages directly against WHC were for its negligent supervision of Vaughan and based on the ambiguity in the pertinent jury interrogatory, possibly for WHC's IIED. Pursuant to the foregoing discussion, the negligent supervision claim is excluded from coverage under the abuse or molestation exclusions of the CGL and CU policies. The trial court determined that if the jury did find against WHC for its own direct IIED, that claim was excluded from coverage because it did not constitute a covered occurrence. The claim for Vaughan's battery was also excluded from coverage under the policies' abuse or molestation exclusions. Nevertheless, the claim for Vaughn's IIED, which WHC is vicariously liable for, was not excluded from coverage under the policies.

{¶ 56} As previously discussed, it is Grange's burden to prove which claims were covered and which were not. Grange has met that burden here. The May 23, 2008 judgment of the trial court in the personal-injury case brought by the Faietas against WHC and its employee, Vaughan, specifies \$82,365 as the amount of compensatory damages for which Vaughan was primarily, and WHC was secondarily, liable. This amount represents the damages for the claims of battery and, potentially, IIED against Vaughan. The remainder of the \$549,100 compensatory damage award—\$466,735—was excluded from coverage.

{¶ 57} Therefore, any amount of compensatory damages for which WHC was found to be directly liable in excess of the \$82,365 (\$466,735) that could have represented

all the damages from any covered IIED claim against Vaughan was established by Grange to be excluded from coverage under the policies. Consequently, Grange's assignment of error is sustained to this extent.

4. Attorney Fees and Postjudgment Interest

{¶ 58} In the personal-injury case, the trial court ordered WHC to pay the Faietas \$693,861.87 in attorney fees. In the indemnification action brought by Grange, the trial court determined that Grange was obligated to provide coverage to WHC for the attorney fees and the \$229,716 in postjudgment interest.

{¶ 59} Grange asserts the trial court erred in so determining because there was no proof that any of the claims were covered. But, as previously discussed, there was coverage for the claim of IIED against Vaughan for which WHC was vicariously liable. Moreover, even if the attorney fees were awarded solely because of the punitive damages assessed against WHC, "[a]ttorney fees are distinct from punitive damages, and public policy does not prevent an insurance company from covering attorney fees on behalf of an insured when they are awarded solely as a result of an award for punitive damages." *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, syllabus. Finally, because the attorney fees cannot now be allocated between the covered and noncovered claims, Grange is liable for the entire amount.

{¶ 60} The postjudgment interest was also recoverable under the CGL and CU policies. Nevertheless, because some of the postjudgment interest is attributable to the compensatory damages that are excluded from coverage, that portion of the interest award is vacated.

{¶ 61} In sum, Grange's assignment of error is sustained insofar as the trial court erred in determining that WHC is entitled to coverage under the insurance policies for the direct compensatory claims against WHC for negligent supervision and IIED. Accordingly, we reverse the judgment of the trial court to this extent and the portion of the postjudgment interest award attributable to this amount. The remainder of Grange's assignment of error is overruled. The remainder of the judgment, including the declaration that Grange must indemnify WHC for the \$82,365 in compensatory damages for which WHC is secondarily liable, the \$693,861 in attorney fees, and the postjudgment interest attributable to this portion of the judgment, is affirmed.

B. *WHC'S Cross-Appeal*

{¶ 62} In its cross-assignments of error, WHC claims the trial court erred in holding that Grange was not obligated to indemnify WHC for the \$1,628,470 in punitive damages awarded against it directly and secondarily in the personal injury case.

{¶ 63} The trial court denied WHC's claim for coverage for the punitive damages awarded against it directly and secondarily in the personal injury case. The trial court did not err in so holding for the following reasons.

{¶ 64} First, R.C. 3937.182(B) prohibits insurance coverage of punitive damages. *Neal-Pettit* at ¶ 21. The statute states in pertinent part that "no other policy of casualty or liability insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for punitive or exemplary damages." R.C. 3937.03(C)(1) refers to "[c]ommercial insurance," which is defined as "any commercial casualty or commercial liability insurance except sickness and accident, fidelity and surety, and automobile insurance as defined in section 3937.30 of the Revised Code." The Grange CGL and CU policies are commercial liability policies and are, thus, prohibited from providing coverage for punitive or exemplary damages.

{¶ 65} Second, "public policy prevents insurance contracts from insuring against claims for punitive damages based upon an insured's malicious conduct." *Neal-Pettit* at ¶ 21. As this court previously decided in *Faieta*, 2008-Ohio-6959, ¶ 43, the *Faietas* presented sufficient evidence of WHC's malice, including its conscious disregard of the well-being and safety of A.F. and the other young children in its care, to justify the trial court's award of punitive damages against WHC.

{¶ 66} Third, WHC's belated citation of R.C. 2719.01 at oral argument does not modify this result. An issue raised for the first time at oral argument and not assigned as error in an appellate brief is untimely. *Watkins v. Dept. of Human Servs.*, 10th Dist. No. 00AP-224 (Oct. 31, 2000).

{¶ 67} Finally, the CU policy contained an endorsement that expressly excludes insurance coverage for punitive or exemplary damages.

{¶ 68} Thus, the trial court did not err in determining that Grange is under no duty to provide coverage for punitive damages in this case. WHC's cross-assignments of error are overruled.

V. CONCLUSION

{¶ 69} Having sustained part of Grange's assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas determining that Grange must indemnify WHC for the \$466,735 in compensatory damages awarded directly against WHC for its negligent supervision of Vaughan and for its IIED on the Faietas and awarding postjudgment interest on this portion of the award for compensatory damages. Having overruled the remainder of Grange's assignment of error, we affirm the judgment of the trial court determining that Grange must indemnify WHC for the \$82,365 in compensatory damages for which it is secondarily liable for its employee's intentional torts, for the \$693,861 in attorney fees, and for that portion of the postjudgment interest award on these amounts. Finally, having overruled WHC's cross-assignments of error, we affirm the judgment of the trial court determining that Grange has no obligation to indemnify WHC for any portion of the punitive damages awarded.

*Judgment affirmed in part;
reversed in part, and cause remanded.*

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

WORLD HARVEST CHURCH,

Plaintiff,

v.

GRANGE MUTUAL CASUALTY
COMPANY

Defendant.

CASE NO: 09 CVH4-07-11327

JUDGE BESSEY

**DECISION DENYING IN PART AND GRANTING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGEMENT
FILED SEPTEMBER 1, 2011**

AND

**DECISION DENYING IN PART AND GRANTING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
FILED SEPTEMBER 2, 2011**

These matters are before the Court upon the Motion for Summary Judgment and Declaratory Relief on Issue of Duty to Indemnify, filed by Plaintiff, World Harvest Church (hereinafter "Plaintiff"), on September 1, 2011. Defendant, Grange Mutual Casualty Company (hereinafter "Defendant"), filed a Motion for Summary Judgment on September 2, 2011. Plaintiff filed its Reply Brief in Support of Motion for Summary Judgment and Declaratory Relief on Issue of duty to Indemnify on September 28, 2011. Defendant also filed a Reply in Support of Its Motion for Summary Judgment on September 28, 2011.

I. Background

This case arises from an underlying lawsuit filed by Andrew Faieta and his parents, in Franklin County Common Pleas Court, Case No. 07 CVH-05-7031. The background of that case is that Richard Vaughan was an employee of Plaintiff's daycare center and qualified as an insured under Plaintiff's policy. Vaughan was found liable for beating a two-and-half-year-old

boy, which resulted in the boy's bruising and a severe rash. The jury found that Vaughan battered the boy, that Plaintiff negligently supervised Vaughan, and that either Vaughan or Plaintiff inflicted intentional emotional distress on the parents of the boy who was battered. The jury awarded \$1,628,470 in punitive damages and \$693,861 in attorney's fees against Plaintiff. The trial court found that Plaintiff was solely liable for \$2,789,066 and that Vaughan was primarily liable for \$82,365. These findings were affirmed on appeal, whereupon Plaintiff settled with interest for a total amount of \$3,101,147.

The lawsuit at issue followed. Plaintiff seeks to have this Court declare that its insurance company, Defendant, must indemnify Plaintiff for the entire sum it was obligated to pay in the first action. In addition to seeking summary judgment for reimbursement of the settlement, Plaintiff has asserted a claim for bad faith against Defendant and wants to continue that argument at trial. Defendant seeks summary judgment for a declaration that Plaintiff is not eligible to be indemnified for any portion of the underlying verdict and for a dismissal of Plaintiff's bad faith claim.

II. Standard of Review

When deciding a Motion for Summary Judgment, the Court must first examine the standard under which summary judgments are properly granted. A motion for summary judgment is properly granted in favor of the moving party, if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: 1) there are no genuine issues as to any material fact; 2) the movant is entitled to a judgment as a matter of law; and, 3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. See Civ.R. 56(C); *State ex. rel.*

Howard v. Ferreri (1994), 70 Ohio St.3d 587, 589; *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617.

A party seeking summary judgment, on the grounds that the nonmoving party cannot prove its case, bears the initial burden of: 1) informing the trial court of the basis for the motion; and, 2) identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. See *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. "The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." *Dresher*, at 288-289. If the moving party fails to satisfy this initial burden, the motion for summary judgment must be denied. See *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 147; *Dresher*.

If the moving party satisfies its initial burden, "the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher*, at 288-289; followed by *Conway v. Calbert* (C.A.10 1997), 119 Ohio App.3d 288, 291, 695 N.E.2d 271, 272-273. Thus, "[a] motion for summary judgment forces the non-moving party to produce evidence on issues for which that party bears the burden of production at trial." *Wade-Hairston v. Franklin Cty. Bd. of Mental Retardation and Developmental Disabilities* (Dec. 17, 1998), Franklin App. No. 98AP-456,

unreported, citing, *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111; see, also, *Dresher*, at 288-289; *Carter v. Consol. Rail Corp.* (C.A.10 1998), 126 Ohio App.3d 177, 181, citing, *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 623 N.E.2d 591; *Cullen v. Ohio Dept. of Rehab. & Corr.* (C.A.10 1998), 125 Ohio App.3d 758, 764, citing, *Stewart*. "The non-movant must also present specific facts and may not merely rely upon the pleadings or on unsupported allegations." *Wade-Hairston*, citing, *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 612 N.E.2d 1295. Moreover, "[w]hen a party moves for summary judgment supported by evidentiary material of a type and character set forth in Civ.R. 56[(C)], the opposing party has a duty to submit materials permitted by Civ.R. 56(C) to show that there is a genuine issue for trial." *Wade-Hairston*, citing, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

III. Discussion

The award of \$3,101,147 can be roughly separated down to \$549,100 in compensatory damages, \$1,628,000 in punitive damages, \$694,000 in attorney fees, and \$230,000 of post judgment interest. It should be noted that the economic and non-economic damages were not broken down by each cause of action at the initial trial. The Court has now been asked to determine which party is responsible for paying each portion of the total award.

a) Compensatory Portion of Verdict

Plaintiff argues that Defendant has the burden of proving the applicability of any exclusion that would prevent coverage of the compensatory portion of the verdict totaling \$549,100. Plaintiff further argues that if coverage can be applied to any of the three causes of action, then Defendant must indemnify Plaintiff for the entire amount of the compensatory portion of the verdict. The causes of action at the underlying trial were battery, intentional

infliction of emotional distress, and negligent supervision. Plaintiff asserts that coverage can be established for all three causes of action.

Defendant counters that coverage cannot be established for any part of the verdict and that Plaintiff bears the burden of demonstrating that it is entitled to coverage. It should be noted that Defendant did provide legal representation to both Plaintiff and Vaughan during the underlying trial. Plaintiff also retained personal counsel at the invitation of Defendant's counsel and signed a Joint Defense Agreement.

Counsel for Defendant was involved throughout the trial process in the underlying lawsuit. The jury interrogatories were written by Plaintiff's counsel but Defendant's counsel participated and could have intervened. Defendant's counsel failed to do so, and this failure has contributed to much of the current confusion in allocating the verdict.

Ohio Courts have found that when an insurer undertakes the defense of an insured in a matter where all actions are insured and "that insurer fails to request an allocated verdict, the insurer will be liable in a subsequent action by the insured for the amount of any such general verdict to the extent of its limits of liability for the covered claims." *Lavender v. Grange Mutual Casualty Company*, 1979 Ohio App. LEXIS 10921 *12.

As such, the Court finds that Defendant bears the burden of proof to demonstrate that coverage does not apply to each of the causes of action and will need to establish exclusions for the other portions of the award, if any. Furthermore, at this time, the Court finds that it is not possible to allocate the proportions of the general compensatory verdicts. Therefore, the Court finds that if Plaintiff establishes coverage for any of the three causes of action, then Defendant must indemnify Plaintiff for the entire compensatory amount of the award.

1) Coverage for the battery committed by Vaughan

Battery is an intentional tort. The Court finds that the policy issued by Defendant to Plaintiff does not cover intentional torts. Further, the Court finds that the policy excludes coverage for certain bodily injuries. However, Plaintiff claims that coverage should still be extended as the act of battery was an occurrence that is covered by the policy when viewed from the point of view of Plaintiff. Plaintiff contends that its employee, Vaughan, not the Plaintiff directly, was found to have committed battery.

The Court finds Plaintiff's argument to be well founded. The "coverage hinges on whether the act is intentional from the perspective of the person seeking coverage." *Safeco Ins. Co. of Am. v. White*, 122 Ohio St. 3d 562, 2009-Ohio-3718 at ¶24. This point has been consistently reaffirmed by the Ohio Supreme Court. "The intentions or expectations of the negligent insured must control the coverage determination." *Doe v. Shaffer* (2000), 90 Ohio St.3d 388 at 393, 2000-Ohio-186, 738 N.E.2d 1243.

Here, the battery was not committed by an officer, director, or other principal of Plaintiff company, but was instead committed by an employee of Plaintiff. When viewed from the perspective of the entity seeking coverage, here Plaintiff, the Court finds that this intentional tort is an accident or occurrence. Therefore, the Court finds that the battery committed by Vaughan is an act that Plaintiff may be indemnified for by Defendant.

2) Coverage for Intentional Infliction of Emotional Distress

The Court finds that the question, again, is who committed the intentional tort? If the tort was committed by Vaughan, then the act would be an occurrence that is covered from the perspective of Plaintiff as discussed above in relation to the tort of battery. However, if the jury found that Plaintiff committed the intentional infliction of emotional distress, it would be an

intentional tort committed by Plaintiff, and therefore would fall under the intentional injury exclusion of the insurance policy.

Unfortunately, the Court finds that it is unclear whether the jury found Vaughan or Plaintiff directly responsible for this tort. The jury 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?" The jury said yes.

Since the questions posed to the jury included "and/or" it is now impossible to tell on what basis the jury came to its answer. Defendant's counsel could have intervened and ensured that the jury was polled in a way that separated responsibility for the cause of the intentional infliction of emotional distress on the Faietas. However, Defendant's counsel failed to do so, and this inaction has led to the current ambiguity as to whom the jury found responsible for this intentional tort. Therefore, the Court finds that Defendant must also indemnify Plaintiff for the damages incurred under the intentional infliction of emotional distress claim.

3) Coverage for Negligent Supervision

The Court finds that negligence would not fall subject to the intentional injury exclusion of the policy. However, Defendant argues that it was the negligent supervision of Plaintiff that allowed for the intentional battery committed by Vaughan. Plaintiff claims Ohio law is clear that coverage extends to an entity found to have committed negligent supervision even if that negligence led to a failure to prevent another insured's intentional misconduct.

The Court agrees with Plaintiff. It is established law that "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 negligent supervision.” *Safeco Ins. Co. of Am. v. White*, (2009) 122 Ohio St. 3d 562, 2009-Ohio-3718, Syllabus 2.

The *White* case involved a case where a minor was found culpable for an intentional tort and the parents were found culpable for a negligent supervision claim. The parents’ insurance policy covered negligent acts such as negligent supervision. Much like the instant case, the jury returned a verdict against the parents on the claim of negligent supervision. The *White* case makes it clear that Ohio law permits coverage for negligent supervision even if that negligence leads to the intentional misconduct of another insured.

The Ohio Supreme Court went on to explain that “the intentions or expectations of the negligent insured must control the coverage determination...a contrary decision would ‘effectively dissolve the distinction between intentional and negligent conduct, allowing the intentional act to devour the negligent act for the purpose of determining coverage.’” *Id.* at ¶25, citing *Doe v. Shaffer* (2000), 90 Ohio St.3d 388 at 393. The Court finds Plaintiff’s arguments well taken and finds that coverage for negligent supervision is not excluded when that act of negligence may have allowed for the intentional bad act of another insured.

Defendant also argues that even if coverage would be extended under certain circumstances, the policy held by Plaintiff excludes coverage for bodily injury that stems from child abuse, including negligent supervision that leads to child abuse. Defendant further argues that the battery found to have been committed by Vaughan qualifies as child abuse based on Ohio law. However, Plaintiff counters that there was no finding by the jury of child abuse, there was only a finding of battery. Plaintiff also notes that the insurance policy contained a clause that provides coverage for claims of bodily injury related to corporal punishment. Plaintiff argues that the injuries found in the underlying case are consistent with a spanking (i.e. corporal

punishment). Therefore, the jury could have found the battery to be a result of corporal punishment gone too far. Plaintiff also argues that Defendant's interpretation of the policy language would contradict other portions of the policy, and argues that the word "abuse" is never defined. Plaintiff claims that the word abuse should be interpreted as sexual abuse. Plaintiff contends that to include bodily injury from other harmful conduct would render other parts of the Commercial General Liability policy worthless, as the corporal punishment clause and other forms of coverage for bodily injury would not be covered based on Defendant's interpretation of abuse.

The Court finds that there is ambiguity as to what the abuse exclusion covers, and "according to well-settled principles of law, the ambiguity must be resolved in favor of the insured." *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St.2d 95, 98, 311 N.E.2d 844. Therefore, based on this well-settled law, the Court agrees with Plaintiff's interpretation of the policy language. Further, the jury was never asked to find a determination as to whether or not an "abuse" occurred.

Therefore, based on the discussion above, the Court finds that the entire compensatory portion of the verdict is covered by the insurance agreement between Plaintiff and Defendant. As such, the Court further finds that Defendant is obligated to provide coverage for and reimburse Plaintiff the entire compensatory award of \$549,100.

b) Punitive Damage Award

The punitive damages award was allocated in two portions. There was an award of \$1,528,470 directly against Plaintiff, and a second award against Vaughan for \$100,000. Plaintiff is also secondarily liable for the award against Vaughan.

Defendant issued two policies to Plaintiff, a Commercial General Liability policy (CGL) and an Umbrella Policy. The Umbrella policy contains language that expressly states that the insurance policy does not apply to punitive or exemplary damages. The CGL policy, Plaintiff notes, does not contain such exclusionary language.

Plaintiff points to the following language in the CGL, "we will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The terms "sum" and "damages" are not defined. Therefore, Plaintiff contends, the language of the policy is ambiguous as to whether it provides coverage in this case. Plaintiff further argues that the Ohio Supreme Court has determined that "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." *Faruque v. Provident Life & Acci. Ins. Co.* (1987), 31 Ohio St. 3d 34, 508 N.E.2d 949, 952.

In response, Defendant claims that both O.R.C. 3937.182 and Ohio public policy prohibit insurance policies from extending coverage for punitive damages. The purpose of punitive damages is to punish the offending party and to deter others from carrying out similar conduct. See, *Detling v. Chockley* (1982), 70 Ohio St. 2d 134, 436 N.E. 2d 208. This purpose is disrupted if a culpable party is not required to pay that punishment by simply shifting the burden of the punishment to their insurer. Based on this idea "Ohio law has long disfavored insurance against punitive damages resulting from the insured's own torts." *Farm Mutual Insurance Company v. Blevins* (1990), 49 Ohio St.3d 165, 172.

The only exception to this general policy is when punitive damages are awarded pursuant to a particular statute and there is no finding of malice, ill will, or similar culpability. See *The Corinthian v. Hartford Fire Ins. Co.*, (2001) 143 Ohio App. 3d 392, 758 N.E.2d 218 (holding

that neither public policy nor statute barred insurance coverage for punitive damages relating to a violation of Nursing Home Patients' Bill of Rights absent malice or ill will); and *Foster v. D.B.S. Collection Agency*, 2008 LEXIS 22264 (holding that O.R.C. 3937.182 does not prohibit insurance of punitive damages in debt collection actions in a case where the policy explicitly included punitive damages, and that Ohio public policy forbids the indemnification of punitive damages without a finding of malice, ill will, or similar culpability or if punitive damages are awarded other than pursuant to a statute).

Plaintiff also cites case law from several other states indicating that some states have started to allow coverage for punitive damages. However, the Court finds that Ohio is not yet one of those states. As Defendants argue, Ohio statutory law and Supreme Court authority provide that it is against public policy to insure an individual for punitive damages arising from the insured's own intentional or malicious acts. In addition, the punitive damages in this case were not awarded in accordance with a particular statute.

Therefore, the Court finds that it would be against Ohio public policy and O.R.C. 3937.182 for Defendant to be required to indemnify Plaintiff for the punitive damage portion of the total award. Defendant is under no duty to provide coverage for punitive damages in this case. This includes the \$100,000 award against Vaughan as Plaintiff admitted vicarious liability at trial.

c) Attorney fees award

Both parties cite the *Neal-Petit* decision as controlling law in this case regarding attorney fees. *Neal-Petit v. Luhman*, 125 Ohio St.3d 327, 928 N.E.2d 421, 2010-Ohio-1829. In that case, the Ohio Supreme Court found that "attorney fees are distinct from punitive damages, and public policy does not prevent an insurance company from covering attorney fees on behalf of an

insured when they are awarded solely as a result of an award for punitive damages.” *Id.* at ¶24. Plaintiff argues that the *Neal-Petit* decision allows for the coverage of attorney fees as damages under a general insuring agreement. In contrast, Defendant argues that there is no coverage in the instant case because there should be no coverage for the compensatory portion of the award. However, as discussed above, the Court finds that Plaintiff is entitled to coverage on the underlying causes of action. As such, the Court finds that consistent with the Ohio Supreme Court’s ruling in *Neal-Petit*, Plaintiff is entitled to have the \$693,861 attorney fees award indemnified by Defendant.

d) Interest award

Plaintiff argues that Defendant’s policy specifically provides coverage for post-judgment interest. This language is found in the Supplemental Payments section and provides for coverage for “all interest on the full amount of any judgment” related to any suit against an insured that the company defends. Plaintiff notes that coverage is triggered when Defendant defends the claim.

The Court finds Plaintiff’s argument well taken and agrees. The plain language of the policy provided that Defendant will extend coverage for any post judgment interest arising from a suit in which Defendant provides counsel. Defendant did in fact provide counsel to Plaintiff during the underlying lawsuit. Therefore, Defendant must indemnify Plaintiff for the entire \$229,716 interest award.

e) Plaintiff’s claim for bad faith

Plaintiff has filed a claim of bad faith against Defendant. Defendant moved for summary judgment dismissing the claim. Defendant argues that a trial court should dismiss bad faith claims as a matter of law where there is evidence that the insurer had some reasonable justification for its conduct and did not act in an arbitrary or capricious way. *Spremuloi’s*

American Service v. Cincinnati Ins. Co. (1992), 91 Ohio App.3d 317. However, Plaintiff argues that evidence of acts indicating that an insurer disregarded its duties to an insured raises an issue of fact for the jury. *Spadafire v. Blue shield* (1985), 21 Ohio App.3d 201, 486 N.E.2d 1201.

Plaintiff further argues that Defendant relies on outdated case law. Plaintiff states that the standard for bad faith in Ohio insurance cases is when an insurer "fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor. Intent is not and never has been an element of the reasonable justification standard." *Zappo v. Homestead Insurance* (1994), 71 Ohio St.3d 552, 554-555, 644 N.E.2d 397. Plaintiff points to several acts by Defendant that may demonstrate that a jury could reasonably find Defendant acted in bad faith. This includes classifying the case as "low damages," failing to intervene properly during trial, failing to communicate with appointed counsel, and failure to consider punitive damages or overall settlement value.

Plaintiff argues that the *Zappo* case makes clear that bad faith depends on the reasonableness of the insurer's conduct, and reasonableness should be a question of fact left for a jury. Further, Plaintiff contends that there is ample evidence that Defendant's conduct can be reasonably interpreted as acting in bad faith based on the *Zappo* standard. The Court agrees with Plaintiff and finds that there is sufficient evidence that could potentially lead reasonable minds to reach different conclusions as to whether or not Defendant acted in bad faith when handling Plaintiff's claim. Therefore, Plaintiff's claim of bad faith shall continue to trial.

IV. Conclusion

Based on the discussion above, the Court finds that Defendant shall indemnify and reimburse Plaintiff for the compensatory portion of the underlying judgment, attorney fees, and interest. However, Defendant is not obligated to indemnify Plaintiff for the punitive damages portion of the award, and there still remain several questions of material fact related to Plaintiff's claim of bad faith against Defendant.

Therefore, the Court accordingly hereby DENIES IN PART and GRANTS IN PART Plaintiff's Motion for Summary Judgment, and DENIES IN PART and GRANTS IN PART Defendant's Motion for Summary Judgment.

Counsel for Plaintiff shall submit the appropriate Judgment Entry pursuant to Loc.Rs. 25.01 and 25.02.

IT IS SO ORDERD.

Copies to:

Robert P Rutter, Esq.
brutter@ohioinsurancelawyer.com
Counsel for Plaintiff, World Harvest Church

James R Gallagher, Esq.
jgallagher@ggptl.com
Counsel for Defendant, Grange Mutual Casualty Company