No. 14-1161

In the Supreme Court of Ohio

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

WORLD HARVEST CHURCH,
Plaintiff-Appellee,

v.

GRANGE MUTUAL CASUALTY COMPANY,
Defendant-Appellant,

MERIT BRIEF OF APPELLANT GRANGE MUTUAL CASUALTY COMPANY

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal arises out of a decision ordering Appellant Grange Mutual Insurance Company (Grange) to indemnify Appellee World Harvest Church (WHC) for over $1 million in compensatory damages, attorney fees, and interest because one of the Church's preschool teachers savagely beat a two-and-a-half-year-old child in the school's care and custody. While the panel concluded that the Grange commercial general liability coverage form (CGL) and umbrella policies issued to WHC provided no coverages for damages caused by the beating asserted under the label of "battery," the court concluded that: (1) the policies did cover those same damages asserted under the label of "intentional infliction of emotional distress" (IIED) and (2) that WHC's "vicarious" liability for its employee's IIED – liability that was the result of the church's litigation strategy to admit that the abuser's acts should be "deemed" to be the acts of WHC – was covered. The decision thereby allowed a litigation strategy to create coverages for uncovered damages.

Grange seeks a reversal and remand for the entry of judgment in its favor. Considered as a whole, the policies at issue clearly and unambiguously exclude coverage for damages arising out of a teacher's horrific abuse of a young child. It is respectfully submitted that this Court's jurisprudence determines coverages based upon "acts," not based upon legal labels appended to those acts or litigation strategies.

Here, the policies in question contained an Abuse or Molestation Exclusion that negated coverages of bodily injury arising out of: (1) the abuse by *anyone* of anyone in the care and custody of the insured and (2) the negligent hiring, supervision or retention of the abuser. While this Court has yet to construe insurance policies containing the standardized, ISO Abuse or Molestation Exclusion, the numerous state and federal courts that have addressed such policies uniformly find no coverages for bodily injury arising out of the abuse of any person in the insured's care, custody, or control, regardless of who the abuser was, and regardless of the legal theory pursued. Those decisions are fully consistent with this Court's insurance jurisprudence directing courts to look to the alleged unlawful conduct rather than legal labels – i.e., "'deal with each act on its merits'" – when considering whether a policy provides coverages for a specific alleged or adjudicated injury. *Safeco Insurance Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, ¶ 32, quoting *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co*., 842 F.Supp. 1151, 1163 (W.D.Ark.), *aff'd* 33 F.3d 1476 (8th Cir.1994).

Subject matter exclusions tailored to specific businesses or enterprises provide parties to an insurance contract with flexibility and clear mutual expectations. *All* claims arising out of certain conduct are barred regardless of the insured's perspective or state of mind. When an exclusion precludes coverages for abuse or molestation by anyone, of anyone within the insured's care, custody, or control, it is irrelevant whether the abuser is an employee or agent of the insured or

another student or a complete stranger; it is irrelevant whether the insured does or does not potentially have respondeat superior liability for bodily injury caused by abuse or molestation; it is irrelevant what cause of action is asserted or what strategic defense decisions are employed in the ensuing litigation. Regardless of the legal vehicle employed, "all classifications of damages arising out of incidents of abuse or molestation" are excluded. *Lincoln Cty. Sch. Dist. v. Doe*, 749 So.2d 943, 946 (Miss.1999) (en banc).

Enforcement of the clear and unambiguous language of the policies at issue moots the second and third propositions of law presented in this appeal. Should this Court affirm the finding of some coverage, however, Grange respectfully submits that the courts below improperly ordered Grange to reimburse WHC for $694,000 the church was ordered to pay in attorney fees awarded against it and $230,000 in post-judgment interest. Both judgments were based on acts the Court of Appeals correctly held were *not* covered by the CGL or umbrella policies. They therefore were not reimbursable.

II. STATEMENT OF FACTS

A. The Underlying Action.

The facts of the underlying action are set forth in post-trial and appellate decisions summarizing and analyzing the evidence upon which the jury based its verdicts in favor of the plaintiffs. *See Faieta v. World Harvest Church*, 147 Ohio Misc.2d 51, 2008-Ohio-3140, 891 N.E.2d 370 ("*Faieta* Tr. Op."), R. 84, Exh. 13, Supp.

at 108; *Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959 ("*Faieta* App. Op."), R. 84, Exh. 14, Supp. at 155.

Appellee World Harvest Church ("WHC"), located in Franklin County, Ohio, operates a preparatory school, which includes the Cuddle Care preschool program. (*Faieta* Tr. Op., ¶ 1, Supp. 121; *Faieta* App. Op., ¶ 2, Supp. at 160.) On May 30, 2006, Michael and Lacey Faieta filed a complaint in the Franklin County Court of Common Pleas, individually and on behalf of their son, Andrew Faieta, alleging that a Cuddle Care teacher (Richard Vaughan) committed a "painful and horrific physical assault" on their two-and-a-half-year-old son that "left plainly visible marks, cuts and contusions to the rear end, back legs, and other parts" of his body. (*Faieta* Compl., p. 2, Supp. at 68; *see also Faieta* App. Op., ¶ 2, Supp. at 160.)

Based on the assault and WHC's refusal to investigate, the Faietas asserted causes of action for negligence, assault and battery, negligent hiring and supervision, respondeat superior, and intentional infliction of emotional distress (IIED) against Vaughan and WHC. (Faieta Compl., pp. 4-7, Supp. 70-73.)

Grange agreed to defend the claims under a reservation of rights. (WHC Compl. (7/29/09), ¶ 8, Supp. at 61.) WHC and Vaughan's defense team (which included counsel appointed by Grange and WHC's personal counsel) pursued a joint defense that the incident never occurred – the marks on Andrew's body were "contact dermatitis" (a skin rash). (*Faieta* Tr. Op. ¶ 32, 45-46, Supp. 127, 129.) Consistent with that legal theory, Defendants filed joint answers to the complaint

and amended complaint in which they admitted that "at all alleged relevant times defendant Vaughan was acting within the scope of his employment" with WHC; that Vaughan's actions "are deemed to be the actions of [WHC]" and that WHC "is liable for the acts of its employee defendant Vaughan." *Faieta* App. Op., ¶ 46, Supp. 168 (punctuation omitted). (*See also Faieta* Joint Answer, ¶ 30-31, Supp. 80; *Faieta* Am. Answer, ¶ 30-31, Supp. 86.)

At trial, the Faietas presented testimony supporting the allegation of a savage beating and emotional trauma suffered by the entire family. The testimony described marks on Andrew that were "raised, red, welts, cuts, abrasions, frayed skin, and swollen" (*Faieta* Tr. Op., ¶ 34, Supp. 128). After the attack, "Andrew's personality changed and he became fearful of being separated from his parents and of being enclosed in rooms, especially bathrooms." (*Faieta* App. Op., ¶ 36, Supp. 166.) The Faietas presented "undisputed testimony" from Andrew's treating psychologist that the child suffered from a post-traumatic stress disorder. (*Id*.)

The Faietas' IIED claim against WHC was based on WHC's "concerted effort to prevent plaintiffs from learning the cause of Andrew's injury." (*Faieta* Tr. Op., ¶ 42, Supp. 129.) The "testimony and demeanor" of WHC's witnesses "demonstrated that WHC's primary objective in investigating the marks was to protect itself and its employees rather than to conduct a good faith investigation." (*Id*., ¶ 45, Supp. 129.) Further, the school refused to speak with the Faietas after an initial meeting and sent them a letter "ordering them not to come on the church's premises" and

"threatening * * * that failing to comply with the order would result in WHC prosecuting them for trespass." (*Id*., ¶ 44, 47, Supp. 129, 130.) *See also Faieta* App. Op., ¶ 28-33, Supp. 165-166. WHC's actions "caused the Faietas serious emotional distress" that required treatment in family therapy. (*Faieta* Tr. Op., ¶ 49, Supp. 130.)

Following a seven-day trial, the jury was presented interrogatories and verdict forms for battery, IIED, and negligent supervision. (*Faieta* Jury 'Rogs, Verdict Forms, R. 84, Exh. 10, Supp. 89.) Because WHC had admitted scope of employment and that Vaughan's acts should be "deemed" the acts of WHC, no jury instruction or interrogatory was necessary or offered for WHC's respondeat superior liability for Vaughan's abuse or for WHC's ratification of Vaughan's malicious conduct. (*Faieta* Tr. Op., ¶ 58-62, Supp. 131-133; *Faieta* App. Op., ¶ 49, Supp. 168.)

The jury returned interrogatories finding against Vaughan on plaintiffs' battery claim; finding against WHC on plaintiffs' negligent supervision claim; and finding that Vaughan "and/or" WHC intentionally inflicted emotional distress on the Faietas. (*Faieta* Tr. Op., ¶ 4, Supp. 121; *Faieta* 'Rogs 1a-4, Supp. 89-94.) Based on those findings, the jury returned verdicts in favor the Faietas, including:

- Compensatory damages of $134,865.00 and punitive damages of $100,000 against Vaughan; and
- Compensatory damages of $764,235.00 and punitive damages of $5,000,000 against WHC.

(App. Op., ¶ 3, Appx. 17; *Faieta* Verdicts, Supp. 104, 105.) Those verdict forms further specified that the Faietas were entitled to attorney fees from WHC, but *not* from Vaughan. (*Id*., Supp. 104, 105.) The trial court thereafter ordered WHC to pay the Faietas $693,861.87 in attorney fees. (*Faieta* Tr. Op., ¶ 161, Supp. 153.)

Damage caps resulted in the entry of a final judgment of $2,871,431.87 – WHC was solely liable for $2,789,066.87, while Vaughan was solely liable and WHC secondarily liable, for $82,365.00. (App. Op., ¶ 6, Appx. 18; *Faieta* JE (5/23/08), Supp. 154.) Those awards were affirmed on appeal. (*See Faieta* App. Op., Supp. 155.) WHC settled with the Faietas in the amount of $3,101,147, which included approximately $230,000 in post-judgment interest. (App. Op., ¶ 8-9, Appx. 18.)

B. This Litigation.

WHC filed this action on July 29, 2009, seeking a declaration of coverages for all damages awarded against Vaughan and WHC, including attorney fees awarded against WHC alone and post-judgment interest. WHC further sought compensatory and punitive damages for Grange's alleged "bad faith" in providing a defense but refusing to indemnify amounts awarded for the adjudicated abuse. (Compl., Supp. 60.)

1. The Grange policies.

The CGL and umbrella policies under which WHC sought reimbursement for its $3.1 million payment are reproduced in Grange's Supplement at pages 1 and 34.

(a) <u>The insuring agreements.</u>

The initial insuring agreement for the CGL coverage form, CG 00 01 (10-01), obligates Grange to cover "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (CGL Form, Supp. 14.)

Paragraph 1.b. of the insuring agreement states that the "bodily injury" must be "caused by an 'occurrence'" (*id*., Supp. 14) and "occurrence" is defined as an "accident." (*Id*., Supp. 27.)

The insuring agreement in the Commercial Liability Umbrella Coverage Form similarly states that Grange will pay only for "bodily injury" to which the insurance applies; that the "bodily injury" must be caused by an "occurrence"; and defines "occurrence" as "an accident." (Umbrella Form, Supp. 42, 55.)

The Insuring Agreements further include an exclusion generally known as an "intended acts" exclusion:

> 2. Exclusions
>
> This Insurance does not apply to:
>
> a. Expected Or Intended Injury
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. * * *

(Supp. at 15, Section I, 2.a.; Supp. at 42, Section I, 2.a.)

(b) The Abuse or Molestation Exclusion.

The CGL and umbrella coverage forms contain virtually identical endorsements entitled "Abuse or Molestation Exclusion" (CG 21 46 (07-98) and CUP 64 (09-96)), that "modif[y] insurance provided under" the policies. (Supp. 2, 35.) The endorsement provides:

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

(*Id*.)

2. Decisions below.

The trial court granted each party's motion for summary judgment in part, finding coverages for all compensatory damages, but for none of the punitive damages, and coverages for the attorney fees paid and post-judgment interest on

the entire judgment. (Tr. Op., Appx. 40.) On appeal, the Tenth District Court of Appeals agreed that the punitive damage awards were not covered, but also held that none of the compensatory damages were covered with one exception – the CGL and umbrella coverage forms covered WHC's vicarious liability for compensatory damages awarded for Vaughan's intentional infliction of emotional distress. *See* App. Op., ¶ 55, 59 Appx. 33,34.

Specifically, the Court of Appeals held as follows:

1. No coverages for WHC's own, post-incident IIED (if any); coverages were precluded by the intended acts exclusion in the insuring agreement of both policies and/or WHC's IIED was not an "occurrence" under the policies (App. Op., ¶ 40, 55, Appx. 28, 33);

2. No coverages for Vaughan's *battery* for which WHC was vicariously liable per Section 1 of the Abuse or Molestation Exclusion in both policies (*id.*, ¶ 48, Appx. 30-31); and

3. No coverages for WHC's negligent supervision of Vaughan, per Section 2(c) of the Abuse or Molestation Exclusion (*id*., ¶ 49, Appx. 31); but

4. Coverages existed for "Vaughan's IIED, which WHC is vicariously liable for" (*id.*, ¶ 55, 59, Appx. 33, 34).

The Court thus concluded that placing a different legal label on abuse – IIED as opposed to battery – created coverages for excluded conduct.

Based on that erroneous premise, the Court of Appeals ordered Grange to indemnify WHC for the $82,365 in compensatory damages awarded to the Faietas for Vaughan's abuse. (App. Op., ¶ 69, Appx. 36.) The Court further ordered Grange to indemnify WHC for: (1) "that portion of the post-judgment interest" that accrued on the $82,365, and (2) the Faietas' attorney fees of $693,861. (*Id.*) On

reconsideration, the Court increased the post-trial interest to $229,716, representing interest on both covered and uncovered claims. (Recon. App. Op., ¶ 23, Appx. 13.) The panel agreed with WHC's argument on reconsideration that interest was owed on uncovered liabilities based on the CGL policy's "supplementary payments" provision, 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.

(Recon. App. Op., ¶ 16, Appx. 10-11; CGL excerpts, Supp. 20-21.)

Grange timely appealed the finding that the policies covered vicarious liability for excluded abuse (and attorney fee award and interest associated with some coverage) to this Court, and WHC filed a cross-appeal challenging each of the findings of no coverage. On December 3, 2014, this Court accepted jurisdiction of Grange's appeal and denied jurisdiction of WHC's cross-appeal.

III. ARGUMENT

This Court should reverse the finding of coverages for excluded abuse and remand for the entry of judgment in Grange's favor. The policies considered as a whole clearly and unambiguously preclude coverages of WHC's adjudicated liability. Regardless of the number of legal claims asserted or creative litigation strategies

employed, Grange is not responsible for indemnifying damages resulting from the savage beating of a child in the insured's care and custody. Such a result accords with this Court's insurance jurisprudence and the uniform position of courts that have construed policies with the standardized Abuse or Molestation Exclusion.

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

A. Standard of Review

A grant of summary judgment based on the interpretation of an insurance contract is reviewed *de novo*. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186.

Principles for the construction of an insurance contract were set forth in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11 as follows (citations omitted):

> When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. * * * We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. * * * We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. * * * When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.

See also Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 64 Ohio St.3d 657, 665 (1992) (citations and emphasis omitted):

> In applying these rules, we have stated that the most critical rule is that which stops this court from rewriting the contract when the intent of the parties is evident, i.e., if the language of the policy's provisions is clear and unambiguous, this court may not "resort to construction of that language." * * * [U]nder the case law of this state, an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded. * * * However, the rule of strict construction does not permit a court to change the obvious intent of a provision just to impose coverage.

B. <u>This Court's Insurance Jurisprudence Is Consistent with the Enforcement of Subject Matter Exclusions Like the Standardized Abuse or Molestation Exclusion.</u>

This Court has yet to interpret a standardized Abuse or Molestation Exclusion. But in three decisions – *Gearing v. Nationwide Ins. Co.,* 76 Ohio St.3d 34, 665 N.E.2d 1115 (1996) ("*Gearing*"), *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243, 2000-Ohio-186 ("*Shaffer*") and *Safeco Insurance Company of America v. White*, 122 Ohio St.3d 562, 913 N.E.2d 426, 2009-Ohio-3718 ("*Safeco*") – this Court established the following general rule of policy construction: courts must identify the damage-causing "act" and construe the policy as a whole to determine whether the parties intended coverages for that act. This Court's focus on damage-causing acts anticipates subject matter endorsements that broadly exclude coverages for all classifications of damages arising out of incidents such as assault, battery, criminal acts, abuse or molestation. Numerous decisions from Ohio appellate courts have

enforced such endorsements, properly recognizing that the parties to the insurance contract have clear expectations that no coverages are provided for claims based on the excluded conduct.

1. ***Gearing, Shaffer* and *Safeco* focus on damage-causing "acts" to determine whether claims are within coverages provided by a policy, construed as a whole.**

The rule of law developed in *Gearing, Shaffer* and *Safeco* resolves the question of whether coverages exist for damages arising out of molestation or assault under policies of insurance that *do not* have an Abuse or Molestation endorsement, but do have a general, "intended acts" exclusion in the insuring agreement.

Gearing addressed the question of whether sexual molestation by an insured constitutes an accidental "occurrence" within the insuring clause of a liability policy when the perpetrator denies any intent to harm his victim. This Court held that: (1) intent to harm will be inferred from certain acts; and (2) when that inference applies, public policy precludes the issuance of insurance for the act. *Gearing*, syllabus.

Shaffer distinguished allegations that an insured negligently hired, supervised and retained a perpetrator of intentional acts from the acts themselves, and held that insuring such acts does not contravene public policy. Adopting the rationale and analysis of *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F.Supp. 1151 (W.D.Ark.), *aff'd*, 33 F.3d 1476 (8th Cir.1994), this Court held that "'[t]he correct method of analyzing this issue * * * would deal with each act on its own

merits and recognize that employers who make negligent hiring decisions clearly do not intend the employees to inflict harm.'" *Shaffer* at 393-394, quoting *Silverball* at 1163.

Finally, *Safeco* applied *Gearing* and *Shaffer* to claims asserting negligent supervision, negligent retention and negligent infliction of emotional distress claims against the parents of a teenager who attacked and stabbed another teenager. The insurer argued that neither the parents' homeowners nor umbrella policies provided coverage for the parents' negligence because: "(1) the injury in this case resulted from an intentional act by [their son], an insured under the policies, and therefore the act was not an 'occurrence,' which both policies define as an 'accident,' and (2) the policies explicitly exclude coverage for the intentional acts of an insured, and the severability clause in both policies does not render the language in the exclusionary clause in both policies ambiguous. *Safeco*, 122 Ohio St.3d at ¶ 12.

First, this Court held that bodily injury caused by negligent acts constituted an "occurrence" under the policies because from the negligent parents' perspective, the stabbing committed by their son was accidental. *Safeco*, ¶ 27.

Second, this Court declined to determine whether an ambiguity was caused by consideration of the policies' intended acts exclusion in conjunction with the severability clauses providing that "'[t]his insurance applies separately to each insured.'" *Id*., ¶ 15, 28. The majority concluded that the use of "an" insured or "any" insured in the intended acts exclusion was irrelevant; the exclusion had no

application at all. Reiterating *Silverball*'s teaching that that the "correct" analysis "would deal with each act on its own merits," this Court emphasized the need to maintain the distinction between "torts like negligent supervision, hiring, retention, and entrustment," and "the related intentional torts (committed by other actors) that make the negligent torts actionable." *Id*. at ¶ 32-33.

In short, to determine coverages under occurrence-based liability policies that include an intended acts exclusion, courts must examine each act alleged and determine: (1) whether the harm resulting from the act is an accident from the perspective of the insured; (2) whether the insured's alleged conduct giving rise to liability intended to cause harm; and (3) whether an intent to harm is inferred as a matter of law based on the nature of the alleged conduct.

2. WHC's admitted vicarious liability for abuse is not a damage-causing act.

Grange respectfully submits that the proper application of *Gearing, Shaffer* and *Safeco* to the facts of this case requires a reversal of the Tenth District's conclusion that the Grange policies provided coverages for WHC's vicarious liability for Vaughan's IIED and entry of judgment in favor of Grange.

Safeco declined to apply an intended acts exclusion to negligent supervision claims because the parents' "acts" giving rise to the negligent supervision claim were "separate and distinct" from the intentional acts "committed by other actors." *Safeco*, 122 Ohio St.3d at ¶ 33. Further, those distinct acts led to distinct injuries. *Id*., ¶ 37: "To prevail, the [plaintiffs] had to demonstrate a separate injury from the

[parents'] negligent failure to monitor Benjamin, one that did not arise from intentional or illegal actions as contemplated by the policy exclusions."

Here, WHC's vicarious liability for Vaughan's IIED is not based on any act separate and distinct from Vaughan's abuse; it is based on WHC's litigation strategy to admit that *Vaughan's* acts "are deemed to be the actions of Defendant World Harvest Church." (*Faieta* Tr. Op., ¶ 58-62, Supp. 131-133; *Faieta* App. Op., ¶ 46-49, Supp. 168.)[1] Here, the Faietas could not (and did not have to) demonstrate any separate injury arising from respondeat superior liability, much less a separate injury "that did not arise from intentional or illegal actions as contemplated by the policy exclusions." *Safeco*, ¶ 37. Instead, the Faietas were entitled, by virtue of WHC's admissions alone, to a judgment that WHC was vicariously liable for the injuries caused by Vaughan's abuse, whether labeled as battery or IIED.

[1] A different litigation strategy would presumably have enabled WHC to obtain a dismissal of the respondeat superior count under Civ.R. 12(C). *See, e.g., Byrd v. Faber,* 57 Ohio St.3d 56, 59 (1991) (citation omitted) (church was entitled to judgment on the pleadings regarding claim for respondeat superior liability arising out of pastor's non-consensual sex with parishioners: "[A]n 'intentional and willful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his principal or employer is not responsible therefore'").

Under these facts, Vaughan's liability and WHC's vicarious liability arose out a single act – intentional abuse resulting in physical and emotional harm – committed by Vaughan and "deemed" to be committed by WHC. Under the rule of law in *Gearing, Shaffer and Safeco*, coverages for that single act are barred by the intended acts exclusion in the insuring agreement of the CGL and Umbrella coverage forms. The effect of the Tenth District decision is that by *admitting* the respondeat superior allegations, WHC bootstrapped coverages for abuse that was itself excluded by the CGL and Umbrella coverage forms. Such bootstrapping is unsupported by public policy. *See, e.g.*, *Gearing*, 76 Ohio St.3d 34, paragraph two of the syllabus ("the public policy of the State of Ohio precludes issuance of insurance to provide liability coverage for injuries resulting from an intentional acts of sexual molestation of a minor").

In short, even without an ISO Abuse or Molestation Exclusion, the policies provided no coverages for admitted vicarious liability. The presence of the Exclusion, however, simplifies policy construction and provides an appropriate platform for this Court's consideration of the proper rules of construction for policies with an Abuse or Molestation or similar subject matter exclusion.

3. Subject matter exclusions' focus on conduct simplifies coverage disputes.

While a *Gearing/Shaffer/Safeco* analysis can be applied here, none of the policies considered in those cases contained an Abuse or Molestation Exclusion – a subject matter exclusion that negates coverages of all damages arising out of abuse

or molestation. Numerous courts construing policies with subject matter exclusions for abuse or molestation, assault or battery, or similar misconduct, have concluded that the exclusion pretermits analyses of "occurrence" or state-of mind exclusions, eliminates the need for parsing the legal theories alleged, and renders considerations of separation-of-insureds provisions unnecessary. All that matters is that the damages alleged in the complaint arise out of the excluded conduct. *See, e.g.*:

- *Lincoln Cty. Sch. Dist. v. Doe*, 749 So.2d 943, 946 (Miss. 1999) (en banc) (CGL policy with Abuse or Molestation Exclusion "serves to exclude from coverage all classifications of damages arising out of incidents of molestation");
- *Evanston Ins. Co. v. Johns*, 530 F.3d 710, 714 (8th Cir.2008) (applying Minnesota law) ("The presence or lack of intent does not control the outcome" of a suit seeking coverage under a CGL policy with an Abuse or Molestation Exclusion);
- *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 588 S.E.2d 378, 384, fn. 2 (S.C.App.2003) (the court "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);
- *Essex Ins. Co. v. Michigan Skatelands, Inc*., 6th Cir. Nos. 93-2132, 93-2145, 1994 WL 589670, at *3 (Oct. 21, 1994) (assault or battery exclusion barred breach of contract and negligence claims where "the underlying claims clearly arose out of tortious conduct"; the court therefore "need not resolve the remaining issues" relating to a separate exclusion "and the Policy's definition of 'occurrence'");
- *Neff v. Alterra Healthcare Corp*., 271 Fed.Appx. 224, 226, 2008 WL 821070 (3d Cir.2008) ("Invoking the separation of insureds provision does not narrow the broad reach of an Abuse or Molestation Exclusion");

- *Harper v. Gulf Ins. Co.*, D.Wyo. No. 01-CV-201-J, 2002 WL 32290984 (Dec. 20, 2002), at *7 ("The intentional design of the ISO Abuse or Molestation Exclusion is that any perceived ambiguity between the 'intentional acts' exclusion and the separation-of-insureds clause is obviated. It is worded to tell the insured employer that he has no coverage where, as here, his employee abuses or molests anyone who is in any insured's care, custody, and control").

Ohio appellate courts have similarly recognized that subject matter exclusions simplify policy interpretation by broadly excluding claims arising out of a narrow category of conduct. *See, e.g., Jackson-Brown v. Monford*, 10th Dist. Franklin No. 12AP-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).

The Third District Court of Appeals analyzed an abuse or molestation exclusion in 2012 and found no duty to defend or indemnify any claims, including respondeat superior, arising out of the molestation of child by a daycare center employee. *Crow v. Dooley*, 3d Dist. Allen No. 1-11-59, 2012-Ohio-2565. The Court distinguished this Court's *Safeco* decision on the grounds that the language of the "intended acts" exclusion in the *Safeco* policies required knowledge or intent to injure on the part of the insured, while "any language regarding the necessary knowledge or intent of the insured is remarkably absent" from the abuse or

molestation exclusion in the insurance policy issued to the daycare center. *Id*. at ¶ 18-20.[2]

Other courts have construed a different subject matter exclusion (assault or battery) and concluded that policies with such endorsements negate coverages for all claims for damages arising out of the excluded conduct. In *Colter v. Spanky's Doll House*, 2d Dist. Montgomery No. 21111, 2006-Ohio-408, for example, the court held that an assault or battery exclusion negated coverages of any claim, whether based on intentional acts or negligence, for bodily injury arising out of an altercation at the insured's bar.. *Id*. at ¶ 14-20. Reading the assault or battery exclusion in conjunction with an "intended acts" exclusion, *Colter* court agreed with the trial court's reasoning that "[w]hile the first exclusion found in the main body of the insurance policy only excludes claims for bodily injury expected or intended by the insured, the latter amendment clearly modifies the policy to exclude *any* claim arising out of *any* assault or battery." *Id*. at ¶ 27-29 (emphasis in original). *See also* ¶ 40-41 ("By its own terms, this provision unambiguously extends to *all* claims arising out of or related to assault or battery, regardless of whether the misconduct

[2] The ISO exclusion at issue in this case is even clearer than the exclusion enforced in *Crow*. The standardized exclusion in the Grange policies (Supp. at 2, 35) not only contains a broad exclusion of any liability arising out of abuse or molestation, without regard to any "requisite mental state of the alleged tortfeasor" (*Crow*, ¶ 20), but it includes, in the second section, an explicit exclusion of damages caused by negligent hiring, supervision, or retention. (*Id*.)

is committed by a Sparky's employee or a third-party patron" (emphasis in original)).

More recently, the Third District addressed a similar subject matter exclusion and held that because the underlying complaint sought damages arising out of an altercation at the insured bar, coverages were excluded. *See Wright v. Larschied*, 3d Dist. Allen No. 1-14-02, 2014-Ohio-3772. The court rejected the insured's argument that it was owed a defense and indemnity for claims asserting that the bar violated "policy, practice or customs" and exhibited a "deliberate indifference to the rights of citizens," holding that the subject matter exclusion "applies to *any* bodily injury arising out of an assault or battery. It does not matter * * * how the assault or battery occurred or who or may or may not have contributed to its occurrence." *Id*. at ¶ 27-28 (emphasis in original). In short:

> The Wrights in their suit could have asserted any claim they wished against Larschied, and it still would have been excluded by the assault-or-battery exclusion so long as the Wrights were attempting to recover for injuries arising out of assault or battery.

Id. at ¶ 31. *Accord Williams v. United States Liab. Ins. Group*, 5th Dist. Stark No. 2011CA00252, 2012-Ohio-1288, ¶ 15 (allegation that bar improperly blocked exits on evening of altercation did not affect bar of coverages of judgment under assault or battery exclusion); *Heinz-Gert K. GRM v. Great Lakes General Agency*, 9th Dist. Lorain No. 03CA008418, 2004-Ohio-6269, ¶ 15-17 (exception providing coverages

for bodily injury for liability assumed under an insured contract did not trump assault or battery exclusion).

Because they construe policies of insurance that broadly exclude a narrow category of conduct, the above decisions are clear and easily understandable for insurers and policyholders alike. Subject matter endorsements thus not only provide unambiguous mutual expectations of coverages tailored to specific enterprises, but simplify and streamline coverage disputes.

Here, the Court of Appeals properly concluded that "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." (App. Op., ¶ 48, Appx. 30-31.) The fact that Vaughan's *acts* constituted excluded abuse ends the inquiry. All damages arising out of the abuse, regardless of the cause of action asserted, are excluded from coverages. It is not just the claim for battery and associated vicarious liability for abuse that is excluded; the claim for IIED and associated vicarious liability is also excluded.

C. Grange Had No Obligation Under the CGL or Umbrella Coverage Forms to Reimburse WHC for Sums It Paid to Satisfy Its Vicarious Liability for Vaughan's IIED.

The ISO Abuse or Molestation Exclusions in the CGL and Umbrella coverage forms issued to WHC modified coverages under the policies by broadly excluding coverages for any bodily injury arising out of: (1) the abuse or molestation of any

person within the care or custody of the insured organization, by any person; and (2) the insured organization's negligent acts associated with the abuse or molestation:

> 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 * * * [e]mployment * * * [s]upervision * * * or * * * [r]etention of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

(Supp. at 2, 35.) Both the history and purpose of the standardized endorsement, as interpreted by numerous courts around the country, demonstrate its applicability to all liabilities adjudicated in *Faieta v. World Harvest Church*, including WHC's admitted liability for Vaughan's IIED.

1. <u>The history, purpose and plain language of the ISO Abuse or Molestation Exclusion preclude findings of policy coverages for vicarious liability for abuse.</u>

The history and purpose of the standardized Abuse or Molestation Exclusion further support enforcement of its plain language. The ISO Abuse or Molestation Exclusion was adopted in 1987, and is "not uncommon" in insurance policies "for those who have care of others," including "medical or therapeutic care providers, healthcare centers, summer camps, schools and preschools, job training programs,

churches, and the like." *Valley Forge Ins. Co. v. Field*, 670 F.3d 93, 97-98 (1st Cir.2011) (citation omitted).

The Abuse or Molestation Exclusion, like assault and battery and criminal act exclusions, "are sensible, routine, unambiguous, and specific." *Monticello Ins. Co. v. Kentucky River Community Care,* 6th Cir. No. 98-5372, 1999 WL 236190 (Apr. 14, 1999) at *3 (punctuation and citation omitted). "[I]t is perfectly sensible to exclude coverage for immoral or illegal acts to avoid moral hazard problems. * * * In fact, several cases establishes a strong public policy against coverage for sexual abuse." *Id*.

Further, "[e]xclusions of this sort have generally been found to be unambiguous in the face of attacks on various parts of the language used[.]" *Field,* 670 F.3d at 98, 101. The plain language of such exclusions firmly establish the reasonable policy coverage expectations of both insurer and insured:

> The Exclusion precludes coverage on the limited occasions where the damages flow from sexual or physical abuse by another of someone in the care of the insured. As explained earlier, that is the very purpose for the Abuse or Molestation Exclusion since its creation. * * * Since the Exclusion was not ambiguous, the [insureds] had no reasonable expectation of coverage.

Id. at 105.

The Exclusion's history further demonstrates that the endorsement was developed to prevent coverages for damages arising out of abuse or molestation regardless of the legal theory alleged to recover damages for abuse or molestation,

and regardless of whether the asserted liability is direct or derivative. *See Harper v. Gulf Ins. Co.*, U.S.D.C. Wyo. No. 01-CV-201-J (Dec. 20, 2002), 2002 WL 32290984, at fn. 9:

> The International Risk Management Institute ("IRMI") publishes a multi-volume insurance reporter series entitled Commercial Liability Insurance. It provides:
>
> > Abuse or Molestation Exclusion
> >
> > Abuse and molestation, as intentional acts, do not come within the CGL coverage of bodily injury arising out of an "occurrence," with respect to an insured who actually commits the abuse or molestation. Organizations that have care or custody of others – schools, hospitals, nursing homes, daycare centers, etc. – are likely to be held vicariously liable for abuse committed by their employees; the CGL intentional acts exclusion would not interfere with coverage for an insured's vicarious liability in such circumstances.
> >
> > This endorsement eliminates coverages for an insured organization's liability in connection with abuse or molestation committed by someone other than that insured. It applies to abuse and molestation incidents against "any person while in the care, custody, and control of the insured" committed by "anyone." That "anyone" could be the insured's employee, agent, independent contractor, customer, client or person completely unconnected with the insured organization.
> >
> > This exclusion goes on to remove coverage for other related claims that are sometimes brought against an organization as alternative grounds of action when an incident of abuse or molestation has occurred. These related allegations are sometimes made to avoid arguments over whether the acts of abuse or molestation were an occurrence ("accident"), and thus to suggest a separate

> occurrence with respect to the employer (the negligent act of employment or supervision). * * * Such claims would be different from purely vicarious liability claims since they allege actual negligence on the part of the insured organization. Such claims are addressed in the second part of the exclusion. That part applies to negligent "employment, investigation, supervision, or retention" of persons who commit abuse or molestation and for whose conduct the insured "is or ever was legally responsible."

Neither the Faietas' labeling of Vaughan's abuse as both a "battery" and "IIED," nor WHC's litigation strategy to admit that Vaughan's acts are to be "deemed" to be the acts of WHC, changes the fact that the Faietas' complaint sought damages arising out of abuse. The Abuse or Molestation Exclusion "is worded to tell the insured employer that he has no coverage where, as here, his employee abuses or molests anyone who is in any insured's care, custody, and control." *Harper*, *supra*, at *7. "The molestation exclusion accordingly serves to exclude from coverage all classifications of damages arising out of incidents of molestation." *Lincoln Cty. Sch. Dist. v. Doe,* 749 S.W.2d 943, 946 (Miss.1999).

2. Numerous courts have rejected attempts to skirt the plain language of the ISO Abuse or Molestation Exclusion.

Decisions from other jurisdictions uniformly interpret the broad language of the standardized Abuse or Molestation Exclusion as applying to all causes of action asserted against insured businesses and institutions when the injuries for which damages are sought arise out of physical abuse or sexual molestation.

In 2014, the Arkansas Supreme Court construed insurance policies with an Abuse or Molestation Exclusion and found no duty to defend or indemnify allegations (including allegations of vicarious liability) arising out of abuse. *See Kolbek v. Truck Exchange*, 431 S.W.3d 900 (Ark.2014) at 907 (plaintiffs alleged negligent hiring, supervision and retention and vicarious liability against abuser's employer), 910, fn. 8 (setting forth the standardized Abuse or Molestation Exclusion at issue here) and 909-910:

> While the Kolbek complaint was amended several times to add and alter claims * * * [t]he injuries and damages in the Kolbek case truly stem from the abuse suffered by the plaintiffs below. No court could help but be sympathetic to those individuals and the injuries they suffered. However, the * * * contract issued by TIE/FIE simply does not exist to provide an insured coverage for this type of alleged harm.

Arkansas law was the source of this Court's "'examine each act on its merits'" approach adopted in *Shaffer* and *Safeco*. *See Shaffer* at 393-94 and *Safeco* at ¶ 32, quoting *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.,* 842 F.Supp. 1151 (W.D.Ark.), *aff'd* 33 F.3d 1476 (8th Cir. 1994). Applying that state's insurance law here results in judgment for Grange.

Other jurisdictions have similarly found no coverages for claims of vicarious, derivative liability arising out of abuse or molestation when the policy contains an Abuse or Molestation Exclusion. *See, e.g.*, *Doe v. Lenarz*, Conn.Sup.Ct. No. CV0540129705, 2007 WL 969610 (Mar. 21, 2007) (applying Abuse or Molestation Exclusion to claims of "derivative liability"); *Mt. 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"). *Accord Houg v. State Farm Fire & Cas. Co.*, 509 N.W.3d 590, 593 (Minn.App.1993) (applying sexual assault exclusion to respondeat superior claims arising out of employee's sexual conduct).

Courts have also rejected other attempts to avoid the clear and unambiguous language of the standardized Abuse or Molestation Exclusion when the damages sought arise out of abuse or molestation. *See, e.g.*:

- *Holiday Hospitality Franchising, Inc. v. Amco Ins. Co.*, 983 N.E.2d 574, 578 (Ind.2013) (barring coverages of claims arising out of hotel employee's molestation of a minor) (emphasis in original):

  > 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. * * * In fact, if these facts did *not* reflect the contemplated exclusion, we would struggle to imagine what reasonably could and still remain within the confines of an ordinary motel business.

- *Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co.*, 757 A.2d 1074, 1083 (Conn.2000) ("[T]he 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"; no duty to defend or indemnify operator of preschool where complaint alleged sexual molestation of one minor by another at the school, "irrespective of the boys' subjective state of mind");

- *Lincoln Cty. Sch. Dist. v. Doe*, 749 So.2d 943, 946 (Miss. 1999) (en banc) (rejecting argument that Abuse or Molestation Exclusion was ambiguous; the Exclusion barred all claims asserted against school where claimed damages arose of molestation of one student by another);

- *American Empire Surplus Lines Ins. Co. v. Chabad House of North Dade, Inc*., 450 Fed.Appx. 792, 794 (11th Cir.2011) (applying Florida law)(regardless of the legal label appended to insured's alleged liability for damages caused when employee of insured home "tormented and abused" special needs child (i.e., negligent misrepresentation, failure to warn), the "plain language" of the Exclusion precluded any duty to defend or indemnify);

- *Neff v. Alterra Healthcare Corp*., 271 Fed.Appx. 224, 226, 2008 WL 821070 (3d Cir. 2008) (under Pennsylvania, Wisconsin or Massachusetts law, Abuse or Molestation Exclusion precluded defense or indemnity of all claims against insured assisted living facility where claims arose out of employee abuse of patient resulting in broken ribs: "The plain and ordinary meaning of the exclusion is that there is no coverage if a plaintiff's injury arises out of abuse or molestation" (footnote omitted)).

- *Nautilus v. Our Camp, Inc*., 136 Fed.Appx. 134 (10th Cir.2005) (applying Wyoming law) (Abuse or Molestation Exclusion barred all claims against camp arising out of one camper's molestation of another: "The express language of the exclusion is worded broadly * * * the parties to an insurance contract, like any other contract, or free to incorporate therein whatever lawful terms they desire and the courts are not at liberty to rewrite the policy under the guise of judicial construction (punctuation and citations omitted));

And courts similar exclusions have found no coverages, notwithstanding creative pleading and arguments by counsel for insureds. *See, e.g.*:

- *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 588 S.E.2d 643 (S.C.App.2003) (abuse exclusion barred coverages of all claims against daycare center arising out of employee acts resulting in "shaken baby" syndrome);

- *Insights Trading Group, LLC v. Federal Ins. Co.,* D.Md. No. RDB-10-340, 2010 WL 2696750, at *5-*6 (July 6, 2010) (all claims based on sexual assault of job programs enrollee by co-enrollee were excluded by subject matter exclusion: "litigants cannot skirt around an exclusion clause merely by relying on certain alternative theories * * * Insights is a sophisticated party that clearly had notice of the plain language of the exclusion clauses");

- *New World Frontier, Inc. v. Mt. Vernon Fire Ins. Co*., 253 A.D.2d 455, 455-456, 676 N.Y.S.2d 648 (Sup.Ct.App.Div.1998) (Where "no cause of action would exist 'but for' the alleged sexual molestation," insured had no duty to defend or indemnify insured preschool against complaint based on one student's molestation of another);

- *ProSelect Ins*. *Co. v. Levy,* 30 A.3d 692 (Vt.2011) (allegations of "malpractice" in complaint in addition to sexual assault could not create coverages in contravention of policy's sexual assault exclusion where alleged acts of malpractice were for the purpose of isolating patient to preserve improper sexual relationship);

- *Houg v. State Farm Fire & Cas. Co*., 509 N.W.2d 590, 593 (Minn.App.1993) (insurer had no obligation to indemnify church's settlement of claims against it arising out of minister's sexual assault of church member):

> M.C.'s detailed complaint and her version of the facts brings the alleged wrong squarely within the meaning of [the sexual conduct] exclusion, and therefore squarely out of State Farm's obligation to indemnify.

Creative pleading in this case similarly cannot change the contract of insurance that does not provide coverage for abuse. A simple review of both the CGL and Umbrella policies – by WHC or anyone – shows conspicuously titled Abuse or Molestation Exclusions. Grange therefore respectfully requests reversal of that portion of the decision below that finds coverages for vicarious liability for abuse, along with the

associated award of indemnity for the Faietas' attorney fees and post-judgment interest, and enter judgment for Grange on all claims for indemnity and reimbursement.

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.)**

This Court need not address Propositions of Law No. 2 or 3 should it agree that the policies issued to WHO preclude reimbursement of WHC's admitted vicarious liability for Vaughan's savage beating. Should this Court agree that such coverages exist, however, then it should also conclude that Grange has no obligation to reimburse WHC for $693,861 in attorney fees awarded to the Faietas.

At issue here is the proper application of this Court's decision in *Neal-Pettit v. Laham*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, to the Tenth District's conclusion that Grange was obligated to indemnify WHC for the attorney's fee judgment against it. *Neal-Pettit* held that attorney's fees predicated on an award of punitive damages could be considered additional "compensatory" damages for purposes of policy coverages. But in that case, there was only one defendant actor, and the defendant's acts giving rise to compensatory and punitive damages were within policy coverages.

Here, there are two defendant actors, only one of the two was liable for attorney's fees, and that defendant's acts giving rise to compensatory and punitive

damages were *not* covered under the policies at issue. Under that scenario, the reasoning of *Neal-Pettit* precludes coverages of the "compensatory" attorney's fee award.

First, it is undisputed that the *Faieta* jury awarded distinct punitive damage awards for the distinct malicious acts of each defendant. The jury awarded $100,000 in punitive damages against Vaughan for his savage beating of Andrew, and $5 million in punitive damages against WHC for its own post-incident IIED and/or negligent supervision of Vaughan. (*See Faieta* Verdict Forms, Supp. 104, 105.)

Second, it is undisputed that the jury expressly determined that the Faietas were entitled to attorney fees *from WHC alone.* Thus, the verdict form against Vaughan expressly provided that the Faietas *were not* entitled to attorney fees from Vaughan, while the verdict form against WHC expressly provided that the Faietas *were* entitled to attorney fees from WHC. (*Id*.)

Finally, it is undisputed that the Tenth District found that the Grange policies issued to WHC did not cover compensatory damages awarded for WHC's IIED or negligent supervision of Vaughan. (App. Op., ¶ 40, 49, 55, Appx. 28, 31, 33.) Therefore, the compensatory attorney's fees are excluded. *See, e.g., Third Wing, Inc. v. Columbia Casualty Co*., 8th Dist. Cuyahoga No. 97622, 2012-Ohio-2393, ¶ 7 (*Neal-Pettit* does not apply when attorney fees "were not awarded for an injury that was covered by the Columbia policy").

Nor did the Court of Appeals construe *Neal-Pettit* as requiring coverages for attorney's fees arising out of uncovered conduct. Instead, the Court held: (1) the fact that only WHC was to pay attorney fees was irrelevant because, under *Neal-Pettit,* attorney fees "'are distinct from punitive damages'"; and (2) "because the attorney fees cannot now be allocated between the covered and non-covered claims, Grange is liable for the entire amount." (App. Op., ¶ 59, Appx. 34.) Both conclusions are flawed.

Contrary to the Court's first conclusion, the fact that only WHC was to pay attorney fees is extremely relevant. As the Twelfth District recently observed, *Neal-Pettit* does not affect the two-pronged predicate for awarding attorney fees: (1) the jury must find that the defendant acted with malice; and (2) the jury must make an actual award of punitive damages for that malicious conduct. *See Roberts v. Mike's Trucking, Ltd.*, 9 N.E.3d 483, 2014-Ohio-766 (12th Dist.), ¶ 28-29 and fn. 2. Here, the jury found that Vaughan's conduct (the battery and associated IIED, if any) was malicious, *and* that WHC's conduct (its negligent supervision and IIED, if any, in stonewalling and threatening the Faietas) was malicious, and returned separate punitive damage awards for each defendant's malicious conduct. The separate and distinct punitive damage award against WHC could only be based on WHC's acts and a finding of malice related to one or both of those acts. The jury's award of "compensatory" attorney fees against WHC could equally only be based on WHC's

acts; it is irrelevant that the fees are "distinct from" the punitive damages awarded for those acts.

For similar reasons, the Tenth District's conclusion that it could not "allocate" the jury's attorney fee award between covered and uncovered claims is flawed. Since the *only* conclusion to be drawn from these facts is that the jury awarded attorney fees as further compensatory damages for *uncovered* conduct (WHC's IIED and/or negligent supervision), those attorney fees cannot be covered under the policy. No allocation is needed. Absent a nexus between covered conduct and attorney's fees, the finding of coverages for attorneys' fees should be reversed.

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.

(Supp. 20-21.)

The Tenth District's initial decision in this case correctly held that Grange was only obligated to reimburse WHC for post-judgment interest that accrued on the *covered* damages of $82,365. (App. Op., ¶ 69, Appx. 36.) On reconsideration,

however, the court agreed with WHC's argument that the supplementary payment provision and *Coventry v. Steve Koren, Inc.*, 1 Ohio App.2d 385 (8th Dist.), *aff'd* 4 Ohio St.2d 24 (1965), obligated Grange to pay post-judgment interest on *uncovered* liabilities. (Recon. App. Op., ¶ 23, Appx. 13.) The reconsidered ruling is in error on both counts.

The supplementary payments clause 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, 1111 11, 14, 20. 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*." (Supp. at 14, 42, 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).

Further, *Coventry v. Steve Koren, Inc.* does not support an interpretation of the supplementary payments clause to include the payment of post-judgment interest on *uncovered* portions of a judgment. The dispute in *Coventry* is one that most often arises in an interpretations of the supplementary payments clause – the insurer argued that the provision could not require the payment of interest in excess of policy limits for *covered* claims. As noted in a leading insurance treatise, "[m]any

policies written on a primary basis require that the insurer pay post-judgment interest on the total amount of the judgment until the insurer pays its policy limits in satisfaction of the judgment." *Couch on Insurance* (3d ed.), § 172:46 (footnote omitted). The omitted footnote explains that the principle does not apply to *uncovered* claims (emphasis added):

> The post-judgment interest clause in an insurance contract serves the purpose of encouraging the insurer to expeditiously pay the portion of the judgment ***that is not subject to dispute*** with the incentive that if it does, it will be protected from the accrual of interest on any part of the judgment ***while the coverage issue is being litigated***; however, once a judgment is entered, the insurer must offer the amount it owes to halt the running of interest.

Id., fn. 89, citing *Lunde v. American Family Mut. Ins. Co.*, 297 S.W.3d 88 (Mo.App.2009).

Arguments similar to those made by WHC in this case were firmly rejected on both contract and public policy grounds in *Bohrer v. Church Mut. Ins. Co*., 12 P.3d 854 (Colo.App. 2000). The underlying judgment in *Bohrer* was comprised of a compensatory and punitive damages award arising out of a church member's six-year counseling relationship that evolved into sexual conduct. A prior decision determined that none of the punitive damages were covered by the insurance policy at issue, and a sexual assault exclusion barred coverages of the 30% of the compensatory damages allocated to sexual misconduct. The insured nevertheless argued that a supplementary payments provision required the insurer to pay post-judgment interest on the *entire* judgment. The court of appeals disagreed.

First, the court held that public policy precluded awarding post-judgment interest on punitive damages or compensatory damages arising out of sexual assault: "[E]ven if we were to assume, without deciding, that the language of the insurance policy would require garnishee to pay all interest on the entire amount of the judgment * * * including the uncovered portion of the compensatory damages and the punitive damages, such a provision would violate Colorado public policy and would, therefore, be unenforceable." 12 P.3d at 856-857 (citation omitted). Ohio's public policy, like Colorado's, prohibits insuring intentional conduct or punitive damages. *See Gearing v. Nationwide Ins. Co*., *supra*, 76 Ohio St.3d 34, paragraph two of the syllabus; *Wedge Prods., Inc. v. Hartford Equity Sales Co*., 31 Ohio St.3d 65, 67, 509 N.E.2d 74 (1987); R.C. 3937.182(B).

Second, *Bohrer* held that "even if" public policy permitted post-judgment interest on judgments for damages arising out of sexual assault:

> * * * we cannot ignore the purpose and nature of the underlying damage award. To accept plaintiff's contention would produce the illogical result of penalizing the insurance company for not paying a judgment it is not legally obligated to pay.

Id. at 857, citing (among other cases), *Casey v. Calhoun*, 40 Ohio App.3d 83, 88, 531 N.E.2d 1348 (8th Dist.1987).

Finally, the *Bohrer* court rejected the plaintiff's attempt to rely on cases which, like *Coventry*, held that interest on *covered* claims could exceed policy limits:

> Those cases, however, involved money judgments that were covered by the provisions of the insurance policy but exceeded the insured's policy limits. They are inapplicable in a case in which, as here, plaintiff is seeking interest on damages that are not only not covered under the insurance policy, but are uninsurable as a matter of public policy.

Bohrer, 12 P.3d at 857. 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 incorporated in policies of insurance issued to organizations that have care of others. 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. 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.

Alternatively, should this Court affirm the Tenth District's finding of limited coverage for WHC's admitted vicarious liability, it should nevertheless reverse the court's conclusion that Grange is obligated to reimburse WHC for the attorney fee award and limit any post-trial interest obligation to the $82,365 award for covered damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Merit Brief of Appellant Grange Mutual Casualty Company** was served on February 6, 2015, per S.Ct.Prac.R. 3.11(B), by sending it by regular U.S. Mail to:

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APPENDIX

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,

NOTICE OF APPEAL OF APPELLANT GRANGE MUTUAL CASUALTY COMPANY

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Grange Mutual Casualty Company

NOTICE OF APPEAL OF APPELLANT

Appellant Grange Mutual Casualty Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, journalized in the Court of Appeals Case No. 13AP-290 on January 6, 2014. An application for reconsideration was timely filed on January 3, 2014. The application for reconsideration was denied on May 29, 2014.

This case is one of public and great general interest.

Respectfully submitted,

Irene C. Keyse-Walker

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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:

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on May 29, 2014, it is the order of this court that Grange's January 3, 2014 application for reconsideration is denied, World Harvest's December 30, 2013 application for reconsideration is granted and we modify our judgment to affirm the portion of the trial court's judgment awarding World Harvest $229,716 in postjudgment interest.

O'GRADY, BROWN & McCORMAC, JJ.

By /S/ JUDGE
Judge Amy O'Grady

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

Tenth District Court of Appeals

Date: 05-29-2014

Case Title: WORLD HARVEST CHURCH -VS- GRANGE MUTUAL CASUALTY COMPANY

Case Number: 13AP000290

Type: JOURNAL ENTRY

So Ordered

/s/ Amy C. O'Grady

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

World Harvest Church,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	No. 13AP-290
v.		(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 prepatory 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).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

World Harvest Church,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	No. 13AP-290
v.		(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

/s/ Amy C. O'Grady

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

World Harvest Church,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	No. 13AP-290
v.		(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. BACKGROUND[1]

{¶ 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 prepatory 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).

Franklin County Ohio Clerk of Courts of the Common Pleas- 2013 Mar 11 1:21 PM-09CV011327

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

WORLD HARVEST CHURCH,	)	CASE NO. 09CVH4-07-11327
	)	
Plaintiff,	)	JUDGE MICHAEL HOLBROOK
	)	
v.	)	
	)	
GRANGE MUTUAL CASUALTY COMPANY,	)	
	)	
Defendant.	)	

JUDGMENT ENTRY

Based on Judge Bessey's Decisions Filed September 1, 2011, and September 2, 2011, the Court hereby enters judgment for the parties as follows:

1) Judgment is hereby rendered in favor of Plaintiff World Harvest Church against Defendant Grange Mutual Casualty Company in the amount of $1,472,677 plus statutory interest from the date of the satisfaction of the *Faieta* judgment, January 21, 2009. This amount represents the amount for which the Court has determined that Grange Mutual Casualty Company must indemnify World Harvest Church—the compensatory award of $549,100, the attorney fee award of $693,861, and the post-judgment interest award of $229,716.

2) Judgment is hereby rendered in favor of Grange Mutual Casualty Company and against World Harvest Church on the issue of whether Grange is obligated to indemnify World Harvest Church for either of the punitive damage awards entered in the *Faieta* case in the amounts of $1,528,470 directly against World Harvest Church and $100,000 against Richard Vaughan for which World Harvest Church was secondarily liable.

Pursuant to Civil Rule 54(B), the Court hereby determines that the Court's decisions fully and finally resolve the declaratory judgments sought by the parties herein and there is no just reason for delay of an appeal from this final judgment.

IT IS SO ORDERED.

Judge Michael Holbrook

APPROVED:

By: /s/ Robert P. Rutter (per 2/25/13 e-mail authority)
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Franklin County Court of Common Pleas

Date: 03-11-2013

Case Title: WORLD HARVEST CHURCH -VS- GRANGE MUTUAL CASUALTY COMPANY

Case Number: 09CV011327

Type: JUDGMENT ENTRY

It Is So Ordered.

/s/ Judge Michael J. Holbrook

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

WORLD HARVEST CHURCH,	:	
	:	
Plaintiff,	:	CASE NO: 09 CVH4-07-11327
	:	
v.	:	JUDGE BESSEY
	:	
GRANGE MUTUAL CASUALTY COMPANY	:	
	:	
Defendant.	:	

DECISION DENYING IN PART AND GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT FILED SEPTEMBER 1, 2011
AND
DECISION DENYNG 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 where 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) <u>Punitive Damage Award</u>

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:

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