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,

REPLY OF APPELLANT GRANGE MUTUAL CASUALTY COMPANY

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The issues in this appeal are: (1) did the Tenth District Court of Appeals erroneously construe the ISO Abuse or Molestation Exclusion when it carved out and found coverages for vicarious liability for abuse; and (2) if not, did the Court nevertheless err when it found coverages for attorney fees awarded for *non*-covered conduct and post-judgment interest accruing on *non*-covered damages?

The first issue is key because enforcement of the plain language of the ISO Exclusion renders the second issue moot. But instead of addressing that core issue, WHC and its amici challenge holdings by the Tenth District on the definition of "abuse" and the inapplicability of a corporal punishment exception that are not before this Court – holdings that WHC challenged in a cross-appeal *this Court declined to hear*. Further, the few pages (Opp. Br. 21-26) that do address vicarious liability analyze whether it is an "occurrence" and/or whether coverages for vicarious liability are precluded by an expected/intended acts exclusion – not whether coverages are barred by a subject matter exclusion that broadly applies to all injuries arising out of specified events.

Such silence on the core issue of great and general interest before this Court speaks volumes. This Reply will: (1) clarify the scope of this appeal; (2) address whether the Tenth District erred when it carved vicarious liability out of the ISO Abuse or Molestation Exclusion; and (3) respond to arguments in opposition to Grange's Propositions of Law 2 and 3, including an argument raised for the first time in this appeal.

I. THE SCOPE OF THIS APPEAL

Grange's first Proposition of Law challenges the Tenth District's holding that "vicarious" liability is immune from the broad reach of an ISO Abuse or Molestation Exclusion. Unable to muster any authority supporting that holding, WHC and its amicus Ohio Association for Justice (OAJ) devote the bulk (or in the case of OAJ, all) of their arguments to challenging appellate court rulings that are *not* before this Court. (*See* Opp. Br. 3, 12-21, 26-27, and entire OAJ amicus brief.) Those arguments constitute nothing more than an improper and untimely attempt to attain reconsideration of this Court's rejection of WHC's cross appeal and should be ignored and stricken. To clarify:

1. The only damages within the scope of the first Proposition of Law are the $82,365.00 in compensatory damages that a jury awarded for injuries caused by Richard Vaughan's savage beating of two-and-a-half-year-old Andrew Faieta. Neither the compensatory damages awarded for WHC's negligent supervision of Vaughan and WHC's post-incident intentional infliction of emotional distress (if any), nor the separate punitive damage awards against Vaughn and WHC, are at issue. WHC challenged the Tenth District's conclusions finding no coverages for those sums in its cross appeal; this Court denied jurisdiction of the cross appeal on December 3, 2014; WHC did not seek reconsideration.

2. Included in WHC's rejected cross appeal were challenges to the Tenth District's conclusions that: (1) the word "abuse" in the ISO Abuse or Molestation

Exclusion is unambiguous and applies to physical abuse; and (2) the corporal punishment exception to the expected/intended act exclusion in the CGL policy issued to WHC has no application to this case. (*See* WHC's Combined Mem. (7/30/14), Prop. 1, 2, 3, pp. 16-20.) WHC and OAJ now improperly attempt to revive the cross-appeal by challenging those findings in their opposing and amicus briefs.

Grange cannot, within the page constraints imposed by rule for a Reply, address all of the mischaracterizations of the underlying trial testimony and legal flaws in WHC's improper arguments. The latter, however, are illustrated by WHC's own authorities.

"Abuse" is unambiguous and is not limited to "sexual abuse." As the Tenth District pointed out: (1) "'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'"; and (2) WHC's "narrow construction" of "abuse" as limited to "sexual abuse" is contrary to dictionary definitions, common understandings of the word, and the uniform interpretation of the Exclusion by other jurisdictions. (App. Op., ¶ 47, citation omitted).

WHC claims that its constricted reading of "abuse" is supported by Windt, *Insurance Claims & Disputes*, § 11:23B. (Opp. Br. 16.) But that section of the treatise actually references *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 588 S.E.2d 643 (S.C.App.2003) for the proper construction of "abuse," and *Oates* adopted a dictionary definition virtually identical to the definition applied by the Tenth

District here. *Compare Oates* at 646 ("abuse" includes "[t]o hurt or injure by maltreatment"); *and* App. Op., ¶ 45 (abuse includes "'bad or improper treatment; maltreatment'"). *Oates* itself applied an ISO Abuse or Molestation Exclusion to *physical* abuse (injuries inflicted by a daycare employee constituting "shaken baby syndrome"). Other jurisdictions have uniformly done so as well. *E.g., Valley Forge Ins. Co. v. Field*, 670 F.3d 93, 97 (1st Cir.2012) (failure of social services agency to detect or report "ongoing physical abuse"); *American Empire Surplus Lines Ins. Co. v. Chabad House of North Dade, Inc.*, 450 Fed.Appx. 792 (11th Cir.2011) (employee of insured home "tormented" special needs child); *Neff v. Alterra Healthcare Corp*., 271 Fed.Appx. 224 (3d Cir.2008) (beating of patient in assisted living facility).

Corporal punishment has no application to this case. The Tenth District correctly held that the evidence and jury findings in the underlying trial, as well as the "manifest language of the [corporal punishment] endorsement" precluded WHC's argument that the provision in the CGL policy's[1] intended acts exclusion obviated the policies' Abuse or Molestation Exclusion. *See* App. Op., ¶¶ 48, 51-52.

First, WHC's corporal punishment argument was inconsistent with the pleadings, evidence and jury verdicts in the underlying trial. The Faietas did not allege corporal punishment "gone awry," and even if corporal punishment were appropriate for a two-and-a-half-year-old in a daycare setting (it is not) there was

[1] The exception is not present in the Grange umbrella policy issued to WHC, and thus could not apply to any claim for coverages under that policy.

no evidence that Andrew misbehaved or was being disciplined. The jury was presented with evidence that presented only two choices – a horrific beating or contact dermatitis. Based on its "careful observation of the witnesses' testimony in this case and its review of the record," the *Faieta* trial court concluded that the evidence supported the Faietas' claim "that the marks on Andrew's body were caused by Mr. Vaughan's abuse and not contact dermatitis." (*Faieta* Tr. Op., Grange Supp. 127.) As the Tenth District noted, the *Faieta* trial judge held that "the jury, in effect, determined that the marks on the child's body 'were a result of abuse' by Vaughn." (App. Op., ¶ 48.)

Second, WHC's argument is contrary to the language of the endorsement and the *Faieta* jury's express finding of intentional harm. The CGL policy's expected/intended act exclusion (Grange Supp. 137), clarifies that two intentional acts that do not harbor a subjective intent to harm – the "use of reasonable force to protect persons or property" and "[c]orporal punishment to your student administered by or at the direction of any insured" – are not included within the exclusion. But here, the *Faieta* jury "expressly found in its answers to interrogatories that Vaughan 'intentionally harmed'" Andrew. (App. Op. ¶ 48; 'Rog 1.A, Grange Supp. 89.) The corporal punishment provision therefore has no application. Nor, as the Tenth District points out, does the provision purport to either limit or modify the policies' Abuse or Molestation Exclusions. (App. Op. ¶ 52).

WHC's authorities confirm the Tenth District's decision. The court in *Atlantic Employers Ins. Co. v. Chartwell Manor School*, 655 A.2d 954 (N.J.Super.Ct.App.Div. 1995) (Opp. Br. 19-20) held that because the insured testified in deposition that he held students' genitals during the administration of corporal punishment to protect them (not to cause harm or in a sexual manner), a jury must decide "whether there was a subjective intention to cause actual injuries." *Id.* at 959. If the jury did make such a finding, the conduct would not be an "occurrence" and there would be no coverages, notwithstanding the policy's corporal punishment endorsement. *Id*. Here, the *Faieta* jury expressly found that Vaughan "intentionally harmed" Andrew; applying *Chartwell* would require a finding of no coverages.[2]

II. THE ISO ABUSE OR MOLESTATION EXCLUSION BARS COVERAGES FOR INJURIES ARISING OUT OF ABUSE REGARDLESS OF THE CAUSE OF ACTION ALLEGED TO RECOVER FOR THOSE INJURIES.

The primary question before this Court is whether the ISO Abuse or Molestation Exclusion precludes coverages for vicarious liability for abuse. The Exclusion provides that "insurance does not apply to 'bodily injury' * * * arising out of * * * abuse or molestation by anyone of any person while in the care, custody or control of any insured" *or* to the "negligent * * * supervision * * * of a person for

[2] *Auto-Owners Ins. Co. v. Illinois Nat. Ins. Co*., 510 Fed.Appx. 445 (6th Cir.2013) (Opp. 20-21) likewise provides no support for WHC – the court in that case enforced the clear language of an endorsement that not only specifically agreed to *cover* negligence claims arising out of abuse, but also specified that the endorsement providing coverages "'*shall be the **only** insuring agreement to apply to abuse or molestation incidents*.'" *Id*. at 449 (emphasis in original).

whom any insured is or ever was legally responsible and whose conduct would be excluded by 1, above." (Grange Supp. 2 (CGL), 35 (Umb.).) As explained in Grange's Opening Brief, subject matter exclusions focus on the injuries alleged and the incident or event that is the source of those injuries. If the injuries and associated damages arise out of the identified event, there are no coverages. It matters not who committed the injury-producing act. The intent or perspective of the insured in relation to the event is equally irrelevant. And coverages are barred regardless of the legal theories or causes of action pursued to recover for the injuries. Rather, the ISO 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 v. Gulf Ins. Co*., D.Wyo. No. 01-CV-201-J, 2002 WL 32290984, at *7 (Dec. 20, 2002).

Other jurisdictions have uniformly applied the ISO Abuse or Molestation Exclusion to a wide variety of legal theories and causes of action. The analysis is streamlined and straightforward. In *Oates*, for example (*supra*, p. 3), the court held that it need only apply the cardinal rule of contract interpretation "'to ascertain and give legal effect to' the parties' intentions as determined by the contract language," to conclude that when a policy contains an Abuse or Molestation Exclusion, an insurer has no duty to defend or indemnify a complaint alleging "shaken baby syndrome" injuries allegedly inflicted by a daycare worker. 588 S.E.2d at 644. The court held: (1) *all* of the claimed injuries were caused by alleged employee acts; (2)

acts causing shaken baby syndrome are abuse; and (3) the policy's abuse or molestation endorsement provided that the insurance did not apply to bodily injury arising out of abuse. *Id*. at 646. Because "the claims are specifically excluded by the policy," the court did not even need to address whether those acts constituted an "occurrence" under the policy. *Id*.

That three-pronged test easily encompasses allegations of vicarious liability for abuse or molestation. *See, e.g., P.D. v. S.W.L.*, 993 So.2d 240, 248 (La.App. 1st Cir.2008) (citations omitted, emphasis added):

> In determining the scope of policy provisions excluding coverage for damages "arising" or "resulting" from certain acts, the focus of the exclusion is on the cause of the damages, not the particular cause of action alleged. * * * Thus, in this case, there is no coverage for any damages "[a]rising out of sexual molestation * * *." All of the damages claimed by plaintiffs arose from the alleged sexual molestation. If there had been no sexual molestation, there would be no damages. Therefore, regardless of the legal classification of the cause of action against the defendants (whether negligence, parental ***vicarious liability***, or some other basis), any claim for damages connected to the sexual molestation cannot be separated therefrom and, thus, must also be excluded from coverage.

Accord Crow v. Dooley, 3rd Dist. Allen No. 1-11-59, 2012-Ohio-2565 (finding no duty to defend or indemnify any claim, including respondeat superior liability, arising out of molestation). That analysis requires the same result here.

A. Injuries Caused by Abuse "Arise Out of" Abuse.

WHC argues (Opp. Br. 20) that this Court's decision in *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-181, requires a "narrow" reading of "arising out of." That argument is misplaced for two reasons.

First, *Hunter*, is distinguishable. The majority opinion in *Hunter* held that an exclusion "for claims 'arising out of' premises" required a nexus between the injuries claimed and a "condition or quality" of the property: "'While most of the endeavors of mankind occur upon the surface of the earth and without it, harm could not occur, the law nevertheless imposes liability for negligent personal conduct upon the recognition that, in most cases, human behavior is a primary cause of the harm and the condition on earth only secondary.'" *Id*., ¶ 27 (citation omitted). The Abuse or Molestation Exclusion bars coverages based on "human behavior," not "the condition on earth" and the concerns addressed in *Hunter* are not present.

Second, even if *Hunter* applied, and even if (as WHC alleges at p. 4) *Hunter* construes "arising out of" as "caused directly by," that test is easily met here. It is indisputable that the $82,365.00 compensatory award against Vaughan was directly caused by Vaughan's abuse of Andrew.

B. Asserting Vicarious Liability for Injuries Arising Out of Abuse Does Not Obviate an Abuse or Molestation Exclusion.

WHC next argues (Opp. Br. 21-24) that the ISO Abuse or Molestation Exclusion does include the term "vicarious liability" and therefore must not exclude

vicarious liability for abuse or molestation. Vicarious liability for abuse or molestation was, in fact, squarely within the cross-hairs of the Exclusion's drafters.

As explained by the International Risk Management Institute (IRMI) treatise quoted at pages 26-27 of Grange's opening brief, the ISO Abuse or Molestation Exclusion was developed *because*: (1) "'[o]rganizations that have care or custody of others * * * are likely to be held *vicariously liable* for abuse committed by their employees'"; and (2) such liability could be found to be both an "occurrence" from the perspective of that organization and not within an expected/intended acts exclusion. *See Harper*, *supra*, at fn. 9 (emphasis added). To exclude that liability from coverages, the first section of the ISO Abuse or Molestation Exclusion was drafted in a manner that does not connect the injury-producing act to *any* insured, to any insured's perspective or state of mind in relation to the incident, or to any legal theory of liability arising out of the insured's relationship to the abuser/molester. The endorsement bars coverages for injuries arising out of abuse or molestation "by anyone" and "[t]hat 'anyone' could be the insured's employee, agent, independent contractor, customer, client or person completely unconnected with the insured organization." *Id.*[3]

[3] Notably, insureds pursuing coverage actions have argued that the ISO Abuse or Molestation Exclusion *only* applies to respondeat superior liability. *See e.g., Hernandez v. Colegio y Noviciado Santa Maria del Camino, Inc*., D.P.R. No. 12-2052 (PAD), 215 WL 1417052, at *2 (Mar. 27, 2015), in which the insured argued that the Exclusion "is directed at excluding coverage under the common 'respondent superior responsibility' that a school would have with respect to actions of its employees and officials toward their students * * *."

IRMI explains that the second section of the ISO Exclusion was drafted to preclude coverages for negligent employment, supervision, etc. – claims that are "different from" the "*purely vicarious liability claims*" that are excluded by the first section. *Harper*, fn. 9 (emphasis added). Thus, the second section anticipates judicial constructions like this Court's holding in *Safeco*, that distinguish claims asserting negligent hiring, supervision as a separate and independent "occurrence" with independent acts and "separate injuries[.]" *Safeco Insurance Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, ¶ 38. The two sections of the ISO Exclusion thus act in tandem to anticipate any number policy interpretations and pleadings.

C. WHC's Authorities Do Not Support Its Argument.

The authorities WHC cites at pages 24-26 of its Opposing Brief do not address a subject matter exclusion in a CGL policy, much less the ISO Abuse or Molestation Exclusion in the Grange CGL policy before this Court. Instead, those authorities merely hold that an insured's vicarious liability for its employee's intentional tort may be an "occurrence," and/or survive a challenge under an expected/intended acts exclusion. As explained above, it is *because* insured's may be held vicariously or separately liable for an employee's intentional tort that the ISO Abuse or Molestation Exclusion was drafted and adopted. WHC offers no support for the Tenth District's contrary conclusion.

The article "*Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts of Damages*" (Opp. Br. 24), for example, challenges the

"myth" that public policy concerns render insurance "not available or allowed" for *any* damages caused by *any* intentional torts. The article makes the unremarkable point that: (1) insurance coverages are available for some intentional torts; and (2) some jurisdictions have allowed coverages for an employer's vicarious liability for an international tort that occurs within the scope of employment, or for negligent hiring/supervision liability that enables an intentional tort.

The Windt treatise and cases cited at pages 24-26 of WHC's Opposing Brief also analyze vicarious liability for injuries caused by intentional torts under policy definitions of "occurrence" and expected/intended acts exclusions – not a subject matter exclusion. *See, McLeod v. Tecorp Intern., Ltd*., 844 P.2d 925 (Ore.App.1992) (employee's sexual harassment was an "occurrence" from the perspective of the vicariously liable employer); *Schmidt v. Smith*, 684 A.2d 66 (N.J.Super.App.Div.1996) (analyzing vicarious liability claims for sexual harassment under an *employer's liability* policy; *Schmidt* "is clearly distinguishable" from similar claims asserted under a CGL policy with a subject matter, employment-related practices exclusion (*Auto-Owners Ins. Co. v. Childersburg BankCorp, Inc*., 1998 WL 1802908 (N.D.Ala.), at *5)); *Gen. Direct Marketing, Inc. v. Lexington Ins. Co*., 410 F.Supp.2d 387, 394 (M.D.Pa.2006) (insurer must defend vicarious liability claims that did not require proof of intentional discrimination where policy only excluded "discrimination committed intentionally"); *Malanga v. Mfrs. Cas. Ins. Co.*, 146 A.2d 105 (N.J.1958), (vicarious liability claim covered where exclusion "expressly linked" excluded

conduct to the viewpoint of the insured (*U.S. Fidelity & Guar. Co. v. Morrison Grain Co., Inc.*, 734 F.Supp. 437, 449 (D.Kan.1990)); *Northern Cas. Co. v. HBE Corp.*, 160 F.Supp.2d 1348 (N.D.Fla.2001) (vicarious liability not excluded by expected/intended acts exclusion); *Property Cas. Co. of MCA v. Conway*, 687 A.2d 729 (N.J.1997) (vicarious liability is an "occurrence" from the perspective of the insured).

While WHC's authorities are consistent this Court's jurisprudence in *Safeco, supra,* they have no application to subject matter exclusions like the Abuse or Molestation Exclusion at issue in this case. *Crow v. Dooley*, *supra,* ¶ 20 (emphasis in original) (because it did not address an exclusion that applied "*without regard* to the specific causal connection to the molester or the requisite mental state of the alleged tortfeasor," *Safeco* was "inapplicable" to court's analysis of CGL policy with Abuse or Molestation Exclusion).

III. EVEN IF THEY DID PROVIDE COVERAGES FOR VICARIOUS LIABILITY FOR ABUSE (AND THEY DO NOT), THE GRANGE POLICIES DO NOT COVER ATTORNEY FEES OR POST-JUDGMENT INTEREST AWARDED FOR *NON*-COVERED CLAIMS.

As noted, Grange's second and third propositions of law need not be addressed if this Court finds no coverages for "vicarious" liability under the ISO Abuse or Molestation Exclusion in the CGL and umbrella policies issued by Grange. If considered, those arguments should be rejected as contrary to Ohio law.

A. No Coverages for the $693,861.87 Attorney Fee Award for WHC's Non-covered, Malicious Conduct.

In opposition to Grange's second Proposition of Law, WHC abandons any effort to defend the Tenth District's reasoning in support of its finding that the jury's award of attorney fees was a covered bodily injury "damage." And for good reason. The Tenth District relied on this Court's decision in *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-129, but that case held that attorney fees awarded for a *covered* act are a bodily injury "damage." Here, the jury only awarded attorney fees for *non*-covered acts – WHC's negligent supervision of Vaughan and post-abuse IIED, if any. The basic insuring agreement for the CGL policy provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" * * * *to which this insurance applies*.

(Grange Supp. 14) (emphasis added). The fact that attorney fees are a form of damages for "bodily injury" has no relevance at all if the bodily injury is not one "to which this insurance applies." Because it is undisputed that the *Faieta* jury awarded attorney fees only for WHC's own malicious conduct,[4] and it is established that none of WHC's conduct was covered, *Neal-Pettit* has no application.

Instead, WHC and amicus United Policyholders present a newly minted argument that was never asserted below or considered by the courts below – that

[4] WHC's suggestion on page 27 that the jury could have awarded attorney fees based on WHC's "vicarious liability for Vaughan's malicious acts" is baseless. The jury separately awarded punitive damages against Vaughan and WHC. (Grange Supp. 104, 105.) It must be presumed that the jury did not award punitive damages for Vaughan's conduct twice – directly and vicariously.

attorney fees are "costs" which must be paid under the policies' "Supplementary Payments" provisions. *See* Grange Supp. 20-21:

> 1. We will pay, with respect to any * * * "suit" against an insured we defend:
>
> * * *
>
> e. All costs taxed against the insured in the "suit."

The new argument is equally misplaced.

As explained in *Polygon Northwest Co. v. American Nat. Fire Ins. Co.* , 189 P.3d 777, 789, ¶ 59 (Wash.App.2008), the cases cited by WHC and its amici hold that attorney fees are a "cost taxed against the insured in a 'suit'" because those jurisdictions define taxable costs as including attorney fees:

> [Plaintiff] cites various cases from other jurisdictions that have held that the phrase "costs taxed" in provisions similar to the one here at issue can be construed to include reasonable attorney fees. * * * However * * * all of those cases are from jurisdictions that specifically provide that reasonable attorney fees are allowed as taxable costs.

Unlike those jurisdictions, "cases from the [Washington] Supreme Court and from this court uniformly hold that 'taxable costs' are not to be defined outside the scope of those which are provided in RCW 4.84.010." *Id*., ¶ 58 (citations omitted). The Supplementary Payments provision therefore could not be reasonably construed to include attorney fees. *Id. Accord Florida Patient's Compensation Fund v. Moxley*, 557 So.2d 863, 864 (Fla.1990) (attorney fees are not "costs" under a policy's supplementary payment provision because under Florida law attorney fees are regarded as costs only when specified as such by the statute which authorizes their

recovery); *Hoang v. Montera Homes (Powderhorn) LLC*, 129 P.3d 1028, 1038 (Colo.App.2005), *rev'd in part on other grounds*, 149 P.3d 798 (Colo.2007) (same); *CIM Ins. Corp. v. Masamitsu*, 74 F.Supp.2d 975, 993 (D.Haw.1999):

> "[C]osts taxed" read in context plainly refers to amounts commonly taxed by courts in suits. * * * This reading comports with the common understanding used by Hawaii courts in "suits" (which is the relevant context to the understand the meaning of "costs taxed * * * in any suit").

Ohio – like Washington, Florida, Colorado and Hawaii – does not allow attorney fees as taxable costs. *See Centennial Ins. Co. v. Liberty Mut. Ins. Co*., 69 Ohio St.2d 50, 51 (1982) (citations omitted) ("Today, we reaffirm the principle that "'[t]he subject of costs is one entirely of statutory allowance and control'"); *Sturm v. Sturm*, 63 Ohio St.3d 671 (1991), syllabus ("Civ.R. 41(D) grants jurisdiction to award costs for a dismissal * * * but such costs do not include attorney fees"). WHC's reliance on *Pasco v. State Auto. Mut. Ins. Co.*, 10th Dist. Franklin No. 99AP-430, 1999 WL 1221633(Opp. Br. 32), is equally misplaced. *Pasco* suggests that if faced with the issue, Ohio courts would *reject* a construction of "costs" as including attorney fees:

> One could question whether the attorney fees awarded under R.C. 1345.09(f) should be assessed "as costs" or as damages. In general, absent specific statutory authority, attorney fees are not "costs." *See Muze v. Mayfield* (1991), 61 Ohio St.3d 173, 573 N.E.2d 1078. * * * Regardless, neither appellee nor its insured appealed the decision of the Ottawa County court of common pleas assessing the attorney fees "as costs." As such, appellee is precluded from challenging this determination here.

Id., fn. 1. Such authority provides scant support for WHC's new theory.

B. No Coverages for Post-Judgment Interest Accrued on Non-covered Claims.

In response to Grange's third Proposition of Law, WHC argues that the majority of jurisdictions, and the insurance industry itself, agree that a CGL's Supplementary Payments provision promises to pay interest on the entirety of any judgment entered in a case in which it has provided a defense, including those portions of the judgment representing non-covered compensatory damages and/or uninsurable punitive damages. (Opp. Br. 33-38.) But that is not what the provision says, and that is not what the cases hold.

The purpose of the Supplementary Payments provision is to compensate an insured for the expense associated with delay when an insurer decides to appeal a judgment *as to which coverages are undisputed.* The 1950s revision to include post-judgment interest accruing on the "full" or "entire" amount of the judgment was necessary to achieve that purpose when the appealed, covered judgment exceeds policy limits. As explained by the Illinois Supreme Court in the paragraph immediately preceding the paragraph quoted by WHC (Opp. Br. 35-36):

> [T]he realities of the relationship between the insurer and the insured argue against the insurer's interpretation. Under the terms of the policy the insurer has complete control of any litigation from which it might incur liability. The insured can not settle with the plaintiff without releasing the insurer from its obligation. Any delay that may cause the accumulation of interest is thus the responsibility of the insurer. And until it has discharged its obligations under the policy it should bear the entire expense of this delay.

> Insurers themselves have recognized this. * * *

River Valley Cartage Co. v. Hawkeye Security Ins. Co., 161 N.E.2d 101, 103 (Ill.1959).

WHC's Ohio authority – *Coventry v. Steve Koren, Inc*., 4 Ohio St.2d 24 (1965) – stands for the same principle. If an excess judgment is awarded on a *covered* liability, and the insurer causes interest to run on the entire appeal by exercising its contractual right to appeal, the Supplementary Payments provision provides that the insurer shall pay interest on the entire judgment until it pays or deposits *that part of the judgment covered by the policy*. *See Couch on Insurance* (3d ed.), § 172:46, fn. 89 (emphasis added):

> [The supplementary payments provision] 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 is being litigated * * *.

WHC's authorities are inapplicable because they do not address the situation where, as here, the insurer provided a defense under a reservation of rights and contested coverages for the ensuing judgment. *Borer v. Church Mut. Ins. Co*., 12 P.3d 854 (Colo.App.2000), however, does address that situation and correctly holds that requiring an insurer to pay interest on non-covered portions of a compensatory damage judgment and punitive damages, "would violate Colorado public policy and would, therefore, be unenforceable." *Id*. at 856-857 (citation omitted). Such a ruling would also "produce the illogical result of penalizing the insurance company for not paying a judgment it is not legally obligated to pay." *Id*. at 857. *Borer* specifically

and correctly distinguishes the authorities upon which WHC relies because those cases "involved money judgments *that were covered* by the provisions of the insurance policy but exceeded the insured's policy limits." *Id*. at 857 (emphasis added).

This Court has long recognized that the duty to defend is broader than the duty to indemnify. *E.g., Hoyle v. DTJ Enterprises, Inc*., __ Ohio St.3d __, 2015-Ohio-843, at ¶ 6. This Court should reject WHC's invitation to establish a rule that punishes insurers for providing a defense until such time as there is a determination of actual liability, and requires insurers to pay hundreds of thousands of dollars in interest on claims that are not only excluded by the policy but uninsurable under Ohio law.

IV. CONCLUSION

WHC and its amici ignore the structure, language, history and purpose of the ISO Abuse or Molestation Exclusion, as well as the cases interpreting it. As other jurisdictions have recognized, the Exclusion benefits insurers and insured organizations alike by telling employers that their CGL polices provide no coverages for injuries arising out of the abuse or molestation by anyone of any person within the organization's care, custody or control. That clarity allows insurers and insureds to customize policy coverages based on risks encountered in a certain line of business.

Such clarity has the additional benefit of streamlining coverage disputes. Courts need only ask: (1) what act or event caused the claimed injuries; (2) was the

event abuse or molestation; and (3) does the policy negate coverages of injuries arising out of abuse or molestation? Insureds' perspective or state of mind become as irrelevant as the form of the legal claim pursued to recover damages caused by abuse or molestation. Here, the clear contract wording and intent of the Grange CGL and Umbrella policies sold to WHC is that liability insurance coverage does not exist for claims against WHC arising out of abuse.

For all of these reasons, as explained more fully above and in its Opening Brief, Appellant Grange Mutual Casualty Company respectfully asks this Court to follow the state and federal courts that have uniformly enforced Abuse or Molestation Exclusions, reverse the decision of the Tenth District Court of Appeals carving out and finding coverages for vicarious liability for abuse, and enter judgment for Grange. Alternatively, this Court should reverse the Court's conclusion that Grange is obligated to reimburse WHC for $693,861.87 in attorney fees 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 **Reply Brief of Appellant Grange Mutual Casualty Company** was served on May 1, 2015, per S.Ct.Prac.R. 3.11(B), by sending it by regular U.S. Mail to:

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