

Bad Caregivers Benefit from a Careless Defense

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Where an insured defendant is sued under multiple theories and coverage is available for only some of them, an Ohio appellate court has ruled that the insurer's duty to defend includes an obligation to recommend that the insured request special interrogatories to the jury to clarify coverage for damages. *World Harvest Church v. Grange Mutual Casualty Co.* arose from a 2006 incident in which a World Harvest Church employee physically abused a child in the church's daycare program. The child's family sued the employee for battery and intentional infliction of emotional distress. The suit asserted claims against World Harvest directly for negligent supervision and intentional infliction of emotional distress, and also alleged that World Harvest was vicariously liable for the two torts the employee committed. Grange expressly reserved its right to deny coverage, on grounds that included a molestation exclusion in World Harvest's liability and umbrella policies. But the insurer also retained counsel to defend World Harvest. The reservation-of-rights letter advised World Harvest that it might wish to consult independent counsel, and World Harvest ultimately retained its own lawyers to act jointly with the counsel Grange provided. The jury found the defendants liable on all counts and awarded compensatory and punitive damages. The compensatory damages totaled more than \$600,000. The trial court held that Grange had the burden of proving coverage was unavailable for each cause of action asserted against its insured. Because the award was not allocated among the different theories, the court further held that World Harvest would be entitled to coverage for the full amount of the compensatory award, so long as coverage was available for at least one of the plaintiffs' claims. The Court of Appeals found that the insured generally has the burden of allocating a judgment. But it also held that this burden shifts to the insurer if the insurer fails to fulfill its duty to defend. According to the appellate court, Grange violated that duty because the counsel it hired "was shown the proposed jury interrogatories and was given the opportunity to review and comment on them, and ... did not propose any interrogatories" relating to allocation. In other words, the court held that the duty to defend—a duty whose breach can expose insurers to a wide variety of serious consequences—includes "the duty not to prejudice an insured's rights by failing to request special interrogatories or a special verdict to clarify coverage or damages." Separately, the Court of Appeals found that the policies' molestation exclusion applied to all of the claims asserted directly against World Harvest. Grange was therefore liable only for the \$82,000 in

compensatory damages that had been awarded against the employee. But this case establishes new law in Ohio, and it could have an expensive effect on future disputes.

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