No. 2022-0322

IN THE
SUPREME COURT OF OHIO

AUSTIN KREWINA,
Plaintiff-Appellee,

v.

UNITED SPECIALTY INSURANCE COMPANY,
Defendant-Appellant.

JURISDICTIONAL APPEAL FROM THE
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO
CASE NO. C-210163

MEMORANDUM OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

> "*** I urge the Supreme Court of Ohio to review this case and its holding in [*Nationwide Ins. Co. v. Estate of] Kollstedt* [, 71 Ohio St.3d 624, 1994-Ohio-245, 646 N.E.2d 816]."
>
> *Krewina v. United Specialty Ins. Co.*, 1st Dist. Hamilton No. C-210163, 2021-Ohio-4425, ¶48 (Myers, J., concurring) ("App. Op.").

I.

It is a rarity that an appellate judge writes separately in an opinion urging this Court to review a case. It happens infrequently, but it does happen when a jurist holds grave concern that one of this Court's precedents is being misinterpreted, misconstrued or misapplied by the judiciary. This is such a case. While concurring with the majority opinion in this case, Judge Beth Myers agreed that reversal and remand of this case to the trial court was called for based on "the reasoning" of *Nationwide Ins. Co. v. Estate of Kollstedt*, 71 Ohio St.3d 624, 646 N.E.2d 816 (1995). But, in Judge Myers' view, "[i]t **does not make sense** to me to have the exclusion dependent upon the mental state of the perpetrator as opposed to the conduct trying to be excluded under the policy." (Emphasis added) (App. Op., ¶50). Not certain that *Kollstedt* should be expanded to apply here because the result "seems to be in contrast to the common understanding of an assault and the plain meaning of the terms," (App. Op., ¶49), she felt compelled to urge this Court to review *Kollstedt* in the context of this case. And, at Judge Myers fervent urging, this Court should do so.

II.

This Court should accept jurisdiction to resolve a question of first impression and public

and great general interest, and one where there is conflicting authority in Ohio: whether an assault and battery exclusion or an abuse endorsement with a sub-limit, which are common subject-matter provisions used in commercial general liability ("CGL") policies for businesses – like mental health facilities, bars and liquor establishments, schools and churches – apply where a non-insured third-party commits a violent act or abuse that is allegedly caused by the negligence of the insured. In a substantial percentage of such cases, the non-insured third-party claims some kind of justification or avoidance, such as self-defense or mental incompetence to avoid liability for his or her otherwise tortious conduct. The insurance provisions in this case are designed to apply no matter what the subjective intent or justification of the attacker/abuser is. This includes where the non-insured assailant or abuser is suffering from a mental condition or impairment resulting in there being a finding of no criminal culpability based upon a not guilty by reason of insanity defense, meaning that the assailant was mentally ill and unable to act with intent to commit and assault or battery or abuse the victim. Moreover, there is uncertainty and confusion in Ohio courts as to whether this Court's opinion in *Kollstedt* extends to third persons who are not insured under the insurance policy to avoid the type of assault and battery exclusion and abuse endorsements commonly found in the CGL policy at issue here. This confusion led to Judge Beth A. Myers' clarion call in her concurring opinion for this Court to review this case.

This case involves an altercation at a mental health facility where a razor knife was used to violently inflict serious injuries to the victim, but the First District's opinion applies equally to bars, taverns, restaurants, and churches which oftentimes are the venues where emotions and tempers flare, sometimes leading to physical altercations between residents, employees/bouncers, patrons and other frequenters on the premises. In the altercation that led to this litigation, there is no dispute that both an assault and battery occurred. One resident of the group care facility attacked

another resident with a razor knife resulting in multiple lacerations to the other resident's face and neck. Whether a plea of self-defense or not guilty by reason of insanity might avoid criminal liability for the bodily injuries caused by the actions of the assailant, neither extinguishes the undisputed fact that the assault and battery happened. One combatant's assertion of impaired mental capacity – or any other affirmative defense such as self-defense, for that matter – does not play into the equation of whether an insurer has a duty to defend or indemnify for the injuries caused by the assault and battery where, as here, no coverage was intended or expected for any "bodily injury" arising out of an "actual, alleged or threatened" assault or battery.

III.

By misconstruing the assault and battery exclusion and abuse endorsement in the CGL policy, the First District has announced an unexpected shift in the scope of insurance coverage provided to mental health facilities – as well as bars, taverns, restaurants and churches - all across the State of Ohio for injuries resulting from physical altercations and abuse which sometimes take place between residents, employees, patrons, or anyone else on the premises. The appellate opinion in this case not only signals an unprecedented change in the law of assault and battery by declaring that – for insurance coverage purposes – a finding of not guilty by reason of insanity can mean that a battery, as that term is commonly understood – did not occur, but it rewrites the clearly expressed intent in a widely-used exclusion and endorsement to a CGL insurance policy in finding liability insurance coverage for a violent confrontation that culminated in an assault and then a battery where such coverage was expressly excluded and never intended.

Jurisdiction of this appeal should be accepted as a case of public and great general interest because the issues raised by the proposition of law address, *first*, a matter of first impression for this Court as to the application of an assault or battery exclusion and an abuse endorsement found

in CGL policies issued to mental health facilities, bars, taverns and restaurant establishments, and churches across the State of Ohio, *second*, the First District's misconstruction of the legal significance of a finding impaired mental capacity by virtue of a not guilty by reason of insanity defense to a criminal charge for purposes of insurance coverage for civil assault and battery, *third*, the First District's flawed analysis construed the assault and battery exclusion and abuse endorsement to still allow coverage when one of the combatants in an altercation is found not guilty by reason of insanity, which creates a conflict with the well-reasoned analysis of appellate courts in Ohio, and, *fourth*, this case will help clarify the inapplicability of this Court's decision in *Nationwide Ins. Co. v. Estate of Kollstedt*, 71 Ohio St.3d 624, 1994-Ohio-245, 646 N.E.2d 816 to CGL policies with assault and battery and abuse endorsements when the combatant is found not guilty by reason of insanity.

IV.

Ohio law has always recognized that the touchstone for defining an insurer's obligations to its insured is the intent of the parties at the time they entered into the insurance policy. The scope of the coverage that the insured intends to obtain and the insurer intends to provide determines the amount of premiums the insured must pay to spread the risk. The parties' intentions are expressed in the language used in the insurance policy, and words and phrases are to be interpreted consistent with those intentions. However, the ruling by the First District in this case completely ignores the intentions of the parties to the insurance policy. Instead, it noted that a non-insured's mental state which negated criminal culpability for an assault and battery based upon a finding of not guilty by reason of insanity resulted in a finding against the insurer and in favor of coverage under the CGL policy, without regard to the insured and insurer's actual intentions as expressed in an assault and battery exclusion and abuse endorsement. The First District thereby

expanded coverage under the insurance policy in ways that the parties had never intended, increasing the risk on which the policy premium had been calculated.

The opinion of the First District adopts an aberrant and illogical interpretation of a CGL insurance policy endorsement excluding coverage for "actual, threatened or alleged" assault or battery which flouts the intent of the parties, interferes with the right to freely enter a contract to carry out those intentions, and creates a conflict among other appellate courts. The opinion re-defines the scope of coverage available under the CGL policies and serves as a seriously flawed authority that may be relied upon by Ohio's trial and appellate courts to give credence to meritless claims for defense and indemnity coverage despite an endorsement which was intended to preclude insurance coverage for bodily injuries arising from assault and battery claims against mental health facilities, bars, taverns, and restaurant establishments. Because of the scope, breadth and far-reaching impact of the issues raised herein for Ohio's insurance industry, the Court should accept jurisdiction over the case to reverse the flawed judgment and opinion of the court of appeals.

Consistent application of assault and battery exclusions and abuse endorsements provide certainty and predictability in that both the insured and insurer will then have mutually clear expectations that no claims arising out of an assault or battery. Here, the First District engaged in a redrafting of the CGL policy to circumvent the assault and battery exclusion and abuse endorsement in order to afford coverage for a claim amounting to an assault or battery where such coverage was never intended. That holding illustrates the need for this Court to provide guidance on this issue of first impression.

V.

"It must be conceded that any legal question, upon the determination of which two Courts of Appeals disagree, is a question of public and great general interest." *Flury v. Central Publishing*

House of Reformed Church, 118 Ohio St. 154, 159, 160 N.E. 679 (1928). It is a matter of public and great general interest when Ohio's courts interpret the language commonly found in insurance policies differently depending on the appellate district in which a case is pending. *See, e.g.*, *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, ¶ 13 and 21. Insurance contracts construed by the First District should be subject to the same rule of law applied in the other appellate districts in Ohio. But that is not what has happened.

As explained herein, the First District's opinion conflicts with the Second District's opinion in *Badders v. Century Ins. Co.*, 2d Dist. Montgomery No. 28170, 2019-Ohio-1900 and the Tenth District case of *World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 13AP-290, 2013-Ohio-5707. This Court should accept jurisdiction to establish a uniform rule for application of assault or battery exclusions and abuse endorsements, like the one in United Specialty Insurance Company's CGL policy, when there is a claim for coverage based upon an assault or battery where the non-insured assailant has avoided criminal culpability for the same conduct due to a finding of not guilty by reason of insanity.

VI.

A rule of law that circumvents the assault and battery exclusion and abuse endorsement, as the First District opinion does here, will sweep within the scope of coverage assault and battery claims upon the mere assertion by one of the combatants of an avoidance or justification defense, such as an insanity defense in a criminal prosecution. Such a rule results in an insurer, like United Specialty Insurance Company, having coverage under a CGL policy which never intended to cover claims for assault and battery and abuse occurring on the premises of a mental health facility, bars, taverns, and restaurants across the State of Ohio. If left undisturbed, the rule of law adopted below risks opening a "Pandora's Box." *Selander v. Erie Ins. Group*, 85 Ohio St.3d 541, 548 (1999)

(Lundberg Stratton, J., dissenting). Going forward, according to the First District, anytime an assault or battery occurs, as long as one of the parties raises a claim of avoidance or justification – such as mental impairment or insanity – the duty to defend the lawsuit will now be triggered despite the presence of the assault and battery exclusion under the CGL policy.

The reasoning of the First District here would, no doubt, surprise most policyholders and insurers. As aptly observed by Judge Myers, "from a policy holder's perspective, surely they would believe that an attack upon a person with a knife would constitute an assault under the policy, causing it to come under the exclusion." (App. Op., ¶50). It is the kind of absurd result which this Court cautioned against in the past when an insurance policy is construed without regard to the parties' intent. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶35.

Such an unprecedented expansion would also threaten to completely upset the Ohio insurance market by suddenly forcing CGL insurers to absorb huge exposures for assault and battery lawsuits even though no commensurate premium was collected or ever contemplated. Or insurers will be unwilling or unable to offer CGL coverage to certain businesses where assault, battery and abuse often occur – such as bars, adult care facilities, nursing homes, churches, etc. Assault and battery exclusions and abuse endorsements are included in CGL policies to control the risks and costs in cases where assault, battery and abuse occur. Removing those exclusions – or making them illusory as has happened here – will make it difficult for such entities to obtain affordable general liability coverage. Ironically, both insurance provisions in the United Specialty Insurance Company CGL policy were designed to make liability insurance more affordable by reducing the amount of risk being transferred to a liability insurer. The First District's opinion frustrates that intent and purpose.

INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose wide array of members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations and governmental entities. For over fifty years, OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient by promoting predictability, stability, and consistency in Ohio's constitutional safeguards, statutory laws, and legal precedents.

OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability and consistency in Ohio's case law and jurisprudence. On issues of importance to its members, OACTA has filed amicus curiae briefs in significant cases before federal and state courts in Ohio advocating and promoting public policy and sharing its perspective with the judiciary on matters that will shape and develop Ohio law.

OACTA's appearance as *amicus* in this case and its submission of this memorandum pursuant to S.Ct.Prac.R. 7.06 in support of Appellant United Specialty Insurance Company and in favor of jurisdiction is premised upon the recognition that there is a glaring need for the Court to provide clear, consistent and reasoned guidance to Ohio courts regarding the scope of common assault and battery exclusions or abuse endorsements in commercial general liability ("CGL") insurance. Guidance and clarification is needed as to how such provisions apply when a non-insured assailant has a mental condition or impairment that overcomes criminal culpability for his or her actions and whether a business has coverage for negligently failing to protect one of its

customers, clients or patients from being attacked by a third person who is not insured under the insurance policy. In providing this guidance and clarification, OACTA urges this Court to readdress the holding in *Kollstedt*.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts from the jurisdictional memorandum filed by Appellant, United Specialty Insurance Company.

ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW

Proposition of Law: Liability insurance exclusions and limitations for harm arising from assault and battery or abuse are subject-matter provisions that are triggered when an ordinary person would believe that assault and battery or abuse had taken place rather than by the subjective intent of the assailant.

This Court addressed the proper manner in which to interpret an insurance contract in *Westfield. Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256:

> 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 re-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. ***As a matter of law, a contract is unambiguous if it can be given a definite legal meaning***.

Id., ¶11-12 (Emphasis added; citations omitted.)

I. The First District's Opinion Does Not Give Effect to the Intent of the Policy.

With respect to the Proposition of Law urged by Appellant United Specialty Insurance Company, the Court is being asked to address and clarify that a mental impairment due to a not

guilty by reason of insanity defense to a criminal charge for assault or battery does not trigger the defense and indemnity coverage provided in a CGL policy which contains an endorsement excluding coverage for "bodily injury" arising out of an "actual, threatened or alleged assault and battery." This is a matter of first impression since the Court has not decided a case addressing the issue of whether an insanity plea in defense to a criminal charge will overcome and trump the express exclusionary language similar to that found in the assault and battery endorsement in the CGL policy.

The First District notes that the CGL policy and its assault and battery exclusionary endorsement does not provide a definition of the terms "assault" and "battery." (App. Op., ¶4, 22. While those terms are not defined, the "mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). A civil assault occurs when there is a willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such harmful or offensive contact. *Stafford v. Columbus Bonding Center*, 177 Ohio App.3d 799, 2008-Ohio-3948, 896 N.E.2d 191, ¶15 (10th Dist.) While this is the legal definition, the commonly understood meaning of an "assault" is no different based upon the dictionary definition of the term.[1] This Court has on occasion referred to a dictionary definition when construing words or phrases in insurance policies. *See*, *e.g.*, *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 128 Ohio St.3d 331, 2010-Ohio-6300, 944 N.E.2d 215, ¶ 12; *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 757 N.E.2d 329 (2001).

[1] *See*, Merriam-Webster.com., http://www.merriam-webster.com/dictionary/assault, (last visited on 3/22/22) defining "assault" as "a threat or attempt to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger of or in apprehension of such harm or contact."

A civil battery occurs when there is an intentional contact with another that is harmful or offensive. *Love v. Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988). This legal definition is similar also to the dictionary definition and commonly understood meaning of a battery.[2] Yet, in holding that coverage existed under the CGL policy, the First District opinion mistakenly intimates that the commonly understood meaning of the terms "assault" and "battery" somehow differs from their legal definitions. (App. Op., ¶22).

Compounding this error was the mistaken treatment of the import of a mental impairment or insanity defense to the question of insurance coverage. "An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it. * * * 'An affirmative defense is any defensive matter in the nature of a confession and avoidance. It admits that the plaintiff has a claim (the "confession") but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the "avoidance").'" (Citations omitted) *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 75 Ohio St.3d 31, 33, 661 N.E.2d 187 (1996).

Mental impairment or insanity is an affirmative defense in that it represents more than a denial or contradiction of the evidence establishing that an assault or battery in fact took place; rather, a mental impairment or insanity defense admits the facts claimed by a plaintiff and then relies on independent facts or circumstances which a defendant claims exempt him or her from liability for the resulting harm or injury. Specifically, operation of the affirmative defense of not guilty by reason of insanity only relieves a defendant from culpability rather than negating an element of the assault or battery offense. A person claiming mental impairment or insanity concedes that the person committed the assault or battery but asserts he or she is not liable or

[2] *See*, Merriam-Webster.com., http://www.merriam-webster.com/dictionary/battery, (last visited on 3/22/22) defining a "battery" as "an offensive touching or use of force on a person without the person's consent."

culpable in doing so. *Estill v. Waltz*, 10th Dist. Franklin No. 02AP-83, 2002-Ohio-5004, ¶24.

Whether the attacker here acted without the mental capacity to be criminally culpable or not, he still is alleged to have committed the battery which the assault and battery endorsement expressly intended to exclude from coverage and precludes United Specialty Insurance Company's duty to defend and indemnify in this case. A defense like mental impairment or insanity cannot trump the express language of an insurance policy exclusion and create coverage by transforming an assault or battery into something other than the commonly understood meaning of an assault and battery.

II. Clarification is Needed Regarding the Scope of *Kollstedt*.

The First Appellate District contended that its holding was mandated by *Nationwide Ins. Co. v. Estate of Kollstedt*, 71 Ohio St.3d 624, 1994-Ohio-245, 646 N.E.2d 816. (App. Op., ¶26-46).

In *Kollstedt*, the Court was asked to determine whether an expected or intended injury exclusion in a liability policy was applicable to bar coverage for injuries caused where the alleged insured tortfeasor lacked the mental capacity to have committed an intentional tort. *Id*., at paragraph one of the syllabus. This Court found that such an exclusion would not apply to bar coverage for the acts of an insured tortfeasor. *Id*. However, the Court did so on the basis of the express policy language at issue—that is, liability coverage does "not apply to bodily injury . . . which is expected or intended by the insured." 71 Ohio St.3d at 625, fn. 1.

While she concurred in the judgment, Judge Myers was troubled by application of *Kollstedt* under the facts of this case, and wrote a concurring opinion in this case:

> . . . From the victim Krewina's standpoint, surely he would believe he was the victim of an assault, even if Doherty was found not guilty by reason of insanity. And from a policy holder's perspective, surely they would believe that an attack upon a person with a knife would constitute an assault under

> the policy, causing it to come under the exclusion. It does not make sense to me to have the exclusion dependent upon the mental state of the perpetrator as opposed to the conduct trying to be excluded under the policy. In other words, the very same attack would be excluded if the perpetrator was someone other than Doherty who had the mental capacity to commit the crime/tort of assault.

(App. Op., ¶¶50-51).

OACTA does not believe that *Kollstedt* is or should be controlling and, to the extent that there is confusion as noted by Judge Myers, OACTA agrees that this Court should accept this appeal because the assault and battery exclusion is a broad categorical damages exclusion that is designed to completely remove from coverage damages in any way related to an "actual, threatened or alleged" assault and battery. Whether the non-insured assailant had the mental capacity to form the actual intent is and should have been irrelevant under the circumstances. Moreover, the abuse endorsement should have been applicable since the victim expressly argued that he was abused as a result of acts or omissions by the insured mental health facility.

III. The Inter-District Conflict Needs to Be Resolved.

The First District's holding that the assault and battery exclusion in the USIC Policy does not bar coverage to BCCC because Doherty could not form the requisite intent to commit assault and battery against Krewina due to mental illness creates an inter-district conflict because it is at odds with *Badders v. Century Ins. Co.*, 2d Dist. Montgomery No. 28170, 2019-Ohio-1900. In *Badders*, the Second Appellate District held that technical definitions of "assault and battery" are "not necessarily representative" of the "plain and ordinary meaning" of the words. Rather, the plain and ordinary meaning of the words is, in pertinent part, "an attack or violent onset" regardless of the actual intent of the tortfeasor allegedly committing the assault and battery. Id., at ¶14. This was true even though the Second Appellate District, in a companion case, had already determined

there were questions of fact about whether the tortfeasor in *Badders* had acted with actual intent to harm the victims in that case. *Id.* at ¶¶2, 13, 18, 31.

Despite the established question of fact on the underlying tortfeasor's actual intent, the majority concluded that the exclusion "applies to exclude coverage for personal injuries and property damage that result from any legally cognizable form of assault, without respect to whether the assault is criminal or tortious." *Id.*, ¶18. Based upon *Badders*, whether Doherty "technically" committed "an actual, threatened or alleged assault and battery" should not have been outcome determinative of this appeal.

This Court can and should recognize the conflicting authority within Ohio jurisdictions as indicating that this case is a matter of public or great general interest and one which this Court should accept jurisdiction to resolve. Lawyers, litigants, claims professionals, insurance agents, and insureds statewide require settled law on these issues as the basis for their business and personal choices. Unsettled law and divergent contract interpretations result in uncertainty, higher premiums and litigation costs which neither Ohio businesses and citizens nor their insurers desire or can afford in these economic times.

The First District, at ¶¶42-43 of its opinion, looked to R.C. 2903.34(A)(1) and R.C. 2903.33(B) for the definition of "abuse" as "knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact." Then, the First District applied this definition to Doherty and found that abuse could not have been committed because Doherty could not form the intent to act either knowingly or recklessly".

However, under similar circumstances, in *World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 13AP-290, 2013-Ohio-5707, ¶45, the Tenth District held that "abuse"

should not be defined by reference to a statute, but instead should be defined by the plain and ordinary meaning of the term. *World Harvest* explained:

> 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]
>
> [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."
>
> *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 "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").

World Harvest Church, 2013-Ohio-5707, ¶ 45.

There is no difference between the use of the term "abuse" in the abuse endorsement in this case treatment of the term "abuse" in *World Harvest*. There is no mental element in the plain and ordinary meaning of the word "abuse". Consequently, the assailant's mental capacity should have been irrelevant to the issue of the abuse endorsement.

CONCLUSION

Amicus curiae The Ohio Association of Civil Trial Attorneys respectfully urges this Court, as the final arbiter of Ohio law, to accept jurisdiction over this appeal, adopt the Proposition of Law advanced by Appellant United Specialty Insurance Company, and clarify the law in these critically important and wide-ranging, yet still unsettled, areas of Ohio insurance coverage law.

Respectfully submitted,

s/Timothy J. Fitzgerald

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CERTIFICATE OF SERVICE

The foregoing ***Memorandum of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Jurisdiction*** was sent via e-mail pursuant to S.Ct.Prac.R. 3.11(C) on this 25th day of March, 2022 to:

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