

ORIGINAL

IN THE SUPREME COURT OF OHIO

Allstate Insurance Company,

Plaintiff-Appellant

vs.

Dailyn Campbell, et al.,

Defendants-Appellees,

Dustin S. Zachariah, et al,

Defendants-Appellees

09-2358

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Court of Appeals Case No.
09 AP 306

Erie Insurance Exchange,

Plaintiff-Appellant

vs.

Corey Manns, et al.

Defendants-Appellees,

Dustin S. Zachariah, et al

Defendants-Appellees

Court of Appeals Case No.
09 AP 307

American Southern Insurance Co.,

Plaintiff-Appellant,

vs.

Dale Campbell, et al.

Defendants-Appellees,

Dustin S. Zachariah, et al

Defendants-Appellees).

Court of Appeals Case No.
09 AP-308

FILED
DEC 30 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Grange Mutual Casualty Company :
 :
 Plaintiff-Appellant, :
 :
 vs. : Court of Appeals Case No.
 : 09 AP-320
 Corey Manns, et al., :
 :
 Defendants-Appellees :
 :
 Robert J. Roby, Jr., :
 :
 Defendant-Appellee. :

Allstate Insurance Company :
 :
 Plaintiff-Appellant, :
 :
 vs. : Court of Appeals Case No.
 : 09 AP-321
 Dailyn Campbell, et al., :
 :
 Defendants-Appellees :
 :
 Robert J. Roby, Jr., :
 :
 Defendant-Appellee. :

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT AMERICAN
SOUTHERN INSURANCE COMPANY.

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**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST.**

This case presents a number of important issues regarding insurance coverage. The primary issue, which involves virtually every liability insurance policy issued in the state of Ohio, is the scope of the doctrine of inferred intent as applied in the context of an intentional act exclusion in a liability insurance policy.

This declaratory judgment action arises out of an incident that occurred between 9 PM and 9:30 PM on the night of November 18, 2005, on County Road 144 in Hardin, County, Ohio, which is a two-lane country road with a speed limit of 55 mph. It had no streetlights in the area or lights from any houses. It was described as a dangerous road because of its hills and curves. That night a group of high school-age boys, including Dailyn Campbell, the son of American Southern's insured, Dale Campbell, placed an artificial deer in the eastbound lane of County Road 144 just over the crest of the hill so that eastbound drivers would not see the deer until they were approximately 15 yards away. Approximately 5 to 7 minutes after the deer had been placed in road, Robert Roby was driving his car eastbound on County Road 144 with Dustin Zachariah as a passenger. After Roby went over the crest of the hill he took evasive action to avoid the artificial deer and his car went off the road, overturned and came to rest in a cornfield. Both Mr. Roby and Mr. Zachariah sustained serious injuries.

The issue is whether these undisputed facts support an objective inference of intent to injure as a matter of law so as to trigger the provisions of an intentional act

exclusion and preclude coverage. The court of appeals reviewed decisions of this Court ¹ involving the doctrine of inferred intent and concluded:

"In the end, our review of Supreme Court precedent in this arena leads to uncertainty about the Supreme Court's view of the strength of the inferred intent doctrine and whether it could apply to preclude coverage for intentional acts that are not as certain to cause injury as the acts underlying murder and sexual molestation."

(Court of Appeals opinion at ¶ 39).

While other Ohio appellate courts have expanded the doctrine beyond cases involving murder or sexual molestation, ² there appears to be some uncertainty about this court's view on the application of inferred intent. Some appellate courts have refused to extend the doctrine beyond cases of sexual assault and shootings, e.g. *Moler v. Beach* (1995) 102 Ohio App. 3d 322, while other courts have used a "substantially certain to result in injury" standard, e.g. *Westfield Ins. Co. v. Blamer* (9/2/99), 10th Dist. No. 98 AP-1576, 1999 Westlaw 680162; *Nationwide Mut. Ins. v. Finkley* (1996), 112 Ohio App. 3d 712. This case provides an opportunity for this court to clarify its position and provide guidance on the scope of the inferred intent doctrine in relation to intentional act exclusions.

The court of appeals initially framed the issue in this case as whether the conduct of the boys supported an objective inference of intent to injure. ³ Yet, the majority, relying heavily on the subjective testimony of the boys that they neither expected nor intended to cause any harm, determined questions of fact existed as to whether harm

¹ See, *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St. 3d 108; *Physicians Ins. Co. v. Swanson* (1991) 58 Ohio St. 3d 189; *Gearing v. Nationwide Ins. Co.* (1996) 76 Ohio St. 3d 34; *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999) 87 Ohio St. 3d 280, and; *Penn Traffic Co. v. AIU Ins. Co.* (2003) 99 Ohio St. 3d 227.

² See, Court of Appeals opinion at ¶¶ 40 and 41, and cases cited therein.

³ Court of Appeals opinion at ¶ 50.

was substantially certain to occur. As noted by Judge Sadler in her dissent, the determination of an insured's subjective intent or lack thereof is not conclusive on the issue of coverage ⁴ and the boys' testimony about their expectations, plans and intentions should not have been considered. Otherwise, an intentional act exclusion will have no application except in those unlikely situations where the insured admits an intent to injure.

The majority of the court of appeals also determined there was an issue of fact as to whether the accident resulted not only from the boys conduct but also from the speed at which Mr. Roby was driving his car, noting that the boys testified two other vehicles managed to avoid the deer. Again, as noted by Judge Sadler in her dissent, this evidence is irrelevant as the objective inferred intent inquiry looks at what, objectively, can be inferred from the intentional acts of the insured, not the conduct of others. Here, the material facts were undisputed and Judge Sadler properly framed the issue as follows:

"[W]hether the act of placing a decoy deer with wooden blocks attached to it, in the middle of a lane of travel, on a curvy two-lane road, where the speed limit is 55 miles per hour, at night, just beyond the crest of a hill, positioned so that motorists would not see it until they were 15 to 30 yards away from the decoy, is substantially certain to cause injury."

This case provides this Court with an opportunity to clarify its position on the application and scope of the doctrine of inferred intent in the context of an intentional act exclusion in a liability insurance policy and provide guidance to the lower courts on the application of such an exclusion. This is an issue that will affect everyone in this state to whom a liability insurance policy has been issued, whether it be an auto, homeowners or business policy.

⁴ *Gearing* (1996) 76 Ohio St. 3d 34, 39.

This case also presents other issues of public or great general interest. Specifically, (1) whether an insured's conviction based on a no contest plea is admissible in relation to a claim for coverage for damages resulting from the insured's criminal acts; (2) the application and scope of a separate criminal acts exclusion, and; (3) whether subsequent sworn testimony of an insured can create an issue of fact as to that insured's residency in relation to a homeowner's liability insurance policy.

As a result of this incident, Dailyn Campbell was charged with a number of crimes. After entering a plea of no contest, the Hardin County Court of Common Pleas, Juvenile Division, found him guilty of two counts of vehicular vandalism, one count of possessing criminal tools and one count of petty theft. These convictions are relevant not only to the intentional act exclusion, but also a determination as to whether his conduct constituted an occurrence under the policy. The convictions are also relevant to the separate criminal acts exclusion contained in the American Southern policy, which excludes coverage for bodily injury resulting directly or indirectly from a criminal act or omission. The trial court did not address these issues because it found intent to injure must be inferred as a matter of law under the circumstances of this case. The court of appeals, although reviewing the trial court's decision *de novo*, declined to decide these issues. These issues are of public or great general interest and should be addressed by this Court. Indeed, the issue of whether an insured's conviction following a plea of no contest is admissible in relation to a claim for insurance coverage is currently before this court in the case of *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, Sup. Ct. Case No. 09-0321. However the issue is decided in that case, there remains the issue of the criminal act exclusion in this case and the scope of its application.

At the time of this incident, American Southern had in effect a policy issued to Dale Campbell, Dailyn's biological father. In order to qualify as an insured under that policy, Dailyn Campbell had to be a resident of his biological father's household. At the time of this incident, Dailyn Campbell lived with his mother (Donna Deisler), who had legal custody of him, and his stepfather (Jeffrey Deisler). Dailyn testified in the underlying personal injury cases and through answers to interrogatories that during the entire year of 2005, he had not lived with anyone else besides his mother and stepfather and was not a resident of any other household. In this declaratory judgment action, Dailyn and his mother testified he regularly followed a visitation schedule with his father from the time of their divorce up to and after the date of this incident. If an affidavit of a party opposing summary judgment contradicts former deposition testimony of that party the affidavit may not, without sufficient explanation, be used to create a genuine issue of material fact to defeat a motion for summary judgment. *Byrd v. Smith* (2006), 110 Ohio St. 3d 24, 30. The same principle applies to depositions, i.e. a more recent deposition cannot be used to contradict prior deposition testimony. *Carnes v. Gordon Food Service*, 2007 WL 1429627 (2nd Dist.). Here, the subsequent depositions cannot be used to create an issue of fact because they contradict Campbell's deposition testimony in the underlying personal-injury cases and the answers to the Zachariah's interrogatories, and no plausible explanation has been offered for the contradiction. Neither the trial court nor the court of appeals addressed this issue.

This case also offers this Court the opportunity to examine and determine the nature and scope of criminal act exclusions and whether subsequent deposition testimony can be used to create an issue of fact with respect to a residency issue in a liability policy.

For these reasons, and those set forth in the memoranda in support of jurisdiction filed by Allstate, Erie and Grange, this court should accept jurisdiction and review this case on the merits.

STATEMENT OF THE CASE AND FACTS.

STATEMENT OF THE CASE

This declaratory judgment action arises out of an incident that occurred on the night of November 18, 2005, when Robert Roby, while traveling eastbound on a dark, unlit portion of County Road 144 in Hardin, County, Ohio, swerved his vehicle to avoid an artificial deer that had been placed in the roadway by a group of high school-age boys, including Dailyn Campbell. Mr. Roby's vehicle went off the roadway and overturned in a field. He filed suit in the Franklin County court of Common Pleas against Dailyn Campbell and the other boys involved for the injuries he sustained. Dustin Zachariah, a passenger in the Roby vehicle, filed a separate lawsuit against Dailyn Campbell and the others for the injuries he sustained.

American Southern Insurance Company, which insured Dailyn Campbell's father, Dale Campbell, filed this declaratory judgment action against Dailyn, his father, and appellees, Roby and Zachariah. Erie Insurance Exchange, Allstate Insurance and Grange Mutual Casualty Company insured various defendants in the Roby and Zachariah personal-injury cases and filed separate declaratory judgment actions. Each insurance company sought a declaration that they owed no duty to defend and/or indemnify their respective insureds. The declaratory judgment actions were consolidated at the trial court level.

On February 6, 2009, the trial court granted summary judgment to American Southern (and the other insurance companies) because the conduct of Dailyn Campbell

and his cohorts was substantially certain to result in harm and therefore excluded under the intentional act exclusions of the various policies. The trial court did not, with respect to American Southern, reach the issues of whether Dailyn Campbell (1) was an insured under the American Southern policy; (2) whether his conduct amounted to an occurrence under the policy; (3) whether his criminal convictions following a plea of no contest were admissible in relation to the coverage issues, or; (4) whether the criminal act exclusion precluded coverage. The trial court's decision was journalized by entry dated March 4, 2009. Roby and Zachariah separately appealed the decision of the trial court and those appeals were consolidated by the 10th District Court of Appeals.

STATEMENT OF FACTS.

On the evening of Friday, November 18, 2005, Dailyn Campbell spoke on the telephone with Corey Manns, who told Dailyn a group of young men wanted to put a fake deer on the road, and were looking for one. Thereafter, a vehicle driven by Josh Lowe in which Corey Manns, Jesse Howard and Taylor Rogers were passengers, arrived at Dailyn's home. Dailyn joined this group.

Dailyn told the group he knew where they could find a fake deer on property near his home. He described it as an archery target. The group drove to the nearby property where Dailyn, Corey Manns and Jesse Howard stole the deer and put it in the back of the Lowe vehicle, which was an SUV. They did not have permission to take the deer. The group then traveled to the home of Josh Lowe where, working in his garage, they fashioned a leg or stand with a piece of wood so the deer would stand upright on its own. They also spray-painted swearwords and "hit me" on it. This was completed around 8:45 p.m.-9 p.m. Dailyn then suggested they place the deer on County Road 144. The group left the Lowe residence and eventually traveled eastbound on County Road 144,

which is a two lane country road with a speed limit of 55 mph. They picked a spot on the road to place the deer and Dailyn Campbell along with either Corey Manns or Jesse Howard placed the deer entirely in the eastbound lane of County Road 144 standing upright just over the crest of a hill.

The purpose for putting the deer in that position on the road was "to make cars slow down or maybe hit it." Indeed, because the deer was placed in the road at night just over the crest of a hill, someone heading eastbound on County Road 144 would not be able to see the deer until they were only 15 yards away. The accident occurred between 9 p.m. and 9:30 p.m. At that time of night in November, and in the area where the incident occurred, County Road 144 was a dark country road, with no street lights in the area or lights from any houses. In addition, there was no fluorescent tape or paint placed on the deer or any other warning signs to alert an approaching driver to its presence. Indeed, Taylor Rogers testified County Road 144 was dangerous because of its hills and curves. Approximately 5-7 minutes after the deer was placed in road, the inevitable happened as Robert Roby traveled eastbound on County Road 144 with Dustin Zachariah as a passenger. After Mr. Roby went over the crest of the hill he took evasive action to avoid hitting the fake deer and his vehicle went off the road, overturned and came to a rest in a cornfield.

As a result of this incident, Dailyn Campbell was charged with a number of crimes. He entered a plea of no contest and the Hardin County Court of Common Pleas, Juvenile Division, found him guilty of two counts of vehicular vandalism,⁵ one count of possessing criminal tools⁶ and one count of petty theft.⁷

⁵ 2nd degree felonies in violation of Revised Code §2909.09 (B) (1) (c).

⁶ 5th degree felony in violation of Revised Code §2929.24 (A).

⁷ 1st degree misdemeanor in violation of Revised Code §2913.02 (A) (1).

On November 18, 2005, Dailyn Campbell lived at 12476 County Road 265 in Hardin County, Ohio with his mother (Donna Deisler), who had legal custody of him, and his stepfather (Jeffrey Deisler). During the entire year of 2005, he had not lived with anyone else besides his mother and stepfather and was not a resident of any other household. American Southern issued a fire and extended coverage policy to Dale and Jeanette Campbell who lived at 7330 County Road 50 in Ridgeway, Ohio. The policy was in effect at the time of this incident. Dale Campbell is Dailyn Campbell's biological father.

The Personal Liability Coverage of the policy issued to Dale and Jeanette Campbell provides:

"Coverage L--Liability-- "We" pay, up to "our" "limit", all sums for which any "insured" is liable by law because of "bodily injury" or "property damage" caused by an "occurrence." This insurance only applies if the "bodily injury" or "property damage" occurs during the policy period. "We" will defend a suit seeking damages if the suit resulted from "bodily injury" or "property damage" not excluded under this coverage."

The term "occurrence" is defined by the policy as follows:

"14. "Occurrence" means an **accident**, including repeated exposures to similar conditions, that results in "bodily injury", or results in "property damage"" (Emphasis added).

The policy excludes liability coverage for bodily injury which results directly or indirectly from the following:

"j. an intentional act of any "insured" or an act done at the direction of any "insured";

"o. a criminal act or omission."

The liability portion of the American Southern policy contains certain definitions applicable to that coverage. Paragraph 1 of the definitional section defines "you" and "your" to mean the person or persons named as the "insured" on the "declarations" page. The declarations page identifies Dale and Jeanette Campbell as the named insureds. The policy further defines insured as follows:

9. "Insured" means:

- a. "you";
- b. "your" relatives if residents of "your" household;
- c. persons under the age of 21 in "your" care or in the care of "your" resident relatives; *****

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.

Proposition of Law No. I:

Where the undisputed material facts establish that an insured's conduct was substantially certain to cause harm, such conduct does not qualify as an "occurrence," where that term is defined as an "accident" under a liability insurance policy.

In determining whether coverage exists under a liability insurance policy, the threshold issue is whether the insured's conduct and resulting harm constitute an "occurrence" under the policy. An insurance company has no obligation to its insured or to others harmed by the actions of an insured, unless the conduct of the insured falls within the coverage of the policy. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St. 3d 34, 36. Moreover, liability insurance does not exist to relieve a wrongdoer from intentional, antisocial or criminal conduct and "inherent in any policy's definition of 'occurrence' is the concept of an incident of an accidental as opposed to intentional nature." *Id.* at 38. The circumstances of this case do not constitute an "occurrence" under the American Southern policy, which defines "occurrence" as an accident that results in bodily injury. The policy does not define the word "accident" and therefore it

must be given its ordinary meaning which, in the context of an insurance policy, refers to “unintended” or “unexpected” happenings, i.e. those that are accidental as opposed to intentional in nature. *Morner v. Giuliano* (2006), 167 Ohio App.3d 785. There was nothing accidental about the manner in which Mr. Roby and Mr. Zachariah were injured.

Whether an injury was caused intentionally or was unexpected or unintended cannot be decided on the basis of an insured's self-serving statement that he did not intend any harm. This subjective analysis, employed by the court of appeals, essentially eviscerates an intentional act exclusion limiting it to those infrequent occurrences when an insured "confesses" an intent to harm. When an objective analysis of the undisputed facts shows the insured's conduct was substantially certain to cause harm, the conduct does not qualify as an occurrence and there can be no coverage.

Proposition of Law No. II:

The doctrine of inferred intent as applied to an intentional act exclusion in a liability insurance policy is not limited to cases of sexual molestation or murder and may be applied where the undisputed facts establish harm was substantially certain to occur as a result of the insured's conduct.

In order to invoke the intentional act exclusion, an insurance company must show that both the insured's action and the resulting harm were intended **or** expected. *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, 193-194. Intent to cause the harm can be inferred when an action is committed with substantial certainty that the harm will result. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34. In *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999) 87 Ohio St. 3d 280, relied upon by appellees, this court held that an intent to injure could be inferred as a matter of law in limited circumstances, citing its decisions in *Gearing* and *Preferred Risk Ins. Co. v.*

Gill (1987), 30 Ohio St. 3d 108 (cases involving sexual molestation and murder, respectively). This seemed to be a retreat from the holding in *Gearing*. In *Penn Traffic Co. v. AIU Ins. Co.* (2003) 99 Ohio St. 3d 227, this court seemed to return to the *Gearing* standard when it quoted from Justice Cook's concurring opinion in *Buckeye Union* where she stated that where substantial certainty exists intent can be inferred as a matter of law. Ohio appellate courts have not limited the application of the inferred intent doctrine to cases involving murder or sexual molestation and have determined other acts created a substantial certainty of harm. This court should clarify the law Ohio and hold that when an insured's conduct causes a substantial certainty of harm (murder, sexual molestation or other violent acts), or where, as here, the insured creates an inherently dangerous situation where harm is substantially certain, the conduct triggers the intentional act exclusion and precludes coverage.

Proposition of Law No. III:

Where made independently relevant by an insurance policy exclusion, an insured's criminal conviction based on a no contest plea is admissible to defend against the insured's claim for coverage for damages resulting from the insured's criminal acts.

This issue obviously has relevance to this case with respect to Propositions of Law I and II as the criminal convictions of Dailyn Campbell go directly to the issue of whether his conduct constituted an occurrence and whether his conduct was substantially certain to cause harm. Dailyn Campbell should not be allowed to plead no contest, be convicted of felony and other charges and then claim innocence when seeking coverage for the same conduct which led to the convictions. This issue is currently before this court in the case of *Elevators Mut. Ins.Co. v. J. Patrick*

O'Flaherty's Inc., Supreme Court Case No. 09-0321. American Southern requests this court to adopt of this proposition of law for the reasons set forth in *Elevators Mut.*

Proposition of Law No. IV:

An exclusion for criminal acts is separate and distinct from an exclusion for intentional acts and operates to preclude coverage regardless of the intent of the insured.

The criminal act exclusion is a separate exclusion and applies regardless of the intentional act exclusion. *Allstate v. Ray*, 1998 WL 896366 (7th District) It does not require a showing Campbell acted with the intent or expectation of causing harm, only that he committed a criminal act. The record clearly establishes he committed several criminal acts and coverage is therefore excluded.

Even if Dailyn Campbell had not been charged with criminal offenses or adjudicated delinquent and found guilty of those offenses, his conduct still constituted violations of the criminal code, i.e. criminal acts. The language of this exclusion is clear and unequivocal. It does not require the insured to be charged with or convicted of a crime, only that the insured commit a criminal act which directly or indirectly results in bodily injury to another. His theft of the artificial deer with the intent to place it on a country road in the path of any oncoming vehicle and carrying out that intent amount to criminal acts defined as theft, possession of criminal tools and vehicular vandalism. Accordingly, coverage is excluded under the policy.

CONCLUSION.

For the reasons set forth above and those set forth in the memoranda in support of jurisdiction filed by co-appellants, Allstate, Erie and Grange, appellate American southern insurance company respectfully requests this court to accept jurisdiction in this case so the important issues presented may be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following by US mail, postage prepaid, on the 30th day of December, 2009.

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Robert H. Willard (0002386)

APPENDIX

Daniel Hurley

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2009 NOV 17 PM 12:21
CLERK OF COURTS

Allstate Insurance Company, :
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Plaintiff-Appellee, :

v. :
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Dailyn Campbell et al., :
 :
Defendants-Appellees, :

No. 09AP-306
(C.P.C. No. 07CVH07-8934)

(REGULAR CALENDAR)

Dustin S. Zachariah et al., :
 :
Defendants-Appellants. :

Erie Insurance Exchange, :
 :
Plaintiff-Appellee, :

v. :
 :
Corey Manns et al., :
 :
Defendants-Appellees, :

No. 09AP-307
(C.P.C. No. 07CVH05-6515)

(REGULAR CALENDAR)

Dustin S. Zachariah et al., :
 :
Defendants-Appellants. :

American Southern Insurance Company, :
 :
Plaintiff-Appellee, :

v. :
 :
Dale Campbell et al., :
 :
Defendants-Appellees, :

No. 09AP-308
(C.P.C. No. 07CVH08-11422)

(REGULAR CALENDAR)

Nos. 09AP-306, 09AP-307, 09AP-308, 09AP-309,
09AP-318, 09AP-319, 09AP-320, and 09AP-321

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Dustin S. Zachariah et al.,	:	
Defendants-Appellants.	:	
	:	
Grange Mutual Casualty Company,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-309
	:	(C.P.C. No. 08CVH02-3167)
Corey Manns et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
Dustin S. Zachariah et al.,	:	
Defendants-Appellants.	:	
	:	
Erie Insurance Exchange,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-318
	:	(C.P.C. No. 07CVH05-6515)
Corey Manns et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
Robert J. Roby, Jr.,	:	
Defendant-Appellant.	:	
	:	
American Southern Insurance Company,	:	
Plaintiff-Appellee,	:	

Nos. 09AP-306, 09AP-307, 09AP-308, 09AP-309,
09AP-318, 09AP-319, 09AP-320, and 09AP-321

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v. :
Dale Campbell et al., :
 :
 : Defendants-Appellees, :
 :
 : Robert J. Roby, Jr., :
 :
 : Defendant-Appellant. :
 :
 : Grange Mutual Casualty Company, :
 :
 : Plaintiff-Appellee, :
 :

No. 09AP-319
(C.P.C. No. 07CVH08-11422)

(REGULAR CALENDAR)

v. :
Corey Manns et al., :
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 : Defendants-Appellees, :
 :
 : Robert J. Roby, Jr., :
 :
 : Defendant-Appellant. :
 :
 : Allstate Insurance Company, :
 :
 : Plaintiff-Appellee, :
 :

No. 09AP-320
(C.P.C. No. 08CVH02-3167)

(REGULAR CALENDAR)

v. :
Dailyn Campbell et al., :
 :
 : Defendants-Appellees, :
 :
 : Robert J. Roby, Jr., :
 :
 : Defendant-Appellant. :
 :

No. 09AP-321
(C.P.C. No. 07CVH07-8934)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 17, 2009

*Crabbe, Brown & James LLP, and Daniel J. Hurley, for
appellee Allstate Insurance Company.*

*Caborn & Butauski Co., LPA, and David A. Caborn, for
appellee Erie Insurance Exchange.*

*Harris & Mazza, and Robert H. Willard, for appellee American
Southern Insurance Company.*

*Gary L. Grubler, for appellee Grange Mutual Casualty
Company.*

*Paul O. Scott, for appellants Dustin S. Zachariah and
Katherine E. Piper.*

*Karr & Sherman Co., LPA, Keith M. Karr, and David W.
Culley, for appellant Robert J. Roby, Jr.*

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendants-appellants, Dustin S. Zachariah, his mother, Katherine E. Piper, and Robert J. Roby, Jr., appeal from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiffs-appellees, Allstate Insurance Company ("Allstate"), Erie Insurance Exchange ("Erie"), American Southern Insurance Company ("American Southern"), and Grange Mutual Casualty Company

("Grange"), on appellees' declaratory judgment actions. For the following reasons, we reverse the trial court's judgment and remand the matter for further proceedings.

{¶2} Joey Ränge, Carson Barnes, Jesse Howard, Corey Manns, Dailyn Campbell, Taylor Rogers, and Joshua Lowe were friends as well as teammates on the Kenton High School football team. On the evening of November 18, 2005, Lowe, accompanied by Manns, Rogers, Howard, and Campbell, drove to a residence in a nearby town and stole a target deer with the intention of later placing it in the travel lane of a rural highway. The group transported the stolen target deer to Lowe's garage, Campbell spray painted profanities and the words "hit me" on the deer while others altered the legs so it could stand upright on pavement.

{¶3} Rogers became ill and left. Shortly thereafter, Barnes and Ränge joined the group. Around 9:00 p.m., the six remaining boys loaded the deer into Lowe's vehicle and drove around, searching for a spot to set it up. Campbell suggested that they place it on County Road 144 ("CR 144"), a two-lane rural highway with a speed limit of 55 m.p.h. Following some discussion about placement options, the six eventually settled on a location just beyond the crest of a hill in the eastbound lane of CR 144. Campbell and Manns retrieved the target deer from the vehicle and placed it in the center of the travel lane; Howard, Lowe, Ränge, and Barnes remained inside the vehicle.

{¶4} After Manns and Campbell returned to the vehicle, Lowe drove up and down CR 144 in order to observe the reactions of motorists suddenly confronted with the deer positioned directly in their travel lane. The group observed at least two motorists approach the deer, navigate around it, and continue on their way. Shortly thereafter, a

vehicle operated by Roby and occupied by Zachariah crested the hill, swerved to avoid the deer, and careened into an adjacent field. Both Roby and Zachariah sustained serious physical injuries as a result of the accident.

{¶5} Manns, Howard, and Campbell subsequently entered no contest pleas in juvenile court to two counts of second-degree felony vehicular vandalism in violation of R.C. 2909.09(B)(1)(c), one count of fifth-degree felony possessing criminal tools in violation of R.C. 2929.24(A), and one count of first-degree misdemeanor petty theft in violation of R.C. 2913.02(A)(1). The juvenile court accepted the pleas, adjudicated the three delinquent, and found them guilty.

{¶6} Appellant Roby thereafter filed a negligence action against the seven boys involved in the incident.¹ Appellants Zachariah and Piper also filed a negligence action against the seven boys.²

{¶7} During the pendency of appellants' lawsuits, appellees filed declaratory judgment actions against their respective insureds³ seeking declarations that they had no legal obligation to defend them in the underlying tort actions or indemnify them against

¹ Roby also asserted negligent supervision claims against the boys' parents and several claims against DaimlerChrysler Corporation, the manufacturer of his automobile.

² Zachariah and Piper also asserted a negligence claim against Roby and a claim for underinsured motorists benefits against their insurance carrier, Nationwide Mutual Insurance Company.

³ American Southern insured Campbell and his father, Dale Campbell, pursuant to a homeowner's policy; Erie insured Manns and his mother, Brenda Ober, and Barnes and his parents, Dan and Sheri Barnes, pursuant to homeowners' policies; Grange insured Manns and his father, Rodney Manns, pursuant to a homeowner's policy; and Allstate insured Campbell and his mother, Donna Deisler, and Howard and his father, Clarence Howard, pursuant to a homeowners' policy. Allstate ultimately obtained a default judgment against Howard. On April 28, 2009, Allstate, Zachariah, Piper, and Roby filed a written stipulation that Allstate would not use the default judgment it obtained against Howard as a defense or basis not to pay Allstate's applicable liability insurance coverage to Zachariah and Piper or Roby if such coverage was ultimately found to be available and those parties were successful in their negligence actions against Howard.

any liability imposed by such actions. Appellees' complaints also named appellants as defendants. Upon motion of the parties, the trial court consolidated the actions.

{¶8} "It is axiomatic that an insurance company is under no obligation to its insured, or to others harmed by the actions of an insured, unless the conduct alleged of the insured falls within the coverage of the policy." *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36, 1996-Ohio-113. "Coverage is provided if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto." *Id.* "'([A]) defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it.'" *Continental Ins. Co. v. Louis Marx & Co., Inc.* (1980), 64 Ohio St.2d 399, 401, quoting *Arcos Corp. v. Am. Mut. Liability Ins. Co.* (D.C.E.D.Pa.1972), 350 F.Supp. 380, 384.

{¶9} At issue in this case is whether appellants' claims against Manns, Barnes, Howard, and Campbell fall within the coverage provided by the pertinent insurance policies and do not fall within an exception in those policies. Accordingly, resolution of this issue requires an examination of the applicable provisions of the various policies, which are set forth below.

{¶10} The Allstate policies issued to Campbell and Howard contain identical terms and conditions and provide, in pertinent part, as follows:

**Coverage X
Family Liability Protection**

Losses We Cover Under Coverage X:

Subject to the terms, conditions and limitations of this policy, **Allstate** will pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury** or

property damage arising from an **occurrence** to which this policy applies, and is covered by this part of the policy.

We may investigate or settle any claim or suit for covered damages against an **insured person**. If an **insured person** is sued for these damages, **we** will provide a defense with counsel of **our** choice, even if the allegations are groundless, false or fraudulent. * * *

{¶11} The Allstate policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury** or **property damage**."

{¶12} In addition, the Allstate policies contain the following exclusionary language:

1. **We** do not cover any **bodily injury** or **property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**. This exclusion applies even if:

a) such **insured person** lacks the mental capacity to govern his or her conduct;

b) such **bodily injury** or **property damage** is of a different kind or degree than intended or reasonably expected; or

c) such **bodily injury** or **property damage** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such **insured person** is actually charged with, or convicted of a crime.

{¶13} The policies issued by Erie to Manns and Barnes contain identical terms and conditions and provide, as relevant here, as follows:

BODILY INJURY LIABILITY COVERAGE

PROPERTY DAMAGE LIABILITY COVERAGE

* * *

We will pay all sums up to the amount shown on the **Declarations** which **anyone we protect** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** caused by an **occurrence** during the policy period. We will pay for only **bodily injury** or **property damage** covered by this policy.

We may investigate or settle any claim or suit for damages against **anyone we protect**, at **our** expense. If **anyone we protect** is sued for damages because of **bodily injury** or **property damage** covered by this policy, we will provide a defense with a lawyer we choose, even if the allegations are not true. * * *

{¶14} The policies define "occurrence" as "an accident, including continuous or repeated exposure to the same general harmful conditions."

{¶15} The Erie policies also include the following coverage exclusions:

We do not cover under *Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage and Medical Payments to Others Coverage*:

1. **Bodily injury, property damage, or personal injury** expected or intended by **anyone we protect** even if:

a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or

b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.

{¶16} The Grange policy issued to Manns provides the following terms and conditions:

COVERAGE E – PERSONAL LIABILITY COVERAGE

We will pay all sums, up to our limits of liability, arising out of any one loss for which an **insured person** becomes legally

obligated to pay as damages because of **bodily injury or property damage**, caused by an **occurrence** covered by this policy. * * *

If a claim is made or suit is brought against the **insured person** for liability under this coverage, we will defend the **insured person at our** expense, using lawyers of our choice.
* * *

{¶17} The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in **bodily injury or property damage** during the policy period."

{¶18} The Grange policy also includes the following exclusions:

Under Personal Liability Coverage and Medical Payments to Others Coverage, we do not cover:

* * *

4. **Bodily Injury or Property Damage** caused by the willful, malicious, or intentional act of a minor for which an **insured person** is statutorily liable.

* * *

6. **Bodily Injury or Property Damage expected or intended by any** insured person.

{¶19} The American Southern policy issued to Campbell provides the following terms and conditions:

Coverage L – Liability – "We" pay, up to "our" "limit", all sums for which any "insured" is liable by law because of "bodily injury" or "property damage" caused by an "occurrence". This insurance only applies if the "bodily injury" or "property damage" occurs during the policy period. "We" will defend a suit seeking damages if the suit resulted from "bodily injury" or "property damage" not excluded under this coverage. * * *

{¶20} The policy defines "occurrence" as "an accident, including repeated exposures to similar conditions, that results in 'bodily injury', or results in 'property damage', if such 'property damage' loss occurs within a 72 hour period."

{¶21} The American Southern policy also contains the following exclusions:

"We" do not pay for a loss if one or more of the following excluded events apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded event.

* * * Liability and Medical Payment Coverage does not apply to "bodily injury" or "property damage" which results directly or indirectly from:

* * *

j. an intentional act of any "insured" or an act done at the direction of any "insured";

* * *

o. a criminal act or omission.

{¶22} Appellees filed separate motions for summary judgment. American Southern argued it was entitled to summary judgment for the following reasons: (1) Campbell did not qualify as an insured under the policy because he did not reside with his father at the time of the accident; (2) the incident giving rise to the Roby and Zachariah lawsuits was not an occurrence as defined by the policy; (3) Campbell's conduct was intentional and expected and, therefore, excluded from coverage under the policy; (4) Campbell's conduct constituted a criminal act for which coverage was excluded; and (5) the policy's intentional acts exclusion also excluded coverage for Dale Campbell's

negligent supervision and control of his son. Erie similarly argued it was entitled to summary judgment for the following reasons: (1) Manns' and Barnes' conduct did not constitute an occurrence giving rise to coverage under the policies; (2) Manns' and Barnes' conduct was intentional, with injury or damage expected and substantially certain to occur, thus excluding coverage; and (3) Manns' juvenile court delinquency adjudication precluded Erie's obligation to defend or provide coverage under the policy. Allstate similarly argued it was entitled to summary judgment on the following grounds: (1) the incident giving rise to the Roby and Zachariah lawsuits did not constitute an occurrence as defined in the policies; (2) coverage was excluded because Campbell's and Howard's conduct was intentional, and the resulting bodily injury was reasonably expected; (3) Campbell's and Howard's juvenile court delinquency adjudications conclusively established intent for purposes of the intentional act exclusion; and (4) the policies' intentional acts exclusions also excluded coverage for Donna Deisler's and Clarence Howard's negligent supervision of their sons. Grange asserted it was entitled to summary judgment because (1) Manns' actions did not constitute an occurrence as defined in the policy, (2) Manns' conduct was intentional and, thus, barred by the intentional conduct policy language, and (3) Manns' delinquency adjudications precluded Grange's obligation to defend or provide coverage under the policy.

{¶23} American Southern, Grange, and Erie thus argued that, because their respective insureds were not entitled to coverage under the terms of their policies, they did not have a duty to defend or indemnify them against the claims asserted in appellants'

tort actions. Allstate argued only that it had no duty to indemnify its insureds in the claims asserted in the Roby and Zachariah lawsuits.

{¶24} Roby filed a single memorandum contra opposing all four appellees' motions for summary judgment. Roby asserted that the intentional conduct exclusionary language in the policies did not apply. More specifically, Roby argued that the "inferred intent" rule did not apply to the boys' conduct because they neither intended nor expected harm to befall either Roby or Zachariah as a result of their placing the deer in the roadway. Roby further argued that the juvenile court adjudications could not be used to infer intent because those adjudications were inadmissible and bore no relation to the ultimate issue of coverage. He also argued that genuine issues of material fact existed regarding the boys' intentions and expectations. In addition, Roby maintained that Campbell was an insured under the American Southern policy because, at the time of the accident, he resided at least part-time with his father pursuant to a court-ordered visitation schedule. Zachariah and Piper filed separate memorandum contra opposing each of the motions for summary judgment filed by the four appellees, asserting essentially the same arguments presented by Roby.

{¶25} By decision filed February 6, 2009, the trial court determined that the personal injuries sustained by Roby and Zachariah did not result from an accident and were otherwise excluded from coverage under the policies' intentional conduct exclusions. More particularly, although the trial court noted that the testimony in the record "consistently demonstrates that the [boys] neither intended nor expected any personal injury or property damage," the trial court nonetheless determined that the boys'

intentional actions in placing the target deer over the crest of a hill at night on a roadway with a speed limit of 55 m.p.h. created a situation where harm was "substantially certain" to occur. Having so found, the court inferred intent as a matter of law. Accordingly, the court concluded that the intentional injury exclusion in the policies applied, and appellees had no duty to defend or indemnify the insureds in the pending personal injury actions. Having so concluded, the court did not consider issues regarding (1) the residency restrictions in the American Southern policy, and (2) the effect of the boys' delinquency adjudications. The trial court journalized its decision by entry filed March 4, 2009.

{¶26} Appellants have separately appealed; each advances one assignment of error. Appellants Zachariah and Piper assert:

The trial court committed reversible error when it granted summary judgment and ruled that intent to injure must be inferred as a matter of law to deny insurance coverage, when boys, engaged in a prank, placed an artificial deer on the roadway.

{¶27} Appellant Roby contends:

The trial court prejudicially erred in granting summary judgment to the Plaintiffs-Appellees by inferring, as a matter of law, that a group of high-school boys intended to cause injury when they placed a fake-deer decoy on a road as a prank in the context of determining insurance coverage in a declaratory-judgment action.

{¶28} Appellants' assignments of error are interrelated, and we will address them jointly. Appellants contend that the trial court erred in granting summary judgment for appellees. More specifically, appellants contend that their injuries resulted from an "accident," and, as such, the loss constituted an "occurrence" for purposes of all four

policies. Appellants further contend that the intentional injury exclusion in the policies does not apply because the record evidence demonstrates that the boys neither intended nor expected any bodily injury to Roby or Zachariah. Although appellants separately argue the issues of coverage for "accidents" and the applicability of the express exclusions for intended or expected injuries, the issue is the same—whether the boys' conduct was an accident or whether it was intended or expected to cause injury. Appellants contend that the question of whether the insureds had the requisite intent to cause injury is a question of fact and that the trial court erred in inferring intent as a matter of law. Appellants assert that, because genuine issues of material fact exist as to whether the insureds intended to cause bodily injury, the trial court erred in granting summary judgment for appellees.

{¶29} An appellate court reviews a summary judgment disposition independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. In conducting this review, an appellate court applies the same standard employed by the trial court. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107. Accordingly, an appellate court "review[s] the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion." *Am. Energy Servs., Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 208. Proper evidentiary materials include only "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." Civ.R. 56(C).

{¶30} Pursuant to Civ.R. 56(C), summary judgment is appropriate only where the evidence demonstrates the following: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reviewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party. *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221. We must resolve any doubts in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶31} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. *Id.* Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims. *Id.* If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Id.* However, once the moving party satisfies its initial burden, the non-moving party bears the burden of offering specific facts showing that there is a genuine issue for trial. *Id.* The non-moving party may not rest upon the mere allegations and denials in the pleadings, but, instead,

must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E); *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶32} It is well established that an insurance policy is a contract, to which we must give a reasonable construction that conforms with the intentions of the parties as gathered from the ordinary and commonly understood meaning of the language they used. *Dealers Dairy Prods. Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, paragraph one of the syllabus. As we noted, each of the policies at issue here grants coverage for an "occurrence" or "accident," but also excludes coverage for intentional acts.

{¶33} In *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, syllabus, the Supreme Court of Ohio held that, "[i]n order to avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expected or intended." In that case, Bill Swanson fired a BB gun toward a group of teenagers who were sitting about 70 to 100 feet away from him. He testified that he was aiming at a sign on a tree 10 to 15 feet from the group, not at them. Nevertheless, one of the BBs hit one of the teenagers, who lost an eye. The trial court found that the injury was accidental and that the insured was obligated to defend and indemnify Swanson, the insured. The Supreme Court affirmed that holding.

{¶34} In *Gearing*, the Supreme Court inferred intent for these purposes. In that case, Peter and Catherine Ozog and their three minor daughters sued Henry Gearing for recovery of damages arising from Gearing's sexual molestation of the three girls. Gearing sought a declaratory judgment that Nationwide, his homeowner's insurance carrier, was obligated to defend and indemnify him in the Ozogs' suit. Gearing admitted

that he intentionally touched the girls inappropriately, but claimed that he did not know that his acts could cause emotional and mental harm to them.

{¶35} In affirming the trial court's grant of summary judgment in favor of Nationwide, the Supreme Court adopted the inferred intent rule, which provides that "intent to injure is inferred as a matter of law from the act of sexual abuse of a child itself, as harm is deemed inherent in the sexual molestation." *Id.* at 36-37. Rather than using the rule to consider whether exclusions to coverage applied, the court used the rule to determine whether coverage was available in the first instance, that is, whether intentional acts of child molestation could be considered "occurrences" for which insurance coverage could be obtained or, instead, could be seen as an intentional tort for which coverage would be contrary to public policy. Within these contexts, the court concluded that (1) Gearing's acts were not "accidental," and, therefore, not occurrences under the policies at issue, and (2) public policy precluded coverage.

{¶36} The court also explained that an insured's denial of an intention to harm anyone is "only relevant where the intentional act at issue is not substantially certain to result in injury." *Id.* at 39. In *Swanson*, for example, the insured's claim that he did not intend or expect anyone to be harmed "was not necessarily logically inconsistent with the facts surrounding the shooting." *Gearing* at 39. The court explained, however, that if the facts surrounding the shooting at issue in *Swanson* had been different—that is, if the shooting had been at close range—then *Swanson* would have been more analogous to *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, in which the court concluded that a murderer's intentional acts fell within an intentional injury exclusion.

{¶37} In *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St.3d 280, 1999-Ohio-67, the Supreme Court appeared to retreat from the application of inferred intent based on substantial certainty of injury. Citing *Swanson*, the court stated that "an intent to injure, not merely an intentional act, is a necessary element to uninsurability. Whether the insured had the necessary intent to cause injury is a question of fact." *Id.* at 283. Citing *Gill and Gearing*, the court referred to those circumstances in which it had inferred intent to injure as "very limited instances." *Id.* In both *Gill and Gearing*, the "insureds were found to have committed wrongful acts, acts that are intentionally injurious by definition." *Id.* at 284. In contrast, in *Buckeye Union*, the intentional act at issue was the failure to settle an insurance claim, an act far different from the murder and molestation at issue in *Gill and Gearing*. In her concurring opinion, Justice Cook recognized the court's holding in *Buckeye Union* as a departure from *Gearing* and the application of inferred intent based on a substantial certainty of injury. See *id.* at 288 (Cook, J., concurring).

{¶38} Arguably, the Supreme Court slowed its retreat from inferred intent in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, in which the court considered whether a particular type of commercial general liability policy covered an employer's liability for substantially certain intentional torts. In our view, *Penn Traffic* is of little value in the context of the case before us, however. The commercial policy at issue in *Penn Traffic* expressly excluded coverage for acts that are substantially certain to cause bodily injury and expressly defined "substantially certain" for these purposes. Therefore, we conclude that it offers us little guidance. Accord *GNFH, Inc. v. West Am.*

Ins. Co., 172 Ohio App.3d 127, 2007-Ohio-2722, ¶54 (concluding that the court's statements on inferred intent were dicta "and had nothing to do with the issue being decided").

{¶39} In the end, our review of Supreme Court precedent in this arena leads to uncertainty about the Supreme Court's view of the strength of the inferred intent doctrine and whether it could apply to preclude coverage for intentional acts that are not as certain to cause injury as the acts underlying murder and sexual molestation. There is no uncertainty, however, about the strength of the inferred intent doctrine among Ohio's appellate courts, which have expanded inferred intent well beyond murder and molestation.

{¶40} In *Horvath v. Nationwide Mut. Fire Ins. Co.* (1996), 108 Ohio App.3d 732, for example, this court reversed a trial court's denial of summary judgment where an insured pleaded guilty to negligent homicide. We held that an insured's intentional act of swinging a metal club with enough force to fracture the victim's skull and cause his brains to seep out showed, as a matter of law, that an injury was substantially certain to occur. We rejected the notion that coverage was required because the insured did not intend or expect to kill anyone. Rather, the insured's "intent to do physical harm" was enough to preclude coverage. *Id.* at 736.

{¶41} Many Ohio courts have similarly inferred intent where an insured has committed an act of violence. See, e.g., *Baker v. White*, 12th Dist. No. CA2002-08-065, 2003-Ohio-1614 (ramming a truck into another car); *State Farm Mut. Auto. Ins. v. Hayhurst* (May 31, 2000), 4th Dist. No. 99 CA 25 (crashing a car into a building); *W.*

Reserve Mut. Cas. Co. v. Macaluso (1993), 91 Ohio App.3d 93 (shooting an intruder at close range); *Aguilar v. Tallman* (Mar. 15 1999), 7th Dist. No. 97 C.A. 116 (punching someone in the face); *Allstate Ins. Co. v. Ray* (Dec. 18, 1998), 7th Dist. No. 96 CA 20 (shooting a barrage of bullets into a car at close range); *Erie Ins. Co. v. Stalder* (1996), 114 Ohio App.3d 1 (engaging in a fistfight).

{¶42} We can easily distinguish the facts of this case from the facts at issue in *Gill* and *Gearing*, where the egregious acts of murder and molestation were intentionally injurious by definition. We can also distinguish this case from those cases involving violent acts committed directly against a person or property, acts that common sense tells us are generally intended, and substantially certain, to cause injury. It is more difficult, however, to distinguish the facts of this case from those at issue in cases where injury was less certain, but nevertheless certain enough to lead the court to infer intent as a matter of law. The trial court relied on two such cases.

{¶43} In *Westfield Ins. Co. v. Blamer* (Sept. 2, 1999), 10th Dist. No. 98AP-1576, a heavily-intoxicated Arthur Creighton poured lighter fluid on a sofa located on the front porch of the home of Freda and David Blamer and then ignited the sofa with a lighter. The ensuing fire spread to the home, causing significant property damage and injuring the Blamers. When the Blamers sued Creighton, he sought coverage under his parents' homeowner's policy. Finding no intent to injure the Blamers, the trial court granted summary judgment in favor of Creighton, the insured. On appeal, this court reversed. We found it "immaterial" that the insured did not intend for the fire to spread to the residence or to harm the inhabitants. Instead, we concluded that the insured "necessarily

intended to cause some harm (and harm was substantially certain to result) when he doused the couch with lighter fluid and set it on fire." Thus, the Blamers' damages did not result from an "occurrence" under Creighton's policy.

{¶44} In *Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App.3d 712, Anwar Stembridge, a 16-year-old without a driver's license, drove a van owned by his grandmother, Gertrude Finkley, without her permission. Discovering the van missing, Finkley reported it stolen. When police attempted to pull the van over, Stembridge fled, drove through a stop sign, and crashed into the vehicle of Dorethea and Sheko Poteete, who sustained injuries. When the Poteetes sued Stembridge and Finkley, Finkley sought coverage under her automobile insurance policy. The policy excluded coverage for "willful acts the result of which the insured knows or ought to know will follow from the insured's conduct." The trial court found that Stembridge's intentional acts precluded coverage and granted summary judgment to the insurer. On appeal, the Ninth District affirmed. The court held "that where an insured willfully and purposefully attempts to elude the police in an automobile chase through an urban area in reckless disregard of traffic control devices, his actions are substantially certain to result in injury." *Id.* at 715.

{¶45} While we agree that *Blamer* and *Finkley* are closer to the facts of this case than those cases that involve violent acts committed directly against a person or property, we have found no Ohio case that involves facts closely akin to the facts before us, i.e., where a group of teenage boys intend to commit a prank. We look, then, to cases outside Ohio.

{¶46} In *Buckel v. Allstate Indemn. Co.*, 314 Wis.2d 507, 2008 WI App 160, four teenage boys created a wall of plastic across a public road. They did so by wrapping clear plastic wrap around sign posts on both sides of the road, crossing back and forth until the barrier was about six feet high. It was late at night, after midnight. One of the boys testified that the plastic wrap blocked the road completely and that it would have been impossible for a vehicle to travel down the road without hitting the plastic. The first vehicle to approach the barrier was a motorcycle driven by Daniel Buckel. Buckel drove directly into the barrier, and he and his passenger were seriously injured. They sued the boys and their parents, who sought coverage under their homeowners' policies. A trial court granted summary judgment in favor of the insurers, and the parents appealed.

{¶47} In an unpublished opinion, the Court of Appeals of Wisconsin, District Two, affirmed. Recognizing that the issue of intent is generally a question of fact under Wisconsin law, the court acknowledged that "in some circumstances the state of mind of a person must be inferred from the acts of that person in view of the surrounding circumstances." 2008 WI App at ¶15. That question of intent, the court said, had to be addressed on a case-by-case basis and "the 'more likely harm is to result from certain intentional conduct, the more likely intent to harm may be inferred as a matter of law.'" *Id.*, quoting *Loveridge v. Chartier* (1991), 161 Wis.2d 150, 169-80. Considering the facts of the case before it, the court concluded that the boys' "intentional creation of a transparent six-foot-high barrier across the road, located such that avoidance was impossible, and put in place at night, produced such a high likelihood of injury that intent to injure may indeed be inferred as a matter of law." *Id.* at ¶17.

{¶48} In *Tower Ins. Co. v. Judge* (U.S. Dist. Minn. 1993), 840 F. Supp. 679, a federal court similarly considered whether the facts surrounding an intended prank could lead, as a matter of law, to inferred intent. Five young men, each 19 years old, spent a weekend together and drank heavily. About midnight on Saturday night, having passed out on the front lawn, Christopher Meyer made his way into a bedroom of the trailer home where the group was staying. Finding Meyer in the bedroom asleep, the other men attempted, but could not awaken, Meyer. Also finding an exposed light switch in the bedroom, they devised a plan to "shock" Meyer awake. They attached speaker wires to his ankle and wrist and the opposite ends of the wires to the light switch terminal. They then turned the light switch on and off repeatedly. After getting little reaction from Meyer, they turned the light switch off and left the room. Over a period of about 20 minutes, three of the men returned periodically to turn the switch on and off. After 20 minutes, one of the men checked on Meyer, who had stopped breathing. Although the group administered CPR and rushed him to a hospital, Meyer died. It was later discovered that electricity had been constantly flowing into Meyer when the light switch was in the off position, and he had died from electrocution.

{¶49} The court applied Minnesota law, which allows intent to be established by (1) proving an insured's actual intent to cause injury or (2) inferring intent "as a matter of law if the insured's acts are of a calculated and remorseless character." *Id.* at 684. For these purposes, acts "are 'calculated and remorseless' only if they are such that harm is substantially certain to occur." *Id.* at 691. Considering the facts of the case, the court found no actual intent to cause injury to Meyer. The court also stated that, "[e]ven with

the benefit of hindsight," it could not "say that there was a high degree of certainty that defendants' actions would cause permanent injury to Meyer." *Id.* The men had discussed the potential dangers of shocking Meyer, and they had even tested the wires on themselves. Although the defendants' assessment of the potential danger proved wrong, their misjudgment was not enough to bring them within the intentional act exclusions.

{¶50} In the case before us, there is no dispute that the boys' conduct was intentional; that is, they did not accidentally place the target deer in the eastbound lane of CR 144. The disputed issue here is whether they also intended harm or injury to follow from their intentional act. Appellants argue that the boys' intention is a question of fact for the jury. Accordingly, we must determine whether the boys' conduct supports an objective inference of the intent to injure.

{¶51} According to the testimony of the seven boys involved in the incident, the idea for placing the target deer in the roadway grew out of a classroom discussion about persons' reactions to various situations. As a result of this discussion, the boys stole a Styrofoam target deer, which weighed 10 to 15 pounds, altered it slightly so it could stand upright, placed it in the middle of the eastbound lane of a two-lane roadway, and observed the reactions of motorists suddenly confronted with an obstruction directly in front of them. The boys generally testified that they expected the motorists to observe the target deer in the roadway and maneuver around it. Manns, however, testified that the boys' purpose in placing the deer in the roadway was to "make cars slow down or maybe hit it." (Depo. 34.) Consistent with the boys' general expectations, the group observed at least two vehicles approach the deer, navigate around it, and drive on.

{¶52} The boys apparently never discussed or even contemplated the possibility that positioning a target deer 15 to 30 yards beyond the crest of a hill in the middle of an unlit two-lane roadway with a speed limit of 55 m.p.h. at night might cause an accident. Although Manns testified that the purpose of placing the deer in the road was to make cars either slow down or hit it, Campbell testified that the group never thought about "an accident," and "didn't think that much deep into it * * * that someone would actually hit [the target deer]." (Depo. 71, 110.) Lowe testified that no one in the group expressed any concern that the placement of the deer could pose a hazard to motorists. (Depo. 36.) Similarly, Manns, Range, and Barnes testified that they did not worry about the target deer posing a potential hazard. The boys' testimony in this regard reasonably suggests that not until they observed Roby's car traveling toward the deer at a high rate of speed were they even aware of the possibility that their actions might result in an accident.

{¶53} Viewing the facts of this case in a light most favorable to appellants, we conclude that genuine issues of material fact exist as to whether the boys necessarily intended to cause harm when they placed the target deer in the roadway, whether harm was substantially certain to result from their actions, and whether their actions fall within the scope of the individual insurance policies. As noted, the majority of the boys testified that they desired only to observe motorists' reactions to the target deer; more specifically, they expected motorists confronted with the deer in the roadway to stop, maneuver around it, and travel on. Although Roby's accident occurred less than ten minutes after the boys placed the deer in the roadway, the boys' expectations that motorists would

successfully avoid the obstruction proved to be reasonable, as at least two motorists reacted in just that way.

{¶54} In *Buckel*, the insureds created a transparent barrier across the entire roadway, making early detection and avoidance impossible. Here, however, the boys' placement of the target deer did not obstruct the entire roadway, leaving room for motorists to avoid the deer by maneuvering around it. In addition, its placement at 15 to 30 yards beyond the crest of the hill apparently provided some stopping distance; no party provided Civ.R. 56-compliant evidence showing that placement at this distance made contact substantially certain.

{¶55} Further, even if the boys expected a motorist to hit the deer, we cannot conclude as a matter of law that harm was substantially certain to result, as it was made of Styrofoam and weighed only 10 to 15 pounds. The target deer is different from other instruments, like a gun, a car or a metal club, that are known to cause harm under certain circumstances. Several of the boys testified that they did not worry about or even contemplate an injury resulting from their actions. As in *Tower*, although their assessment of the potential danger ultimately proved to be incorrect, their misjudgment was not enough to bring them within the intentional acts exclusions in the policies as a matter of law.

{¶56} In addition, genuine issues of material fact remain as to whether the accident resulted not only from the boys' conduct in placing the deer in the roadway, but also from Roby's conduct. The boys testified that, as they traveled westbound on CR 144, they passed Roby heading eastbound toward the deer at an excessive rate of

speed. Indeed, Barnes described Roby's car as traveling "really fast toward the deer." (Depo. Exhibit 126, at 25.) Ramge testified that Roby was traveling at a "high rate of speed" and came "flying by" their vehicle. (Depo. Exhibit 125, at 20-21.) Lowe stated that Roby was driving at a "high rate of speed," which he estimated to be 80 m.p.h. (Depo. 37, 115.) Campbell described Roby's speed as "real fast" and estimated it to be 80 m.p.h. (Depo. 72-73, 121-23, 208-09.) Manns testified that Roby's car was going so fast it "shook" Lowe's vehicle when it passed and suggested that Roby was driving 80 m.p.h. (Depo. 33, 105.) Howard testified that Roby was driving "really fast." (Depo. 38.) The boys turned around to follow Roby's vehicle because they were concerned that Roby's excessive speed would impede his ability to see and/or avoid the deer. (Barnes Depo. Exhibit 126, at 25; Ramge Depo. 34 and Exhibit 125, at 21-22; Lowe Depo. 37, 131-32 and Exhibit 121, at 33-36; Manns Depo. 33-34; Howard Depo. 133.) Reasonable persons could conclude from this body of evidence that Roby's speed may have been a factor contributing to the accident and, accordingly, the injuries he and Zachariah suffered were not substantially certain to occur from the boys' actions alone.

{¶57} Because questions of fact remain as to the certainty of harm from the boys' actions, we reverse the trial court's conclusion that intent may be inferred as a matter of law under these circumstances. Accordingly, we conclude that the trial court erred in granting appellees' motions for summary judgment. We decline to address issues that the trial court did not address in the first instance, including, but not limited to, the residency restrictions in the American Southern policy, the effect of the boys' delinquency

adjudications, if any, regarding the criminal acts exclusions in some of the policies, and Roby's negligent supervision claims.

{¶58} For the foregoing reasons, we sustain appellants' assignments of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand this matter to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

BROWN, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶59} For the following reasons, I respectfully dissent.

{¶60} Because " 'a completely subjective test would virtually make it impossible to preclude coverage for intentional [injuries] absent admissions by insureds of specific intent to harm or injure,' "⁴ in determining whether an intentional act is substantially certain to cause injury, "determination of an insured's subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage." *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 39, 1996-Ohio-113. For this reason, I would not consider the boys' testimony about their expectations, plans and intentions, as recounted in paragraphs 51 through 53 of the majority opinion.

⁴ *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 37, 1996-Ohio-113, quoting *Wiley v. State Farm Fire & Cas. Co.* (C.A.3, 1993), 995 F.2d 457, 464.

{¶61} This is also why I disagree with the majority's comparison of this case to the case of *Tower Ins. v. Judge* (U.S. Dist. Minn. 1993), 840 F. Supp. 679. Ante, ¶55. In *Tower*, the court refused to infer intent because the insureds had made a factual error about whether the switch's "off" position would stop the flow of electricity into the victim; theirs was not a miscalculation about the level of danger they were inflicting upon their victim through actions about which they were in possession of all of the correct facts, as in this case. Because miscalculations about what might happen involve the subjective expectations and intentions of the insureds, they have no place in our analysis.

{¶62} For a similar reason, I also consider irrelevant evidence regarding Roby's speed and the boys' testimony that two vehicles other than Roby's successfully avoided an accident while passing the decoy deer. The inferred intent inquiry does not address the actions of any specific victim or potential victim; it only addresses what, objectively, can be inferred from the intentional actions of *the insured*.

{¶63} In this case, the appropriate inquiry is "whether the boys' conduct supports an *objective* inference of the intent to injure." (Emphasis added.) Ante, ¶50. Under this objective standard, the question is whether the act of *placing a decoy deer with wooden blocks attached to it, in the middle of a lane of travel, on a curvy, two-lane road, where the speed limit is 55 miles per hour, at night, just beyond the crest of a hill, positioned so that motorists would not see it until they were 15 to 30 yards from the decoy*, is substantially certain to cause injury.

{¶64} In my view, it is difficult to imagine how the boys could have done more to inject chaos into the flow of traffic on that road. Whether motorists selected one or the

other of the available options – try to avoid the decoy or hit the decoy – the risk of injury was substantially certain, given the deliberate choice to place the deer on that particular road under all the attendant circumstances. After all, "even when skillfully and carefully operated, [] use [of a motor vehicle] is attended by serious dangers to persons and property." *Hess v. Pawloski* (1927), 274 U.S. 352, 356.

{¶65} I am mindful that Ohio's appellate courts have applied the doctrine of inferred intent in narrow circumstances, usually in situations where the likelihood of harm was so great that it could be said that injury was *certain* – not just substantially certain – to result.⁵ However, the doctrine has also been applied in a case in which the insured injected a level of chaos and danger into the flow of traffic, which is already naturally attended by dangers to persons and property, similar to that in the present case. In *Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App.3d 712, the Ninth Appellate District held "that where an insured willfully and purposefully attempts to elude the police in an automobile chase through an urban area in reckless disregard of traffic control devices, his actions are substantially certain to result in injury." *Id.* at 715. In *Finkley*, the fact that the driver might have avoided causing injury, whether through his own driving

⁵ See, e.g., *Gearing*, supra (sexual molestation); *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108 (murder/wrongful death); *Horvath v. Nationwide Mut. Fire Ins. Co.* (1996), 108 Ohio App.3d 732 (swinging a metal club hard enough to fracture the victim's skull and cause brain matter to seep out); *Baker v. White*, 12th Dist. No. CA2002-08-065, 2003-Ohio-1614 (ramming truck into another vehicle); *Aguilar v. Tallman* (Mar. 15, 1999), 7th Dist. No. 97 C.A. 116 (punching someone in the face); *Allstate Ins. Co. v. Ray* (Dec. 18, 1998), 7th Dist. No. 96 CA 20 (shooting a barrage of bullets into a car at close range); *Westfield Ins. Co. v. Blamer* (Sept. 2, 1999), 10th Dist. No. 98AP-1576 (setting a sofa on fire that was located on the porch of a home); *Ash v. Grange Mut. Cas. Co.*, 5th Dist. No. 2005CA0014, 2006-Ohio-5221 (setting a sofa on fire that was located inside a home).

skill or that of others, did not alter the court's conclusion that injury was substantially certain to occur.

{¶66} I conclude likewise in this case and would affirm the trial court's judgment. Though Ohio courts have applied the doctrine of inferred intent largely in cases in which it was arguably unnecessary to do so because injury was *certain* to result from the insured's intentional acts (e.g., murder, felonious assault or sexual molestation), I believe it is appropriate to infer injurious intent in this case because under the narrow circumstances presented herein, the insureds' actions were *substantially certain* to cause injury. Because the majority concludes otherwise, I respectfully dissent.

AV

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
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CLERK OF COURTS

Allstate Insurance Company, :
Plaintiff-Appellee, :

v. :
Dailyn Campbell et al., :
Defendants-Appellees, :

Dustin S. Zachariah et al., :
Defendants-Appellants. :

No. 09AP-306
(C.P.C. No. 07CVH07-8834)
(REGULAR CALENDAR)

NOV 20 2009

Erie Insurance Exchange, :
Plaintiff-Appellee, :

v. :
Corey Manns et al., :
Defendants-Appellees, :

Dustin S. Zachariah et al., :
Defendants-Appellants. :

No. 09AP-307
(C.P.C. No. 07CVH05-6515)
(REGULAR CALENDAR)

American Southern Insurance Company, :
Plaintiff-Appellee, :

v. :
Dale Campbell et al., :
Defendants-Appellees, :

No. 09AP-308
(C.P.C. No. 07CVH08-11422)
(REGULAR CALENDAR)

Nos. 09AP-306, 09AP-307, 09AP-308, 09AP-309,
09AP-318, 09AP-319, 09AP-320, and 09AP-321

Dustin S. Zachariah et al.,
Defendants-Appellants.

Grange Mutual Casualty Company,
Plaintiff-Appellee,

v.

Corey Manns et al.,
Defendants-Appellees,

Dustin S. Zachariah et al.,
Defendants-Appellants.

Erie Insurance Exchange,
Plaintiff-Appellee,

v.

Corey Manns et al.,
Defendants-Appellees,

Robert J. Roby, Jr.,
Defendant-Appellant.

American Southern Insurance Company,
Plaintiff-Appellee,

No. 09AP-309
(C.P.C. No. 08CVH02-3167)
(REGULAR CALENDAR)

No. 09AP-318
(C.P.C. No. 07CVH05-6515)
(REGULAR CALENDAR)

Nos. 09AP-306, 09AP-307, 09AP-308, 09AP-309,
09AP-318, 09AP-319, 09AP-320, and 09AP-321

v.	:	No. 09AP-319
Dale Campbell et al.,	:	(C.P.C. No. 07CVH08-11422)
Defendants-Appellees,	:	(REGULAR CALENDAR)
Robert J. Roby, Jr.,	:	
Defendant-Appellant.	:	
Grange Mutual Casualty Company,	:	
Plaintiff-Appellee,	:	

v.	:	No. 09AP-320
Corey Manns et al.,	:	(C.P.C. No. 08CVH02-3167)
Defendants-Appellees,	:	(REGULAR CALENDAR)
Robert J. Roby, Jr.,	:	
Defendant-Appellant.	:	
Allstate Insurance Company,	:	
Plaintiff-Appellee,	:	

v.	:	No. 09AP-321
Dalyn Campbell et al.,	:	(C.P.C. No. 07CVH07-8934)
Defendants-Appellees,	:	(REGULAR CALENDAR)
Robert J. Roby, Jr.,	:	
Defendant-Appellant.	:	

Nos. 09AP-306, 09AP-307, 09AP-308, 09AP-309,
09AP-318, 09AP-319, 09AP-320, and 09AP-321

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 17, 2009, appellants' assignments of error are sustained, and 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 consistent with said decision. Costs shall be assessed against plaintiffs-appellees.

FRENCH, P.J., and BROWN, J.

By *Judith L. French*
Judge Judith L. French, P.J.