

ORIGINAL

IN THE SUPREME COURT OF OHIO

Allstate Insurance Company, : Case No. 09-2358  
Appellant, : On Appeal from the  
-vs- : Franklin County Court of Appeals  
: Tenth Appellate District  
Dailyn Campbell, *et al.*, :  
Appellees, : Court of Appeals  
Case No. 09AP-306  
: [Dustin S. Zachariah, *et al.*, :  
Appellees] :

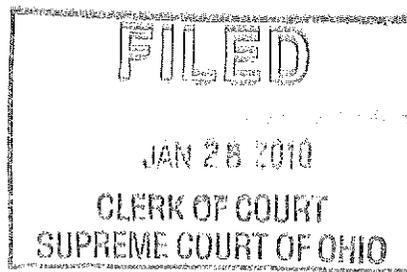
---

Erie Insurance Exchange, : Court of Appeals  
Appellant, : Case No. 09AP-307  
-vs- :  
Corey Manns, *et al.*, :  
Appellees, :  
[Dustin S. Zachariah, *et al.*, :  
Appellees] :

---

American Southern Insurance : Court of Appeals  
Company, : Case No. 09AP-308  
Appellant, :  
-vs- :  
Dale Campbell, *et al.*, :  
Appellees, :  
[Dustin S. Zachariah, *et al.*, :  
Appellees] :

---



Grange Mutual Casualty Co., : Court of Appeals  
Appellant, : Case No. 09AP-309  
-vs- :  
Corey Manns, *et al.*, :  
Appellees, :  
[Dustin S. Zachariah, *et al.*, :  
Appellees] :

---

Erie Insurance Exchange, : Court of Appeals  
Appellant, : Case No. 09AP-318  
-vs- :  
Corey Manns, *et al.*, :  
Appellees, :  
[Robert J. Roby, Jr., :  
Appellee] :

---

American Southern Insurance : Court of Appeals  
Company, : Case No. 09AP-319  
Appellant, :  
-vs- :  
Dale Campbell, *et al.*, :  
Appellees, :  
[Robert J. Roby, Jr., :  
Appellee] :

---

Grange Mutual Casualty Co., : Court of Appeals  
Appellant, : Case No. 09AP-320  
-vs- :  
Corey Manns, *et al.*, :  
Appellees, :  
[Robert J. Roby, Jr., :  
Appellee] :

---

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

---

**MEMORANDUM OF APPELLEES DUSTIN S. ZACHARIAH AND KATHERINE  
E. PIPER OPPOSING JURISDICTION**

---

PAUL O. SCOTT (0000809) (Counsel of Record)  
Paul O. Scott Co., LPA  
471 East Broad Street  
Suite 1100  
Columbus, OH 43215  
Telephone: 614/460-1633  
Facsimile: 614/469-1171  
E-Mail: [pscott@poslaw.com](mailto:pscott@poslaw.com)

*Attorney for Appellees  
Dustin S. Zachariah and Katherine E. Piper*

KEITH M. KARR (0032412) (Counsel of Record)  
DAVID W. CULLEY (0079399)  
KARR & SHERMAN CO. L.P.A.  
Two Miranova Place, Suite 410  
Columbus, Ohio 43215  
Telephone: 614/478-6000  
Facsimile: 614/478-8130  
E-Mail: [kkarr@karrsherman.com](mailto:kkarr@karrsherman.com)

*Attorneys for Appellee*  
*Robert J. Roby, Jr.*

DANIEL J. HURLEY (0034999) (Counsel of Record)  
CRABBE BROWN AND JAMES LLP  
500 South Front Street  
Suite 1200  
Columbus, OH 43215  
Telephone: 614/229-4492  
Facsimile: 614/229-4484  
E-Mail: [dhurley@cbjlawyers.com](mailto:dhurley@cbjlawyers.com)

*Attorney for Appellee*  
*Allstate Insurance Company*

DAVID A. CABORN (0037347) (Counsel of Record)  
CABORN & BUTAUSKI CO., LPA  
765 South High Street  
Columbus, Ohio 43206  
Telephone: 614/445-6265  
Facsimile: 614/445-6295  
E-Mail: [dcaborn@sbcglobal.net](mailto:dcaborn@sbcglobal.net)

*Attorney for Appellee*  
*Erie Insurance Exchange*

ROBERT H. WILLARD (0002386) (Counsel of Record)  
HARRIS & MAZZA  
941 Chatham Lane, Suite 201  
Columbus, Ohio 43221  
Telephone: 614/457-9731  
Facsimile: 614/457-3596  
E-Mail: [robertwillard@harrismazzalaw.com](mailto:robertwillard@harrismazzalaw.com)

*Attorney for Appellee*  
*American Southern Insurance Company*

GARY L. GRUBLER (0030241) (Counsel of Record)  
610 South Front Street  
Columbus, Ohio 43216  
Telephone: 614/449-5900  
Facsimile: 614/449-5980  
E-Mail: [grublerg@grangeinsurance.com](mailto:grublerg@grangeinsurance.com)

*Attorney for Appellee*  
*Grange Mutual Insurance Company*

## TABLE OF CONTENTS

	<b>Page No.</b>
Explanation of Why This Court Should Decline Jurisdiction .....	1
Statement of the Case and Facts.....	2
Argument.....	5
Response to Appellants' First Proposition of Law	
When considering an insurance policy that excludes coverage for expected or intended injury, an intent to injure, not merely an intentional act, is a necessary element to uninsurability. Similarly, when a policy defines "occurrence" as an "accident", the insurer must establish an intent to cause harm in order to avoid liability under the policy. Whether the insured had the necessary intent to cause injury is a question of fact.....	5
Response to Appellants' Second Proposition of Law	
When considering an insurance policy that excludes coverage for expected or intended injury, an intent to injure may be inferred as a matter of law, but only when the act and the harm are so intertwined that to intend the act is to intend the harm, or where the harm is substantially certain to occur.....	8
Response to Appellant American Southern's Third and Fourth Propositions of Law	
Criminal convictions for offenses that do not contain an element of intentional harm do not establish uninsurability under an intentional harm exclusion or a criminal acts exclusion.....	11
Conclusion .....	13
Certificate of Service .....	14

## **EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION**

This case is about a misguided juvenile prank and its unintended consequences.

The facts of the case are unique. Neither the parties, nor the courts below, have cited a case presenting similar facts.

Members of a high school football team stole a lightweight Styrofoam deer decoy and placed it on a country road, thinking it would be humorous to watch motorists react. They had no intent to injure anyone. But injuries resulted when a vehicle containing Appellees, Dustin S. Zachariah and Robert J. Roby, Jr., swerved to avoid a collision with the decoy, and overturned.

The Appellants, liability insurers for the pranksters, seized on policy language that excludes coverage for expected or intended injury—even though there was no proof that the teammates expected or intended to harm anyone. In the declaratory judgment actions, the insurers argued, and the trial court agreed, that intent could and should be inferred as a matter of law.

The Franklin County Court of Appeals reversed. In a well-reasoned and thorough opinion, the majority analyzed the controlling precedent of this Court, as well as opinions from lower appellate courts. In the court's view, this precedent recognizes that there are some forms of misconduct in which the conduct and the resultant injury are so closely intertwined that to intend the act is to intend the harm. The court reversed because this prank falls outside the scope of such precedent. It analyzed the facts of the case and resolved the case according to the long-settled summary judgment standard:

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.

*Allstate Ins. Co. v. Campbell*, 2009-Ohio-6055, ¶53.

The appellate court did not misconstrue or improperly limit this Court's precedent. It reviewed the law and applied it to a truly unique set of facts.

The opinion of the Court of Appeals, then, does not present matters of public and great general interest. The opinion will apply only to these unique facts, and is of interest only to the parties to this case.

### **STATEMENT OF THE CASE AND FACTS**

#### **The November 18, 2005 Incident**

On November 18, 2005, Dailyn Campbell, Jesse Howard, Joshua Lowe, Corey Manns, Joseph Ramge, and Carson T. Barnes, teammates on the Kenton High School football team, executed a poorly thought-out scheme designed to startle motorists. (Taylor Rogers, another defendant, became ill and went home.) These teammates decided to place a fake or decoy deer near the crest of a hill on County Road 144, ("Hepburn Road") in Hardin County, Ohio, apparently thinking it would be humorous to watch motorists react. As Carson Barnes testified, the juveniles wanted to watch motorists stop and go around the fake deer. (Carson Barnes Depo. 56-57)

The record establishes that Manns, Lowe, Howard, and Campbell stole a Styrofoam deer decoy from a home in Hepburn. (Corey Manns Depo. 24-26) The four then took the deer to Lowe's house, where they spray painted obscenities on it and fashioned a stand that would support the deer. (Joshua Lowe Depo. 25-26) Barnes and Ramge arrived at Lowe's house just as the deer was being loaded into an SUV driven by Lowe. (Carson Barnes Depo. 20)

The boys got into the SUV and left to find a place to put the deer. They settled upon a location on County Road 144. They drove off, but watched to see the reactions of drivers when they saw the deer. (Carson Barnes Depo. 30, 31, 56-57, 67-68; Dailyn Campbell Depo. 69-71, 111, 136, 220; Jesse Howard Depo. 35; Joshua Howard Depo. 57, 58)

In their deposition testimony, the boys stated that some cars stopped at the deer and went around it. Carson Barnes stated that four cars stopped. (Carson Barnes Depo. 72 ; Barnes Interview, Exhibit 126, at 22); Dailyn Campbell said at least three stopped. (Dailyn Campbell Depo. 206) Jesse Howard (Jesse Howard Depo. 39), Jocy Range (Exhibit 125, at 20), Corey Manns (Corey Manns Depo. 58), and Joshua Lowe (Joshua Lowe Depo. 116) said four stopped.

Dustin S. Zachariah was a passenger in a Dodge motor vehicle operated by Robert J. Roby, Jr. as it proceeded in an easterly direction on County Road 144. About five to seven minutes after the youths placed the Styrofoam deer, Roby came upon the decoy, swerved and crashed off of the roadway to avoid a collision. Both Robert and Dustin were ejected from the vehicle. Dustin suffered a fractured collarbone, a fractured sternum, fractured ribs, a collapsed lung, a bruised heart, a bruised brain, and injuries to other parts of his body.

#### **The Liability Insurers' Arguments in the Declaratory Judgment Actions**

Insurers for the teens filed declaratory judgment actions seeking to avoid coverage for the negligence of their respective insureds. Allstate Insurance Company (“Allstate”) insures Howard; Allstate and American Southern Insurance Company (“American Southern”) insure Campbell; Erie Insurance Exchange (“Erie”) insures Manns and Barnes; and Grange Mutual Insurance Company (“Grange”) insures Manns. The insurers moved for summary judgment arguing that they had no duty to indemnify.

The insurers pointed to policy language that (1) limits their obligation to cover losses which arise from an “occurrence” and (2) excludes coverage for intentional or criminal acts.

**The Trial Court's Decision: Intent to Cause Injury Inferred as a Matter of Law**

By Decision rendered February 6, 2009, and journalized March 4, 2009, the Common Pleas Court granted summary judgment for the insurers. The court found that “the testimony in the record consistently demonstrates that the Defendants neither intended nor expected any personal injury or property damage.” But despite this record, the court found that such intent should be inferred as a matter of law.

**The Appellate Decision: Intent to Cause Injury Is a Question of Fact**

Zachariah and Piper appealed from the trial court decision, as did Roby. By Opinion and Entry rendered November 17, 2009, the Court of Appeals reversed the trial court judgment and remanded the case for further proceedings. In its opinion, the court found that the issue of whether the teens intended to cause injury was a question of fact:

{¶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.

## ARGUMENT

### Response to Appellants' First Proposition of Law

When considering an insurance policy that excludes coverage for expected or intended injury, an intent to injure, not merely an intentional act, is a necessary element to uninsurability. Similarly, when a policy defines "occurrence" as an "accident", the insurer must establish an intent to cause harm in order to avoid liability under the policy. Whether the insured had the necessary intent to cause injury is a question of fact.<sup>1</sup>

It is the burden of the insurer to prove that damages fall within an exclusion from coverage. See, e.g., *SCSC Corp. v. Allied Mut. Ins. Co.* (Minn. 1995), 536 N.W.2d 305, 316. It is also the law in Ohio that "[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, 415 N.E.2d 325, quoting *Arcos Corp. v. Am. Mut. Liability Ins. Co.* (E.D.Pa.1972), 350 F.Supp. 380, 384.

---

<sup>1</sup> This argument also responds to the Third Propositions of Law asserted by Grange and Allstate.

In *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d 280, 283, 720 N.E.2d 495, citing *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, 193, 569 N.E.2d 906, the court stated "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.*" (Emphasis added.)

The trial court correctly found that the "record consistently demonstrates that the Defendants neither intended nor expected any personal injury or property damage." The appellate court agreed that no such intent existed. There is a critical distinction between an intentional act and intentional or expected injury. Many intentional acts result in wholly unintentional injuries. It is for these unintentional injuries people purchase insurance. *Physician's Insurance Company of Ohio v. Swanson* controls on this point.

In *Swanson*, two groups of teenage children clashed at a recreational area, and one of the children, Bill Swanson, went to his home and returned with a BB gun. Bill aimed the BB gun in the direction of the other group and fired it three times. He testified he had been aiming at a sign on a tree some ten to fifteen feet from the group. He testified he intended to scare the other children, and because he was 70 to 100 feet away, he did not believe he would hit any of the children. However, at least two children were struck, including Todd Baker, who lost his right eye. Baker brought an action against Swanson's parents. Swanson's insurance company argued Bill Swanson's intentional act in firing the BB gun triggered the "intentional acts" exclusion in their contract.

The language in the PICO insurance policy excluded coverage for bodily injury or property damage which is expected or intended by the insured. It defined accident as "\*\*\*\* an event or series of unrelated events that unexpectedly, unintentionally and

suddenly causes personal injury or property damage during the policy period." There was no coverage for personal injury or property damage caused intentionally.

In *Swanson*, this Court distinguished its prior case of *Preferred Risk Insurance Company v. Gill* (1987), 30 Ohio St.3d 108, 507 N.E.2d 1118. *Gill* held an insurer has no duty to defend or indemnify its insured where the insurer demonstrates the act of the insured was intentional and therefore outside of the policy coverage. The *Swanson* court pointed out *Gill* involved a case where the perpetrator had pled guilty to aggravated murder with specifications for killing an 11 year old girl. *Gill* held because an essential element of aggravated murder is an intention to cause the victim's death, there was no duty to defend or indemnify.

The *Swanson* court found *Gill* was premised on the fact the insured's plea of guilty to aggravated murder conclusively established his intent to cause the injury. *Gill* actually stands for the proposition the perpetrator *must intend the injury, not just the act*, for the exclusion to apply. *Swanson* at 58 Ohio St.3d 191.

Conceptually related to this analysis is the insurers' use of the word "accident" to define "occurrence". This Court has previously held that if the injury was not intentionally caused, then it was accidentally suffered and was, therefore, an "occurrence" under an applicable insurance policy. *Safeco Ins. Co. v. White*, 112 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, citing *Rothman v. Metro. Cas. Ins. Co.* (1938), 134 Ohio St. 241, 247, 12 O.O. 50, 16 N.E.2d 417. The appellate court below correctly recognized that arguments based upon the "occurrence" language are essentially identical to those based upon the exclusions. The court noted that "[a]lthough 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.” *Allstate Ins. Co. v. Campbell*, at ¶28.

### **Response to Appellants' Second Proposition of Law**

When considering an insurance policy that excludes coverage for expected or intended injury, an intent to injure may be inferred as matter of law, but only when the act and the harm are so intertwined that to intend the act is to intend the harm, or where the harm is substantially certain to occur.

In their Second Proposition of Law, the Appellants create a straw man. They argue that the inferred intent doctrine is not limited to sexual molestation or homicide cases. Neither Appellees nor the lower courts ever asserted that it was so limited.

Further, the assertion that the appellate court applied a purely subjective standard here is belied by the language of the opinion. The court stated:

{¶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. (Emphasis added.)

The court proceeded to analyze the facts of this case according to this Court's precedent. It did not utilize a purely subjective test.

This Court has recognized that the law limits application of the inferred intent doctrine to a small number of cases in which the conduct is so reprehensible that no one can reasonably dispute its intentionality. The Court's opinion in *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 38-39, 665 N.E.2d 1115 demonstrates this point:

Sexual abuse of children constitutes conduct so reprehensible that the General Assembly has categorized such conduct as felonious upon commission of the proscribed acts themselves, irrespective of the defendant's intent, his capacity to form intent, or failure of the child to resist. See, e.g., R.C. 2907.05. Acts of sexual molestation of a minor are "criminal offense[s] for which public policy precludes a claim of unintended consequences, that is, a claim that no harm was intended to result from the act." *Horace Mann Ins. Co. v. Leeber* (1988), 180 W.Va. 375, 379, 376 S.E.2d 581, 585. Consistent with the public policy expressed in the Criminal Code, we agree with those courts that have concluded that "a person who sexually manipulates a minor cannot expect his insurer to cover his misconduct and cannot obtain such coverage simply by saying that he did not mean any harm," *Whitt v. De Leu* (W.D.Wis.1989), 707 F.Supp. 1011,1016. Moreover, requiring an insurer to indemnify an insured who has engaged in sexual abuse of a child "subsidizes the episodes of child sexual abuse of which its victims complain, at the ultimate expense of other insureds to whom the added costs of indemnifying child molesters will be passed." *Horace Mann Ins. Co. v. Fore* (M.D.Ala.1992), 785 F.Supp. 947, 956. Similarly, "the average person purchasing homeowner's insurance would cringe at the very suggestion that he was paying for such coverage \* \* \* [a]nd certainly \* \* \* would not want to share that type of risk with other homeowner's policy holders." *Rodriguez v. Williams* (1986), 42 Wash.App. 633, 636, 713 P.2d 135, 137-138.

Similarly, in *Buckeye Union Ins. Co. v. New England Ins. Co.*, the Court stated:

*In very limited instances, this court has held that the intent to injure can be inferred as a matter of law under certain circumstances. In Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, 30 OBR 424, 507 N.E.2d 1118, intent to injure was inferred from the defendant's criminal conviction for aggravated murder, an essential element of which is that the perpetrator intended to cause the death. In *Gearing*, this court held that the intent to injure could be inferred from the insured's plea of guilty to charges involving the sexual molestation of minors. The court reasoned that the act and the harm are so intertwined in regard to molestation of children that to intend the act is also to intend the harm.

*Id.* at 283-284. (Emphasis added.)

In those very limited instances wherein courts have inferred intent to injure, their decision to do so was based upon a finding that the injury was substantially certain to occur as a result of the character of the conduct of the tortfeasor – where the tortfeasor's

act and harm were so inseparable that to intend the act was also to intend the harm. This case is distinguishable from those in which the very nature of the instrumentality used to inflict harm is sufficient to demonstrate intentional conduct on the part of the tortfeasor. See, for example, *Allstate v. Cole* (1998), 129 Ohio App.3d 334, 717 N.E.2d 816, appeal allowed, 84 Ohio St.3d 1447 and dismissed 85 Ohio St.3d 1401 (Cole shoots and kills Robinson—involuntary manslaughter); *Allstate v. Hevitan* (Jan. 24, 1996), Medina App. No. 2443-M (Hevitan shoots Hoegler—aggravated assault); *Farmers Ins. of Columbus, Inc. v. Martin*, Clermont App. No. CA 2004-03-022, 2005-Ohio-556 (Martin shoots Amburgey—felonious assault with firearm); *Woods v. Cushion* (Sept. 6, 2000), Summit App. No. 19896 (Cushion shoots Woods—felonious assault); *Baker v. White*, Clermont App. No. CA2002-08-065, 2003-Ohio-1614 (White rams Baker's car—felonious assault); *Campobasso v. Smolko* (July 24, 2002), Medina App. No. 3259 (Hill drugs Campobasso—felonious assault); *Nationwide Mut. Fire Ins. v. Carerras* (Nov. 15, 1995), Lorain App. No. 95-CA-006301, appeal not allowed 75 Ohio St.3d 1477 (Carerras shoots and kills McKern—involuntary manslaughter and felonious assault); *Morner v. Guillano*, 163 Ohio App.3d 785, 2006-Ohio-2943, 857 N.E.2d 602 (Guillano shoots at persons); *Allstate Ins. Co. v. Cutcher* (N.D. Ohio 1996), 920 F.Supp. 796, aff'd (CA 6, 1997), 114 F.3d 1186 (Cutcher punches Tiller, who falls into river and dies—involuntary manslaughter); and *Buckel v. Allstate Indemn. Co.* 314 Wis.2d 507, 2008 WI App 160 (Boys create a wall of plastic across a public road located such that avoidance was impossible).

In this case, however, it has been alleged, and there is ample evidence to substantiate that the accident was caused not only by the boys' conduct in placing the fake

deer in the road, but by the concurring negligence of Roby in operating his vehicle at an excessive speed. Reasonable persons could concur from this evidence that but for the concurring negligence of Roby, there would have been no accident. The appellate court recognized that:

{¶56} 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.

Assuming, *arguendo*, that some of the boys may have expected a motorist to hit the deer, that expectation would not be sufficient to establish an intentional act for purposes of the exclusion. As the appellate court noted:

{¶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.

Appellants continue to rely upon *Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App.3d 712, 679 N.E.2d 1189 and *Westfield Ins. Co. v. Blamer* (Sept. 2, 1999), Franklin App. No. 98AP-1576. In *Finkley* the tortfeasor was racing through the streets and in *Blamer* the boy lit a sofa intending to harm the sofa. By contrast, there is no intent to harm here.

### **Response to Appellant American Southern's Third and Fourth Propositions of Law**

Criminal convictions for offenses that do not contain an element of intentional harm do not establish uninsurability under an intentional harm exclusion or a criminal acts exclusion.

American Southern relies on the juvenile court prosecution of some of the tortfeasors (Campbell, Howard, Manns, Lowc) to show intent. First, as the Court of Appeals noted, the trial court did not base its decision on this exclusion, so the issue was not properly before the appellate court. This Court should likewise decline to address an issue never addressed at the trial level.

Moreover, the juvenile court convictions were the result of no contest pleas and should be inadmissible since Crim.R. 11(B)(2) and Evid.R. 410 prohibit the use, in a civil or criminal proceeding, of a no contest plea as evidence. But more importantly, the convictions were not based on a criminal offense that requires proof of an intent to injure. The youths were found guilty of possession of criminal tools [R.C. 2929.24(A)]; theft [R.C. 2913.02(A)(1)]; and vehicular vandalism [R.C. 2909.09(B)(1)]. Neither the possession of criminal tools violation nor the theft offense requires any consideration whatsoever of harm or risk of harm.

The youths were found guilty of vehicular vandalism as a second degree felony. The elements of the offense are knowingly dropping or throwing any object at, onto, or in the path of a vehicle. To prove a violation of this statute as a second degree felony, the State is not required to show a knowing intent to cause physical harm. The State merely has to show that the accused knowingly threw or dropped the object, and that harm resulted. The offender does not have to possess the intent to cause physical harm in order for a second degree felony to be established.<sup>2</sup>

---

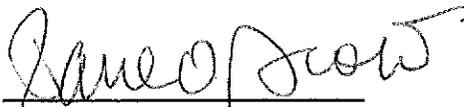
<sup>2</sup> The American Southern policy contains an exclusion purporting to deny coverage for losses caused by criminal acts. The use of the term “criminal” is overly broad—aggravated murder is a crime, as is littering. If any criminal act may be used as an excuse to avoid coverage, then the American Southern policy is so broad in its language that it is hard to envision a factual situation that would permit coverage.

The behavior of the teens, while negligent, does not shock the conscience the same way as the conduct of sexual abusers of children. The average person purchasing homeowner's insurance would not cringe at the suggestion that she or he was paying for such coverage. On the contrary, the average insurance purchaser would expect that homeowner's insurance would be broad enough to provide coverage for losses caused by such conduct.

### CONCLUSION

For the foregoing reasons, Appellees Dustin S. Zachariah and Katherine E. Piper respectfully submit that this appeal does not present questions of public or great general interest as would warrant review by this Honorable Court. Accordingly, Appellees urge the Court to decline jurisdiction.

Respectfully submitted,



**Paul O. Scott (0000809)**  
Paul O. Scott Co., LPA  
471 East Broad Street  
Suite 1100  
Columbus, OH 43215  
Telephone: 614-460/1633  
Facsimile: 614-469/1171  
E-Mail: [pscott@poslaw.com](mailto:pscott@poslaw.com)

*Attorney for Appellees  
Dustin S. Zachariah and Katherine E. Piper*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing Memorandum of Appellees Dustin S. Zachariah and Katherine E. Piper Opposing Jurisdiction was served upon the following by regular US mail, postage prepaid, this 28 day of January 2010:

DANIEL J. HURLEY (0034999)  
CRABBE BROWN AND JAMES LLP  
500 South Front Street  
Suite 1200  
Columbus, OH 43215  
Telephone: 614/229-4492  
Facsimile: 614/229-4484  
E-Mail: [dhurley@cbjlawyers.com](mailto:dhurley@cbjlawyers.com)

*Attorney for Appellee  
Allstate Insurance Company*

DAVID A. CABORN (0037347)  
CABORN & BUTAUSKI CO., LPA  
765 South High Street  
Columbus, Ohio 43206  
Telephone: 614/445-6265  
Facsimile: 614/445-6295  
E-Mail: [dcaborn@sbcglobal.net](mailto:dcaborn@sbcglobal.net)

*Attorney for Appellant  
Erie Insurance Exchange*

ROBERT H. WILLARD (0002386)  
HARRIS & MAZZA  
941 Chatham Lane, Suite 201  
Columbus, Ohio 43221  
Telephone: 614/457-9731  
Facsimile: 614/457-3596  
E-Mail: [robertwillard@harrismazzalaw.com](mailto:robertwillard@harrismazzalaw.com)

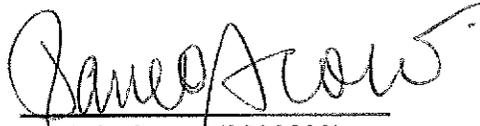
*Attorney for Appellant  
American Southern Insurance Company*

GARY L. GRUBLER (0030241)  
610 South Front Street  
Columbus, Ohio 43216  
Telephone: 614/449-5900  
Facsimile: 614/449-5980  
E-Mail: [grublerg@grangeinsurance.com](mailto:grublerg@grangeinsurance.com)

*Attorney for Appellant  
Grange Mutual Insurance Company*

KEITH M. KARR (0032412)  
DAVID W. CULLEY (0079399)  
KARR & SHERMAN CO. L.P.A.  
Two Miranova Place, Suite 410  
Columbus, Ohio 43215  
Telephone: 614/478-6000  
Facsimile: 614/478-8130  
E-Mail: [kkarr@karrsherman.com](mailto:kkarr@karrsherman.com)

*Attorneys for Appellee  
Robert J. Roby, Jr.*

  
**Paul O. Scott (0000809)**

*Attorney for Appellees  
Dustin S. Zachariah and Katherine E. Piper*