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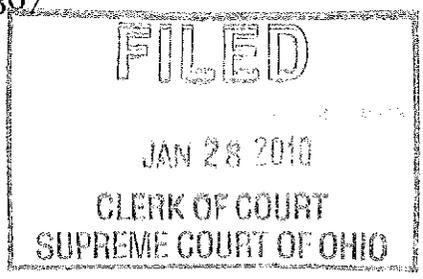
IN THE SUPREME COURT OF OHIO

Allstate Insurance Company, :  
 Plaintiff-Appellant, :  
 vs. :  
 Dailyn Campbell, *et al.*, :  
 Defendants-Appellees, :  
 Dustin S. Zachariah, *et al.*, :  
 Defendants-Appellees. :

**Case No. 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

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

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

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

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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. :

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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. :

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**MEMORANDUM IN OPPOSITION  
TO JURISDICTION OF APPELLEE  
ROBERT J. ROBY, JR.**

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE  
OF PUBLIC OR GREAT GENERAL INTEREST**

**I. INTRODUCTION**

Appellants Allstate Insurance Co. (“Allstate”), Erie Insurance Exchange (“Erie”), American Southern Insurance (“American Southern”), and Grange Mutual Casualty Co. (“Grange”), have each requested that this Court extend jurisdiction over these consolidated declaratory judgment actions, arguing that this case is one of public or great general interest. However, this case is not one of public or great general interest for several reasons.

First, as confirmed by the Court of Appeals, the existence of genuine issues of material fact made summary judgment unfounded. The Court of Appeals properly remanded the case to the trier of fact to rule on the disputed issues of fact pursuant to the controlling law. As such, this case is premature for this Court’s consideration at this time.

Second, even if, *arguendo*, this case were ripe for possible consideration, the Court of Appeals’ decision follows the well-articulated precedent that a trial court may only infer the intent of a tortfeasor under the substantial certainty test in limited circumstances. This case does not challenge or stray from this precedent; rather, it follows it.

Third, this case is not one of a public or great general interest because it has very little precedential or instructive value due to the extremely unique set of facts and circumstances presented. Contrary to Appellants’ position, the Court of Appeals’ decision will have no impact on the public at large or insurance coverage in general in the State of Ohio.

Instead, the Court of Appeals Decision and Journal Entry of November 17, 2009, articulate the well-reasoned conclusion that, due to the existence of genuine issues of material fact, and pursuant to this Court's clear precedent, the trial court incorrectly granted summary judgment to Appellants based on the substantial certainty test.

Because: (1) "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," (2) genuine issues of material fact exist as to "whether harm was substantially certain to result from [the boys' actions]", and (3) genuine issues of material fact exist as to "whether [the boys'] actions fall within the scope of their individual insurance policies," "the trial court erred in granting [Appellants'] motions for summary judgment" (Court of Appeals Decision, ¶ 55-57).

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

On November 18, 2005, a group of high-school boys participated in the ill-conceived prank of placing a target deer decoy onto a country road. Appellee Robert J. Roby subsequently lost control of his vehicle when he swerved to avoid the target deer.

Appellees Roby and Zachariah each filed civil suits against the boys involved in the ill-fated prank. During the pendency of the tort actions, Appellants Allstate, Erie, American Southern, and Grange filed declaratory judgment actions requesting a determination that they had no duty to defend or indemnify the boys in Appellees' tort actions.

Appellees then moved for summary judgment on the issue of insurance coverage. Appellees presented several arguments in support of their position that the boys' actions were not insurable.

The trial court found that the boys actions were substantially certain to result in harm, and ruled that the boys' actions were not insurable.

On appeal, the Franklin County Court of Appeals held that "questions of fact remain as to the certainty of harm from the boys' actions"; therefore, "the trial court erred in granting [Appellants'] motions for summary judgment" (Court of Appeals Decision, ¶ 57).

The record consistently shows that the pranksters thought it would be humorous to watch as cars stopped or slowed down to avoid the deer decoy. As noted by the Court of Appeals, "the boys apparently never discussed or even contemplated that possibility that [the prank] might cause an accident" (Court of Appeals Decision, ¶ 52).

Even if, *arguendo*, there were sufficient evidence to determine that the boys intended or expected a vehicle to strike the deer, the Court of Appeals acknowledged that "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" (Court of Appeals Decision, ¶ 55). "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" (Court of Appeals Decision, ¶ 55).

Further, genuine issues of material fact exist as to whether the prank was inherently dangerous: "no party provided Civ.R. 56-compliant evidence showing

that placement at this distance made contact substantially certain” (Court of Appeals Decision, ¶ 54).

Finally, genuine issues of material fact exist as to whether Appellee Roby allegedly contributed to the collision. “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 [Appellee] Zachariah suffered were not substantially certain to occur from the boys’ actions alone” (Court of Appeals Decision, ¶ 56).

After the Court of Appeals’ Decision was rendered, Appellant Erie filed a Motion for Reconsideration. Therein, Appellant Erie reargued its position that a statement by one of the boys justified the trial court’s grant of summary judgment. In its Memorandum Decision, rendered on January 7, 2010, the Court of Appeals again rejected this argument, and further clarified the reasons why summary judgment was inappropriate here:

“In our decision, however, we expressly considered Manns’ statement. We also considered the remaining testimony. ‘Viewing the facts of this case in a light most favorable to appellants,’ as we must, we concluded ‘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*’” (Court of Appeals Memorandum Decision, ¶ 5).

“We specifically rejected the argument that an intention to make cars slow down and hit the deer equated, as a matter of law, to a substantial certainty of harm. We stated: ‘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.’ We considered, too, that genuine issues of fact remained as to whether Roby’s conduct contributed to the accident” (Court of Appeals Memorandum Decision, ¶ 5).

Now, Appellants seek reconsideration of the Court of Appeals’ Decision by arguing that this case presents a public or great general interest. As is set forth more fully herein, this case is not one of a public or great general interest because: (1) genuine issues of material fact preclude summary judgment, (2) the Court of Appeals followed this Court’s substantial certainty test, and (3) this case has extremely limited effect on the public or insurance coverage in general.

### **III. ARGUMENT**

Section 6, Article IV, of the Ohio Constitution provides that a judgment of a court of appeals of this State shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the court of appeals has original jurisdictions, and cases of great general interest. *Williamson v. Rubich* (1960), 171 Ohio St. 253. “Except in these special circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause.” *Id.* at 253-254.

Where a party believes his cause to be one of public or great general interest, this Court has held that “*the sole issue for determination...is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the party.*” *Id.* at 254. This Court has emphasized that it will not review cases where “it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance.” *Id.* at p. 255.

Although Appellants seek to qualify this case as one of a public or great general interest, nothing in their memoranda in support of jurisdiction contradicts the Court of Appeals determination that genuine issues of fact preclude summary judgment. Instead, Appellants reargue the facts and law presented to the Court of Appeals in an effort to attain another appellate review of the issues presented.

Appellants also seek reconsideration of the Court of Appeals' determination that the boys actions were not substantially certain to occur. First, this is an inappropriate basis on which to request jurisdiction before this Court. Second, as set forth more fully below, the Court of Appeals properly analyzed and applied this Court's precedent in reaching its well-reasoned conclusion.

Finally, Appellants make cursory statements that this case will have a significant impact on the public and insurance coverage in Ohio. However, this position is not supported beyond mere allegations made to comply with this Court's jurisdictional requirements. Instead, a review of the record demonstrates that this case is one of extremely limited impact and precedent due to its unique circumstances. The Court of Appeals' Decision does not alter or stray from this Court's precedent in this arena; it follows such.

Appellants each individually filed Memoranda in Support of Jurisdiction. Generally, Appellants Allstate, Erie, and Grange share several similar propositions of law. These three propositions will be addressed collectively due to the similarity and relatedness of the arguments.

Appellant American Southern also presents additional propositions of law seeking a determination on an issue of law that was presented to both the trial

court and the Court of Appeals. However, no court has made any determination of these issues, which are addressed below.

**RESPONSE TO APPELLANTS' FIRST, SECOND, AND THIRD  
PROPOSITIONS OF LAW**

Appellants separately argue the issues of coverage for “occurrences,” the applicability of intended or expected policy exclusions, and the doctrine of inferred intent as their first three propositions of law. These issues and the controlling law center on the same issue – whether the boys’ conduct was an accident or intentional, and whether their action was substantially certain to cause injury. These separate propositions of law will be addressed collectively.

As set forth by this Court, the issue of whether an incident is an accident or whether an insured intended to cause harm for the purposes of determining insurance coverage is an issue of fact, and should only be determined as a matter of law in a very limited set of circumstances. *Physicians Insurance Co. v. Swanson* (1991), 58 Ohio St.3d 189, 569 N.E.2d 906; *Buckeye Union Insurance Co. v. New England Insurance Co.* (1999), 87 Ohio St.3d 280, 720 N.E.2d 495.

The voluminous precedent in this arena demonstrates that only two specific types of behavior have been shown to qualify as the very limited circumstances under which a court may infer intent: intentional murder and the sexual molestation of children.

“Outside of gunshots at point blank range and the sexual molestation of children, Ohio courts have adhered to the *Swanson* [and *Buckeye Union*] rule that intent to injure or its expectation are questions of fact, and intent or expectation is not to be presumed as a matter of law.” *Moler v. Beach* (1995), 102

Ohio App.3d 332, 337, 657 N.E.2d 303, citing *Nationwide Mutual Insurance Co. v. Machniak* (1991), 74 Ohio App.3d 638, 600 N.E.2d 266, and *Lumbermens Mutual Casualty Co. v. S-W Industries, Inc.* (C.A.6 1994), 23 F.3d 970.

Similar to *Swanson*, the incident *sub judice* arises from an intentional act. In *Swanson*, there was no question of whether the tortfeasor intended to fire his BB gun at a group of children with whom he was arguing. Here, there is no question that the boys intended to place the target deer on the roadway.

However, this fact is not relevant to determining the applicability of coverage. Instead, the issue at issue is whether any of the boys intended harm to result from their actions. To that end, this Court has provided the “substantial certainty test,” by which a Court may infer the intent of an individual in a very limited set of circumstances.

The Court of Appeals properly followed this precedent and applied it to the circumstances of this case. Construing the evidence in favor of the non-moving party, as is required, the Court determined that there were insufficient facts to support the claim that the boys’ actions were substantially certain to result in harm.

Just like shooting a BB gun at a group of children, the negligent act of placing a target deer in the roadway does not lead to a substantial certainty of harm. This Court found in the *Swanson* case that, although shooting a BB gun at a group of people was intentional and had foreseeable consequences, the tortfeasor did not intend to harm any person. Similarly, placing the Styrofoam deer decoy in the roadway was intentional, but not intentionally harmful as a matter of law under the controlling precedents.

Since *Swanson*, this Court rendered a decision in *Buckeye Union* which implicitly rejected cases the two cases relied upon by the Appellants: *Westfield Insurance Co. v. Blamer* (Sept 2, 1999), Franklin App. No. 98AP-1576, 1999 Ohio App. LEXIS 4098, and *Nationwide Mutual Insurance Co. v. Finkley* (1996), 112 Ohio App.3d 712, 679 N.E.2d 1189.

In the instant case, the record demonstrates that the conduct was not one of the limited circumstances that are intentionally injurious by definition, and therefore the issue is one of fact.

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 Insurance Co. v. Louis Marx & Co., Inc.* (1980), 64 Ohio St.2d 399, 401, 415 N.E.2d 325, citations omitted. Appellants attempt to avoid this burden by arguing that any case with a foreseeable harm should be excluded from coverage under the inferred intent doctrine.

The inferred intent doctrine is limited to cases where the intent to harm is “virtually inseparable” from the conduct at issue. Examples are limited to firing a gun at point-blank range (*Western Reserve Mutual Casualty Co. v. Macaluso* (1993), 91 Ohio App.3d 93, 631 N.E.2d); sexual molestation of children (*Auto-Owners Insurance Co. v. Brubaker* (1994), 93 Ohio App.3d 211, 638 N.E.2d 124); intentionally punching a person in the face (*Erie Insurance Co. v. Stadler* (1996), 114 Ohio App.3d 1, 682 N.E.2d 712); applying lighter fluid to a sofa and setting it on fire (*Westfield Insurance Co. v. Blamer, supra*); shooting an ex-wife eight times while she sat in a car with a passenger nearby (*Allstate Insurance Co. v. Ray* (Dec. 18, 1998), Mahoning App. No. 96CV-20, 1998 WL 896366; and,

attempting to elude the police in a stolen vehicle in an urban area without regard to traffic signals (*Nationwide Mutual Insurance Co. v. Finkley, supra*).

In each of the cases above, the insured engaged in conduct that is virtually inseparable from the resulting harm. Shooting a gun at one's ex-wife at close range is inseparable from the intent to harm; the only plausible intent for the actor was to cause harm. However, in the instant case, there are other plausible reasons why the boys placed the deer in the roadway, including the reason supported by the record and noted by the Court of Appeals: to engage in a harmless prank. Regardless, the inference of intent is not sufficiently supported under these circumstances, unlike the cases cited above.

This distinction was noted by the Court of Appeals: “[t]he 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.” (Court of Appeals Decision, ¶ 55). Under the substantial certainty test, the Court of Appeals properly found that the act of placing the target deer was not virtually inseparable from a harm.

If this Court were to follow Appellants' position, countless absurdities would result, and the scope of insurance in Ohio would be radically altered. For example, an insurance company would have no duty to defend or indemnify an individual that intentionally throws a baseball which accidentally breaks a neighbor's window, one who intentionally changes lanes and causes a motor-vehicle collision, amongst others. These actions each involve an intentional act, and application of Appellants' position would exclude such events from insurance coverage.

The Court of Appeals was mindful of this and presented the issue on appeal as:

“[T]here 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” (Court of Appeals Decision, ¶ 50).

The Court of Appeals found:

“[W]e 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” (Court of Appeals Decision, ¶ 53).

The Court of Appeals specifically noted that no evidence existed in the record to demonstrate that placement of the deer decoy “made contact substantially certain,” nor that any contact with the deer decoy was substantially certain to cause any harm (because it was made of Styrofoam and weighed only 10 to 15 pounds) (Court of Appeals Decision, ¶ 55). The Court noted that the boys’ placement of the deer decoy did not obstruct the entire roadway, leaving room for motorists to avoid the deer by maneuvering around it, and that its placement provided some stopping distance (Court of Appeals Decision, ¶ 54-55).

This is an important fact in light of *Buckel v. Allstate Indemnity Co.*, 314 Wis.2d 507, 2008, WI App. 160, a case relied upon by Appellants and addressed by the Court of Appeals. In *Buckel*, four teenage boys wrapped clear plastic wrap on sign posts across a roadway, creating an invisible and unavoidable obstruction.

“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” (Court of Appeals Decision, ¶ 55). Moreover, the record is clear that no vehicle, including Appellee Roby’s, struck the deer decoy. In fact, the boys testified that several cars approached and circumvented the target deer before Appellee Roby’s incident.

The Court of Appeals implicitly acknowledged that the instant case, unlike *Buckel*, did not involve a situation where a collision was substantially certain to occur. The Court of Appeals went further in its substantial certainty analysis, finding that “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 occur, as it was made of Styrofoam and weighed only 10 to 15 pounds” (Court of Appeals Decision, ¶ 55).

Appellants’ first three propositions of law do not support any allegation that this case is one of a public or great general interest. Instead, Appellants merely attempt to reargue the issue of substantial certainty presented to the Court of Appeals.

However, the Court of Appeals’ Decision addresses all of the Appellants’ arguments and expressly finds that a court cannot, as a matter of law, construe that a collision and/or any harm was substantially certain to occur under the circumstances of this case. This Court should therefore decline jurisdiction under Appellants’ first three propositions of law.

## **RESPONSE TO APPELLANT AMERICAN SOUTHERN'S THIRD AND FOURTH PROPOSITIONS OF LAW**

In its third and fourth propositions of law, Appellant American Southern sets forth an argument for denying coverage based on a criminal-acts exclusion in its policy of insurance. This argument was briefed to the trial court and the Court of Appeals, but neither court rendered any determination thereupon.

Appellant American Southern argues that the boys' pleas of no contest to various juvenile delinquencies triggers a coverage exclusion for criminal acts. It is vital to note that the boys pled no contest to juvenile delinquencies involving theft, possessing criminal tools, and vehicular vandalism; but, the boys did not plead to any delinquency involving causing or intending to cause harm to Appellee Roby.

On an initial note, Appellant American Southern does not make any connection between these propositions of law and an allegation that this case is one of a public or great general interest. Instead, Appellant seeks a *de novo* review of these arguments. Therefore, this is not a proper basis for requesting this Court's jurisdiction.

Regardless, Appellant American Southern's argument fails because: (1) the proffered evidence is inadmissible, (2) there is no direct nexus between the juvenile delinquencies and the injuries to Appellees Roby and Zachariah, and (3) the juvenile delinquencies do not have the same effect as a criminal adjudication.

First, the evidence upon which Appellant American Southern relies is inadmissible pursuant to Evidence Rule 410, Criminal Rule 11(B)(2), and R.C. 2937.07. Evidence Rule 410 states that evidence of a plea of no contest is not

admissible in any subsequent civil or criminal proceeding. Criminal Rule 11(B)(2) provides that neither: (1) the plea of no contest, nor (2) the admission to the truth of the fact alleged in the charging document may be used against a defendant in any subsequent civil proceeding. Contrary to Plaintiffs' Motion, the plea cannot even be used as an admission to the facts alleged. R.C. 2937.07 states, in pertinent part, that a plea of no contest shall not be construed as an admission of any fact at issue in a subsequent civil action or proceeding.

Second, there is no nexus between the juvenile delinquencies and any intent to harm. The mindsets underlying the delinquencies do not deal with an intention to harm any person or object. For example, the boys pled no contest to the delinquency of theft, which is defined as "knowingly obtain[ing] or exert[ing] control over the property or services [of another]." Whether the Defendants intended to obtain property owned by another person has no bearing on whether they intended or expected to cause harm. Therefore, these delinquencies are not relevant to a determination as to whether the boys intended or expected harm to result from their actions.

In Ohio, it has long been held that juvenile court proceedings are civil, not criminal, actions. *In re Anderson* (2001), 92 Ohio St.3d 63. The "inherently criminal" aspects of these laws, not their nature or totality, are often addressed in the context of providing sufficient constitutional safeguards upon the delinquent juvenile, not in the context of satisfying the "criminal act" exclusion of an insurance policy. Therefore, these delinquencies cannot be used to trigger the criminal acts exclusion under Appellant American Southern's policy.

Appellant American Southern's third and fourth propositions of law do not support an argument that this case is one of a public or great general interest. Instead, Appellant seeks reconsideration of an issue presented to the trial court and Court of Appeals. Even if this argument were ripe for jurisdiction, Appellant's argument fails for the three reasons set forth above. This Court should therefore decline jurisdiction under Appellants' third and fourth propositions of law.

#### **IV. CONCLUSION**

Appellants fail to state a proper argument supporting their claim that this case is one of a public or great general interest. Instead, Appellants seek further review of arguments and issues presented and adjudicated by the Court of Appeals. However, the Court of Appeals considered these issues in light of the controlling precedent in its well-reasoned opinion. For these reasons, this Court should decline jurisdiction over this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the forgoing was served upon the following:

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