

ORIGINAL

IN THE SUPREME COURT OF OHIO

Allstate Insurance Company et al.

v.

Dailyn Campbell, et al.

Case No. 2009-2358

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

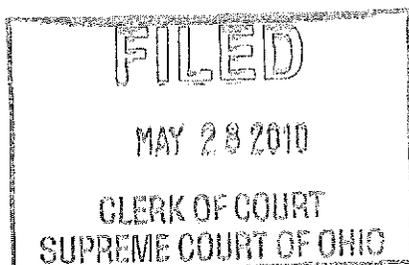
MERIT BRIEF OF APPELLANT ERIE INSURANCE EXCHANGE

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STATEMENT OF FACTS

The material facts which control the outcome of this case are undisputed. This action arises out of an incident that occurred on the night of November 18, 2005. On that evening, a group of high school age boys devised and carried out a plan to steal an artificial deer and place it in a roadway. Corey Manns, Josh Lowe, Jesse Howard and Dailyn Campbell traveled to a house in Hepburn, Ohio to steal a fake deer to use for their evening plans. (Supp. 48-50; Manns depo., pgs. 24-26). After stealing the deer, the four boys took the deer back to Josh Lowe's house where they proceeded to spray paint profanities and "hit me" on it, and make a stand so that the deer could stand upright when they would put it in the road. (Supp. 16-19, 49-50, 73-74; Campbell depo., pgs. 48-51; Manns depo., pgs. 25-26; Lowe depo., pgs. 25-26). Carson Barnes, knowing about the plan to put the fake deer in the road, met up with Corey, Josh, Jesse and Dailyn at Josh's house. (Supp. 60; Barnes depo., pg. 19). Carson went to Josh's with Joey Ramge because he wanted to go. (Supp. 59-60; Barnes depo., pg. 18-19). When Carson arrived at Josh's, the fake deer was being loaded into the SUV being driven by Josh Lowe. (Supp. 61; Barnes depo., pg. 20).

The group then got into the SUV being driven by Josh Lowe to find a location to place the fake deer on the road. (Supp. 51-52; Manns depo., pg. 28-29). Eventually, the group stopped on County Road 144, just over the crest of a hill. (Supp. 29, 31, 56, 63; Campbell depo., pgs. 110, 117; Manns depo., pg. 35; Barnes depo., pg. 30). County Road 144 is a two-lane hilly and curvy country road with a speed limit of 55 miles per hour. (Supp. 23, 36, 76; Campbell depo., pgs. 56, 126; Rogers depo., pg. 108). Corey Manns, Dailyn Campbell and Jesse Howard got out of the SUV after stopping on County Road 144. (Supp. 53, 62; Manns depo., pg. 31; Barnes depo., pg. 27). Corey Manns picked up the head of the deer and handed it to Dailyn, who

then placed the deer entirely in the eastbound lane. (Supp. 27-28, 53; Campbell depo., pgs. 63-64; Manns depo., pg. 31). The deer was placed just over the crest of the hill. (Supp. 29, 31, 56, 63; Campbell depo., pgs. 110, 117; Manns depo., pg. 35; Barnes depo., pg. 30). The placement of the deer was such that someone heading eastbound on County Road 144 would not see the deer until they were only 15 to 30 yards away. (Supp. 45, 75; Campbell depo., pg. 193; Lowe depo., pg. 72). The deer was also placed in a section of the road that was dark and contained no street or other lights. (Supp. 57, 66; Manns depo., pg. 66; Barnes depo., pg. 59). The deer was placed in the road sometime between 9:00 and 9:30 pm, when it was dark outside. (Supp. 30-31, 66; Campbell depo., pgs. 116-117; Barnes depo., pg. 59).

One of the boys involved in placing the deer in the road testified the purpose for placing the deer in the road was “to make cars slow down or maybe hit it.” (Supp. 55; Manns depo., pg. 34). After the deer was placed in the middle of the eastbound lane, the boys drove around the area to watch the reactions of drivers who encountered the deer. (Supp. 64-65; Barnes depo, pgs. 56-57). Within five to seven minutes after having placed the deer in the road, the inevitable occurred as Robert Roby was traveling eastbound on County Road 144 with Dustin Zachariah as a passenger. (Supp. 67; Barnes depo, pg. 72, Roby Complaint, ¶ 2, Zachariah Complaint, ¶ 1). Mr. Roby drove over the crest of the hill, saw the fake deer and took evasive action to avoid hitting the deer. Mr. Roby then lost control of his vehicle, which went off the road, overturned, and came to rest in a corn field. (Roby Complaint, ¶ 4-5).

On the date of this incident, Defendant Corey Manns resided with his mother, Brenda Mitchell. (Supp. 46; Manns depo., pg. 12). Brenda Mitchell was a named insured under a homeowners’ policy of insurance issued by Plaintiff-Appellant Erie. Defendant Carson Barnes resided with his parents, Dan and Sheri Barnes (Supp. 58; Barnes depo., pg. 10). Dan and Sheri

Barnes were named insureds under a homeowners' policy issued by Plaintiff-Appellant Erie. Both homeowners' policies contain the same applicable definitions, coverage language and exclusions.

The insurance policy issued by Erie provides that Erie "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." (Supp. 77). In the policy, an occurrence is defined as "an accident, including continuous or repeated exposure to the same general harmful conditions." (Supp. 78). The policy excludes coverage for:

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.

(Supp. 77). Thus, Erie's policy of insurance provides coverage for accidents, but not for any acts where injury or property damage is expected or intended.

Following the incident, Robert J. Roby filed suit against Corey Manns and Carson Barnes, among others, in the Franklin County Common Pleas Court, case number 06 CVC-11-1436. Dustin Zachariah and his mother, Katherine E. Piper, also brought suit against Corey Manns, Carson Barnes, the other Defendant-actors and Robert J. Roby in the Franklin County Court of Common Pleas, case number 06 CVC-12-15945. Appellant Erie Insurance proceeded to file a declaratory judgment action in Franklin County, case number 07 CVH-6515, which action was ultimately consolidated with the declaratory judgment actions filed by Appellants Allstate Insurance Company, American Southern Insurance Company and Grange Mutual

Casualty Company. Erie, along with other Plaintiff-insurers, filed Motions for Summary Judgment setting forth the various grounds which demonstrated that insurance coverage was not available as a matter of law to indemnify the Defendant-actors for intentional conduct which was substantially certain to, and did in fact result in harm.

On February 6, 2009, the trial court rendered its decision granting summary judgment in favor of the appellant insurers. The trial court correctly determined that the immediately attendant circumstances, which involved placing the artificial deer over the crest of a hill at night on an unlit road with a speed limit of 55 miles per hour, fully supported the conclusion that the Defendant-actors' conduct was substantially certain to result in harm, the inevitable car crash, and the resultant injuries flowing from the crash. (Appx. 59-60). The court also determined the inferred intent doctrine applied to the circumstances as a matter of law. (Appx. 60). The trial court's decision was memorialized via a judgment entry on March 4, 2009. (Appx. 43-46).

Defendant-Appellees Roby, Zachariah and Piper subsequently filed a Notice of Appeal to the Tenth Appellate District. On appeal, the Defendants claimed that the Trial Court erred in granting summary judgment to the Plaintiffs based upon the assertion that genuine issues of material fact existed as to whether the Defendant-actors intended to cause bodily injury. (Appx. 25). The Tenth District Court of Appeals reversed the judgment of the trial court. The appellate court concluded genuine issues of material fact existed as to whether the Defendant-actors necessarily intended to cause harm when they placed the artificial deer in the roadway. In arriving at this conclusion, the Court cited the testimony of the majority of the Defendant-actors to the effect they only desired to observe motorists' reaction to the artificial deer and did not even contemplate an accident as a result of placing the deer in the middle of the road. (Appx. 36-37). In a dissenting opinion, Judge Sadler correctly concluded that the subjective expectations

and intentions of the insureds had no place in an inferred intent analysis, as the appropriate inquiry was “whether the boys conduct supports an objective inference of the intent to injure.” (Appx. 40). The majority decision of the lower court implicitly rejected the application of the inferred intent doctrine to the facts presented. The Tenth District Court acknowledged that Ohio appellate courts have utilized the inferred intent doctrine in analyzing various fact patterns, yet expressed uncertainty about this Court’s view of the strength of the doctrine, stating as follows:

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.

(Appx. 30). The Appellate Court thus reversed the trial court’s decision, finding there were questions of fact as to the certainty of harm from the boys’ actions. (Appx. 38-39).

Plaintiffs-Appellants Erie, Allstate, Grange and American Southern filed their Notices of Appeal to the Supreme Court of Ohio on December 30, 2009. (Appx. 1-6). On March 10, 2010, the Supreme Court accepted the appeal.

ARGUMENT

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

As previously cited, the policy of insurance issued by Erie excludes coverage for acts where bodily injury, property damage or personal injury were expected or intended. (Supp. 77). This Court has previously held that the intent to injure can be inferred as a matter of law. See e.g. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 665 N.E.2d 1115. In this case, the trial

court focused on the immediately attendant circumstances of the case, namely that the Defendant-actors placed an artificial deer over the crest of a hill at night on a road with a speed limit of 55 miles per hour, in determining that conduct was substantially certain to result in harm and, accordingly, that the inferred intent doctrine was applicable. (Appx. 59-60). Appellant Erie contends the trial court was correct in conducting an objective analysis, applying the inferred intent doctrine and determining the Defendant-actors were not entitled to coverage for their acts.

Intentional act exclusions and the doctrine of inferred intent have been analyzed by this Court and numerous appellate courts multiple times. The 1987 case of *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, 507 N.E.2d 1118, provides one of the first instances where this Court has inferred the intent to injure as a matter of law. *Gill* involved the intentional killing of an eleven year old girl. *Id.* at 108. The policy at issue excluded coverage for injury that was expected or intended and, accordingly, the Court held the insurer was not required to defend or indemnify Gill. *Id.* at 113.

Several years later, in *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, 569 N.E.2d 906, this Court held, in a 4-3 decision, that it was not sufficient for an insurer to merely show an act was intentional but “[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.” *Id.* at 193. Importantly, the trial court in *Swanson* had determined harm was not substantially certain to occur as a result of the insured firing a BB gun from seventy to one hundred feet away from the injured party, and aiming at a tree ten to fifteen feet from the injured party. *Id.* at 189, 193. The inferred intent doctrine was thus not analyzed in *Swanson*. Rather, the opinion considered the differences in intending the act versus intending harm from

the act. *Id.* at 191-193. However, in a well-reasoned dissent, Justice Wright, in interpreting *Preferred Risk Ins. Co. v. Gill*, *supra* stated:

I find it more reasonable to state that *Gill* stands for the proposition clearly enunciated in the opinion that where an insurance policy employes such intentional tort coverage exclusions, the court construing the terms of the policy may infer intent to harm as a matter of law, when the insured could reasonably expect that his or her conduct would result in bodily injuries which are a natural and probable result of that conduct.

Id. at 196. (citations omitted). Justice Wright noted seventeen states followed that viewpoint at the time. *Id.*

The policy issued by Eric in the instant case also differs from the policy interpreted by this Court in *Swanson*, as Erie's policy excludes coverage for injuries that are different from the degree, kind or quality than the injury intended or expected. (Supp. 77). Under Erie's policy, even if the boys only expected cars would hit and damage the fake deer, the plain reading of Erie's policy language dictates that all bodily injury and property damage would be excluded from coverage.

The seminal case in relation to intentional act exclusions and the doctrine of inferred intent is this Court's decision in *Gearing v. Nationwide Insurance Company* (1996), 76 Ohio St.3d 34, 665 N.E.2d 1115. In *Gearing*, this Court held that intent could be inferred as a matter of law in incidents of intentional acts of sexual molestation. Syllabus, ¶ 1. In *Gearing*, Plaintiff-Appellant Gearing was sued by the Ozogs, the parents of three minors, for the sexual molestation of the minors. Gearing filed a declaratory judgment action against his homeowner's carrier, Nationwide, seeking a declaration that Nationwide was obligated to defend him in the suit filed by the Ozogs. Gearing claimed he did not know his acts of sexual molestations could cause emotional and mental harm to the children, and asserted that he did not intend to cause any injury or harm to the minors. *Id.* at 35. Summary judgment was granted in favor of Nationwide. In

affirming summary judgment, the appellate court held the sexual molestation fell within an intentional injury exclusion of the Nationwide policy. *Id.*

A discretionary appeal was subsequently allowed. This Court first noted 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.” *Id.* at 36. The Court then analyzed the inferred intent rule, and looked to the decisions of other states finding harm inherent in sexual molestations, regardless of the offender’s expressed intent. *Id.* at 36-37. The Court also looked at the minority approach, which had been largely abandoned, of allowing evidence of subjective intent to rebut any inference of intent. *Id.* at 37. The Court cited that “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. Human nature augurs against any viable expectation of such admissions.’” *Id.* at 37 (citations omitted).

In looking to a Vermont case, the Court stated that:

in those cases where 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. *Rather, an insured’s protestations that he ‘didn’t mean to hurt anyone’ are only relevant where the intentional act is not substantially certain to result in injury.*

Id. at 39 (emphasis added). The Court also noted a similar conclusion was inherent in their past decisions. *Id.* Accordingly, the Court held summary judgment denying coverage was proper. *Id.* at 40. “Because harm was inherent in the act of sexual molestation, [Gearing’s] representations that he was subjectively ignorant of the fact that his actions would harm his victims were insufficient to raise a genuine issue of material fact.” *Id.*

The Court in *Gearing* also addressed their decision in *Swanson*, *supra*. In *Swanson*, the Court noted they found the intentional shooting of a gun did not necessarily equate to resulting

injury, and that Swanson's testimony he never intended or expected for anyone to be harmed was "not necessarily logically inconsistent" with the facts surrounding the shooting. *Id.* at 39. The Court also noted that *Swanson* would have been more analogous to *Preferred Risk v. Gill*, *supra*, where the conduct was indisputably outside coverage, had the shooting been at close range. *Id.* at 40. Thus, there was no substantial certainty of harm in *Swanson* as was present in *Gearing*. Appellant Erie contends the Defendant-actors' actions in the instant case of placing a fake deer in the middle of a road with a 55 miles per hour speed limit at night just over the crest of a hill leaving drivers little time to react is more akin to the facts of *Gearing* than *Swanson*, as harm was substantially certain to occur from placing the deer in such a position under those circumstances. In fact, the accident at issue occurred less than ten minutes after the deer was placed in the roadway. (Appx. 36).

Subsequent to *Gearing*, this Court reviewed whether an insurance company's bad faith in failing to settle a claim constituted the type of intentional tort that was uninsurable. *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d 280, 720 N.E.2d 495. In considering the case, the Court noted that intent to injure could be inferred as a matter of law under certain circumstances, such as in *Gearing*, *supra* and *Gill*, *supra*. *Id.* The act at issue in *Buckeye Union* was failing to settle an insurance claim. The Court held they would not place the act of failing to settle an insurance claim on the same plane as murder and molestation, and did not infer any intent to injure from an act of contract interpretation. *Id.* at 284. The Court then went on to determine that "[s]ince the jury did not specifically find that Buckeye acted with an intent to injure, Buckeye's bad-faith failure to settle the insurance claim was itself not necessarily an uninsurable act." *Id.* at 286-287.

Justice Cook, in an opinion concurring in judgment only in *Buckeye Union*, noted that *Gearing* represented current Ohio law at the time, and was the better-reasoned approach as it embodied an objective analysis. *Id.* at 290. Justice Cook went on to provide a more detailed assessment of the analysis the Court should undertake pursuant to *Gearing*. Justice Cook stated that under *Gearing*, when direct intent did not exist, the analysis then:

considers objectively whether the torfeasor's intentional act was substantially certain to cause injury. In such instances 'determination of an insured's subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage.' Rather, where substantial certainty exists, intent to harm will be inferred as a matter of law.

Id. at 289 (citations omitted). Justice Cook also went on to note that while *Gearing* was decided in the sexual molestation context, "its application is certainly not so limited." *Id.* However, for the purposes of the instant case, the *Buckeye Union* decision simply did not expand the inferred intent rule to encompass contract interpretation. The acts at issue currently before this Court are undeniably more severe than contract interpretation as they involve the intentional and criminal conduct of placing an obstruction in a roadway at night.

This Court later went on to adopt Justice Cook's concurring opinion from *Buckeye Union* in *Penn Traffic Co. v. AIU Ins. Co.* (2003), 99 Ohio St.3d 227, 228, 790 N.E.2d 1199. The Court quoted that "where substantial certainty exists, intent to harm will be inferred as a matter of law." *Id.*, citing to *Buckeye Union*, *supra* at 289. In *Penn Traffic Co.*, this Court considered whether a commercial general liability insurance policy, which contained an exclusion for bodily injury to employees arising out of the scope of employment, covered an employer's liability for substantially certain intentional torts. *Id.* at 227.

Ohio appellate courts have also continued to infer intent for actions substantially certain to cause injury, and have utilized an objective analysis, as opposed to relying on stated subjective

intent, in doing so. The Tenth District case of *Westfield Insurance Company v. Blamer* (10th Dist., Sept. 2, 1999), 99-LW-3700, unreported (Appx. 63-67), is directly on point with the instant case. In *Blamer*, insured Arthur Creighton, who was heavily intoxicated, entered the front porch of Freda Blamer, poured lighter fluid on the sofa and ignited the sofa with a lighter. The fire consumed the residence, caused significant property damage and injured the owners. Suit was filed against Mr. Creighton, who was insured under his parents' homeowner's insurance policy issued by Westfield. Westfield subsequently filed a declaratory judgment action and motion for summary judgment, seeking a declaration that the homeowner's policy did not cover the intentional acts of Mr. Creighton. Evidence submitted indicated Mr. Creighton did not know that the Blamers were home and did not intend or expect the Blamers to be injured. It also did not appear Mr. Creighton intended for the fire to spread to the house. The trial court, citing to *Swanson*, supra, held that even though the insured admitted he intended to set the sofa on fire, it could not be inferred from the evidence that he intended to specifically injure the owners of the residence. *Id.* at pgs. 1-2. (Appx. 63-64).

On appeal, the Tenth District Court relied on *Gearing*, supra, and determined the acts of the insured were not covered. *Id.* at pgs. 3-4 (Appx. 65-66). In discussing *Swanson*, supra, the Court stated:

We find, however, that despite its broad language, *Swanson* does not mandate coverage in this case. Unlike the insured here, the insured in *Swanson* did not intend to cause any harm, nor was harm substantially certain to result from his actions.

...

Thus, *Swanson* does not require that the insured intended the full extent of the resulting injury in order for the conduct to be considered intentional and thus outside the scope of coverage. *Rather, coverage is inapplicable if the insured intended to cause an injury by his intentional acts or if injury was substantially certain to occur from such acts.*

Id. at pg. 3 (Appx. 65) (citations omitted) (emphasis added).

The Court in *Blamer*, like the trial court in the instant action, further provided that “in determining whether an incident is accidental for purposes of liability insurance, ‘the focus should be on the injury and its immediately attendant causative circumstances.’” *Blamer* at pg. 3 (Appx. 65), citing *Worrell v. Daniel* (1997), 120 Ohio App.3d 543, 551. Accordingly, the Court found it was:

immaterial in the instant case that Creighton may not have specifically intended that the fire spread to the Blamers’ residence or that he did not specifically intend to cause Mrs. Blamer’s injuries. Creighton 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, . . . Creighton's actions cannot be considered accidental, and the Blamers' damages cannot be considered to have resulted from an "occurrence" to which coverage applies.

Id. at pg. 4 (Appx. 66). Additionally, the Court stated that “to hold otherwise would frustrate the longstanding public policy of denying liability coverage for intentional, criminal acts because society has an interest in discouraging such conduct.” *Id.* Thus, the judgment was reversed and remanded. *Id.* at pg. 5 (Appx. 67).

In *Nationwide Mut. Ins. Co. v. Finkley* (9th Dist., 1996), 112 Ohio App. 3d 712, the Ninth District considered whether the actions of an unlicensed sixteen-year old fleeing police fell within an “intentional acts” policy exclusion. In *Finkley*, the insured’s grandson, Anwar Stembridge, took the insured’s car without permission. The insured, Gertrude Finkley, assumed her car had been stolen and called police. The police later attempted to pull Stembridge over, but Stembridge fled. While attempting to elude the police, Stembridge failed to stop at a stop sign and crashed into another vehicle. The insurer, Nationwide, filed a declaratory judgment action asserting coverage should not be afforded for the accident. The trial court granted summary

judgment in favor of Nationwide, finding that the “willful and deliberate act” fell within the intentional acts exclusion. *Id.* at 714.

On appeal to the Ninth District, the Court noted Stembridge voluntarily and purposefully committed the reckless behavior of fleeing police and engaging in an automobile chase. The Court found that “[a]ny reasonable person would know, or should know, that such actions would probably lead to serious injury.” *Id.* at 715. In following *Gearing*, *supra*, the Court cited that:

where 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. Rather, an insured’s protestations that he ‘didn’t mean to hurt anyone’ are only relevant where the intentional act at issue is not substantially certain to result in injury.

Id. Accordingly, 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 for traffic control devices, his actions are substantially certain to result in injury.” *Id.* Accordingly, summary judgment was affirmed in favor of Nationwide. *Id.* at 716.

Ohio appellate courts also continued to use an objective analysis to infer intent for intentional acts substantially certain to cause harm pursuant to *Gearing*, *supra*, following its decision in *Buckeye Union*, *supra*. In *Arrowood v. Grange* (8th Dist., 2003), 2003-Ohio-4075, the Eighth District considered whether Grange was properly granted summary judgment in their action for a declaratory judgment seeking a declaration that Robert Lemieux, Jr. was not entitled to coverage for his action of discharging a weapon three times in the front of the home of Arrowood. *Id.* at ¶ 3, 7. One of the bullets ricocheted off the house and hit Arrowood as she was exiting the back door of the home. *Id.* at ¶3. The bullets did not hit any of the individuals standing in the front of the house. *Id.* at ¶35. The trial court determined coverage was excluded under the policy’s provision which excluded coverage for actions where bodily injury or

property damage was expected or intended. *Id.* at ¶ 8-15. On appeal, the Court, citing to *Gearing*, supra, noted that intent to harm could be inferred from certain acts due to their nature, and that wrongdoers should not be relieved of liability for “intentional, antisocial, criminal conduct.” *Id.* at ¶33. The Court also stated that “[t]he focus of any analysis under *Swanson* and *Gearing* should not be on the victim, but on the action of the insured and whether the insured’s action is substantially certain to cause harm.” *Id.* at ¶34. The Appellate Court agreed that Lemieux’s actions were substantially certain to cause harm. *Id.* at ¶35. Accordingly, the judgment of the trial court denying coverage was affirmed.

Additionally, the Eleventh District case *Wight v. Michalko* (11th Dist., 2005), 2005-Ohio-2076 provides an example of a court using an objective analysis, as opposed to relying on the insured’s stated intent, in denying coverage. In *Wight*, the defendant-actor-insured threw a five pound rock through the first floor window of a house where a party was occurring. The rock hit and injured an individual at the party, and suit was brought by the injured party against the defendant-actor. The insurer for the defendant-actor intervened in the action, and asserted that no coverage was provided under the policy, given the intentional nature of the actions of the insured. Summary judgment was ultimately granted in favor of the insurer, and an appeal was taken. On appeal, the insured relied upon his testimony that he did not intend to hit or hurt anyone when he threw the rock, even though he did intend to throw the rock into the house because he was angry. *Id.* at ¶1-9. The insured also attempted to rely on *Swanson*, supra. However, the court provided:

Appellant's reliance on *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St. 189, is misplaced. In *Swanson*, the Supreme Court of Ohio ruled that an insurer was obligated to defend and indemnify a teenage boy who shot a BB gun in the general vicinity of a group of other teenagers, not intending to hit anyone, but striking one of the teens in the eye. The Court specifically held that

in order to avoid coverage under an intentional acts exclusion, it was not sufficient to show that the act was intentional, but rather "the insurer must [also] demonstrate that the injury itself was expected or intended." *Id.* at syllabus. We must stress, however, that unlike the insured here, the insured in *Swanson* did not intend to cause any harm, nor was harm substantially certain to occur from his actions.

Id. at ¶32. Accordingly, summary judgment in favor of the insurer was affirmed. *Id.* at ¶38.

In *Morner v. Guiliano*, (12th Dist., 2006), 167 Ohio App.3d 785, 2006-Ohio-2943, the Twelfth District considered whether coverage was applicable for an injury caused by seventeen year old Matt Giuliano shooting an air rifle with BBs at people to "aggravate" them. One of Guiliano's shots onto a balcony 20 to 25 feet away and 10 to 15 feet above him hit Sara Morner in the eye, and resulted in her no longer being able to see out of her left eye. *Id.* at 788-789. Guiliano had not intended to cause anyone serious injury, but had intended to "aggravate" or "get a rise" of out of them. *Id.* at 788. Guiliano's father's insurer, State Farm, filed a declaratory judgment action and motion for summary judgment seeking a declaration it was not obligated to defend or provide coverage to Giuliano. State Farm was awarded summary judgment. *Id.* at 790.

On appeal, appellants relied on *Swanson*, supra, and argued whether an insured expected or intended injury was a question of fact unless injury was substantially certain to occur. *Id.* at 792. However, the Court found that unlike *Swanson*, Giuliano was attempting to cause some harm as he was attempting to aggravate them and expected they would experience a stinging sensation from the BB, although it did not appear he intended or expected the far more serious injury he caused to Morner. *Id.* at 794. Nevertheless, the Court noted that the majority rule in the country was to exclude coverage "if the insured intended to do a particular act, and intended to do some harm, even if the harm actually done was radically different from that intended." *Id.*

citing *Allstate Ins. Co. v. Steinemer* (C.A.11, 1984), 723 F.2d 873. The Twelfth District had also previously excluded coverage on several cases when some injury was intended from an act. *Id.* Accordingly, the Court held coverage for Giuliano was barred under the expected or intended injury exclusion as Giuliano intended to do "some harm". *Id.* at 795.

Finally, the Wisconsin Court of Appeals case *Buckel v. Allstate Indemnity Co.* is directly on point with the instant case, and with this Court's holding in *Gearing*, *supra*. (Wis.App, Sept. 17, 2008), 758 N.W.2d 224, No. 2007AP1836. In *Buckel*, an accident occurred when a motorcycle driver and his passenger struck a "wall" of plastic wrap that had been placed across a road by a group of teenage boys. The youths had devised a plan to place plastic wrap across the roadway to create an invisible barrier, and "...see what would happen". *Id.* at ¶3. Shortly after midnight on July 12, 2004, the youths arrived at an agreed upon spot on a roadway, and proceeded to wrap clear plastic around two sign posts. The youths then walked a short distance away, and waited. After approximately 20 minutes, the youths saw a light coming over a hill toward the plastic wrap, and they hid behind some bushes. They then heard a loud screech, and fled the scene. The light they observed was the motorcycle approaching the plastic wrap. The riders were both seriously injured in the collision. *Id.* at ¶4.

The injured motorcycle riders brought suit against the boys and their parents, and the insurance carriers for the Defendants participated in the litigation. The insurers ultimately moved for summary judgment, asserting that there was no coverage under the policies for the intentional acts of the youths. The trial court granted the insurers' motions. *Id.* at ¶s 6-7. On appeal, the Plaintiffs asserted summary judgment was inappropriate, because the question of intent should have gone to the jury. The Court of Appeals noted that Wisconsin's Supreme Court had previously held that "...an intentional acts exclusion precludes coverage where an

intentional act is substantially certain to produce injury even if the insured person asserts (honestly or dishonestly) that no harm was intended." *Id.* at ¶11, citing *Loveridge v. Chartier*, (1991), 161 Wis. 2d 150, 168, 468 N.W. 2d 146. In affirming the decision of the trial court, the Court of Appeals in *Buckel* stated as follows:

We understand that the issue of intent is generally a question of fact and, where intent is disputed and material to the outcome of the case, the issue should prevent summary judgment; however, 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. See *Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 569, 360 N.W. 2d 65 (Ct. App. 1984). A person intends to injure another if he or she "intend[s] the consequences of" his or her act or "believe[s] that they are substantially certain to follow." *Loveridge*, 161 Wis. 2d at 168. We may infer that an insured intended to injure or harm using an objective standard where "the degree of certainty that the conduct will cause injury is sufficiently great to justify inferring intent to injure as a matter of law." *Id.* at 169; see also *B.N.*, 275 Wis. 2d 240, ¶14 (where the facts, viewed objectively, demonstrate a sufficient degree of certainty, the court may infer intent).

The question of intent must 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." *Loveridge*, 161 Wis. 2d at 169-70. Therefore, we must determine whether the boys' conduct supports an objective inference of the intent to injure.

...

Buckel and *Brzykcy* respond that the boys affirmatively averred that they had no intent to injure and that such subjective evidence should overcome the objective inference. We disagree. "[A]n insured cannot prevent a court from inferring his [or her] intent to injure as a matter of law by merely asserting he [or she] did not intent to injure or harm." *Ludwig v. Dulkan*, 217 Wis.2d 782, 789, 579 N.W.2d 795 (Ct.App.1998).

Id. at ¶15-18. The Court also held the objective standard for inferring intent applied to preclude coverage where the harm that occurs is different in character or magnitude from the harm intended. *Id.* at ¶19.

The facts in *Buckel* are parallel to those presented in the instant action. Specifically, both actions involve the intentional placement of obstructions on roadways at night, when visibility would be low. The danger in the instant case was magnified by the fact that the road in question had a 55 miles per hour speed limit, and the deer was placed just over the crest of a hill, giving drivers little time to react. Thus, as in *Buckel*, the immediately attendant causative factors produced such a high likelihood of injury that intent to injure can be inferred as a matter of law. Accordingly, the trial court's determination that no coverage is provided under the policies issued by Erie, which comports with law, logic and common sense, should not have been disturbed on appeal.

Based upon the undisputed facts of this case, and the unambiguous language set forth in the policies issued by Erie, the trial court concluded that the Erie policies do not provide coverage for the claims asserted by Robert Roby, Dustin Zachariah and Katherine Piper against Corey Manns or Carson Barnes. Although each of the Defendant-actors offered up a self-serving statement in discovery that they did not intend any injury to person or property, the trial court realized that the Defendant-Actors' protestations that they "didn't mean to hurt anyone" were irrelevant, as the conduct in question was substantially certain to result in injury. (Appx. 57-58). In arriving at the determination that the Defendant-actors' conduct was not covered under the policies issue by Erie, the trial court properly focused upon the immediately attendant causative circumstances, and cited those circumstances in holding that the inferred intent doctrine applied to the facts of the case. Specifically, the trial court stated as follows:

The fact that Defendants placed an artificial deer on a road is not without significance. Indeed, the presence of a real deer on a road poses a significant risk of catastrophic and sometimes unavoidable harm. The Court cannot ignore the common knowledge in this regard.

Additionally, the record demonstrates that there were no additional lights to illuminate the area where Defendants placed the deer. This fact is particularly important in conjunction with the fact that Defendants placed the deer just over the crest of a hill at night.

Finally, the fact that the road had a speed limit of 55 miles per hour is additionally of consequence, again due to time of day and the placement in relation to the hill. All of these circumstances lead to the finding that a driver had little or no time to react to the deer.

Although a few drivers slowed down and avoided the deer, this Court agrees with Plaintiffs' assertion that a car crash was inevitable. Although Defendants were unable to foresee the potential results of their actions, this Court finds that their conduct was substantially certain to result in harm. This Court finds the analysis and holdings of *Blamer* and *Finkley* to be particularly directive. Therefore, this Court finds that the inferred intent doctrine applies to the circumstances of this case. As such, this Court will infer Defendants' intent as a matter of law.

As a result of this finding, the Court finds that there is no coverage under any of the policies at issue. Accordingly, there is no duty to defend and/or indemnify Defendants in the pending bodily injury actions.

(Appx. 60). As a review of applicable Ohio law has revealed, the trial court properly applied the doctrine of inferred intent using an objective analysis of the undisputed facts and circumstances presented in this action.

However, the appellate court, in reversing the trial court's judgment and holding the doctrine of inferred intent was not applicable, focused on the testimony of the Defendant-actors. Specifically, in determining whether the boys' conduct supported an objective inference of intent to injure, the Court undertook the following substantial subjective analysis:

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.

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, Ränge, 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.

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.

(Appx. 35-37). The Court also took into consideration whether the speed of Mr. Roby's vehicle was a factor in contributing to the accident. (Appx. 37-38). However, as noted by Justice Sadler's dissent, "the appropriate inquiry is 'whether the boys' conduct supports an *objective* inference of the intent to injure.'" (Appx. 40). Thus, Justice Sadler believed the boys' testimony regarding the expectations and intentions, as well evidence regarding Roby's speed and how other vehicles reacted to the deer were irrelevant. (Appx. 39-40). Justice Sadler opined that:

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.

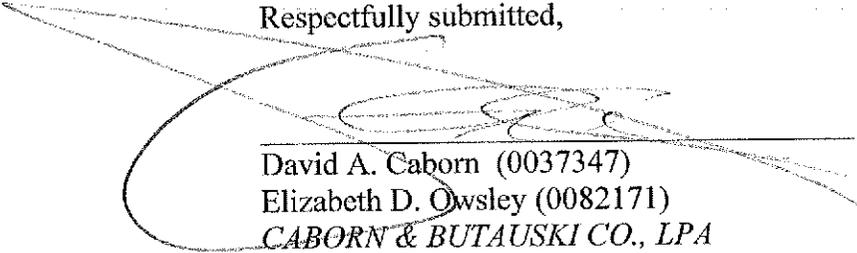
(Appx. 40-41). Justice Sadler also noted a distinction between the Supreme Court cases where intent was inferred when injury was "certain" and the standard of only requiring harm to be "substantially certain." (Appx. 41). Accordingly, Justice Sadler thought injurious intent could be inferred under these particular circumstances. (Appx. 42).

CONCLUSION

Appellant Erie asserts the intent to injure can and should be inferred in instances other than murder and sexual molestation, and should be applied in situations such as the instant case where insureds engage in such conduct that is substantially certain to result in harm. In the instant case, the Defendant-actors placed an artificial deer in the lane of an unlit portion of road with a speed limit of 55 miles per hour over the crest of a hill at night, thus providing motorists with little time to react to the obstruction in their lane. Given those circumstances, injury, be it to persons or property, was inevitable. While the Appellate Court relied on the testimony of the Defendant-actors that they did not intend harm, an objective analysis of the facts should have been conducted pursuant to *Gearing*, supra. When the undisputed facts of this case are

considered, common sense dictates that harm was substantially certain to occur from the Defendant-actors' conduct of placing the fake deer in the road under those circumstances. Accordingly, Appellant Erie Insurance Exchange respectfully requests this Court reverse the decision of the Appellate Court, and reinstate the grant of summary judgment in favor of Appellant Erie.

Respectfully submitted,



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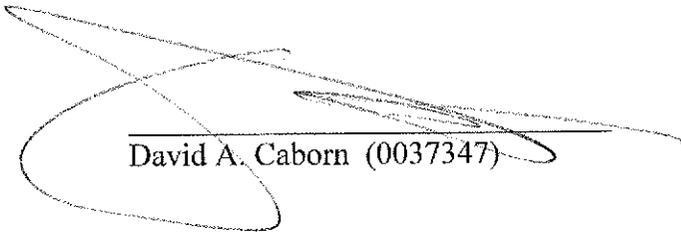
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APPENDIX

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IN THE SUPREME COURT OF OHIO

09-2358

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

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
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SUPREME COURT OF OHIO

Grange Mutual Casualty Company,

Plaintiff-Appellant

vs.

Corey Manns

Defendants-Appellees,

Dustin S. Zachariah, et al

Defendants-Appellees.

Court of Appeals Case No.
09 AP-309

Erie Insurance Exchange,

Plaintiff-Appellant,

vs.

Corey Manns, et al.,

Defendants-Appellees

Robert J. Roby, Jr.,

Defendant-Appellee.

Court of Appeals Case No.
09 AP 318

American Southern Insurance Co.,

Plaintiff-Appellant,

vs.

Dale Campbell, et al.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellee.

Court of Appeals Case No.
09 AP-319

Grange Mutual Casualty Company

Plaintiff-Appellant,

vs.

Corey Manns, et al.,

Defendants-Appellees

Robert J. Roby, Jr.,

Defendant-Appellee.

Court of Appeals Case No.
09 AP-320

Allstate Insurance Company

Plaintiff-Appellant,

vs.

Dailyn Campbell, et al.,

Defendants-Appellees

Robert J. Roby, Jr.,

Defendant-Appellee.

Court of Appeals Case No.
09 AP-321

JOINT NOTICE OF APPEAL OF APPELLANTS ALLSTATE INSURANCE CO., ERIE
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GRANGE MUTUAL CASUALTY COMPANY

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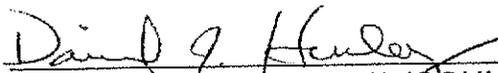
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Joint Notice of Appeal of Appellants Allstate Insurance Co., Erie Insurance Exchange, American Southern Insurance Company and Grange Mutual Casualty Company.

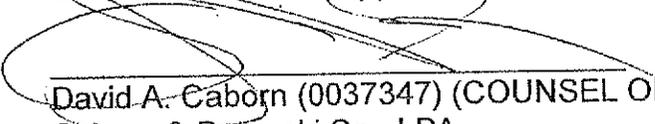
Allstate Insurance Co., Erie Insurance Exchange, American Southern Insurance Co. and Grange Mutual Casualty Co. jointly give notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, 10th Appellate District, entered in Court of Appeals case Nos. 09 AP 306, 09 AP 307, 09 AP 308, 09 AP 309, 09 AP 318, 09 AP 319, 09 AP 320 and 09 AP 321 on November 17, 2009.

These consolidated cases raise questions of public or great general interest.

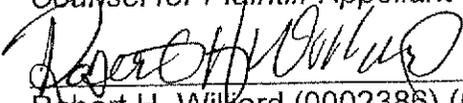
Respectfully Submitted,



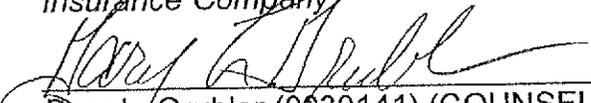
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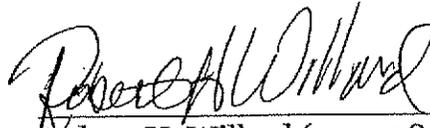
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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. 07CVH07-8934)

(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, :

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

(REGULAR CALENDAR)

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

Erie Insurance Exchange, :
 :
 Plaintiff-Appellee, :

v. :

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

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

(REGULAR CALENDAR)

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

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.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellant.

Alistate 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)

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

4

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 French
Judge Judith L. French, P.J.

[Cite as *Allstate Ins. Co. v. Campbell*, 2009-Ohio-6055.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Allstate Insurance Company, :

Plaintiff-Appellee, :

v. :

Dailyn Campbell et al., :

Defendants-Appellees, :

Dustin S. Zachariah et al., :

Defendants-Appellants. :

Erie Insurance Exchange, :

Plaintiff-Appellee, :

v. :

Corey Manns et al., :

Defendants-Appellees, :

Dustin S. Zachariah et al., :

Defendants-Appellants. :

American Southern Insurance Company, :

Plaintiff-Appellee, :

v. :

Dale Campbell et al., :

Defendants-Appellees, :

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

(REGULAR CALENDAR)

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

(REGULAR CALENDAR)

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

(REGULAR CALENDAR)

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

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

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 that 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); *Aguiar 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.) Ramage 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; Ramage 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); *Aguiar 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.

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO

Erie Insurance Exchange

Plaintiff,

vs.

Corey Manns, et al.

Defendants.

CASE NO. 07 CVH-05-6515
JUDGE CONNOR

Allstate Insurance Co.

Plaintiff,

vs.

Dailyn Campbell, et al.

Defendants.

CASE NO. 07 CVH-07-8934

CLERK OF COURTS

2007 MAR -6 PM 12:10

COMMON PLEAS COURT
FRANKLIN CO. OHIO

FILED

American Southern Insurance Company

Plaintiff,

vs.

Dale Campbell, et al.

Defendants.

CASE NO. 07-CVH-08-11422

Grange Mutual Casualty Co.

Plaintiff,

vs.

Corey Manns, et al.

Defendants.

CASE NO. 08CVH-02-03167

JUDGMENT ENTRY

These consolidated declaratory judgment actions are before the court upon the motion for summary judgment filed on July 1, 2008 by Plaintiff, Erie Insurance Exchange; the motion for summary judgment filed on June 30, 2008 by Plaintiff, Allstate Insurance Company; the motion for summary judgment filed on July 2, 2008 by Plaintiff, American Southern Insurance Company, and; the motion for summary judgment filed on July 1, 2008 by Plaintiff, Grange Mutual Casualty Company.

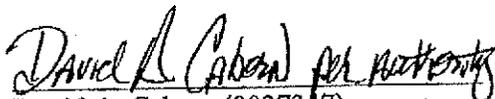
After considering the evidence submitted by the parties and the arguments of counsel, and in accordance with its decision of February 6, 2009, a copy of which is attached hereto and incorporated herein, the Court finds there are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law. Accordingly, the above referenced motions for summary judgment are well taken and the Court hereby sustains the same. As to Plaintiffs Erie Insurance Exchange, American Southern Insurance Company and Grange Mutual Casualty Company, the court finds there is no coverage under their respective insurance policies and hence no duty to defend and/or indemnify their respective insureds in the bodily injury actions pending before Judge Fais (Case No. 06 CVB-11-1436) and Judge Lynch (Case No. 06 CVC-12-15945) of this Court. As to Plaintiff, Allstate Insurance Company, the attached decision of this Court found it did not have a duty to defend or indemnify its insureds. Upon further review of the record, this Court finds Allstate did not move for summary judgment on the issue of the duty to defend. Therefore, as to Allstate only, the court finds it does not have a duty to indemnify its insureds in the above referenced bodily injury actions. However, this Court makes no finding regarding Allstate's duty to defend its insureds in those actions.

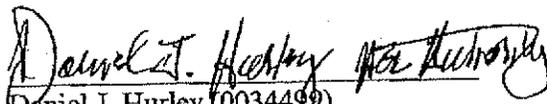
The Court, having rendered judgment on all of the claims and as to all of the parties before it, finds this Judgment Entry to be a terminating entry and there is no just reason for delay.

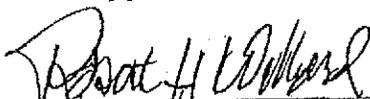
IT IS SO ORDERED.

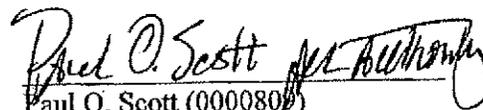
Judge Travis, sitting by assignment

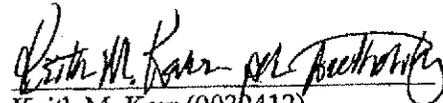
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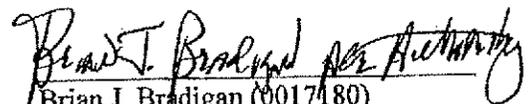

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COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Erie Insurance Exchange, :
Plaintiff, : CASE NO. 07CVH05-6515
-vs- : JUDGE JOHN A. CONNOR
Corey Manns, et al., :
Defendants. :

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
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CLERK OF COURTS

Allstate Insurance Co., :
Plaintiff, : CASE NO. 07CVH-07-8934
-vs- :
Dallyn Campbell, et al., :
Defendants. :

American Southern Insurance Company, :
Plaintiff, : CASE NO. 07CVH-08-11422
-vs- :
Dale Campbell, et al., :
Defendants. :

Grango Mutual Casualty Co., :
Plaintiff, : CASE NO. 08CVH-02-3167
-vs- :
Corey Manns, et al., :
Defendants. :

DECISION SUSTAINING ERIE'S MOTION FOR SUMMARY JUDGMENT; AND
DECISION SUSTAINING ALLSTATE'S MOTION FOR SUMMARY JUDGMENT; AND
DECISION SUSTAINING AMERICAN SOUTHERN'S MOTION FOR SUMMARY
JUDGMENT; AND
DECISION SUSTAINING GRANGE'S MOTION FOR SUMMARY JUDGMENT

Rendered this ____ day of February 2009.

CONNOR, J.

I. INTRODUCTION

On November 18, 2005, a group of high school-age boys devised a plan to place an artificial deer in the road. To that end, Corey Manns, Josh Lowe, Jesse Howard and Dailyn Campbell (hereinafter "Defendants" collectively) stole an artificial deer and took it back to Lowe's house. Defendants spray painted profanities and the phrase "hit me" on the deer. Additionally, Defendants constructed a supportive stand, which allowed the deer to stand upright on its own.

Carson Barnes and Joey Range (also hereinafter "Defendants" collectively) arrived at Lowe's house as the deer was being placed into Lowe's SUV. Defendants Manns, Lowe, Howard, Campbell, Barnes, and Range then left to find a place to put the deer. They stopped on County Road 144, just over the crest of a hill.

After the SUV stopped, Manns, Campbell and Howard got out of the SUV. Manns picked up the deer and handed it to Campbell, who placed the deer in the eastbound lane. After the deer was placed on the road, Defendants remained in the general area to watch the reaction of other drivers as they approached the deer.

Several cars approached the deer, stopped and/or slowed down, and avoided it. Then a vehicle operated by Robert Roby and occupied by Dustin Zachariah approached the deer. As

Roby drove over the crest of the hill, he saw the deer and took evasive action. Roby lost control over his vehicle, which left the roadway, overturned and eventually came to rest in an adjacent field. Both Roby and Zachariah were seriously injured as a result of the crash.

Roby and Zachariah have each filed suit against the alleged tortfeasors. Roby's suit is pending as case number 06CVB-11-1436 before the Honorable David Fais of this court. Zachariah's suit is pending as case number 06CVC-12-15945 before the Honorable Julie Lynch of this court.

The matter *sub judice* presents the declaratory judgment claims of four insurance companies (hereinafter "Plaintiffs" collectively) for each of its respective insured(s). Plaintiffs have all filed motions for summary judgment, which seek findings that there is: (1) no coverage available to the defendants, (2) no duty to defend, and (3) no duty to indemnify the defendants. Defendants¹ have filed memoranda contra, and Plaintiffs have filed replies. The pending dispositive motions are therefore now ripe for review.

The arguments presented for and against the Plaintiffs are similar in nature and will be considered cumulatively unless otherwise specified.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment is governed by Rule 56(C) of the Ohio Rules of Civil Procedure, which provides: "summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A

¹ Although Mr. Roby and Mr. Zachariah are not insured under the policies, they are defendants in this action and oppose Plaintiffs' motions. While they are not alleged tortfeasors and did not engage in the conduct described in this Decision, the Court will nevertheless refer to the "Defendants" collectively for mere convenience.

summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

The Supreme Court of Ohio has adopted a three-part standard to be used when deciding if summary judgment is appropriate. The moving party must show: "(1) [T]hat there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

Additionally, the nonmoving party must go beyond the allegations or denials contained in his pleadings and affirmatively demonstrate the existence of a genuine issue of material fact in order to prevent the granting of a motion for summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

Moreover, the entry of summary judgment against a party is mandated when the nonmoving party: "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial * * * [by designating] specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett* (1986) 477 U.S. 317.

The Supreme Court of Ohio has adopted and approved the *Celotex* burden on the nonmoving party, provided that the moving party meets its initial burden of informing the court

of the basis for the motion and identifying portions of the record demonstrating the absence of any genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

III. LAW AND ANALYSIS

An insurance policy is a contract between an insured and the insurer. *Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St. 3d 474, 478. As such, the interpretation of an insurance policy is a matter of law. *Cincinnati Ins. Co. v. CPS Holdings, Inc.* (2007), 115 Ohio St. 3d 306, 307 citing *Sharonville v. Am. Emps. Ins. Co.* (2006), 109 Ohio St. 3d 186. When interpreting an insurance policy, a court must give effect to the intent of the parties to the agreement. *Cincinnati Ins. Co. v. Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St. 3d 270, 273, citing *Emps.' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, syllabus.

The intent of the parties is presumed to reside in the language they used. *Cincinnati Ins. Co. v. Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St. 3d 130, paragraph one of the syllabus. As such, a court must analyze the plain and ordinary meaning of the language used in the contract, unless another meaning is clearly apparent from its contents. *Cincinnati Ins. Co. v. Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St. 2d 241. Therefore the Court will first analyze the insurance policies underlying this dispute.

The Erie Policies

The Erie policies provide:

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.

(Emphasis omitted). Erie Policies, p. 14. Furthermore, the policies define an "occurrence" as: "an accident, including continuous or repeated exposure to the same general harmful conditions."

(Emphasis omitted). Erie Policies, p. 2. Finally, the Erie policies provide the following exclusion:

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.

(Emphasis omitted). Erie Policies, p. 14.

The Grange Policy

The Grange policy provides:

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.

(Emphasis omitted). Grange Policy, p. 9. Furthermore, the policy defines an "occurrence" as:

"an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which result in bodily injury or property damage during the policy period."

(Emphasis omitted). Grange Policy, p. 1. Finally, the Grange policy provides the following exclusion:

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.

Grange Policy, p. 11.

The Allstate Policy

The Allstate policies provide:

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

Allstate Policies, p. 19. The policies define the term "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." Allstate Policies, p. 3.

Furthermore, the Allstate policies provide the following exclusion:

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 damages 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.

(Emphasis omitted). Allstate Policies, p. 19.

The American Southern Policy

The Personal Liability Coverage portion of the American Southern Policy provides:

"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.

American Southern Policy, p. 4. Furthermore, the policy provides:

"Occurrence" means 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.

American Southern Policy, p. 3. Finally, the American Southern policy provides the following exclusion:

"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."

American Southern Policy, pp. 4-5.

Generally, the Insurance Companies assert that the personal injuries and property damage did not result from an "accident" and/or are otherwise excluded from coverage under the policies' respective exclusions. Additionally, Plaintiffs assert that the juvenile court's adjudications of delinquency establish the requisite intent of the Defendants.

Conversely, Defendants assert that the injuries were neither intended nor expected. Rather, the harm was both unintended and unexpected. Additionally, this Court cannot infer Defendants' intent as a matter of law. Finally, Defendants' criminal delinquencies are inadmissible and have no relation to the ultimate issue of coverage.

Based upon the briefs before the Court, the issue is whether Plaintiffs are entitled to judgment as a matter of law. Specifically, the issues regard: (1) whether there is coverage, (2)

whether an exclusion precludes coverage, and (3) whether there is any duty to defend and/or indemnify.

The preliminary issue is whether the insurance policies provide coverage. Indeed, "[i]t 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.* (1996), 76 Ohio St. 3d 34, 36. There is coverage "if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto." *Id.*

As outlined above, all of the policies provide coverage for an "occurrence," which is defined as an "accident." The policies fail to define the term "accident" any further. Therefore this Court must give the term its ordinary meaning. *Morner v. Giullano*, 167 Ohio App., 3d 785, 2006 Ohio 2943, ¶25.

The Ohio Supreme Court has held that the ordinary meaning of the term "accident" refers to "an unexpected, unforeseeable event." *Randolph v. Grange Mut. Cas. Co.* (1979), 57 Ohio St. 2d 25, 29. Further, the Tenth District Court of Appeals recently held the term relates to "'unintended' or 'unexpected' happenings." See *Haimbaugh v. Grange Mut. Cas. Co.* (Aug. 7, 2008), Franklin App. No. 07AP-676, 2008 Ohio 4001 quoting *Morner* at ¶25. Indeed, "Inherent in a policy's definition of 'occurrence' is the concept of an incident of an *accidental* as opposed to an *intentional* nature." (Emphasis *sic*.) *Gearing* at 36.

The seminal case that established the framework for the relevant analysis is *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St. 3d 189. The *Swanson* Court held: "the insurer must demonstrate that the injury itself was expected or intended. It is not sufficient to show merely that the act was intentional." *Swanson* at 193. Further, the court aptly noted: "[a]lmost

all acts are intentional in one sense or another but many unintended results flow from intentional acts." *Swanson* at 192 quoting *State Farm Mut. Auto. Ins. Co. v. Worthington* (C.A. 8, 1968), 405 F.2d 683, 688.

In *Gearing*, the court applied the *Swanson* framework to the intentional act of molesting a child. The *Gearing* Court held that the intentional acts of sexual molestation are virtually inseparable from the harm they cause. *Gearing* at 37. Specifically, *Gearing* held: "to do the act is necessarily to do the harm which is its consequence; and * * * since unquestionable the act is intended, so also is the harm." *Id.* quoting *Allstate Ins. Co. v. Mugavero* (1992), 79 N.Y.2d 153, 160.

In *Westfield Ins. Co. v. Blamer* (Sept. 2, 1999), Franklin App. No. 98AP-1576, 1999 Ohio App. LEXIS 4098, the Tenth District Court of Appeals analyzed the breadth of the *Swanson* holding. The facts in *Blamer* involved an insured who intentionally set fire to a sofa that was on the front porch of a residence. The insured contended that he did not intend for the fire to spread to the residence and cause further damage. The trial court was presented with cross-motions for summary judgment. The trial court overruled the insurer's motion, while it sustained the insured's motion. The trial court relied heavily upon *Swanson*. Upon reviewing the decision to grant summary judgment to the insured, the Tenth District provided:

Despite its broad language, *Swanson* does not mandate coverage in this case. Unlike the insured here, the insured in *Swanson* did not intend to cause any harm, nor was harm substantially certain to result from his actions. * * * Thus, *Swanson* does not require that the insured intended the full extent of the resulting injury in order for the conduct to be considered intentional and thus outside the scope of coverage. * * * Rather, coverage is inapplicable if the insured intended to cause an injury by his intentional acts or if injury was substantially certain to occur from such acts.

(Emphasis sic). The Tenth District found that the insured necessarily intended to cause some harm when he set the couch on fire. Additionally, and importantly, the court found that harm was substantially certain to result. For these reasons, the Tenth District reversed the trial court's finding for coverage.

The *Blamer* Court further provided: "in determining whether an incident is accidental for purposes of liability insurance, 'the focus should be on the injury and its immediately attendant causative circumstances.'" *Blamer* at 8 quoting *Worrell v. Daniel* (1997), 120 Ohio App. 3d 543, 551. As this rule relates to the matter *sub judice*, the relevant inquiry regards the bodily injuries and property damage associated with the car crash. Therefore the immediately attendant causative circumstances involve: the placement of the artificial deer over the crest of a hill at night on a road with a speed limit of 55 miles per hour.

The Court therefore rejects Plaintiffs' suggestion that the preparatory work (i.e. stealing the deer, painting it, and constructing a stand) necessarily equates to a finding of an intention to harm. While these circumstances may relate to an inference of intent, they certainly do not equate to a finding of intentional harm, as some Plaintiffs suggest.

Indeed, the testimony in the record consistently demonstrates that the Defendants neither intended nor expected any personal injury or property damage. [Howard Depo. Tr., pp. 50-51; Campbell Depo. Tr., pp. 70-71, 110-111; Manns Depo. Tr., pp. 104-105; Barnes Depo. Tr., pp. 30-31]. Instead, Defendants merely wanted to see the reactions of other drivers. [Howard Depo. Tr., p. 35; Barnes Depo. Tr., pp. 56-57; Manns Depo. Tr., p. 69; Rangs Depo. Tr., pp. 63-64].

These assertions, however, do not complete the analysis. "Rather, an insured's protestations that he 'didn't mean to hurt anyone' are only relevant where the intentional act at

issue is not substantially certain to result in injury." *Blamer* quoting *Gearing* at 39. When a substantial certainty of harm exists, a court may infer intent to harm. *Haimbaugh* citing *Gearing*.

Courts have applied the inferred intent doctrine to situations where an insured: fires a gun at point blank range (*W. Reserve Mut. Cas. Co. v. Macaluso* (1993), 91 Ohio App. 3d 93); intentionally runs into another vehicle (*Baker v. White* (Mar. 31, 2003), Clermont App. No. CA2002-08-065, 2003 Ohio 1614); sexually molests a child (*Gearing*, supra); intentionally strikes a person in the face to "stop him" (*Urie Ins. Co. v. Stadler* (1996), 114 Ohio App. 3d 1); sets fire to a sofa while it is on the front porch of a residence (*Blamer*, supra); disregards traffic signals during an attempt to elude police who pursued him through the streets of downtown Akron (*Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App. 3d 712); and strikes a person's head with an iron club with sufficient force to split victim's head open (*Horvath v. Nationwide Mut. Fire Ins. Co.* (1996), 108 Ohio App. 3d 732).

However, the Tenth District Court of Appeals recently described the uncertainty in this area of the law. See *Haimbaugh*, supra. Specifically, the court provided:

"[T]he actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result." *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173, 175, 551 N.E.2d 962. In certain circumstances, the court has found a court may infer intent to injure and deprive coverage where a substantial certainty of harm existed. See, e.g. *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 38, 1996 Ohio 113, 665 N.E.2d 1115.

In *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St.3d 280, 283, 1999 Ohio 67, 720 N.E.2d 495, however, the court referred to those circumstances under which it had inferred intent to injure as "very limited instances." Thus, according to *Buckeye Union*, the "normal standard" for determining insurability is to make a factual determination as to whether the actor intended the actual harm that resulted. *Id.* at 284. In other words, "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 *Physicians Ins. Co. v. Swanson* (1991), 58 Ohio St.3d 189, 193, 569 N.E.2d 906. In a concurring opinion, Justice Cook recognized the court's holding as a departure from *Gearing* and the substantial certainty method for precluding insurability. See *Id.*, at 288 (Cook, J., concurring).

In *Doe v. Shaffer*, 90 Ohio St.3d 388, fn. 5, 2000 Ohio 186, 738 N.E.2d 1243, the court acknowledged "that there is debate within this court concerning the current state of the law on whether 'substantial-certainty' torts fall within the public policy exclusion for insurance coverage." And, in *Penn Traffic Co. v. AIG Ins. Co.*, 99 Ohio St.3d 227, 2003 Ohio 3373, 790 N.E.2d 1199, the court returned briefly to a substantial certainty standard, at least in the context of employer-intentional torts, thus adding even more uncertainty about whether current law allows substantial-certainty torts to preclude insurability. Recent appellate opinions reflect this uncertainty. See, e.g., *Talbert v. Continental Cas. Co.*, 157 Ohio App. 3d 469, 2004 Ohio 2608, 811 N.E.2d 1169 (distinguishing Supreme Court precedent because exclusion of substantial-certainty tort from coverage would render policy at issue illusory); *State Farm Mut. Auto. Ins. Co. v. Hayhurst* (May 31, 2000), Pickaway App. No. 99 CA 25, 2000 Ohio App. LEXIS 2388, fn. 1 (declining to follow the court's plurality opinion in *Buckeye Union*); *Altvater v. Ohio Cas. Ins. Co.*, Franklin App. No. 02AP-422, 2003 Ohio 4758 (applying *Penn Traffic* and substantial-certainty analysis in the context of an employer intentional tort claim).

Halmbaugh at P32-34.

Again, to determine whether conduct was accidental or intentional, the focus should be on the immediately attendant causative circumstances. *Blamer* quoting *Worrell*, *supra*. Those circumstances involve placing the artificial deer over the crest of a hill at night on a road with a speed limit of 55 miles per hour.²

² While the record demonstrates Defendants merely stopped the vehicle on a whim and placed the deer where they stopped, Defendants indisputably and intentionally placed the deer on the road. Therefore, while Defendants' subjective intent was relevant in the prior analysis, it is not relevant to determine whether this Court may infer intent.

The fact that Defendants placed an artificial deer on a road is not without significance. Indeed, the presence of a real deer on a road poses a significant risk of catastrophic and sometimes unavoidable harm. The Court cannot ignore the common knowledge in this regard.

Additionally, the record demonstrates that there were no additional lights to illuminate the area where Defendants placed the deer. This fact is particularly important in conjunction with the fact that Defendants placed the deer just over the crest of a hill at night.

Finally, the fact that the road had a speed limit of 55 miles per hour is additionally of consequence, again due to time of day and the placement in relation to the hill. All of these circumstances lead to the finding that a driver had little or no time to react to the deer.

Although a few drivers slowed down and avoided the deer, this Court agrees with Plaintiffs' assertion that a car crash was inevitable. Although Defendants were unable to foresee the potential results of their actions, this Court finds that their conduct was substantially certain to result in harm. This Court finds the analysis and holdings of *Blamer* and *Finkley* to be particularly directive. Therefore this Court finds that the inferred intent doctrine applies to the circumstances of this case. As such, this Court will infer Defendants' intent as a matter of law.

As a result of this finding, the Court finds that there is no coverage under any of the policies at issue. Accordingly, there is no duty to defend and/or indemnify Defendants in the pending bodily injury actions.

Additionally, in light of the foregoing findings, the Court needs not to consider issues: (1) regarding the American Southern residency dispute, and (2) regarding the effects of Defendants' delinquency adjudications.

IV. CONCLUSION

Based upon the foregoing, the Court finds there are no genuine issues of material fact that necessitate a trial. Reasonable minds could only reach one conclusion. Accordingly, the Court finds Plaintiffs' motions to be well taken and hereby SUSTAINS Plaintiffs' motions for summary judgment.

Counsel for Plaintiffs shall prepare, circulate, and submit the appropriate judgment entry within twenty (20) days of receipt of this decision, pursuant to Local Rule 25. The first paragraph of the entry shall contain the name of the motion, the date upon which the motion was filed, and by whom the motion was filed. A copy of this decision shall accompany the entry. Finally, the entry shall state that it is a terminating entry and there is no just reason for delay.



JOHN A. CONNOR, JUDGE

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38.HTM

99-LW-3700 (10th)

Westfield Insurance Company, Plaintiff-Appellant,
v.
Freda M. Blamer et al., Defendants-Appellees.

No. 98AP-1576
10th District Court of Appeals of Ohio, Franklin County.
Decided September 2, 1999

APPEAL from the Franklin County Court of Common Pleas.

Isaac, Brant, Ledman & Teetor, James H. Ledman, J. Stephen Teetor and Barbara Kozar Letcher, for appellant.

Buckley, King & Bluso, Thomas C. Drabick, Jr. and Thomas I. Blackburn, for appellees Freda M. Blamer and David A. Blamer,

Robert W. Willard, for appellee Arthur B. Creighton.

OPINION

LAZARUS, P.J.

The issue in this case is whether the personal liability coverage provided to an insured under a homeowner's insurance policy issued by plaintiff-appellant, Westfield Insurance Company ("Westfield"), applies to the property damage and bodily injuries sustained by defendants-appellees, Freda Blamer and her son David Blamer, when such damages resulted from the insured intentionally setting fire to a couch on the front porch of Mrs. Blamer's residence. Because we find, as a matter of law, that the insured's act of intentionally setting the fire did not constitute an "occurrence" to which the liability coverage applies under the policy, we reverse the decision of the trial court granting summary judgment in favor of the appellees.

The material facts in this case are uncontroverted. In the early morning hours of July 29, 1995, a heavily intoxicated defendant-appellee, Arthur B. Creighton, entered the front porch of Mrs. Blamer's residence, poured charcoal lighter fluid on a sofa located on the porch, and ignited the sofa with a lighter. The fire ultimately spread to the residence causing significant property damage to the residence and bodily injury to Mrs. Blamer.

On January 31, 1996, Creighton pleaded guilty to two counts of aggravated arson in violation of R.C. 2909.02 and one count of arson in violation of R.C. 2909.03. Creighton received an indeterminate sentence of not less than ten years and no more than twenty-five years.

At the time of the incident, Creighton was an insured under his parents' homeowner's insurance policy issued by appellant Westfield. This policy provided personal liability coverage to an insured for "damages because of bodily injury or property damage caused by an occurrence." An "occurrence" is defined under the policy as:

[A]n accident *** which results, during the policy period, in:

- a. Bodily Injury; or
- b. Property damage."

The policy also contains an intentional-acts exclusion, providing that coverage did not apply to injury or damage "which is expected or intended by one or more insureds." On January 24, 1997, the Blamers filed suit seeking money damages for injuries resulting from Creighton's conduct and naming him and John Doe Insurance Company, Creighton's then-unknown insurer, as defendants. On October 7, 1997, Westfield filed a declaratory judgment action seeking a declaration that the homeowner's policy at issue did not cover the intentional acts of Creighton and, as a result, Westfield had no obligation to defend Creighton in the underlying tort action or indemnify him against any liability imposed by such action.

At his deposition taken in this case, Creighton could not remember most of the details concerning the setting of the fire itself. However, Creighton did testify that he knew the Blamers from the neighborhood, that he did not specifically know that they were in the residence when he started the fire, but that he had no reason to believe that they were not there. Furthermore, in answers to requests for admissions propounded by the Blamers pursuant to Civ.R. 36, Creighton admitted that any injury suffered by the Blamers as a result of his conduct was unintended, unexpected, and accidental.

On July 31, 1998 and August 3, 1998 respectively, Westfield and the Blamers each filed motions for summary judgment. Westfield argued that the policy does not cover the Blamers' damages in this case because such damages did not result from an accident and are otherwise excluded from coverage under the policy's intentional acts exclusion provision. The Blamers argued that their damages did result from an accident and the exclusion does not apply because Creighton did not specifically intend to harm the Blamers and because such harm was not substantially certain to result from his conduct.

On October 15, 1998, the trial court issued its decision on the motions. Relying extensively on Physicians Ins. Co. of Ohio v. Swanson (1991), 58 Ohio St.3d 189, the trial court agreed with the Blamers that coverage applies unless Creighton specifically intended to injure the Blamers. The trial court further held that even though Creighton admitted he intended to set the sofa on fire, it could not be inferred from the evidence that Creighton intended to specifically injure the Blamers. As stated by the trial court:

Creighton has consistently stated that he did not intend to cause the specific physical injuries to the Blamers. Westfield has pointed to no evidence in the record by which it could be concluded that Creighton knew the Blamers were present when he set the sofa on fire, or that he specifically intended through his action to injure the Blamers. Nor does it appear that Creighton intended to do any more than set the sofa on fire, or that he intended for the fire to spread to the house itself. (Decision at 4.)

Based upon this analysis, the trial court held that the personal liability provisions in the Westfield policy covers the Blamer's injuries, denied Westfield's motion for summary judgment, and granted the Blamer's motion for summary judgment.

On November 20, 1998, the trial court filed its judgment entry reflecting its decision. It is from this entry that Westfield timely appealed, raising the following three assignments of error:

Assignment of Error No. 1

The Trial Court erred by failing to consider whether bodily injuries resulting from a fire intentionally set by an insured to a residence known by him to be occupied are "bodily injuries% caused by an occurrence" as that term is defined by the policy.

Assignment of Error No. 2

The Trial Court erred by refusing to infer intent to injure a matter of law for the purpose of excluding insurance coverage under a homeowner's policy where the insured used an accelerant to purposefully set fire to a couch on the porch of a residence known by him to be occupied in the middle of the night.

Assignment of Error No. 3

The Trial Court erred by denying a jury an opportunity to determine whether it could be inferred that an arsonist could reasonably expect that someone could be injured when he used an accelerant to set fire to

a couch located on the porch of a residence known by him to be occupied in the middle of the night.

In its first assignment of error, appellant contends that the trial court erred when it failed to find that the Blamers' injuries did not result from an "occurrence," i.e., an accident, for which liability coverage is provided under the policy. Westfield contends that there is nothing accidental about intentionally dousing the couch with lighter fluid and setting it on fire. These facts alone, contends appellant, are sufficient to take Creighton's conduct outside the definition of an accident and outside its obligation to indemnify Creighton.

"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.* (1996), 76 Ohio St.3d 34, 36. "Coverage is provided if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto." *Id.*

As noted above, the Westfield policy at issue here provides liability coverage for an "occurrence," which the policy defines as an "accident" that results in property damage or bodily injury. Given the longstanding public policy in Ohio against obtaining liability insurance for one's intentional torts, "inherent in a policy's definition of 'occurrence' is the concept of an incident of an accidental, as opposed to an intentional, nature." (Emphasis sic.) *Gearing*, supra, at 38. In determining whether an incident is accidental for purposes of liability insurance, "the focus should be on the injury and its immediately attendant causative circumstances." *Worrell v. Daniel* (1997), 120 Ohio App.3d 543, 551.

Here, appellees concede that Creighton's act of setting the couch on fire was not itself an accident. However, relying on *Swanson*, supra, appellees contend that the trial court properly found that their damages were the result of an accident because Creighton neither intended to cause their harm and because such harm was not substantially certain to result from his conduct.

In *Swanson*, the Ohio Supreme Court ruled that an insurer was obligated to defend and indemnify a teenage boy who shot a BB gun in the general direction of a group of other teens, not intending to hit anyone, but unfortunately striking one of the teens in the eye. In so ruling, the court specifically held that in order to avoid coverage under an intentional acts exclusion, it was not sufficient to show that the act was intentional, "[t]he insurer must [also] demonstrate that the injury itself was expected or intended." *Id.* at syllabus.

We find, however, that despite its broad language, *Swanson* does not mandate coverage in this case. Unlike the insured here, the insured in *Swanson* did not intend to cause any harm, nor was harm substantially certain to result from his actions. As noted by the Supreme Court in *Gearing*, supra, at 39:

Our finding of liability coverage in *Swanson* was in the context of facts where the intentional shooting of a gun did not necessarily equate to resulting injury. Even though all evidence pointed to the conclusion that *Swanson* meant to shoot the gun, the act of shooting the gun at a distance seventy to one hundred feet away from the ultimate victim could not be said to necessarily result in personal injury, particularly in light of his testimony that he was aiming elsewhere. *Swanson's* testimony to the effect that he never intended or expected for anyone to be harmed was not necessarily logically inconsistent with the facts surrounding the shooting.

In *Gearing*, the court held that liability coverage did not apply to acts of sexual molestation of a minor despite the insured's admission that he did not subjectively intend to hurt or harm his victims. "[I]n those cases where 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." (Emphasis added.) *Id.* at 39. "Rather, an insured's protestations that he 'didn't mean to hurt anyone' are only relevant where the intentional act at issue is not substantially certain to result in injury." *Id.*

Thus, *Swanson* does not require that the insured intended the full extent of the resulting injury in order for the conduct to be considered intentional and thus outside the scope of coverage. See *Horvath v. Nationwide Mut. Fire Ins. Co.* (1996), 108 Ohio App.3d 732 (act of hitting another on the head with a club-like device causing death was outside scope of coverage even though insured did not intend to cause death); *Hoh v. Sublett* (Aug. 10, 1994), Hamilton App. No. C-930473, unreported (act of striking plaintiff in face knowing that injury was possible was outside scope of coverage even though insured did not intend or appreciate the "full extent of the possible injuries."). Rather, coverage is inapplicable if the insured intended to cause an injury by his intentional acts or if injury was substantially certain to occur

from such acts. See *Grandjean v. James* (July 26, 1996), Montgomery App. No. 15708, unreported ("[t]he [Swanson] court did not state that the insured had to intend the extent of the injury, the court merely required that the insured intended or expected to cause an injury."). (Emphasis added.); *Aetna Casualty & Surety Co. v. Cigany* (Sept. 24, 1998), Cuyahoga App. No. 73230 ("[t]he Swanson court did not state that the insured had to intend the extent of injury, only that the insured had to intend or expect to cause an injury."). (Emphasis added.)

The recent decision by the Eighth Appellate District in *Cigany* is particularly relevant here. In *Cigany*, the insured, a high school student, used a lighter to set fire to a stuffed teddy bear located in a storage area at his school building. As a result of the burning of the bear, the fire spread to the building, causing significant damage. Like the policy at issue in the instant case, the student was insured for damages resulting from an "occurrence," which the policy defined as an accident. Affirming summary judgment for the insurer, the court specifically rejected the insured's argument that the damage to the school building was accidental since the insured only intended to burn the bear and not the building itself. According to the court, it was sufficient under *Swanson* that the student intended to cause "some harm." "That he did not intend to cause the extent of the harm is not relevant ***. Having satisfied its burden of demonstrating that *Cigany* intended to cause harm and, therefore, that his actions were not accidental, there was no 'occurrence' as defined in the policy sufficient to trigger coverage."

Likewise, it is equally immaterial in the instant case that *Creighton* may not have specifically intended that the fire spread to the *Blamers'* residence or that he did not specifically intend to cause *Mrs. Blamer's* injuries. *Creighton* 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, like the insured in *Cigany*, *Creighton's* actions cannot be considered accidental, and the *Blamers'* damages cannot be considered to have resulted from an "occurrence" to which coverage applies.

Moreover, to hold otherwise would frustrate the longstanding public policy of denying liability coverage for intentional, criminal acts because society has an interest in discouraging such conduct. As noted by the court in *Gearing*, supra, at 38, "[l]iability insurance does not exist to relieve wrongdoers of liability for intentional, antisocial, criminal conduct." Here, by dousing the couch with lighter fluid and setting it on fire, *Creighton* committed arson in violation of R.C. 2909.03, a crime for which he has been incarcerated. As such, public policy precludes holding appellant liable under these facts. See *Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App.3d 712, 715-16 (it would violate established public policy to hold an insurer responsible for injuries caused by an insured who willfully and purposefully attempted to elude the police in an automobile chase through an urban area); *Worrell*, supra, at 551 (stating that holding insurer responsible for insureds' participation in homicide would be against public policy).

Finally, we are not persuaded by appellees' reliance on the pre-*Gearing* case of *Michigan Millers Ins. Co. v. Anspach* (1996), 109 Ohio App.3d 618. In *Anspach*, the Second Appellate District ruled that liability coverage applied to the conduct of two minors who acted as "look outs" while others robbed a house and set it on fire, causing personal injuries and death to its occupants. The evidence showed that while the principals in the crime knew that the house was occupied, the two insured "look outs" did not. Given this fact, the *Anspach* court held that coverage applied as to the minors' conduct because while they intended to assist in the robbery and the arson, they did not intend or expect the resulting damage to the occupants. In so doing, however, the *Anspach* court applied an expansive reading of *Swanson* one that cannot be maintained given the Ohio Supreme Court's pronouncements in *Gearing* and the other authorities discussed above.

More importantly, however, the result in *Anspach* directly contradicts the Ohio Supreme Court's holding in *Cuervo v. Cincinnati Ins. Co.* (1996), 76 Ohio St.3d 41, a case decided the same day as *Gearing*. In *Cuervo*, the issue was whether liability insurance covered a father's negligent conduct in failing to properly supervise his son, who sexually abused two minors. The court of appeals had ruled that liability insurance applied because there was no evidence that the father intended or expected any harm to occur to the minor children. The Ohio Supreme Court reversed, holding that it is immaterial that an insured did not intend to cause injury when the plaintiffs' damages "flow from" the otherwise intentional acts of others that do not constitute an "occurrence" under the policy. *Id.* at 44. Since the damages to the minor children resulted from the intentional, criminal acts of the son, there was no "occurrence." Given that there was no "occurrence," there could be no coverage. The same rationale applies to the facts in *Anspach*, where the injuries sustained by the occupants of the house resulted from the intentional acts of the principals to the crime. As in *Cuervo*, the damages did not result from an "occurrence" for which coverage could be applied. As such, the *Anspach* court's conclusion that the insured minors did not intend or expect to cause harm to the house occupants was immaterial to whether coverage should have applied in the first instance. In short, the finding of coverage in *Anspach* cannot be maintained under the law today.

For the foregoing reasons, we rule as a matter of law that appellees' damages did not result from an "occurrence," to which liability coverage is provided under appellant's policy. As a result, the trial court erred in granting summary judgment for appellees.

Appellant's first assignment of error is sustained, and appellant's remaining assignments of error are rendered moot and the judgment of the Franklin County Court of Common Pleas is reversed and this cause is remanded for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

PETREE and BROWN, JJ., concur.