

ORIGINAL

IN THE SUPREME COURT OF OHIO

ALLSTATE INSURANCE COMPANY, et al. :

Plaintiff-Appellants, :

v. :

DAILYN CAMPBELL, et al., :

Defendants, :

CASE NO. 2009-2358

Discretionary Appeal from the  
Franklin County Court of Appeals  
Tenth Appellate District

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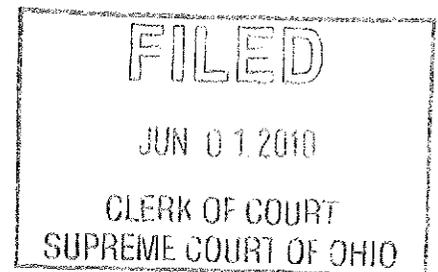
MERIT BRIEF OF APPELLANT GRANGE MUTUAL CASUALTY COMPANY

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## STATEMENT OF FACTS

On November 18, 2005, Corey Manns and several other teenage boys stole a fake or decoy deer and took it to one the boys' homes to build a stand to stabilize it. (Supp. p. 47 – Appellants' Joint Supplement is filed with the Merit Brief of Appellant Erie Insurance Exchange). After writing several obscenities and other phrases such as "hit me" on it, they put it in a vehicle and after nightfall drove until they placed it in the center of the eastbound lane on County Road 144 in Hardin County, Ohio. (Supp. pp. 73-74; Supp. p. 52). The boys remained in the vicinity and after watching several drivers' reactions, noticed a vehicle operated by Appellee Roby and occupied by Appellee Zachariah approaching their handiwork in the road. (Supp. pp. 54-55). Appellees Dustin S. Zachariah, Katherine E. Piper and Robert J. Roby, Jr. have alleged in lawsuits filed in the Franklin County Common Pleas Court against Manns and the other boys that the placement of the decoy deer caused an automobile accident to occur, thereby resulting in injury to Zachariah and Roby. Appellant Grange Mutual Casualty Company ("Grange") issued a policy of insurance to Rodney Manns, Corey Manns' father, and filed an action seeking a declaratory judgment that Manns was not entitled to indemnification or a defense under the Grange policy. Appellants Erie Insurance Exchange, Allstate Insurance Company and American Southern Insurance Company filed similar declaratory judgment actions, and these actions were consolidated at the Trial Court level.

Grange's Homeowner's Policy No. SH 7977622-07 in effect from March 13, 2005 to March 13, 2006, states that:

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.

(Supp. p. 80)

The policy defines “occurrence” in the following terms:

“Occurrence” means 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.

(Supp. p. 79)

The Grange policy also contains the following exclusions from coverage:

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.

(Supp. p. 81)

Appellants Grange, Eric, Allstate and American Southern filed motions for summary judgment seeking an Order that the carriers owed no coverage to the boys in the form of indemnification or duty to defend. In a Decision rendered on February 6, 2009, (Appendix p. 47) the Trial Court granted the Motions of Grange (and the other insurance company Appellants) finding that Manns’ conduct was substantially certain to result in harm, inferring intent to harm, and finding that there was no coverage under the Grange policy and that Grange had no duty to indemnify or defend Manns. Appellees Roby, Zachariah and Piper (Zachariah’s mother) appealed this Decision and ultimate Judgment Entry (Appendix p. 43) to the Franklin County Court of Appeals. On November 17, 2009, the Court of Appeals, in a two to one Decision, reversed the Trial Court’s Decision finding that “questions of fact remain as to the certainty of harm from the boys’ actions”

and that intent may not be inferred as a matter of law under the circumstances of this case. (Appendix p. 5). Appellants Grange, Eric, Allstate and American Southern appealed (Appendix p. 1) that single Decision and Judgment Entry (Appendix p. 7) from the Tenth District Court of Appeals, and on March 10, 2010, the Supreme Court agreed to hear the appeal.

## ARGUMENT

### Proposition of Law No. 1

**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.**

This Court has stated that self evident 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 Insurance Co.*, 76 Ohio St.3d 34, 36. Grange’s policy specifically excludes coverage for bodily injury expected or intended by anyone it insures. These exclusions bar coverage in this case as a matter of law.

The case of *Physicians Ins. Co. v. Swanson* (1991), 58 Ohio St.3d 189;569 N.E.2d 906, where an insured fired a BB gun in the direction of other children, is the often-cited case setting forth the standard for exclusion of coverage for an intentional act. In *Swanson* there was enough distance between the insured and the injured child that the act of firing his gun would not necessarily have resulted in an injury, especially in light of the insured's testimony that he intended only to scare the other children. The Supreme Court held that in order to avoid coverage based upon an exclusion for expected or intended injuries, “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*, 58 Ohio St.3d at 193. The *Swanson* Court added that while an act might be intentional, there is still coverage “if the

insured does not specifically intend to cause the resulting harm **or is not substantially certain that such harm will occur.**" *Id* at 193 (Emphasis added). The "insured" in *Swanson* was found to be covered based upon his testimony that he was only trying to scare the injured party and did not intend to shoot her as well as the Court's finding that harm was not substantially certain to occur.

"Because it is always in the interest of an insured to establish coverage and avoid policy exclusions, an insured's self-serving statements denying intent to injure are often of negligible value in demonstrating intent or expectation." *Nationwide v. Irish* (2006), 167 Ohio App.3d 762 at 771, 857 N.E.2d 169. It would be rare that the "insured" would acknowledge that he or she intended to harm another. In those situations, the typical situations, where the "insured" proclaims that he didn't mean to hurt anyone or anything, the harm may be substantially certain to occur thereby causing the Court, as the Trial Court did and this Court did in *Gearing*, to infer intent. *Gearing*, 76 Ohio St.3d at 36; *Westfield Insurance Company v. Blamer* (Sept. 2, 1999), *Franklin App. No. 98 AP01576*, *unreported* at p. 4. This Court in *Gearing* found 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." 76 Ohio St.3d at 36. The 10<sup>th</sup> District Court of Appeals in this case appears to limit the inferred intent rule to cases involving acts like molestation and murder.

Despite Corey Manns' self-serving proclamation that he did not intend to injure anyone and even though the boys did not murder or molest the Appellees, placing a fake deer on a country road at night with the purpose "to make cars slow down or maybe hit it" creates a situation where harm is substantially certain to occur and inferring intent is appropriate. Further, the boys painted the words "hit me" on the fake deer and placed it as an obstacle to vehicles on the road close to a hill making avoidance by drivers even less likely, carrying their plan out to completion without withdrawing. (Supp. 49,56). Damage of some sort was anticipated and, in fact, desired. The standard for coverage

is not just did the insured intend harm, but was harm substantially certain to occur, since an insured would rarely acknowledge his or her intent to harm. Circumstances where harm is substantially certain to occur are not limited to insureds' acts of murder and sexual molestation. The acts of Corey Manns and his cohorts, while not murder or sexual molestation, are, like murder and sexual molestation, criminal and substantially certain to result in harm. The severity or magnitude of the harm should have no bearing on inferring intent where the harm is substantial certainty to occur. The Court in *Westfield Insurance Company v. Blamer* found that it was immaterial that the insured "may not have specifically intended that the fire spread to the Blamer's residence or that he did not specifically intend to cause Mrs. Blamer's injuries" as 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." *Blamer* at p. 5. While Corey Manns, as you might expect, says that he did not intend or expect anyone to get hurt, damage or injury was substantially certain to occur and he admits that they intended to cause a vehicle to swerve or hit the deer. The words "hit me" added to the deer by the boys in this joint effort further establish this expectation, substantial certainty or even hope. In fact, when Appellee Roby's car went past the boys at a speed they thought would be too fast to allow him to slow down before encountering the fake deer, thinking "something might happen," Manns and his comrades turned around to witness the result of their grand plan. (Supp. p. 55). To them, given all the circumstances which they orchestrated, damage was substantially certain to occur.

In *Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App.3d 712, 679 N.E.2d 1189, the insured's grandson, who did not have a driver's license, took her car without her permission. When the grandmother noticed the car was missing, she assumed it had been stolen and notified the police. When the police saw the boy driving the car, they attempted to pull him over, but the boy tried to elude the police by crashing into a stop sign, causing an accident. The insurer denied coverage, arguing that it

was an intentional act, since the accident was "substantially certain to occur." The Court agreed that this was not covered and that the intentional act exclusion applied. The Court stated: "We hold 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." *Finkley*, 112 Ohio App. 3d at 715. It's true that, as in this case, things other than injury could occur, but injury was, as the Trial Court in this case found, substantially certain to occur and intent is inferred. As Judge Sadler in the dissenting opinion to the 10<sup>th</sup> District's Decision in this matter noted, as in *Finkley*, the insured in this case "injected a level of chaos and danger into the flow of traffic, which is already naturally attended by dangers to person and property," and the inferred intent rule application is appropriate. The deliberate installation of the decoy deer made harm or injury substantially certain to occur no matter what approaching drivers did. While the crimes of sexual molestation and murder might be viewed by most as more heinous or severe than the acts of the Appellees on the night of this incident, their crimes are still substantially certain to result in harm thereby resulting in the inference of intent described by *Gearing* and Courts since *Gearing*. Such an inference should not be limited to sexual molestation or murder cases.

### **Proposition of Law No. 2**

**Policy language which excludes coverage for "bodily injury or property damage expected or intended by any insured person" denotes an objective as opposed to a subjective standard of coverage rendering an insured's subjective intent irrelevant.**

In *Gearing* this Court noted that when determining if an intentional act is substantially certain to result in injury, "determination of an insured's subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage." 76 Ohio St. 3d at 39. The Supreme Court in *Gearing* reached this conclusion because "a completely subjective test would virtually make it impossible to preclude coverage for intentional [injures] absent admissions by insureds of specific intent to harm or injure."

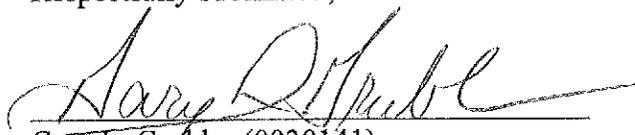
Id. The dissenting opinion in the Tenth District's Decision from which this matter is appealed references this Court's finding in *Gearing* and the Tenth District majority's incorrect decision to utilize a subjective test. This Court added that public policy favored prohibiting obtaining insurance to cover damages caused by an intentional torts and that wrongdoers such as Manns should not be relieved of liability through insurance coverage for "intentional, antisocial, criminal conduct." *Gearing*, 76 Ohio St.3d at 38. Accordingly, even though Manns acknowledges that he expected vehicles to swerve or hit the decoy and in most situations the usually well counseled insured will deny intent to harm, the substantially certain standard is objective based upon the attendant circumstances rather than the subjective proclamations of the insured. The circumstances in this case involve placing a decoy deer with wooden blocks attached to allow it to stand, in the center of the lane of travel on a two lane curvy road with a 55 mile per hour speed limit, at night, just past the crest of a hill so that motorists could not see it until they were 15 to 30 yards away. Even with the most adamant denials of intent or expectation of damage by the culprits, damage under these circumstances is substantially certain to occur, and intent should be inferred.

While Appellees may assert and the Court of Appeals noted that other results beyond injury to Roby and Zachariah could have occurred, the standard first set forth by this Court in *Swanson* is if harm was substantially certain to occur, not *certain* to occur. (Emphasis added.) Further, the Tenth District noted as apparent relevant evidence the speed and activities of Appellees' Roby and Zachariah. Any such evidence is not relevant to the analysis. "To focus on the status of the victim misses the intent of *Swanson* and *Gearing*." *State Farm & Casualty Company v. Boyson* (July 6, 2000), 8<sup>th</sup> Dist. No. 76194.

## CONCLUSION

The Decision of the Tenth Appellate District Court of Appeals seems to apply a test of “certainty” of harm as opposed to the “substantial certainty” of harm standard set forth by this Court in the *Swanson* case and in cases since *Swanson*. Where harm is substantially certain to occur, intent of the insured may be inferred. Such an inference should not be confined to situations involving sexual molestation or murder, but rather should apply to other situations where harm is substantially certain to occur, such as this case. Further, this Court and courts in Ohio should not, when determining if harm is substantially certain to occur, consider the subjective intent of the insured through his or her proclamations that “they meant no harm” or the actions of a victim, but rather should objectively review the attendant circumstances. Accordingly, since an objective review of the facts demonstrates that Corey Manns and his friends deliberately at night on a two lane country road placed a decoy deer in the center of a lane just beyond a hill precluding drivers from seeing the obstacle until they were a short distance from it, this Court should find as a matter of law that harm was substantially certain to occur and infer intent thereby excluding insurance coverage for Manns and his cohorts under the terms of their policies. Appellants respectfully urge this Court to reverse the Decision of the Tenth District Court of Appeals.

Respectfully submitted,



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# APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

09-2358

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

Court of Appeals Case No.  
09 AP 306

Erie Insurance Exchange,  
Plaintiff-Appellant  
vs.  
Corey Manns, et al.  
Defendants-Appellees,  
Dustin S. Zachariah, et al  
Defendants-Appellees

Court of Appeals Case No.  
09 AP 307

American Southern Insurance Co.,  
Plaintiff-Appellant,  
vs.  
Dale Campbell, et al.  
Defendants-Appellees,  
Dustin S. Zachariah, et al  
Defendants-Appellees).

Court of Appeals Case No.  
09 AP-308

FILED  
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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

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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

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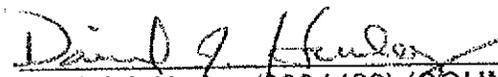
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**Joint Notice of Appeal of Appellants Allstate Insurance Co., Erie Insurance Exchange, American Southern Insurance Company and Grange Mutual Casualty Company.**

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.

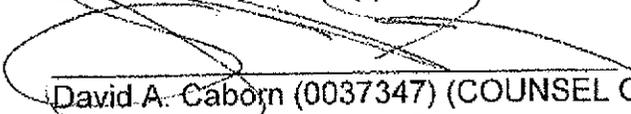
These consolidated cases raise questions of public or great general interest.

Respectfully Submitted,



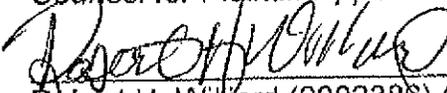
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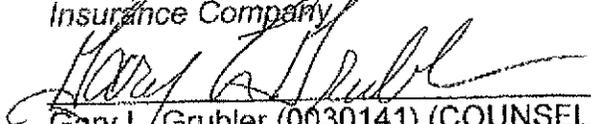
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**CERTIFICATE OF SERVICE**

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

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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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. 07CVH05-8515)  
(REGULAR CALENDAR)

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

v. :

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

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

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

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

Grange Mutual Casualty Company, :  
 :  
 Plaintiff-Appellee, :

v. :

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

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

Erie Insurance Exchange, :  
 :  
 Plaintiff-Appellee, :

v. :

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

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

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

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

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

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

v.

Dale Campbell et al.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellant.

Grange Mutual Casualty Company,

Plaintiff-Appellee,

v.

Corey Manns et al.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellant.

Allstate Insurance Company,

Plaintiff-Appellee,

v.

Dailyn Campbell et al.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellant.

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

(REGULAR CALENDAR)

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

(REGULAR CALENDAR)

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

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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   
Judge Judith L. French, P.J.

(Travis) 324

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
NOV 17 PM 12:19  
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)

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. 07CVH05-8515)  
(REGULAR CALENDAR)

American Southern Insurance Company, :  
Plaintiff-Appellee, :

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

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

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

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

Grange Mutual Casualty Company, :  
 :  
 Plaintiff-Appellee, :

v. :

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

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

Erie Insurance Exchange, :  
 :  
 Plaintiff-Appellee, :

v. :

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

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

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

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

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

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

v.

Dale Campbell et al.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellant.

Grange Mutual Casualty Company,

Plaintiff-Appellee,

v.

Corey Manns et al.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellant.

Allstate Insurance Company,

Plaintiff-Appellee,

v.

Dailyn Campbell et al.,

Defendants-Appellees,

Robert J. Roby, Jr.,

Defendant-Appellant.

No. 09AP-319

(C.P.C. No. 07CVH08-11422)

(REGULAR CALENDAR)

No. 09AP-320

(C.P.C. No. 08CVH02-3167)

(REGULAR CALENDAR)

No. 09AP-321

(C.P.C. No. 07CVH07-8934)

(REGULAR CALENDAR)

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09AP-318, 09AP-319, 09AP-320, and 09AP-321

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**D E C I S I O N**

Rendered on November 17, 2009

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*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.*

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**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

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("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 Range, 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 Range 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, Range, 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

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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.<sup>1</sup> Appellants Zachariah and Piper also filed a negligence action against the seven boys.<sup>2</sup>

{¶7} During the pendency of appellants' lawsuits, appellees filed declaratory judgment actions against their respective insureds<sup>3</sup> seeking declarations that they had no legal obligation to defend them in the underlying tort actions or indemnify them against

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

<sup>2</sup> 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.

<sup>3</sup> 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 Delsler, 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.

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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

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**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**

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

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

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

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

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

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

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

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

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

#### **COVERAGE E – PERSONAL LIABILITY COVERAGE**

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

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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. \* \* \*

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{¶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

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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'

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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'

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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

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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).

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{¶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,

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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

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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.

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{¶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.*

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*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.*

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*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

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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.

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{¶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.

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{¶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

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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.

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{¶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, Ramage, 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

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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

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

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

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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,' "<sup>4</sup> 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.

<sup>4</sup> *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.

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{¶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

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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.<sup>5</sup> 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

<sup>5</sup> 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).

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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.

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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

FILED  
COMMON PLEAS COURT  
FRANKLIN CO., OHIO  
2007 MAR -4 PM 12:10  
CLERK OF COURTS

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.

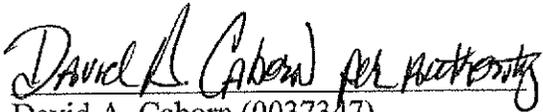
After considering the evidence submitted by the parties and the arguments of counsel, and in accordance with its decision of February 6, 2009, a copy of which is attached hereto and incorporated herein, the Court finds there are no genuine issues of material fact and Plaintiffs are entitled to judgment 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.

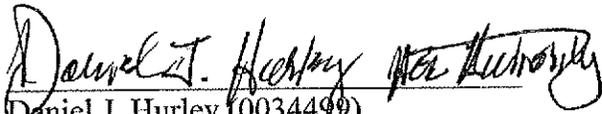
The Court, having rendered judgment on all of the claims and as to all of the parties before it, finds this Judgment Entry to be a terminating entry and there is no just reason for delay.

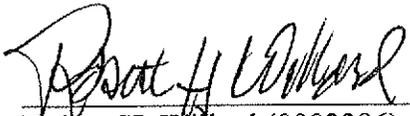
IT IS SO ORDERED.

Judge Travis, sitting by assignment

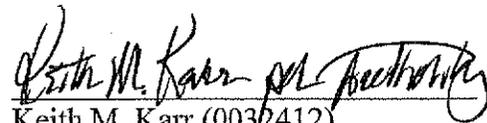
**APPROVED:**

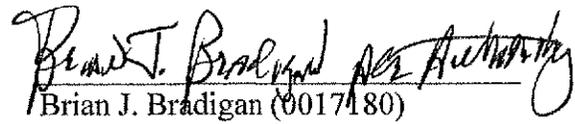
  
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COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

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  
23 FEB - 6 PM 4: 04  
CLERK OF COURTS

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

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

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

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**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. Defendants<sup>1</sup> 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

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<sup>1</sup> 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.* citing *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.* citing *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.* citing *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. Giuliano*, 167 Ohio App., 3d 785, 2006 Ohio 2943, P25.

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 *Halmbaugh v. Grange Mut. Cas. Co.* (Aug. 7, 2008), Franklin App. No. 07AP-676, 2008 Ohio 4001 quoting *Morner* at P25. 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; Range 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” (*Erie 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. AIU 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*); *Altwater 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).

*Haimbaugh* 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.<sup>2</sup>

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<sup>2</sup> 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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