

**IN THE SUPREME COURT OF OHIO**

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

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

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

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SUPREME COURT OF OHIO

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

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

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

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

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

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**MERIT BRIEF OF APPELLEES DUSTIN S. ZACHARIAH  
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## STATEMENT OF THE CASE AND FACTS

### **The Teenage Prank**

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

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

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

### **Other Drivers Avoided the Hazard**

Carson Barnes testified that he saw four cars stop and drive around the Styrofoam deer. (Carson Barnes Depo. 32, 72-73) Both Jesse Howard and Joshua Lowe stated that

they saw two cars come up to the deer, stop, and drive around it. Thereafter, two other cars passed them prior to the speeding Roby vehicle, and they later saw those cars stopped in front of the deer. (Jesse Howard Depo. 37-38, 83, 97, 111-112; Joshua Lowe Depo. 31-36, 39-40, 97, 116-117) Joey Ramage recalled that three cars passed the boys prior to their seeing the Roby vehicle, and that he saw at least two clear the deer. (Joey Ramage Depo. 31-33, 76) Dailyn Campbell saw one car drive around the deer and two others stopped in front of the deer. (Dailyn Campbell Depo. 64, 67-68, 206) Corey Manns testified that three or four cars passed the boys, and that he saw at least one stop and go around the deer. (Corey Manns Depo. 33, 36, 58, 61-62, 69-70)

### **The Accident**

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

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

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

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

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

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

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

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

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

{¶52} The boys apparently never discussed or even contemplated the possibility that positioning a target deer 15 to 30 yards beyond the crest of a hill in the middle of an unlit two-lane roadway with a speed limit of 55 m.p.h. at night might cause an accident. Although Manns testified that

the purpose of placing the deer in the road was to make cars either slow down or hit it, Campbell testified that the group never thought about "an accident," and "didn't think that much deep into it \* \* \* that someone would actually hit [the target deer]." (Depo. 71, 110.) Lowe testified that no one in the group expressed any concern that the placement of the deer could pose a hazard to motorists. (Depo. 36.) Similarly, Manns, Ramge, and Barnes testified that they did not worry about the target deer posing a potential hazard. The boys' testimony in this regard reasonably suggests that not until they observed Roby's car traveling toward the deer at a high rate of speed were they even aware of the possibility that their actions might result in an accident.

{¶53} Viewing the facts of this case in a light most favorable to appellants, we conclude that genuine issues of material fact exist as to whether the boys necessarily intended to cause harm when they placed the target deer in the roadway, whether harm was substantially certain to result from their actions, and whether their actions fall within the scope of the individual insurance policies.

## ARGUMENT

### **FIRST PROPOSITION OF LAW [Response to American Southern's Proposition of Law I]**

If an injury was not intentionally caused, then it was accidentally suffered and constitutes an "occurrence" under a liability insurance policy. [*Rothman v. Metro. Cas. Ins. Co.* (1938), 134 Ohio St. 241, 247, 12 O.O. 50, 16 N.E.2d 417, applied]

In the argument under its first proposition of law, American Southern argues that the insured's conduct was intentional and does not qualify as an "occurrence" under its policy. The argument confuses two distinct concepts—the *act* or conduct and the *injury* sustained by Zachariah. It is the injury that is the "occurrence"—not the act of the insured.

This Court has held that if the injury is not intentionally caused, then it is accidentally suffered and is, therefore, an "occurrence" under an applicable insurance policy. *Safeco Ins. Co. v. White*, 112 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, citing *Rothman v. Metro. Cas. Ins. Co.* (1938), 134 Ohio St. 241, 247, 12 O.O. 50, 16

N.E.2d 417. In *Rothman*, this Court acknowledged that “ ‘accident,’ as the term is ordinarily used, is a more comprehensive term than ‘negligence,’ and in its common signification means an unexpected happening without intention or design.” Id. at 247, citing *Commonwealth Cas. Co. v. Headers* (1928), 118 Ohio St. 429, 161 N.E. 278. *Rothman* stands for the proposition that absent contrary language in a policy, “if the injury was not intentionally caused, then it was accidentally suffered.” Id. at 246, 16 N.E.2d 417.

There is no evidence that the insureds specifically intended to injure anyone. Recognizing this absence of evidence, American Southern argues that because the insured’s conduct was “substantially certain” to cause harm, courts should infer intent as a matter of law. The record belies this assertion.

First, injury was not unavoidable. The record shows that some cars stopped at the deer and went around it.

Next, it is necessary to consider the instrumentality—the Styrofoam deer. As the appellate court noted at ¶55:

“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. \* \* \*.”

Contrary to American Southern’s argument, the conduct of the pranksters did not create such a substantial risk of harm that it did not constitute an “occurrence.” Moreover, as established below, the conduct was not of such a degree as to fall within exclusions for expected or intended injury.

**SECOND PROPOSITION OF LAW [Response to Allstate's Proposition of Law I, American Southern's Proposition of Law II, Erie's Proposition of Law, and Grange's Proposition of Law I]**

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

Conceptually related to the above discussion is the analysis that applies to consideration of policy exclusions for expected or intended injury. The appellate court correctly recognized that arguments based upon the "occurrence" language are essentially identical to those based upon the exclusions. The court noted that "[a]lthough appellants separately argue the issues of coverage for 'accidents' and the applicability of the express exclusions for intended or expected injuries, the issue is the same—whether the boys' conduct was an accident or whether it was intended or expected to cause injury." *Allstate Ins. Co. v. Campbell*, at ¶28. The insurers all argue that coverage is excluded by the policy provisions.

It is the burden of the insurer to prove that damages fall within an exclusion from coverage. See, e.g., *SCSC Corp. v. Allied Mut. Ins. Co.* (Minn. 1995), 536 N.W.2d 305, 316. It is also the law in Ohio that "[a] defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it." *Continental Ins. Co. v. Louis Marx & Co., Inc.* (1980), 64 Ohio St.2d 399, 401, 415 N.E.2d 325, quoting *Arcos Corp. v. Am. Mut. Liability Ins. Co.* (E.D.Pa. 1972), 350 F.Supp. 380, 384.

In *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d 280, 283, 720 N.E.2d 495, citing *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, 193, 569 N.E.2d 906, the court stated "an intent to injure, not merely an

intentional act, is a necessary element to uninsurability. *Whether the insured had the necessary intent to cause injury is a question of fact.*" (Emphasis added.)

There is no evidence in the record that the boys specifically intended to cause injury. The trial court correctly found that the "record consistently demonstrates that the Defendants neither intended nor expected any personal injury or property damage." The appellate court agreed that no such intent existed.

There is a critical distinction between an intentional act and intentional or expected injury. Many intentional acts result in wholly unintentional injuries. It is for these unintentional injuries people purchase insurance. *Physician's Insurance Company of Ohio v. Swanson* controls on this point.

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

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

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

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

The *Swanson* court found *Gill* was premised on the fact the insured's plea of guilty to aggravated murder conclusively established his intent to cause the injury. *Gill* actually stands for the proposition the perpetrator *must intend the injury, not just the act*, for the exclusion to apply. *Swanson*, 58 Ohio St.3d at 191. A contrary reading of the exclusion—that reckless acts absent deliberate injury are sufficient to forfeit coverage—“would render insurance coverage illusory for many of the things for which insureds commonly purchase insurance.” *Tanner v. Nationwide Mut. Fire Ins. Co.* (Texas 2009), 289 S.W.3d 828. As one leading commentator puts it, coverage can still exist “when the injury was unintended, even if the act which gave rise to the injury was intentional.” 8A Couch on Insurance 3d (2005) 119:8.

Appellants argue that intent to injure may, and should be, inferred as a matter of law. In making this argument, the Appellants create a straw man. They argue that the

inferred intent doctrine is not limited to sexual molestation or homicide cases. Neither Appellees nor the lower courts ever asserted that it was so limited.

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

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

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

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

charges involving the sexual molestation of minors. The court reasoned that the act and the harm are so intertwined in regard to molestation of children that to intend the act is also to intend the harm.

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

In those very limited instances where courts have inferred intent to injure, their decision to do so was based upon a finding that the injury was substantially certain to occur as a result of the character of the conduct of the tortfeasor – where the tortfeasor's act and harm were so inseparable that to intend the act was also to intend the harm. This case is distinguishable from those in which the very nature of the instrumentality used to inflict harm is sufficient to demonstrate an intent to injure on the part of the tortfeasor. See, for example, *Allstate v. Cole* (1998), 129 Ohio App.3d 334, 717 N.E.2d 816, appeal allowed, 84 Ohio St.3d 1447, and dismissed, 85 Ohio St.3d 1401 (Cole shoots and kills Robinson—involuntary manslaughter); *Allstate v. Hevitan* (Jan. 24, 1996), Medina App. No. 2443-M (Hevitan shoots Hoegler—aggravated assault); *Farmers Ins. of Columbus, Inc. v. Martin*, Clermont App. No. CA 2004-03-022, 2005-Ohio-556 (Martin shoots Amburgey—felonious assault with firearm); *Woods v. Cushion* (Sept. 6, 2000), Summit App. No. 19896 (Cushion shoots Woods—felonious assault); *Baker v. White*, Clermont App. No. CA2002-08-065, 2003-Ohio-1614 (White rams Baker's car—felonious assault); *Campobasso v. Smolko* (July 24, 2002), Medina App. No. 3259 (Hill drugs Campobasso—felonious assault); *Nationwide Mut. Fire Ins. v. Carerras* (Nov. 15, 1995), Lorain App. No. 95-CA-006301, appeal not allowed, 75 Ohio St.3d 1477 (Carerras shoots and kills McKern—involuntary manslaughter and felonious assault); *Morner v. Guillano*, 163 Ohio App.3d 785, 2006-Ohio-2943, 857 N.E.2d 602 (Guillano shoots at persons); *Allstate Ins. Co. v. Cutcher* (N.D. Ohio 1996), 920 F.Supp. 796, aff'd (CA 6,

1997), 114 F.3d 1186 (Cutcher punches Tiller, who falls into river and dies—involuntary manslaughter); *Arrowood v. Grange*, Cuyahoga App. No. 82487, 2003-Ohio-4075 (Lemieux shoots near people and pleads guilty to felonious assault); and *Buckel v. Allstate Indemn. Co.* (Wis. App. 2008), 314 Wis.2d 507, 758 N.W.2d 224 (Boys create a wall of plastic entirely across a public road located such that avoidance was impossible).

The insurers cite cases where the insured intended some harm, and coverage was denied. These cases--*State Farm Fire & Cas. Co. v. Barker*, 143 Ohio App.3d 407, 2001-Ohio-1887, 758 N.E.2d 228 (Insured threw a rock at vehicle, intending to cause harm); *Wight v. Michalko*, Portage App. No. 2004-P-0038, 2005-Ohio-2076 (Insured, angered by an earlier assault, threw rock into house when he knew people were in the house and pleaded guilty to aggravated assault)--are readily distinguishable on their facts. Also, see *Moler v. Beach* (1995), 102 Ohio App.3d 332, 337, 657 N.E.2d 303, where a neighbor threw a rock in the direction of another neighbor injuring her foot. The court refused to extend the inferred intent rule to this scenario.

In addition, there is ample evidence to prove that the accident was caused not only by the boys' conduct in placing the fake deer in the road, but by the concurring negligence of Roby in operating his vehicle at an excessive speed. Reasonable persons could concur from this evidence that but for the concurring negligence of Roby, there would have been no accident. The appellate court recognized that:

“{¶}56} Reasonable persons could conclude from this body of evidence that Roby's speed may have been a factor contributing to the accident and, accordingly, the injuries he and Zachariah suffered were not substantially certain to occur from the boys' actions alone.”

To say it another way, no other motorist operating within the speed limit hit the Styrofoam deer. Should the boys have anticipated a speeding car?

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

{¶55} Several of the boys testified that they did not worry about or even contemplate an injury resulting from their actions. As in *Tower*, although their assessment of the potential danger ultimately proved to be incorrect, their misjudgment was not enough to bring them within the intentional acts exclusions in the policies as a matter of law.

Appellants continue to rely upon *Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App.3d 712, 679 N.E.2d 1189 and *Westfield Ins. Co. v. Blamer* (Sept. 2, 1999), Franklin App. No. 98AP-1576. In *Finkley* the tortfeasor was racing through the streets and in *Blamer* the boy lit a sofa intending to harm the sofa. By contrast, there is no intent to harm here, nor do the facts establish conduct that was so egregious that it created a substantial risk of harm.

The *Finkley* opinion has drawn criticism. In *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d at 833-34, the Texas Supreme Court attacked the fundamental flaw in the *Finkley* analysis:

Nationwide relies on *Nationwide Mutual Insurance Co. v. Finkley*, an Ohio intermediate appeals court decision that construed the same policy exclusion and concluded “no coverage.” We find *Finkley* unpersuasive as it misapplies the policy exclusion. Although *Finkley* describes a Texas-like standard that would bar coverage where the insured’s conduct is “substantially certain to result in injury,” *Finkley* actually applies a different standard, opining that “[a]ny reasonable person would know, or should know, that such actions [of the driver] would probably lead to serious injury.” In our view, this reading departs from the controlling policy language. The exclusion does not apply whenever a reasonable person would or should know that his actions “would probably lead” to injury; the policy imposes a stricter test, that the driver ought to know that injury “will follow” from his conduct.

The Texas Supreme Court rejected the analysis now advanced by the Appellants in this case—namely that a reasonable person would or should know that the actions would probably lead to serious injury. That is a far broader reading of the exclusion than is proper under the law.

Further, the view of the dissenting appellate judge below that the doctrine of inferred intent applies when the insured injected a level of chaos and danger into the flow of traffic, likewise improperly broadens the scope of the exclusion. The test is not whether the insured generated chaos. Rather, the appropriate test is whether the act and the harm are so intertwined that to intend the act is to intend the harm. The test is not met here. Further, regardless of what standard is used the issue would be a question of fact in the case. See *Grange Mut. Cas. Co. v. Tumbleson*, Scioto App. No. 03 CA-2898, 2004-Ohio-2180.

American Southern argues that these questions should always be decided by the court. There will be times when the court cannot decide these issues as a matter of law. After all, the trier of fact can determine the issue of substantial certainty in this context just as it could in workplace intentional tort cases.

This Court held in *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, 2010-Ohio-1043, that convictions based on no contest pleas are not admissible to determine insurance coverage. Notwithstanding this clear pronouncement, Allstate continues to raise and rely upon inadmissible, irrelevant judicial juvenile findings. These juvenile adjudications have no bearing.

**THIRD PROPOSITION OF LAW [Response to Allstate’s Proposition of Law II and Grange’s Proposition of Law II]**

Evidence of the lack of a specific intention to cause harm is relevant to determining the applicability of policy provisions that exclude coverage for expected or intended injury.

Grange’s assertions that the appellate court applied a purely subjective standard are contrary to the language of the opinion. The court stated:

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

The court proceeded to analyze the facts of this case according to this Court's precedent. It did not utilize a purely subjective test, nor has Zachariah ever argued for the application of one. To the contrary, in concluding that facts remained in dispute as to the certainty of harm from the boys’ conduct, the court considered that other cars had passed around the deer:

{¶53} “Although Roby’s accident occurred less than ten minutes after the boys placed the deer in the roadway, the boys’ expectations that motorists would successfully avoid the obstruction proved to be reasonable, as at least two motorists reacted in just that way.”

The court further took into account the evidence of Roby’s speeding vehicle:

{¶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.”

Consideration of all of these factors constituted a proper objective analysis.

Moreover, the absence of evidence of a specific intent to injure, while not necessarily dispositive, is germane to analyzing the conduct as well as the risk of harm

created by the conduct. Such evidence is relevant. First, the insurer has an obligation to address the insured's subjective intent to injure. Once the insurer recognizes the lack of a specific intent to cause harm, and the conduct is not intertwined with harm, it can only assert the "substantially certain" argument. But great care should be taken not to cast "too broad a net by excluding coverage for injuries that arise as the result of behavior which is undoubtedly criminal under the relevant statute, but involves a set of circumstances that do not indicate heinous, or egregious conduct." *Nationwide Mut. Ins. Co. v. Irish* (2006), 167 Ohio App.3d 762, 770, 2006-Ohio-3227, 857 N.E.2d 169, quoting *Nationwide Mut. Fire Ins. Co. v. Kubacko* (1997), 124 Ohio App.3d 282, 291, 706 N.E.2d 17. See, also, *W. Res. Cas. Co. v. Glagola*, Stark App. No. 2005CA 00225, 2006-Ohio-6013.

Essentially, the insurers argue that this Court should adopt the dissent in *Swanson*. Although Erie adds some qualification, Erie and Grange use the "expected or intended" language which *Swanson* reviewed. But the insurers want this Court to adopt a different analysis.

Admittedly, the Allstate policy language is a little different. It focuses on the words, "may reasonably be expected." The language is close enough to *Swanson* to be treated the same.

Allstate cites *Allstate Ins. Co. v. McCarn* (after remand) (2004), 471 Mich. 283, 293, 683 N.W.2d 656, which quotes *Allstate Ins. Co. v. McCarn* (2002), 466 Mich. 277, 288, 645 N.W.2d 202:

"We must be careful not to take the expectation of harm test so far that we eviscerate the ability of parties to insure against their own negligence. Otherwise, liability insurance coverage for negligence would seem to become illusory."

The exclusion should not be allowed to swallow the liability coverage. Even if a purely objective standard is used to analyze the exclusion, and even if the boys' testimony on intent is excluded, the issue would be a question of fact in this case.

### **CONCLUSION**

To review, in the context of an insurance policy exclusion for expected or intended injury, an intent to injure may be inferred as a matter of law, but only when the act and the harm are so intertwined that to intend the act is to intend the harm. Testimony on intent to injure is relevant.

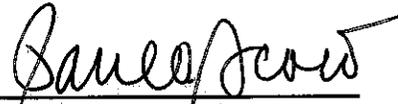
If this Court adopts a rule that intent to injure may be inferred as a matter of law when the harm is "substantially certain" to occur, this Court should also hold that the question of "substantial certainty" may be a question of fact for the trier of fact, just as it has been in the workplace setting. Testimony on intent to injure is still relevant.

If this Court goes beyond a test of "substantial certainty" and permits an objective analysis of "expected or intended injury," to exclude coverage as a matter of law, this Court should also hold that this determination may be a question of fact for the trier of fact.

Again, regardless of the test, this case presents a question of fact for the trier of fact - even if the boys' testimony about intent is excluded.

Appellees Dustin S. Zachariah and Katherine E. Piper respectfully submit that the Franklin County Court of Appeals correctly applied this Court's precedent, and committed no error. Accordingly, Appellees Dustin S. Zachariah and Katherine E. Piper urge the Court to affirm the judgment of the Franklin County Court of Appeals.

Respectfully submitted,



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The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellees Dustin S. Zachariah and Katherine E. Piper was served upon the following by regular US mail, postage prepaid, this 25 day of June 2010:

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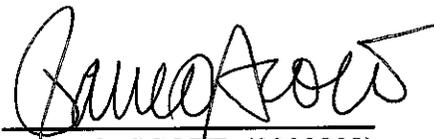
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