

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2009-2358**

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**ALLSTATE INSURANCE COMPANY, et al.  
Plaintiff-Appellants**

**-vs-**

**DAILYN CAMPBELL, et al.  
Defendant-Appellees**

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**BRIEF OF AMICUS CURIAE,  
OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF DEFENDANT-APPELLEES, DUSTIN ZACHARIAH, et al.**

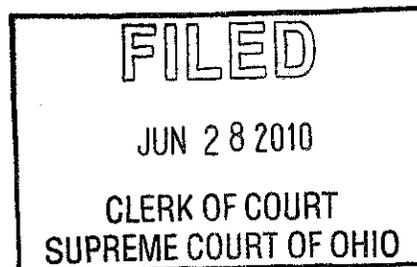
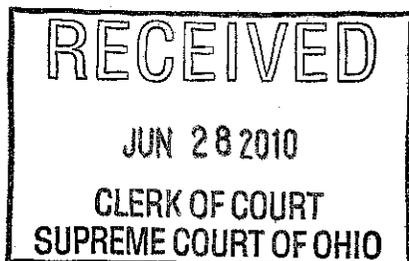
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## INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”). The OAJ is comprised of approximately two thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The purpose of this Brief is to urge this Court to adhere to a sensible construction of the inferred intent rule. The doctrine should be reserved for those tortious acts or omissions which, by their nature, necessarily will inflict some level of harm or loss. Liability coverage should not be forfeited simply because an injury or fatality was a likely, or even highly probable, result of the misconduct. When a reasonable person might not have appreciated the adverse consequences, summary judgment cannot be granted on the grounds that the wrongdoing was undeniably intentional and thus excluded from coverage. Unless the inferred intent rule is confined to its proper boundaries, countless policyholders will unwittingly discover that they are being denied a defense and exposed to potentially ruinous liability as a result of a course of action which was never actually intended to harm anyone.

## ARGUMENT

### **OAJ'S PROPOSITION OF LAW: SUMMARY JUDGMENT MAY BE GRANTED IN FAVOR OF AN INSURER UPON THE INFERRED INTENT DOCTRINE ONLY WHEN THE EVIDENCE IS UNDISPUTED THAT HARM TO ANOTHER WAS AN INEVITABLE CONSEQUENCE OF THE INSURED'S TORTIOUS ACTS OR OMISSIONS.**

The OAJ has no intention of arguing in this Brief that existing legal standards should be modified or abandoned. No attempt will be made to demonstrate that the controlling precedents are in need of reexamination. In the proceedings below, the Tenth District carefully traced the development of the "inferred intent" doctrine in Ohio over the last 19 years. *Allstate Ins. Co. v. Campbell*, 10<sup>th</sup> Dist. No. 09AP-306, 2009-Ohio-6055, 2009 W.L. 3823362, ¶ 33-49. The majority faithfully adhered to the overwhelming consensus of authority in concluding that genuine issues of material fact existed over whether the applicable intentional acts exclusion barred coverage. *Id.*, ¶ 50-57. The OAJ's position is that this unerring logic should be upheld in order to avoid an unnecessary disruption of the decisional law which presently governs this oft perplexing issue.

Liability coverage is purchased to afford protection against lawsuits alleging tortious misconduct, and such wrongdoing often entails some sort of criminal misdeed. The mere fact that fines or incarceration may be imposed upon the insured does not necessarily mean, however, that coverage will be forfeited. For example, both indemnity and a defense will still be owed when the insured disobeys a traffic signal and causes an accident in an intersection, even while under the influence of alcohol, absent a specific policy exclusion. *See e.g., Greater Cincinnati Chamber of Comm. v. Ghanbar* (1<sup>st</sup> Dist. 2004), 157 Ohio App. 3d 233, 810 N.E. 2d 455. An employer which exposes an employee to the substantial certainty of injury by deliberately disregarding

OSHA mandated safety precautions, moreover, will also be entitled to liability protection unless the policy specifically provides otherwise. See e.g., *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St. 3d 173, 551 N.E. 2d 962; *Presrite Corp. v. Commercial Union Ins. Co.* (8<sup>th</sup> Dist. 1996), 113 Ohio App. 3d 38, 680 N.E. 2d 216.

This Court's precedents recognize that there comes a point when certain particularly egregious acts will, by their very nature, be unworthy of insurance protection. When harm to another is an inevitable and direct consequence of such acts or omissions, the inferred intent rule will apply. See e.g., *Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34, 1996-Ohio-113, 665 N.E. 2d 1115. Determining whether that point has been reached is usually left to the trier-of-fact. See e.g., *Grange Mut. Cas. Co. v. Tumbleson*, 4<sup>th</sup> Dist. No. 03CA2898, 2004-Ohio-2180, 2004 W.L. 912606 ¶ 20-30.

In this appeal, the insurers have offered no sound justification for any departure from the longstanding rule that:

In 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.

*Physician's Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, 569 N.E.2d 906, syllabus. As observed in *Buckeye Union Ins. Co. vs. New England Ins. Co.*, 87 Ohio St 3d. 280, 283-284, 1999-Ohio-67, 720 N.E. 2d 495, 499, an "intent to injure" can be inferred only in "very limited instances." Two scenarios have been recognized which are (1) the insured's criminal conviction for aggravated murder, an essential element of which was that he intended to cause the victim's death and (2) the insured's sexual molestation of minors. *Id.* Reasonable minds could certainly find that the instant action does not fall within the "very limited instances" in which an intent to injure can be inferred as a matter of law. The issue of "[w]hether the insured had the necessary

intent to cause injury is a question of fact” which must be resolved by the jury. *Id.* (citation omitted).

Admittedly, Judge Sadler raised several compelling points in her dissent from the Tenth District’s decision. *Campbell*, 2010-Ohio-6055 ¶ 59-66. It certainly makes sense that an objective approach should be utilizing in determining whether an intent to cause injury will be inferred from the tortious misconduct. An insured’s purely subjective protests of innocence should not be dispositive.

With all due respect to the dissenting judge, however, adopting an objective test does not mean that the insured’s explanations as to the motivations for his/her actions becomes superfluous and undeserving of any consideration at all. Such testimony is still relevant to the question of what a reasonable person would have understood and appreciated under the circumstances. *Evid. R. 402 & 403*. While claims of an “empty head but pure heart” may ultimately be determined to be unworthy of credence, only the trier of fact can render such a credibility determination. *Turner v. Turner*, 67 Ohio St. 3d 337, 341, 1993-Ohio-176, 617 N.E. 2d 1123, 1127; *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St. 3d 84, 88, 585 N.E. 2d 384, 389.

Oftentimes in difficult cases like this, summary judgment is not a suitable mechanism for resolving disputes over a party’s intentions. *Terry Barr Sales Agency, Inc. v. All-Lock Co.* (6<sup>th</sup> Cir. 1996), 96 F. 3d 174, 178; *S. J. Groves & Sons Co. v. Ohio Tpk. Comm.* (6<sup>th</sup> Cir. 1963), 315 F. 2d 235, 237-238. “Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of ‘even handed justice.’” *Poller v. Columbia Broadcasting Syst., Inc.* (1962), 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458; see also *Williamson v. Wilbur-Rogers, Inc.* (6<sup>th</sup> Cir. 1967), 381 F. 2d 719, 721 (“As this Court has noted before, a trial judge should be slow to dispose of a case involving such a degree of complexity where questions of motivation or fraud may be at

issue and parties should normally be allowed to develop their cases by witnesses at trial.”) The majority below properly concluded that the determination of whether the policies’ intentional acts exclusions barred coverage simply could not be resolved in this particular instance through Rule 56.

**CONCLUSION**

For the foregoing reasons, the OAJ urges this Court to abide by the existing precedents and affirm the Franklin County Court of Appeals in all respects.

Respectfully submitted,



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