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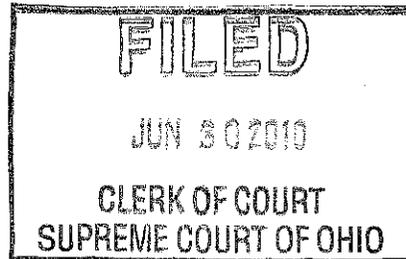
IN THE SUPREME COURT OF OHIO

Allstate Insurance Company,	:	Case No. 2009-2358
	:	
Appellant,	:	On Appeal from the Franklin
	:	County Court of Appeals,
v.	:	Tenth Appellate District
	:	
Dailyn Campbell, <i>et al.</i> ,	:	
	:	
Appellees.	:	

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STATEMENT OF THE CASE AND FACTS

This appeal arises from motions for summary judgment filed by the Appellants, Allstate Insurance Co. (“Allstate”), Erie Insurance Exchange (“Erie”), American Southern Insurance Co. (“American Southern”), and Grange Mutual Casualty Co. (“Grange”), in a consolidated declaratory judgment action. Each Appellant sought a declaration that it did not owe their respective insured a duty of defense or indemnity in tort actions initiated by Appellees Robert J. Roby, Jr. (“Roby”), and Dustin Zachariah (“Zachariah”), arising from a motor-vehicle incident that occurred on November 18, 2005.

On November 18, 2005, a group of high-school boys and teammates on the Kenton High School football team (hereinafter “the insureds” or “the boys”) stole a Styrofoam target deer decoy from a home in Hepburn, Ohio, after a classroom discussion about how people react to various situations. The deer decoy weighed only ten to fifteen pounds. *Allstate v. Campbell* (Nov. 17, 2009), Franklin App.Nos. 09AP-306 - 309; 09AP-318 - 09AP-321, 2009 WL 3823362 (hereinafter “*Decision*”).

Several members of the group fashioned a leg to support the foam deer decoy, then spray-painted various obscenities and the words “hit me” onto it in brightly-colored paint. Two other boys arrived later and joined the group as the target decoy was loaded into a SUV. *Id.*

The boys then began to look for a location to perpetrate their prank, with no particular location in mind. *Id.* Eventually, the boys “just kind of stopped the vehicle” (Barnes, 30:2-4; Campbell, 57:1-8) at a spot on County Road 144 in Kenton, Ohio. The boys did not select a specific spot or area beforehand; it was chosen on a whim. *Id.*

All of the boys agree that placing the deer decoy in the roadway on November 18, 2005, was intended solely as a prank (Campbell, 136:3-12; Howard, 35:11-13). The boys just wanted to “get some laughs” (Campbell, 70:6-10). The boys expected their prank would cause drivers to stop and go around the deer (Campbell, 136:3-12; Barnes, 56:5 - 57:9). The purpose of the prank was to see how drivers would react to the deer. *Id.*

The boys were not concerned that a traffic accident might occur (Campbell, 71:19-21), and did not intend for a vehicle to crash (Campbell, 136:3-12). No one in the group expressed any concern that the placement of the deer could pose a hazard to motorists. (Lowe, 36). They did not believe, even if someone were to hit the deer decoy, that the lightweight Styrofoam decoy would do any damage or cause any injury (Campbell, 219:10-14; Manns, 72:24 - 73:8).

The prank was not aimed at any particular individual (Campbell, 53:14-22). The boys did not know, or expect, Appellees Roby and Zachariah would be driving down County Road 144 that night; they did not seek to harm Appellee Roby or Zachariah. *Id.*

Once the decoy was in place, the insureds drove back and forth along the county road to witness their expected result – vehicles slowing down and maneuvering around the decoy. Just as the boys expected, at least two, perhaps four, vehicles approached the deer, navigated around it, and drove away. *Id.*

The boys intended to remove the deer decoy before they left the area (Campbell, 70:4-5; Howard, 63:7-64:1) that evening. Before the incident giving rise to this suit occurred, the boys intended to take one more trip past the deer to watch motorists stop and go around it (Howard, 63:22-64:5). As they prepared to make their last pass, a vehicle, allegedly Roby’s, passed them at an allegedly fast rate of speed (Howard, 38:14-17). The issue of Appellee Roby’s speed immediately prior to the incident is a genuine

issue of fact; each side has proffered experts on this subject that have come to significantly different calculations and results on the issue of Appellee Roby's speed. The Court of Appeals identified the fact that Appellee Roby's speed is at issue: "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 [insureds'] actions alone." *Decision*, paragraph 56.

Appellee Roby came upon the deer decoy in his Dodge Neon, maneuvered around the deer decoy, but lost control of his vehicle. *Decision*, paragraph 4. Appellee Roby and his passenger, Appellee Zachariah, both sustained serious and permanent injuries from the incident. *Id.*

Subsequently, three of the boys entered pleas of no contest to various juvenile delinquencies, including two counts of second-degree felony vehicular vandalism, one count of fifth-degree possessing criminal tools, and one count of first-degree misdemeanor petty theft. *Id.*, paragraph 5. A juvenile court accepted the pleas and adjudicated the three delinquent. *Id.* None of the juvenile delinquencies contained any elements tied to an intent to harm Appellees.

Appellants have consistently taken considerable liberties with the evidence in this case in lower-court pleadings to attempt to bolster their arguments that the insureds' acts were inherently dangerous. Appellants have alleged: that the insureds carefully selected a dangerous place to put the deer decoy; that the insureds calculated their every act to increase the likelihood of an incident; and that the boys were excited that a collision might occur when they saw a vehicle pass them at an allegedly high rate of

speed. However, there is absolutely no evidence in the record to support such argumentative contentions.

After the incident, Appellee Roby filed suit against the pranksters and DaimlerChrysler in the Franklin County Court of Common Pleas, a case captioned *Robert J. Roby Jr. v. DaimlerChrysler Corp. et al.*, 06-CV-14836. Appellee Zachariah also filed suit against the pranksters and Appellee Roby in the Franklin County Court of Common Pleas, a case captioned *Dustin S. Zachariah v. Robert J. Roby, et al.*, 06-CV-15945.

As discovery progressed in the personal-injury suits, Appellants each filed separate declaratory judgment actions. *Id.*, paragraph 7. Although discovery was not complete, the underlying tort actions were stayed pending resolution of the declaratory judgment actions. The individual declaratory judgment actions were then consolidated.

Appellants individually filed motions for summary judgment, arguing each had no duty to defend or indemnify their insureds based on three premises: (1) that the prank was not an “occurrence” under the respective insurance policies, (2) that the prank was an intentional act and was thereby excluded under an intentional-acts exclusion in the respective policies, and (3) that the prank was a criminal act and was thereby excluded from coverage under a criminal acts exclusion.

The applicable policies of insurance include the following terms, conditions, and exclusions. The American Southern policy states:

“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.

14. “Occurrence” means accident, including repeated exposures to similar conditions, that results in “bodily injury,” or results in “property damage.”

The American Southern policy also contains the following exclusion:

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.

The Grange policy states:

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.

“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.

The Grange policy contains the following exclusions from coverage:

Under Personal Liability Coverage and Medical Payments to Others Coverage, we do not cover:

4. Bodily Injury of 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.

The Erie policy states:

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 this policy period.

“occurrence” means an accident, including continuous or repeated exposure to the same general harmful conditions.

The Erie policy contains the following exclusions from coverage:

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 that was expected or intended.

The Allstate policies state:

Losses We Cover Under Coverage X: Subject to the terms, conditions, and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy.

14. “Occurrence” means an accident, including continuous or repeated exposure by substantially the same general harmful conditions during that policy period resulting in bodily injury or “property damage”

The Allstate policies contain the following exclusions:

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.

Decision, paragraphs 10 - 22. None of the pertinent policies of insurance define the term “accident.”

By a Decision rendered on February 6, 2009, and journalized March 4, 2009, (hereinafter “*trial court Decision*”) the trial court sustained the insurers’ motions for

summary judgment based solely on the insurer's intentional-act exclusion arguments.

The trial court construed the facts of the case based on the limited record and stated:

“[a]lthough a few drivers slowed down and avoided the deer, this court agreed 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 *Finkey* 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.” *Trial court Decision*, p. 14.

The trial court determined that the insureds' acts were substantially certain to result in harm because “the presence of a real deer on a road poses a significant risk of catastrophic and sometimes unavoidable harm.” *Trial court Decision*, p. 14.

By a Decision rendered on November 17, 2009, the Tenth District Court of Appeals (hereinafter “*Decision*”) reversed, stating:

“viewing the facts of this case in a light most favorable to appellants,” as it must, “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.” *Decision*, paragraph 53.

And,

“[b]ecause 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 [Appellants'] motions for summary judgment.” *Id.*

Appellants subsequently appealed the Court of Appeals Decision. This Court accepted several assignments of error from each Appellant that will be addressed collectively herein.

INTRODUCTION

This case presents, in general, issues regarding the scope and applicability of the “inferred intent rule” in the context of summary judgment motions submitted in a declaratory judgment action. This case provides the Court with an opportunity to provide notice to Ohio’s insurance policyholders that an intent to harm can only be inferred, as a matter of law, when the insured’s act and the resulting harm are so inherently intertwined that the act can be considered injurious by definition.

In this case, a group of high-school teenagers placed a lightweight Styrofoam deer decoy onto the side of one lane of travel of a roadway with an avenue of escape as a prank. The insureds did not intend or expect harm to result from their actions as a matter of law. Accordingly, Appellee Roby’s incident is an “occurrence,” and the insureds’ acts are not excluded under applicable policy language.

The limited applicability of the inferred intent rule must be reaffirmed by this Court to eliminate inconsistent and improper applications of the “substantial certainty” standard. If the rule is expanded to Appellants’ standard, the line between negligence and intentional acts will be blurred, and the public at large will no longer understand what they are purchasing when they buy a homeowner’s policy of insurance. Parents in Ohio will be left wondering whether their children’s negligent acts will continue to be insured, or to what extent.

In the alternative, numerous genuine issues of material fact exist which preclude summary judgment in Appellants’ favor as a matter of law. Where genuine issues of material fact pertinent to the issue of an insured’s intent exist, application of the inferred intent rule as a matter of law is inappropriate.

This case also requires the Court to apply the long-standing principle that terms of a contract must be given their plain and ordinary meaning, and that any ambiguities in a contract must be construed in favor of the non-drafting party. Here, the plain meaning of the language of the policies of insurance at issue denote a subjective, rather than an objective, standard, for determining the intent or expectation of an insured.

PROPOSITION OF LAW #1

THE INSUREDS DID NOT INTEND OR EXPECT TO CAUSE HARM AS A MATTER OF LAW.

Initially by way of motions for summary judgment, Appellants assert that the insureds' actions do not constitute an "occurrence." In the alternative, Appellants argue that the insureds' actions are excluded from coverage under "intentional" or "expected" exclusions in each insurance policy.

Each policy defines the term "occurrence" as "an accident." No policy further defines the term "accident." Accordingly, the term must be given its ordinary meaning. To that end, this Court has held that if an injury is not intended, that it is accidentally suffered and is therefore an "occurrence." *Safeco v. White* (2009), 112 Ohio St.3d 562, 913 N.E.2d 426; and, *Rothman v. Metro Cas. Ins. Co.* (1938), 134 Ohio St. 241, 16 N.E.2d 417.

Whether an insureds' conduct was an "occurrence" or was "intentional" or "expected" turns on a determination of whether the insureds intended or expected to cause harm by their acts. Whether the insureds acted intentionally is irrelevant to the inferred intent rule; at issue is whether the insureds, a group of young high-school boys, acted with an intent or expectation to cause harm by their acts. *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, 569 N.E.2d 906 (an insurer "must

demonstrate that the injury itself was expected or intended” in order to declare that an act does not constitute an “accident” or to exclude coverage under an “expected” or “intended” exclusion). “It is not sufficient to show merely that the act was intentional.” *Id.*, at 193. “Almost all acts are intentional in one sense or another but many unintended results flow from intentional acts.” *Id.*, internal citations omitted.

Because these issues were presented by the Appellants by way of motions for summary judgment, Appellants bear the burden of demonstrating that no genuine issues of material fact exist, and that they are entitled to judgment as a matter of law. Ohio Civ.R. 56(C). Specifically, Appellants bore the burden of demonstrating that the insureds intended or expected harm to occur when they perpetrated their ill-advised prank. *Id.*

The first consideration is whether there is any direct evidence in the record to demonstrate that the insureds intended or expected harm. Appellants implicitly concede, and the record demonstrates, that there is no direct evidence in the record that the insureds intended or expected harm to result from their actions. Each of the boys testified that the act was intended as a harmless prank, and that no one anticipated harm would result therefrom. The boys each testified that they intended and expected motorists to harmlessly slow down and maneuver around the deer decoy.

At issue, then, is whether this case fits into the class of limited group cases where intent can and should be inferred as a matter of law. This analysis must be made with two long-standing principles in mind: (1) any ambiguities in the terms of the insurance policies must be construed in favor of the insureds, and (2) the Appellants bear the burden of demonstrating that no genuine issues of material fact exist, and they are entitled to judgment as a matter of law.

From the onset of Ohio's acceptance of the inferred intent rule, this Court identified significant limitations on when the rule could be satisfied for the purposes of determining the applicability of insurance coverage. In *Swanson*, this Court distinguished the earlier case of *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St. 3d 108, 507 N.E. 2d 1118, to demonstrate the limited applicability of the rule.

In *Gill*, the insured pled guilty to a crime that included the essential element of the intention to cause a victim's death. This direct evidence of intent justified judgment as a matter of law on the issue of intent. However, this Court noted the distinction between intent and lower states of civil culpability: "an intentional injury exclusion will not apply if the insured intentionally does an act, but has no intent to commit harm, even if the act involves the foreseeable consequences of great harm or even amounts to gross or culpable negligence." *Swanson*, 191, citation omitted.

In cases where there is no direct evidence of intent, the intent or expectation to injure is a question of fact, and is not to be presumed as a matter of law. *Id.*; and, *Moler v. Beach* (1995), 102 Ohio App.3d 332, 657 N.E.2d 303, citing *Nationwide Mut. Ins. Co. v. Machniak* (1991), 74 Ohio App.3d 638, 600 N.E.2d 266, and *Lumbermens Mut. Cas. Co. v. S-W Indust., Inc.* (C.A.6 1994), 23 F.3d 970.

Swanson arose from a dispute between two groups of children. During the dispute, one of the boys procured a BB gun, aimed it at the group of children with whom he was fighting, and fired the weapon three times. The boy later testified that he intentionally fired the gun towards the other group with the intent to scare, not harm. At least two of the children were hit (implying that the boy continued to fire the gun after striking an individual).

In adopting the inferred intent rule, the Court considered the circumstances of *Swanson* and found that there was insufficient evidence to exclude coverage as a matter of law. The facts of *Swanson* are similar and illustrative to the instant action. In each case, a juvenile engaged in an intentional act with a foreseeable risk of harm. In each case, the act was ill-advised, negligent, and potentially harmful. However, in each case, the act and subsequent harm were not so inherently intertwined as to allow a Court to infer the insureds intent as a matter of law.

As is more-fully described below, the inferred intent rule has been explicitly limited to cases where the act will almost always result in harm. Common examples include the sexual molestation of children and intentional murder. In such cases, harm will always result from the act. For example, sexually molesting a child or physically assaulting a person will always result in harm to the victim. Because these acts always lead to harm, the inferred intent rule eliminates the need for further analysis into the insured's intent and permit a court to infer intent as a matter of law. Further, the Court has held that, as a matter of public policy, such acts are not insurable losses in Ohio.

On the other hand, the act of placing a Styrofoam deer decoy onto one side of a two-lane roadway will not always lead to harm as a matter of law or fact. Here, the actors provided a means of escape to those who encountered the deer; there was sufficient room to maneuver around the decoy. Further, the location of the deer provided drivers with time to stop their vehicles before striking the obstacle. *Decision*, paragraph 54. The deer only obstructed one portion of one lane on the roadway. Consistent with the insureds' expectations, several vehicles encountered the obstacle, maneuvered around it, and drove away. *Id.*, paragraph 53. Appellee Roby also avoided

the obstacle. The insureds' acts are not intentionally injurious by definition, and therefore the "intended" or "expected" exclusions do not apply.

In an attempt to exclude coverage in this case, Appellants would have this Court adopt a far more inclusive application of the inferred intent rule. This standard would greatly exceed the Court's general policy behind the inferred intent rule, and would exclude numerous acts that are not injurious by definition from insurance coverage as a matter of law.

Further, Appellants standard will leave lower courts grasping for an understanding as to the scope and applicability of the inferred intent rule. If the rule expands beyond cases that are inherently intertwined with harm, the question must be asked: exactly how certain must the harm be to trigger the rule? The esoteric and subjective term "subjective" provides little clarity to this issue and will lead to inconsistent results as the lower courts attempt to define and understand this term.

In determining whether certainty of harm is "substantial," should a mathematical formula be applied? If so, what percentage of likelihood of harm must be demonstrated to constitute a substantial certainty? We know that negligence requires a showing that a harm is "more likely than not," and that absolute certainty would entail one hundred percent certainty. "Substantial" certainty must therefore fall somewhere between 51% certainty and 100% certainty. Is something substantially certain if the odds of harm are three out of four, or is the standard higher? How often must harm follow an act to be considered substantially certain?

Appellants have argued, contrary to the evidence, that harm was an "inevitable" result from the insureds' prank. Appellants argue, generally, that the insureds' act was so dangerous that harm would eventually occur - it was only a matter of time until harm

resulted. “Inevitability,” however, is an inappropriate standard and includes a large range of acts that are currently considered negligent in the state of Ohio.

Almost any act, if repeated enough times, will “inevitably” result in harm; it is only a matter of time until harm will occur. Consider an individual that runs a long red light every morning on his or her way to work. Mathematically, harm is inevitably going to result from this intentional act - it’s just a matter of time. Harm may occur the tenth time the individual runs the light, or possibly the hundredth or thousandth time; but eventually harm will occur. Under Appellants’ reading of the inferred intent rule, the individual’s act of running a red light would be excluded from insurance coverage as a matter of law.

A similar argument can be constructed out of almost any negligent act with harm as a foreseeable consequence. For example, changing lanes without looking at one’s mirrors, not shoveling an unnatural accumulation of ice or snow one’s sidewalk in violation of a local ordinance, or hitting baseballs in one’s backyard towards a house will inevitably lead to harm - it’s just a matter of time.

At the onset of its acceptance of the inferred intent rule, this Court identified the problems inherent with a broad application of the inferred intent rule:

“Such an interpretation would radically alter the scope of insurance company liability. On an exclusion such as this one, the [insurance] company would have no liability for the baseball intentionally thrown which accidentally breaks the neighbor’s window, the intentional lane change which forces another driver into a ditch, or the intentionally started trash fire which spreads to the adjacent lot. Countless other examples are imaginable, in all of which the insurance company could rely on such an exclusion to avoid liability because the course of conduct of the insureds involved intentional acts.” *Swanson*, at 192-193, internal citations omitted.

These are just some of the countless absurdities that would result from extending the inferred intent rule beyond cases where the act and harm are injurious by definition.

Appellants will attempt to point this argument by labeling it as a “slippery slope” argument. However, no Appellant has yet to refute this point or suggest how their standard would not result in these results. Appellants may also respond that these examples are absurd, and no rightful insurance company would take such a position. But, the insurers are doing exactly that; albeit they have chosen a more unusual case than a person running a red light, the analogy applies: they seek to exclude coverage on acts where harm is foreseeable, but not intended or expected.

If Appellees’ standard is accepted, they will have absolute discretion to exclude coverage for losses with foreseeable harm as a matter of law. Presumably, they would pick and chose the more unusual cases to exclude so that they continue to have something to sell to the public. But the fact that this case presents unusual circumstances makes it no more inherently dangerous than other ill-advised acts with foreseeable harmful results.

Another example is illustrative. How fast must a vehicle travel to pose a substantial certainty of harm to other vehicles? If a speed limit is 55 miles per hour, does driving 80 miles per hour on a busy roadway pose a substantial certainty of harm? If not 80 miles per hour, does 100 miles per hour pose a substantial certainty? Would the rule require a driver to travel 180 miles per hour to be inferred to intend harm? Where does a court, as a matter of law, draw the line?

A final example can be drawn from the context of employer-intentional torts. Consider a delicatessen where employees use mechanical slicers to cut their customer’s lunchmeat. Even if the machine’s device is left on, eventually, if enough employees use a

meat slicer enough times, someone is going to cut his or her finger. The harm is therefore “inevitable” and “substantially certain” to occur. If so, and Appellants’ standard is accepted, this Court’s recent precedents in the employer-intentional torts context must be completely reexamined, and employers will be held liable for just about every injury their employees receive.

In this case, the only direct evidence of the certainty of harm comes from the fact that Appellees Roby and Zachariah were harmed. Appellants point to the incident as proof that an incident was inevitable - it was only a matter of time. This analysis fails to consider other evidence in this case: every driver (at least two to five drivers and Appellee Roby) avoided the deer decoy, just as the insureds expected.

Assume that there were only two other cars and Appellee Roby that avoided the decoy; do 1/3 odds constitute substantial certainty? If there were in fact six cars that avoided the deer decoy, do 1/6 odds constitute substantial certainty?

Appellants will respond that the incident occurred within 10 minutes after the decoy was placed on the roadway, thus demonstrating the inevitability of harm. Again, this argument bases the certainty of harm on the fact that harm occurred. This argument fails for two reasons.

First, there is no evidence that anyone else would have been harmed by the prank. No vehicle struck the obstacle. Only one vehicle was involved in an incident, and there are, *arguendo*, potential causes or contributory factors other than the insureds’ acts. The fact that Appellee Roby was involved in a harmful incident is not direct proof that the insureds intended or expected harm to result from their prank, nor that harm was substantially certain to occur. Perhaps Appellee, *arguendo*, was going 100 miles per hour and the incident resulted from his speed. Perhaps, *arguendo*, a statistical

oddity occurred. Consider the driver that runs a red light. Regardless of the mathematical odds of harm (the “certainty”), the incident could occur the first time he or she runs the light. The simple fact that Appellee Roby was harmed by the incident was not, in and of itself, proof that the boys act was intentionally injurious by definition.

One problem with Appellants’ application of the inferred intent rule can be seen in the trial court’s decision. In an attempt to define this nebulous concept, the Court analogized this case to the harm presented by a real deer on a roadway, a harm the court defined as “sometimes unavoidable.” *Trial court Decision*, p. 14. This interpretation clearly includes far more than just acts inherently intertwined with harm and, for all intents and purposes, includes any negligent act. In its effort to apply this vague standard, the trial court went far beyond this Court’s original policy and rule regarding inferred intent. If Appellants’ standard is accepted here, similar inconsistent and improper decisions will follow.

Based upon the totality of circumstances presented herein, the insureds did not intend or expect harm to result from their negligent, ill-advised, stupid prank. Although harm may have been foreseeable, the record reflects that the insureds did not intend or expect harm to result from their acts.

PROPOSITION OF LAW #2

THE INSUREDS’ INTENT CANNOT BE INFERRED AS A MATTER OF LAW BASED ON THE CIRCUMSTANCES OF THIS CASE.

A. THE DOCTRINE OF INFERRED INTENT CAN ONLY BE APPLIED AS A MATTER OF LAW IN VERY LIMITED CIRCUMSTANCES.

The issue of whether an insured intended to cause harm for the purposes of determining insurance coverage should only be determined as a matter of law in a very

limited set of circumstances. *Physicians Insurance Co. v. Swanson* (1991), 58 Ohio St.3d 189, 569 N.E.2d 906; *Buckeye Union Ins. Co. v. New Eng. Ins. Co.* (1999), 87 Ohio St.3d 280, 720 N.E.2d 495.

Currently, the inferred intent doctrine is limited to cases where the intent to harm is “virtually inseparable” from the conduct at issue. Examples are limited to firing a gun at point-blank range (*Western Reserve Mutual Casualty Co. v. Macaluso* (1993), 91 Ohio App.3d 93, 631 N.E.2d 1079); sexual molestation of children (*Auto-Owners Ins. Co. v. Brubaker* (1994), 93 Ohio App.3d 211, 638 N.E.2d 124); intentionally punching a person in the face (*Erie Ins. Co. v. Stadler* (1996), 114 Ohio App.3d 1, 682 N.E.2d 712); applying lighter fluid to a sofa and setting it on fire (*Westfield Ins. Co. v. Blamer* (Sept. 2, 1999), Franklin County App. No. 98AP-1576, 1999 WL 680162); shooting an ex-wife eight times while she sat in a car with a passenger nearby (*Allstate Ins. Co. v. Ray* (Dec. 18, 1998), Mahoning App. No. 96CV-20, 1998 WL 896366); and, attempting to elude the police in a stolen vehicle in an urban area without regard to traffic signals (*Nationwide Mut. Ins. Co. v. Finkley* (1996), 112 Ohio App.3d 712, 679 N.E.2d 1189).

Two specific types of behavior have consistently been shown to qualify as the very limited circumstances under which a court may infer intent: intentional assault and the sexual molestation of children. “Outside of gunshots at point blank range and the sexual molestation of children, Ohio courts have adhered to the *Swanson* [and *Buckeye Union*] rule that intent to injure or its expectation are questions of fact, and intent or expectation is not to be presumed as a matter of law.” *Moler v. Beach*, *supra*, internal citations omitted.

In *Buckeye Union*, this Court again set forth the limitations of the inferred intent rule. The plurality opinion first noted that, as set forth in *Swanson*: “[w]hether [an]

insured had the necessary element to cause injury is a question of fact.” *Id.*, at 283. The *Buckeye Union* plurality also drew distinctions with *Preferred Risk Ins. Co. v. Gill*, *supra*, and *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 665 N.E.2d 1115 and once again held that the inferred intent rule could only be applied in “very limited instances.” *Id.*

In the cases cited above where a court made an inference of intent, the insureds engaged in conduct that was virtually inseparable from the resulting harm. For example, shooting a gun at one’s ex-wife at close range is inseparable from the intent to harm. Similarly, dousing a couch with lighter fluid that is on a person’s front porch and setting it on fire is inseparable from intent to harm. In each case, the only reasonable intention or expectation of the actor was to cause harm, thereby eliminating the need for a trier of fact to thoroughly analyze and construe the facts of the case.

The inferred intent rule is a procedural means of promoting judicial efficiency by permitting a trial court to quickly dispose of cases where it is certain that the insured acted with an intent to cause harm via summary judgment. In a case where the act and harm are so inherently intertwined, there is no need to submit the case to a trier of fact, and judgment as a matter of law is appropriate.

In *Moler v. Beach*, an insurer argued that harm was substantially certain to result from an individual’s intentional act of throwing a rock at a neighbor as a result of an altercation. The Second District Court of Appeals court rejected the insurer’s argument and stated:

“[t]he intentional act of directing a rock towards a victim is a far cry from shooting a victim at point blank range. The intention of a rock hurler may be simply to slam the rock into the ground in front of the victim (possibly the situation here since the victim was hit in the foot) or simply toss it short of

the victim as a warning or insult of some kind. In any case, we find that the trial court was well within its discretion in not stretching the presumption of intent to the facts of this case” *Id.*, at 338.

In the present case, the Court of Appeals followed a similar analysis in finding that reasonable persons could come to more than one conclusion as to the insureds’ intent in this case. Just as “the intention of a rock hurler may be simply to slam the rock into the ground in front of the victim,” “the boys’ expectations that motorists would successfully avoid the obstruction proved to be reasonable, as at least two motorists reacted in just that way.” *Id.* and *Decision*, paragraph 53. Correctly, the court of appeal in each case declined to stretch the presumption of intent to acts that were not intentionally injurious by definition.

Outside of sexual molestation of children and intentional assault, courts have applied the inferred intent rule to cases where the insured commits an act of violence against another person or property. Examples include: ramming a truck into another car (*Baker v. White* (Mar. 31, 2003), Clermont App.No. CA2002-08-065, 2003 WL 1689609); crashing a car into a building (*State Farm Mut. Auto. Ins. v. Hayhurst* (May 31, 2000), Pickaway App.No. 99 CA 25, 2000 WL 715000); shooting an intruder at close range (*Western Reserve Mu. Cas. Co. v. Macaluso, supra*); punching someone in the face (*Aguiar v. Tallman* (Mar. 15, 1999), Mahoning App.No. 97 CA 116, 1999 WL 148367); shooting a barrage of bullets into a car at close range (*Allstate Ins. Co. v. Ray* (Dec. 18, 1998), Mahoning App.No. 96 CA 20, 1998 WL 896366); engaging in a fistfight (*Erie Ins. Co. v. Stadler* (1996), 114 Ohio App.3d 1, 682 N.E.2d 712), and swinging a metal club at another person at close range (*Horvath v. Nationwide Mutual Fire Ins.*

Co. (1996), 108 Ohio App.3d 732, 671 N.E.2d 638). In each of these cases, the violent act against another person is “virtually inseparable” from the resulting harm.

Because the Court of Appeals could not find a case where the inferred intent rule was applied and that is analogous to the circumstances of this matter, it looked to an out-of-state case proffered by the Appellants - *Buckel v. Allstate Indemnity Co.* 314 Wis.2d 507, 2008 WI App. 160. *Buckel* involved a group of boys that created a wall of clear plastic across a public road. The invisible plastic wall blocked the road completely and that it would have been *impossible* for a vehicle to not strike the barrier. Based on this certainty of harm, the court inferred the intent to harm as a matter of law.

The Court of Appeals compared *Buckel* to the instant matter, noting that here: (1) there was room to avoid the deer decoy, (2) at least two, and perhaps three, vehicles avoided the deer decoy, (3) the location of the deer provided some stopping distance in front of the deer, and (4) the 10 to 15 lb Styrofoam deer may not cause damage if struck by a vehicle, to find that the certainty of harm was less in the instant matter. The difference between the two cases is clear, and reflects the general policy of when the inferred intent rule is applicable.

Ohio is not the only state that limits the application of the inferred intent rule to “very limited instances.” The Supreme Court of Pennsylvania narrowly applies the inferred intent rule, and does not support its extension to cases other than those involving child sexual abuses. *Minnesota Fire and Cas. Co. v. Greenfield*, (2004) 579 Pa. 333, 2002 PA Super 260 (explicitly denying its application when an insured went on a “shooting spree” killing several people). Wisconsin allows application in “limited circumstances” such as sexual molestation of a minor, or armed robbery. *Laforte v. Bandoli*, (2000) 240 Wis.2d 324, 621 N.W.2d 386. (denying the application to the

throwing of a glass at a person seven feet away). Wisconsin further declines to infer intent to injure simply because the defendant was engaged in criminal activity when the injury occurred. *Glennon v. Hansen*, (2008) 315 Wis.2d 771, 771 N.W.2d 930. Vermont limits the inferred intent rule to cases involving the sexual abuse of a minor or sexual harassment. *Serecky v. National Grange Mut. Ins.*, (2004) 177 Vt. 2004, 857 A.2d 798.

Appellants rely heavily on *Penn Traffic Co. v. AUI Ins. Co.* (2003), 99 Ohio St.3d 227, 790 N.E.2d 1199, for the premise that the “very limited” standard for applying the inferred intent rule is no longer controlling law. However, *Penn Traffic* did not involve application of the inferred intent rule. *GNFH, Inc. v. West American Ins. Co.* (2007), 172 Ohio App.3d 127, 873 N.E.2d 345.

Instead, *Penn Traffic* was adjudicated on the specific language of the insurance policy at issue, which explicitly defined the policy’s “intended or expected” exclusion as both “deliberate-intent torts” and “substantial-intent torts.” *Id.*, citing *Penn Traffic*. The policies at issue herein do not contain similar language. The Tenth District Court of Appeals subsequently recognized that Justice Cook’s comments on “inferred intent” in *Penn Traffic* were not necessary to the court’s decision. *Alvater v. Ohio Casualty Insurance* (Sep. 9, 2003), Franklin App.No. 02AP-422, 2003 WL 22077728. “The court’s comment on ‘inferred intent’ was, therefore dictum, and had nothing to do with the issue being decided.” *GNFH, Inc.*, p. 140.

Appellants’ position casts too broadly a net by excluding coverage for injuries that arise as the result of childish behavior that is undoubtedly stupid, negligent, and perhaps even reckless, but involves a set of circumstances that do not indicate heinous or egregious conduct. The Eleventh District Court of Appeals came to a similar conclusion in *Nationwide Mutual Fire Ins. Co. v. Kubacko* (1997), 124 Ohio App.3d

282, 706 N.E.2d 17, wherein the court declined to infer intent in a case where the insured was convicted of child endangering, a crime that involved the mindset of recklessness. The Court found so even after noting that reckless misconduct involves a conscious choice of a course of action, either with the knowledge of serious danger to others involved in it or with the knowledge of facts that would disclose this danger to any reasonable man. *Id.*, internal citations omitted.

B. A POLICY OF INSURANCE MUST BE CONSTRUED IN FAVOR OF THE NON-DRAFTING PARTY.

A judgment in Appellants' favor would also directly conflict with Ohio's general principal that insurance policies should be construed against the drafter (the insurance company), and in favor of the non-drafting party. "Where [a] written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party." *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 797 N.E.2d 1256, citing *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 406 N.E.2d 515. Because the insurer, not the insured, drafts the language in an insurance policy, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured." *Safeco Ins. Co. of America v. White*, paragraph 18, internal citations omitted.

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, citations omitted. On their motions for summary judgment, Appellants held the burden of establishing that the boys' actions fit into the exclusionary language of the pertinent

policies of insurance. Construing such a motion, the trial court had the duty to construe the language of this policy in favor of the insureds, which it failed to do.

Here, none of the policies exclude coverage for acts that are “substantially certain” to result in harm. The policies exclude only acts that result in intended or expected harm. Yet, the trial court went to great lengths to stretch the common-sense meaning of these terms to bring the insureds’ actions within the scope of the exclusions. Instead of construing these terms in favor of the insureds, the court liberally construed them to the benefit of the drafting parties, the insurers.

Construing policy language pursuant to Appellants’ standard will cause significant confusion amongst Ohio’s insureds regarding just when the coverage they paid for applies. No longer will Ohio’s mothers and fathers have notice as to when their insurance policy will cover their children’s ill-advised actions. No longer will a reasonable person’s comprehension of the terms “intended” or “expected” control issues of coverage; instead, Ohio will be left with a vague and ambiguous rule that can and most likely will be construed in favor of insurance companies and against the citizens of this State.

Appellants also seek to have courts construe the evidence in a case in their favor for the purposes of determining an insured’s intent. For example, in this case, Appellants pick and choose the facts that support their conclusions. If a portion of the insureds’ deposition testimony helps their argument, they argue that it is dispositive. If the insureds’ deposition testimony works against them, they argue that the testimony is worthless, subjective, and should not be considered.

It is undisputed that one cannot rely on insurance to provide coverage for harm that is either intended or expected. However, homeowners purchase insurance coverage

with the understanding that, if they are parents of minor children, their children's stupid, ill-advised, and/or negligent acts are covered by insurance. Countless acts with foreseeable results similar to those *sub judice* fall into this category. A ruling that this prank is not an insurable loss as a matter of law eliminates a large aspect of homeowner's coverage and will lead to uncertainty as to the extent of such coverage.

Extending the permissible use of the inferred intent rule to situations like that presented herein also gives insurance companies in Ohio unreasonable control of coverage issues as a matter of law. A broad application of the inferred intent rule will lead to liberal construction of insurance policy exclusion, and will lead to insurers picking and choosing which cases they, and they alone, deem uninsurable. Under Appellants' standard, they will be entitled to judgment in their favor on such cases as a matter of law.

The better result, and the result consistent with this Court's underlying policy, is to recognize that the inferred intent rule should only be used at summary judgment to interpret and/or apply exclusionary policy language in the very limited circumstances where the harm and act are inherently connected. Examples include the sexual molestation of children, murder, or intentional assaults against another person. If this high standard is not met, a court cannot infer an insured's intent as a matter of law.

PROPOSITION OF LAW #3

IN THE ALTERNATIVE, THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT PRECLUDE A FINDING THAT THE INSUREDS INTENDED TO CAUSE HARM AS A MATTER OF LAW.

The Court of Appeals identified several genuine issues of material fact underlying the issues *sub judice*. Because these genuine issues of material fact go directly to the

issues under consideration pursuant to Appellants' motions for summary judgment, the Court of Appeals correctly declined to rule in Appellants' favor as a matter of law.

First, the Court of Appeals noted a genuine issue of material fact existed as to the intent or expectation of the insureds: “[v]iewing the facts of this case in a light most favorable to [the insureds], 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.” To reach this conclusion, the Court considered the insureds’ testimony in light of a reasonable-person standard, and found “[a]lthough 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 of Appeals did not rely on this testimony in reaching its decision, but it did correctly note that, unlike a case of murder or sexual molestation, reasonable persons could come to different conclusions as to the boys’ intentions or expectations.

Second, the Court of Appeals noted a genuine issue of material fact existed as to whether a collision was substantially certain to occur based on the location and placement of the deer decoy, which “did not obstruct the entire roadway, leaving room for motorists to avoid the deer by maneuvering around it.” *Decision*, paragraph 54. The Court also noted that the location of the deer decoy on the roadway “apparently provided some stopping distance; no party provided Civ.R. 56-compliant evidence showing that placement at this distance made contact substantially certain.” *Id.*

Third, the Court of Appeals noted a genuine issue of material fact existed as to whether harm was substantially certain to result from the insureds’ acts: “even of 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 ten to fifteen pounds.” *Decision*, paragraph 55. The Court reasonably refused to hold, as a matter of law, that striking a 10 to 15 lb piece of foam could cause any damage to a person or vehicle. *Id.*

In identifying this issue of fact, the Court of Appeals identified an important distinction between this case and cases where the inferred intent rule can be applied: “[t]he target deer is different from other instruments, like a gun, a car[,] or a metal club, that are known to cause harm under certain circumstances.” *Id.* Unlike cases of an individual sexually molesting a child or intentionally shooting someone, there are issues regarding whether the instrumentality used in this case was certain to cause any harm.

Fourth, the Court of Appeals noted yet another disputed material fact that precluded a finding of summary judgment: Appellee Roby’s alleged speed. The record contains allegations that Appellee Roby was traveling in excess of the posted speed limit immediately prior to the incident, although Appellee Roby and his expert witness contest this allegation. The issue of how fast Appellee Roby was traveling is in dispute: “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 [insureds’] actions alone.” *Decision*, paragraph 56.

Appellants and the dissent confuse this point. Because Appellants base their argument that the incident was inherently dangerous in part on the fact that Appellee Roby was harmed, whether any other act or event made the harm more or less likely is relevant. If Appellee Roby’s speed did contribute to the incident, and such speed was

unforeseeable, then this evidence is relevant to understanding what the insureds knew or should have known at the time they acted.

Consider, *arguendo*, that the incident would not have occurred but for Appellee Roby's speed. Further assume that Appellee Roby avoided the deer decoy without incident and that no other motorist was harmed by the boys' acts. In such a case, where no harm occurred, a Court could not infer that the boys intended or expected harm to result.

All of the aforementioned disputed issues go directly to the heart of this matter: how certain was harm to result from the obstruction? Unlike a case where a person sexually molests a child or intentionally punches or shoots another person, issues of fact exist herein that preclude judgment as a matter of law.

Subsequent to the Court of Appeals' *Decision*, Appellant Erie moved for reconsideration, arguing that their insured's testimony that the deer was placed on the roadway to "make cars slow down or maybe hit it" equated to an intention to cause property damage, an act that Erie argued would preclude coverage under their policy as a matter of law. The Court of Appeals, on reconsideration, noted that "[w]e specifically rejected the argument that an intention to make cars slow down and hit the deer equated, *as a matter of law*, to a substantial certainty of harm." A1-6. The Court of Appeals considered all of the pertinent evidence in a light most favorable to the non-moving party and found that issues of fact precluded a finding that harm was intended as a matter of law.

It is important to note that the Court of Appeals' *Decision* does not hold that the boys' acts were not substantially certain to cause harm, nor that the policies of insurance apply. Instead, the *Decision* holds that the existence of material facts precludes

judgment as a matter of law on this matter on summary judgment. As required by *Swanson*, these issues must be determined by a trier of fact. Appellants still have the right and opportunity to present their evidence and argument to the trier of fact, who may or may not reach a different conclusion after hearing all of the evidence in open court.

Appellees are incorrect in claiming that “the undisputed material facts establish” in their assignments of error. As evidenced by the Court of Appeals’ decision, there are several dispositive issues of fact at issue. If these facts were not disputed, judgment as a matter of law may or may not be appropriate; but *Swanson* and her progeny hold that where issues of fact exist as to the certainty of harm, summary judgment is inappropriate.

Construing the evidence in a light most factorable to the insureds, reasonable minds could conclude that the insureds did not intend to cause harm to any person as a result of their acts. Reasonable minds could also conclude that harm was not certain to result from the act. Consistent with *Swanson*, the Court of Appeals correctly identified these disputed material facts that precluded judgment as a matter of law on the issue of the insureds’ intent.

PROPOSITION OF LAW #4

THE POLICY LANGUAGE AT ISSUE DENOTES A SUBJECTIVE, NOT AN OBJECTIVE STANDARD, FOR DETERMINING WHETHER AN INSURED INTENDS OR EXPECTS TO CAUSE HARM.

Appellants incorrectly argue that the language of their insurance policies mandate an objective as opposed to a subjective standard. On the contrary, the specific language of the pertinent policies of insurance denote a subjective standard, not an objective standard.

The American Southern policy excludes injury which results from “any intentional act of any ‘insured.’” The Grange policy excludes “[b]odily [i]njury or [p]roperty [d]amage expected or intended by any insured person.” The Erie policy excludes “[b]odily injury, property damage, or personal injury expected or intended by anyone we protect.”

The language of these three policies make no mention, inferred or directly, of an objective standard. The plain meaning of each of these three policies is that the exclusion will apply if the insured intended or expected harm. No reasonable construction of these terms can lead to a conclusion that the contract mandates application of an objective standard.

Further, if the Appellants had intended to require an objective standard, they, as the drafters of the policies, could have included specific policy language to that effect. If so, the insureds would have specific knowledge and understanding of the extent of coverage. This could be easily accomplished with simple terms; for example, the policies could exclude from coverage: “any resulting harm that a reasonable person could or should have intended or expected.” But, Appellants did not include any such language in the pertinent policies of insurance. Absent such language in the policies themselves, a court cannot read such terms and conditions into the policies.

Appellants may try to broaden the terms “by any insured person” or “intended by anyone we protect” of their policies to denote an objective person standard, meaning that the harm must be considered through the eyes of “anyone” the insurer insures. This is an incorrect construction of these terms. As mentioned above, if the insurers had sought to mandate an objective standard, they could have done so clearly and

conspicuously. The fact that they did not do so evidences the fact that the insurers are now seeking to add unintended meaning to these terms.

Second, and more importantly, these terms reflect the insurers attempt to include any person who is an insured under the policy into the class of persons excluded from coverage. As identified in a concurring opinion to *Safeco Ins. Co. of Am. V. White*, insurers are aware of the need to phrase their policies in a way that will include any insured under the exclusions; to not leave room for any insured to avoid the exclusion because the terms of the policy were drafted too narrowly. *Id.*, 574.

The Allstate policy excludes “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.” Inclusion of the word “reasonable” does not mean the language mandates an objective standard be applied. Quite the opposite: the plain meaning of this language means that the intent or expectation must be considered from the reasonable viewpoint of the insured.

Again, had Allstate sought to require the application of a reasonable person standard, it could have said so clearly and conspicuously. It did not do so. Instead, it merely included the term “reasonably.”

The most ordinary and logical reading of the Allstate policy is that acts which were reasonably expected by the insured should be excluded from coverage. In fact, this language is more exclusive than the other three policies, which exclude any act that could be expected. The Allstate policy only excludes harms that could reasonably be expected by the insured. This again denotes a subjective standard; one that is constrained by the reasonableness of an insured’s expectations.

Further, regardless of whether one defines the Allstate policy terms as objective or subjective, the Court of Appeals explicitly applied the language of the policy to the circumstances of this matter: “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.” *Decision*, paragraph 53 (emphasis added).

The Court of Appeals applied a reasonable person standard to the testimony of the insureds. Contrary to Appellants’ arguments, the Court of Appeals did not rely on this testimony, nor did it base its decision on that testimony. Instead, the Court considered what a reasonable person might conclude based upon that testimony. The Court determined that a reasonable person could find the insureds’ testimony reasonable, and therefore recognized that this issue of fact precluded summary judgment as a matter of law. Based on this conclusion, the Court could have found the exclusions inapplicable.

Appellants consistently mischaracterize *Gearing* for the proposition that any consideration of an insureds’ testimony constitutes an improper subjective analysis. *Gearing* discussed the fact that an insured’s “subjective intent,” or lack thereof, is not conclusive of the issue of coverage. 76 Ohio St.3d at 39. As noted by the dissenting opinion in the Court of Appeals and discussed in *Gearing*, a completely subjective test would make it difficult to apply any exclusionary language. *Id.*

But, *Gearing* does not hold that an insured’s subjective intent, or lack thereof, cannot be considered by a court. Nor does it hold that the test must be completely objective. In fact, the above quotation demonstrates that some element of subjectivity must be applied in the analysis. The limitation is that the analysis cannot be completely

subjective, as it would allow any actor to avoid coverage exclusions with his or her own testimony.

The policy language, along with *Gearing*, dictate that a court must determine the issue of intent from the standpoint of the insured, albeit with a wary eye on an insured's own testimony. The Court of Appeals did exactly so by applying a reasonable person standard to the insureds' testimony. This analysis poses no risk that intentional harms will be protected by insurance – presumably the Court of Appeals would find that a reasonable person would not consider a convicted child molester's testimony that he did not intend or expect to cause harm to be reasonable.

The Court of Appeals considered other circumstances of this incident in light of a reasonable person standard. It noted that “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.” *Decision*, paragraph 54. Not only were cars able to avoid the deer decoy, but the placement of the deer “provided some stopping distance; no party provided Civ.R. 56-complaint evidence showing that placement at this distance made contact substantially certain.” *Id.* The Court of Appeals also stated: “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 actions alone.” *Id.*, paragraph 56.

The dissenting opinion in the Court of Appeals and the Appellants confuse this point. The fact that the majority considered other potential causal factors of the incident does not mean that it applied a subjective standard. The majority opinion reflects consideration of all of the facts of this matter as applied to a reasonable person

standard. If the victim's actions cause or contribute to the incident, then that evidence is relevant to the issue of whether the harm was substantially certain. This is especially true in a case such as this, where Appellants continually rely on the specific circumstances of the incident to argue that the harm was substantially certain to result.

For example, assume *arguendo* that Appellee Roby was traveling 120 miles per hour at the time of the incident. Also, assume *arguendo* that the boys could not foresee that persons would drive at such a speed on County Road 144. Finally, assume *arguendo* that the collision would not have occurred if Appellee Roby were only traveling 55 miles per hour. Under these assumptions, harm was not substantially certain to occur absent Appellees' hypothetical speed, which was hypothetically unforeseeable. Absent Appellees' acts, the harm would not have occurred. Therefore, one cannot consider the subjective or objective expectation of a person without considering other causative factors.

Based on the plain meaning of the policies at issue and controlling case law on the subject, the pertinent policy exclusions for intent and expectation must be viewed from the perspective of the insureds. The Court of Appeals correctly did so.

CONCLUSION

Based upon controlling case law, pertinent facts, and pertinent policy language, the insureds did not intend or expect harm to result from their actions. The inferred intent rule is limited to cases where the act and harm are so inherently intertwined as to deem the act intentionally injurious by definition. Although the insureds engaged in a negligent, ill-advised act with foreseeable consequences, the act of placing a lightweight Styrofoam deer decoy onto a portion of a roadway with an avenue of escape is not intentionally injurious by definition.

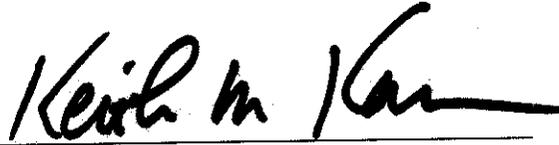
The limited applicability of the inferred intent rule must be stressed by this Court to eliminate inconsistent and improper applications of the esoteric “substantial certainty” standard. If the rule is expanded to Appellants’ standard, the line between negligence and intentional acts will be eliminated, and the public at large will no longer understand what they are purchasing when they buy a homeowner’s policy of insurance. Parents in Ohio will be left wondering whether their children’s negligent or stupid acts will continue to be insured, or to what extent.

Further, the policy language at issue herein must be given its plain and ordinary meaning, and any ambiguities in the policy must be construed in favor of the non-moving party. The plain language of the policies at issue denotes a subjective, not objective, standard for interpreting the insureds’ intent. Regardless, the Court of Appeals’ *Decision* follows the language of the policies at issue.

For that reason, Appellee Roby respectfully requests that this Court clarify the limited applicability of the inferred intent rule and find, as a matter of law, that the subject policy exclusions be deemed inapplicable. In the alternative, Appellee Roby respectfully requests this Court to limited applicability of the inferred intent rule and find that genuine issues of material fact precluded summary judgment as a matter of law in Appellants’ favor.

Respectfully submitted,

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
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2009 JAN -7 PM 1:33
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. 07CVH05-6515)
(REGULAR CALENDAR)

American Southern Insurance Company, :

Plaintiff-Appellee, :

v. :

Dale Campbell et al., :

Defendants-Appellees, :

Dustin S. Zachariah et al., :

Defendants-Appellants. :

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

Grange Mutual Casualty Company, :

Plaintiff-Appellee, :

v. :

Corey Manns et al., :

Defendants-Appellees, :

Dustin S. Zachariah et al., :

Defendants-Appellants. :

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

Erie Insurance Exchange, :

Plaintiff-Appellee, :

v. :

Corey Manns et al., :

Defendants-Appellees, :

Robert J. Roby, Jr., :

Defendant-Appellant. :

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

American Southern Insurance Company, :

Plaintiff-Appellee, :

v. :

Dale Campbell et al., :

Defendants-Appellees, :

Robert J. Roby, Jr., :

Defendant-Appellant. :

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

Grange Mutual Casualty Company, :

Plaintiff-Appellee, :

v. :

Corey Manns et al., :

Defendants-Appellees, :

Robert J. Roby, Jr., :

Defendant-Appellant. :

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

(REGULAR CALENDAR)

Allstate Insurance Company, :

Plaintiff-Appellee, :

v. :

Dailyn Campbell et al., :

Defendants-Appellees, :

Robert J. Roby, Jr., :

Defendant-Appellant. :

No. 09AP-321
(C.P.C. No. 07CVH07-8934)

(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on January 7, 2010

*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.

ON APPLICATION FOR RECONSIDERATION

FRENCH, J.

{¶1} Plaintiff-appellee, Erie Insurance Exchange ("Erie"), has moved for reconsideration of our November 17, 2009 decision, which reversed the trial court's judgment and remanded the matter for further proceedings. *Allstate Ins. Co. v. Campbell*, 10th Dist. No. 09AP-306, 2009-Ohio-6055. Defendants-appellants, Dustin S. Zachariah, Katherine E. Piper, and Robert J. Roby, Jr. (collectively, "appellants"), oppose the application.

{¶2} When analyzing an application for reconsideration, we consider whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. An application for reconsideration "is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1996), 112 Ohio App.3d 334, 336.

{¶3} As Erie states, the court concluded that, "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." *Allstate* at ¶57. In support of its application for reconsideration, Erie contends that we "should have given consideration to Erie's alternative argument that, even if the doctrine of inferred intent did not apply, summary judgment would nonetheless have been warranted in favor of Appellee Erie [as] a matter of law as it relates to the conduct of Corey Manns," the son of its insured. Although the trial court did not address this alternative argument, Erie argues, we should have done so here.

{¶4} Specifically, Erie points to Manns' statement that the boys placed the Styrofoam deer in the road to "make cars slow down or maybe hit it." (Manns Depo. 34.) Erie then argues that Manns' intention to cause a car to hit the deer equates to an intention to cause property damage, an act that precludes coverage under Erie's policy as a matter of law.

{¶5} In our decision, however, we expressly considered Manns' statement. We also considered the remaining testimony. "Viewing the facts of this case in a light most favorable to appellants," as we must, we concluded "that genuine issues of material fact exist as to whether the boys necessarily intended to cause harm when they placed the target deer in the roadway, whether harm was substantially certain to result from their actions, and *whether their actions fall within the scope of the individual insurance policies.*" *Allstate* at ¶53 (emphasis added).

{¶6} We specifically rejected the argument that an intention to make cars slow down and hit the deer equated, as a matter of law, to a substantial certainty of harm. We

stated: "Further, even if the boys expected a motorist to hit the deer, we cannot conclude as a matter of law that harm was substantially certain to result, as it was made of Styrofoam and weighed only 10 to 15 pounds." *Allstate* at ¶55. We considered, too, that genuine issues of fact remained as to whether Roby's conduct contributed to the accident.

{¶7} For all these reasons, we conclude that Erie has not demonstrated an obvious error in our original decision or an issue that we did not sufficiently consider. Therefore, we deny Erie's application for reconsideration.

Application for reconsideration denied.

BROWN, J., concurs.
SADLER, J., concurs separately.

SADLER, J., concurring separately.

{¶8} For the reasons expressed in my dissent in *Allstate v. Campbell*, 10th Dist. No. 09AP-306, 2009-Ohio-6055, ¶¶65-66, I adhere to the belief that, with or without explicit expressions of intent such as that upon which Erie bases its application, the facts and circumstances demonstrate that the actions of the boys involved, including Erie's insured, are an appropriate basis upon which to infer injurious intent. Despite my fundamental disagreement with the majority on that point, because I agree that the majority *fully considered* whether Erie was entitled to summary judgment based on its insured's statement of his intention to make a car slow down or hit the deer, I concur in denying the application for reconsideration.
