

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**ALLSTATE INSURANCE COMPANY, et al.** :

Plaintiff-Appellants, :

v. :

**DAILYN CAMPBELL, et al.,** :

Defendants, :

**CASE NO. 2009-2358**

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

---

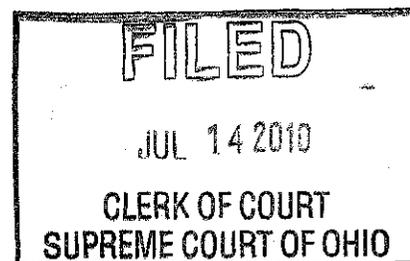
**REPLY BRIEF OF APPELLANT GRANGE MUTUAL CASUALTY COMPANY**

---

Gary L. Grubler (0030141)  
610 South Front Street  
Columbus, Ohio 43215  
Telephone: (614) 449-5900  
Fax: (614) 449-5980  
[grublerg@grangeinsurance.com](mailto:grublerg@grangeinsurance.com)  
*Counsel for Plaintiff-Appellant Grange Mutual Casualty Company*

Daniel J. Hurley (0034999)  
Crabbe, Brown & James LLP  
500 S. Front St., Suite 1200  
Columbus, OH 43215  
Telephone: (614) 229-4492  
Fax: (614) 229-4559  
[dhurley@cbjlawyers.com](mailto:dhurley@cbjlawyers.com)  
*Counsel for Plaintiff-Appellant Allstate Insurance Company*

David A. Caborn (0037347)  
Caborn & Butauski Co. LPA  
765 S. High St.  
Columbus, OH 43206  
Telephone: (614) 445-6265  
Fax: (614) 445-6295  
[dcaborn@sbcglobal.net](mailto:dcaborn@sbcglobal.net)  
*Counsel for Plaintiff-Appellant Erie Insurance Exchange*



Robert H. Willard (0002386)  
Harris & Mazza  
941 Chatham Ln., Suite 201  
Columbus, Ohio 43221  
Telephone: (614) 457-9731  
Fax: (614) 457-3596  
[robertwillard@harrismazzalaw.com](mailto:robertwillard@harrismazzalaw.com)  
*Counsel for Plaintiff-Appellant American Southern Insurance Company*

Keith M. Karr (0032412)  
David W. Culley (0079399)  
Karr & Sherman Co. LPA  
Two Miranova Place, Suite 410  
Columbus, OH 43215  
Telephone: (614) 478-6000  
Fax: (614) 478-8130  
[kkarr@karrsherman.com](mailto:kkarr@karrsherman.com)  
*Counsel for Defendant-Appellee Robert J. Roby, Jr*

Paul O. Scott (000809)  
Paul O. Scott, LPA  
471 E. Broad St., Suite 1100  
Columbus, OH 43215  
Telephone: (614) 460-1632  
Fax: (614) 469-1171  
[pscott@poslaw.com](mailto:pscott@poslaw.com)  
*Counsel for Defendants-Appellees Dustin S. Zachariah and Katherine S. Piper*

Appellee Roby asserts that the Appellants have “consistently taken considerable liberties with the evidence” to bolster arguments that the boys’ “acts were inherently dangerous.” Specifically, Appellees state that the Appellants have asserted that the boys carefully selected a dangerous place to put the decoy deer, that they calculated their every act to increase the likelihood of an accident and that they were excited that a collision might occur when they saw Roby’s vehicle pass at a high rate of speed. Frankly, what the boys thought and felt are not relevant. Had the boys expressly indicated their intent to cause harm, there would be no question that their acts were not covered under the Appellants’ policies. Given, as one might expect, that the boys did not acknowledge that they intended or expected harm, the analysis turns to was harm substantially certain to occur. In that situation, the Courts have inferred intent. Since the boys, as expected, denied an intent to injure, their thoughts with respect to “careful” selection, “calculating” the likelihood of incidents or their “excitement” that a collision might occur when a car quickly drove by them are not relevant. What is relevant is what they actually did and what occurred. They did place the decoy deer in a spot on the road at night when it would likely be perceived by a motorist with very little time to react. They did place the deer in the center of the lane which would necessitate that a motorist in that lane would have to do something other than drive uninterruptedly. Lastly, the boys did pass their decoy deer on several occasions waiting to see if something would happen. A “substantial certainty” and “inferred intent” analysis does not hinge upon their thoughts and calculations since they’d already denied an intent to harm.

On pages 15 and 16 of his Brief Appellee Roby gives several hypothetical examples of situations where confusion would result should this Court reverse the Court of Appeals’ decision. Specifically, Appellee Roby asks how fast a driver must be going in order to pose a substantial certainty of harm. He also cites an example of delicatessen owner who utilizes mechanical meat

slicers as providing or using an item that will inevitably cause one to cut off his or her finger thereby arguably making harm “substantially certain to occur.” However, in these situations, there are many different results that could occur by virtue of the “insureds” acts. The person driving at a high rate of speed may be attempting to get some place quickly, avoid something or get through a light. The delicatessen owner utilizes a meat slicer for the purpose of cutting meat. There are many uses and reasons for the actions that do not involve harm and harm would not be substantially certain to occur thereby causing intent to not be inferred. However, in this case there is no other purpose and ultimately no other result substantially certain to occur than a significant obstacle to motorists who will have to take unexpected action substantially certain to result in harm from the acts of these boys. All of the facts put together in this case, not just the idea of conducting a “prank,” create a substantial certainty of harm situation.

Appellee Roby also asserts on page 17 of his Brief that the position set forth by the Appellants would “lead the Court to find that basically any negligent act could be excluded from coverage.” The Appellee fails to recognize that two very different standards are proposed. Negligence occurs if there is foreseeable harm; it is covered. In the intentional acts situation intent would be inferred only if harm is “substantially certain to occur” from an intentional act.

Appellee Roby asserts on page 20 of his Brief that intent should not be inferred and harm was not substantially certain to occur because “reasonable persons could come to more than one conclusion as to the insureds’ intent.” As an example, the Appellee argues and the Court of Appeals notes that in part because other motorist avoided the obstruction, the boys’ expectations would be that any motorist would successfully avoid the obstruction. Again, when the boys denied that they expected or intended any kind of harm, the analysis becomes whether harm was substantially certain to occur. In order to avoid the obstruction (what Appellant and the Court of Appeals asserts is a

reasonable expectation), any driver would have to swerve or abruptly stop in the two lane road at night with virtually no warning since the deer was placed just over the crest of the hill. These facts taken all together demonstrate a situation where harm was substantially certain to occur as these boys injected chaos on a dark country road by placing something on the road that blocked all traffic in one direction and forced all traffic in that direction to take some kind of evasive action.

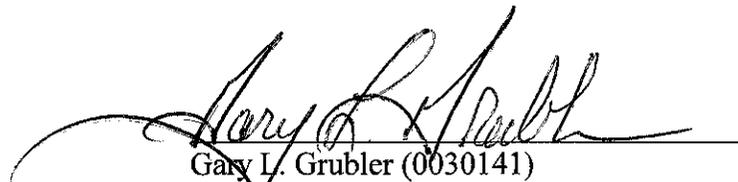
Appellee Roby asserts and the Court of Appeals suggested that the substantial certainty of harm was less in this matter because other vehicles did avoid the decoy, its location provided some stopping distance, there was room to avoid the deer and the decoy's weight might not cause damage if struck by a vehicle. However, the objective analysis of all of the facts warrants inferring intent. Drivers proceeding any speed at night on this country road does not know when it encounters this deer decoy that it only weighs 15 lbs, that they may have room to get around it by going into the other lane or that they might be able to stop in time without hitting it. The facts regarding the placement of the deer and the surroundings establish that an unknowing driver suddenly encounters something that looks like a deer in his or her lane thereby prompting some sort of reaction. If a driver had been telephoned before he or she encountered this point on the road with a warning that there was something in the road, the motorist would have an opportunity to expect and react in such a manner that harm might not occur. However, a motorist in this situation had no such opportunity and certainly did not have an opportunity to gage the weight of the decoy, the room to stop or the manner to avoid the decoy in a way to minimize the harm.

On page 28 of his Brief Appellee Roby asserts that if he and others avoided the decoy deer, the Court could not infer intent. Obviously, this would be the case because there would be no lawsuit or harm for which intent could be inferred.

The Appellants assert that if the Court applies the inferred intent doctrine to cases beyond sexual molestation and assault, “parents in Ohio would be left wondering whether their children’s negligent or stupid acts will be continued to be insured, or to what extent.” Again, parents in Ohio who will dwell on this subject will know and it will be well settled that their children’s negligent acts which encompass those things for which harm is foreseeable are covered. It is only those intentional acts where harm is substantially certain to occur that parents will and should be without coverage. Parents in Ohio do not likely and should not anticipate buying insurance coverage to pass off exposure to others in those situations where their children’s acts are substantially certain to result in harm. If children commit intentional acts and deny that they intended harm but harm is foreseeable, there is coverage. If children commit intentional acts and either acknowledge that they intended harm or that harm is substantially certain to occur, as a matter of law, there should be no coverage.

Appellant Grange Mutual Casualty Company respectfully request that both propositions of law be found well taken and the Court of Appeals’ Decision be reversed finding that Cory Manns is not entitled to a defense and is not entitled to indemnification under the Grange policy.

Respectfully submitted,



Gary L. Grubler (0030141)  
610 South Front Street  
Columbus, Ohio 43215  
Phone: (614) 449-5900  
Fax: (614) 449-5980  
[grublerg@grangeinsurance.com](mailto:grublerg@grangeinsurance.com)  
*Counsel for Appellant*  
*Grange Mutual Casualty Company*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served via regular U.S.

Mail, postage pre-paid, this \_\_\_\_ day of July, 2010 upon:

Daniel J. Hurley (0034999)  
Crabbe, Brown & James LLP  
500 S. Front St., Suite 1200  
Columbus, OH 43215  
Telephone: (614) 229-4492  
Fax: (614) 229-4559  
[dhurley@cbjlawyers.com](mailto:dhurley@cbjlawyers.com)  
*Counsel for Plaintiff-Appellant Allstate Insurance Company*

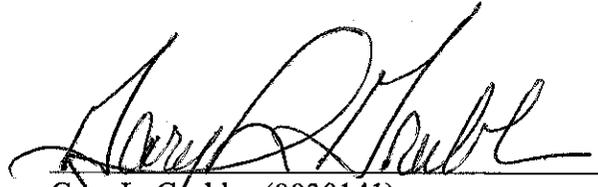
David A. Caborn (0037347)  
Caborn & Butauski Co. LPA  
765 S. High St.  
Columbus, OH 43206  
Telephone: (614) 445-6265  
Fax: (614) 445-6295  
[dcaborn@sbcglobal.net](mailto:dcaborn@sbcglobal.net)  
*Counsel for Plaintiff-Appellant Erie Insurance Exchange*

Robert H. Willard (0002386)  
Harris & Mazza  
941 Chatham Ln., Suite 201  
Columbus, Ohio 43221  
Telephone: (614) 457-9731  
Fax: (614) 457-3596  
[robertwillard@harrismazzalaw.com](mailto:robertwillard@harrismazzalaw.com)  
*Counsel for Plaintiff-Appellant American Southern Insurance Company*

Keith M. Karr (0032412)  
David W. Culley (0079399)  
Karr & Sherman Co. LPA  
Two Miranova Place, Suite 410  
Columbus, OH 43215  
Telephone: (614) 478-6000  
Fax: (614) 478-8130  
[kkarr@karrsherman.com](mailto:kkarr@karrsherman.com)  
*Counsel for Defendant-Appellee Robert J. Roby, Jr*

Paul O. Scott (000809)  
Paul O. Scott, LPA  
471 E. Broad St., Suite 1100  
Columbus, OH 43215  
Telephone: (614) 460-1632  
Fax: (614) 469-1171  
[pscott@poslaw.com](mailto:pscott@poslaw.com)

*Counsel for Defendants-Appellees Dustin S. Zachariah and Katherine S. Piper*

A handwritten signature in black ink, appearing to read "Gary L. Grubler", written over a horizontal line.

Gary L. Grubler (0030141)  
*Attorney for Appellant*  
*Grange Mutual Casualty Company*