ORIGINAL

IN THE SUPREME COURT OF OHIO

ALLSTATE INSURANCE COMPANY, et al.	:	
Plaintiff-Appellee,	:	
v.	:	CASE NO. 2009-2358
DAILYN CAMPBELL, et al,	:	Discretionary Appeal from the Franklin County Court of Appeals
Defendants	:	Tenth Appellate District

REPLY BRIEF OF APPELLANT ERIE INSURANCE EXCHANGE

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TABLE OF AUTHORITIES

Cases:	Pages
Alvater v. Ohio Cas. Ins. Co. (10th Dist., 2003-Ohio-4578, at para 15.....	3
Buckeye Union Ins. Co. v. New England Ins. Co. (1999), 87 Ohio St. 3d 280, 720 N.E. 2d 495	1, 3
Gearing v. Nationwide Ins. Co., 76 Ohio St. 3d 34, 665 N.E. 2d 1115	1, 2, 3
Hess v. Pawloski (1927), 274 U.S. 352, 356.....	5
Penn Traffic Co. v. AIU Ins. Co. 99 Ohio St. 3d 227, 2003-Ohio-3373....	3

By way of the arguments set forth in their merit briefs, the Appellees are clearly attempting to persuade this Court that, if the application of an objective analysis to the undisputed controlling facts in this case would lead to the conclusion that intent to harm can be inferred as a matter of law, then Courts in Ohio could "...find that basically any negligent act could be excluded from coverage." (Brief of Appellee Roby, at page 17). Any such contention has no merit, as Appellant Erie Insurance Exchange ("Erie") and the other Appellant-insurers in this action seek nothing more than a uniform application of an objective analysis in determining whether intent can be inferred as a matter of law dependent upon the specific circumstances presented before a court of law. Appellee Erie submits that the appropriate inquiry in this case would be "whether the boys' conduct supports an objective inference of the intent to injure." (Appx. 40). As succinctly summarized in Judge Sadler's dissenting opinion in the lower court, application of the objective analysis adopted by this court in Gearing v. Nationwide Ins. Co., 76 Ohio St. 3d 34, 665 N.E. 2d 1115, and espoused by Justice Cook in her concurring opinion in Buckeye Union Ins. Co. v. New England Ins. Co. (1999), 87 Ohio St. 3d 280, 720 N.E. 2d 495 fully supports the conclusion that the insureds' actions were substantially certain to cause injury as a matter of law, and therefore coverage is excluded as a matter of law:

> {¶60} Because "'a completely subjective test would virtually make it impossible to preclude coverage for intentional [injuries] absent admissions by insureds of specific intent to harm or injure,'" in determining whether an intentional act is substantially certain to cause injury, "determination of an insured's subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage." Gearing v. Nationwide Ins. Co., 76 Ohio St. 3d 34, 39, 1996-Ohio-113. For this reason, I would not consider the boys' testimony about their expectations, plans and intentions, as recounted in paragraphs 51 through 53 of the majority opinion.
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> {¶63} In this case, the appropriate inquiry is "whether the boys' conduct supports an objective inference of the intent to injure." (Emphasis added.) Ante, ¶50. Under this objective standard, the

> question is whether the act of placing a decoy deer with wooden blocks attached to it, in the middle of a lane of travel, on a curvy, two-lane road, where the speed limit is 55 miles per hour, at night, just beyond the crest of a hill, positioned so that motorists would not see it until they were 15 to 30 yards from the decoy, is substantially certain to cause injury.
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> (Appx. 39, 40).

In arriving at it's majority decision, the lower court did not employ an objective analysis in reversing the trial court's decision granting summary judgment in favor of the Appellants. Under such an analysis, the subjective thoughts and intentions of the boys simply are not relevant to the inquiry, just as the issue of whether Appellee Roby was speeding is irrelevant to the inquiry. Rather, the inquiry should have focused on what the boys actually did (the placement of the decoy deer, and what transpired as a result of those actions). "[i]n those cases where an intentional act is substantially certain to cause injuries, determination of an insured's subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage. Rather, an insured's protestations that he "didn't mean to hurt anyone" are only relevant where the intentional act at issue is not substantially certain to result in injury." Gearing, Supra, 76 Ohio St. 3d 34, at 39, 665 N.E. 2d 1115. In conducting its analysis, the lower court should have focused on the boys' conduct, which involved the act of placing the artificial deer in the middle of a lane of travel on a curvy, unlit, two-lane road at a 55 mph speed limit just beyond the crest of the hill, to the exclusion of the boys' testimony. Such an analysis fully lends itself to the legal conclusion that, based upon the undisputed facts surrounding the boys' conduct, harm was substantially certain to occur as a matter of law, and therefore, intent could be inferred as a matter of law.

In his merit brief at page 19, Appellee Roby states that this Court "once again" held in Buckeye Union that the inferred intent rule can only be applied in "very limited instances." At page 6 of his brief, Appellee Zachariah implies that under Ohio law, an intent to injure may be inferred as a matter of law, but only when the act and the harm are so intertwined that to intend the act is to intend the harm. In fact, this Court has never held that the inferred intent doctrine only applies in "very limited instances", or that intent to injure may be inferred as a matter of law only where the act and harm are so intertwined that to intend the act is to intend the harm. Appellees have simply restated in the form of legal propositions dicta from the plurality opinion in Buckeye Union, Supra. It is respectfully submitted that this Court in Buckeye Union did not limit its holding in Gearing, or otherwise retreat from the application of inferred intent based upon the substantial certainty of injury. As noted by Justice Cook in her concurring opinion in Buckeye Union, this Court's position in Gearing is couched upon the premise that where direct intent does not exist, then the analysis proceeds to an objective consideration of whether the tortfeasor's intentional act is substantially certain to cause injury, utilizing a objective analysis. Buckeye Union, at 290. Thereafter, this Court in Penn Traffic Co. v. AIU Ins. Co. 99 Ohio St. 3d 227, 2003-Ohio-3373 chose to adopt Justice Cook's concurring opinion from Buckeye Union that intent to injure would be inferred as a matter of law in substantial certainty cases. See, e.g., Alvater v. Ohio Cas. Ins. Co. (10th Dist., 2003-Ohio-4578, at para 15.). Thus, under Ohio law as it currently stands, the question of whether intent can be inferred should be addressed on a case-by-case basis, so as to determine whether an actor's conduct supports an objective inference of the intent to injure.

Turning to an objective analysis of the boys' conduct in this action, in an attempt to downplay the criminal, anti-social nature of the boys' conduct, the Appellees assert that the

artificial deer, which was constructed of Styrofoam, would not represent the type of dangerous instrumentality which would be known to cause harm under certain circumstances, such as a gun, a car or a metal club. Of course, in the case at bar, the issue to be analyzed is not whether the artificial deer itself represents a dangerous instrumentality, but whether the placement of the artificial deer in the middle of a lane of travel on a two-lane roadway so as to obstruct traffic proceeding on that roadway represents conduct which is substantially certain to cause harm. The facts in this case are undisputed that the deer was placed in the middle of a lane of traffic beneath the crest of a hill at night on the unlit, two-lane road with a 55 mph speed limit so as to obstruct oncoming traffic. In relation, the placement of such was that oncoming motorists on County Road 144 would not see the deer until they were 15 to 30 yards away, thereby depriving a motorist of sufficient reaction time to determine whether the obstruction was a real deer, or an artificial deer. Thus, the fact that the artificial deer may have only weighed 10 to 15 pounds is irrelevant.

At page 12 of his brief, Appellee Roby asserts that the placement of the obstruction in the form of the artificial deer so as to obstruct only one lane of a two-lane roadway would weigh against inferring intent as a matter of law because "the actors provided a means of escape" for a hapless motorist who would encounter the obstruction, which "means of escape" by definition would require the motorist to attempt to veer into the opposite lane of oncoming traffic at the last possible instance. Appellee Roby's assertion in this regard is ironic, as the conduct of the boys in obstructing the roadway via placement of the deer on County Road 144 under all the attendant circumstances certainly did not leave him with a "means of escape" upon encountering the obstruction. Indeed, as noted by Judge Sadler in her decision in the court below, the deliberate

conduct of the boys under the circumstances elevated the risk of injury to substantial certainty under any objective analysis:

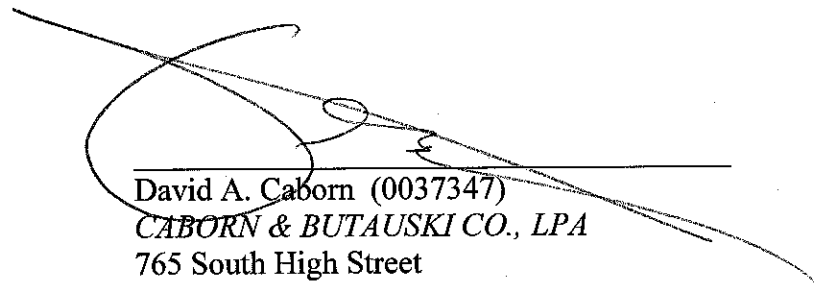
> {¶64} In my view, it is difficult to imagine how the boys could have done more to inject chaos into the flow of traffic on that road. Whether motorist selected one or the other of the available options – try to avoid the decoy or hit the decoy – the risk of injury was substantially certain, given the deliberate choice to place the deer on that particular road under all the attendant circumstances. After all, "even when skillfully and carefully operated, [ ] use [of a motor vehicle] is attended by serious dangers to persons and property." Hess v. Pawloski (1927), 274 U.S. 352, 356.

(Appx. 40, 41)

In the final analysis, this case is not a complicated case, and contrary to Appellees' contentions, reinstating the trial court's grant of summary judgment in favor of Appellant Erie and the other insurers that are parties to this appeal will not alter the legal landscape in this state as it relates to interpretation of insurance coverage issues. Whether or not a given type of conduct would support an objective inference of the intent to injure under Ohio law is to be addressed by using an objective analysis on case-by-case basis. The trial court in the instant action conducted the correct analysis in arriving at the determination that the boys' conduct was substantially certain to result in harm as a matter of law. In contrast, the Court of Appeals did not conduct the appropriate objective analysis, choosing instead to consider the boys' testimony about their subjective intentions and expectations, as well as irrelevant testimony regarding Appellee Roby's speed. Appellant Erie respectfully submits that by way of the instant action, this Court is presented with the opportunity to provide clarification concerning the application of an objective analysis in determining whether an intentional act is substantially certain to cause injury. Appellant Erie further respectfully requests the Court to apply the proper objective

analysis to circumstances presented in this action, which Appellant submits would support the reversal of the decision of the Court of Appeals, and reinstatement of the grant of summary judgment in favor of Appellant Erie.

Respectfully submitted,



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