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**I. REPLY TO MERIT BRIEF OF APPELLEES ZACHARIAH AND PIPER.**

Appellees maintain this incident was nothing more than a "teenage prank" designed to surprise motorists. They fail to mention or discuss the undisputed facts: the target deer was intentionally placed in the middle of the eastbound lane of a dark, unlit and dangerous country road on the other side of the crest of a hill where the speed limit was 55 mph and an eastbound driver would not see the target deer until he or she was virtually on top of it. The boys did this because they wanted to see some reaction from cars that approached the deer, i.e. slowing down or hitting the deer. Indeed, it was only 5-7 minutes after they placed the deer in the road that Mr. Roby and Mr. Zachariah were injured. These are the undisputed facts this court must keep in mind when determining whether the boys' conduct was substantially certain to cause harm, not the subjective, self-serving statements of Dailyn Campbell and the other boys that they did not intend to injure anyone. *Western Reserve Mut. Ins. Co. v. Campbell* (1996), 111 Ohio App. 3d 537, 541.

On page 3 of their brief, appellees quote from the decision of the trial court that "the testimony in the record consistently demonstrates that the Defendants neither intended or expected any personal injury or property damage" and argue that based on this evidence inferring intent as a matter of law was error. This quote is taken out of context. The trial court's statement is an obvious reference to their self-serving statements they did not intend to injure anyone, not a finding of undisputed fact. Indeed, the trial court recognized this when it stated: "These assertions, however, do not complete the analysis." (Decision of trial court at p.11) In other words, their subjective intent is irrelevant. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34 at 38. See also, footnote 2 on page 13 of the trial court's decision where Judge Connor correctly

stated the subjective intent of the boys was not relevant to determine whether the court could infer intent.

Appellees also quote extensively from the decision of the 10th District Court of Appeals. This quotation shows the Court of Appeals, while professing to apply an objective standard, improperly relied on the subjective intent of the boys. The subjective analysis employed by the Court of Appeals essentially eviscerates an intentional act exclusion limiting it to those infrequent occurrences when an insured "confesses" intent to harm. Where, as here, an objective analysis of the undisputed facts shows the insured's conduct was substantially certain to cause harm, the conduct does not qualify as an occurrence and there can be no coverage.

In their response to American Southern's first proposition of law, appellees argue if an injury was not intentionally caused it was accidentally suffered and amounts to an occurrence under liability insurance policy. Appellees also contend American Southern confuses the act or conduct of the insured and the injury sustained by appellee, Zachariah, claiming it is the injury that is the occurrence under the policy not the act of the insured. These arguments ignore the policy language and the law Ohio. Injury is not an occurrence under the policy. The American Southern policy states it covers bodily injury caused by an occurrence, which is defined as an accident resulting in bodily injury. The policy does not define the word "accident" and therefore it must be given its ordinary meaning which, in the context of an insurance policy, refers to "unintended" or "unexpected" happenings, i.e. those that are accidental as opposed to intentional in nature. *Morner v. Giuliano* (2006), 167 Ohio App.3d 785.

In order to invoke the intentional act exclusion, an insurance company must show that both the insured's action and the resulting harm were intended or expected.

*Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189 at 193-194. Intent to cause the harm can be inferred when an action is committed with substantial certainty that the harm will result. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34. An intentional act exclusion will apply if the insured intended or expected some harm, although not necessarily the severity or extent to which the insured actually caused harm. *Morner v. Giuliano* (2006), 167 Ohio App. 3d 785.

The issue here is not whether appellee Zachariah was injured, but how he was injured, i.e. by conduct that was accidental or intentional. Dailyn Campbell and the others intentionally placed the target deer in the road. This is undisputed. The question is whether the boys intended or expected some harm. This cannot be decided on the basis of an insured's self-serving statement that he did not intend any harm because situations where an insured admits an intent to injure will be few and far between. Therefore, courts look to the conduct of the insured and the surrounding circumstances to determine whether intent to injure can be inferred as a matter of law. This is analogous to cases involving punitive damages where this court has recognized it is seldom possible to prove actual malice except by inferring it through conduct and surrounding circumstances. *Davis v. Tunison* (1959), 168 Ohio St. 471, 475; *Columbus Fin., Inc. v. Howard* (1975), 42 Ohio St.2d 178, 184. The undisputed facts of this case clearly show reasonable minds could only conclude the conduct of Dailyn Campbell and the others was not an occurrence, i.e. an accident, under the policy. It was a well thought out plan which created a situation where injury was substantially certain to occur.

Appellees also argue on page 5 of their brief that "injury was not unavoidable" because the record shows some cars stopped or went around the fake deer. This equates

substantial certainty of harm with absolute certainty, i.e. appellees argue injury must be unavoidable for it to be substantially certain. Not surprisingly, they cite no authority for this proposition. Injury does not have to occur every time an act is committed for injury to be substantially certain. If the boys had spread nails or tacks on the road, every car that went by might not have gotten a flat tire, but they still would have created a situation where it was substantially certain someone would.

Appellees also argue on page 5 of their brief it is necessary to consider the instrumentality involved, i.e. the Styrofoam deer. They quote from the decision of the Court of Appeals which refused to conclude harm was substantially certain because the deer was made of Styrofoam and only weighed 10-15 pounds. However, the Court of Appeals ignored the attendant circumstances and human nature. The issue is not whether contact with the deer was substantially certain but whether under all of the circumstances injury or damage was substantially certain to occur. Certainly, striking an object weighing 10-15 pounds while traveling at 55 mph is substantially certain to cause some property damage to a vehicle. The more important point is that a driver on a dark country road suddenly confronted with an object in the road just over the crest of a hill will suddenly react, swerve to avoid it and lose control of the vehicle. The photographs in the records showed the grade of the Hill and the impossibility of seeing anything on the other side of the crest of the hill. In light of all of the attendant circumstances, injury or damage was substantially certain to occur. That the harm was radically different from what the boys may have intended or expected does not negate the application of the intentional act exclusion.

In their second proposition of law, appellees contend that an intent to injure may be inferred as a matter of law only when the act and the harm are so intertwined that to

intend the act is to intend the harm. They also contend that whether an insured has the necessary intent to cause injury is a question of fact. In support of these propositions, appellees rely upon this court's decision in *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999) 87 Ohio St. 3d 280 and its citation to *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189. However, inferring intent as a matter of law is not limited to the category of cases espoused by appellees. *Buckeye Union* cites to page 193 of the *Swanson* decision for the proposition that intent to cause injury is a question of fact. However, the *Swanson* decision did not say it is a question of fact but held the exclusion was not applicable because the trial court determined the injury was not intentionally inflicted or substantially certain to occur and that determination was supported by competent, credible evidence. Justice Cook noted in her concurring opinion in *Buckeye Union* that a different result would likely have been obtained in *Swanson* if the shooting had occurred 5-10 feet away rather than 70 feet. See also, *Grange Mut. Cas. Co. v. Tumbleson*, 2004 Westlaw 912606.

This case presents a rather unique set of facts. Whether the conduct of the boys was substantially certain to cause harm can and must be determined as a matter of law based on these facts. It is not likely that such a finding would open the floodgates of litigation or cause insurance companies to argue the intentional act exclusion applies to run-of-the-mill traffic accidents. The determination of whether conduct was substantially certain to cause harm should be done on a case-by-case basis, just as courts determine as a matter of law whether a legal duty exists. It involves an objective examination of the conduct of the insured, not the injured party or third persons. Consequently, any negligence of appellee Roby in operating his vehicle at an excessive speed or the fact other cars may have avoided the target deer. Judge Sadler correctly

noted in her dissenting opinion: "The inferred intent inquiry does not address the actions of any specific victim or potential victim; it only addresses what, objectively, what can be inferred from the intentional acts of *the insured*." (Court Of Appeals opinion, Sadler, J., dissenting, at ¶ 62). Based on this analysis, the undisputed facts clearly and objectively show the boys created a situation where harm to someone was substantially certain to occur. As a result, the trial court correctly concluded that intent to injure must be inferred as a matter of law.

## **II. REPLY TO MERIT BRIEF OF APPELLEE ROBY.**

Appellee Roby's brief contains many of the arguments set forth by appellee's Zachariah and Piper which have been dealt with above. Roby also describes this incident as a "prank" and focuses on the boys' testimony that they did not intend any harm. He also ignores the salient and undisputed facts as set forth in American Southern's merit brief, instead choosing to accuse appellants of taking liberties with the evidence -- an accusation that is untrue. For instance, he claims appellants have alleged the boys carefully selected a dangerous place to put the deer. American Southern has never claimed this, only that the boys placed the deer just over the crest of a hill. Nor has American Southern ever claimed the boys calculated their every act to increase the likelihood of an accident or that they were excited a collision might occur. If anyone has taken liberties with the evidence, it is appellee Roby. For instance, on page 8 of his brief he claims the deer was placed onto the side of one lane of travel. In fact, the deer was placed entirely in the eastbound lane of County road 144.

Much of appellees' brief is devoted to what can best be described as the "Chicken Little" argument, i.e. the sky will fall down on insurance coverage if appellants' arguments are accepted because many acts will no longer be covered. This argument is

disingenuous. Appellee recites various scenarios including running a red light, traveling well above the speed limit or using a meat slicer and poses the question where does the court draw the line on when the intent can be inferred as a matter of law. These examples all rely on one fact. On the other hand, if someone intentionally runs a red light every day going to work during rush hour at a busy intersection, then it can be reasonably concluded harm is substantially certain to occur. In other words, all the facts must be considered not just one fact taken in isolation. That is why determining whether intent should be inferred as a matter of law should be done on a case-by-case basis considering all of the attendant circumstances. This case is not simply about boys placing a fake deer on the road. It is about placing the deer on a dark country road over the crest of the hill where the speed limit is 55 mph so that a driver would be suddenly confronted with the deer in his lane travel. Finding that harm was substantially certain to occur under these facts will not open the floodgates of litigation or result in a denial of insurance coverage on a grand scale as argued by appellee.

Further, appellant does not, as suggested by appellee, argue this incident is proof of the inevitability of the incident. Rather, under all of the attendant circumstances the fact of the accident bears out the substantial certainty of harm created by the boys particularly when this accident occurred only 5-7 minutes after the deer was placed in the road.

Appellee also argues intent or expectation to injure is a question of fact and cannot be pursued as a matter of law, citing *Moler v. Beach* (1995), 102 Ohio App. 3d 332. However, this case was decided before *Gearing* and *Penn Traffic*, both of which held the intent to injure may be inferred as a matter of law where harm is substantially certain.

Appellee also argues genuine issues of fact exist as to whether harm was substantially certain to occur. For this proposition, appellee relies in large part upon the decision of the Court of Appeals which relied heavily on the subjective intent of the boys and their testimony they did not intend any harm. Again, their subjective protestations are only relevant where the intentional act at issue is not substantially certain to cause harm. *Gearing* at p. 39. Where, as here, their acts were substantially certain to cause harm their subjective testimony and expectations are irrelevant.

### **III. REPLY TO AMICUS BRIEF OF OHIO ASSOCIATION FOR JUSTICE**

The Ohio Association for Justice essentially argues there are genuine issues of material fact that require affirmance of the decision of the Court of Appeals. As noted above, the material facts are undisputed and a court can determine as a matter of law under these facts that harm was substantially certain to occur. In doing so, an objective approach must be used and the insureds subjective protests of innocence are irrelevant. The Amicus brief argues the insured's explanations as to the motivations for his or her actions is still relevant to the analysis. Again, where the acts were substantially certain to cause harm the insured's subjective testimony and expectations or motivations are irrelevant. *Gearing* at p. 39.

### **IV. CONCLUSION**

For the reasons set forth above and in the merit brief of appellant, American Southern, the trial court correctly concluded Dailyn Campbell and the others created a situation where harm was substantially certain to occur and therefore properly inferred intent to injure. Wherefore, American Southern Insurance Company respectfully requests this court to reverse the decision of the 10th District Court of Appeals and affirm the decision of the trial court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert H. Willard", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the following by US mail, postage prepaid, on the 20th day of July, 2010.

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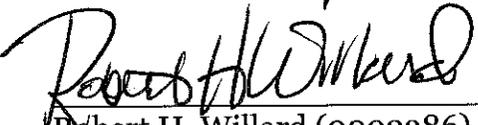
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