

ORIGINAL

IN THE SUPREME COURT OF OHIO

Allstate Insurance Company,	:	Supreme Court
	:	Case No. 2009-2358
Plaintiff-Appellant,	:	
	:	On Appeal from the Franklin
vs.	:	County Court of Appeals,
	:	Tenth Appellate District
Dailyn Campbell, et al.,	:	
	:	Court of Appeals Case Nos.
Defendants-Appellees,	:	09AP306, 09AP307, 09AP308,
	:	09AP309, 09AP318, 09AP319,
	:	09AP320 and 09AP321

REPLY BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY

Daniel J. Hurley (0034999)
 CRABBE, BROWN & JAMES LLP
 500 S. Front Street, Suite 1200
 Columbus, OH 43215
 (t) 614-229-4492
 (f) 614-229-4559
dhurley@cbjlawyers.com
Counsel for Plaintiff-Appellant Allstate Insurance Company

Robert H. Willard (002386)
 HARRIS & MAZZA
 941 Chatham Lane, Suite 201
 Columbus, OH 43221
 (t) 614-457-9731
 (f) 614-457-3596
rwillard@mazza-law.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
 (t) 614-944-5240
 (f) 614-478-8130
kkarr@karrsherman.com
Counsel for Defendant-Appellee
 Robert J. Roby, Jr.

David A. Caborn (0037347)
 CABORN & BUTAUSKI CO., LPA
 765 South High Street
 Columbus, OH 43206
 (t) 614-445-6265
 (f) 614-445-6295
dcaborn@sbcglobal.net
Counsel for Plaintiff-Appellant Erie Insurance Exchange

Paul O. Scott (000809)
 PAUL O. SCOTT, LPA
 471 East Broad Street, Suite 1100
 Columbus, OH 43215
 (t) 614-460-1632
 (f) 614-469-1171
pスコット@poslaw.com
Counsel for Defendants-Appellees Dustin S. Zachariah and Katherine E. Piper

Gary L. Grubler (0030241)
 605 South Front Street, Suite 201
 Columbus, OH 43216
 (t) 614-449-5900
 (f) 614-449-5980
grublerg@grangeinsurance.com
Counsel for Plaintiff-Appellant Grange Mutual Casualty Company

FILED
 JUL 27 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

Paul W. Flowers (0046625)
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113
(t) 216- 344-9393
(f) 216-344-9395
pwf@pwfco.com
*Counsel for Amicus Curiae, Ohio
Association for Justice*

Brian Sullivan (0063536)
Clifford Masch (0015737)
REMINGER CO., L.P.A.
1400 Midland Bldg.
101 Prospect Ave., West
Cleveland, OH 44115
*Attorney for Amicus Curiae, Ohio
Association of Civil Trial Lawyers*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
RESPONSE TO APPELLEES' ARGUMENTS	1
1. APPELLEES NEGLECT TO MENTION THREE OF THE MOST SIGNIFICANT, MATERIAL AND UNDISPUTED FACTS WHEN THEY MISCHARACTERIZE THE INSUREDS' CONDUCT AS A "TEENAGE PRANK".	1
2. THE ALLEGED CONCURRING NEGLIGENCE OF ROBY IS IRRELEVANT AND IMMATERIAL TO THE ISSUE OF WHETHER INTENT CAN BE INFERRED FROM THE INTENTIONAL ACTS OF THE INSUREDS.	2
3. APPELLEE ROBY'S MISGUIDED "INTRODUCTION" AND MISCHARACTERIZATION OF THE RECORD.	3
4. A SUBSTANTIALLY CERTAIN STANDARD IS NOT "A VAGUE AND AMBIGUOUS RULE"	6
5. ALLSTATE'S POLICY LANGUAGE REQUIRED AN OBJECTIVE STANDARD BE APPLIED, RENDERING THE INSUREDS' PURPORTED BELIEFS AND EXPECTATIONS IRRELEVANT	8
CONCLUSION	10
CERTIFICATE OF SERVICE	12
APPENDIX	<u>Appx. Page.</u>
<i>Dustin S. Zachariah, et al. v. Robert J. Roby, et al.</i> Tenth Ohio Appellate District Court of Appeals, Appeal No. 08-AP-99	1

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Allstate Insurance Company v. Dolman</i> 2007-Ohio-6361	2
<i>Allstate Insurance Company v. Roberts</i> (Mar. 25, 1991) Twelfth District No. CA90-04-075	10
<i>B.M.B. v. State Farm Fire & Cas. Co.</i> (Minn. 2003) 664 N.W.2d 817	8
<i>B.N. v. Giese</i> (2004) 275 Wis.2d 240, 247, 685 N.W.2d 568	8
<i>Loveridge v. Chartier</i> (1991) 161 Wis.2d 150, 468 N.W.2d 146	8
<i>Owner-Operators Independent Drivers Risk Retention Group v. Stafford</i> 2008-Ohio-1347	10
<i>Physicians Insurance Company of Ohio v. Swanson</i> (1991) 58 Ohio St.3d 189	6
<i>Scott v. Allstate Indemnity Company</i> (N.D. Ohio 2006) 417 F.Supp.2d 929	10
<i>Spivey v. Battaglia</i> (Fla. 1972) 258 So.2d 815	9
<i>Snowden v. Hastings Mutual Insurance Company</i> 2008-Ohio-1540	10
<i>Steinke v. Allstate Insurance Company</i> (1993) 86 Ohio App.3d 798	10
<i>Turner v. PCR, Inc.</i> (Fla. 2000) 754 So.2d 683	9
Restatement of the Law 2d, Torts (1977)	2
Restatement (Second) of Torts (1965)	7, 8

RESPONSE TO APPELLEES' ARGUMENTS

I. APPELLEES NEGLECT TO MENTION THREE OF THE MOST SIGNIFICANT, MATERIAL AND UNDISPUTED FACTS WHEN THEY MISCHARACTERIZE THE INSURED'S CONDUCT AS A "TEENAGE PRANK".

Appellees, in their respective and selective "Statement of Facts", describe how the defendant teenagers stole the deer decoy, spray-painted obscenities on it, and then fashioned a stand to support the deer. The Appellees then describe how the teenagers drove off in a SUV and selected "on a whim" a location to place the deer decoy on a county road just over the crest of a hill.¹ However, the Appellees conveniently omit mentioning three of the most significant, material and undisputed facts, i.e., the defendant teenagers performed their criminal acts **at night and in an unlit area** of a dangerous county road where the **speed limit is 55 mph**. By blatantly omitting these facts, it is certainly much easier for the Appellees to mischaracterize the Defendants' conduct as a "prank".

However, the term "prank" is defined as "a playful or mildly mischievous act." The *Webster Merriam Dictionary* (1989). If the Defendants had placed the deer decoy during daylight and on a straight and level stretch of County Road 144, it would still be a stretch to even consider that conduct a "prank". At least under that scenario, drivers approaching the deer decoy would have been able to see it well in advance. However, that is not what the Defendant teenagers did. Their act was no "prank". Instead it was a disaster waiting to happen. Not surprisingly, it only took 5-7 minutes after they placed the deer decoy on the dark, dangerous, and unlit county road for the inevitable to happen.

¹Appellees Zachariah and Piper put in parentheses "question of fact" after the phrase "near the crest of a hill" (Merit Brief of Zachariah and Piper, pg. 1), however, the fact that the deer decoy was positioned just over the crest of a hill has never been in dispute.

II. THE ALLEGED CONCURRING NEGLIGENCE OF ROBY IS IRRELEVANT AND IMMATERIAL TO THE ISSUE OF WHETHER INTENT CAN BE INFERRED FROM THE INTENTIONAL ACTS OF THE INSUREDS.

The Appellees, particularly Zachariah and Piper, contend that their injuries and damages were caused not only by the teenagers' conduct in placing the fake deer in the road, but also by the concurring negligence of Roby in operating his vehicle at an excessive rate of speed. The Appellate Court below erroneously agreed with this comparative negligence/liability analysis by finding 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 boys' actions alone." (Appendix 8, at ¶56). In her dissenting opinion, Judge Sadler correctly pointed out that the evidence regarding Roby's speed and the insureds' testimony that a couple other vehicles had avoided the target deer was totally irrelevant and immaterial because "the inferred intent inquiry does not address the actions of any specific victim or potential victim; it only addresses what, objectively, can be inferred from the intentional acts of the insured." (Appendix 8, at ¶62).

This causation-type analysis proposed by Appellees and adopted by the court below was properly rejected in the case of *Allstate Insurance Company v. Dolman*, 2007-Ohio-6361 which stated:

Damages from tortious conduct may have multiple causations. See Restatement of the Law 2d, Torts (1977), 324, 879 Comment a. The [intentional act] exclusions, however, go not to causation, but to damages. By the plain language of the exclusions, if bodily injury or property damages result from the intentional or criminal acts of anyone insured under the policy, there is no coverage. Since June Doe's injury is undisputably the result of the criminal acts of an insured. . .there is no coverage under this policy.

(Id. at ¶ 54).

Moreover, even if Roby's alleged excessive speed were a proper factor to be considered in determining whether the injuries he and Zachariah suffered were substantially certain to happen, it is common knowledge and beyond cavil that motorists speed. Thus, the answer to Appellees Roby and Zachariah's question "Should the boys have anticipated a speeding car?" is "Absolutely they should have."

III. APPELLEE ROBY'S MISGUIDED "INTRODUCTION" AND MISCHARACTERIZATION OF THE RECORD.

Appellee Roby, in the Introduction of his Merit Brief, makes a couple of interesting statements, to say the least. First, Roby states that the "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." (Roby Merit Brief, at pg. 8). It is unclear what "avenue of escape" Roby is referring to. A motorist, traveling at or around 55 mph on a dark, unlit, two-lane county road, who drives over the crest of a hill and suddenly encounters a deer decoy in the road has four options to instantaneously choose from: (1) quickly maneuver the vehicle into the oncoming lane of travel; (2) slam on his/her brakes to try to avoid hitting the deer; (3) drive straight ahead and smash into the deer; or (4) shoot off to the right side of the road into a ditch/field (as Roby's vehicle did). None of those options present much of "an avenue of escape".

Next, Roby bemoans the application of a "substantial certainty" standard by asserting that if that standard were applied "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." (Id.). Roby's meritless concerns about a "substantial certainty" standard will be addressed in more detail infra. However, as for the

understanding of the public at large regarding homeowner's insurance, one could imagine that Ohio motorists would be thrilled to hear that an individual can intentionally place objects on Ohio's roadways in the path of vehicles secure in the knowledge that any resulting damages or injuries will be covered by that individual's homeowner's insurance policies. It is not difficult to imagine word spreading among Ohio grade-schoolers and high-schoolers that it is okay to intentionally place objects in the road to see what happens and to see how motorists react because it will be covered by their parents' homeowner's insurance policy. Let the havoc begin!

Roby further states that "parents in Ohio will be left wondering whether their children's negligent acts will continue to be insured, or to what extent." (Id.). No they won't. The parents in Ohio can sleep soundly knowing that their children's **negligent** acts are virtually always insured, but that, as would and should be expected, their children's **intentional** acts that lead to injuries that are substantially certain to occur are not insured.

Appellee Roby also incredulously states that the "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." (Id. at pg. 10). Nothing could be further from the truth. Not only do the undisputed, material facts demonstrate that harm was expected to result from their actions, but in addition, the teenagers were certainly as familiar with the dangerousness of the situation as was their friend, Taylor Rogers, who stated that he would never have permitted his friends, the Defendant teenagers, to place the deer on the roadway in that area:

- A. I wouldn't have permitted them to put it on - on any roadway -

- Q. Okay.
- A. - but definitely not in that area.
- Q. Okay. You mentioned that you thought of - of County Road 144 at that time as a dangerous road. What do you mean when you say "dangerous"? What factors play into that?
- A. Umm, it's very hilly in spots and curves. There's a big curve on it, and there's usually Amish in that area, and it's just a dangerous road.

(Supp. at pg. 76).

Roby then claims that "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." (Roby Merit Brief, at pg. 12). As stated, that may be true, but those aren't the facts in this case. Once again, Roby conveniently fails to mention that the deer decoy was placed in the center of the eastbound lane just over the crest of a hill on a 55 mph county road at night in an unlit area.

At page 13 of Appellee Roby's Merit Brief, he disputes that harm was an "inevitable" result from the insureds' conduct. That is certainly an interesting statement considering that it directly conflicts with the conclusion that Roby argued in his Amicus Curiae Brief filed in the Appellate Court in the matter of *Dustin S. Zachariah, et al. v. Robert J. Roby, et al.*, Tenth Ohio Appellate District Court of Appeals, Appeal No. 08-AP-99 (Appdx., pg. 1). Roby, in his Amicus Curiae Brief, took a more objective view and argued that his injury as a result of the Defendants' conduct was not only foreseeable - it was "inevitable":

In the case *sub justice* [sic], the foreseeability of harm resulting from placing a fake deer decoy on an unlit country road at night speaks for itself. . . A natural and continuous sequence of events directly led from the deer decoy being placed onto the roadway to Appellant's injuries. . . This dangerous situation, created by Appellees, directly caused Appellant's injuries. The deer decoy in the street set in motion a sequence of events that

made Appellant's injuries a direct, proximate, **reasonably inevitable** and foreseeable consequence. (emphasis added)

(Appendix, at pgs. 22-24).

Allstate could not agree more, and no reasonable person could reach any other conclusion. In fact, even if the far too stringent standard suggested by Amicus Curiae, Ohio Association for Justice, applied, i.e., summary judgment may be granted in favor of an insurer upon the inferred intent doctrine when the evidence is undisputed that harm to another was an inevitable consequence of the insured's intentional acts, then Roby himself must agree that the trial court properly entered summary judgment in favor of the insurers.

IV. A SUBSTANTIALLY CERTAIN STANDARD IS NOT "A VAGUE AND AMBIGUOUS RULE".

Appellee Roby spends the majority of his Merit Brief arguing that if this Court were to adopt a "substantially certain" standard, then "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." (Roby Merit Brief, at pg. 24). According to Roby, because a court may not be able to put a precise percentage on the level of certainty of harm in order to establish "substantial certainty", the substantial certainty standard is too "nebulous". Such concerns by Roby are clearly unfounded.

First, this Court in *Physicians Insurance Company of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, essentially held that an intentional act exclusion applies when it is demonstrated that the injury itself was expected (substantially certain to occur) or intended (intentionally inflicted). In *Swanson*, this Court affirmed the trial court's judgment stating that "the trial court's determination that Todd Baker's injury was not intentionally inflicted or

substantially certain to occur is supported by competent, credible evidence.” (Id. at pgs. 193-194, emphasis added). Therefore, this Court, after reviewing the evidence in *Swanson*, did apply a “substantially certain” analysis. Conversely, in this case, the Court can and should determine that the trial court’s determination that the Appellees’ injuries were substantially certain to occur is supported by competent, credible evidence.

Second, the “substantially certain” standard is clearly explained in the Restatement (Second) of Torts Section 8(a) (1965). That section provides as follows:

The word “intent” is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act or that he believes that the consequences are substantially certain to result from it.

Under Comment b, the Restatement states:

Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and he still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantially certain, the actor’s conduct loses the character of intent, and becomes mere recklessness, as defined in Section 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in Section 282. All three have their important place in the law of torts, but the liability attached to them will differ.

The only distinction between “intent” as used in the Restatement and intent in this case as applied to Allstate’s intentional act exclusion is that Allstate’s policy does not require the subjective belief of the insured that the consequences are substantially certain. In other words, an objective standard is applied.

Third, courts from other jurisdictions have recognized “the general rule is that intent is inferred as a matter of law when the nature and circumstances of the insured’s act are such that harm is substantially certain to result.” See, e.g., *B.M.B. v. State Farm Fire & Cas. Co.* (Minn. 2003), 664 N.W.2d 817, 822. The Supreme Court of Wisconsin in *Loveridge v. Chartier* (1991), 161 Wis.2d 150, 468 N.W.2d 146 stated:

An insured intends to injure or harm another if he “intend[s] the consequences of his act, or believe[s] that they are substantially certain to follow. In other words, intent may be actual (a subjective standard) or inferred by the nature of the insured’s intentional act (an objective standard). Therefore, an intentional-acts exclusion precludes insurance coverage where an intentional act is substantially certain to produce injury even if the insured asserts, honestly or dishonestly, that he did not intend any harm.

(*Id.*, 161 Wis.2d at 168, 468 N.W.2d 146 (citing *Raby v. Moe* (1990), 153 Wis.2d 101, 110, 450 N.W.2d 452)). The court in *Loveridge* further stated:

... a court may infer that an insured intended to injure or harm as a matter of law (an objective standard), “if the degree of certainty that the conduct will cause injury is sufficiently great to justify inferring intent to injure as a matter of law.

(*Id.*)

The *Loveridge* court further noted that there is no bright-line rule to determine when intent should be inferred as a matter of law; each set of facts must be considered on a case-by-case basis -- the more likely harm is to result from certain intentional conduct, the more likely intent to harm may be inferred as a matter of law. (*Id.* at 169-170, 468 N.W.2d 146; see also, *B.N. v. Giese* (2004), 275 Wis.2d 240, 247, 685 N.W.2d 568, 571-572.)

Likewise, in *Turner v. PCR, Inc.* (Fla. 2000), 754 So.2d 683, the Florida Supreme Court held that the substantial-certainty method of satisfying the intentional-tort exception

calls for an objective inquiry: the relevant question is not whether the individual actually knew that his conduct was substantially certain to result in injury or death but, rather, whether the individual *should have known* that his/her conduct was substantially certain to result in harm or injury. (Id. at 688). This method requires a court to look to the totality of the circumstances “to determine whether a reasonable person would understand that the [insured’s] conduct was substantially certain to result in injury. . .”. (Id.) Although *Turner* involved an employer intentional tort action, its decision rests squarely on tort law principles. In adopting an objective substantial-certainty test, the court relied on *Spivey v. Battaglia* (Fla. 1972), 258 So.2d 815, which itself relied on the Restatement of Torts, for the proposition that “where a *reasonable man* would believe that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he had intended it”. (Id. at 817). Based on this tort law principle, the court in *Turner* held that an injury would not be considered “accidental”, and the intentional-tort exclusion could be satisfied, if the injury resulted from conduct that was objectively substantially certain to result in injury. Therefore, under this standard, the insured need not have *known* that his/her conduct was substantially certain to cause injury; the fact that he/she *should have known* of the substantial certainty of injury would be sufficient to negate the unexpectedness or unusualness of any resulting injury, regardless of whether the injury truly was unexpected by the insured.

Finally, the term “substantial” simply means “considerable in. . .degree”. The *American Heritage Dictionary*, Second College Edition (1985). Accordingly, in the context of interpreting an intentional-injury exclusion in a homeowner’s policy and in the context of

tort law principles, “substantial certainty” simply requires a showing that the likelihood of damage or injury is “considerable in degree”.

Thus, Appellee Roby’s concerns about applying a substantial certainty analysis are unfounded and greatly exaggerated. It is a standard that has been recognized and applied by this Court and foreign courts, and it is even set forth in the Restatement (Second) of Torts.

V. ALLSTATE’S POLICY LANGUAGE REQUIRED AN OBJECTIVE STANDARD BE APPLIED, RENDERING THE INSUREDS’ PURPORTED BELIEFS AND EXPECTATIONS IRRELEVANT.

Appellant Allstate’s policy clearly and unambiguously states that it excludes coverage for “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.” (Emphasis added). Not only have Ohio courts held that this language is clear and unambiguous, but they have also routinely held that this language requires that a court apply an objective as opposed to a subjective standard of coverage thereby rendering an insured’s subjective belief, intent and expectations irrelevant. *Allstate Insurance Company v. Roberts* (Mar. 25, 1991), Twelfth District No. CA90-04-075; *Owner-Operators Independent Drivers Risk Retention Group v. Stafford*, 2008-Ohio-1347, ¶29; *Steinke v. Allstate Insurance Company* (1993), 86 Ohio App.3d 798; *Snowden v. Hastings Mutual Insurance Company*, 2008-Ohio-1540; *Scott v. Allstate Indemnity Company* (N.D. Ohio 2006), 417 F.Supp.2d 929. As pointed out in Allstate’s Merit Brief, these Ohio court holdings are in concert with holdings from courts from other jurisdictions that have addressed identical policy language.

Indeed, Appellees Roby and Zachariah candidly admit that “the Allstate policy language is a little different.” (Merit Brief of Zachariah and Piper, at pg. 15). Incredibly, on the other hand, Appellee Roby, without citing any legal authority whatsoever, argues that the inclusion of the word “reasonable” does not mean the language mandates an objective standard be applied. In fact, Appellee Roby goes even further and states that “the plain meaning of this language means that the intent or expectation must be considered from the reasonable viewpoint of the insured.” Of course, Appellee Roby gives absolutely no explanation as to how he has reached such an interpretation of Allstate’s policy exclusion. The phrase “or which may reasonably be expected to result” is much different than Appellee Roby’s rewording of the policy: “Which were reasonably expected by the insured”. That language simply does not appear in the policy. Contrary to Appellee Roby’s strained construction, the phrase “which may reasonably be expected to result” is in no way tied to the insured’s expectations.

Appellees further argue that 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 the case. Yet, the very quote from the Court of Appeals used by the Appellees belies that very argument: “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 that just that way.” (Court of Appeals Decision, at ¶53). In fact, the Court of Appeals discussed at length the insureds’ subjective intent when it cited and relied upon the insureds’ testimony about their expectations in placing the deer decoy in the road. (Id., at ¶51-53). There is also no question that the court below erroneously considered that

testimony as part of its reasoning for finding issues of fact on whether harm was substantially certain to occur. (Id., at ¶55).

Under Allstate's policy language, the Appellate Court should have, but did not, objectively focus solely on the consequences that could have reasonably been expected to occur as a result of the insureds' intentional conduct. The Appellate Court below should not have considered, but did consider, the insureds' self-serving claims of non-expectation of injury. Moreover, simply because a couple of cars may have avoided the deer (assuming that that portion of the insureds' testimony is even true) does not alter the fact that some harm or damage was substantially certain or inevitably going to occur while the target deer remained in the roadway.

In this case, the trial court got it right when it found that the intentional conduct of the insureds "was substantially certain to result in harm." Using an objective standard, a reasonable person in the insureds' position, with knowledge of the totality of the facts possessed by them, would have and should have expected that damage and injury was substantially certain to result from the placement of a deer decoy at night just over the crest of a hill on an unlit county road with a speed limit of 55 mph.

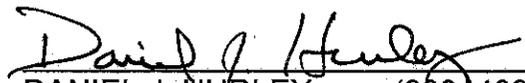
VI. CONCLUSION

For each and all of the foregoing reasons, Appellant Allstate respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and affirm the trial

court's granting of summary judgment in favor of Allstate and finding that Allstate has no duty to indemnify Dailyn Campbell or Jesse Howard in the Roby and Zachariah lawsuits.

Respectfully submitted,

CRABBE, BROWN & JAMES LLP
500 South Front Street, Suite 1200
Columbus, Ohio 43215
(614) 229-4492 (614) 229-4559 (fax)



DANIEL J. HURLEY (0034499)
*Counsel for Appellant Allstate Insurance
Company*

Certificate of Service

The undersigned herein certifies that a true and accurate copy of the foregoing has been forwarded by electronic email delivery on this 21st day of July, 2010, to:

Keith M. Karr, Esq.
David W. Culley, Esq.
KARR & SHERMAN CO., LPA
Two Miranova Place, Suite 410
Columbus, OH 43215
(t) 614-944-5240
(f) 614-478-8130
kkarr@karrsherman.com
*Counsel for Defendant-Appellee
Robert J. Roby, Jr.*

Paul O. Scott, Esq.
PAUL O. SCOTT, LPA
471 East Broad Street, Suite 1100
Columbus, OH 43215
(t) 614-460-1632
(f) 614-469-1171
psscott@poslaw.com
*Counsel for Defendants-Appellees Dustin
S. Zachariah and Katherine E. Piper*

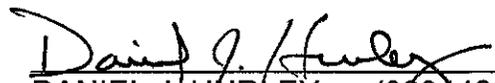
Robert H. Willard, Esq.
HARRIS & MAZZA
941 Chatham Lane, Suite 201
Columbus, OH 43221
(t) 614-457-9731
(f) 614-457-3596
rwillard@mazza-law.com
*Counsel for Plaintiff-Appellant American
Southern Insurance Company*

David A. Caborn, Esq.
CABORN & BUTAUSKI CO., LPA
765 South High Street
Columbus, OH 43206
(t) 614-445-6265
(f) 614-445-6295
dcaborn@sbcglobal.net
*Counsel for Plaintiff-Appellant Erie
Insurance Exchange*

Gary L. Grubler, Esq.
605 South Front Street, Suite 201
Columbus, OH 43216
(t) 614-449-5900
(f) 614-449-5980
grublerg@grangeinsurance.com
*Counsel for Plaintiff-Appellant Grange
Mutual Casualty Company*

Paul W. Flowers (0046625)
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113
(t) 216- 344-9393
(f) 216-344-9395
pwf@pwfco.com
*Counsel for Amicus Curiae, Ohio
Association for Justice*

Brian Sullivan (0063536)
Clifford Masch (0015737)
REMINGER CO., L.P.A.
1400 Midland Bldg.
101 Prospect Ave., West
Cleveland, OH 44115
*Attorney for Amicus Curiae, Ohio
Association of Civil Trial Lawyers*



DANIEL J. HURLEY (0034499)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2008 MAR 17 PM 2:16

CLERK OF COURTS

DUSTIN S. ZACHARIAH, et al.,
Plaintiffs-Appellants,

vs.

ROBERT J. ROBY, et al.,
et. al.,
Defendants-Appellees.

Appeal No. 08-AP-99

REGULAR CALENDAR

On Appeal from the Court of
Common Pleas, Franklin
County, Ohio

BRIEF OF AMICUS CURIAE
ROBERT J. ROBY

Keith M. Karr (0032412)
David W. Culley (0079399)
KARR & SHERMAN CO., LPA
One Easton Oval, Suite 550
Columbus, Ohio 43219
(p) 614-478-6000
(f) 614-478-8130
kkarr@karrsherman.com
Counsel for Robert J. Roby

Michael J. Valentine (0038806)
REMINGER & REMINGER CO, LPA
65 East State St., 4th Floor
Columbus, Ohio 43215
(p) 614-232-2421
(f) 614-232-2410
mvalentine@reminger.com
Counsel for Appellee Carson
Barnes

James D. Utrecht (0015000)
UTRECHT & YOUNG, LLC
12 South Plum St.
Troy, Ohio 45373
(p) 937-335-2622
(f) 937-335-4577
Jim-Utrecht@woh.rr.com
Counsel for Appellee Joseph
Ramge

Robert B. Fitzgerald (0018462)
BARAN, PIPER, TARKOWSKY,
FITZGERALD & THEIS CO., LPA
121 W. High St., Suite 905
P.O. Box 568
Lima, Ohio 45802
(p) 419-227-5858
(f) 419-227-4569
rfitzgerald@baranlaw.com
Counsel for Appellee Carson
Barnes



TABLE OF CONTENTS

TABLE OF AUTHORITIES iii.

STATEMENT OF THE CASE AND FACTS..... 1

STATEMENT OF *AMICUS CURIAE* INTEREST 3

STANDARD OF REVIEW 4

ARGUMENT 5

SOLE ASSIGNMENT OF ERROR – THE TRIAL COURT
 PREJUDICIALLY ERRED IN GRANTING SUMMARY
 JUDGMENT TO APPELLEES CARSON BARNES AND
 JOEY RAMGE 5

 I. Appellees Were Members Of A Joint Enterprise
 With The Common Purpose Of Placing A Deer
 Decoy In A Roadway..... 5

 II. Appellees Owed Appellant A Duty 18

 III. Appellees Proximately Caused Appellant’s Injuries 23

CONCLUSION 24

CERTIFICATE OF SERVICE 25

APPENDIX attached

*Decision Granting The Motion of Defendant Carson
 Barnes For Summary Judgment, Filed September 7,
 2007 and Decision Granting The Motion of
 Defendant Joey Range For Summary Judgment,
 Filed September 11, 2007 (November 27, 2007)* A

*Judgment Entry Granting The Motions Of Defendant
 Carson Barnes And Joey Range For Summary
 Judgment (January 11, 2008)* B

*Allen v. Benefiel (10th Dist., 1999), 1999 WL 770942,
 Case No. 99Ap-90* C

*Hatcher v. Paykoff Water Hauling and Truck Company,
 (3rd Dist., 1983), 1983 WL 7312, Case No. 9-82-14* D

TABLE OF AUTHORITIES

Ohio Cases

<i>Allen v. Benefiel</i> (10 th Dist., 1999), 1999 WL 770942, Case No. 99Ap-90	10
<i>Bloom v. Leech</i> (1929), 120 Ohio St. 239, 243-244, 166 N.E. 137	6
<i>Bonacorsi v. Wheeling & Lake Erie Ry. Co.</i> (2002), 95 Ohio St.3d 314, 767 N.E.2d 707	4
<i>Crawford v. State</i> (1991), 57 Ohio St.3d 184, 566 N.E.2d 1233	20
<i>Doe v. Shaffer</i> (2000), 90 Ohio St.3d 388, 738 N.E.2d 1243	4
<i>Hannah v. Dayton Power & Light Co.</i> (1998), 82 Ohio St.3d 482, 696 N.E.2d 1044	4
<i>Hatcher v. Paykoff Water Hauling and Truck Company</i> , (3 rd Dist., 1983), 1983 WL 7312, Case No. 9-82-14	20
<i>Lawrence v. Toledo Terminal R. Co.</i> (1950), 154 Ohio St. 335, 96 N.E.2d 7	23
<i>Menifee v. Ohio Welding Products, Inc.</i> (1984), 15 Ohio St.3d 75, 472 N.E.2d 707	22
<i>Mussivand v. Davis</i> (1989), 45 Ohio St.3d 314, 544 N.E.2d 265	19
<i>Osborne v. Lyles</i> (1992), 63 Ohio St.3d 326, 587 N.E.2d 825	4
<i>Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshall</i> (2002), 96 Ohio St.3d 266, 773 N.E.2d 1018	20
<i>West American Ins. Co. v. Carter</i> (1989), 50 Ohio Misc.2d 20, 553 N.E.2d 1099	16, 17
<i>Zawlocki v. Houtz</i> (1974), 40 Ohio App.2d 118, 318 N.E.2d 424	23
 <u>Ohio Statutes</u>	
RC § 2909.09	5, 18, 19

RC § 4511.74 5, 18, 19, 20

Ohio Jurisprudence

70 Ohio Jur.3d Negligence §102 19

STATEMENT OF THE CASE AND FACTS

On November 18, 2005, members of the Kenton High School football team, including Appellees Carson Carnes and Joseph Ramage, joined together to perpetrate a "prank"; to wit: they placed a deer decoy at the bottom of a hill in an unlit country road at night. The purpose of the prank was to witness how drivers would react to the deer decoy.

Mr. Roby and his passenger, Appellee Dustin Zachariah, came upon the deer decoy as they crested a hill on Country Road 144 in Mr. Roby's automobile. Mr. Roby was forced to swerve his vehicle to avoid the deer. As a result, the car tumbled and rolled several times before coming to a stop off of the roadway. Both Mr. Roby and Mr. Zachariah were thrown from the vehicle. Mr. Roby sustained severe and permanent injuries as a result of the crash. Mr. Zachariah was also injured as a result of the crash.

On December 5, 2006, Appellant Zachariah filed suit in the Franklin County Court of Common Pleas against several defendants, including Appellees and Mr. Roby, due to injuries sustained as the result of a motor vehicle crash. Mr. Roby had previously filed suit in the Franklin County Court of Common Pleas for injuries resulting from the same motor vehicle crash in November of 2006. That matter is captioned *Robert J. Roby Jr. v. DaimlerChrysler Corp.*, case number 06-CV-14836, and is currently pending before Judge David W. Fais. Discovery for both cases was consolidated.

On September 7, 2007, Appellee Ramage filed a Motion for Summary Judgment. On September 11, 2007, Appellee Barnes filed a Motion for Summary Judgment. Appellees argued that they were not liable for Mr. Roby and Mr.

Zachariah's injuries because they had not personally placed the deer in the roadway. They argued that they were merely passengers in the prankster's vehicle, and that they were just along for the ride.

Appellees each filed similar Motions for Summary Judgment in the *Roby* case. The Motions are currently pending.

On November 27, 2007, the trial court in the *Zachariah* case rendered a Decision granting summary judgment in favor of Appellees Barnes and Ramge. Appendix 1. On January 11, 2008, the Court approved and filed a "Judgment Entry Granting the Motions Of Defendant Carson Barnes and Joey Range For Summary Judgment." Appendix 7.

It is from these two judgments that Appellant now appeals.

STATEMENT OF AMICUS CURIAE INTEREST

Mr. Roby has a very strong interest in the outcome of this appeal. He maintains a separate action against the same defendants arising from the same set of operative facts. It appears that the trial court in the *Roby* case may be waiting for resolution of this appeal before ruling on Appellees' Motions for Summary Judgment. The *Roby* trial court may directly apply the findings of this court.

Appellees Barnes and Range are defendants in the *Roby* case. Both Appellees filed motions for summary judgment in the *Roby* case that are almost identical to those filed in the *Zachariah* case. The motions are currently pending in the *Roby* case, presumably delayed for the outcome of this appeal.

If the trial court's decision is upheld, it is anticipated that Appellees will attempt to argue *res judicata* or collateral estoppel as it relates to Appellees' liability in the *Roby* case. Although Mr. Roby disputes the applicability of this Court's conclusions to his own actions, it is still important that he be able to protect his own interests.

Mr. Roby must therefore oppose the Motions of Appellees Barnes and Range in this action. This action may be the only way that Mr. Roby's arguments pertaining to the liability of Barnes and Range will be considered. This Court should allow Mr. Roby to be heard on the issue; he is entitled to protect his interests in this action.

STANDARD OF REVIEW

Issues decided upon summary judgment are reviewed *de novo*, pursuant to the standard set forth in Civil Rule 56(C). *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243, citation omitted. Accordingly, this Court should apply the same standard as did the trial court. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.* (2002), 95 Ohio St.3d 314, 319, 767 N.E.2d 707.

A court should grant summary judgment with caution, resolving all doubts against the moving party. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 333, 587 N.E.2d 825. Civil Rule 56(C) provides that summary judgment shall be granted only when the filings in the record, including depositions, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion. *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citation omitted.

ARGUMENT

SOLE ASSIGNMENT OF ERROR THE TRIAL COURT PREJUDICIALLY ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES CARSON BARNES AND JOSEPH RAMGE.

The trial court granted summary judgment to Appellees because it found:

(1) Appellees Barnes and Ramge owed no duty to Appellant, and (2) Appellees did not proximately cause Appellant's injuries. (Appendix A)

However, the record contains abundant evidence to demonstrate, at a minimum, the existence of a genuine issue of material fact that Appellees owed a duty to Appellant and proximately caused his injuries.

In his Memoranda Contra Appellees' Motions for Summary Judgment, Appellant Zachariah presented several bases from which Appellees owed a duty to him: (1) as members of a joint enterprise; (2) under a foreseeability of harm analysis; (3) under RC § 4511.74 - placing injurious material on highway; (4) under RC § 2909.09 - vehicular vandalism; and (5) pursuant to ordinary and reasonable care. Each theory is supported by evidence in the record and demonstrates a genuine issue of material fact regarding the duty owed by Appellees to Appellant.

I. Appellees Were Members Of A Joint Enterprise With The Common Purpose Of Placing A Deer Decoy In A Roadway.

The Ohio Supreme Court has stated that parties are engaged in a joint enterprise, within the meaning of the law of negligence, where there is: (1) a community of interests in the purposes of the undertaking, (2) an equal right to direct and govern the movements and conduct of each other with respect thereto.

Bloom v. Leech (1929), 120 Ohio St. 239, 243-244, 166 N.E. 137, internal citations and emphasis omitted (emphasis added). To be a member of a joint enterprise, an individual must have some voice and **right** to be heard in its control or management. *Id.*

Accordingly, where alleged negligence arises from the operation of a prank, the key to finding the existence of a joint enterprise is an individual's control over, or the **right to control the operation of the prank**. The issue for the trial court was: did Appellees have an interest in the purposes of the prank and a right to control the operation of the prank? If the record contains evidence demonstrating a genuine issue of material fact pertaining to these two elements, then the trial court erred in granting summary judgment to Appellees.

In the case at bar, deposition testimony from the record establishes that Appellees Barnes and Ramage shared a common interest and purpose with their co-defendants in participating in the prank. Specifically, they wanted to witness how drivers would react to the deer decoy in the roadway. Both Appellees directly acknowledge this interest in their depositions.

Appellees joined the group for the sole purpose of participating in, and enjoying the results of, placing the fake deer in the roadway:

- Q: But generally, it's fair to say you knew they were talking about putting a fake deer on the road?
A: Yes.
Q: Now, when you went to Josh Lowe's house, did you want to be part of the activity?
A: I was just along for the ride.
Q: Okay. Did you want to go along for the ride?
A: Yes.
Q: Did you want to go to see what they were doing?
A: Yes.
Q: And you wanted to be part of it?

A: I wanted to watch – I wanted to be in the car – I wanted to watch.

Q: Okay. You wanted to watch what they did?

A: Yes.

R.179, 6 (6/8/07 Deposition of Carson T. Barnes p. 19:22 – 20:16). And:

Q: * * * it's fair to state that when you saw this prank, you were looking for a reaction of these automobiles that were – these drivers that were coming up to this fake deer on 144, correct?

A: Yes, sir.

R. 177, 17 (6/8/07 Deposition of Joey W. Ramge, p. 63:22 – 64:3).

Appellees joined the group only **after** they learned of the plan to place the deer decoy in the road:

Q: * * * when did you first learn something about a deer being put on the road?

A: After Taco Bell, and I got a call from Corey Manns.

R.179, 5 (Barnes depo., p. 15:9 – 15:14).

Q: And what does Mr. Manns say?

A: That they're going to put a deer in the road.

R. 179, 5 (Barnes depo., p. 16:20 – 16:22).

Q: Okay. Corey called you and he said something about, we're going to put a fake deer on the road?

A: Correct.

Q: And did he say something like, do you want to come along, or anything like that?

A: Yes.

Q: And what did you say?

A: We – or Joey [Ramge] and I were sitting there and then we got into Joey's vehicle, and Joey drove to Josh Lowe's house [where the team met up before perpetrating the prank].

Q: You wanted to go to Josh Lowe's house, right?

A: Correct.

R. 179, 6 (Barnes depo., p. 19:1 – 19:18).

Q: Now, you would've felt comfortable saying no to him if

you did not want to go, correct?
A: Yes.
Q: But you didn't?
A: No.

R.177, 27 (Ramge depo., p. 103:12 - 103:16).

As soon as Appellees met up with the group, they watched as the plan began to unfold:

Q: When you got to Mr. Lowe's [co-defendant] house, what happened?
A: I saw them - - or I saw them putting the fake deer into the car.
Q: Did you see that it was a fake deer?
A: Yes.

R.179, 6 (Barnes depo., p. 20:17 - 20:22).

There could be no doubt that the group was going to go through with their plan and place the deer decoy in the roadway that night:

Q: It's certainly fair to say, though, you knew they were headed somewhere to put the deer on the road?
A: I knew they were going somewhere, yeah.
Q: To put the deer in the road?
A: Yes.

R.179, 7 (Barnes depo., p. 23:17 - 23:22).

Appellees joined the group to witness the results of the prank:

Q: And it's - the way - the way I'm understanding, correct me if I'm wrong - or it's fair to state that when you saw this prank, you were looking for a reaction of these automobiles that were - these drivers that were coming up to this fake deer on 144, correct?
A: Yes, sir.
Q: and that would be the - it would be fair enough to state that would be the reason that the group was going back and forth east and west on Kenton - I mean on Route 144 where this deer was, correct?
A: Yes, sir.

R. 177, 17 (Ramge Depo., p. 63:21 - 64:9). And:

Q: And what was the purpose of the trip?
A: To find somewhere to set the deer down.
Q: Did everybody know that's what the purpose was?
A: Yeah.
Q: Were you kind of all in this together?
A: Yes.
Q: Did anybody say, hey, this is a bad idea; I don't want any part of it?
A: Not that I'm aware of.
Q: It was kind of something you were all doing jointly?
A: Yes.

R.175, 8 (7/7/07 Deposition of Corey J. Manns p. 29:12 - 29:24). And:

Q: Still a team effort [driving back and forth to watch drivers react to the deer]?
A: Yes, sir.
Q: Still everybody in there together?
A: Yes, sir.

R.200, 19 (6/6/07 Deposition of Dailyn Campbell p. 72:4 - 72:7).

Knowing the purpose of the trip, Appellees got into the vehicle with the deer decoy on back:

Q: You get in the SUV that's being driven by Josh Lowe, right?
A: Yes.

R.177, 7 (Range depo., p. 25:3 - 25:5).

Appellees' own testimony establishes: (1) Appellees knew of the plan to place the deer in the road, (2) Appellees voluntarily drove to their friend's house to join the group, (3) Appellees watched as the deer was loaded in the SUV, (4) Appellees knew that those leaving in the SUV intended to place the deer in the roadway, (5) Appellees wanted to see what would happen when drivers encountered the deer decoy in a roadway, and (6) Appellees got into the SUV. The evidence shows that Appellees both shared in and joined in the common purpose of participating in their mutually-agreed-upon prank. Accordingly, the

first element of a joint enterprise has been established.

It is important to note that all that is required for the second element is the **right**, or authority to control the operation of the prank; a person need not actually exercise the control to be held liable as a member of a joint enterprise. This Court has acknowledged this distinction in *Allen v. Benefiel* (10th Dist., 1999), 1999 WL 770942, Case No. 99Ap-90 (Appendix C), by stating that “[a] joint enterprise is the joint prosecution of a common purpose under such circumstances that each member of such enterprise has the **authority** to act for all in respect to the control of the agencies employed to execute such common purpose.” *Id.* at 3 (emphasis added).

In *Allen*, this Court went on to state that where the alleged negligence arises from operation of a vehicle, “the key to finding the existence of a joint enterprise... is the passenger’s control over or the right to control the actual operation and movement of the motor vehicle.” By analogy, where alleged negligence arises from the operation of a prank, the key to finding the existence of a joint enterprise is the individual’s control over **or the right to control** the actual operation of the prank. The question is: did Appellees have the authority/right to control the operation of the prank?

In the present case, although Appellees may not have themselves placed the deer in the roadway, they were members of a group that communally decided where to put it. The deposition testimony provides, in part, as follows:

- Q: One person took the deer out and put it on the road, right?
- A: Yes, sir.
- Q: But you all knew what was going on, right?
- A: Yes, sir.
- Q: Nobody said, don’t put it there, right?

A: Yes, sir.
Q: Everybody agreed where to put it, right?
A: Yes, sir.
Q: It's all part of a common group, right?
A: Yes, sir.
Q: And you didn't try to get out of it, did you?
A: No.

R.177, 8 (Ramge depo., 29:19 - 30:7). And:

Q: Now everybody go along with that idea, to put it on Country Road 144?
A: I don't recall. I think there was some discretion as to where else to put it, but we all eventually decided 144.

* * * * *

Q: Did anybody object to the idea of putting the deer on the road?
A: No, sir.
Q: Again, it was kind of a mutual choice?
A: Yes, sir.
Q: Everybody in it together?
A: Yes, sir. But before we placed the deer on the road, we dropped off Taylor because he was getting sick.

R.200, 15 (Campbell depo., p. 54:21 - 55:14). Even Appellees' co-defendants felt that the decision was mutual:

Q: Okay. Back when you placed the deer on the road, was everybody, again, in agreement to place it there?
A: Yes, sir.

R.200, 18 (Campbell depo., p. 66:13 - 66:16).

Appellees did not personally place the deer decoy in the roadway because they did not need to. Obviously, all six members of the group did not need to assist in taking the deer decoy from the vehicle:

Q: Would it be fair to state that there - there wasn't a need for everybody that was in your vehicle - not your vehicle, everyone that was in Mr. Lowe's vehicle, when they took the deer out and put it in the roadway, that you wouldn't need all

of you – all of the – of your friends to pick the deer and put it on the roadway?

A: Correct.

(Deposition of Jessie Howard, 90:16 – 90:23). Although this deposition was not filed on the record, the testimony does not need to be considered as evidence because it merely reflects a logical truth: it did not take six people to remove the deer decoy from the vehicle. Such is supported by the fact that the deer decoy was light in weight and made of Styrofoam:

Q: * * * Let me ask you, can you tell me what the deer was made of?

A: I don't know. I couldn't tell you. Nothing that heavy, like material, nothing like that.

Q: I've read in some of the records here that the deer may have been made out of Styrofoam.

A: Yeah, that sounds –

Q: Does that sound right?

A: Yes, sir.

R. 200, 55 (Campbell depo, p. 217:9 – 217:18).

Only a few of the group members needed to get out of the vehicle and place the deer in the roadway at the scene of the crash. In fact, it is likely impossible that all six of the defendants could have done so concurrently. Yet the trial court's Decision requires as much; essentially, the Decision holds that all six of the defendants needed to get out of the car and place a hand on the deer decoy in order to be held liable. Such is counterintuitive and demonstrates the reasoning and logic behind joint enterprise theory: when a group joins together to

effectuate a common goal, each member may not participate in every step of the process, yet each remains liable for the group's collective actions.

Moreover, an issue of fact exists as to whether Appellee Barnes or Ramage actually helped their co-defendants remove the deer from the SUV from the back seat. Co-defendant Dailyn Campbell testified that someone in the car helped get the deer decoy out him by handing him a piece of the deer decoy from inside the vehicle:

A: I took – I got out – I think Corey got out with – with me. It was one of them two that got out with me. Then someone stayed in the car and handed me a piece from the back.

R.200, 16 (Campbell depo., p. 60:12 – 60:15).

The relationship of Appellees to their co-defendants also proves that they had the authority and right to control the operation of the prank. All of the defendants were close friends and teammates on the Kenton High School Football team:

Q: Who got out of the vehicle [to place the deer on the road]?

A: Jesse Howard, Corey Manns, and Dailyn Campbell.

Q: So you saw three of your – they're buddies, right?

A: Yes.

Q: You played on a football team together?

A: Yes.

R.179, 8 (Barnes depo., p. 27:14 – 27:21).

Q: And without going into detail, all your codefendant friends, Dailyn Campbell, Jessie Howard, Josh Lowe, Corey Manns, and Joey Ramage, you were all friends before and after this incident?

A: Yes.

R.179, 8 (Barnes depo., p. 97:4 – 97:8).

Q: What is your relationship prior to November 18, 2005, with Dailyn Campbell, how would you define it?

A: Friends, went through football and stuff together.

* * * * *

Q: So you were on the same football team at Kenton – Kenton High School?

A: Yes.

Q: And what position did you play?

A: Center.

Q: And Mr. Campbell was the quarterback?

A: Yes, sir.

Q: Was Jesse Howard also on the football team?

A: Yes, sir.

* * * * *

Q: And what position was Jesse Howard?

A: He was a safety, and I think he played a little wide receiver.

Q: And Josh Lowe, was he also on the football team?

A: Yes, I think so.

R.200, 15 (Range depo., p. 54:21 – 55:23).

Q: How would you define your relationship with Corey Manns?

A: We were pretty good friends too.

* * * * *

Q: And did Corey Manns play football with Kenton?

A: Yes, sir.

Q: And what position did he play?

A: Wide receiver.

R.200, 15-16 (Range depo., p. 57:23 – 58:7). Appellees were equals – friends and teammates – with the other co-defendants.

No single person in the group was a “ringleader”; the co-defendants felt that they were members of a common cause:

Q: And then on – I think you’ve already told me that you really couldn’t single out any person that was planning to put the deer out there in the road, right?

A: Correct.

Q: And while you were along for the ride, you knew what they were up to, right?

A: Yes, sir.

R.179, 13 (Barnes depo., p. 46:9 - 46:16).

The right to control is a subjective element that turns on the opinions of other members of a joint enterprise. Accordingly, there is no better person to ask if Appellees had authority or the right to control than the other defendants. Those other defendants felt that the decisions were group decisions and that everyone in the group was an equal:

Q: So it's [the decision as to where to place the deer decoy] kind of a - team effort, a team idea?

A: I guess, yes.

Q: Is there any ring leader that's telling everybody what to do?

A: No.

Q: Just kind of one-for-all, all-for-one kind of thing?

A: Yeah.

R.175, 9 (6/7/07 Deposition of Corey Jay Mans, 32:8 - 32:22).

Q: * * * it was kind of a joint decision where to put the deer?

A: Yeah.

Q: The whole night was kind of a joint venture?

A: Yeah.

Q: And nobody tried to get out of the venture, right?

A: No.

R.175, 14 (Manns depo., 51:16 - 56:5).

Q: Now everybody go along with that idea, to put it on Country Road 144?

A: I don't recall. I think there was some discretion of where else to put it, but we all eventually decided 144.

* * * * *

Q: Did anybody object to the idea of putting the deer on the road?

A: No, sir.

Q: Again, it was kind of a mutual choice?

A: Yes, sir.

Q: Everybody in it together?

A: Yes, sir. * * *

R.200, 15 (Campbell depo., p. 54:21 – 55:12).

Q: * * * So when Corey said that, it was more or less kind of got everybody I think in somewhat of an agreement to go along with the Friday night.”
Answer by you: “Yeah.”
Is that correct?

A: Yes.

Q: And that’s kind of like what you said. It was kind of a joint agreement. Right?

A: Yes.

R.174, 13-14 (7/7/07 Deposition of Joshua L. Lowe p. 49:19 – 50:4).

Q: So it’s kind of – kind of a prank that you just – everybody went along with?

A: Yes, sir.

R.174, 15 (Lowe depo., p. 57:21 – 57:23).

Q: They were both [Barnes and Ramge] going along with everybody. Right?

A: Yes, sir.

R.174, 35 (Lowe depo., p. 134:19- 134:21).

The authority or right to control does not need to be expressly recognized; it can be implicitly recognized. *West American Ins. Co. v. Carter* (1989), 50 Ohio Misc.2d 20, 21, 553 N.E.2d 1099, citations omitted. In *West American*, several defendants were found to be members of a joint enterprise under circumstances similar to those at hand. There, three juveniles stole a car together. The court noted that “[e]ach knew what was about to happen and each juvenile could have made the decision not to enter the vehicle.” *Id.* at 21.

In the case at bar, there is evidence that Appellees each knew what was about to happen and each could have made the decision not to enter the vehicle.

Each could have left the group at any point. They stayed, however, to see the results of the prank.

Moreover, the court in *West American* stated that:

“[b]y voluntarily entering the vehicle, the two passengers were impliedly authorizing the driver to act for them. To find otherwise would lead to a result where persons commonly united in a criminal scheme or plan could escape civil liability for their acts. Fairness and justice to the victim demand that such a result under these circumstances not be reached.” *Id.* at 21.

Here, just as in *West American*, Appellees impliedly authorized both the driver of the vehicle, and those persons who placed the deer on the road, to act. Similarly, to find Appellees Barnes and Ramge not liable for Appellant’s injuries would lead to a result where persons commonly united in a criminal scheme could escape civil liability for their acts. Both Appellees were charged and pled guilty to criminal charges as a result of their participation in this prank.

The incidents at issue herein are best summarized by Appellee Ramge himself:

Q: And I think at Page 31 at Line 19, you say, quote, it was just going to be like a **prank**, and it turned into something we didn’t really want it to be. That was kind of your feeling about the whole thing, right?

A: Yes, sir.

R.200, 12 (Ramge Depo., p. 45:1 – 45:7; emphasis added).

Deposition testimony established that several Defendants believed that Appellees had equal control and authority over the group and the plan. Several co-Defendants testified that the plan was a group effort and that all the members were on equal ground, with no one person possession more control than another.

Appellees were full and equal members of the group. Accordingly, the second element required for the existence of a joint enterprise is also satisfied by ample evidence on the record.

Appellees had an interest in the purpose of the prank and had the authority or right to control the operation of the prank. Both elements required for a joint enterprise have been proven to exist in this case. Accordingly, Appellees were members of a joint enterprise and the trial court erred in reaching the opposite conclusion.

II. Appellees Owed Appellant A Duty.

In his pleadings to the trial court, Appellant demonstrated the existence of genuine issues of material fact regarding Appellees' duties via five bases: (1) ORC § 4511.74 – placing injurious material on highway; (2) ORC § 2909.09 – vehicular vandalism; (3) failure to exercise ordinary and reasonable care; (4) foreseeability of harm; and (5) via membership in a joint enterprise. Each of these bases is independently supported by evidence in the record.

RC § 4511.74 states, in pertinent part:

(A) No person shall place or knowingly drop upon any part of a highway, lane, road, street, or alley any tacks, bottles, wire, glass, nails, or other articles which may damage or injure any person, vehicle, streetcar, trackless trolley, or animal traveling along or upon such highway, except such substances that may be placed upon the roadway by proper authority for the repair or construction thereof.

Any person who drops or permits to be dropped or thrown upon any highway any destructive or injurious material shall immediately remove the same.

RC § 2909.09 states, in pertinent part:

(B) No person shall knowingly, and by any means, drop or throw any object at, onto, or in the path of any of the following: (1) Any vehicle, streetcar, or trackless trolley on a highway;

It is undisputed that one or more of the defendants placed the deer decoy on the roadway. This act alone breached both § 4511.74 and § 2909.09.

The liability of any member of a joint enterprise is imputed to any and all other members of the enterprise:

If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect of the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others. Where the action is brought against a third party, the rule is that the negligence of one member of the joint enterprise, within the scope of the enterprise, will be imputed to the others.

The imputation of negligence because of a joint enterprise should be confined to the kind of a joint enterprise where a member thereof can select his joint adventurers, just as a partner can select his partners and an employer can select his employees. In such instances there is some justification for making a member of the joint enterprise responsible for what another member does in its execution.

70 Ohio Jur.3d Negligence §102 (internal citations omitted; emphasis added).

As a violation of the duty to obey traffic safety laws is usually considered negligence *per se*, the undisputed violation on behalf of one or more members of the joint enterprise resulted in *per se* negligence on behalf of the entire joint enterprise; see, *Mussivand v. Davis* (1989), 45 Ohio St.3d 314, 319, 544 N.E.2d 265 (a violation of a statute that imposes a specific safety requirement constitutes

negligence *per se*); and generally, *Crawford v. State* (1991), 57 Ohio St.3d 184, 566 N.E.2d 1233. Each of these statutes, together with the undisputed facts of this matter, demonstrates a genuine issue of material fact pertaining to Appellees' negligence.

Moreover, Appellees directly violated § 4511.74 by permitting their co-defendants to drop the deer decoy on Country Road 144. The evidence cited above demonstrates that Appellees went along with the group to see the deer decoy be placed in the roadway. Appellees let one or more of the co-defendants drop the deer decoy on the roadway so they could witness the driver's reactions; they permitted the deer to be placed on the roadway for their own interest and benefit. This evidence demonstrates Appellees' direct violation of § 4511.74.

Appellees owed a duty to exercise ordinary and reasonable care in preventing injury to Appellees after creating the dangerous situation. *Hatcher v. Paykoff Water Hauling and Truck Company*, 1983 WL 7312 at *3; case No. 9-82-14 (Appendix D). *Hatcher* involved a negligence action based upon a motorist failing to remove a driveshaft from the highway. As a result, plaintiff struck the object and damaged her vehicle. The Third District Court of Appeals affirmed the trial court in that "[t]he the action taken by defendant driver in regard to removing the broken parts from the highway did not meet the standard required under the circumstances. The evidence supports the trial court's findings and conclusions as to defendant driver's negligence." *Id.* at *4.

Similarly, Appellees here were negligent in that they had a general duty to exercise ordinary and reasonable care in preventing an injury after placing the deer in the roadway. They breached that duty by (1) failing to warn oncoming

motorists of the deer and (2) by failing to remove the deer from the roadway. The deposition testimony of the Defendants supports this proposition. Appellees could have removed the deer from the roadway before Roby came upon it:

Q: Before the incident with Mr. Roby, you at least had an opportunity, if you wanted, to get out of the vehicle and move that deer?

A: Yes.

R.200, 19 (Ramge depo., 70:18 – 70:22; emphasis added). And:

Q: When you knew this deer was upon the roadway, would it be fair to state that you had an opportunity if you wanted to get out of the car and take the deer off the road, this fake deer?

A: Yes, sir.

Q: And you never did that, correct?

A: No, I didn't, sir.

R.179, 16 (Barnes depo., p. 55:15 – 55:21; emphasis added). Appellees also failed to warn drivers of the obstruction in the roadway:

Q. Now, would it also be fair to state that every time that you went by with your group, this team, on November 18th, 2005, where the deer was, that you never put any warnings up where this deer was placed on the roadway on 144?

A. Like a warning sign?

Q. Warning sign or any type of warnings that would notify the drivers of automobiles going eastbound on 144 as they came up to the hill that there's a -- that there's a fake deer on the road?

A. No.

Q. Would it also be fair -- And none of your group put any warning signs, correct?

A. No.

Q. There were no warnings at all on this particular fake deer before the Roby incident, correct?

A. No.

Q. Is that correct?

A. Yes.

R.200, 20 (Ramge depo., 74:17 – 75:13).

The above-cited testimony, when applied to the law cited herein, proves

that the Appellees breached their duty by failing to warn oncoming traffic and by failing to remove the obstruction from the roadway. Under the facts presented herein, Appellees are not simply a third-party "Good Samaritan" with no legal responsibility as the trial court found. They are tortfeasors with legally imposed duties to act or refrain from acting. By virtue of Appellees' actions, and non-actions, a special relationship existed between each and the Appellant.

Appellees also had a duty to Appellant under a foreseeability of harm analysis. It is a well established principle that the existence of a duty depends on the foreseeability of harm. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or non-performance of an act. *Id.*, 77; see also *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshall* (2002), 96 Ohio St.3d 266, 773 N.E.2d 1018. In the case *sub justice*, the foreseeability of harm resulting from placing a fake deer decoy on an unlit country road at night speaks for itself.

Five different legal theories give rise to Appellees owing one or more duty to Appellant. The evidence presented herein, at minimum, creates a genuine issue of material fact as to whether Appellees had a duty and/or breached that duty. This is not a case where Appellant is arguing for a new duty of care to be imposed to require a witness to another's tortuous conduct to rectify the situation. This is a case where the law requires that an as individuals and members of a group that created a dangerous situation be liable for the results; such is a rather well-developed notion in this state.

III. Appellees Proximately Caused Appellant's Injuries.

The issue of proximate cause is a question of fact that should be submitted to a jury if reasonable minds can differ on the issue. See, *Lawrence v. Toledo Terminal R. Co.* (1950), 154 Ohio St. 335, 96 N.E.2d 7; *Zawlocki v. Houtz* (1974), 40 Ohio App.2d 118, 318 N.E.2d 424. In this action, the record contains ample evidence to demonstrate a genuine issue of material fact regarding whether Appellant's injuries were proximately caused by the deer decoy being placed onto the roadway. At a minimum, reasonable minds could differ on this issue, so it was improper for the trial court to rule as a matter of law on the matter.

Appellees individually and as members of the joint enterprise proximately caused Appellant's injuries. ~~A natural and continuous sequence of events directly led from the deer decoy being placed onto the roadway to Appellant's injuries.~~ It is undisputed that the deer decoy caused the accident which precipitated Appellant's injuries. Without the deer having been placed on the roadway, or but for that action, Appellant's injuries would not have occurred.

As Appellees were members of the joint enterprise that placed the deer in the roadway, they are accountable for the actions of their teammates. The negligence of any and or all of the group members is imputed to Appellees.

Appellees also proximately caused Appellant's injuries by violating a statute that creates a duty, failing to exercise reasonable and ordinary care, and/or because of the foreseeability of harm of their actions. By violating these duties, Appellees directly and proximately exposed Appellant to harm. This dangerous situation, created by Appellees, directly caused Appellant's injuries. ~~The deer decoy in the street set in motion a sequence of events that made~~

Appellant's injuries a direct, proximate, reasonably inevitable, and foreseeable consequence.

CONCLUSION

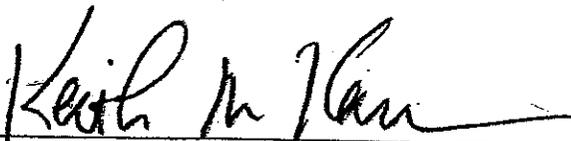
The record contains evidence that is in direct conflict with the findings of the trial court which demonstrates, at a minimum, that Appellees owed Appellant one or more duties and proximately caused his injuries. Moreover, there is evidence that Appellees are *per se* liable for Appellant's injuries due to violations of statutes.

Reasonable minds could find that Appellees owed a duty to Appellant and their breach of that duty proximately caused Appellant's injuries. Construing the evidence in a light most favorable to Appellant, there is ample evidence demonstrating a genuine issue of material fact regarding duty and proximate causation in this matter.

At a minimum, there is sufficient evidence to put these issues before a trier of fact. Accordingly, the trial court erred in granting summary judgment to Appellees. The decision of the trial court should be reversed and remanded.

Respectfully submitted,

KARR & SHERMAN CO., LPA



Keith M. Karr (0032412)
David W. Culley (0079399)
One Easton Oval, Suite 550
Columbus, Ohio 43219
(p) 614-478-6000
(f) 614-478-8130
kkarr@karrsherman.com

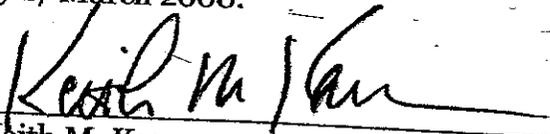
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded to:

<p>Paul O. Scott, Esq. Clark Perdue Arnold & Scott 471 East Broad Street, Suite 1400 Columbus, Ohio 43215 Attorney for Plaintiff</p>	<p>Edwin J. Hollern, Esq. Edwin J. Hollern Co., L.P.A. 77 North State Street Westerville, Ohio 43081 Attorneys for Defendant Dailyn Campbell (Allstate Insurance)</p>
<p>Robert B. Fitzgerald, Esq. Baran Piper Tarkowsky Fitzgerald & Theis 121 West High Street, Suite 905 P.O. Box 568 Lima, Ohio 45802 Attorneys for Defendant Carson Barnes (Erie Insurance/Liberty Insurance)</p>	<p>Michael J. Valentine, Esq. Reminger & Reminger Capitol Square Office Building 65 East State Street, 4th Floor Columbus, Ohio 43215 Attorney for Carson Barnes (Erie Insurance/Liberty Insurance)</p>
<p>Mark S. Maddox, Esq. Frost, Maddox & Norman 987 South High Street Columbus, Ohio 43206-2527 Attorney for Defendant Robert Roby (Allstate Insurance)</p>	<p>Jill K. Mercer, Esq. 280 North High Street, Suite 810 Columbus, Ohio 43215 Attorney for Defendant Nationwide Mutual Insurance Company</p>
<p>Rick E. Marsh, Esq. Lane Alton & Horst Two Miranova Place, Suite 500 Columbus, Ohio 43215 Attorney for Defendant Jesse Howard (Allstate Insurance)</p>	<p>C. Joseph McCullough, Esq. White Getgey & Meyer 8977 Columbia Road, Suite A Loveland, Ohio 45140-1100 Attorney for Defendant Joshua Lowe (United Services Insurance)</p>
<p>Kelly M. Morgan, Esq. Morgan Law Offices 380 South Fifth Street, Suite 3 Columbus, Ohio 43215 Attorney for Defendant Corey Manns (Grange Insurance)</p>	<p>John C. Nemeth, Esq. John C. Nemeth & Associates 21 East Frankfort Street Columbus, Ohio 43206 Attorney for Defendant Corey Manns (Erie Insurance)</p>
<p>James D. Utrecht, Esq. Utrecht & Young 12 South Plum Street Troy, Ohio 45373 Attorney for Defendant Joseph Ramage (Westfield Insurance)</p>	<p>Crystal Ritchie, Esq. Gallagher Gams Pryor Tallan & Littrell 471 East Broad Street, 19th Floor Columbus, Ohio 43215 Attorneys for Defendant Taylor Rogers (Grange Insurance)</p>

<p>Stephen V. Freeze, Esq. Freund Freeze & Arnold 1 South Main Street, Suite 1800 Dayton, Ohio 45402 Attorney for Defendant Taylor Rogers (Farmers Insurance)</p>	<p>Richard J. Silk, Jr., Esq. Freund Freeze & Arnold 65 East State Street, Suite 800 Columbus, Ohio 43215 Attorney for Defendant Taylor Rogers (Farmers Insurance)</p>
<p>Charles W. Hess, Esq. 7211 Sawmill Road, Suite 200 Dublin, Ohio 43016 Attorney for Defendant Carson Barnes</p>	<p>Robert H. Willard, Esq. Harris & Mazza 941 Chatham Lane, Suite 201 Columbus, Ohio 43221 Attorney for Plaintiff American Southern Insurance Company</p>
<p>John C. Leach, Esq. Sutter O'Connell & Farchione 1301 East Ninth Street, Suite 3600 Cleveland, Ohio 44114 Attorney for Defendant DaimlerChrysler Corporation</p>	<p>Daniel J. Hurley, Esq. Crabbe Brown & James 500 South Front Street, Suite 1200 Columbus, Ohio 43215 Attorney for Plaintiff Allstate Insurance Company</p>
<p>Brian J. Bradigan, Esq. Brian J. Bradigan, Inc. 450 Alkyre Run Drive, Suite 120 Westerville, Ohio 43082 Attorney for Defendants Dailyn Campbell and Donna Deisler</p>	<p>Gary L. Grubler, Esq. 605 South Front Street, Suite 210 Columbus, Ohio 43215 Attorney for Plaintiff Grange Mutual Casualty Company</p>
<p>Javier Armengau, Esq. 857 South High Street Columbus, Ohio 43206 Attorney for Defendant Corey Manns</p>	<p>David A. Caborn, Esq. Caborn & Butauski 765 South High Street Columbus, Ohio 43206 Attorneys for Plaintiff Erie Insurance Exchange</p>

by regular U.S. Mail and e-mail on this day 17 March 2008.



 Keith M. Karr (0032412)
 David W. Culley (0079399)
 Counsel for Robert J. Roby