

IN THE SUPREME COURT OF OHIO

Allstate Insurance Company,

Plaintiff-Appellant,

vs.

Dailyn Campbell, et al.,

Defendants-Appellees,

Supreme Court
Case No. 2009-2358

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Court of Appeals Case Nos.
09AP306, 09AP307, 09AP308,
09AP309, 09AP318, 09AP319,
09AP320 and 09AP321

JOINT MOTION FOR RECONSIDERATION/CLARIFICATION OF APPELLANTS
ALLSTATE INSURANCE COMPANY, ERIE INSURANCE EXCHANGE, AND
GRANGE MUTUAL CASUALTY COMPANY

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**BRIEF IN SUPPORT OF APPELLANTS' JOINT MOTION FOR
RECONSIDERATION/CLARIFICATION**

I. INTRODUCTION

Appellants Allstate Insurance Company, Erie Insurance Exchange and Grange Mutual Casualty Company hereby respectfully move this Court, pursuant to S. Ct. Prac. R. 11.2, for reconsideration/clarification of this Court's Slip Opinion No. 2010-Ohio-6312. Appellants herein simply seek to have this Court clarify inconsistencies in the Court's Opinion of December 30, 2010 with respect to the remand instructions to the trial court. More specifically, Appellants respectfully request that this Court clarify that the issue to be determined by the trier of fact is whether any injury or damage was intended or could have reasonably been expected to result from the intentional acts of the teenagers, not whether the boys intended or expected the harm to result from their intentional actions.

Although there is no set standard that is applied to motions for reconsideration/clarification made to this Court, this Court has often granted motions for clarification to correct or limit a prior decision or opinion. *Wagenknecht v. Levin*, 121 Ohio St.3d 1411, 2009-Ohio-805; *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749;

Disciplinary Council v. Keller, 111 Ohio St.3d 1472, 2006-Ohio-5625; *Sarmiento v. Grange Mutual Insurance Co.*, 107 Ohio St.3d 1701, 2005-Ohio-6763.

II. **THE COURT'S OPINION ALTERNATES BETWEEN WHETHER AN OBJECTIVE OR SUBJECTIVE TEST IS TO BE APPLIED UPON REMAND.**

This Court, after determining that it could not infer an intent to cause injury as a matter of law, then proceeded to state inconsistent standards (objective vs. subjective) to be applied upon remand to the trial court and the trier of fact. In Paragraph 58 of the Opinion, this Court set forth an objective standard stating:

Because we do not infer the insureds' intent to harm as a matter of law and the boys deny that harm was intended or expected, whether the injury was expected or reasonably expected is an issue to be determined by the trier of fact.

However, in the very next paragraph, at Paragraph 59, this Court indicated a subjective standard applied:

In a declaratory action like this, the trier of fact on remand must weigh the facts in evidence to determine whether the boys intended or expected harm and, consequently, whether the insurance agreements provide coverage in this case.

Then, in Footnote 6 of the Opinion, wherein this Court was addressing Allstate's policy language, the Court again set forth an objective test stating:

. . . Allstate's inclusion of the word "reasonably" into its exclusionary language does not alter our analysis here, because the issue of whether the harm was intended or could reasonably be expected to result from an intentional act is a question of fact.

Finally, in the Conclusion at Paragraph 62, this Court returned to a subjective analysis stating:

...the trier of fact must conduct a factual inquiry on remand to determine whether the boys intended or expected the harm that resulted from their intentional actions.

Thus, in Paragraph 58 and in Footnote 6 of the Opinion, this Court clearly states an objective standard to be applied by the trier of fact, i.e., whether injury or harm was intended or reasonably expected to result from the insureds' intentional act. However, in Paragraphs 59 and 62 of the Opinion, this Court set forth a subjective standard, i.e., whether the boys intended or expected harm.

Although unclear, this Court certainly could not have meant to remand this case to the trier of fact under a subjective test in light of the fact that the teenagers have already denied that they intended or expected harm, as recognized by this Court in Paragraph 58 of the Opinion. Indeed, as this Court stated in *Gearing v. Nationwide Insurance Co.* (1996), 76 Ohio St.3d 34, 665 N.E.2d 1115, "A completely subjective test would virtually make "it impossible to preclude coverage for intentional [injuries] absent admissions by insureds of a specific intent to harm or injure. Human nature augurs against any viable expectation of such admissions."" (Id., 76 Ohio St.3d at pg. 37).

Accordingly, Appellants jointly move this Court to clarify its Opinion of December 30, 2010 to make clear that the issue to be determined by the trier of fact in this declaratory judgment action is whether any harm or damage was intended or could reasonably be expected to result from the intentional act of the insureds.

III. **FOR AN INTENTIONAL ACT EXCLUSION TO APPLY, AN INSURER IS NOT REQUIRED TO SHOW THAT THE EXACT HARM OR DAMAGE THAT ACTUALLY RESULTED WAS INTENDED OR REASONABLY EXPECTED, BUT ONLY THAT HARM OR DAMAGE WAS INTENDED OR REASONABLY EXPECTED.**

In addition to alternating between an objective vs. a subjective test to be applied upon remand, this Court in the above-cited portions of its Opinion, in three instances, also used the term “the injury” or “the harm” in terms of what was intended or reasonably expected to result from the insureds’ intentional acts. Again, although unclear, this Court certainly could not have meant that for the intentional act exclusions in the Appellants’ policies to apply, the insurer Appellants would have to prove that the boys intended the actual harm they caused or that the exact injuries sustained by the injured claimants were reasonably expected to result from the insureds’ intentional actions.

It is well-settled that an intentional act exclusion will apply where the insured intended or should have reasonably expected harm to occur, even if the harm actually done was radically different from that intended or expected. *Morner v. Giuliano* (2006), 167 Ohio App.3d 785, at 789; *Pachucki v. Republic Insurance Co.* (Wis. 1979), 278 N.W.2d 898 (under homeowners intentional act policy exclusion, there is no requirement that insurer prove that insured specifically intended resulting injury, but insurer need only prove that the insured intended act and intended or should have reasonably expected to cause some kind of bodily injury); *Rodriguez v. Williams* (Wash. 1986), 729 P.2d 627 (homeowners policy intentional act exclusion applies irrespective of insured’s actual subjective intent and notwithstanding that scope of injuries inflicted might have been greater than or different from injuries which objectively might have been expected); *Metropolitan Prop. & Cas. Ins. Co. v. Buckner* (Tenn. Ct. App. 2009), 302 S.W.3d 288 (intentional act exclusion applies where

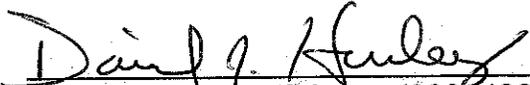
an intentional act is undertaken with the intention or reasonable expectation that harm will result, but harm of a different nature, character or magnitude actually occurs); *Tennessee Farmers Mut. Ins. Co. v. Evans* (Tenn. 1991), 814 S.W.2d 49; *Government Employees Ins. Co. v. Brown* (D. Colo. 2010), ---F.Supp.2d--, 2010 WL 3731385 (exclusion for intentional conduct applies whenever some injury is intended or expected, even though the injury that actually results differs in character or degree from the injury actually intended or expected); *Lopez v. American Family Mut. Ins. Co.* (Colo. App. 2006), 148 P.3d 438, 439; *American Family Mut. Ins. Co. v. Johnson* (Colo. 1991), 816 P.2d 952, 955.

Accordingly, Appellants respectfully move this Court to clarify that in order for the intentional act exclusions in the Appellants' policies to apply, the Appellants are not required to show that the harm or injury that actually resulted to the third-party claimants in this case was intended or reasonably expected, but only that some harm or damage was intended by the insureds or should have been reasonably expected to result from their intentional acts.

IV. CONCLUSION.

For the foregoing reasons, Appellants jointly move this Court to clarify its Opinion to make clear that the issue to be determined by the trier of fact is whether any harm or damage was intended by the insureds or could reasonably have been expected to result from their intentional acts in this case.

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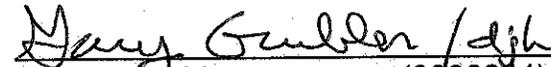
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Certificate of Service

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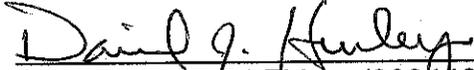
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