

**IN THE SUPREME COURT OF OHIO**

Allstate Insurance Company,	:	Case No. 2009-2358
	:	
Appellant,	:	On Appeal from the Franklin
	:	County Court of Appeals,
v.	:	Tenth Appellate District
	:	
Dailyn Campbell, <i>et al.</i> ,	:	
	:	
Appellees.	:	

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**APPELLEE ROBERT J. ROBY, JR.'S MEMORANDUM IN OPPOSITION  
TO APPELLANTS' JOINT MOTION FOR RECONSIDERATION**

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Keith M. Karr (0032412) (COUNSEL OF RECORD)  
David W. Culley (0079399)  
KARR & SHERMAN CO., LPA  
Two Miranova Place, Suite 410  
Columbus, Ohio 43215  
(t) 614-478-6000  
(f) 614-478-8130  
kkarr@karrsherman.com  
*Counsel for Appellee, Robert J. Roby, Jr.*

Paul O. Scott (000809)  
PAUL O. SCOTT, LPA  
471 East Broad St., Suite 1100  
Columbus, Ohio 43215  
(t) 614-460-1632  
(f) 614-469-1171  
pscott@poslaw.com  
*Counsel for Appellees, Dustin S. Zachariah and Katherine E. Piper*

Robert H. Williard (002386)  
HARRIS & MAZZA  
941 Chatham Lane, Suite 201  
Columbus, Ohio 43221  
(t) 614-457-9731  
(f) 614-457-3596  
robertwilliard@harrismazzalaw.com  
*Counsel for Appellant, American Southern Insurance Company*

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David A. Caborn (0037347) (COUNSEL OF RECORD)  
Elizabeth D. Owsley (0082171)  
CABORN & BUTANSKI CO., LPA  
765 South High St.  
Columbus, Ohio 43206  
(t) 614-445-6265  
(f) 614-445-6295  
dcaborn@sbcglobal.net  
*Counsel for Appellant, Erie Insurance Exchange*

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

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

Brian D. Sullivan (0063536) (COUNSEL OF RECORD)  
Clifford C. Masch (0015737)  
REMINGER CO., LPA  
1400 Midland Building  
101 Prospect West  
Cleveland, Ohio 44115  
(t) 216-687-1311  
(f) 216-687-1841  
bsullivan@reminger.com  
*Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys*

Paul W. Flowers (0046625)  
PAUL W. FLOWERS CO., LPA  
Terminal Tower, 35<sup>th</sup> Floor  
50 Public Square  
Cleveland, Ohio 44113  
(t) 216-344-9393  
(f) 261-344-9395  
pwf@pwfco.com  
*Counsel for Amicus Curiae, Ohio Association of Justice*

## MEMORANDUM IN OPPOSITION

### **I. APPELLANTS' JOINT MOTION FOR RECONSIDERATION DOES NOT COMPLY WITH SUPREME COURT RULE OF PRACTICE 11.2 AND SHOULD BE DENIED**

The test generally applied to a motion for reconsideration is whether the motion calls to the attention of a court an “obvious error” in its decision or raises and issue for a court’s consideration that was either not considered at all or was not fully considered by a court when it should have been. *Matthews v. Matthews* (February 25, 1982), 10<sup>th</sup> Dist. No. 80AP-841. This Court has cited *Matthews* approvingly with regard to the standard to be applied to a motion for reconsideration pursuant to S.Ct.Prac.R. 11.2. *Oberlin Manor, Ltd. V. Lorain County Board of Revision, et al.*, 69 Ohio St.3d 1, 1994-Ohio-500. Further, S.Ct.Prac.R. 11.2(B) states that a motion for reconsideration “shall not constitute a reargument of the case.”

Appellants’ Joint Motion for Reconsideration does not include any new or novel arguments; it is merely a recital of earlier arguments submitted by Appellants in their Merit Briefs. The Joint Motion for Reconsideration does not point to an obvious error in this Court’s decision in the Court’s Slip Opinion No. 2010-Ohio-6312, nor does it raise an issue that was not considered, or was inadequately considered, in the Court’s decision. *State v. Owens* (1996), 112 Ohio App.3d 334, 336, 678 N.E.2d 956. Rather, the Appellants proffer arguments that should be made to the trial court upon remand in an attempt to have this Court dictate the lower court’s factual conclusions. Argument of these factual issues is not an appropriate basis for a motion for reconsideration. S.Ct.Prac.R. 11.2.

## **II. THE COURT CLEARLY SET FORTH THE STANDARD TO BE APPLIED BY THE TRIAL COURT ON REMAND**

In their first proposition for reconsideration, Appellants argue that the Court's Slip Opinion No. 2010-Ohio-6312 is inconsistent as to the standard to be applied by a trier of fact on remand. This is incorrect; the Court's Opinion clearly sets forth the standard to be applied by a trier of fact upon remand.

Because the intent of the insureds in this case cannot be inferred as a matter of law, the applicability of insurance coverage is an issue of fact for a trier of fact:

[i]n 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.

Slip Opinion No. 2010-Ohio-6312, paragraph 59. Further,

... 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.

Slip Opinion No. 2010-Ohio-6312, paragraph 62.

Under both the Erie policy and the Grange policy, the question is whether the insureds intended or expected bodily injury to result from their actions. Under the Allstate policy, the question is whether the insureds intended or reasonably expected bodily injury to result from their actions.

The question under the Allstate policy is slightly different than that under the Grange and Erie policies because of a minor difference in policy language - the Allstate policy includes the word "reasonably" before the word expectation in its exclusionary language. The Erie and Grange policies do not include this word.

The policy language presented by Appellants' Joint Motion is addressed in this Court's Slip Opinion. Specific differences in policy language were directly addressed by this Court in the Slip Opinion, and Appellants' Motion for Reconsideration provides no new facts or argument. Appellants do not point to an "obvious error" in the Court's application of the policy language. Instead, Appellants seek another bite at the inferred intent apple, even in light of the plain language of this Court's Slip Opinion.

Paragraph 62 of the Court's Slip Opinion gives further direction to a trier of fact on remand by affirming the Court of Appeals' judgment on this issue, which found that "[t]he disputed issue here is whether [the boys] also intended harm or injury to follow from their intentional act." *Allstate v. Campbell*, (November 17, 2009), 09AP-306.

The Tenth District Court of Appeals addressed several of the issues of fact that a trier of facts must consider upon remand, including, but not limited to: the testimony of the seven boys involved in the incident regarding their intent and expectations, whether the placement of the deer decoy left room for motorists to maneuver around it, whether harm could result if a car struck the 10 to 15 lb. Styrofoam decoy, and whether Appellee Roby's alleged speed caused or contributed to the incident. *Id.* These are just some of the issues a trier of fact will need to consider in reaching a factual determination regarding coverage in this case.

Appellants cite to *Gearing v. Nationwide Insurance Co.* (1996), 76, Ohio St.3d 34, 665 N.E.2d 1115, to reargue that the boys' testimony regarding their intentions or expectations is irrelevant to the trial court in considering the factual

issues sent back on remand. Appellants made this same argument to the trial court, to the Court of Appeals, and to this Court. S.Ct.Prac.R. 11.2 does not allow for the Appellants to reargue this point. Further, the Court rejected this argument by holding that the inferred intent doctrine is inapplicable in this case, thus making the insureds' testimony relevant on remand.

The language cited by Appellants from *Gearing* is limited to the context of application of the inferred intent rule on a motion for summary judgment. In a determination of fact before a trier of fact, this Court's Slip Opinion and the 10<sup>th</sup> District Court of Appeals' decision make it clear that an insured's testimony is relevant and must be considered by the trier of fact on remand.

Appellants argue that 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." But that is exactly what this Court, and the Court of Appeals, held. Both decisions make it clear that the trier of fact must consider numerous evidentiary elements, including the insureds' testimony.

In their second proposition for reconsideration, Appellants argue that they are not required to show that the boys intended or expected the exact harm that resulted from their acts for the pertinent policy exclusions to apply. This point is tangential to the issues presented to this Court, and one that is misleading.

Again, the standard to be applied by the trial court is whether the insureds intended or expected [or in the case of the Allstate policy, reasonably expected] bodily injury to result from their actions. All of the policies of insurance separate the concepts of property damage and bodily injury. The trier of fact must, as

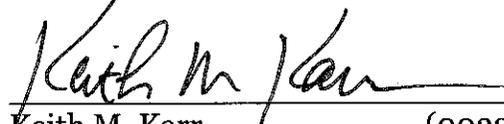
described by this Court, determine whether the insureds intended or expected bodily injury in light of their testimony that they did not intend or expect to cause any bodily injury or harm to any person.

Further, the Court of Appeals noted that there were questions of fact as to whether a vehicle striking a Styrofoam deer decoy would sustain any property damage. This is consistent with the insureds' testimony that this incident was the result of a negligent prank gone wrong. Appellants' final attempt to expand the scope of their policies must be denied.

This Court's Slip Opinion, along with the Court of Appeals' November 17, 2009, Judgment Entry, clearly set forth the standard to be applied by a trier of fact upon remand. No further clarification is necessary. Appellants raise no new issues or arguments, they merely recite earlier arguments in an attempt to reargue this case. Appellants' Joint Motion for Reconsideration should be denied.

Respectfully submitted,

**KARR & SHERMAN CO., LPA**



Keith M. Karr (0032412)

David W. Culley (0079399)

KARR & SHERMAN CO., LPA

Two Miranova Place, Suite 410

Columbus, Ohio 43215

(t) 614-478-6000

(f) 614-478-8130

kkarr@karrsherman.com

*Counsel for Appellee, Robert J. Roby,  
Jr.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certify that a true and accurate copy of the forgoing was served upon the following:

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

Robert H. Williard  
HARRIS & MAZZA  
941 Chatham Lane, Suite 201  
Columbus, Ohio 43221  
(t) 614-457-9731  
(f) 614-457-3596  
robertwilliard@harrismazzalaw.com  
*Counsel for Appellant, American Southern Insurance Company*

David A. Caborn  
Elizabeth D. Owsley  
CABORN & BUTANSKI CO., LPA  
765 South High St.  
Columbus, Ohio 43206  
(t) 614-445-6265  
(f) 614-445-6295  
dcaborn@sbcglobal.net  
*Counsel for Appellant, Erie Insurance Exchange*

Daniel J. Hurley  
CRABBE BROWN & JAMES LLP  
500 South Front St., Suite 1200  
Columbus, Ohio 43215  
(t) 614-229-4492  
(f) 614-229-4559  
dhurley@cbjlawyers.com  
*Counsel for Appellant, Allstate Insurance Company*

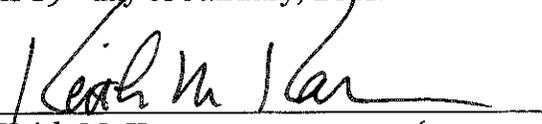
Gary L. Grubler  
605 South Front St., Suite 201  
Columbus, Ohio 43216  
(t) 614-449-5900  
(f) 614-449-5980

grublerg@grangeinsurance.com  
*Counsel for Appellant, Grange Mutual Casualty Company*

Brian D. Sullivan  
Clifford C. Masch  
REMINER CO., LPA  
1400 Midland Building  
101 Prospect West  
Cleveland, Ohio 44115  
(t) 261-687-1311  
(f) 261-687-1841  
bsullivan@reminger.com  
*Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys*

Paul W. Flowers (0046625)  
PAUL W. FLOWERS CO., LPA  
Terminal Tower, 35<sup>th</sup> Floor  
50 Public Square  
Cleveland, Ohio 44113  
(t) 216-344-9393  
(f) 261-344-9395  
pwf@pwfco.com  
*Counsel for Amicus Curiae, Ohio Association of Justice*

via facsimile and/or electronic mail on this 19<sup>th</sup> day of January, 2011.

  
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Keith M. Karr (0032412)  
David W. Culley (0079399)