

ORIGINAL

IN THE SUPREME COURT OF OHIO

DUANE HOYLE,	)	No. 13-1405
	)	
Appellant/Cross-Appellee,	)	On Appeal from
	)	the Court of Appeals,
vs.	)	Ninth Appellate District
	)	Case Nos. 26579 & 26587
DTJ ENTERPRISES &	)	
CAVANAUGH BUILDING CORP.,	)	
	)	
Appellees/Cross-Appellants.	)	
	)	

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Memorandum Opposing Jurisdiction  
of Appellees, DTJ Enterprises & Cavanaugh Building Corp.

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**I. EXPLANATION OF WHY THIS CASE DOES NOT PRESENT A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

This is not a case of public and great general interest. Cincinnati Insurance Company (hereinafter "CIC") misrepresents the appellate court's decision as a ruling on the 'civil liability of all Ohio employers for employer intentional torts.' It is no such thing. It is in fact a narrow ruling denying summary judgment and interpreting contract language in an insurance policy. The Ninth District's decision does not consider the employer's liability under R.C. § 2745.01(C) at all. The question of liability for DTJ Enterprises, Inc. and Cavanaugh Building Corp. (hereinafter collectively "Cavanaugh"), the employer-defendants in this action, remains unresolved. CIC attempts to recast Cavanaugh's arguments, as employer, as their own. The Ninth District has not issued a ruling on Ohio's employer intentional tort scheme; it has merely interpreted CIC's insurance contract. It is from that narrow, private issue of contract interpretation that the Ninth District rendered its opinion, and for which CIC seeks this Court's review.

This matter arises from a claimed employer intentional tort brought by Duane Hoyle against Cavanaugh. Mr. Hoyle fell from a scaffolding while in the scope of his employment, and brought suit against Cavanaugh on March 25, 2008, bringing claims in both common law and under Ohio's Employer Intentional Tort statute, R.C. § 2745.01. CIC intervened as an intervening Plaintiff and filed a complaint for declaratory judgment regarding its coverage obligations as insurer for Cavanaugh.

CIC provides a Commercial General Liability Policy and a Commercial Umbrella Liability Policy covering Defendants. These policies specifically cover injury caused by an "intentional act," which is defined as "an act which is substantially certain to cause 'bodily injury.'" Employers Liability Form GA 106 OH 01 96 at 1, 4. An act which is "substantially

certain” to cause injury is defined as one where “(a) an insured know of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (b) an insured knows that if an ‘employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the ‘employee’ will be a substantial certainty; and (c) an insured under such circumstances and with such knowledge, does act to require the ‘employee’ to continue to perform the dangerous risk.” *Id.* at 4. The policy excludes coverage for acts “committed by or at the direction of an insured with the deliberate intent to injure.” *Id.* at 2.

CIC offered this “stop gap” policy to provide coverage for those employer intentional torts which did not rise to the level of “direct intent.” After the adoption of R.C. §2745.01 and this Court’s decision in *Kaminski v. Metal and Wire Prod. Co.*, 125 Ohio St.3d 250, 927 N.E.2d 1066, 2010-Ohio-1027, CIC has stopped offering such insurance and now offers solely “defense only” policies for employer intentional torts.

Cavanaugh moved for summary judgment based on Mr. Hoyle’s claims, asserting no genuine issue of fact remained regarding any intent to injure under R.C. §2745.01. CIC also moved for summary judgment on its declaratory judgment action, asserting the statutory definition of employer intentional tort eliminated any instance where it could be required to indemnify Cavanaugh. On April 20, 2012, the trial court granted summary judgment in favor of Cavanaugh on all claims based in R.C. §2745.01(A) & (B), expressly finding no evidence of a deliberate intent to injure Mr. Hoyle. However, the Court found genuine issues of fact remained under R.C. §2745.01(C), regarding both whether the jack ladder pins which were allegedly removed constituted an “equipment safety guard,” and whether liability remained under the “rebuttable presumption” of intent contained in that subsection.

Despite the finding that CIC had no deliberate intent to cause harm, the trial court granted summary judgment in favor of CIC, finding no issue of genuine fact remained regarding its need to indemnify Cavanaugh for any damage award. Cavanaugh moved the trial court to reconsider its ruling regarding CIC's coverage. After reconsideration, the trial court affirmed its summary judgment in favor of CIC. The trial court declared this grant of summary judgment a final, appealable order, and both Mr. Hoyle and Cavanaugh appealed.

The sole issue on appeal was whether the trial court had improperly granted summary judgment based on CIC's insurance policy language, and whether genuine issues of fact remained regarding whether coverage existed when (1) deliberate intent to harm had already been determined not to exist under subsections (A) and (B) of R.C. § 2745.01, but (2) genuine issues of fact remained against the insured employer based on a "rebuttable presumption" of intent under subsection (C) of that statute, as that statute was interpreted by the trial court. The appellate court interpreted that policy language in favor of the insured, and found that if genuine issues of fact remained against Cavanaugh, so too did questions of fact remain based on the policy. The trial court decision was reversed, and the matter was remanded for further proceedings based on the denial of CIC's motion for summary judgment.

Throughout the appeals process, CIC has attempted to cast this as a consideration of Ohio's employer intentional torts system. It is not. Mr. Hoyle's claims against Cavanaugh, based on R.C. § 2745.01(C), remain pending before the trial court. The Ninth District resolved only an issue of policy interpretation. It did not offer any opinion regarding the scope of subsection (C), or the ultimate determination of liability under that statute. Despite CIC's claims that this is a matter involving the statutory employer intentional torts scheme,

CIC simply does not like the way the appellate construed its insurance contract (a contract it, in fact, no longer offers).

Any attempt to have this Court address the language of R.C. §2745.01(C) and the liability of *employers* for intentional torts in the workplace in this matter is untimely. The case against Cavanaugh has never been appealed, and remains pending at the trial court. In fact, CIC's continued efforts to deny its contractual obligations in this matter place Cavanaugh in the peculiar, and precarious, position of arguing for coverage under a policy it purchased to protect it, while not arguing *in favor* of its own liability under the statute. Cavanaugh disagrees with the trial court's determination that any question of liability remains against it under the statute. However, based on the denial of summary judgment there has been no final determination of that liability, and instead Cavanaugh is left to argue *in favor* of liability based on its insurance provider's continued efforts to avoid its contractual obligation.

Finally, CIC's appeal is premature. Even if the policy issues it raises were proper for this Court, they have never been fully addressed by either the appeals court or even at the trial level. The Ninth District reversed the trial court's decision granting summary judgment in CIC's favor. In doing so, it made no ultimate determination of either Cavanaugh's liability under R.C. §2745.01(C), or CIC's obligation to indemnify Cavanaugh under its policy. The appellate decision found only that "there exists a question of fact as to whether [a claim under subsection (C)] falls within the policy exclusion, precluding summary judgment on the issue of coverage." The appellate court merely denied CIC's motion for summary judgment, there has been no final determination of any fact or issue of law in this matter. Even if this were a matter of public and great general concern (which it is not) it

would be more efficient for this matter to be addressed at the conclusion of this case. The court's determinations regarding Cavanaugh's liability, and whether any such liability even exists, will inform the necessity and posture of any future appeal.

Briefly, as to the *Amicus* memorandum in support of the Ohio Association of Civil Trial Attorneys, Cavanaugh would reiterate the arguments presented above. It seems clear that the *Amicus Curiae* misinterpret the position of this case as involving a consideration of the *employer's* liability under the statute. A determination of such liability will remain pending regardless of any determination of the *insurer's* obligations under its policy. There has been no determination that Cavanaugh is liable under the statute. CIC merely seeks to avoid the obligations of its policy language. This is not a matter of public and great general interest. It is a simple contract claim.

## II. ARGUMENT AGAINST APPELLANT'S PROPOSED PROPOSITIONS OF LAW

### Appellant's Proposition of Law No. I:

**Where an employee is relying upon R.C. §2745.01(C) to create a rebuttable presumption of intent to injure arising from the employer's deliberate removal of an equipment safety guard, the ultimate burden remains with the employee to prove that the employer acted with "deliberate intent" in order to establish liability against the employer for an employer intentional tort.**

In its first proposition of law, CIC seeks to rewrite the language of its contract, and ignore the effect of the statutory presumption on that contract, in order to avoid its obligations to Cavanaugh. Neither the trial court nor the appellate court have addressed the ultimate issue of Cavanaugh's liability, yet CIC attempts to couch this proposition of law in the language of the statute and not in that of its contract.

Again, CIC's action in this appeal forces Cavanaugh into the strange position of

apparently arguing against its own interests. Cavanaugh ultimately agrees with CIC that it is without liability in this matter - it has already established that it acted without deliberate intent to cause harm, and that it is exempt from liability under the statute, including under subsection (C). Cavanaugh is also confident that the ladder jack stands at issue do not constitute an "equipment safety guard" and this case does not fall within the scope of the rebuttable presumption under R.C. 2745.01(C). However, because the trial court found that liability might remain under subsection (C), while at the same time finding there was no evidence of deliberate intent to harm, whatever remains under that subsection must be separate from the deliberate intent standard of the remainder of the statute. These rulings regarding Cavanaugh's liability under the statute are not on appeal.

The issue on appeal is one of contract language, not of statutory construction. CIC's insurance contract excludes those torts caused by a "deliberate intent to injure" as described in subsections (A) and (B). The trial court clearly decided Cavanaugh was not liable under those subsections, and specifically found no evidence of deliberate intent. With these findings under the statute, it is impossible for the court to simultaneously exclude coverage based on the contract language. The contract exclusion mirrors the language of subsections (A) & (B), and does not specifically consider the effect of the subsection (C)'s presumption of intent under the contract. It is this discrepancy, and not the statutory language, that is addressed in the appellate opinion.

A rebuttable presumption shifts the burden of proof to the employer. In this case, if Cavanaugh, as the employer-defendant fails to rebut this presumption, it will be found liable without any definitive determination of its "deliberate intent to injure" Mr. Hoyle, but simply based solely on the statutory presumption. Under Ohio law, a "'presumption' is a procedural

device which is resorted to only in the absence of evidence by the party in whose favor a presumption would otherwise operate.” *Forbes v. Midwest Air Charter, Inc.*, 86 Ohio St.3d 83 (1999), quoting, *Ayers v. Woodard*, 166 Ohio St.138 (1957). Moreover, a presumption “would *ab initio* be inapplicable” where evidence is presented to rebut the presumption. *Id.* Therefore, a presumption is simply a legal fiction which is created by law – it is not fact. The “presumption of intent” in this case is distinct from any actual “deliberate intent to harm.” under the policy.

The Ninth District couches its decision solely in the contract language, and the effect of this presumption on the insurance contract. It does not address the issue of burden under the statute. The contract language does not address the rebuttable presumption under subsection (C) in any way. The appellate court is couched in this distinction – while the un rebutted presumption may amount to a finding of proof *under the statute* (an issue that remains pending before the trial court), this is not the same as proof of deliberate intent under the contract. The contract allows coverage for harm from “intentional acts.” Without actual proof of a deliberate intent to harm, the un rebutted presumption under the statute does not invoke the exclusion and coverage remains under the policy.

In its effort to avoid its contractual obligations, CIC misstates the recent holdings of this Court and its other cited case law. *Kaminski* specifically states that the “General Assembly’s intent in enacting R.C. 2745.01 \* \* \* is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D).” *Kaminski*, 2010-Ohio-1027 at ¶56 (emphasis added). The exception in subsection (C) is a clear exception to the unified standard of subsections (A) & (B). Similarly, *Houdek v. ThyssenKrupp Materials, N.A.*, 134 Ohio St.3d 491, 983 N.E.2d

1253, 2012-Ohio-5685, has no application to this case. *Houdek* was decided without consideration of the rebuttable presumption under 2745.01(C). *Id* at ¶27. Despite CIC's assertions, this Court has not incorporated subsection (C) into the standard expressed in subsections (A) and (B).

Those courts that have considered subsection (C) clearly recognize the standard as a distinct, separate standard from the "deliberate intent" standard of subsections (A) & (B). "The specific-intent requirement is moderated, however, by subsection C of Ohio Revised Code 2745.01, which sets up a rebuttable presumption of intent to injure when the employer deliberately removes an equipment safety guard or deliberately misrepresents a toxic or hazardous substance." *Rudisill v. Ford Motor Company*, 709 F.3d 595, 603. While Cavanaugh disagrees with this interpretation, the trial court in this matter has embraced this distinction as it applies to employers, and that decision is not on appeal at this time. CIC seeks to redefine a rebuttable presumption solely as it applies to its insurance policy, but not as it applies to employers under R.C. 2745.01(C).

Any consideration of the liability of employers under subsection (C), and the standard of proof under that statute, is premature. Cavanaugh has not had an opportunity to present either argument or evidence before the trial court regarding subsection (C) or in rebuttal to its presumption of intent. The appeal addressed only CIC's liability under the policy, and CIC is not the proper party to be arguing regarding the employer's liability under the statute.

**Appellant's Proposition of Law No. II:**

**Ohio public policy prohibits an insurer from indemnifying its insured/employer for employer intentional tort claims filed under R.C. §2745.01 because an injured employee must prove that the employer committed the tortious act with direct or deliberate intent to injure in**

**order to establish liability.**

CIC raises, for the first time, the suggestion that the insurance contract it issued to Cavanaugh is void as contrary to Ohio's public policy. In general, this Court will not consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court. *City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 25, 213 N.E.2d 179 (1965). CIC did not raise the question of public policy in its motion for summary judgment or in its appeal before the Ninth District. It would be inappropriate for the Supreme Court to consider this question when it has not previously been raised.

This is especially true given the interlocutory nature of this appeal; this matter remains pending before the trial court regarding Cavanaugh's liability. Should Cavanaugh be found free from liability, obviously CIC would be under no obligation to pay and any consideration of its liability would be moot. Even if Cavanaugh were found liable, the court's determination of that liability, and its interpretation of subsection (C), would inform any subsequent appeal and potential claim that insurance coverage was in violation of public policy. CIC's second proposition of law is not yet ripe for review.

Regardless, CIC again misstates the appeals court's holding and the decision at issue in this case. This is not a "direct intent" intentional tort as defined in subsections (A) & (B). There is no public policy against protecting an employer for liability under subsection (C), which is based on a standard separate and apart from the direct intent to cause harm defined in the policy exclusion. As already stated, the rebuttable presumption of subsection (C) is not proof of direct intent to cause harm under the policy.

**Appellant's Proposition of Law No. III**

**An insurer has no duty to indemnify an employer-insured for**

**employer intentional tort liability when an employee invokes R.C. §2745.01(C) for the deliberate removal of an equipment safety guard where an endorsement to the insurer's policy excludes coverage for "liability for acts committed by or at the direction of an insured with deliberate intent to injure."**

The contract exclusion does not encompass the rebuttable presumption of intent in R.C. 2745.01(C). The contract only excludes actions which were based on the "deliberate intent to injure" the employee, tracking the language of subsections (A) & (B), but with disregard to the rebuttable presumption of subsection (C). The trial court has already determined that such intent did not exist, and granted summary judgment in favor of Cavanaugh on subsections (A) and (B). However, the trial court held genuine issues of fact remain regarding CIC's liability based on the removal of the ladder jack pins under R.C. 2745.01(C). This liability must be based in something other than the "deliberate intent to injure" of subsections (A) & (B).

Because the language of the insurance contract expressly, and intentionally, mirrors that of only subsections (A) & (B), the appeals court properly determined that if liability remained against Cavanaugh under subsection (C), it must also lie under the contract. The plain language of the contract excludes coverage only on proof of deliberate intent to injure, not on a presumption of such intent. The appeals court properly determined **that genuine issues of fact remained** regarding CIC's liability under the policy.

Again, CIC's cited case law is contrary to its position. *Irondale Industrial Contractors, Inc. v. Virginia Surety Company, Inc.*, 754 F.Supp.2d 927 (N.D. Ohio 2010) involves a policy which excludes **all** intentional torts, both those demonstrating deliberate intent, and those involving harm which was "substantially certain" to occur. The district court read this much more inclusive language to encompass claims under R.C. §2745.01(C)

as well. The policy exclusion here is much more limited in scope, and given the trial court's determination that Cavanaugh could only be liable under R.C. §2745.01(C), the deliberate intent exclusion could not apply.

The other case CIC relies upon, *Everest Nat'l Ins. Co. v. Valley Flooring Specialties*, E.D. Cal. No. CV F 09-1695, 2009 WL 997143 (Apr. 14, 2009), is inapposite to CIC's position. While the Eastern District of California ultimately ruled that the insurer in that case did not owe coverage, it did so on grounds other than the intentional tort exclusion. That court specifically held that the removal of an equipment safety guard **did not** fit within the policy exclusion for intentional harm. "The intentional exclusion addresses injury 'intentionally caused or aggravated' by Valley Flooring. **Everest fails to explain or demonstrate that the alleged absence of an operation guard equates to intentional conduct to invoke the exclusion.**" *Id.* at \*29 (emphasis added). The California court recognized that the removal of a safety guard does *not* amount to a deliberate intent to harm.

Cavanaugh is confident that it will ultimately be found free from liability in this case. It has already been established that Cavanaugh did not act with deliberate intent to harm Mr. Hoyle, and Cavanaugh has successfully rebutted the presumption of intent under R.C. §2745.01(C). Cavanaugh also disputes that the ladder jack pins at issue in this matter constitute an equipment safety guard. However, as the appellate court properly determined, whatever genuine issues of fact remain as to Cavanaugh's liability under the statute (as presently interpreted by the trial court, and which Cavanaugh disputes), those issues of fact also remain regarding CIC's obligations under the policy. These obligations arise solely from the language of that policy, and not from the statute itself. The appellate decision was properly decided and should be affirmed.

### III. CONCLUSION

This is a simple matter of contract interpretation, involving a stop-gap insurance policy that the Appellant no longer offers. Despite CIC's efforts to cast this as a decision regarding R.C. §2745.01(C) and its application to employers, the Ninth District ruled solely on the language of CIC's insurance policy, and this is not a matter of public and great general interest. CIC seeks instead to have this Court review a decision based on the interpretation of a contract exclusive to these parties.

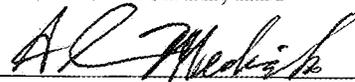
The posture of this case, as an interlocutory appeal regarding only the issue of insurance coverage, also makes any attempt to interpret the effect and application of R.C. §2745.01(C) as it applies to employer intentional torts premature, and would potentially place Cavanaugh in a position where it must argue against its own interests in order to preserve the policy coverage for which it has bargained.

Finally, the appellate court's decision only reversed the trial court's grant of summary judgment. The Ninth District did not definitively find that CIC owed coverage to Cavanaugh under its policy. It merely held that, given the trial court's posturing of this case against Cavanaugh, genuine issues of fact remain regarding CIC's policy coverage. The ultimate issues both of Cavanaugh's liability under the statute, and CIC's obligation to indemnify Cavanaugh under the policy, remain pending before the trial Court. Once this matter is fully resolved, many or all of the issues raised here may be moot, and will certainly be more properly postured for consideration on appeal.

For the above reasons, Appellees, DTJ Enterprises, Inc. and Cavanaugh Building Corp., respectfully request this Court refuse jurisdiction over this matter.

Respectfully submitted,

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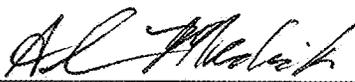
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