

ORIGINAL

IN THE SUPREME COURT OF OHIO

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CASE NO. 13-1405

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**DUANE ALLEN HOYLE**  
Plaintiff-Appellee,

-vs-

**DTJ ENTERPRISES, INC.; CAVANAUGH BUILDING CORP;**  
Defendant-Appellees,

and

**THE CINCINNATI INSURANCE COMPANY**  
Intervener-Appellant.

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**ON APPEAL FROM THE NINTH APPELLATE DISTRICT,  
SUMMIT COUNTY, OHIO, CASE NOS. 26579 & 26587**

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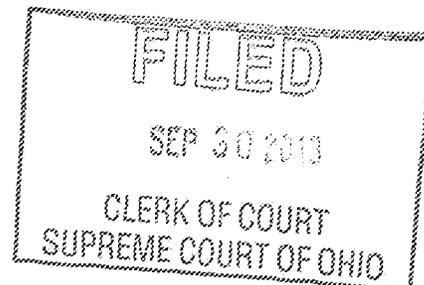
**MEMORANDUM OPPOSING JURISDICTION OF  
PLAINTIFF-APPELLEE, DUANE ALLEN HOYLE**

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**EXPLANATION OF WHY THIS CASE PRESENTS NO ISSUES  
OF PUBLIC AND GREAT GENERAL IMPORTANCE**

Far from presenting issues of “public and great general importance,” Intervener-Appellant, The Cincinnati Insurance Company (“CIC”), is seeking to undermine a decision that requires nothing more than for the insurer to furnish the coverage that had been expressly promised in exchange for the substantial premiums that have been received. Although scarcely mentioned in the contrived Memorandum of Appellant, The Cincinnati Insurance Company, in Support of Jurisdiction, dated August 30, 2013 (“CIC’s Memorandum”), this carrier has been marketing commercial liability insurance policies to Ohio businesses that explicitly furnish protection against workplace “intentional act” claims. As recognized by the Ninth District below, CIC’s policies are relatively unique in that they include the assurance that:

[CIC] will pay those sums that an insured becomes legally obligated to pay as damages because of “bodily injury” sustained by your “employee” in the “workplace” and caused by an “intentional act” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages. [emphasis added].

*Hoyle v. DTJ Ents., Inc.*, 9<sup>th</sup> Dist. No. 26579, 2013-Ohio-3223, ¶ 8 (July 24, 2013).

Although never acknowledged in CIC’s Memorandum, the phrase “intentional act” has been defined in a manner so that a deliberate intent to injure is not required to trigger coverage. *Id.* at ¶ 8. All that is necessary is “an act which is substantially certain to cause ‘bodily injury,’” and meets the following conditions:

- a. An insured knows 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 task.

*Id.* Through these generous policy terms, CIC’s agents have undoubtedly convinced countless Ohio businesses to purchase the coverage in order to ensure that they will be indemnified and a defended against inferred intent workplace intentional tort claims that are brought under R.C. 2745.01.

The Ninth District majority correctly recognized that the availability of the statutory “equipment safety guard” presumption that has been furnished by R.C. 2745.01(C) is unrelated to the purely contractual issue of whether duties to indemnify and defend are owed by Intervener CIC under the facts of this particular case. *Hoyle*, 2013-Ohio-3223, ¶19. The tort-reform legislation that is being touted is relevant only to the personal injury claim that Plaintiff-Appellee, Duane Allen Hoyle, is pursuing against Defendant-Appellees, DTJ Enterprises, Inc. and Cavanaugh Building Corp. (collectively “DTJ”). Since there is no dispute that the pending complaint “contains an allegation in any one of its claims that could arguably be covered by the insurance policy, even in part and even if the allegations are groundless, false, or fraudulent[,]” the workplace “intentional act” coverage clauses cannot be evaded. *Sharonville v. American Empl. Ins. Co.*, 109 Ohio St. 3d 186, 189, 2006-Ohio-2180, 846 N.E. 2d 833, 837, ¶13, citing *Sanderson v. Ohio Edison Co.*, 69 Ohio St. 3d 582, 635 N.E. 2d 19 (1994), paragraph one of the syllabus. Defendant DTJ is entitled to both indemnity and a defense so long as the remaining theories of recovery fall within the scope of an “intentional act” as defined in the policy, not the unrelated statute.

The *Amicus* Brief that has been submitted by the Ohio Association of Civil Trial Attorney is thus way off base. The *Amicus* has fretted that the appellate court “decision opens the door for liability under the statute - created by the rebuttable presumption - without an employer acting with deliberate intent to harm.” *The Ohio Association of Civil Attorneys’ Amicus Curiae Memorandum in Support of Jurisdiction dated September 9, 2013, p. 3, p. 3.* CIC’s policy is not defined in a manner that turns upon whether or not the “equipment safety guard” presumption is available, and instead furnishes its own definition of “intentional act” that sets the parameters for the coverage this is owed. *Hoyle*, 2013-Ohio-3223, ¶8. The issue of how the “equipment safety guard” presumption can be established was thoroughly explained by this Court in *Hewitt v. L.E. Myers Co.*, 134 Ohio St. 3d 199, 2012-Ohio-5317, 981 N.E. 2d, 795, and need not be revisited.

The reason that CIC’s Memorandum never references the three-part definition of “intentional act” is that this distinct policy language is completely inconsistent with the “issues of public and great general importance” that have been devised to pique this Court’s interest. While it is true that the majority of commercial liability insurance policies do not cover workplace intentional tort actions, the insuring agreement that was examined below by the Ninth District is not one of them. If CIC does not wish to cover such claims, all that is needed is the deletion of the aforementioned policy provisions. Those Ohio businesses that elect to insure with the carrier will then have no reason to believe that they are protected against inferred intent workplace intentional tort claims.

But that is not what CIC wants, and this Court’s assistance is therefore needed. Noticeably absent from CIC’s Memorandum is any explanation of how any business

would ever be entitled to coverage for a “bodily injury’ sustained by your ‘employee’ in the ‘workplace’ and caused by an ‘intentional act’ to which this insurance applies” if the Propositions of Law are sustained. And the dissenting judge seemed to be completely unconcerned that her unprecedented interpretation of the parties’ intentions would render critical policy language completely superfluous. *Hoyle*, 2013-Ohio-3223, ¶ 23 (Hensal, J., dissenting). Rather than enable insurance carriers to dupe businesses into purchasing workplace “intentional act” coverage that is purely illusory, this Court should leave the Ninth District’s sound decision intact.

**STATEMENT OF CASE AND FACTS**

The Ninth District's Opinion accurately describes the relevant procedural background and pertinent facts. *Hoyle*, 2013-Ohio-3223, ¶ 2-3.

## ARGUMENT

Intervener-Appellant CIC has fashioned three Propositions of Law, designed to create intriguing legal issues where none exist. Each will be separately addressed in the remainder of this Memorandum.

**PROPOSITION OF LAW 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.**

Given that this appeal concerns only an insurance coverage dispute, the first Proposition of Law raises an extraneous issue that is not ripe for consideration. Intervener CIC is seeking a purely advisory opinion explaining how an "employee" can establish a statutory workplace intentional tort claim against the "employer" through the presumption that is furnished by R.C. 2745.01(C). *CIC's Memorandum*, pp. 9-11. This ill-conceived Proposition of Law has nothing to do with insurance. *Id.*, p. 9. This is hardly the time for this Court to entertain such a debate, as the underlying workplace intentional tort claim between Plaintiff Duane Allen Hoyle and Defendant DTJ has not yet been concluded. *Summit C.P. Case No. CV-2010-03-1984*. If the case proceeds to trial and a defense verdict is rendered, the question of how the presumption applies will be rendered moot in all likelihood.

Even if this Court were to adopt this Proposition of Law *in toto*, a reversal of the Ninth District majority would not be necessary. The appellate court soundly reasoned that:

\*\*\* Although the deliberate intent to injure may be presumed *for purposes of the statute* where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to “deliberate intent” *for the purposes of the insurance exclusion*. [emphasis original].

*Hoyle*, 2013-Ohio-3223, ¶ 19. Given that Intervener CIC has yet to cite any authorities suggesting that a statutory presumption, such as that found in R.C. 2745.01(C), can be “borrowed” by an insurer to deny coverage that is otherwise available, or even furnish a logical argument in support of such a nonsensical principle, resolution of this Proposition of Law will not benefit the carrier.

In its zeal to avoid its coverage obligations, Intervener CIC appears to have forgotten that insurance policies are nothing more than contracts. *Nationwide Mut. Ins. Co. v. Marsh*, 15 Ohio St.3d 107, 472 N.E.2d 1061, 1062 (1984); *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 218-219, 2003-Ohio-5849, 797 N.E.2d 1256, 1261. Except where the General Assembly has deliberately intervened, insuring agreements will be governed by the plain and ordinary meaning of their terms. *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 49, 2008-Ohio-4838, 896 N.E.2d 666, 669, ¶ 15; *City of Sharonville v. American Empl. Ins. Co.*, 109 Ohio St.3d 186, 187, 2006-Ohio-2180, 846 N.E.2d 833, 836, ¶ 6.

In an obvious effort to produce a policy that will be attractive to Ohio businesses, Intervener CIC adopted its own definition of “intentional act” that broadened the coverage to reach workplace injury claims that are brought by employees against their employers. *Hoyle*, 2013-Ohio-3223, ¶ 8. Even though the carrier is now seeking to avoid having to indemnify and defend such claims, the courts of this State have steadfastly refused to glean new terms and conditions from unambiguous insurance

contracts. *Atwood v. State Farm Mut. Ins. Co.*, 68 Ohio App.3d 179, 182, 587 N.E.2d 936, 937 (4<sup>th</sup> Dist. 1990). Regardless of the practical implications for the parties, the courts have never been in the business of judicially re-writing insurance policies, which appear to have been drafted improvidently. *McNally v. American States Ins. Co.*, 308 F.2d 438, 445 (6<sup>th</sup> Cir. 1962); *Schwartz v. Stewart Title Guar. Co.*, 134 Ohio App.3d 601, 607, 731 N.E.2d 1159, 1163 (8<sup>th</sup> Dist. 1999). Instead, any uncertainty must be resolved in favor of the insured. *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 313 N.E.2d 844, syllabus (1974); *Csulik v. Nationwide Mut. Ins. Co.*, 88 Ohio St.3d 17, 20, 2000-Ohio-262, 723 N.E.2d 90, 92.

There is nothing in the text of R.C. 2745.01(C) that even remotely suggests that the legislature intended for commercial liability policies to be altered by the presumption that is afforded when equipment safety guards are deliberately removed. The enactment is simply irrelevant to the contractual rights that have been established between Intervener CIC and its policyholder. Unlike most liability policies, the agreement at issue contains its own definition of “intentional act” that expands, not limits, the coverage obligations that are owed. *Hoyle*, 2013-Ohio-3223, ¶ 8. Since there is no reason to believe that the General Assembly intended for R.C. 2745.01(C) to modify the terms of insuring agreements, any resolution of this Proposition of Law can have no impact upon the coverage dispute that is the focus of this appeal.

It should go without saying that this Court has consistently refused to issue advisory opinions. *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 174, 2011-Ohio-4609, 956 N.E.2d 825, 831, ¶ 27. But, that is all this Proposition of Law seeks. No issues of public or great general importance are therefore implicated at this stage in the

proceedings.

**PROPOSITION OF LAW 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.**

In contrast to the first Proposition of Law, the second does indeed bear directly upon the insurance carrier's financial interests. Intervener CIC is arguing, in essence, that it should be entitled to sell insurance policies to Ohio businesses promising to cover "intentional act[s]" committed within the workplace, without ever having to honor the commitment. Such claims can always be denied on the basis of "public policy" in the insurer's misguided view, leaving innumerable Ohio businesses exposed to potentially ruinous personal injury and wrongful death actions. *CIC's Memorandum, pp. 12-13.*

Not long ago, this Court issued a reminder that "the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 472, 2007-Ohio-6948, 880 N.E.2d 420, 428, ¶ 21, quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network v. DuPuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 21. It is undoubtedly no accident that the General Assembly has yet to enact any legislation prohibiting insurers from covering compensatory awards based upon intentional acts that fall short of malicious misconduct, including presumed intent claims brought under authority of R.C. 2745.01(C). This Court should refuse the invitation to do so through judicial *fiat*. *State ex rel. Myers v. Chiaramonte*, 46 Ohio St.2d 230, 238, 348 N.E.2d 323 (1976).

Indeed, the solution available to Intervener CIC is quite simple. In order to avoid coverage for all workplace intentional torts, the carrier need only remove the provisions that broadened the policy and obligated the Ninth District to recognize contractual duties to defend and indemnify. *Hoyle*, 2013-Ohio-3223, ¶ 8. Just two years ago, this Court considered an indistinguishable workplace intentional tort claim and concluded that no coverage was owed under the commercial general liability policy that had been issued to the employer in that case. *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770. The insuring agreement under consideration in *Ward* did not contain a promise of “intentional act[s]” coverage like the instant policy does. *Hoyle*, 2013-Ohio-3223, ¶ 8. Any insurer, including CIC, which does not intend to cover such workplace injury claims has thus been furnished with a blueprint for accomplishing that objective. The only conceivable reason that CIC is declining to issue similar policies is that business may be lost without the promise of comprehensive employee injury claim protection. The carrier cannot have it both ways, and thus no issues of public or great general importance are truly at stake.

**PROPOSITION OF LAW 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 final Proposition of Law is predicated upon nothing more than legal sophistry. Citing just two inapposite federal district court decisions, and the six sentence dissent that was issued below, Intervener CIC contends that coverage must be denied to Defendant DTJ because most commercial insurance policies contain intentional acts exclusions. *CIC's Memorandum, pp. 13-15*. While Intervener CIC's own policy does contain an exclusion for a "deliberate intent to injure[,]," the feature that sets it apart from all others is the explicit commitment to cover "damages because of 'bodily injury' sustained by your 'employee' in the 'workplace' and caused by an 'intentional act' to which this insurance applies." *Hoyle, 2013-Ohio-3223, ¶ 8*. And, a three-part definition of "intentional act" has been adopted by the carrier that does not involve deliberate or malicious wrongdoing. *Id.* The Ninth District's sound ruling is predicated squarely upon these decidedly pro-policyholder provisions, yet the analysis that has been furnished in support of this Proposition of Law never mentions them. *CIC's Memorandum, pp. 13-15*.

Intervener CIC's exclusion for a "deliberate intent to injure" is undeniably a general policy provision. On the other hand, the commitment to cover any "intentional act" claim arising from the workplace setting is more specific, and certainly applies to the underlying claim that has been brought by Plaintiff against Defendant DTJ. Since

specific policy terms control over those that are more general, the “deliberate intent to injure” exclusion is not a bar to coverage. *Edmondson v. Motorists Mut. Ins. Co.*, 48 Ohio St.2d 52, 53, 356 N.E.2d 722, 723 (1976). It has yet to be determined by the trier-of-fact whether Defendant DTJ committed an “intentional act” as defined in the CIC policy. *Hoyle*, 2013-Ohio-3223, ¶ 8.

In the end, Intervener CIC remains unable to identify any meaningful examples of how coverage could be afforded under the workplace intentional act provision if these misguided Propositions of Law are adopted. The dissenting judge was also notably silent on this critical point. *Hoyle*, 2013-Ohio-3223, ¶23 (Hensal, J., dissenting). The carrier’s true motivations are not difficult to discern, which is to avoid coverage without regard to the actual policy terms.

As the Ninth District majority appreciated, constructions and interpretations should be avoided that produce illusory coverage obligations. *Glover v. Smith*, 1<sup>st</sup> Dist. No. C-02-0192, 2003-Ohio-1020, ¶ 22 (Mar. 7, 2003); *Pilgrim v. Cigna Prop. & Cas. Ins. Co.*, U.S. 9<sup>th</sup> Cir. No. 01-36030, 64 Fed. Appx. 13 (Apr. 2, 2003). “An insurance policy must be construed so that the whole instrument may stand and, when reasonably possible, effect and meaning should be given to each and every sentence, clause, and word of the contract.” *Tamburino v. Grange Mut. Cas. Ins. Co.*, 7<sup>th</sup> Dist. No. 88 CA 134, 1989 W.L. 3935, p. \*3 (Jan. 10, 1989). CIC’s dogged effort to nullify those express policy provisions that require workplace intentional acts claims to be paid is unworthy of this Court’s time and attention, and certainly does not implicate any issues of great public or general importance.

**CONCLUSION**

Since each of the three Propositions of Law are fundamentally flawed, and the Ninth District's decision furnishes the only plausible interpretation of the relatively unique workplace "intentional act" policy provisions that have been adopted, no issues of public or great general importance justify further Supreme Court review.

Respectfully Submitted,

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