

ORIGINAL

No. 13-1405

IN THE
SUPREME COURT OF OHIO

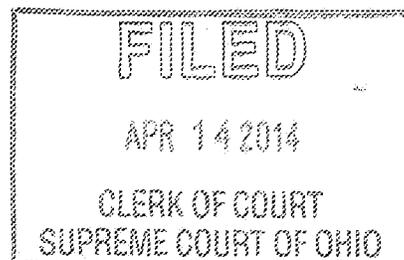
DUANE HOYLE,
Plaintiff-Appellee

-and-

THE CINCINNATI INSURANCE COMPANY
Intervening Plaintiff-Appellant

v.

DTJ ENTERPRISES, INC., et al.,
Defendants-Appellees.

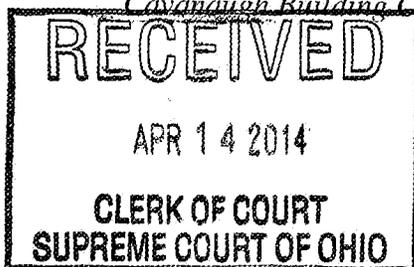


JURISDICTIONAL APPEAL FROM THE
COURT OF APPEALS, NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NOS. CA-26579 & CA-26587

MERIT BRIEF OF DEFENDANTS-APPELLEES
DTJ ENTERPRISES, INC., AND
CAVANAUGH BUILDING CORPORATION

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I. STATEMENT OF THE FACTS

Plaintiff-Appellee, Duane Allen Hoyle (Mr. Hoyle or “Plaintiff”), filed a civil action against Defendants-Appellees DTJ Enterprises, Inc. (“DTJ”) and Cavanaugh Building Corporation (“Cavanaugh”) in the Summit County, Ohio Court of Common Pleas, alleging that he was injured when he fell from a ladder jack scaffold on a construction project in 2008. Mr. Hoyle alleged employer intentional tort claims against DTJ and Cavanaugh as employer-defendants under Ohio common law and Ohio’s intentional tort statute, R.C. §2745.01.

At the time of Mr. Hoyle’s accident, DTJ and Cavanaugh were insured under a Commercial General Liability Policy and a Commercial Umbrella Liability Policy issued by Appellant Cincinnati Insurance Company (“CIC”). (Appellant’s Supplement to Merit Brief (“CIC Supp.”) at 32-212.) CIC issued Policy No. 081 75 12 to Cavanaugh, covering a policy period of March 31, 2007 to March 31, 2010 (the Policy). The Policy provides coverage for “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” (CIC Supp. at 50.) The Policy contains an exclusion stating that the insurance does not apply to “‘Bodily injury’ or ‘property damage’ which may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended.” (CIC Supp. at 51.)

However, the Policy also contains an endorsement, an “Employers Liability Coverage Form- Ohio,” on a Form GA 106 OH 01 96, which DTJ and Cavanaugh purchased for an additional annual premium of \$2,657.00. (CIC Supp. at 109-114.) This endorsement expressly provides coverage for injuries sustained by employees as a result of certain “intentional” acts. (CIC Supp. at 110.) The Employers Liability Coverage Form states:

[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.

Id. (Emphasis added.)

The Employers Liability Coverage Form defines "intentional act" as follows:

3. "Intentional Act" means an act which is substantially certain to cause "bodily injury." For purposes of the coverage afforded by this insurance, an act is substantially certain to cause "bodily injury" when the following conditions are met:

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 work.

(CIC Supp. at 113.) The Form contains an exclusion from the intentional act coverage for: "h. liability for acts committed by or at the direction of an insured with **the deliberate intent to injure.**" (*Id.* at 111.) (Emphasis added.)

CIC was granted leave to intervene as a plaintiff in Mr. Hoyle's case and sought a declaratory judgment as to its indemnity obligations under its policies.

CIC, and DTJ and Cavanaugh, subsequently filed motions for summary judgment with the trial court. DTJ and Cavanaugh argued that they were entitled to summary judgment because there was insufficient evidence to demonstrate an employer intentional tort under R.C. §2745.01. This statute provides:

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an

intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, “substantially certain” means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

(D) This section does not apply to claims arising during the course of employment involving employment discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

R.C. §2745.01.

DTJ and Cavanaugh argued that there was no evidence that anyone from DTJ or Cavanaugh intended to deliberately harm or injure Mr. Hoyle or had the belief that injury to him was substantially certain to occur. (Motion for Summary Judgment, Appellees’ Supplement to Merit Brief (“Appellee Supp.” at 1-41)). In addition, DTJ and Cavanaugh argued that Mr. Hoyle could not demonstrate an intentional tort under R.C. §2745.01(C), as the evidence did not show that DTJ and Cavanaugh deliberately removed an “equipment safety guard” from the equipment and materials Mr. Hoyle used.

CIC moved for summary judgment on its claim for a declaratory judgment that it was not obligated to indemnify DTJ and Cavanaugh under the terms of the Policy. (Motion for Summary Judgment of CIC, CIC Supp. at 18-28.) CIC argued that “there is no possibility under which CIC might owe a duty to indemnify any judgment rendered at trial of this matter” due to

the exclusion in the Employers Liability Coverage Form for acts committed by or at the direction of the insured with “the deliberate intent to injure.” (CIC Supp. at 23.)

The trial court held that the Plaintiff failed to adduce evidence on summary judgment sufficient to create a genuine issue of material fact as to whether DTJ and Cavanaugh acted with the specific intent necessary to establish an employer intentional tort under R.C. §2745.01(A) and (B), and granted DTJ and Cavanaugh partial summary judgment with respect to claims brought by Mr. Hoyle under those sections. The trial court ruled:

Plaintiff’s deposition testimony provides evidence that Plaintiff did not believe that Defendants intended to cause him injury. Plaintiff provides no evidence that the Defendants acted with a specific intent to injure the Plaintiff. The Court finds that Plaintiff is unable to prove a claim under R.C. §2745.01(A) and (B) because the evidence shows there was no specific intent to cause an injury. No genuine issue of material fact remains, and therefore summary judgment is granted in favor of the Defendants.

(Appellant’s Apx. at 23, citations omitted.)

However, despite its finding that “Plaintiff provide[d] no evidence that the Defendants acted with the specific intent to injure the Plaintiff” such that summary judgment was proper on claims under R.C. §2745.01(A) and (B), the trial court did not grant DTJ and Cavanaugh summary judgment with respect to a claim by Mr. Hoyle under R.C. §2745.01(C). Instead, the trial court found that a claim under R.C. §2745.01(C) could go forward because “genuine issues of material fact remain[ed] as to whether there was a deliberate removal of the pins used to hold the ladder jack to the ladder” and as to whether the pins constituted an “equipment safety guard” such that Mr. Hoyle might be able to establish an employer intentional tort through the statutory method created by R.C. §2745.01(C). (Appellant’s Apx. at 24, 26.)

The trial court then proceeded to decide CIC’s motion for summary judgment. The trial court granted CIC’s motion even though the trial court held that Mr. Hoyle could

proceed with an employer intentional tort claim against DTJ and Cavanaugh under R.C. §2745.01(C) and despite the trial court's finding that the "Plaintiff provide[d] no evidence that the Defendants acted with the specific intent to injure the Plaintiff." The trial court held that CIC could have no duty to indemnify DTJ and Cavanaugh under R.C. §2745.01 under any circumstance due to the exclusion for "acts committed by or at the direction of the insured with the deliberate intent to injure." The trial court held that "[a]ny possible surviving claim [that Mr. Hoyle had] under R.C. 2745.01(C) would necessarily include the 'intent to injure' and would thus be precluded by the insurance policies" issued by CIC. (Appellant's Apx. at 19.)

In a cogent and well-reasoned opinion, the Ninth District Court of Appeals reversed the trial court's grant of summary judgment to CIC on the issue of insurance coverage in light of the trial court's finding that an intentional tort claim under R.C. 2745.01(C) could proceed. *Hoyle v. DTJ Ents., Inc.*, 2013-Ohio-3223, 994 N.E.2d 492 (9th Dist.) (Appellant's Apx. at 5.) The Court of Appeals appreciated that since the trial court found insufficient evidence on summary judgment to demonstrate either that DTJ or Cavanaugh had specific intent to injure within the meaning of R.C. §2745.01(A) and (B), the only way that Mr. Hoyle could demonstrate a viable intentional tort claim against DTJ and Cavanaugh in the case was through the statutory presumption method created by R.C. §2745.01(C), where the necessary intent to injure is "presumed." (Appellant's Apx. at 9.) The Court of Appeals also recognized that, while this Court's precedents (including its decisions in *Kaminski v. Metal Wire Prods. Co.*, 2010-Ohio-1027, 125 Ohio St.3d 250, 927 N.E.2d 1066, and *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 2012-Ohio-5685, 134 Ohio St.3d 491, 983 N.E.2d 1253) establish that an employer's specific intent to cause an employee injury is a necessary requirement for demonstrating an employer intentional tort under R.C. §2745.01, the "specific-intent requirement is moderated . . .

by [R.C. §2745.01(C)], 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.” (Appellant’s Apx. at 12, citing *Rudisill v. Ford Motor Co.*, 709 F.3d 595, 603 (6th Cir. 2013); *Houdek*, at ¶30 (Pfeifer, J. dissenting.)) The Court of Appeals recognized that the question in the case was “whether, if deliberate intent were to be presumed by operation of subsection (C), the claim would be excluded from coverage under the Employer Liability policy for actions taken with the ‘deliberate intent’ to injure.” (Appellant’s Apx. at 12.)

The Court of Appeals cogently reasoned that although “deliberate intent to injure may be presumed *for purposes* [of R.C. §2745.01(C)] where there is deliberate removal of a safety guard . . . that does not in and of itself amount to “deliberate intent” *for the purposes of the insurance exclusion.*” (Appellant’s Apx. at 13.) Instead, the Court of Appeals found that genuine issues of material fact exist as to whether the Policy’s exclusion for acts taken with a “deliberate intent to injure” necessarily includes situations where there is no evidence that the employer intended to injure or harm an employee but where the employer’s intent to injure an employee is merely “presumed.” The Court stated:

The Employer Liability policy at issue here provides coverage for “bodily injury” caused by an “intentional act,” which it defines as one where the insured (1) knows of the existence of a dangerous condition within its business operation, (2) knows that if an employee is subjected to the dangerous condition, then harm to the employee will be a “substantial certainty,” and (3) requires “the ‘employee’ to continue to perform the dangerous task.” The policy excluded from coverage “liability for acts committed by or at the direction of an insured with the deliberate intent to injure[.]” Therefore, we cannot conclude that an “intentional act” under the policy, which is specifically covered as set forth above, includes an act committed with “deliberate intent” to injure, which is specifically excluded. Based upon the presumption of deliberate intent under R.C. 2745.01(C), there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting “deliberate intent” to injure under the terms of the policy. As the trial court determined that questions of fact existed as to the viability of [a] claim under subsection (C), we conclude that there

likewise exists a question of fact as to whether such a claim falls within the policy exclusion, precluding summary judgment on the issue of coverage.

(Appellant's Apx. at 14.)¹

This Court granted CIC's discretionary appeal to review three propositions of law. CIC contends the decision of the Court of Appeals should be reversed because: (1) the decision fails to adhere to this Court's binding precedent interpreting R.C. §2745.01 to require that an employee establish the employer's direct or deliberate intent to injure in order to prevail ultimately on a claim for employer intentional tort; (2) the decision disregards the public policy of Ohio by imposing a duty upon insurers like CIC to indemnify insured-employers who intentionally injure employees under R.C. §2745.01(C); and (3) the imposition of a duty to indemnify in this case would ignore the endorsement in the Policy excluding coverage for "liability for acts committed by or at the direction of the insured with deliberate intent to injure." (CIC Merit Br. at 43.)

II. SUMMARY OF THE ARGUMENT

None of the Propositions of Law asserted by CIC demonstrate that the Ninth District Court of Appeals erred in reversing the trial court's grant of summary judgment to CIC on the issue of indemnity coverage. Contrary to CIC's contention that the Court of Appeals' decision "signals a seismic shift in the current EIT law as adopted and enacted by Ohio's General Assembly" and "trump[s] this Court's precedent requiring an employee to establish an employer's specific intent to injure in order to prevail on a claim against the employer for intentional tort," (CIC Merit Br. at 10, 43), the Court of Appeals' decision in no way counters

¹ The dissenting Judge stated that he would find (as the trial court found) that the parties intended for the phrase "deliberate intent to injure" as used in the Policy exclusion "to have the same meaning under the contract as under Section 2745.01," regardless of the method or circumstances under which deliberate intent was shown. (Appellant's Apx. at 15-16.)

this Court's precedents regarding what a plaintiff must prove in order to establish liability in an employer intentional tort case. The Court of Appeals did not hold that an intentional tort claim was established or that CIC had an indemnity obligation but merely, and correctly, held that CIC was not entitled to summary judgment on the issue of indemnity coverage at this juncture in the case given the ruling of the trial court. Specifically, the Court of Appeals found that material issues of fact exist as to whether the Policy excludes liability coverage in a situation that could now arise where Mr. Hoyle is able to demonstrate the intent necessary to make out an employer intentional tort solely through a legal presumption under R.C. §2745.01(C), without evidence that the "Defendants acted with the specific intent to injure the Plaintiff." (*See Ruling of Trial Court, Appellant's Apx. at 23.*)

The holding by the Court of Appeals on the issue of insurance coverage does not contradict this Court's precedents regarding what a plaintiff must prove in order to demonstrate an employer intentional tort under R.C. §2745.01 but merely held that *this insurance Policy* – which purports to afford coverage for "intentional acts" – does not clearly exclude coverage in a situation where liability for an intentional act is established solely through the construct of a legal presumption.

Therefore, as much as CIC wants to characterize the Court of Appeals' decision as some kind of global holding regarding the intent a plaintiff must show in order to establish an intentional tort under R.C. §2745.01, the Court of Appeals' decision in fact was no such thing. The decision was a limited holding that there could be coverage under the terms of this insurance Policy under circumstances that could arise in this case. This Court should affirm the judgment of the Court of Appeals as the Court correctly concluded that material issues of facts exist as to whether coverage may exist under the terms of this Policy.

III. ARGUMENT AS TO CIC'S ASSERTED PROPOSITIONS OF LAW

A. 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 CIC's first asserted Proposition of Law and various subparts, CIC purports to argue that the decision of the Court of Appeals "fail[s] to follow this Court's decisions" like *Kaminski, Houdek*, and *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 2010-Ohio-1029, 125 Ohio St.3d 280, 927 N.E.2d 1092, in which this Court established that the Ohio General Assembly's purpose in enacting R.C. §2745.01 was to significantly limit recovery for employer intentional torts in this state and to permit recovery only when an employer acts with specific intent to cause an employee injury. (See CIC Merit Br. at 9-10, 15.) DTJ and Cavanaugh adamantly *disagree* with CIC that the Court of Appeals' decision somehow fails to follow these precedents.² The Court of Appeals did *not* hold that a plaintiff may establish an employer intentional tort based on something less than the specific intent this Court has held necessary in order to make out an employer intentional tort claim. Rather, the Court of Appeals simply acknowledged that where (as in this case) an employee seeks to establish an intentional tort claim solely under R.C. §2745.01(C), the specific intent that is required to make out a claim is

² DTJ and Cavanaugh agree that this Court's decisions establish that the Ohio General Assembly intended to significantly restrict actions for employer intentional torts in this state and to limit recovery for such torts "to only those most egregious cases when an employer acts with specific intent to cause an employee injury." (See CIC Merit Br. at 10, 13-14.) The Court of Appeals also expressly recognized and acknowledged this Court's decisions in this regard. (See CIC Apx. at 12.) ("Pursuant to the Ohio Supreme Court's decisions . . . , R.C. §2745.01 requires specific or deliberate intent to cause injury to recover on an employer intentional tort.")

established through the construct of a legal presumption (by showing that the employer deliberately removed a safety device), not through actual proof that the defendant had an “intent to injure another” or “the belief that the injury was substantially certain to occur.” Such a recognition by the Court of Appeals does not counter this Court’s precedents regarding what is required to establish an employer intentional tort in any way, but simply acknowledges what R.C. §2745.01(C) expressly states and provides on its face, *i.e.*, that “[d]eliberate removal by an employer of an equipment safety guard . . . creates a **rebuttable presumption** that removal or misrepresentation was committed with intent to injure another.” R.C. §2745.01(C) (emphasis added.)

In this regard, then, the Court of Appeals properly observed that the specific-intent requirement in intentional tort cases “is moderated” under §2745.01(C), as the statutory language the General Assembly used in subsection (C) “sets up a rebuttable presumption of intent to injure when the employer deliberately removes and equipment safety guard or deliberately misrepresents a toxic or hazardous substance,” which is a different method for proving a claim than in R.C. §§2745.01(A) or (B). (Appellant’s Apx. at 12.)³

CIC completely mischaracterizes the Court of Appeals’ decision when it states that “the Ninth Circuit reversed and construed the ‘intent to injure’ another requirement of R.C. §2745.01(C) as being a degree of culpability less than and distinct from the deliberate intent required under subsections (A) and (B) of the EIT statute for purposes of insurance coverage.”

³ This Court has already appeared to have recognized that some difference exists between what is required to prove an employer intentional tort claim under R.C. §2745.01(C) from the proof that is needed under sections (A) and (B). *See, e.g. Kaminski, 2010-Ohio-1027, at ¶56* (the “General Assembly’s intent in enacting R.C. 2745.01 . . . is to permit recovery for intentional torts only when an employer acts with specific intent to cause an injury, *subject to subsections (C) and (D).*”) (Emphasis added.)

(See CIC Merit Br. at 21, citing ¶19 of the Appellate Court’s decision.) Again, this is not what the Court of Appeals held. The Court of Appeals did not hold that something less than specific intent is required in order to make out an employer intentional tort claim under R.C. §2745.01(C), but acknowledged that the statutory language used by the General Assembly in R.C. §2745.01(C) allowed a plaintiff to prove intent through the construct of a legal presumption rather than through actual proof that the defendant intended to injure the employee. The Court of Appeals then found that genuine issues of material fact existed as to whether there could be insurance coverage in this case, not because the plaintiff was allowed to show something less than specific intent in order to make out a claim under R.C. §2745.01(C), but because the Court could not conclude that (but instead found genuine issues of material fact to exist as to whether) the intent that could be shown solely through the construct of a legal presumption for purposes of establishing liability under R.C. §2745.01(C) equated with acts taken with the “deliberate intent to injure” within the meaning of the Policy exclusion. As the Court of Appeals stated: “[O]ur inquiry pertains to whether, if deliberate intent *were to be presumed* by operation of subsection (C), the claim would be excluded from coverage under the Employer Liability policy for actions taken with the ‘deliberate intent’ to injure” as described in paragraph 2.h of the Employers Liability Coverage Form. (See Appellant’s Apx. at 12, ¶17.) The Court of Appeals’ decision thus turned on the meaning of the contractual language in the Policy at issue and not, as CIC purports to suggest, on some finding or determination by the Court that a plaintiff like Mr. Hoyle need not establish specific intent in order to establish a claim under R.C. §2745.01(C).

The Court of Appeals, moreover, did not err in somehow misconstruing the ultimate burden of proof that a plaintiff bears in an employer intentional tort case, as CIC also appears to contend in its first Proposition of Law. CIC discusses in some detail the burdens that

a plaintiff bears in an employer intentional tort case and asserts that the plaintiff in such cases (Mr. Hoyle here) bears the ultimate burden to prove that the employer acted with specific or deliberate intent. CIC also discusses the effect of a legal presumption in the context of a claim under R.C. §2745.01(C) and asserts:

[I]f Cavanaugh can't or doesn't come forward with evidence to rebut the presumption created by the removal of the ladder jack pins – assuming they are found ultimately to be safety guards which were deliberately removed by the employer – the legal import and consequence will be that Cavanaugh acted with specific intent to injure Mr. Hoyle. On the other hand, if Cavanaugh does present evidence sufficient to rebut the presumption, the only way for Mr. Hoyle to prevail will be through presentation of direct evidence that Cavanaugh intended to injure him.

(CIC Merit. Br. at 27.)

The Court of Appeals' decision, determining that CIC was not entitled to summary judgment, in no way holds that Mr. Hoyle does not bear the burdens CIC asserts.⁴ Rather, the Court of Appeals merely held that CIC was not entitled to summary judgment because the Court found that genuine issues of material fact exist regarding the scope of indemnity coverage afforded under the terms of *this* Policy. That is, the Court could not conclude that “deliberate intent to injure” as used in CIC’s insurance Policy exclusion covers a situation (that could arise in this case) where Mr. Hoyle is able to meet his burden of proving intent under R.C. §2745.01(C) solely through a statutory presumption (*i.e.*, in the situation where Mr. Hoyle demonstrates “deliberate removal” of a “equipment safety guard” and DTJ and Cavanaugh for some reason are unable to rebut the presumption of intent that would arise by operation of law under R.C. §2745.01(C) through such a showing). The Court could not conclude that “intent to injure” that may be “presumed” for purposes of satisfying R.C.

⁴ DTJ and Cavanaugh agree that Mr. Hoyle bears the burdens of proof and persuasion in any employer intentional tort claim he brings.

§2745.01(C) necessarily equates with the “deliberate intent to injure” that CIC intended to exclude from insurance coverage. (*See* Appellant’s Apx. at 13.)

CIC disagrees with the Court of Appeals’ conclusion that genuine issues of material fact exist regarding the meaning of its Policy exclusion, but this disagreement does demonstrate that the Court of Appeals either misconstrued or misapplied the burdens of proof or persuasion that fall on the plaintiff (Mr. Hoyle) in an employer intentional tort case, or that the Court of Appeals somehow “failed to follow” this Court’s precedents regarding employer intentional torts.

DTJ and Cavanaugh respectfully submit that the Court of Appeals reasonably, and correctly, held that CIC was not entitled to summary judgment in this case because genuine issues of material fact exist as to the scope of intentional act coverage provided in the Policy; specifically, whether “deliberate intent to injure” as set forth in the Policy exclusion was intended to apply only to circumstances where the employer actually intended to injure or harm an employee, and not to a circumstance where a plaintiff is able to show intent based solely on a legal presumption constructed under R.C. §2745.01(C). The Court of Appeals did not, as CIC contends in its First Proposition of Law, “trump this Court’s precedent requiring an employee to establish an employer’s specific intent to injure in order to prevail on a claim against the employer for intentional tort.”⁵

⁵ Furthermore, even *assuming* the Court of Appeals incorrectly found that material issues of fact exist as to the meaning of “deliberate intent to injure” as used in CIC’s Policy exclusion, this does not represent a decision requiring this Court review, particularly at this point in time. As discussed above, the Court of Appeals’ decision reversing the trial court’s grant of summary judgment based on the terms of the Policy does not constitute a departure from this Court’s precedents. Further, the decision is not ripe for review as the Court of Appeals remanded the case to the trial court and no final determination has been made in the trial court either as to liability under R.C. §2745.01 or indemnity coverage under the Policy.

B. 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. 2945.01 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 its second asserted Proposition of Law, CIC asserts that it has long been against public policy in Ohio to permit insurance coverage for torts which are motivated by an intent and purpose to injure. (*See* CIC Merit Br. at 29-30.) CIC then purports to argue that because "current [employer intentional tort] law limits claims for employer intentional torts to situations in which an employer acts with "specific intent" to cause an injury to another injury . . . Ohio public policy prohibits an insured/employer for any claim made pursuant to R.C. from providing indemnity coverage to an insured/employer for any claim made pursuant to R.C. §2745.01 including subsection (C)." (CIC Merit Br. at 30.)

As a preliminary matter, CIC did not raise this "public policy" argument in its appeal to the Ninth District Court of Appeals, and the Court of Appeals did not address it. (*See* Brief of Cincinnati Insurance Company in the Court of Appeals, Appellee's Supp. at 42-79.) This Court "will not ordinarily 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 (Ohio 1965). Even if this Court were to address the public policy argument now, this Court should reject CIC's contention that Ohio public policy bars insurance coverage for all claims under R.C. §2745.01, including claims under R.C. §2745.01(C) where an employer's intent to injure is merely "presumed."

As this Court has recognized, although Ohio law generally prohibits liability insurance from covering intentional torts, "[n]ot all intentional torts are uninsurable in Ohio."

Buckeye Union Ins. Co. v. New England, 87 Ohio St.3d 280, 283, 720 N.E. 495, 498 (Ohio 1999). Direct “intent to injure, not merely an intentional act, is a necessary element to uninsurability.” *Id.*

In *Harasyn v. Normandy Metals, Inc.*, 29 Ohio St.3d 173, 551 N.E.2d 962 (Ohio 1990), this Court held that Ohio public policy does not prohibit an employer from insuring against tort claims by employees in cases where the employer did not intend to injure the employee but knew that injury was “substantially certain” to occur. This Court reasoned that the public policy considerations for depriving an employer of insurance protection were not compelling where an employer’s intent to injure is inferred from substantial certainty of injury. In reaching this holding, the Court distinguished the different policy considerations for precluding insurance coverage for torts where the employer directly intends to injure the employee, on the one hand, from other intentional tort situations where insurance should be allowed, on the other. The Court stated:

It is often said that public policy prohibits liability insurance for intentional torts. This statement is based on ‘the assumption that such conduct would be encouraged if insurance were available to shift the financial cost of the loss from the wrongdoer to his insurer. . . .’ However, this blanket prohibition makes no distinctions as to the various forms of intentional wrongdoing and does not admit the possibility that some torts might not be particularly encouraged if insurance were available to them. The better view is to prohibit insurance only for those intentional torts where the fact of insurance coverage can be related in some substantial way to the commission of wrongful acts of that character. . . . In the case of a ‘direct intent’ tort, the presence of insurance would encourage those who deliberately harm another. **In torts where intent is inferred from ‘substantial certainty’ of injury, the presence of insurance has less effect on the tortfeasor’s actions because it was not the tortfeasor’s purpose to cause the harm for which liability is imposed. In the latter situation, the policy of assuring victim compensation [and allowing insurance] should prevail.**

29 Ohio St.3d at 176, 551 N.E.2d at 965. (Emphasis added; internal citations omitted.)

This Court's reasoning in *Harasyn* indicates that insurance coverage is permissible in the circumstances of this case, where the intent that is required to establish liability for an employer intentional tort claim can only be established via the rebuttable presumption set forth in R.C. §2745.01(C), without Plaintiffs presenting actual proof that DTJ or Cavanaugh intended to harm or injure him. That is, this case presents a situation where the policy considerations this Court identified in *Harasyn* for depriving an employer of insurance coverage are *not* compelling because, in this case, there has been and will be no evidence to show that it was DTJ's and Cavanaugh's purpose to cause the Plaintiff harm or injury. Rather, if liability is imposed under R.C. §2745.01(C) in this case, it will *only* be on the basis of a legal presumption created in the statute, which allows an employer's intent to be "presumed." Therefore, as in *Harasyn*, the policy "of assuring victim compensation" and allowing for insurance should prevail as "it was not the tortfeasor's purpose to cause the harm for which liability is imposed" and "the presence of insurance has less effect on the employer-tortfeasor's actions." *See Harasyn*, 29 Ohio St. 3d at 176, 551 N.E.2d at 965.

CIC purports to argue that Ohio public policy now prohibits an insurer from indemnifying an insured/employer for any claim made pursuant to the intentional tort statute. (*See* CIC Merit Br. at 32.) But this Court has not found that the Ohio General Assembly intended to overrule or set aside the policy reasons this Court identified in *Harasyn* for allowing intentional tort insurance where it was not the tortfeasor's purpose to harm an employee. The policy considerations identified by the Court in *Harasyn* for allowing (and disallowing) intentional tort insurance remain persuasive even under R.C. §2745.01.

Accordingly, CIC's second asserted proposition of law that Ohio public policy prohibits an insurer from indemnifying an insured-employer for all tort claims brought under

R.C. §2745.01 lacks merit and does not demonstrate a basis for this Court to overrule the decision of the Court of Appeals.

C. Appellant's Proposition of Law No. III:

An insurer has no duty to indemnify an employee-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 insured's policy excludes coverage for "liability for acts committed by or at the direction of an insured with deliberate intent to injure."

As an "alternative" to its arguments that the Court of Appeals' decision fails to follow this Court's decisions and Ohio public policy (which, for the reasons stated above, both lack merit), CIC contends in its third Proposition of Law that "the imposition of a duty to indemnify in this case ignored the policy endorsement excluding coverage for 'liability for acts committed by or at the direction of an insured with deliberate intent to injure.'" (CIC Merit Br. at 43.) This position also lacks merit.

First, the Court of Appeals did not "impose" a duty on CIC to indemnify in this case or find that coverage exists under the Policy. As discussed above, the Court of Appeals held that genuine issues of material fact exist as to whether the "deliberate intent to injure [that] may be presumed *for purposes* [of R.C. §2745.01(C)] where there is deliberate removal of a safety guard" amounts to "deliberate intent *for the purposes of the insurance exclusion*" in CIC's Policy where there is no evidence (as the trial court found) that DTJ or Cavanaugh intended to harm or injure Mr. Hoyle or knew that injury to Mr. Hoyle was substantially certain to occur. (See Appellant's Apx. at 13.) There has been no final determination as to either liability or coverage in this case.

Second, the Court of Appeals did not err, but reasonably concluded that genuine issues of material fact exist regarding coverage under the terms of the Policy. It is black-letter law that insurance coverage is determined by reasonably construing the contract “in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed.” *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 211, 519 N.E.2d 1380, 1383 (Ohio 1988). “Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.” *Id.*, syllabus. “The insurer, being the one who selects the language in the contract must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect.” *Lane v. Grange Mut. Cos.*, 45 Ohio St.3d 63, 543 N.E.2d 488 (Ohio 1989). “If an exclusionary clause will reasonably admit of an interpretation that would preserve coverage for the insured, then as a matter of law, a court is bound to adopt the construction that favors coverage.” *Watkins v. Brown*, 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487 (Ohio App. 2d Dist. 1994).

The Policy CIC issued to Cavanaugh does not clearly preclude coverage where intent to injure is merely “presumed.” As the Court of Appeals observed, the Policy CIC issued to Cavanaugh on its face purports to afford coverage for intentional acts, defined to include acts which are “substantially certain to cause ‘bodily injury.’” The Policy excludes from this intentional act coverage only acts committed by the insured-employer with “the deliberate intent to injure.” The phrase “deliberate intent to injure” is not defined in the Policy, and the Policy does not reference R.C. §2745.01 in any way or state that an act committed with the “deliberate intent to injure” includes acts described in R.C. §2745.01(C) from which an intent to injure may be “presumed.”

A reasonable interpretation of the provisions in the Policy is that CIC intended for the phrase “deliberate intent to injure” as used in the Policy exclusion to apply only to situations where the employer actually intended to harm or injure an employee because the Policy expressly covers liability for “intentional acts” where the employer knew that injury was substantially certain to occur. That is, because the Policy expressly *affords* coverage for intentional acts where injury is “substantially certain” to occur, this indicates that the phrase “deliberate intent to injure” as used in the Policy exclusion covers intent different from that which exists in such covered situations, *i.e.*, the Policy exclusion is intended to cover only situations where the employer actually intended to harm or injure an employee, not where an employer merely knows that injury is substantially certain to occur. Accordingly, the exclusion also does not apply in the situation the Court of Appeals recognized might arise in this case, if Mr. Hoyle is able to demonstrate intent for purposes of establishing an employer intentional tort solely through a legal presumption. At the very least, a reasonable interpretation of the Policy that preserves coverage exists; therefore, the Court of Appeals was correct to adopt the construction that favors coverage. *See Watkins v. Brown*, 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487.

Irondale Industrial Contractors Inc. v. Virginia Surety Company, Inc., 754 F. Supp. 927 (N.D. Ohio 2010), the case on which CIC primarily relies to support its contention that there can be no coverage under the terms of this Policy in any circumstance, considered a completely different liability insurance policy. The policy in *Irondale* afforded liability insurance coverage only for “bodily injury by accident.” *Id.* at 930. Additionally, the policy expressly excluded from this accidental coverage: “Bodily injury **intentionally caused or aggravated by you** [Irondale], or bodily injury resulting from an act which is determined to

have been **committed by you [Irondale] with the belief that an injury is substantially certain to occur.**” *Id.* at 930 (emphasis added.). On this policy language, the court held that the policy excluded all employer intentional tort claims under Ohio’s intentional tort statute, including claims under R.C. §2745.01(C). *Id.* at 933.

The Policy at issue here does not provide insurance coverage only for accidental bodily injury, but instead expressly provides coverage for “intentional acts,” including acts where injury is substantially certain to occur. The only exclusion from the intentional act coverage in this Policy is for acts committed by the insured-employer with “the deliberate intent to injure.” As explained above, CIC did not make clear in its Policy what the phrase “deliberate intent to injure” means, and (as the Court of Appeals correctly found) the exclusion could reasonably be interpreted in light of all of the terms of the Policy to exclude only circumstances where the employer-insured actually deliberately intended to harm or injure the employee, not to circumstances where the employer’s intent to injure is merely “presumed.”

Irondale is simply not on point and does not support CIC’s contention that there are no circumstances under which indemnity coverage might exist in *this* case under *this* Policy.

CIC also argues that the Ninth Circuit erred by ignoring the principle that contracts of insurance are deemed to have been entered into by the parties “in view of the state of the law generally, at the time, as it related to the subjects of validity and coverage.” (CIC Merit Br. at 36.) CIC appears to contend this means that because R.C. §2745.01 was enacted before the Policy took effect, this necessarily means that CIC intended for the phrase “deliberate intent to injure” as used in the Policy exclusion to incorporate (or, in CIC’s words, “borrow”) all of the circumstances where intent may exist for purposes of establishing an employer’s liability under R.C. §2745.01. (*See id.*) The Court should reject this argument. Even acknowledging that R.C.

§2745.01 was enacted prior to the effective date of the Policy and the Policy should be viewed in light of this statute, there is absolutely nothing in the Policy itself which indicates that CIC intended for the phrase “deliberate intent to injure” as used in the Policy exclusion to pertain to or be defined to include all circumstances under which liability may be established under R.C. §2745.01. Indeed, as discussed above, the Policy on its face indicates that CIC intended to exclude from coverage only those situations where the employer actually intended to harm or injure the employee since the Policy expressly affords coverage for “intentional acts” that are “substantially certain” to cause injury. The Policy nowhere refers to a presumption of intent that may arise under R.C. §2745.01(C), much less clearly provide that such a legal presumption somehow constitutes a “deliberate intent to injure.”

Furthermore, if CIC’s view were accepted and all situations in which an employee may establish intent for purposes of establishing employer liability under R.C. §2745.01 were incorporated into the Policy exclusion, then one must wonder what “Intentional Act” coverage CIC purported to sell Cavanaugh in the Employers Liability Coverage Form for an additional annual premium of \$2,657.00. If all situations in which an employee may establish intent for purposes of establishing an employer intentional tort under R.C. §2745.01 were incorporated into the Policy exclusion as CIC appears to contend, then all “Intentional Acts” defined in the Policy would fall within the Policy exclusion and no “Intentional Act” defined in the Policy would be covered. This would certainly render the “Intentional Act” coverage purportedly afforded in the Employers Liability Coverage Form (for which Cavanaugh paid CIC an additional premium) illusory. CIC argues that the Policy is not illusory because it “provided other coverage, such as negligence-only coverage when employers are sued both as employers and in some other capacity, and in other situations not involving the strict employment relationship (i.e. ‘dual

capacity' and 'third-party over' cases)." (CIC Merit Br. at 39.) This argument is utterly inconsistent with the plain language in CIC's Employers Liability Coverage Form and this Court should reject it. The Employers Liability Coverage Form expressly states 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.

(CIC Supp. at 110) (Emphasis added.)

Cavanaugh certainly would never have concluded from the language CIC used in the Employers Liability Coverage Form that it was purchasing only "negligence-only coverage when employers are sued both as employers and in some other capacity, and in other situations not involving the strict employment relationship." From Cavanaugh's perspective, it purchased the additional coverage in the Employers Liability Coverage Form to supplement its workers compensation insurance and to cover those sums it became "legally obligated to pay as damages because of 'bodily injury' sustained by [its] 'employee[s]' in the 'workplace' and caused by an 'intentional act.'" (*See id.*) There would have been absolutely no reason for Cavanaugh to have purchased the additional coverage in the Employers Liability Coverage Form if Cavanaugh believed that the Policy excluded coverage for all intentional tort claims under R.C. §2745.01, even when it could not be shown that Cavanaugh had a deliberate intent to injure an employee.

In the end, no matter what the state of the law, it is the burden of the *insurer*, "being the one who selects the language in the contract," to be clear and exact as to what an exclusion in its policy covers in order for the exclusion to be given effect. *See Lane*, 45 Ohio St.3d 63, 543 N.E.2d 488. CIC, simply, did not clearly and exactly state in the Policy the meaning of the exclusion for acts committed with a "deliberate intent to injure" in light of R.C.

§2745.01. The Court of Appeals did not err in finding that CIC is not entitled to summary judgment regarding indemnity coverage at this juncture because a reasonable interpretation of the Policy exists that preserves coverage under circumstances that now might arise in this case. The Court of Appeals did not err, but correctly found, that CIC was not entitled to summary judgment because a reasonable interpretation of the Policy allows for coverage in the situation where intent to injure is merely “presumed.” See *Watkins v. Brown*, 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487.

IV. CONCLUSION

For all of the reasons stated above, DTJ and Cavanaugh respectfully request that this Court affirm the decision of the Court of Appeals. The Court of Appeals’ decision did not run afoul of this Court’s decisions regarding what is required to establish an employer intentional tort in Ohio or Ohio public policy regarding insurability for certain intentional acts. Instead, the Court merely held, given the decision of the trial court that Mr. Hoyle may proceed with an employer intentional tort claim under R.C. §2745.01(C), that indemnity coverage also may exist under the terms of *this* Policy. This was a correct decision based on the law in Ohio that provisions of a contract of insurance that are reasonably susceptible of more than one interpretation are construed strictly against the insurer and liberally in favor of the insured.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of Defendants-Appellees DTJ Enterprises, Inc. and Cavanaugh Building Corporation has been transmitted via e-mail pursuant to S.Ct.Prac.R. 3.11(B)(1) this 11 day of April 2014 to the following:

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