

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 13-1405

DUANE ALLEN HOYLE
Plaintiff-Appellee,

-vs-

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

and

THE CINCINNATI INSURANCE COMPANY
Intervener-Appellant.

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

MERIT BRIEF OF
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INTRODUCTION

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 its Brief, this carrier has been marketing an “Employers Liability Coverage Form – Ohio” endorsement to businesses in this state that explicitly furnishes protection against workplace “intentional act” claims. *Supplement to the Merit Brief of Appellant the Cincinnati Insurance Company (“CIC’s Supp.”)*, p. 110-114. As recognized by the Ninth District below, these 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., 9th Dist. Summit No. 26579, 2013-Ohio-3223, ¶ 8. The phrase “intentional act” has been defined in a manner so that a deliberate intent to injure is not required to trigger coverage. *CIC’s Supp.*, p. 113. 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 defended against inferred intent workplace intentional tort claims that are brought under R.C. 2745.01. In this case, a premium of \$2,657.00 was paid for the "Employer Liability Coverage" endorsement. *CIC's Supp.*, p. 109.

Common Pleas Judge Thomas A. Teodosio determined below that genuine issues of material fact exist upon the question of whether an "equipment safety guard" was deliberately removed for purposes of R.C. 2745.01(C). It remains to be determined whether Defendant-Appellees, DTJ Enterprises, Inc. and Cavanaugh Building Corp. (collectively "DTJ"), will be able to rebut the interference of an "intent to injure" that is imposed by the statute. If Plaintiff-Appellee, Duane Allen Hoyle, is successful through this approach, liability will be imposed even in the absence of direct proof that the employer actually intended to cause the injury. That is exactly the type of claim that CIC's workplace "intentional act" provision must be designed to cover. Otherwise, that entire endorsement is meaningless. Since 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 insurer is obligated to at least defend the claim. *Sharonville v. American Empl. Ins. Co.*, 109 Ohio St.3d 186, 189, 2006-Ohio-2180, 846 N.E. 2d 833, ¶13, citing *Sanderson v. Ohio Edison Co.*, 69 Ohio St.3d 582, 635 N.E. 2d 19 (1994), paragraph one of the syllabus.

In affording a logical meaning to CIC's workplace "intentional act" coverage, the Ninth District majority correctly recognized that the presumption of an intent to injure

furnished by R.C. 2745.01(C) does not *ipso facto* allow the coverage to be denied on the basis of the deliberate acts exclusion. *Hoyle*, 2013-Ohio-3223, at ¶19-21. As CIC has properly acknowledged, a *prima facie* case is established if the presumption is left un rebutted. *Merit Brief of Appellant the Cincinnati Insurance Company ("CIC's Merit Brief")*, p. 18. Plaintiff is in full agreement that if the employer fails to overcome the presumption, he will be entitled to either a directed verdict imposing liability or a jury instruction to the same effect (or both). *Id.*, pp. 18-19. "[T]he employer's intent to injure an employee is conclusively inferred as a matter of law from the act of deliberately removing an equipment safety guard or deliberately misrepresenting a toxic or hazardous substance in the workplace." *Id.*, p. 39. But since the requisite *mens rea* is effectively established only through a legal fiction, there will be no basis for denying coverage on the grounds that the employer actually acted with a deliberate intent to injure. Neither R.C. 2745.01, nor any other statute that CIC has cited, even remotely suggests that the statutory presumption also applies to coverage determinations.

The reason that CIC's Brief mentions the three-part definition of "intentional act" only in passing 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 to discontinue the marketing of the workplace "intentional act" endorsement. 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 founded upon R.C. 2745.01(C).

CIC evidentially wants to market insured-friendly policies without having to

honor the commitments that have been made, and needs this Court's assistance to circumvent the express terms of its endorsement. Noticeably absent from both the insurer's Memorandum in Support of Jurisdiction and Merit Brief is any plausible 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, at ¶ 23 (Hensal, J., dissenting). Rather than enable insurance carriers to dupe businesses into purchasing a workplace "intentional act" endorsement that is purely illusory, this Court should leave the Ninth District's sound decision intact.

STATEMENT OF CASE AND FACTS

For purposes of this coverage dispute, the pertinent case history and relevant facts may be succinctly stated as follows.

Plaintiff Hoyle commenced his workplace intentional tort action against Defendant DTJ on March 19, 2010. *T.d. 1*. The Complaint alleged that he had been employed as a carpenter on March 24, 2008 at the Wyoga Place Apartments Construction Project. *Id., p. 2, paragraph 11*. His superiors directed him to work on a make-shift scaffold apparatus formed by placing a platform between two vertical extension ladders. *Id., paragraph 12*. No guards or other mandatory safety features were furnished on the elevated work platform. *Id., paragraph 13*. All too predictably, the haphazard structure collapsed, causing Plaintiff to fall 13 feet onto the concrete pavement. *Id., p. 5, paragraph 14*. Significantly for purposes of the instant appeal, he specifically alleged pursuant to R.C. 2745.01(C) that an "equipment safety guard," which would have prevented the supports from separating, had been deliberately removed by the employer. *Id., p. 13, paragraph 41*.

Defendant DTJ submitted an Answer denying liability and interposing various affirmative defenses on April 27, 2010. *T.d., 6*. The parties then proceeded with discovery.

On June 2, 2011, Intervenor-Appellant, CIC, moved to join the proceedings. *T.d., 40*. The request was granted on June 29, 2011. *T.d., 41*. Approximately two weeks later, the insurer submitted its Intervenor's Complaint for Declaratory Judgment. *T.d., 45*. The pleading alleged that Defendant DTJ had purchased commercial liability coverage from CIC that was in force at the time of Plaintiff's fall. *Id., p. 3, paragraph 8*. The insurer sought a judicial determination that no coverage was owed at all for the employer intentional tort claims that had been alleged. *Id., pp. 13-14, paragraphs 12-*

17. Plaintiff submitted an Answer denying the insurer's allegations on July 19, 2011. *T.d.*, 48. A similar responsive pleading was filed by Defendant DTJ on August 4, 2011. *T.d.*, 55.

Defendant DTJ, on August 11, 2011, moved for summary judgment upon all of Plaintiff's claims. *T.d.*, 57. The employer asserted that the carpenter would be unable to establish a deliberate intent to injure as required by R.C. 2745.01. *Id.* Intervenor CIC filed its own Motion for Summary Judgment on August 30, 2011 arguing that no commercial liability was owed to Defendant DTJ as a matter of law. *T.d.*, 72.

Plaintiff opposed Intervenor CIC's Motion on September 9, 2011, and observed that liability could potentially be imposed without demonstrating that the employer actually intended to cause the carpenter to fall off the make-shift, work platform. *T.d.*, 75. He also opposed Defendant DTJ's Motion on September 16, 2011. He cited deposition testimony revealing *inter alia* that Plaintiff and the other workers had been prohibited from inserting pins and clips into the ladder jack brackets that had been supplied by the manufacturer to prevent separation and collapse. *Id.*, pp. 29-34. An affidavit was submitted that had been executed by a board-certified safety engineer, Phillip L. Colleren, C.S.P., confirming that the haphazard elevated platform that had been created violated numerous regulations and standards. *T.d.*, 87, paragraphs 14-15. He explained that:

The pins and clips are safety guards that prevent detachment of the brackets from the ladders. A label on the bracket warns readers that failure to use the bracket[s] in accordance with the precautions can result in injury.

(Emphasis added, citation omitted) *Id.*, p. 5. Reply and Surreply briefs then followed. *T.d.*, 88, 91, 94, 96, & 105.

In a judgment entry dated April 20, 2012 the trial court granted summary

judgment in favor of Defendant DTJ only in part. *T.d., 123*. While the court concluded that Plaintiff could not establish that a direct intent to injure under R.C. 2745.01(A)-(B), genuine issues of material fact existed upon the claim relating to the statutory presumption set forth in Subsection (C). *Id.* The decision specifically noted that the pins could potentially qualify as “equipment safety guards” under the controlling precedents. *Id., p. 6*. The court further concluded that no coverage was owed under CIC’s policy for any claims based upon R.C. 2745.01. *Id., pp. 6-7*.

Defendant DTJ moved for reconsideration on April 26, 2012, arguing that the trial court ruled before the employer had been afforded a proper opportunity to respond. *T.d., 126*. DTJ then submitted a Brief in Opposition to Motion for Summary Judgment of Intervening Plaintiff, the Cincinnati Insurance Company on May 10, 2012. *T.d., 128*. The trial court granted an opportunity for reconsideration and leave to submit the response five days later. *T. d., 130*. CIC then tendered a Reply Brief on May 25, 2012. *T.d., 131*. In a Judgment Entry dated July 18, 2012, the trial court reaffirmed the determination that no coverage was owed by CIC. *T.d., 146*. A finding of “no just reason for delay” was included in the ruling. *Id., p. 4*.

At the conclusion of briefing and oral argument, the Ninth District reversed the trial court’s coverage determination. *Hoyle, 2013-Ohio-3223*. Judge Hensal dissented on the grounds that all intentional tort claims were excluded notwithstanding the workplace “intentional acts” endorsement. *Id. at ¶ 23*.

This Court has now accepted jurisdiction over this appeal. *Hoyle v. DTJ Ents., Inc., 137 Ohio St.3d 1421, 2013-Ohio-5285, 998 N.E. 1177*.

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 Brief.

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.

A. EFFECT OF THE STATUTORY PRESUMPTION

The first Proposition of Law seeks an adjudication of an issue that is neither ripe for consideration, nor contrary to the Ninth District's holding. In the order dated April 20, 2012, the trial court concluded that genuine issues of material fact existed over whether the pins used to hold the ladder jack to the ladder qualified as equipment safety guards. In the ensuing appeal, the Ninth District held that the presumption merely shifted the burden of producing the evidence, and serves no purpose once it has been sufficiently rebutted. *Hoyle*, 2013-Ohio-3223, at ¶18. That is largely the same argument that CIC is now making. *CIC's Merit Brief*, pp. 16-18.

The only difference between the Ninth District's holdings and CIC's position under this Proposition of Law appears to be the insurer's insinuation that the mere presentation of a modicum of rebuttal evidence will cause the statutory presumption to "disappear" for good. *CIC's Merit Brief*, pp. 19-20. Acceptance of this unprecedented position would render R.C. 2745.01(C) toothless. Any employer could simply assert in an affidavit that a safety guard had been removed to speed up production,

notwithstanding the increased risk of injuries that would result, but without the specific intention to injure the plaintiff. This Court should reject the notion that the General Assembly took the time to prepare, debate, and approve a statutory presumption that can be so easily defeated.

While there can be no doubt that the objective of R.C. 2745.01 is to substantially limit the opportunities for recovering civil damages from an employer, the statute “does not eliminate the common-law cause of action for an employer intentional tort.” *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 263, 2010-Ohio-1027, 927 N.E.2d 1066, 1080, ¶56, citing *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, paragraph three of the syllabus. Those who deliberately expose their workers to known dangers can still be held liable for damages under the statutory “substantial certainty” test. *Smith v. Ray Esser & Sons Inc.*, 9th Dist. No. 12CA010150, 2013-Ohio-1095, ¶14-25.

This legislation was not completely anti-employee, as the General Assembly furnished an important presumption in R.C.2745.01(C) providing that:

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

The statutory presumption that has been established is thus concise and unambiguous, as the Twelfth District has recently explained:

Simply stated, R.C. 2745.01(C) “establishes a rebuttable presumption that the employer intended to injure the worker if the employer deliberately removes a safety guard.” *Rivers v. Otis Elevator*, 2013–Ohio–3917, 996 N.E.2d 1039, ¶25 (8th Dist. 2013).

Downard v. Rumpke of Ohio, Inc., 12th Dist. Butler No. CA2012-11-218, 2013-Ohio-

4760, ¶20.

The General Assembly has thus singled-out those workplace intentional tort claims involving deliberate removals of safety guards for special treatment. Employers rarely (if ever) disable or eliminate such protective devices in an effort to inflict harm upon a specific worker, but regularly do so to either cut costs or maximize the speed of production (or both). The substantial certainty of injuries and fatalities that follows is now fully appreciated, and thus the enactment leaves one avenue for securing civil damages that does not necessarily require a demonstration of a specific intent to injure. This Court should decline CIC's invitation to judicially eradicate the only remnant of the common law standard that that has been left intact.

For this reason, CIC's assertion that this Court's precedents require a specific intent to cause harm in all circumstances is simply untrue. The equipment safety guard presumptions was not at issue in *Stetter*, 125 Ohio St. 3d 280, *Kaminski*, 125 Ohio St. 3d 250, and *Houdek v. ThyssenKrupp Mats. N.A., Inc.*, 134 Ohio St. 3d 491, 2012-Ohio-5685, 983 N.E. 2d 1253. And while Subsection (C) of R.C. 2745.01 was examined in *Hewitt v. L.E. Myers Co.*, 134 Ohio St. 3d 199, 2012-Ohio-5317, 981 N.E. 2d 795, this Court stopped well short of suggesting that the presumption serves no substantive function and evaporates as soon as the employer disclaims any intent to injure.

The Ninth District determined below that the "presumption shifts the evidentiary burden of producing evidence, i.e., the burden of going forward, to the party against whom the presumption is directed." *Hoyle*, 2013-Ohio-3223, ¶18, quoting *Hall v. Kemper Ins. Cos.*, 4th Dist. Pickaway No. 02CA17, 2003-Ohio-5457, ¶92 (citations omitted). Given that the General Assembly must have enacted R.C. 2745.01(C) in order to further an important policy objective, such as discouraging the deliberate removal of equipment safety guards and compensating those who are injured by such unacceptably

dangerous practices, a substantive construction should be ascribed to the enactment. Temporarily shifting the burden of production, without more, accomplishes nothing.

An example of a substantive presumption that achieves more than just shifting the burden of proof can be found in *State v. Myers*, 26 Ohio St. 2d 190, 271 N.E. 2d 245 (1971). At issue in that case was the statutory presumption establishing that a motorist with a sufficiently high blood-alcohol concentration measurement is presumed to be under the influence of alcohol. *Id.*, 26 Ohio St. 2d at 198. Apparently in reliance upon the presumption, the prosecutor had not submitted any expert testimony upon that pivotal element of the offense. *Id.*, at 199. Proof had been admitted at trial, however, with regard to whether the motorist was indeed visibly impaired. *Id.*, at 192-193. In his defense, he had testified that his alcohol consumption had been minimal and any decreased mental alertness was attributable to prescription medication he was taking. *Id.*, at 193.

After observing that the “disappearing” presumption theory had been recognized in *Ayers v. Woodard*, 166 Ohio St. 138, 140 N.E. 2d 401 (1957), this Court drew a distinction between evidentiary and substantive presumptions. *Myers*, 26 Ohio St. 2d at 199-200. The alcohol impairment presumption not only supplanted expert testimony, but “also bears directly on an issue material to the case, i.e., whether Defendant was under the influence of alcohol.” *Id.*, at 199. The unanimous decision then reasoned that:

We believe that the General Assembly, in enacting R.C. 4511.19(B), fully intended that the trier of the facts be instructed regarding the presumption contained therein when properly administered test results are available. R.C. 4511.191, the implied consent statute, evidences a bold legislative effort to procure a chemical test of body fluid or breath from those suspected of operating a motor vehicle while under the influence of alcohol. Hopefully, the fact that the law requires suspects to be tested will have the effect of

detering those under the influence from driving; a loss of the driving privilege being a sanction for an unlawful refusal to be tested. Furthermore, the General Assembly has provided a means of producing scientifically reliable evidence bearing on the innocence or guilt, without which the trial of those alleged to have been driving under the influence of alcohol often tends to be turned on emotional rather than factual considerations.

If we were to hold that this statutory presumption is to be rendered nonproductive by a police officer testifying that in his opinion defendant was under the influence of alcohol, or the admission of other evidence descriptive of a defendant's appearance or behavior, we would be acting contra to the intended thrust of the statute. We thus believe this statutory presumption to be significantly different from the common-law presumption considered in *Ayers v. Woodard*, supra. [emphasis added]

Id., at 200. This Court unanimously concluded that even though the motorist exercised his right to submit rebuttal evidence, the presumption could still be supplied to the jury so long as the preliminary requirements were satisfied and they were advised that the presumption was rebuttable. *Id.*

Plaintiff is mindful that *Myers*, 26 Ohio St. 2d 190, has been distinguished as a criminal case. *Forbes v. Midwest Air Charter, Inc.*, 86 Ohio St. 3d 83, 86, 1999-Ohio-85, 711 N.E. 2d 997. But *Myers* is being cited in this instance only to demonstrate that the General Assembly can and does adopt statutory presumptions that serve more than just procedural purposes. Here, the legislature has decided to ensure that those disreputable employers that persist in endangering their workers' lives and safety by deliberately removing critical guards will be held accountable, at least civilly. Through the subrogation rights that are afforded under R.C. 4123.931, the Ohio Bureau of Workers' Compensation will also be able to recoup the benefits that are paid in such instances, leaving the employer and its insurer ultimately responsible. This Court should confirm that under its plain and ordinary terms, R.C. 2745.01(C) preserves a

separate approach for imposing intentional tort liability without proof of a specific intent to injure, which does not “disappear” as soon as rebuttal testimony is offered.

B. ESTABLISHING LIABILITY THROUGH THE PRESUMPTION

Supplying substantive force to R.C. 2745.01(C) is entirely consistent with CIC’s position. The insurer has acknowledged that if the employer fails to overcome the presumption, “the plaintiff’s burden of proof will be satisfied and it will be established conclusively that the employer acted with the specific deliberate intent to injure the employee which will result in liability being posed under the EIT statute.” *CIC’s Merit Brief*, p. 18. The point that appears to have been missed is that it is the deliberate removal that must be rebutted, not the deliberate intent to injure that is inferred by the statute.

And even if Subsection (C) directed otherwise, the issue is ultimately one for the trier-of-fact once the conditions for the presumption (i.e., a deliberate removal of an equipment safety guard) have been sufficiently established for summary judgment purposes. As is their prerogative, jurors are free to disbelieve even supposedly “uncontroverted” rebuttal evidence. *Ace Seal Baling, Inc. v. Porterfield*, 19 Ohio St.2d 137, 138, 249 N.E.2d 892 (1969); *Bradley v. Cage*, 9th Dist. Summit No. 20713, 2002-Ohio-816, *4-5. In *Downard*, 2013-Ohio-4760 for example, the Twelfth District held that even though the defendant presented more than a vague denial of its intent to injure the plaintiff by removing the safety device, a jury trial was still necessary. The defense witnesses’ testimony could be deemed incredible, and disregarded by the trier-of-fact. *Id.*, ¶68-78. In that instance, the plaintiff was entitled to rely on the invocation of the presumption created by R.C. 2745.01(C) as grounds to sustain her burden at trial to establish by the statutorily created, circumstantial inference that an intentional tort occurred through the removal of an equipment safety guard without even proving the

employer's actual intent to injure the employee. *Id.*

CIC relies heavily upon on the decision in *Rudisill v. Ford Motor Co.*, 709 F.3d 595, 605 (6th Cir.2013), for the proposition that when the presumption created by R.C. 2745.01(C) has been successfully rebutted with the evidence offered by the employer, the presumption disappears as if it had never arisen. *CIC's Merit Brief p. 20.* But CIC has omitted an important aspect of the Sixth Circuit's holding. Merely submitting some competent evidence to rebut the presumption is insufficient to remove the matter from the trier-of-fact's resolution if the evidence adduced is weak or entirely based on self-serving, or self-congratulatory affidavits. *Rudisill* at 606. As recognized by the Sixth Circuit, a plaintiff need not present evidence of the employer's actual deliberate intent to injure the employee in relying on the R.C. 2745.01(C) presumption at trial. *Id.* at 608. In other words, if the presumption is un rebutted, or the employer adduces weak evidence, such as the self-serving "we didn't mean to hurt anyone" affidavits, then a plaintiff may establish a prima facie intentional tort case without ever having to actually demonstrate the deliberate intent to injure the employee that would invoke the exception to liability established by CIC's insurance policy language. Establishing an employer intentional tort claim and the applicability of an insurance exclusions are therefore separate considerations.

Accordingly, the prospect, if not substantial likelihood, remains that a jury in this case will find that the statutory presumption has not been sufficiently rebutted and "the employer's intent to injure [the] employee is conclusively inferred as a matter of law from the act of deliberately removing an equipment safety guard or deliberately misrepresenting a toxic or hazardous substance in the workplace." *CIC's Merit Brief, p. 39.* This *mens rea* is inferred only for purposes of allowing damages to be recovered under R.C. 2745.01, even where the employer has removed a safety guard without

actually intending to injure or kill the plaintiff. Since there is no legal authority that allows CIC to apply the same inference to its intentional acts exclusion, the attempt to evade coverage was properly rejected by the appellate court. The majority explained 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 sic.)

Hoyle, 2013-Ohio-3223, at ¶ 19.

Because Ohio’s approach to compensating injured workers is unique, this Court should disregard CIC’s references to California and Kentucky authorities cited in support of the proposition that R.C. 2745.01(C) should be read to require a plaintiff to always produce evidence of deliberate intent to injure in order to establish a claim pursuant to R.C. 2745.01. In *Everest Nat. Ins. Co. v. Valley Flooring Specialties*, E.D.Cal. No. F 08-1695 LJO GSA, 2009 WL 997143, the court explained that under California’s workers compensation scheme, the employer’s insurance policy had two components, a liability and a workers compensation component. *Id.* at *10; *see also Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal.3d 903, 917, 226 Cal.Rptr. 558, 718 P.2d 920 (1986) (“Rather than filling any gaps in coverage, [the insured’s] proffered construction of the policy would require [the insurer] to pay for [the employee’s] injuries twice, once by providing * * * workers’ compensation benefits owing to [the employee] * * *, and the second time by providing [coverage] for [employee’s] tort suit as a nonemployee.”). The purpose of precluding coverage under the liability policy was to avoid a double recovery by forcing the insurer to pay twice, once from each component of the single policy. *Id.* Such a concept is not at issue in the current case and it is unclear whether citing to *Everest* offers any persuasive discussion given the

disparity between California and Ohio's employer insurance coverage. *See also Moore v. Environmental Const. Corp.*, 147 S.W.3d 13, 2004 WL 1906172 (Ky.) (recognizing that Kentucky requires deliberate intent to injure in all intentional tort cases, unlike Ohio's statutory scheme providing the rebuttable presumption of a prima facie case for damages upon evidence the employer removed an equipment safety guard). This Proposition of Law lacks merit and should be overruled.

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 the second Proposition of Law, 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 despite the additional premiums they have paid. *CIC’s Merit Brief*, pp. 28-32.

In an obvious effort to produce an endorsement 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. *CIC’s Supp.*, pp. 110-114. The insurer must have envisioned that some sort of workplace “intentional act” claims would be covered, and the only conceivable examples are the equipment safety guard cases. As previously discussed, R.C. 2745.01(C) allows liability to be imposed against the insured employer even in the absence of proof of an actual direct intent to injure.

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, ¶ 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 actual, malicious misconduct, including inferred 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). Therefore, as long as the exclusion language does not violate public policy, the definition of “intentional act” provided by the policy controls.

Ohio public policy long favored allowing insurance coverage in intentional tort cases as long as there was no demonstrable or actual, deliberate intent to injure the employee. *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St.3d 173, 551 N.E.2d 962 (1990); *Presrite Corp. v. Commercial Union Ins. Co.*, 113 Ohio App.3d 38, 42, 680 N.E.2d 216 (8th Dist.1996) (noting that public policy encourages insurance coverage for intentional torts not predicated on a deliberate intent to injure the employee). CIC wants to conflate the public policy against insurance coverage for the employer’s actual and deliberate intent to injure, with the employer’s action in removing a safety feature, which legally becomes an act compensable as an employer intentional tort through 2745.01(C) regardless of the actual intent to injure. *See, e.g., Downard*, 2013-Ohio-4760, ¶ 74 (a jury could impose liability in the face of the employer’s evidence demonstrating a functional purpose for removing the equipment safety guard and the affidavits from the employer’s representatives stating there was no intent to injure the plaintiff).

Plaintiff is in full agreement that no coverage is available in Ohio, as a matter of law, for punitive damages recovered as a result of malicious wrongdoing. But individuals and business are still entitled to issuance protection against compensatory awards that are imposed when the intent to cause harm is inferred from the

surrounding facts and circumstances. See e.g., *Harasyn*, 49 Ohio St.3d 173; *Presrite Corp.*, 113 Ohio App.3d 38. Under the common law “substantial certainty” test, the employer’s intentional act was inferred from the employer’s decision to expose the worker to the virtual inevitability of harm that was known to exist. *Blankenship v. Cincinnati Milacrom Chems., Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572 (1982); *Fyffe v. Geno’s, Inc.*, 59 Ohio St.3d 115, 118, 570 N.E. 2d 1108 (1991). Thus, the definition of intentional tort “encompass[ed] two different levels of intent. The first level, which [this Court] refer[red] to as ‘direct intent,’ is where the actor does something which brings about the exact result desired. In the second, the actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result.” *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345, (2d Dist.) ¶27, citing *Harasyn*. Ultimately, public policy permitted employers to purchase insurance for compensatory damages awarded based on the intentional tort not involving an employer’s intent to bring about the exact result desired, the injury to the employee. *Id.* at ¶28. The policy of assuring innocent victims compensation should prevail in situations where no deliberate intent to injure was demonstrated. *Harasyn*, at 176.

That same species of recovery continues to survive, albeit in a restricted form, in the equipment safety guard provision set forth in R.C. 2745.01(C). Evidentially, the General Assembly has determined that the deliberate removal of such protection should subject the employer to damages even in the absence of proof of a specific intent to injure that employee. Such reprehensible practices have been afforded a unique status under the statute, yet CIC and its *amici* expect this Court to override the distinction and require proof of direct intent in all cases.

There is no need to judicially repeal R.C. 2745.01(C), as the solution available to

CIC is quite simple. In order to avoid coverage for all workplace intentional torts, as CIC is seeking, the carrier need only remove the endorsement that broadened the policy and obligated the Ninth District to recognize contractual duties to defend and indemnify. *Hoyle*, 2013-Ohio-3223, at ¶ 8.

Just a few 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, at ¶ 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, providing coverage for employer intentional tort claims in an endorsement while simultaneously denying coverage for all employer intentional tort claims through a general policy exclusion. Thus, CIC’s second Proposition of Law should be rejected.

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."

A. EXCLUSION OF COVERAGE THROUGH THE INFERENCE

The final Proposition of Law has already been refuted, for the most part, in Plaintiff's response to the first two propositions of law. *CIC's Merit Brief*, pp. 33-43. While CIC's own policy does contain a general exclusion for a "deliberate intent to injure[.]" *CIC's Supp.*, p. 74, 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." *Id.*, p. 110. And, a three-part definition of "intentional act" has been adopted by the carrier that does not involve deliberate or malicious wrongdoing. *Id.*, p. 113. The strong prospect remains that the deliberate removal of a safety guard will subject Defendant DTJ to liability under R.C. 2745.01(C), even though the employer may not have specifically intended for Plaintiff to suffer his devastating fall.

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 (1984); *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 218-219, 2003-Ohio-5849, 797 N.E.2d 1256. Except where the General Assembly has deliberately intervened, insuring agreements will be governed by the plain and ordinary meaning of their terms, presumed to codify the parties' intent. *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶ 15;

City of Sharonville v. American Empl. Ins. Co., 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 6.

CIC cannot seriously believe that the applicability of the intentional acts exclusion can be established through a mere inference, and as a matter of law no less. It is a familiar maxim that once an initial right to coverage has been established, the insurer bears the burden of demonstrating that a policy exception or exclusion is applicable. *Continental Ins. Co. v. Louis Marx & Co., Inc.*, 64 Ohio St.2d 399, 401-402, 415 N.E.2d 315 (1980). “An insurer who claims that a policy exclusion prohibits insurance coverage must show that the exclusion specifically applies.” *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶19, citing *Continental Ins. Co. v. Louis Marx & Co., Inc.*, 64 Ohio St.2d 399, 401, 415 N.E.2d 315 (1980). It must be remembered that exclusions in an insurance contract must be clear and unambiguous to be enforceable. *Id.*, citing *Moorman v. Prudential Ins. Co. of Am.*, 4 Ohio St.3d 20, 21, 445 N.E.2d 1122 (1983); *Nationwide Ins. Co. v. Johnson*, 84 Ohio App.3d 106, 109, 616 N.E.2d 525 (12th Dist.1992). Any uncertainty must be resolved in favor of the insured. *American Fin. Corp. v. Firemen’s Fund Ins. Co.*, 15 Ohio St.3d 171, 173, 239 N.E. 2d 33 (1968); *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 313 N.E.2d 844 (1974), syllabus; *Csulik v. Nationwide Mut. Ins. Co.*, 88 Ohio St.3d 17, 20, 2000-Ohio-262, 723 N.E.2d 90.

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 CIC and its policyholder, DTJ. 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. *CIC's Supp.*, p. 113. 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, CIC must establish the applicability of the intentional acts exclusion without the benefit of any presumptions or inferences.

In *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, 942 N.E.2d 1090, ¶ 10, for example, four relevant insurance policies were reviewed to determine whether the insurers met their burden to demonstrate the applicability of an exclusion in a situation involving the insured placing a Styrofoam, deer-shaped target on a stretch of a county highway. An unsuspecting motorist was injured taking evasive actions to avoid what he thought was a live animal. *Id.* at ¶ 2. In affirming the applicability of the exclusion only with regard to one of the four insurers, it was noted that the relevant policy language for “all intentional acts” of the insured, encompassing the act of willfully placing the Styrofoam, deer target on the highway. *Id.* at ¶ 60. Three of the insurance policies considered limited the exclusion to “harm caused intentionally” or “expected or intended” by the insured, and thus were deemed inapplicable because the insurer provided no evidence that the insured “intended” to harm anyone, even as misguided as he was in playing a potentially catastrophic prank. *Id.* The emphasis was on the difference between exclusions for intentional or expected injuries from exclusions from intentional acts. *Id.*

Following the rationale behind *Campbell*, CIC has not established that DTJ, as the insured, caused bodily injury as a result of intentional criminal acts, and therefore, failed to establish the applicability of the exclusion. *See Sauer v. Crews*, 10th Dist. No. 12AP-320, 2012-Ohio-6257 (the insurer failed to specifically demonstrate the applicability of the exclusion, denying coverage injury arising out of the transportation of mobile equipment, because the trailer was parked and unattached at the time of the

accident, and thus not being “transported”); *Kuss v. U.S. Fid. & Guar. Co.*, 2nd Dist. Montgomery No. 19855, 2003-Ohio-4846, ¶ 14 (insurer failed to present evidence supporting the applicability of the exclusion, and therefore, the trial court’s decision granting summary judgment was in error).

B. INAPPLICABILITY OF THE DELIBERATE ACTS EXCLUSION

CIC’s exclusion for a “deliberate intent to injure” is undeniably a general policy provision. *CIC’s Supp.*, p. 74. 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. *Id.*, pp. 110-114. 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 (1976). It has yet to be determined by the trier-of-fact whether Defendant DTJ acted with the “deliberate intent to injure” as required to exclude coverage. *Id.*, 74. Given the availability of the presumption, damages can be recovered without such a finding.

This particular scenario is distinguishable from the facts of *Ward*, 129 Ohio St.3d 292, in which the insured was only seeking a defense, not indemnity. CIC’s reliance on *Ward* for the proposition that the exclusion can be invoked without the trier-of-fact’s determination of liability is misplaced. In *Ward*, the exclusion in the policy at issue specifically denied coverage for all employer intentional tort claims, even the substantial certainty variety. *Id.* at ¶ 9. In that case, this Court’s holding that a trier-of-fact’s resolution of the claims was unnecessary was sensible in light of the uncontested fact that no employer intentional tort could ever fall under the terms of coverage.

In this case, the *Ward* holding, that a determination by the fact-finder is unnecessary to resolve the coverage issue, is inapplicable. If the trier-of-fact determines

that DTJ failed to rebut the presumption arising from its removal of an equipment safety guard, Plaintiff will not have to produce any evidence of DTJ's deliberate intent to injure that would implicate the exclusion that CIC is utilizing to deny coverage. CIC's resort to the exclusion is premature, and purely speculative.

C. THE ILLUSORY ENDORSEMENT

And perhaps more importantly, CIC remains unable to identify any meaningful examples of how coverage could be afforded under the workplace "intentional act" endorsement if these misguided Propositions of Law are adopted. The dissenting judge was also notably silent on this critical point. *Hoyle*, 2013-Ohio-3223, at ¶ 23 (Hensal, J., dissenting).

As the Ninth District majority appreciated below, constructions and interpretations should be avoided that produce illusory coverage obligations. *Glover v. Smith*, 1st Dist. Hamilton No. C-02-0192, 2003-Ohio-1020, ¶ 22; *Pilgrim v. Cigna Property & Cas. Ins. Co.*, 64 Fed.Appx. 13 (9th Cir.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.*, 7th Dist. Mahoning No. 88 CA 134, 1989 WL 3935, *3.

All the insurer has been able to do is point to *Ward*, 129 Ohio St. 3d 292, and theorize that since some "negligence-only coverage" is afforded there is nothing illusory about the policy. *CIC's Merit Brief*, pp. 39-40. The flaw in that ill-conceived logic is readily apparent. The "Employers Liability Coverage Form – Ohio" that DTJ purchased for an additional \$2,657.00 offered the promise of protection against workplace "intentional act" claims, not awards predicated upon negligence. *CIC's Supp.*, pp. 109-114. The dual capacity, third-party over, and other causes of action that CIC is

cryptically referencing do not involve either the traditional employer-employee relationship or require any intentional wrongdoing. They are already covered (subject to the express conditions and exclusions) in the Commercial General Liability Coverage Form. *Id.*, pp. 50-60. So long as the bodily injury or property damage arises from an occurrence that is accidental from the standpoint of the insured, commercial general liability policies cover virtually any negligence claim that can be brought against the policyholder. *See e.g., City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 180-181, 459 N.E.2d 555, 558 (1984). A special “intentional acts” endorsement is not needed.

The policy at issue in *Ward*, 129 Ohio St. 3d 292, did not purport to cover any workplace intentional tort claims. This Court examined a stop-gap endorsement that specifically excluded injuries “intentionally caused or aggravated by” the insured employer. *Id.*, ¶9. The parties even acknowledged that there would never be indemnity coverage for the claim, and disagreed only over whether a defense had to be furnished. *Id.*, ¶16. The argument that the stop-gap endorsement was illusory was rejected because some types of negligence theories were indeed covered under its terms. *Id.*, ¶24.

Here, in stark contrast, CIC has yet to identify workplace “intentional acts” lawsuits that were covered only after DTJ agreed to pay the additional premium for the Employers Liability Coverage Form – Ohio. This Court is being asked, in effect, to bless the practice of charging additional premiums for an endorsement that furnishes no new coverage at all. The troubling deception can be remedied only by holding that the “intentional acts” provision was intended by both parties to apply whenever liability is imposed by inference under R.C. 2745.01(C).

D. THE CONSENSUS OF AUTHORITY

The only other authority CIC could muster in support of its claim that it owes no

duty to defend or indemnify DTJ, is *Irondale Indus. Contractors, Inc. v. Virginia Sur. Co., Inc.*, 754 F.Supp.2d 927, 933 (N.D. Ohio 2010). In *Irondale*, however, the insurance policy at issue expressly excluded coverage for injuries “intentionally caused or aggravated by [the employer],” or “committed by [the employer] with the belief that an injury is substantially certain to occur.” *Id.* The *Irondale* court merely stated the obvious conclusion, that under any theory of recovery, even one predicated on R.C. 2745.01(C), the policy at issue specifically excluded coverage for any form of an employer intentional tort claim, and therefore, the employer was not entitled to insurance coverage pursuant to that specific policy. In short, *Irondale* is inapplicable in light of the facts that not only is the exclusion worded more specifically to exclude all forms of employer intentional tort claims in that case, but also that CIC’s policy specifically includes coverage for certain intentional acts of the employer, a provision not under consideration in *Irondale*.

CIC cites several cases for the proposition that statutory provisions form part of all contracts of insurance as if fully written into the insurance contracts themselves. *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 288, 695 N.E.2d 732 (1998) (“subsequent legislative enactments cannot alter the binding terms of a preexisting agreement entered into by contracting parties under the law as it existed at the time that the contract was formed”). CIC claims, without citation to any authority, that because the policy provision defined intentional acts, for which coverage applied, to include acts for which the employer was substantially certain that injury could result, the legislature’s narrower definition of “substantially certain” should override the parties intent. *CIC’s Merit Brief p.37*. Nothing in the statute, however, prevents the parties from agreeing to define “substantially certain” to include claims for which the employer did not deliberately intend to injure the employee, but liability is nonetheless imposed

upon the employer by a trier-of-fact. *See Downard*, 2013-Ohio-4760, ¶ 74. CIC seeks nothing other than to promise the broad “intention acts” coverage, only to renege by unilaterally redefining the language it drafted the moment liability becomes imminent.

For example, in *GNFH, Inc.*, 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345 (2d Dist.), the Second District determined that the insurers were unable to provide any logical reason for adding an endorsement in a policy that provided for coverage of employer intentional torts, only to claim after-the-fact that the policy excluded coverage for all forms of employer intentional torts, even those brought under the substantial certainty line of authority. *Id.* at ¶ 140. That court concluded that the endorsement must logically be read as covering some form of intentional torts, such as the assault and battery claim alleged in the facts of that case, or there would be no reason to include the coverage in the policy, differentiating general insurance policies that generally exclude all forms of employer intentional tort claims. *Id.*

Similarly, in *Auto-Owners Ins. Co. v. Illinois Nat. Ins. Co.*, 510 Fed.Appx. 445, 450 (6th Cir.2013), the Sixth Circuit held that the insurer improperly relied on the less-specific, exclusion clause prohibiting claims for abuse or molestation in light of the fact that the more specific endorsement providing coverage for abuse or molestation claims was purchased. *Id.* In that case, the insurer provided a general policy specifically excluding coverage for claims involving child abuse or molestation. *Id.* The plaintiff, an adoption agency, purchased an endorsement to provide coverage for abuse or molestation claims and sought contribution for attorney fees incurred in defending against one such claim. The insurer denied coverage, but the Sixth Circuit held that if the insurer’s arguments were accepted, the endorsement providing coverage for the claims would render the coverage purchased illusory. *Id.*

The decision by the this Court in *Harasyn*, 49 Ohio St.3d 173, further illustrates

the pragmatic approach to understanding the parties intent in purchasing and selling insurance. The *Harasyn* majority refused the insurer's request to wield public policy as a sword against coverage for intentional acts when an insurer actively promoted and sold specific coverage for workplace "intentional torts," insurable according to public policy. *Id.* at 177. According to the majority, "if such coverage is excluded, the insured is left with essentially no coverage in return for the premiums paid to secure the supplemental endorsement." *Id.* at 178.

This Court should follow the reasoned approach espoused in the *Harasyn*, *Auto-Owners Ins. Co.*, and *GNFH* decisions, and not allow CIC to avoid its obligations under the endorsement it promoted and sold to Ohio corporations to provide coverage for employer intentional tort claims not involving direct or actual intent to injure. CIC's dogged effort to nullify the endorsement should be rejected by this Court and this final Proposition of Law should be denied.

CONCLUSION

Since each of the three Propositions of Law are fundamentally flawed, and the lower appellate court's decision furnishes the only plausible interpretation of the relatively unique workplace "intentional act" coverage that has been promised, the sound decision of the Ninth Judicial District Court of Appeals should be affirmed in all respects.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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