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

REPLY BRIEF OF APPELLANT THE CINCINNATI INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUHORITIES ..... *iii*

I. *INTRODUCTION* *1*

II. *REBUTTAL ARGUMENT* *5*

A. Should Mr. Hoyle Prevail Ultimately by Meeting His Burden of Proof, Cavanaugh's EIT Liability Under R.C. §2745.01(C) Will Amount to Specific Intent to Injure for Which There is No Indemnity Coverage. **5**

B. The Employers Liability Coverage in CIC's Policy Is Not Illusory Coverage. **8**

1. CAVANAUGH'S UNCERTAINTY ABOUT COVERAGE DOES NOT MEAN THE POLICY WAS ILLUSORY. **9**

2. UNDER WARD V. UNITED FOUNDRIES, INC., *CAVANAUGH RECEIVED "SOME BENEFIT" FROM THE EMPLOYERS LIABILITY COVERAGE IN THE CIC POLICY.* **10**

3. INSUREDS, LIKE CAVANAUGH, OBTAINED THE BENEFIT OF COVERAGE DURING THE PERIOD OF UNCERTAINTY AS TO THE CONSTITUTIONALITY OF THE EIT STATUTE. **12**

C. The Court of Appeals Erred When it Declared that "Deliberate Intent to Injure" in CIC's Policy Exclusion Means Something Different than "Deliberate Intent" and "Intent to Injure" in the EIT Statute **14**

D. The Public Policy Argument Made in Proposition of Law No. II Is Implicit in the Indemnity Coverage Issue Presented and Should Be Resolved by This Court. **17**

1. THERE HAS BEEN NO WAIVER BY CIC OF THE PUBLIC POLICY ARGUMENT. **17**

2. HARASYN *DOES NOT CONTROL THE PUBLIC POLICY BAR TO INDEMNITY COVERAGE AFTER THE ENACTMENT OF R.C. §2745.01.* **18**

3. THE ABSENCE OF LEGISLATION ADDRESSING WHETHER PUBLIC POLICY ALLOWS OR PROHIBITS INDEMNITY COVERAGE FOR EIT LIABILITY PURSUANT TO R.C. §2745.01 IS NOT DISPOSITIVE. 19

III. CONCLUSION *20*

CERTIFICATE OF SERVICE *22*

TABLE OF AUHORITIES

Cases

Barry v. A.E. Steel Erectors, Inc.,
8th Dist. Cuyahoga No. 90436, 2008-Ohio-3676, rev'd, 126 Ohio St.3d 63,
930 N.E.2d 318, 2010-Ohio-3131 13

Belvedere Condominium Unit Owners Ass'n v. R.E. Roark Cos., Inc.,
67 Ohio St.3d 274, 617 N.E.2d 1075 (1993) 17

Brunny v. Prudential Ins. Co. of America,
151 Ohio St. 86, 84 N.E.2d 504 (1949) 19

Cain v. Field Local School Dist. Bd. of Edn.,
11th Dist. Portage No. 2012-P-0127, 2013-Ohio-1492 15

Cantu v. Irondale Indus. Contr., Inc.,
6th Dist. Fulton No. F-11-018, 2012-Ohio-6057 15

Ceccarelli v. Levin,
127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342 8

Celebrezze v. Netzley,
51 Ohio St.3d 89, 554 N.E.2d 1292 (1990) 2

Defiance v. Kretz,
60 Ohio St.3d 1, 573 N.E.2d 32 (1991) 7

Downard v. Rumpke of Ohio, Inc.,
12th Dist. Butler No. CA2012-11-218, 2013-Ohio-4760, discr. appeal denied,
138 Ohio St.3d 1449, 2014-Ohio-1182 ..... 4, 5

Fleming v. AAS Serv., Inc.,
177 Ohio App.3d 778, 2008-Ohio-3908, 896 N.E.2d 175 (11th Dist.), rev'd.,
126 Ohio St.3d 108, 930 N.E.2d 809, 2010-Ohio-3132 13

Forbes v. Midwest Air Charter, Inc.,
86 Ohio St.3d 83, 711 N.E.2d 997 (1999) 6

Fyffe v. Jeno's, Inc.,
59 Ohio St.3d 115, 570 N.E.2d 1108 (1991) 13, 14

Gaines v. MQSW Acquisition Co.,
11th Dist. Lake No. 2007-L-200, 2008-Ohio-3744 14

Glowacki v. North Western Ohio Ry. & Power Co.,
116 Ohio St. 451, 157 N.E. 21 (1927) 19

Gomolka v. State Auto. Mut. Ins. Co.,
70 Ohio St.2d 166, 436 N.E.2d 1347 (1982) 9

Guappone v. Enviro-Cote, Inc.,
9th Dist. Summit No. 24718, 2009-Ohio-5540 13

Harasyn v. Normandy Metals, Inc.,
49 Ohio St.3d 173, 551 N.E.2d 962 (1990) 18, 19, 20

Henson v. Cleveland Steel Container Corp.,
11th Dist. Portage No. 2008-P-0053, 2009-Ohio-180 13

Hill v. City of Urbana,
79 Ohio St.3d 130, 679 N.E.2d 1109 (1997) 17

Home Indem. Co. of N.Y. v. Village of Plymouth,
146 Ohio St. 96, 64 N.E.2d 248 (1945) 16

Houdek v. ThyssenKrupp Materials N. A., Inc.,
134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253 15

Irondale Industrial Contractors, Inc. v. Virginia Surety Company, Inc.,
754 F.Supp.2d 927 (N.D. Ohio 2010) 11

Jefferson v. Benjamin Steel Co., Inc.,
5th Dist. Richland Nos. 09 CA 62 & 09 CA 75, 2010-Ohio-50 14

Kaminski v. Metal & Wire Prods. Co.,
125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066 ..... passim

Kaminski v. Metal & Wire Prods. Co.,
175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262 (7th Dist.), rev'd,
125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066 13

Klaus v. United Equity, Inc.,
3d Dist. Allen No. 1-07-63, 2008-Ohio-1344, rev'd, 125 Ohio St.3d 279,
927 N.E.2d 1092, 2010-Ohio-1014 13

Lipker v. Doseck,
176 Ohio App.3d 89, 2008-Ohio-1756, 889 N.E.2d 1093 (2d Dist.) 1

Magda v. Greater Cleveland Regional Transit Auth.,
8th Dist. Cuyahoga No. 92570, 2009-Ohio-6219 13

National Credit Union Admin. v. First Nat. Bank & Trust Co.,
522 U.S. 479, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998) 15

Nationwide Ins. Co. v. Alli,
178 Ohio App.3d 17, 2008-Ohio-4318, 896 N.E.2d 742 (7th Dist.) 9

Newark v. Lucas,
40 Ohio St.3d 100, 532 N.E.2d 130 (1988) 7

Pilkington North America, Inc. v. Travelers Casualty & Surety Co.,
112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121 (2006) 5

Riffle v. Physicians & Surgeons Ambulance Serv., Inc.,
135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983 20

Rivers v. Otis Elevator,
8th Dist. Cuyahoga No. 99365, 2013-Ohio-3917 ..... 11, 15

Riverside Ins. Co. v. Wiland,
16 Ohio App.3d 23, 474 N.E.2d 371 (11th Dist. 1984) 1

Ross v. Farmers Ins. Group of Companies,
82 Ohio St.3d 281, 695 N.E.2d 732 (1998) 17

Rudisill v. Ford Motor Company,
709 F.3d 595 (6th Cir.2013) 6

Schiemann v. Foti Contracting, L.L.C.,
8th Dist. Cuyahoga No. 98662, 2013-Ohio-269 15

Sharonville v. Am. Employers Ins. Co.,
109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833 8

Smith v. Inland Paperboard & Packaging, Inc.,
11th Dist. Portage No. 2008-P-0072, 2009-Ohio-3148 13

State Auto Ins. Co. v. Golden,
125 Ohio App.3d 674, 709 N.E.2d 529 (8th Dist. 1998) 10, 11

State v. Myers,
26 Ohio St.2d 190, 271 N.E.2d 245 (1971) 6, 7

State v. Thurman,
2d Dist. Montgomery No. 14741, 1995 WL 386820 (Jun. 28, 1995) 7

Stetter v. R.J. Corman Derailment Servs., L.L.C.,
125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092 20

Tablack v. Bd. of Mahoning Cty. Commrs.,
7th Dist. Mahoning No. 07 MA 197, 2008-Ohio-4804 13

Talbert v. Continental Cas. Co.,
157 Ohio App.3d 469, 2004-Ohio-2608, 811 N.E.2d 1169 (2d Dist.) 12

Talik v. Fed. Marine Terminals, Inc.,
117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204 14

Ward v. United Foundries, Inc.,
129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770 ..... passim

Warren v. Libbey Glass, Inc.,
6th Dist. Lucas No. No. L-09-1040, 2009-Ohio-6686 13

Weil v. State,
46 Ohio St. 450, 21 N.E. 643 (1889) 17

Wright v. Mar-Bal, Inc.,
11th Dist. Geauga No. 2012-G-3112, 2013-Ohio-5647 15

Statutes

R.C. §2745.01 ..... passim

R.C. §2745.01(A) 3, 15

R.C. §2745.01(B) 3, 15, 18

R.C. §2745.01(C) ..... passim

R.C. §4511.19(A) 7

R.C. §4511.19(B) 6, 7

Other Authorities

42 Ohio Jurisprudence 3d, Evidence and Witnesses, § 104 19

85 Ohio Jurisprudence 3d, Statutes, §233 15

I. INTRODUCTION

Intervening Plaintiff-Appellant The Cincinnati Insurance Company ("CIC") asks this Court to address three propositions of law in this appeal relating to its duty to indemnify under the Commercial General Liability ("CGL") and Umbrella Liability covering a policy period of March 31, 2007 to March 31, 2010 ("the Policy"). All three of the propositions relate to whether CIC owes a duty to indemnify Defendants-Appellees DTJ Enterprises, Inc. and Cavanaugh Building Corporation (collectively "Cavanaugh") for the Employer Intentional Tort ("EIT") liability to Plaintiff-Appellee Duane Allen Hoyle ("Mr. Hoyle") pursuant to R.C. §2745.01(C) post-*Kaminsky*.[1]

Two concepts come into play when determining whether there is such a duty to indemnify. First, unlike the duty to defend which is broader, an insurer's duty to indemnify is predicated upon the law governing an insured's legal liability. *Lipker v. Doseck*, 176 Ohio App.3d 89, 2008-Ohio-1756, 889 N.E.2d 1093, ¶9 (2d Dist.). Second, the duty to indemnify arises when coverage is provided under the insurance policy at issue. *Riverside Ins. Co. v. Wiland*, 16 Ohio App.3d 23, 26, 474 N.E.2d 371 (11th Dist. 1984). As demonstrated by this case, before a court can answer whether there is coverage under the CIC Policy, there must be an initial determination made of the insured's legal liability under the law that governs the EIT claim being made. Here, answering the question whether CIC owes a duty to indemnify Cavanaugh requires the Court to examine the legal standard and parameters giving rise to civil liability of Ohio employers for EIT claims arising out of an alleged violation of R.C. §2745.01(C) when there has been a deliberate removal of an equipment safety guard.

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[1] *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066.

In each of their answer briefs, Cavanaugh and Mr. Hoyle – as well as their amicus, The Ohio Association for Justice ("OAJ") – have argued strenuously and at length against this Court even considering Proposition of Law No. I. Reiterating arguments already made in the jurisdictional memoranda but rejected when the Court agreed to hear this case, Appellees, and now their amicus, advance a number of meritless arguments in the hopes of blocking the Court from addressing Proposition of Law No. I.[2] Such arguments, if they were valid – and they are not – would render declaratory judgment relief unavailable in all insurance coverage disputes. Yet, Appellees and OAJ have thrown up these impediments and roadblocks to frustrate this Court from looking at the import on the coverage issue of a finding of liability against Cavanaugh for the alleged violation of R.C. §2745.01(C), which is the only remaining claim Mr. Hoyle can pursue in this case at trial.

As CIC established in its Merit Brief at pages 9-25, whatever legal liability Cavanaugh might have to Mr. Hoyle following a trial will necessitate Mr. Hoyle meeting his burden of proof and establishing, directly or by operation of an unrebutted presumption, that Cavanaugh specifically intended to injure him. This is so because an employer's "deliberate removal" of an "equipment safety guard" leads to "a rebuttable presumption that the removal * * * was committed *with intent to injure another* if an injury * * * occurs as a direct result." (Emphasis

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[2] OAJ advances a peculiar argument regarding the finality and purported lack of appellate jurisdiction for this Court to consider Proposition of Law No. I. OAJ Am. Br. at 2-3. This cryptic argument is a red-herring. The argument has never been made in this case and neither Cavanaugh nor Mr. Hoyle embrace it in their briefs. CIC is not employing "an improper end-around" as OAJ suggests because CIC is not seeking review by this Court of the trial court's opinion denying Cavanaugh's summary judgment motion. Nor could it be reviewed since denials of summary judgment are not reviewable, even if the trial court certifies that no just reason for delay exists. *Celebrezze v. Netzley*, 51 Ohio St.3d 89, 90, 554 N.E.2d 1292 (1990). This Court need not say anything in regard to the resolution of Proposition of Law No. I which will impact the unappealed summary judgment ruling or what happens between Cavanaugh and Mr. Hoyle during trial.

added). R.C. §2745.01(C). Therefore, before addressing the two propositions of law regarding an insurer's indemnity obligations, the Court must address and decide whether the "intent to injure another" in subsection (C) of the EIT statute has the same legal meaning and import as "intent to injure another" and "deliberate intent to cause an employee to suffer an injury" found in subsections (A) and (B), respectively, of R.C. §2745.01.

Cavanaugh, Mr. Hoyle and OAJ are so adamant and determined to prevent that analysis from taking place for one reason: this Court has already held that, under current Ohio EIT law, the employer's specific or direct intent to injure the employee is the only way to prove an employer's liability. *Kaminski, supra*, ¶55. Any express recognition by this Court that *Kaminski* applies equally to the "intent to injure" presumption pursuant to an EIT claim brought under R.C. §2745.01(C) will mean that there will be no indemnity coverage under the CIC Policy.

For these reasons, appellate jurisdiction has attached to Proposition of Law No. I and it is properly before the Court for resolution on the record in this case. The issues of whether indemnity coverage can be provided for EIT claims without offending Ohio public policy or is owed under the CIC Policy as presented in Propositions of Law No. II and III are intertwined with resolution of the issue presented by Proposition of Law No. I.

It is equally important to make clear what this case is not about. At page 8 of Mr. Hoyle's Merit Brief, the assertion is made that CIC's Proposition of Law No. I is asking the Court to adopt a rule that "the mere presentation of a modicum of rebuttal evidence will cause the statutory presumption to 'disappear' for good." While Mr. Hoyle cites CIC's Merit Brief at pages 19-20 as support for this assertion, no such argument is being made by CIC in this case. CIC is not presenting any proposition of law which requires this Court to decide what amount or quantum of evidence is needed in order for an employer to rebut the statutory presumption of

intent to injure arising out of subsection (C) of R.C. §2745.01. Also not presented in this appeal is any issue as to whether the employer's rebuttal of the presumption of intent to injure an employee can be resolved as a matter of law or is a factual determination that must be submitted to a jury. Those issues, while no doubt important, will have to await another day.[3] As this case addresses only the indemnity coverage question under CIC's Policy, whether Cavanaugh will present sufficient evidence to ultimately overcome the presumption of intent to injure, is of no moment here. If the presumption is overcome on remand, there would be no liability for CIC to indemnify. What is at issue here is what happens should Mr. Hoyle prevail on his sole-remaining claim pursuant to R.C. §2745.01(C) and establish EIT liability against Cavanaugh.

And that issue does not require this Court to await a final resolution of Mr. Hoyle's underlying EIT lawsuit against Cavanaugh.[4] *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770, ¶22. As in *Ward*, there are no set of facts under which Cavanaugh would be covered under the CIC Policy because all possible scenarios and methods of proof by which Mr. Hoyle might meet his burden in order to establish liability pursuant to R.C. §2745.01(C) results in an outcome whereby Cavanaugh will have been found to have intended to injure Mr. Hoyle. As a result, there is no indemnity coverage for such an EIT claim because such liability falls squarely within the exclusion in CIC's Policy.

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[3] The Court was presented with those precise issues but chose not to accept the appeal in *Downard v. Rumpke of Ohio, Inc.*, 12th Dist. Butler No. CA2012-11-218, 2013-Ohio-4760, discr. appeal denied, 138 Ohio St.3d 1449, 2014-Ohio-1182.

[4] OAJ unjustifiably accuses CIC of causing delay and preventing Cavanaugh and Mr. Hoyle from resolving this case at a trial by virtue of the appeal taken by CIC. OAJ Am. Br. at 6. Nothing prevented Cavanaugh and Mr. Hoyle from proceeding to trial while CIC's appeal was being decided. In fact, after the Court of Appeals opinion was announced, it was counsel for Cavanaugh and Mr. Hoyle who voluntarily agreed to a further stay of the case while this Court heard CIC's appeal.

II. REBUTTAL ARGUMENT

A. **Should Mr. Hoyle Prevail Ultimately by Meeting His Burden of Proof, Cavanaugh's EIT Liability Under R.C. §2745.01(C) Will Amount to Specific Intent to Injure for Which There is No Indemnity Coverage.**

In Proposition of Law No. I, CIC's Merit Brief thoroughly examines each of the possible scenarios under which Mr. Hoyle might meet his burden to establish EIT liability and prevail against Cavanaugh based upon the sole remaining claim pursuant to R.C. §2745.01(C). CIC Merit Br. at 14-21. Such an analysis is required in order to for this Court ascertain whether CIC could have a duty to indemnify Cavanaugh. Unlike the duty to defend which is broader, the duty of indemnification is more narrow and triggered only if the insured's liability, if established, will fall within the policy's coverage.[5] *Ward*, supra, ¶20; *Pilkington North America, Inc. v. Travelers Casualty & Surety Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, ¶35 (2006).

Only two possible scenarios exist by which Mr. Hoyle can meet his burden to prove Cavanaugh's liability under R.C. §2745.01(C). Under Scenario No. 1, if Cavanaugh fails to rebut the presumption of intent to injure, the result will be that Cavanaugh acted with the specific deliberate intent to injure Mr. Hoyle which will result in liability being imposed under the EIT statute. CIC Merit Br. at 18-19. Scenario No. 2 assumes that Cavanaugh is able to rebut the presumption of intent to injure.[6] If the presumption of intent to injure is successfully rebutted,

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[5] Not appreciating this key distinction, Mr. Hoyle argues gratuitously that CIC "is obligated to at least defend the claim" of Mr. Hoyle. (Citations omitted.) Hoyle Br. at 2. Yet that is precisely what CIC has been and is doing. The duty to defend is not an issue in this appeal.

[6] Without citation to any authority, Mr. Hoyle suggests the adoption of the wrong standard regarding what the employer must rebut in order to overcome the presumption afforded by R.C. §2745.01(C). In his Answer Brief, Mr. Hoyle asserts incorrectly that "it is the deliberate removal that must be rebutted, not the deliberate intent to injure that is inferred by the statute." Hoyle Br. at 13. That is wrong. The correct burden of rebuttal placed on an employer by operation of R.C. §2745.01(C) is to marshal evidence that there was in fact no intent to injure; that is the point of a rebuttable presumption. *See, Downard, supra*, ¶46, quoting *Rudisill v. Ford*

Mr. Hoyle could only meet his burden of proof in order to prevail by establishing directly that Cavanaugh acted with the specific intent to injure him. CIC Merit Br. at 19-21. This latter scenario is akin to what happens in employment discrimination matters when an employer has rebutted the employee's prima facie case. CIC Merit Br. at 22-24. The two scenarios advanced by CIC as the employee's avenue of recovery against an employer for the deliberate removal of an equipment safety guard is not, as Mr. Hoyle asserts, an "invitation to judicially eradicate the only remnant of the common law standard that has been left intact." Hoyle Br. at 10.

Mr. Hoyle's reliance on *State v. Myers*, 26 Ohio St.2d 190, 271 N.E.2d 245 (1971) is misplaced, and not simply because, as he readily acknowledges, *Myers* has been distinguished as a criminal case inapplicable to civil cases. Hoyle Br. at 12, citing *Forbes v. Midwest Air Charter, Inc.*, 86 Ohio St.3d 83, 711 N.E.2d 997 (1999). At the time of the *Myers* decision, former R.C. §4511.19(B) stated that if a prohibited level of alcohol was found in the defendant's blood, breath, or urine at the time of the test, "it shall be presumed that the defendant was under the influence of alcohol." Under this prior version of the statute, if the fact finder found that the test was properly performed and concluded that the defendant's breath, blood, or urine contained the concentration of alcohol set forth in the statute, one element of the prosecution's case was presumed to be present: that the defendant was under the influence of alcohol. *Myers*, *supra* at 201. Since the presumption was rebuttable, the defendant could then go forward with his own evidence on that element. *Id.* Mr. Hoyle's own brief notes the key reason why *Myers* has no application here: the issue resolved by this Court was whether and how the jury should be apprised of the presumption and the defendant's ability to offer rebuttal evidence. Hoyle Br. at

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Motor Company, 709 F.3d 595, 608 (6th Cir.2013). It is telling that Mr. Hoyle's Answer Brief is internally inconsistent. At page 2, he acknowledges that Cavanaugh will have the ability "to rebut the inference of an 'intent to injure' that is imposed by the statute.

12. That issue is not before the Court here. CIC takes no position in this appeal as to whether or how a jury should be apprised of the rebuttable presumption created by R.C. §2745.01(C).

Since the *Myers* decision, however, the language of former R.C. §4511.19(B) which created the statutory presumption has changed significantly. *State v. Thurman*, 2d Dist. Montgomery No. 14741, 1995 WL 386820, *2-3 (Jun. 28, 1995). The General Assembly replaced the rebuttable presumption of being under the influence with *per se* violations such that R.C. §§4511.19(A)(2)-(4) became a strict liability statute. *Defiance v. Kretz*, 60 Ohio St.3d 1, 3, 573 N.E.2d 32 (1991); *Newark v. Lucas*, 40 Ohio St.3d 100, 103, 532 N.E.2d 130 (1988). In determining whether the defendant committed a *per se* offense under the new statutory scheme, the trier of fact was not required to find that the defendant operated a vehicle while under the influence of alcohol or drugs, but only that the defendant's chemical test reading was at a prohibited level and that the defendant operated a vehicle within the state. *Kretz, supra. See, also, Lucas, supra.* Not even Mr. Hoyle has suggested that R.C. §2745.01(C) creates per se liability against an employer.

CIC's position in this case is that if Cavanaugh is liable to Mr. Hoyle in the underlying case by operation of R.C. §2745.01(C) – which is why there is no need to await the outcome of trial between Mr. Hoyle and Cavanaugh – CIC has no duty to indemnify Cavanaugh. That is because, under current Ohio law and this Court's precedent, the employer's specific or direct intent to injure the employee is the only way an employee proves an employer's EIT liability. *Kaminaky*, supra. With that being so, Mr. Hoyle cannot meet his burden of proof of a viable claim against Cavanaugh for which there would indemnity coverage owed by CIC. Ohio public policy prohibits insuring torts where there is a specific intent to injure. Even if public policy does not prohibit such indemnity coverage, coverage is clearly and explicitly excluded because

CIC's Policy does not provide coverage when an employer intends to injure an employee. CIC's policy exclusion expressly precludes coverage when an employer's acts are committed with "deliberate intent to injure." Emp. Liab. Cov. Form, Supp. p. 111.

Throughout its discussion of Proposition of Law No. I, Cavanaugh repeatedly asserts that the Court of Appeals did nothing more than find the existence of genuine issues of material fact which precluded summary judgment in favor of CIC. Cavanaugh Br. at 11, 12, 13. Neither the Court of Appeals nor Cavanaugh identify what facts are in dispute regarding CIC's duty to indemnify. There are no genuine issues of material fact in regard to the interpretation of a statute, like R.C. §2745.01, or the construction of an insurance policy, like CIC's Policy. Resolution by this Court of both issues are matters of law, not fact. *Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342, ¶8; *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6. Even Mr. Hoyle concedes that R.C. §2745.01(C) is "concise and unambiguous." Hoyle Br. at 9. This Court's application to R.C. §2745.01(C) of its holding in *Kaminski, supra*, ¶55 that an employer's specific or direct intent to injure the employee is the only way for an employee to prove an employer's EIT liability and what impact doing so has on CIC's duty to indemnify Cavanaugh in this case are matters of law which are ripe for review regardless of whether Cavanaugh or Mr. Hoyle prevail at trial.

B. <u>The Employers Liability Coverage in CIC's Policy Is Not Illusory Coverage</u>.

Cavanaugh, Mr. Hoyle and OAJ all argue that the coverage provided by CIC's Policy was illusory. Cavanaugh Br. at 21-22; Hoyle Br. at 4, 25-26; OAJ Am. Br. at 1, 4-5. The arguments that, if the Court adopts CIC's propositions of law, the coverage afforded in CIC's CGL and Umbrella policies will be rendered illusory should be rejected.

1. Cavanaugh's uncertainty about coverage does not mean the Policy was illusory.

In support of this argument, Cavanaugh asserts that it did not believe and never would have intended to purchase the additional coverage in the Employers Liability Coverage Form if the Policy excluded indemnity coverage for all intentional tort claims under R.C. §2745.01. Cavanaugh Br. at 22. But where the language of an insurance policy is clear and unambiguous, parties cannot ask courts to rewrite or otherwise construe the language the parties have adopted simply because, in retrospect, the insured finds that the policy doesn't provide the desired coverage. *Nationwide Ins. Co. v. Alli*, 178 Ohio App.3d 17, 2008-Ohio-4318, 896 N.E.2d 742, ¶22 (7th Dist.), citing *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 168, 436 N.E.2d 1347 (1982).

Both Cavanaugh and Mr. Hoyle argue that the coverage provided in the Endorsement would be illusory due to the "substantial" $2,657.00 premium which Cavanaugh paid annually for the Employer Liability Coverage endorsement.[7] Cavanaugh Br. at 1, 21; Hoyle Br. at 1, 2, 26. Yet, there can be no uncertainty or confusion as to what coverage was being excluded. Paragraph 2.h of The Employers Liability Coverage endorsement expressly states, in relevant part, that "[t]his insurance does not cover: * * * liability for acts committed by or at the direction of an insured *with the deliberate intent to injure*." (Emphasis added) Emp. Liab. Cov. Form, Supp. p. 111. The CIC Policy also contained a notice to employers about the changes taking place in Ohio EIT law with the enactment in 2005 of R.C. §2745.01 and, because of those changes as well as uncertainty regarding the outcome of expected challenges to the EIT legislation, urged employers like Cavanaugh to consult with their insurance and legal

[7] The $2,657 annual premium paid by Cavanaugh provided limits of $1 million. Employers Liab. Cov. Part Decl., Supp. p. 109. The total annual premium paid by Cavanaugh for all CGL coverage parts, including the Employer Liability Coverage but excluding auto coverage, was $100,932. Summ. Of Premiums, Supp. p. 35.

professionals to undertake a review of the coverage provided by the Employer's Liability Coverage Form and to determine whether the coverage being afforded met their specific coverage needs.

2. *Under* Ward v. United Foundries, Inc., *Cavanaugh received "some benefit" from the Employers Liability Coverage in the CIC Policy.*

The arguments made here about illusory coverage are indistinguishable from and do not overcome this Court's opinion in *Ward*. The policy being considered in *Ward* involved the interpretation of a stop-gap endorsement to a commercial liability insurance policy for EIT claims. The insurer sought to avoid defending the EIT claim brought against its insured policy based upon an exclusion from coverage for injuries "expected or intended from the standpoint of the insured," bodily injury to an employee arising in the course of employment, and injury to the family of an employee as a consequence of the employee's injury, as well as for contribution claims and claims alleging liability under the dual-capacity doctrine. *Id.*, ¶4. The trial court concluded that if the stop-gap endorsement excluded coverage for the intentional tort claim, then the policy was illusory. *Id.*, ¶10. The court of appeals reversed. *Id.*, ¶11. Accepting the case to resolve an inter-district conflict, this Court held that "[w]hen there is *some benefit* to the insured from the face of the endorsement, it is not an illusory contract." (Emphasis added.) *Id.*, ¶ 24, citing *State Auto Ins. Co. v. Golden*, 125 Ohio App.3d 674, 678, 709 N.E.2d 529 (8th Dist. 1998).

Like Cavanaugh here, the insured in *Ward* contended that it had intended to purchase insurance for EIT claims and that if the stop-gap endorsement did not provide a defense or indemnification coverage for such claims, then the insurance policy was illusory. Rejecting the same argument made here by Cavanaugh and Mr. Hoyle that the coverage provided in CIC's policy would have been illusory if full coverage wasn't provided for the claims made pursuant to

R.C. §2745.01, the *Ward* Court observed:

> Although the stop-gap endorsement may not have added the coverage that United intended, it did add coverage for "employer's liability hazards" that were expressly excluded in the CGL policy: coverage for consequential bodily injury (claims by relatives of an employee for their injuries resulting as a consequence of the employee's injury), claims alleging liability under the dual-capacity doctrine (liability both as employer and in another capacity), and contribution or indemnification claims of third parties resulting from workplace injuries. When there is some benefit to the insured from the face of the endorsement, it is not an illusory contract. *State Auto Ins. Co. v. Golden* (1998), 125 Ohio App.3d 674, 678, 709 N.E.2d 529.
>
> United contends that this was not the coverage it intended to purchase. But this is an argument for United to assert against the insurance agency and broker who procured the policy, not against the insurer. For purposes of this action, the plain language of the stop-gap endorsement that United purchased is plain, unambiguous, and not misleading, and the policy is not illusory.

Ward, supra, ¶¶ 24-25. *See also, Irondale Industrial Contractors, Inc. v. Virginia Surety Company, Inc.*, 754 F.Supp.2d 927, 933 (N.D. Ohio 2010) ("The Ohio Endorsement may limit coverage to Irondale, but '[w]hen some benefit to the insured is evident from the face of the endorsement, the endorsement is not an illusory contract.'" Quoting *State Auto. Ins. Co. v. Golden, supra*, 125 Ohio App.3d at 678).

Mr. Hoyle is critical that CIC hasn't set forth how indemnity coverage would be afforded to employers like Cavanaugh when an EIT claim is made based upon the Employer's Liability Coverage Form for "intentional acts." Hoyle Br. at 26. In its Merit Brief at page 39, CIC gave some examples of coverage that would be provided to employers like Cavanaugh in situations not involving the strict employment relationship, such as "dual capacity" and "third-party over" cases. Employees do make such claims when asserting EIT claims. *See, e.g., Rivers v. Otis Elevator*, 8th Dist. Cuyahoga No. 99365, 2013-Ohio-3917, ¶14 (addressing "dual-capacity doctrine" in the context of an EIT claim brought pursuant to R.C. §2745.01(A) and (C)). As noted in *Ward*, as long as there is some benefit to the insured from the face of the endorsement, it

is not an illusory contract. *Ward, supra*, ¶24.

OAJ directs the Court to the opinion in *Talbert v. Continental Cas. Co.*, 157 Ohio App.3d 469, 2004-Ohio-2608, 811 N.E.2d 1169 (2d Dist.). *Talbert* was decided before *Ward* and thus the court of appeals did not have the benefit of this Court's opinion in regard to if and when an insurance policy can be found to be illusory. The policy language in *Talbert* was different and the appellate court was applying that policy to an EIT claim based upon the common law standard, which had become the norm only in a small number of Ohio appellate districts like the Second District, not the statutory standard in R.C. §2745.01. *Id.*, ¶27-34. The insurer in *Talbert* was arguing against coverage based upon the employee's injury being the result of a substantial-certainty intentional tort which the insurer asserted was not an "occurrence," defined in its policy as an "accident." *Id.*, ¶35. Further, this Court's *Ward* decision completely supplants the law as it existed in the Second District so the *Talbert* rule with respect to when coverage is illusory no longer applies.

3. Insureds, like Cavanaugh, obtained the benefit of coverage during the period of uncertainty as to the constitutionality of the EIT statute.

Insureds of CIC did actually obtain some benefit from the Employer's Liability Coverage Form during the "stop-gap" period between the enactment of R.C. §2745.01, which became effective on April 7, 2005 and this Court's *Kaminski* decision on March 23, 2010. CIC's Policy at issue here provided coverage which extended over much of that time-period.[8] During that interim five-year period, Ohio's courts were uncertain and cautious as to whether R.C. §2745.01 was constitutional. Insurers and employers were equally and understandably uncertain as to whether EIT liability was based upon the common law or statutory provisions in R.C. §2745.01.

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[8] CIC's Policy No. CPP 081 75 12 had a policy period from March 31, 2007 to March 31, 2010. Comm. Policy Decl., Supp. p. 32.

During this period of time, R.C. §2745.01 was being declared unconstitutional by a number of appellate courts. *See, Warren v. Libbey Glass, Inc.*, 6th Dist. Lucas No. No. L-09-1040, 2009-Ohio-6686, ¶34; *Fleming v. AAS Serv., Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908, 896 N.E.2d 175, ¶21 and 40 (11th Dist.), rev'd. 126 Ohio St.3d 108, 930 N.E.2d 809, 2010-Ohio-3132; *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262, ¶36 (7th Dist.), rev'd, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066; *Barry v. A.E. Steel Erectors, Inc.*, 8th Dist. Cuyahoga No. 90436, 2008-Ohio-3676, at ¶21-27, rev'd, 126 Ohio St.3d 63, 930 N.E.2d 318, 2010-Ohio-3131. As a result of rulings such as these, in the districts where the EIT statute had been declared unconstitutional, the courts continued applying the common law "substantial certainty" standard from *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991). *See, Henson v. Cleveland Steel Container Corp.*, 11th Dist. Portage No. 2008-P-0053, 2009-Ohio-180, ¶47; *Magda v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 92570, 2009-Ohio-6219, ¶49; *Tablack v. Bd. of Mahoning Cty. Commrs.*, 7th Dist. Mahoning No. 07 MA 197, 2008-Ohio-4804. Some courts continued to apply the *Fyffe* test without regard to the constitutionality of the EIT statute. *Klaus v. United Equity, Inc.*, 3d Dist. Allen No. 1-07-63, 2008-Ohio-1344, rev'd, 125 Ohio St.3d 279, 927 N.E.2d 1092, 2010-Ohio-1014. Others adhered to the statutory law only. *Guappone v. Enviro-Cote, Inc.*, 9th Dist. Summit No. 24718, 2009-Ohio-5540, ¶10; *Smith v. Inland Paperboard & Packaging, Inc.*, 11th Dist. Portage No. 2008-P-0072, 2009-Ohio-3148, ¶36. In still other districts where the statute's constitutionality was undecided and uncertain, EIT claims were being pursued by employees and were being analyzed by courts under the common law *Fyffe* standard, even when the EIT claim arose after April 7, 2005. *See, e.g., Jefferson v. Benjamin*

Steel Co., Inc., 5th Dist. Richland Nos. 09 CA 62 & 09 CA 75, 2010-Ohio-50, ¶74-115;[9] *Gaines v. MQSW Acquisition Co.*, 11th Dist. Lake No. 2007-L-200, 2008-Ohio-3744, ¶18

So the Employer's Liability Coverage Form in CIC's Policy was not illusory as it provided "some benefit" [i.e., both a defense and indemnity] to insureds while employers and insurers awaited this Court's final resolution of the uncertainty as to whether EIT claims which occurred after April 7, 2005 were governed by R.C. §2745.01 or *Fyffe*.[10]

C. The Court of Appeals Erred When it Declared that "Deliberate Intent to Injure" in CIC's Policy Exclusion Means Something Different than "Deliberate Intent" and "Intent to Injure" in the EIT Statute.

Cavanaugh accuses CIC of having "completely mischaracterize[d]" the Ninth District opinion in regard to the appellate court's disparate treatment of the "intent to injure" language as used in the EIT statute and CIC's Policy. Cavanaugh Br. at 10. But there can be no dispute that the Ninth District majority opinion held that the statutory "deliberate intent to injure" terminology has a meaning different and distinct from that same language used in CIC's Policy exclusion. App. Op., ¶19, Apx. 13. It was this aspect of the majority opinion that prompted Judge Hensal to dissent on the express ground that "the parties intended for the term 'deliberate intent' to have the same meaning under the contract as under Section 2745.01." App. Op., ¶23 (Hensal, J. dissent), Apx. p. 16. CIC's position is the same as Judge Hensal in her dissent.

Cavanaugh suggests that "[t]his 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)." (Cavanaugh Br. at 10,

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[9] *Jefferson* is one case wherein CIC was the insurer of the employer. 2010-Ohio-50, ¶46.

[10] For EIT claims that predated the April 7, 2005 effective date of R.C. §2745.01, the common law "substantial certainty" standard set forth in *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991) still applied. *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶17.

fn. 3, citing *Kaminski*, supra, ¶56). However, the language quoted by Cavanaugh from the *Kaminski* opinion does not support that conclusion. The language appearing in ¶56 of *Kaminski* notes little more than that liability for an EIT claim can be established by way of the rebuttable presumption provided for in R.C. §2745.01(C), which is a method of proof not available to an employee under R.C. §2745.01(A) or (B). That dicta in *Kaminski* at ¶56 did not interpret "intent to injure" under subsection (C) of R.C. §2745.01 as being qualitatively different from the "intent to injure" and "deliberate intent" standards used in subsections (A) and (B) of R.C. §2745.01. Nor would this Court have done so because it is an established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning. *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998). *See also*, 85 Ohio Jurisprudence 3d, Statutes, §233.

Courts have noted that the language appearing in R.C. §2745.01 does vary slightly between the subsections. *Cantu v. Irondale Indus. Contr., Inc.*, 6th Dist. Fulton No. F-11-018, 2012-Ohio-6057, ¶21. But that variation in terminology presents no conflict in the statutory standard as there is only one standard which must be met in order for an employee to recover on an EIT claim: the employer must have acted with "specific" or "deliberate" intent to cause injury. *Cain v. Field Local School Dist. Bd. of Edn.*, 11th Dist. Portage No. 2012-P-0127, 2013-Ohio-1492, ¶17, citing *Houdek v. ThyssenKrupp Materials N. A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶24-25. Since *Kaminski*, Ohio's appellate courts have noted the one standard of intent to injure the employee applies in cases involving EIT claims, even in cases which are brought under R.C. §2745.01(C). *Wright v. Mar-Bal, Inc.*, 11th Dist. Geauga No. 2012-G-3112, 2013-Ohio-5647, ¶23; *Rivers v. Otis Elevator, supra*, ¶21; *Schiemann v. Foti Contracting, L.L.C.*, 8th Dist. Cuyahoga No. 98662, 2013-Ohio-269, ¶17.

Here, the Court of Appeals went a step further in an effort to disassociate the terminology in the EIT statute from the language in CIC's Policy exclusion. App. Op., ¶19, Apx. 13. Mr. Hoyle maintains similarly that R.C. §2745.01(C) is "simply irrelevant" to whether CIC is obligated to indemnify Cavanaugh. Hoyle Br. at 22. As established at pages 35-38 of CIC's Merit Brief, the positions taken by Court of Appeals and Mr. Hoyle in this regard are predicated upon flawed logic and reasoning as it ignores the rule of construction that "[c]ontracts of insurance must be 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." *Home Indem. Co. of N.Y. v. Village of Plymouth*, 146 Ohio St. 96, 102, 64 N.E.2d 248 (1945). As noted in *Home Indem. Co. of N.Y.*, "statutes relating to matters pertinent to the risk covered by a contract of insurance become a term or part of the contract itself." (Citations omitted.) *Id.* at 102. [11]

Cavanaugh dismissively ridicules CIC with the assertion that "[i]n its zeal to avoid its coverage obligations, Intervener CIC appears to have forgotten that insurance policies are nothing more than contracts." (Citations omitted.) Cavanaugh Br. at 21. CIC has done no such thing. Nor has this Court ever forgotten that concept when interpreting insurance policies in light of the law in existence at the time. In fact, it was not all that long ago in an insurance coverage case, after noting that "[i]t is axiomatic that an insurance policy is a contract between the insurer and the insured," this Court reiterated the century-old precept that " '[c]ontracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and

[11] Cavanaugh mistakenly attributes the reference to the word "borrow" in CIC's argument regarding the incorporation of existing law into the policy as being "CIC's word[ ]." Cavanaugh Br. at 20. The "borrow[ing]" concept of legal principles into a contract of insurance was not "CIC's words" but was taken from Mr. Hoyle's jurisdictional memorandum. CIC Br. at 36, quoting Hoyle Juris. Memo, at 7.

formed part of the contract.' " *Ross v. Farmers Ins. Group of Companies*, 82 Ohio St.3d 281, 287, 695 N.E.2d 732 (1998), quoting *Weil v. State*, 46 Ohio St. 450, 453, 21 N.E. 643 (1889).

D. <u>The Public Policy Argument Made in Proposition of Law No. II Is Implicit in the Indemnity Coverage Issue Presented and Should Be Resolved by This Court.</u>

1. There has been no waiver by CIC of the public policy argument.

Cavanaugh argues that CIC failed to preserve the argument advanced in Proposition of Law No. II that Ohio's public policy bars an employer from obtaining indemnity insurance coverage for the current statutory EIT claims. Cavanaugh Br. at 14. Cavanaugh overlooks the fact that CIC did argue in the courts below that Ohio's public policy prohibits indemnity coverage for today's "specific intent" EIT claims pursuant to R.C. §2745.01. CIC made the public policy argument in its summary judgment briefing before the trial court. CIC's MOSJ at 5, 6, 8, 10, Supp. p. 22, 23, 25, 27. CIC reiterated that position again in its appellate brief before the court of appeals. CIC App. Br. at 27, Second Supp. p. 73. The public policy argument has not been waived by CIC. Cavanaugh is correct that the Ninth District did not address the public policy issue in its opinion. But that omission does not prevent this Court from resolving whether Ohio's public policy prohibits employers from obtaining indemnity coverage for the "specific intent" EIT claims brought pursuant to R.C. §2745.01.

Even when an issue is not argued expressly in the lower courts, this Court has made it clear that "[w]hen an issue of law that was not argued below is implicit in another issue that was argued and presented by an appeal, we may consider and resolve that implicit issue. To put it another way, if we must resolve a legal issue that was not raised below in order to reach a legal issue that was raised, we will do so." *Belvedere Condominium Unit Owners Ass'n v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993). *See also*, *Hill v. City of Urbana*, 79 Ohio St.3d 130, 133-134, 679 N.E.2d 1109 (1997).

No one can question whether CIC argued the indemnity coverage issues, which included alerting the courts below to the public policy argument. Before this Court can reach the precise insurance coverage issue presented by this case involving an interpretation of CIC's Policy, the Court must first determine whether indemnity insurance coverage for EIT claims exists at all. Implicit in the insurance coverage issue is whether Ohio's long-standing public policy prohibiting insurance coverage for direct intent torts is applicable to the EIT claim made in this case pursuant to R.C. §2745.01(C). This Court should not leave for another day the important and timely question of whether the public policy of this state bars indemnity coverage under any insurance policy where direct intent to injure an employee is established directly or is established by way of a presumption that arises when the employer has deliberately removed a safety guard. To ignore the public policy argument now will only leave Ohio's insurers and employers in a state of uncertainty and confusion as to whether indemnity insurance coverage can be obtained in regard to direct intent EIT claims brought pursuant to R.C. §2745.01.

2. **Harasyn** ***does not control the public policy bar to indemnity coverage after the enactment of R.C. §2745.01.***

Cavanaugh, Mr. Hoyle, and OAJ all rely upon *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St.3d 173, 551 N.E.2d 962 (1990) in opposing the public policy prohibition against indemnity coverage for EIT claims brought pursuant to R.C. §2745.01. Cavanaugh Br. at 15-16; Hoyle Br. at 18-19; OAJ Am. Br. at 5. The distinction made in *Harasyn* between direct intent and inferred intent liability is based upon the common law concept of substantial certainty which no longer applies in the context of EIT claims under R.C. §2745.01. This is because "substantially certain" now "means that an employer acts with *deliberate intent to cause an employee to suffer an injury*, a disease, a condition, or death." (Emphasis added.) R.C. §2745.01(B).

The key distinction recognized in *Harasyn* between direct and inferred intent also does not apply to EIT liability under R.C. §2745.01(C), which creates a presumption of intent to injure another, not just an inference. There are two reasons why this is significant. First, the inference of intent in *Harasyn* arises from the common law "substantially certain" standard of a tort which, as established above, no longer exists under the current EIT statute. Second, the concepts of a presumption and an inference are not interchangeable. Compare, *Brunny v. Prudential Ins. Co. of America*, 151 Ohio St. 86, 84 N.E.2d 504 (1949) and *Glowacki v. North Western Ohio Ry. & Power Co.*, 116 Ohio St. 451, 157 N.E. 21 (1927). An inference is a mere permissible deduction that the jury may or may not make without any express direction of the law to that effect. 42 Ohio Jurisprudence 3d, Evidence and Witnesses, § 104 (3d Ed.). "A presumption, on the other hand, is a mandatory deduction resulting from a previously known and ascertained connection between the fact presumed and the fact from which the inference is made, without the intervention of any act of reason in the individual instance." *Id.* In their haste to apply *Harasyn*, Appellees overlook what distinguishes an inference from a presumption.

3. The absence of legislation addressing whether public policy allows or prohibits indemnity coverage for EIT liability pursuant to R.C. §2745.01 is not dispositive.

Cavanaugh and Mr. Hoyle both argue that this Court should refrain from ruling on the public policy argument in Proposition of Law No. II because the General Assembly has not addressed this issue by way of legislation. Cavanaugh Br. at 16; Hoyle Br. at 17-18. But there was no legislation enacted when this Court decided *Harasyn* and there has been no legislation over the almost 25-years since *Harasyn* was announced. Cavanaugh and Mr. Hoyle cannot dispute that *Harasyn* held that Ohio's public policy does prohibit insurance coverage for direct-intent torts against employers. Cavanaugh Br. at 15; Hoyle Br. at 18. In *Harasyn*, this Court was not reluctant to set down the public policy parameters for insurance protection in the area of

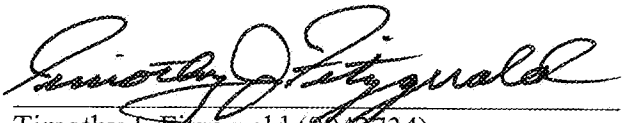
EIT claims.

The lack of any legislation by the General Assembly is no indication that Ohio's public policy allows insurance coverage for the direct intent EIT liability pursuant to R.C. §2745.01. To the contrary. It is presumed that the legislature was aware of existing case law covering a particular topic when it drafts a statute. *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶19. It should be presumed that the General Assembly was fully aware of *Harasyn* and its public policy prohibition against coverage for direct intent torts against employers when enacting R.C. §2745.01, which limits claims for employer intentional torts only to situations where an employer acts with the "specific intent" to cause an injury to another. *Kaminski, supra*, ¶ 56; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 26. Consequently, the General Assembly must have realized that defining EIT claims as it did would result in insurance coverage no longer being available for EIT liability as a matter of public policy, as this Court held in the *Harasyn* decision.

III. CONCLUSION

Intervening Plaintiff-Appellant, The Cincinnati Insurance Company respectfully requests that this Court reverse the judgment of the court of appeals and reinstate the judgment of the court of common pleas. No indemnity coverage can arise here as it is prohibited by public policy or is excluded by the express terms of the insurance policy endorsement which provides that no indemnity coverage is owed when the employer's liability to an employee arises from "acts committed by or at the direction of an insured *with deliberate intent to injure*."

Respectfully submitted,



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