

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

---

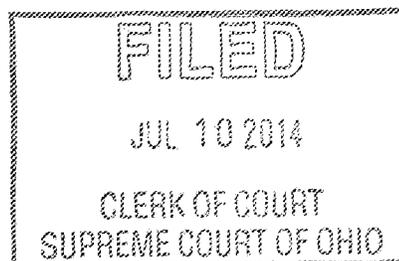
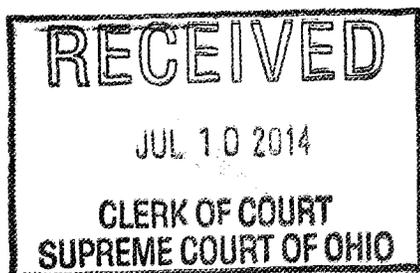
MEMORANDUM IN OPPOSITION OF  
PLAINTIFF-APPELLEE, DUANE ALLEN HOYLE,  
TO MOTION FOR LEAVE TO FILE POST-ORAL ARGUMENT  
SUPPLEMENTAL BRIEF

---

David R. Grant Esq. (#0065436)  
**PLEVIN & GALLUCCI**  
55 Public Square, Suite 2222  
Cleveland, Ohio 44113  
(216) 861-0804  
FAX: (216) 861-5322  
DGrant@pglawyer.com

*Attorneys for Plaintiff-Appellee,  
Duane Allen Hoyle*

Paul W. Flowers, Esq. (#0046625)  
**[COUNSEL OF RECORD]**  
**PAUL W. FLOWERS CO., L.P.A.**  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113  
(216) 344-9393  
FAX: (216) 344-9395  
pwf@pwfco.com



David G. Utley, Esq. (#0038967)  
**DAVIS & YOUNG, L.P.A.**  
One Cascade Plaza, Suite 800  
Akron, Ohio 44308  
(330) 376-1717  
FAX: (330) 376-1797

*Attorney for Defendant-Appellees,  
DTJ Enterprises, Inc. and Cavanaugh  
Building Corporation*

Mark W. Bernlohr, Esq. (#0038640)  
**JACKSON KELLY PLLC**  
17 South Main Street, Suite 101B  
Akron, Ohio 44308  
[mwbernloh@jacksonkelly.com](mailto:mwbernloh@jacksonkelly.com)

*Attorney for Defendant-Appellees,  
DTJ Enterprises, Inc. and  
Cavanaugh Building Corporation*

Michael M. Nelter, Esq. (#0063555)  
P.O. Box 145496  
Cincinnati, Ohio 45250  
[Michael.Nelter@staffdefense.com](mailto:Michael.Nelter@staffdefense.com)

*Attorney for Intervening Plaintiff-Appellant,  
The Cincinnati Insurance Company*

Timothy J. Fitzgerald, Esq. (#0042734)  
**KOEHLER NEAL LLC**  
3330 Erieview Tower  
1301 East Ninth Street  
Cleveland, Ohio 44114  
(216) 539-9370  
FAX: (216) 916-4369

*Attorney for Intervener-Appellant,  
The Cincinnati Insurance Company*

Thomas Vollmar, Esq. (#0064033)  
**FREUND, FREEZE & ARNOLD**  
1 South Main Street, Suite 1800  
Dayton, Ohio 45402-2017

*Attorney for Amicus Curiae, Ohio Association  
of Civil Trial Attorneys*

Tod T. Morrow, Esq.  
**MORROW & MEYER, LLC**  
6269 Frank Avenue, NW  
North Canton, Ohio 44720  
[tmorrow@morrowmeyer.com](mailto:tmorrow@morrowmeyer.com)

*Attorney for Defendant-Appellees,  
DTJ Enterprises, Inc. and  
Cavanaugh Building Corporation*

Steven J. Chuparkoff, Esq. (#0039141)  
50 South Main Street, Suite 615  
Akron, Ohio 44308  
[Stephen.chuparkoff@staffdefense.com](mailto:Stephen.chuparkoff@staffdefense.com)

*Attorney for Intervening Plaintiff-Appellant,  
The Cincinnati Insurance Company*

Peter D. Traska, Esq. (#0079036)  
**TRASKA KIMBRELL, LTD**  
4352 Pearl Road, Suite A  
Cleveland, Ohio 44109  
[ptraska@traskakimbrell.com](mailto:ptraska@traskakimbrell.com)

*Attorney for Amicus Curiae, Ohio Association  
for Justice*

## MEMORANDUM

Plaintiff-Appellee, Duane Allen Hoyle, opposes the Motion of Appellant The Cincinnati Insurance Company for Leave to File Post-Oral Argument Supplemental Material dated July 1, 2014. For sound reasons, such eleventh hour manipulations of the appellate record are prohibited by S.Ct.Prac.R. 17.09(A). No opportunity remains for Plaintiff to depose the affiant, Joel W. Davenport, and otherwise investigate and contest the new evidentiary submissions. His fundamental appellate rights will be seriously impaired if this unorthodox request is granted.

The due process concerns aside, the mere fact that Intervener-Appellant, Cincinnati Insurance Company (“CIC”), is attempting to belatedly supplement the evidentiary record is certainly significant. No plausible response remains to the argument that the “intentional act” endorsement – as interpreted by the insurer – is purely illusory. Initially, CIC had claimed that the policyholder was being provided with coverage against “dual capacity” and “third-party over” claims for damages. *Merit Brief of Appellant The Cincinnati Insurance Company dated February 24, 2014, pp. 39-40.* Plaintiff observed in response that these rarely encountered theories of recovery are already covered under the general “occurrence” section of the Commercial General Liability Policy. *Merit Brief of Plaintiff-Appellee Duane Allen Hoyle, dated April 15, 2014, pp. 25-26.* CIC then argued, for the first time, that the endorsement had been marketed to Ohio businesses as a result of the uncertainty that supposedly existed over whether the Workplace Intentional Tort Statute (R.C. 2745.01) would be declared unconstitutional. *Reply Brief of Appellant The Cincinnati Insurance Company dated May 5, 2014, pp. 9-10.* That contrived justification fell apart during oral argument, at which point CIC’s counsel maintained – also for the first time – that the policyholder had received a full refund once the enactment was upheld in *Kaminski v. Metal & Wire*

*Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, and *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092.

If this latest rationalization is indeed accurate, appropriate evidence should have been submitted to the trial court during the summary judgment proceedings below. It is now too late to do so at the end stages of the appellate process.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Motion of Appellant, The Cincinnati Insurance Company for Leave to File Post-Oral Argument Supplemental Material.

Respectfully Submitted,

David R. Grant, (per authority)  
David R. Grant, Esq. (#0065436)  
**PLEVIN & GALLUCCI**

*Attorneys for Plaintiff-Appellee,  
Duane Allen Hoyle*

  
Paul W. Flowers, Esq. (#0046625)  
**[COUNSEL OF RECORD]**  
**PAUL W. FLOWERS CO., L.P.A.**

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Memorandum** has been sent by e-mail on this 9<sup>th</sup> day of July, 2014 to:

David G. Utley, Esq.  
**DAVIS & YOUNG, L.P.A.**  
One Cascade Plaza, Suite 800  
Akron, Ohio 44308  
[dutley@davisyoung.com](mailto:dutley@davisyoung.com)

*Attorney for Defendant, DTJ Enterprises, Inc.  
and Cavanaugh Building Corporation*

Mark W. Bernlohr, Esq.  
**JACKSON KELLY PLLC**  
17 South Main Street, Suite 101B  
Akron, Ohio 44308  
[mwbernlohr@jacksonkelly.com](mailto:mwbernlohr@jacksonkelly.com)

*Attorney for Defendant-Appellees,  
DTJ Enterprises, Inc. and  
Cavanaugh Building Corporation*

Michael M. Nelter, Esq.  
P.O. Box 145496  
Cincinnati, Ohio 45250  
[michael\\_nelter@staffdefense.com](mailto:michael_nelter@staffdefense.com)

*Attorney for Intervening Plaintiff-Appellant,  
The Cincinnati Insurance Company*

Peter D. Traska, Esq.  
**TRASKA KIMBRELL, LTD**  
4352 Pearl Road, Suite A  
Cleveland, Ohio 44109  
[ptraska@traskakimbrell.com](mailto:ptraska@traskakimbrell.com)

*Attorney for Amicus Curiae, Ohio Association  
for Justice*

Timothy J. Fitzgerald, Esq. (#0042734)  
**KOEHLER NEAL LLC**  
3330 Erieview Tower  
1301 East Ninth Street  
Cleveland, Ohio 44114  
[tfitzgerald@koehlerneal.com](mailto:tfitzgerald@koehlerneal.com)

*Attorney for Intervener-Appellant,  
The Cincinnati Insurance Company*

Thomas Vollmar, Esq. (#0064033)  
**FREUND, FREEZE & ARNOLD**  
1 South Main Street, Suite 1800  
Dayton, Ohio 45402-2017  
[avollmar@fflaw.com](mailto:avollmar@fflaw.com)

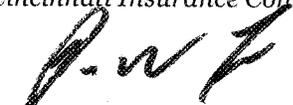
*Attorney for Amicus Curiae, Ohio Association of  
Civil Trial Attorneys*

Tod T. Morrow, Esq.  
**MORROW & MEYER, LLC**  
6269 Frank Avenue, NW  
North Canton, Ohio 44720  
[tmorrow@morrowmeyer.com](mailto:tmorrow@morrowmeyer.com)

*Attorney for Defendant-Appellees,  
DTJ Enterprises, Inc. and  
Cavanaugh Building Corporation*

Steven J. Chuparkoff, Esq.  
50 South Main Street, Suite 615  
Akron, Ohio 44308  
[stephen\\_chuparkoff@staffdefense.com](mailto:stephen_chuparkoff@staffdefense.com)

*Attorney for Intervening Plaintiff-Appellant,  
The Cincinnati Insurance Company*

  
Paul W. Flowers, Esq., (#0046625)  
**PAUL W. FLOWERS CO., L.P.A.**  
*Attorney for Plaintiff-Appellee,  
Duane Allen Hoyle*