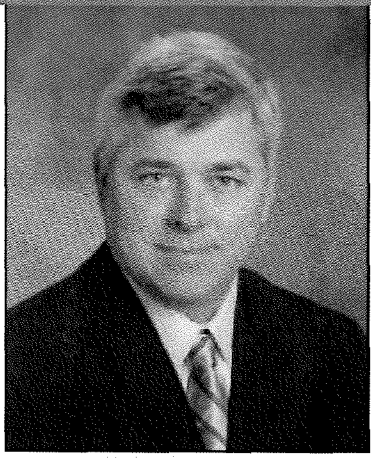
PENDING IN THE OHIO SUPREME COURT



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Allstate Ins. Co. v. Campbell, Sup. Ct. Case No. 2009-2358 (Ct. App. Franklin Cty., 2009-Ohio-6055)

On November 18, 2005, several teenagers stole a target deer with the intention of later putting it in the middle of a public road so that they could observe the reaction of motorists who were suddenly confronted the deer directly in their lane of travel—the teenagers testified that the idea flowed from a classroom discussion about how people react to various situations. The group saw at least two cars approach the deer, go around, and continue on their way without incident. Unfortunately, as another vehicle approached it swerved and lost control, causing the driver and a passenger to sustain serious injuries. Three of the teenagers entered no contest pleas in juvenile court to vehicular vandalism, a second-degree felony, possessing criminal tools, a fifth degree felony, and petty theft, a first-degree misdemeanor. The injured persons filed suit against the teenagers alleging that they negligently caused injuries to them, and the various insurance companies who had issued policies which would cover the teenagers' liability for negligence filed actions seeking declarations that they had no legal obligation to defend them in the underlying tort action, or to indemnify them against any judgment rendered in that action.

Although the Trial Court found that the teenagers had not intended nor expected that any personal injury would result from their conduct, it found that they nonetheless created a situation where harm was "substantially certain" to occur, such that the Trial Court inferred the existence of intent as a matter of law and held that the insurance companies had no duty to provide a defense to the teenagers, or to indemnify them. The Trial Court did not address the effect of the teenagers' no contest pleas upon the coverage issues.

The Court of Appeals examined the holding of the Ohio Supreme Court in the context of insurance coverage for the sexual abuse of a child, *Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34, 1996-Ohio-113, and noted that the it had adopted the "inferred intent" rule, which provides that "intent to injure is inferred as a matter of law from the act of sexual abuse of a child itself, as harm is deemed inherent in the sexual molestation." Para. 35. The Court of Appeals also noted that the Ohio Supreme Court had held in that case that the denial by an insured of any intention to harm someone is "only relevant where the intentional act at issue is not substantially certain to result in injury." Para. 36. The Court of Appeals then held that there was no dispute that the teenagers' conduct in placing the target deer in the middle of the road was intentional, such that the only issue was whether they intended harm or injury to follow from their intentional act, which was a question of fact. The Court of Appeals then held that the evidence that the target deer was made of Styrofoam and only weighed 10 to 15 pounds, when considered in conjunction with the testimony of the teenagers to the effect that their primary motivation was to observe the reactions of motorists who were suddenly confronted with an obstruction directly in front of them that two vehicles confronted with the deer were able to safely maneuver around it, and that the motorist who struck the deer and lost control was traveling at an excessive rate of speed, created an issue of fact whether they intended for injury to result (although the Court of Appeals did note that one of the boys had testified that their purpose was to "make cars slow down or maybe hit it"): "[G]enuine issues of material fact exists as to whether the boys necessarily intended to cause harm when they place the target deer in the roadway, whether harm was substantially certain to result from their actions, and whether their actions fall within the scope of the individual insurance policies." Para. 53.

Judge Saddler dissented, and indicated that, because "a completely subjective test would virtually make it impossible to include coverage for intentional [injuries] absent the admissions by insured's of specific intent to harm or injure," she "would not consider the boy's testimony about their expectations, plans and intentions, as recounted...[in] the majority opinion." Para. 60

The Ohio Supreme Court, over the dissents of Justices Pfeiffer, Lundberg Stratton, and O'Donnell, agreed to consider Allstate Insurance Company's and Grange Insurance Company's Propositions of Law Numbers II and III, which provide as follow:

> Proposition of Law No. II: The Doctrine Of Inferred Intent As Applied To An Intentional Act Exclusion In An Insurance Policy Is Not Limited To Cases Of Sexual Molestation Or Homicide And May Be Applied Where The Undisputed Facts Establish Harm Was Substan-

tially Certain To Occur As A Result Of The Insured's Conduct.

> Proposition of Law No. III: Policy Language Which Excludes Coverage For "Bodily Injury… Which May Reasonably Be Expected To Result From The Intentional Acts...Of Any Insured Person" Denotes An Objective As Opposed To A Subjective Standard Of Coverage Rendering An Insured's Subjective Intent Irrelevant.

Chief Justice Moyer, and Justices Lanzinger and Cupp, indicated that they would have also accepted jurisdiction over Allstate's and Grange's Proposition of Law No. I, which provided as follows:

> Proposition of Law No. I: Where The Undisputed Material Facts Demonstrate That An Insured's Intentional Conduct Was Substantially Certain To Cause Harm, Such Conduct Does Not Constitute An "Occurrence" Where That Term Is Defined As An "Accident" In A Homeowner's Insurance Policy.

With regard to the two other insurers involved in the case, Erie Insurance Company and American Southern Insurance Company, the Supreme Court also agreed to review propositions of law similar to the propositions of law advanced by Allstate and Grange, and rejected a proposition of law which set forth the same principle of law that was set forth in Proposition of Law No. I asserted by Allstate and Grange, which the Court had already rejected. Finally, with regard to the appeal of American Southern Insurance Company, Justice O'Connor indicated that she would have also accepted jurisdiction over its Propositions of Law No. III and IV, which provided as follows:

> Proposition of Law No. III: Where Made Independently Relevant By An Insurance Policy Exclusion, An Insured's Criminal Conviction Based On A No Contest Plea Is Admissible To Defend Against The Insured's Claim For Coverage For Damages Resulting From The Insured's Criminal Acts

Proposition Of Law No. IV: An Exclusion For Criminal Acts Is Separate And Distinct From An Exclusion For Intentional Acts And Operates To Preclude Coverage Regardless Of The Intent Of The Insured

Westfield Ins. Co. v. Turner, Sup. Ct. Case Nos. 2009-2214, 2010-0024 (Ct. App. Butler Cty., 2009-Ohio-5642)

Two minors, Terrell Whicker and his cousin Ashley Arvin, were involved in an accident when the ATVs they were operating on a farm in Indiana owned by their grandparents, Michael and Marilyn Hunter, who resided in Hamilton, Ohio, collided. Terrell Whicker filed suit against his cousin, Ashley Arvin, and her parents, and his and Ashley's grandparents, the Hunters, to recover compensation for the bodily injuries he sustained. The Hunters' personal residence in Hamilton, Ohio, was insured by Westfield, and their Indiana farm was insured by Grinnell Insurance.

Westfield Insurance filed an action seeking a declaratory judgment that its policy did not apply to the losses that occurred on the farm in Indiana, and Grinnell Insurance filed a counterclaim, seeking a declaration that the Westfield policy applied on a pro rata basis. Westfield sought summary judgment on the ground that the accident "arose out of premises" that were not an "insured location" such that the Westfield policy did not apply. Grinnell responded that the accident did not "arise out" of the premises because the injury was not caused by some defective condition in the premises, such that the exclusion did not apply.

The Court of Appeals examined the holdings in other Ohio cases and concluded that while the Eighth District Court of Appeals had held that an injury "arises out" of insured premises whenever the injury has some causal connection to the premises, the Second District Court of Appeals had held that "arises out" requires that the injury have been caused by a defective condition of the premises. Paragraph 12. The Court of Appeals then examined the policy language in the Westfield policy and noted that the exclusion referred to bodily injuries "arising out of a premises," not "arising out of **a condition on** a premises." Paragraph 20. Accordingly, the Court of Appeals held that the exclusionary language "arising out of" only required that the accident arise out of the use of the premises, not that the injury have been caused by a dangerous condition on the premises. The Court of Appeals, therefore, held that the injury at issue "arose out of the premises," even though it was not caused by a condition of the premises, such that the Westfield policy did not apply because the Indiana farm was not an insured location under the Westfield policy covering the Hunters' Ohio residence. But, because there is a conflict among the various Ohio appellate courts as to the proper interpretation of "arise out of," the Court of Appeals certified the following question to the Ohio Supreme Court:

> When construing an insurance policy exclusion, does an injury "arise out" of a premises only if some dangerous condition exists on the premises that caused or contributed to the injury, or must the injury only originate in or have a causal connection with the premises?

Federal Ins. Co. v. Executive Coach Luxury Travel, Sup. Ct. Case No. 2009-2307 (Ct. App. Allen Cty., 2009-Ohio-5910)

On March 2, 2007, a bus that was transporting the Bluffton University's baseball game to a game in Florida crashed as a result of the negligence of the bus driver, killing five of the baseball players and the bus driver and his wife, and injuring others. The bus had been hired by the University from Executive Coach. At the time of the accident, Bluffton University had insurance policies with three companies: a policy issued by Hartford Insurance Company which included commercial automobile coverage; a commercial umbrella policy issued by American Alternative Insurance Corporation, and a commercial excess follow-form policy issued by Federal Insurance Company. The Federal policy provided that it covered losses that were covered by the underlying policy, which was the policy issued by American Insurance, and the American policy provided that it covered losses that were covered by its underlying policy, which was the Hartford policy. Accordingly, American Insurance and Federal Insurance sought a declaration that their policies did not apply to the liability of the bus driver, because he was not an "insured" under the policy issued by Hartford, which defined as an insured as anyone "using with your permission in a covered auto you own, hire or borrow...." The issue, then, was whether the bus driver was using a vehicle the University had "hired" with the "permission" of the University.

The Court of Appeals noted that the Hartford policy did not define the terms "permission" or "hire," and noted that, when those terms are given their ordinary meaning, it could be concluded that the bus driver was using a vehicle with the "permission" of Bluffton University that it had "hired." The court then examined the holding of the Franklin County Court of Appeals which held that when, as in this case, the evidence shows that the conduct driver, although employed by separate corporation, and although driving a bus owned by that corporation, could have been controlled by the entity which hired the bus to provide transportation, when there is "shared control," the determinative factors should be which entity had the greater right of control—the corporation which employed the bus driver and owned the bus, or the entity which had hired the bus and driver to provide transportation. The Court of Appeals then help that rea-