Ohio State Bar Association 2011 Convention

INSURANCE AND NEGLIGENCE LAW UPDATE

Allstate v. Campbell And Other Recent Coverage Issues– What Now?

Presenter: Keith M. Karr, Esq.
KARR & SHERMAN CO. LPA
Two Miranova Place
Suite 410
Columbus, Ohio 43215
614.478.6000
kkarr@karrsherman.com
www.karrsherman.com

KARR & SHERMAN
A LEGAL PROFESSIONAL ASSOCIATION

Allstate v. Campbell, What Now?

On November 18, 2005, a group of high-school boys and teammates on the Kenton High School football team participated in a juvenile prank of placing a fake-deer decoy in a country road.

All of the boys agreed that placing the deer decoy in the roadway was intended solely as a prank. The boys just wanted to "get some laughs." The boys expected their prank would cause drivers to stop and go around the deer. The whole purpose of the prank was to see how drivers would react to the deer.

A car operated by Robert Roby and a passenger, Dustin Zachariah, came upon the deer decoy in a Dodge Neon, swerved to avoid it, and lost control of his vehicle. Roby and Zachariah sustained very serious disfigurement and permanent injuries from the incident.

Roby and Zachariah brought suit against the pranksters. The pranksters' insurance carriers filed declaratory judgment actions, which were consolidated.

Allstate, American Southern, Erie, and Grange insurance filed Motions for Summary Judgment arguing they had no duty to defend or indemnify the pranksters because the prank was not an "occurrence" under the respective policies, the prank was an intentional act, and excluded under the intentional-acts exclusion policy, and it was a criminal act under the criminal acts exclusion.

The trial court sustained the insurers' motions for summary judgment based only on the insurer's intentional-act exclusion arguments. The trial court did not address the insurer's arguments regarding an "occurrence" or the criminal acts exclusions.

The trial court inferred that the boys intended to harm, even in the absence of no direct evidence to support the inference:

> "Although a few drivers slowed down and avoided the deer, this court agreed with Plaintiffs' assertion that a car crash was inevitable. ***Although Defendants were unable to foresee the potential results of their actions,*** **this Court finds that their conduct was substantially certain to result in harm.** This Court finds the analysis and holdings of *Blamer* and *Finkley* to be particularly directive. Therefore this Court finds that the inferred intent doctrine applies to the circumstances of this case. As such, **this Court will infer Defendants' intent as a matter of law.[1]"**

[1] Decision Sustaining Erie, Allstate, American Southern, and Grange's Motion for Summary Judgment, pg 14 (Franklin County Court of Common Pleas, J. Connor, February 6, 2009).

By a Decision rendered on November 17, 2009, the Tenth District Court of Appeals reversed, stating:

> "viewing the facts of this case in a light most favorable to appellants," as it must, "that genuine issues of material fact exist as to whether the boys necessarily intended to cause harm when they placed 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.[2]"

And,

> "[b]ecause questions of fact remain as to the certainty of harm from the boys' actions, we reverse the trial court's conclusion that intent may be inferred as a matter of law under these circumstances. Accordingly, we conclude that the trial court erred in granting [Appellants'] motions for summary judgment.[3]"

Appellants-Insurers subsequently appealed the Court of Appeals Decision.

The Supreme Court of Ohio accepted two propositions of law upon review:

> 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 substantially certain to occur as a result of the insured's conduct.
>
> 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.[4]

[2] *Allstate v. Campbell,* 2009-Ohio-2358 ¶53, Consolidated Action.
[3] *Id.* at ¶ 57.
[4] *Allstate Ins. Co. v. Campbell*, 124 Ohio St.3d 1506, 2010-Ohio-799, 922 N.E.2d 969

I. Proposition of Law I– Is the doctrine of inferred intent, as applied to intentional act exclusion, not limited to cases of sexual molestation and homicide?

A. Insurance Argument

The insurance carriers argue the doctrine of inferred intent, as applied to intentional act exclusions, is not limited to cases of sexual molestation and homicide. The carriers cite to *Swanson*, where a person aimed, fired, and struck a person with a BB from a BB gun from a far distance, with intent only to scare, not to harm.[5]

The carriers urge the Court to apply the two tiered Swanson test to determine applicability of the exclusion. First, under the *Swanson* test, the Court must determine whether the act was intentional. Second, upon finding an act was intentional, the Court must determine (1) whether the insured actually intended to cause injury or damage; or (2) whether it was reasonably expected that some harm would occur.[6]

In this case the boys, upon their own admission, did not intend to cause injury. Therefore, the insurance carriers argue that they did however, reasonably expect harm to occur.

To determine whether reasonably expectation of injury is present, the carriers urged the court to apply the substantially certain test. In *Swanson*, the Court held that a person's intentional act is not excluded under a policy, unless the insured intended to injure, or where injury was *substantially certain* to occur.[7]

Five years after the *Swanson* decision, the Court, in *Gearing v. Nationwide Ins. Co.*, held, where an intentional act is substantially certain to cause injury or damage, the insured's subjective intent, or lack thereof, is not conclusive of the issue of coverage. Moreover, a person's self serving statement that they "didn't mean to hurt anyone" is only relevant where the act is not substantially certain to result in injury or damage.[8]

To bolster their argument, the carriers cite Justice Cooks' concurrence in *Buckeye Union Ins. Co. v. New England Ins. Co.* In her concurrence, Justice

[5] *Physicians Ins. Co. of Ohio v. Swanson*, (1991) 58 Ohio St.3d 189.
[6] *Id.*
[7] *Id.*
[8] *Gearing v. Nationwide Ins. Co.* (1996) 76 Ohio St.3d 34

Cook states the majority misapplied Ohio law under Gearing and Swanson, and back to a fact based analysis in *Harasyn*.[9]

Justice Cook's concurrence states that the *Harasyn*, direct fact based test, was supplemented by *Swanson* and its prodigy with the second tier, determining whether there was intent to injure or whether it was reasonably expected that harm would occur. Moreover, the carriers argue, that Justice Cook's concurrence, embodied an objective analysis, rejecting a subjective analysis, which in the carriers' opinion was the better-reasoned approach.[10]

Justice Cook further stated, allowing coverage for wrong acts, substantially certain to cause injury, is against public policy.[11]

The carriers went on to cite state the Minnesota high court applies the substantially certainty analysis.[12]

Under the substantially certainty analysis, the court is required to infer intent where the act is substantially certain to cause harm, even in the absence of direct intent to cause such harm. The carriers argued, as such, inferring intent is therefore not limited to sexual molestation and homicide, but all intentional acts that were substantially certain to cause harm.

Applying the substantial certainty analysis to the case at hand, the carriers, presented facts showing, at the time of the incident, it was extremely dark and the artificial deer was virtually impossible to see until it was too late. In addition, there were no streetlights in the area or lights from houses to illuminate the road. The pranksters knew the speed limit on County Road 124 was 55 mph, and by placing the deer on the other side of the hill, they created a situation where it was certain that drivers who came over that hill would be suddenly confronted by a "deer" in the road and be required to react just as suddenly.

B. Victim Argument.

Roby, in his reply, argued that where there is no direct evidence of intent, intent or expectation to injure is a question of fact, and is not presumed as a matter of law.

Applying the facts and outcome in *Swanson* to the matter at hand, Roby argued that said facts in *Swanson* are similar and illustrative to the case at hand. In each case a juvenile engaged in an intentional act with a foreseeable risk of harm. In each case, the act was ill-advised, negligent, and potentially harmful.

---

[9] *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999) 87 Ohio St.3d 280, J. Cook, concurring, citing *Harysyn v. Normandy Medal*s, Inc. (1990) 49 Ohio St.3d 173, wherein the Court had discussed the different levels of intent with intentional torts.
[10] *Id.*
[11] *Id.*
[12] *B.M.B. v. State Farm Fire & Cas. Co.* (Minn. 2003) 664 N.W.2d 817;

However, in each case, the act and subsequent harm were not so **inherently intertwined** as to allow the Court to infer the insured's intent as a matter of law.

Roby's next contention is that intent may only be inferred, where the act will almost always result in harm. Due to the fact these event almost always lead to harm, the inferred intent rule eliminates the need for further analysis into the insured's intent and permit a court to infer intent as a matter of law.

Under the facts of this matter, the act will not always lead to harm. The facts show that cars had time to slow down and miss the deer, and even stop completely before going around the deer. These facts alone show the event was not one that would almost always result in harm.

Roby next argues that inevitability cannot be the standard applied. The carries contended that it was only a matter of time till injury was to result. Such a term would apply to many other negligent acts under Ohio law, and therefore are inevitable. The Court acknowledges this type of danger in *Swanson*.

By allowing such a broad standard to apply, the carriers would be able to potentially exclude losses with foreseeable harm, and/or pick and choose the more unusual cases to exclude, so they have something to sell to the public.

Roby contends that the carriers' requested application of the inferred intent rule would exclude numerous acts that are not injurious by definition as a matter of law. Moreover, it leaves the term substantially open to an interpretation that can be 51 percent up to 100 percent. This broad scope, if applied, would only cause to create more confusion of the term substantially certain.

Applying Roby's "inherently intertwined" analysis, the facts show many cars missed the Styrofoam deer. Moreover, the boys did not intend more expect harm. Since the placement of the Styrofoam deer was not almost always going to cause harm, and the fact that the harm was avoidable, intent cannot be inferred.

C. Court Ruling

The Supreme Court of Ohio held, "as applied to an insurance policy's intentional-act exclusion, the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm.[13]"

Further, the Court explained why *Gill* and *Gearing* provide examples of where the doctrine applies. In both cases, the insured could not claim they were unaware that harm could result from their actions.[14] Moreover, *Swanson*, where a BB gun was fired from a long distance, *and Buckeye Union*, where an insurance company refused to settle a claim, are cases where harm does not necessarily

[13] *Allstate Ins. Co. v. Campbell*, 2010-Ohio 6312 ¶ 56.
[14] *Id*. at ¶49

result from the act itself. In both cases a fact based inquiry was required to determine if an exclusion applied.[15]

This limitation in scope, the majority held, was appropriate, because the rule is only needed in a narrow range of cases where the insured's testimony on intent is irrelevant due to the fact the act could not have been done without causing harm. Therefore, the intent may only be inferred where the action necessitate the harm.[16]

The Court went ahead and applied the "inherently intertwined" comparing the prank to the acts in *Swanson* and *Buckeye Union*:

> "We cannot say as a matter of law that the act of placing a target deer in a road in the manner don here necessarily results in harm. Indeed, other cars had passed by and avoided the target. While the boys' act was ill-conceived and irresponsible and resulted in serious injuries, the action and the harm are not intrinsically tied the way they are in murder and sexual molestation. We accordingly conclude that while the doctrine of inferred intent may apply to actions other than murder or sexual molestation, it does not apply in this case.[17]"

The Court found that the carriers' reliance upon Justice Cook's concurrence is unfounded. The plurality opinion in *Gearing* found, the rule of inferred intent is based upon, "the premise that acts of sexual molestation and the fact of injury caused thereby are 'virtually inseparable.'" Ergo, to do the act is necessarily to do the harm, since the act is intended, so too is the harm.[18]

The Court stated that nowhere in *Gearing* does the opinion state that the substantially certain test should be used to determine whether to infer intent as a matter of law.[19]

II. Proposition of Law III - Does the terms "reasonably expected to result" denote an objective or subjective standard?

A. Insurance Argument

The carriers' urged the court to apply an objective standard to the terms "reasonably expected to result." The carriers explained insurance policies generally have two types of intentional act exclusions. First, coverage is excluded

[15] *Id*. at ¶ 50
[16] *Id*. at ¶ 48
[17] *Id*. at ¶ 51
[18] *Id*. at ¶ 47, citing *Gearing*, 76 Ohio St.3d at 37.
[19] *Id*. at ¶ 53, discussing the *Gearing* substantially certain test.

where injury or damage is "expected or intended by the insured. Second, coverage is excluded where injury or damage is "intended by or which may reasonably be expected to result from the intentional acts . . . of any insured person.[20]"

Under the former, the carriers argued, Ohio courts held a self serving statement is of negligible value. Under the latter, Ohio courts should objectively focus on the consequences, that could reasonably been expected.[21] Furthermore, the carriers went on to cite other states that hold that such language requires the application of an objective rather than a subjective standard.[22]

Lastly, the carriers reverted back to an argument of inevitability. Discrediting the fact that numerous cars missed the Styrofoam deer, the carriers urged the court to adopt the idea that damage was inevitable under the facts.

B. Victim Argument

Roby replied, urging the court to apply a subjective standard to the intent of the pranksters, according to the policies so written. The Grange and Erie policies, exclude coverage from an intentional act when damage or injury was "expected or intended" by an insured. Moreover, the American Southern policy excluded injury resulting from "any intentional act of any insured." This language clearly denotes a subjective intent, where the insured's direct intent is material. If the drafters, the carriers themselves, desired to have an objective standard applied, they could have done so. Therefore a court cannot read such terms into the terms of the policies.

In response to the Allstate policy, where the language excludes "any bodily injury or property damage intended by, or which may reasonably be expected to result, from the intentional or criminal acts or omissions of, any insured person," Roby argued the inclusion of the term reasonable does not *mandate* an objective standard. This language merely shows the intent or expectation must be considered from the reasonable viewpoint of *the insured*.

Roby argued the Court of Appeals correctly applied the Allstate policy:

> "Although Roby's accident occurred less than ten minutes after the boys placed the deer in the roadway, the boys' expectations that

[20] See attached policy exclusions
[21] *Nationwide Mut. Ins. Co. v. Irish*, (2006) 167 Ohio App.3d 762, ¶ 38; *Nationwide Mut. Ins. Co. v. Layfield* 2003-Ohio-6756 at ¶ 12
[22] *Id.*

> motorists would successfully avoid the obstruction proved to be *reasonable*, as at least two motorists reacted in just that way.[23]"

Further, Roby argues the carriers misapply *Gearing*. The carriers argue that *Gearing* stands for the proposition that an insured's self serving testimony constitutes an improper subjective analysis, and should not be considered. *Gearing*, Roby argued, does not impose a completely objective or subjective standard. *Gearing* simply dictates a court must determine the issue of intent from the standpoint of the insured, albeit with a wary eye on an insured's own testimony. The Court of Appeals did exactly so be applying a reasonable person standard to the insureds' testimony.

Lastly, Roby argues, issues of material fact are present, precluding any summary judgment, and said material facts could affect the reasonable person analysis. These material facts are causative factors that must be taken into account in order to determine both a subjective and an objective expectation or intent of an insured. Therefore, since these causative factors are still in dispute, summary judgment was improper as the Court of Appeals held.

C. Court Ruling

The Court affirmed the Court of Appeals decision, holding:

> "The Allstate, Grange, and Erie polices each contain exclusionary language stating that the insurers will not cover harm expected or intended by an insured. Because we do not infer the insureds' intent to harm as a matter of law and the boys deny that harm was intended or expected, whether the injury was expected or reasonably expected is an issue to be determined by the trier of fact.[24]"

Further, the Court held, a motion for summary judgment may be granted if and when intent may be inferred as a matter of law. When the act does not necessarily result in harm, or is not inherently intertwined, intent will not be inferred as a matter of law, and summary judgment is improper. The court must weigh *all facts* whether the pranksters intended or expected harm.[25]

[23] *Supra* note 2.
[24] *Supra* note 13 at ¶ 58.
[25] *Id. at* ¶ 59.

III. Justice O'Donnell Dissent

Justice O'Donnell concurred in the decision to extend the doctrine of inferred intent as applied to intentional acts exclusions to acts other than sexual molestation and homicide, but dissented on the "intrinsically tied" test.[26]

O'Donnell argues the Court should not depart from *Gearing's* substantial certainty test:

> "The majority justifies its adoption of this new test by stating that *Gearing* 'did not address the question of whether intent may be inferred in cases involving acts other than sexual molestation or murder' and that as a result, '[a] close examination of *Gearing* . . . reveals that this court has limited the scope of inferred intent.[27]"

The majority, in his opinion, should adhere to decision in *Gearing*, as he argues, is clearly applicable to the prank. Citing *Swanson*, O'Donnell states that this court, applied the *Gearing* analysis, or substantial certainty test, to situations other than sexual molestation and homicide (shooting a BB gun from long range), and therefore the courts narrow interpretation is artificial.[28]

Justice O'Donnell argues that the pranksters, according to the facts on record, anticipated and waited for injury to occur. Based upon this analysis, applying *Gearing*, O'Donnell would reverse the Court of Appeals decisions, and uphold the trial court ruling, as the act of placing a Styrofoam deer on a roadway at night is substantially certain, in his opinion, to cause to injury.[29]

IV. American Southern Policy

The Court held that American Southern's policy, as drafted, is extremely broad and frees it from the *Gill*, *Swanson*, and *Gearing* analysis. Those cases addressed intentional injury; rather American Southern's policy addressed the act. The Court then held such language give American Southern no duty to defend.[30]

---

[26] *Supra* note 13, J. O'Donnell, concurring in part and dissenting in part, ¶ 68
[27] *Id.* at ¶ 76.
[28] *Id.* at ¶77
[29] *Id.* at ¶ 78
[30] *Supra* note 2 at ¶61

American Southern excludes coverage from, "***an intentional act*** of any insured or an act done at the direction of any insured.[31]"

The question that must be asked is, "what now?" An insured in Ohio is now open to the fact that coverage may be precluded for *any* act, if it is in any way intentional. The American Southern policy, as the Court held, addressed an intentional *act*, not injury. This is the classic "door opening" holding that public policy cannot uphold.

Under this American Southern ruling, the carriers are now potentially able to draft a policy saying they will not cover any intentional act, regardless of any other factor. Does this now mean that running a red light, changing lanes, or driving under the influence of alcohol resulting in injury to another is now uninsurable?

These are some examples of classic negligence, whereby the act is taken with intent to do as you do, but there is no intent to harm. Justice Pfeiffer, concurring in part but dissenting to the American Southern decision, argues that most accidents are the result of intentional acts, yet it is the result that is unintended.[32] Under this policy and decision, any action is potentially uninsurable.

This type of language crosses all boundaries, not just the operation of a motor vehicle. When a child intentionally throws a baseball at another person, but instead of the ball being caught, the ball hits the person, causing injury, he is now not covered under the American Southern policy language. Where does this end?

V. Justice Cupp Dissent

Justice Cupp concurred in judgment in regards to Erie and Grange, but dissented as applied to Allstate. Justin Cupp would argue that there is no coverage under the Allstate policy.[33]

His reason for dissent extends from the language contained in Allstate's exclusion, whereby coverage is excluded for injury, "which may reasonably be expected to result from the intentional or criminal acts or omission of" an

[31] *Supra* note 20
[32] *Supra* note 2, J Pfeiffer, concurring in part and dissenting in part, at ¶ 67
[33] *Id.*, J. Cupp, concurring in part and dissenting in part, at ¶ 80

insured.[34] The addition of the qualifier, reasonably, placed the Allstate policy in line with American Southern's.[35]

In his opinion, even though the injury was not certain to occur, it is arguably reasonably expected to result from the intentional acts. Justice Cupp urges the Allstate language denotes the application of a more objective, rather than subjective test for intent, and as such, there is no genuine issues of material fact in regards to Allstate.[36]

VI. What Now?

The majority holding is a mixed victory for Ohioans. On one hand, parents may now be covered for the pranks of their children. On another hand, the insurance carriers might be able to simply draft a policy excluding *any* intentional act, regardless of intent to harm.

In essence, the *Campbell* holding leaves Ohio families to question every action they take. Our clients must be educated to read their policies. By simply having insurance, it might indeed only be a mirage of coverage.

[34] *Supra* note 20.
[35] *Supra* note 2, J. Cupp, concurring in part and dissenting in part, at ¶ 81
[36] *Id.*

The Intra-Family Exclusion – How Insurance Coverage Potentially Harms, Rather Than Protects, Your Family

Under current Ohio law, insurance carriers are able to draft away coverage for any family member, residing in the same residence. This is sometimes referred to as the intra-family, or relative-resident, exclusion.

Intra-family or resident-relative exclusions have long been held valid in Ohio.[37] In fact, the Ohio Supreme Court, after abolishing spousal-tort immunity, suggested that insurance companies use this type of exclusion to reduce the cost of insurance premiums.[38]

R.C. 3937.18(I) governs Uninsured and Underinsure Motorist coverage exclusions:

> (I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, *including but not limited to* any of the following circumstances. (emphasis added).[39]

R.C. 3937.18 permits policies with UM coverage to limit or exclude coverage under circumstances that are specified in the policy even if those circumstances are not also specified in the statute.[40]. The Supreme Court held that "[e]liminating the mandatory coverage offering and simultaneously permitting the parties to agree to coverage exclusions not listed in the statute provides insurers considerable flexibility in devising specific restrictions on any offered uninsured- or underinsured-motorist coverage.[41]"

Recently, the Third District Court of Appeals, upheld intra family exclusions.[42] Interpreting an Allstate exclusion, the Appeals Court held, an exclusion stating "Liability Coverage does not apply to bodily injury to you or any relative," however broadly, is valid.

---

[37] *See* Kuhnle v. Zander, (2004) 103 Ohio St.3d 474; *Kelly v. Auto-Owners Ins. Co.,* 2006-Ohio 3599 ("intrafamilial-tort exclusion, which is apparently designed to prevent fraudulent or collusive intrafamilial lawsuits for insurance benefits, is permitted under Ohio law"); *Nussbaum v. Progressive Cas. Ins. Co.*, (1988) 61 Ohio App.3d 1

[38] *Kelly v. Auto-Owners Ins. Co.,* 2006-Ohio-3599, citing *Shearer v. Shearer* (1985) 18 Ohio St.3d 94.

[39] R.C. 3937.18(I)

[40] *Snyder v. Am. Family Ins. Co.*, (2007) 114 Ohio St.3d 239

[41] *Id.*, citing R.C. 3987.18

[42] *Dunson v. Home-Owners Ins. CO.*, 2010-Ohio-1928

Dunson, involved an Allstate policy, whereby all liability exclusions were adopted by reference in the UM policy. Plaintiffs argued that such a reference is ambiguous in itself, since the UM Policy does not define and identity, within the UM policy itself, whom is exclude, but merely reference the separate liability policy. The Court found that such incorporation, however broad, was not ambiguous within the four corners of the policy.[43]

What Now?

As in the recent holding in *Allstate v. Campbell*, insureds in Ohio are again left to ponder, "For what acts is my family protected under my insurance?" This is something our families should not be forced to question.

Under the intra-family exclusions, if you are involved in an accident and your passenger spouse and children are hurt, you will potentially be left without coverage. Instead of purchasing coverage to protect your family, your coverage, in essence, precludes your family, therefore you become uninsured. This is not the envisioned purpose of the exclusion. The purpose of said exclusion is to prevent fraudulent lawsuits. However, the rendered effect is preventing needed coverage for injured family members.

Taken at face value, the goal of avoiding fraudulent family lawsuits is an acceptable purpose. However, where does such a goal stop? Does this mean that carriers can now draft away all coverage, couched under the goal of preventing *all* fraudulent claims? Insurance carriers are given more and more leeway to draft as it pleases, and Ohio families are suffering at their hands. Under current Ohio law, any ambiguity in an insurance contract, or any agreement where there is unequal bargaining power, is interpreted strictly against the drafter and in favor of the non drafting party.[44] The intra-family exclusion, as drafted, is ambiguous to the citizens of Ohio. Insured families have no idea these exclusions fail to protect their spouse and children.

It would seem that our jury system is better served to distinguish the family fraudulent claims from the valid actions for fair compensation from an automobile collision.

And is the intra-family exclusion contrary to the current laws in Ohio that all drivers must be insured? Or is it now all Ohio drivers must be insured under just certain circumstance?

---

[43] *Id.*

[44] *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 797 N.E.2d 1256, citing *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 406 N.E.2d 515

It seems the only recourse is either a Supreme Court ruling against said exclusions, or a legislative amendment prohibiting such exclusions in Ohio family insurance policies.

Policies Excluding Coverage of those Operating Vehicles without a Valid License

Insurance policies in Ohio can contain exclusions whereby coverage is precluded if an insured operates a vehicle without a "valid license." The provision may be couched in such language as:

> "No coverage is afforded under any section of this policy if the covered auto is being operated by a person who is not a qualified, licensed driver, or is without a valid driver license, or whose driver license is expired, revoked or suspended, or is in violation of any condition of their driving privileges, or is without privileges to drive for any reason.[45]"

Under the preceding policy language, and those similar, an insurance carrier drafts out coverage as a result of the negligence of a driver operating a vehicle without a "valid license." Ohio courts have upheld such exclusions as valid.[46]

The Supreme Court of Ohio, in *Kaplysh v. Takieddine*, held that an unlicensed driver could be excluded from coverage.[47] The Court relied on the definition of the term "license" to preclude coverage. Under the plain meaning in Webster's third New International Diction (1981), the term "license" means, having a license: permitted or authorized by license. Moreover, the terms "expire" and "expiration" means to come to an end: to reach a close, to become void through passage of time.[48]

Using these definitions the Court found that driving on a license expiring just twenty-two days prior, was a termination, and therefore, not a valid license. Just recently, the Sixth District Court of Appeals, held *Kaplysh* is still applicable today.[49]

These types of exclusion result in the preclusion of coverage of those operating with suspended licenses, those driving with privileges whom arguably are not following a precise order, and even those whom simply failed to pay reinstatement fees, yet their actual suspension is expired.

Yet again Ohio families are presented with a situation, whereby a person's negligence is precluded by, an albeit simple, exclusion. Taken by itself, this

---

[45] *Smith v. Safe Auto Ins. Co.*, 2008-Ohio-5806; citing Safe Auto policy.
[46] *Kaplysh v. Takeddine* (1988) 35 Ohio St.3d 170
[47] *Id.*
[48] *Id.*
[49] *Supra* note 44

exclusion may reflect public sentiment against those operating without a valid license, however, along with the preceding two topics explained in this discussion, this exclusion simply represents the lack of protection Ohio families have from insurance carriers, and reflects the power the carrier has in determining the limited circumstances where coverage is applied.

CONCLUSION

The result of the decisions in *Campbell*, the intra-family exclusions, and the denial of coverage based on an "invalid" license are just three examples of how the citizens of Ohio are being taken advantage of by their insurance carriers.

Citizens probably have no idea these exclusions preclude coverage in certain situations. Moreover, the American Southern decision in *Campbell* opens the door to insurance carriers to simply write out any *act* from coverage. This is not the goal of insurance, nor does it protect our citizens.

As we learned in law school, negligence is the result of the breach of a duty, causing harm. Negligence is why we carry insurance. Today, insurance carriers are given more and more power to preclude negligence from coverage.

The information in this article is the opinion of the author, used for educational purposes only, and is not intended to constitute legal advice. **The author would like to thank Justin A. Cousino and David W. Culley, attorneys with Karr and Sherman for all of their valuable assistance.**