IN THE SUPREME COURT OF OHIO

Case No. 2013-1405

Duane Hoyle, Plaintiff-Appellee, and

The Cincinnati Insurance Company,
Intervening Plaintiff-Appellant,

vs.

DTJ Enterprises, Inc. et al.,
Defendants-Appellants.

On Appeal from the Ohio Ninth District Court of Appeals,
Summit County, Case Nos. CA-26579 & 26587

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF ALL APPELLEES

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STATEMENT OF INTEREST

The Ohio Association for Justice is Ohio's largest professional association of attorneys who focus their practices on serving the injured. OAJ frequently acts as a friend of this Court for the purpose of providing input on insurance coverage issues.

This case pits the interests of an alleged tortfeasor against those of its own insurance company. OAJ is allied with Mr. Hoyle, DTJ Enterprises and Cavanaugh Building Corporation during this appeal. The fellow Appellees are in this instance situated similarly to many of OAJ's members' injured clients: they are insurance consumers.

Apparently without embarrassment, Appellant Cincinnati Insurance Company has pursued this appeal to advance the position that it sells employer intentional tort policies that provide no indemnity. This appeal therefore presents a question of loss-shifting. CIC, however, as already calculated how much it must charge in order to write EIT stop-gap coverage in the wake of Ohio's current EIT statute. CIC has already made actuarial calculations about what it will cost to provide the coverage. CIC has in fact collected premiums, from the Appellees and others. There is no dispute that CIC collected these premiums not only to provide a defense, but also to "pay those sums that an insured becomes legally obligated to pay." *Hoyle v. DTJ Ents., Inc.*, 9th Dist. No. 26579, 2013-Ohio-3223, ¶ 8, quoting the CIC policy.

The Appellees are therefore pulling in the same direction, albeit ultimately on opposite sides of this case. Mr. Hoyle is hurt. The co-Appellees are defending against their insurer's attempt to take premiums based on an illusory promise of indemnity. OAJ's interests include advocating to see an insurer do right by its insured.

STATEMENT OF THE CASE AND FACTS

The Amicus adopts the Appellees' statements of the case and facts.

LAW AND ARGUMENT

This Court has no jurisdiction over the first proposition of law. CIC's own policy language easily resolves the other two propositions. What CIC is attempting is to re-define the issues in a manner that would negate the terms it wrote into the policy. The Amicus asks that this Court refuse to allow it.

> **Proposition of Law No. 1:** When an employee is relying upon R.C. § 2745.01(C) to create a rebuttable presumption of intent to injure arising from the employer's removal of an equipment safety guard, the ultimate burden remains with the employee to prove that the employer acted with "deliberate intent" in order to establish liability against the employer for Employer Intentional Tort.

I. APPELLANT'S INVOCATION OF THIS COURT'S JURISDICTION IS IMPROPER ON THE FIRST PROPOSITION OF LAW.

The first proposition would ask this Court to decide a part of this case on which there has been no final, appealable order. The issues of the intent necessary to support a claim under R.C. § 2745.01(C) were discussed at length in Section II of the trial court's first Order grating partial summary judgment. See Case No. CV 2010-03-1984, Order of April 20, 2012, Sec. II. Unlike the order under appeal, the April decision does not contain the certification that there is "no just reason for delay."

Section 3(B)(2), Article IV of the Ohio Constitution provides that "courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals *** ." See, e.g., *Harkai v. Scherba Indus.*, 136 Ohio App. 3d 211, 213-214, 736 N.E.2d 101, 103, (9th Dist. 2000).

While Civil Rule 54(B) allows piecemeal appeals by inclusion of the language, "no just reason for delay," the trial court did not take this action with the April Order. The issues discussed therein are therefore not properly before this Court.

The issues in this appeal are therefore much more straightforward than CIC's efforts would suggest. Whether Mr. Hoyle will ultimately succeed in making out the requisite intent to support his claim is an issue for another day. But CIC has made it the first issue that it wishes to pursue. CIC's attempt is an improper end-around, and directs this Court's review toward an issue on which there is no appellate jurisdiction.

> **Proposition of Law No. 2:** Public policy prohibits an insurer from indemnifying its insured/employer for Employer Intentional Tort claims filed under R.C. § 2745.01 because an injured employee must prove that the employer committed the tortious act with direct or deliberate intent to injure in order to establish liability.
>
> **Proposition of Law No. 3:** An insurer has no duty to indemnify an employer-insured for Employer Intentional Tort liability when the employee invokes R.C. § 2745.01(C) for the deliberate removal of an equipment safety guard where an endorsement to the insurer's policy excludes coverage for "liability for acts committed by or at the direction of an insured with deliberate intent to injure."

II. PUBLIC POLICY ALLOWS INSURANCE COVERAGE FOR ACTS WHERE INTENT IS INFERRED.

First, these Proposition invite this Court to ignore the language of the CIC policy actually under review. The policy contains the following definition of "an act which is substantially certain to cause `bodily injury:"

> a. An insured knows of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
>
> b. An insured knows that if an "employee" is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the "employee" will be a substantial certainty; and
>
> c. An insured under such circumstances and with such knowledge, does act to require the "employee" to continue to perform the dangerous task.

Rather than honor the policy it wrote, CIC appeals to this Court to import statutory and case law definitions. The policy simply needs no other definition of intent. Nothing in the law precludes CIC from writing and selling an endorsement that provides broader coverage than the minimum required by law.

CIC's position is that even though it wrote the insurance policy, it was against public policy to do so. If that were the case, the time for this insight was *prior* to accepting premium dollars for coverage that promises indemnity that is contrary to public policy. But CIC is incorrect. "When construing an agreement, the court should prefer a meaning which gives it vitality rather than a meaning which renders its performance illegal or impossible." [Cite omitted.] Generally, 'courts disfavor contract interpretations which render contracts illusory or unenforceable.'" *Talbert v. Cont'l Cas. Co.*, 157 Ohio App. 3d 469, 473, 2004-Ohio-2608, P9, 811 N.E.2d 1169, 1172 (Second District 2004).

In *Talbert*, an insurer made a similar argument as CIC makes here. CIC maintains that the presence of other coverage provisions renders the endorsement something better than an illusory promise. CIC has no response, however, to the fact that the promise of indemnity could never be a true promise. Indemnity is of the essence of an insurance contract. The EIT endorsement would be illusory under CIC's reading:

> However, we are struck by the fact that if Continental's interpretation is correct, Amcast would have purchased nothing when it purchased this policy from Continental. *** The only thing that the Continental insurance policy asserts to cover is those injuries to Amcast's employees arising out of their employment with Amcast that is not covered by the worker's compensation system. In Ohio, the only injuries that would not be covered by worker's compensation are intentional torts and pursuant to *Harasyn*, the only intentional tort that one can insure against without violating Ohio public policy is substantial certainty intentional torts. Thus,

> the only thing the Continental policy would provide coverage for was substantial certainty intentional torts. Yet, Continental now argues that even these are not covered under its policy. The only thing Continental argues would be covered under the policy is "dual capacity" torts. However, the *Harasyn* Court addressed this argument and found it to be specious. *Harasyn*, supra. We find that Continental's argument would render its policy illusory. Like the courts in *Harasyn* and [479] *Miller*, we are not inclined to give the insurance policy a reading that would render it useless. Amcast paid a significant premium for this policy, and we fail to see what they paid for if it was not coverage for substantial certainty intentional torts. Therefore, we do not find Continental's argument persuasive.

Talbert, 157 Ohio App. 3d 469, 478-479, 2004-Ohio-2608, P36.

Not long ago, this Court stated, "people who pay separate premiums for separate coverages should get what they pay for...". *Berrios v. State Farm Ins. Co.*, 98 Ohio St. 3d 109, 112, 2002-Ohio-7115, P26, 781 N.E.2d 149, 151. "Intent" has always been a hotly contested term of art in the development of Ohio's EIT law. CIC had full awareness of that history, and elected to write a coverage under the new statute.

CIC is not entitled to re-write its policy with resort to definitions that lie outside of it. The policy contains the above definition of "intent." There is no reason to look beyond.

Further, Ohio Courts have long held that substantial certainty intent is a species of "implied intent," rather than a specific intent to injury. See e.g., *Harasyn v. Normandy Products*, 49 Ohio St.3d 173, 551 N.E.2d 962 (1990). The new EIT statute creates a presumption; it alters the burden of going forward on this case. It allows a jury to impute intention based on deliberate removal of safety equipment, or exposure to hazardous substances.

In this case it remains to be seen what intentions will be proved, and what conduct will be at issue. CIC does not dispute that it will be providing a defense. While doing so, CIC and the other parties will develop the facts that prove, or disprove

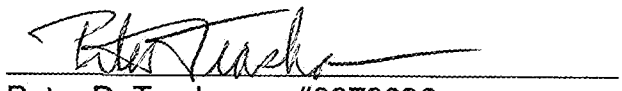
the liability of the co-Appellees. But presently, those facts, and the co-Appellees actual intent, are not established. Due to CIC's intervention and continuing attempts to escape its own promises, this case has kept all parties in the Courts of Appeals. DTJ Enterprises and Cavanaugh's intent, and liability remain to be litigated.

This case pits the interests of insured businesses against their insurance company. It therefore presents a question of which party should bear any loss ultimately proved to be payable. Amicus OACTA, being in the position of having to choose between parties representative of its clients, or a party like its usual payors, has taken the side of its payors. CIC's position is literally that it should be able to sell indemnity coverage that cannot indemnify anything. This Court should not countenance this position.

CONCLUSION

For the reasons above, as well as those advanced by the Appellees, Amicus the Ohio Association for Justice asks that this Court AFFIRM the judgment of the Ninth District Court of Appeals.

Respectfully Submitted,



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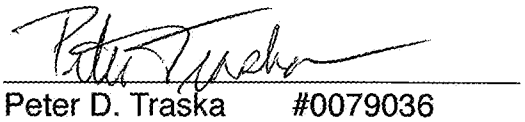

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