

**From:** John Travis  
**Sent:** Mon 3/16/2015 11:16 AM  
**Gallagher Sharp Newsflash: No Coverage for Employer Intentional Tort**

The Supreme Court of Ohio held in a 5-2 decision, “An insurance provision that excludes coverage for acts committed with the deliberate intent to injure an employee precludes coverage for employer intentional torts, which require a finding that the employer intended to injure the employee.” (Justices Lanzinger and Kennedy concurring in syllabus and judgment only.)

In *Hoyle v. DTJ Enterprises, Inc.* Slip. Op. No. 2015-Ohio-843, the plaintiff was working on a ladder-jack scaffold on a construction project. He claimed that his job superintendent kept bolts used to secure the scaffold in his office because using them was too time consuming. The plaintiff’s expert, a safety engineer, opined that the scaffold was not properly secured. The plaintiff fell from the unsecured scaffold and filed suit against his employer alleging that the defendant acted with deliberate intent under R.C. §2745.01 to cause the plaintiff’s injury and that the defendant’s actions constituted or were equivalent to the “deliberate removal by an employer of an equipment safety guard” as set forth in R.C. §2745.01.

Cincinnati Insurance Company (“CIC”) insured the employer under a commercial general liability policy. CIC intervened in the action, and filed a complaint for a declaratory judgment that CIC had no obligation to indemnify the employer for the injuries the plaintiff sustained in his fall. CIC did not dispute its obligation to defend the employee’s bodily injury suit. The employer moved for summary judgment on the plaintiff’s claim, arguing that he could not prove that his employer acted with intent to injure or that injury was substantially certain. The trial court found genuine issues of material fact as to whether the pins normally used to secure the ladder jacks constituted an equipment safety guard and whether the employer deliberately removed them.

CIC, however, maintained that even if the plaintiff prevailed on his employer-intentional-tort claim, any liability would be excluded from CIC’s coverage because the insured’s liability would be premised upon a deliberate intent to injure the employee. The plaintiff responded that an employer intentional tort proven with the rebuttable presumption of intent under R.C. 2745.01(C) did not involve deliberate intent to injure and was therefore not excluded from coverage. The Employers Liability Coverage Form in CIC’s policy covered “intentional act” (defined as “an act which is substantially certain to cause ‘bodily injury’”), but excluded coverage for “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.” The trial court granted summary judgment in favor of CIC, and a divided court of appeals reversed the trial court.

On further appeal, the Supreme Court recognized that it had to assume that the plaintiff could establish that the defendant deliberately removed an equipment safety guard and that the removal was a direct cause of his injury because the trial court had not yet determined whether the presumption applied or was rebutted. In either case, though, the high court concluded that intent to injure was an essential element of his employer intentional tort claim. Thus, the plaintiff could not recover without a finding that the defendant acted with the intent to injure, and there were no set of facts under which the defendant could be legally liable to the plaintiff that would fall

within CIC's coverage. The Supreme Court, therefore, reversed the court of appeals. The Supreme Court found it unnecessary to address a public policy argument, and it declined to decide if coverage was illusory because that argument was not made in the courts below.

Justices O'Neill and Pfeiffer dissented and complained that insurance agents are selling "worthless pieces of paper that will never pay a claim..."

The full opinion can be found at: <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2015/2015-Ohio-843.pdf>

If you have any questions, please contact:

John Travis  
Insurance Practice Group Manager  
GALLAGHER SHARP  
Sixth Floor, Bulkley Building  
1501 Euclid Avenue  
Cleveland, Ohio 44115-2108  
Ph: (216) 241-5310  
[jtravis@gallaghersharp.com](mailto:jtravis@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)