UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LIBERTY MUTUAL FIRE INSURANCE COMPANY,	:	Case No. 3:13-cv-175
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
IVEX PROTECTIVE PACKAGING, INC.,	:	
Defendant.	:	

ORDER GRANTING IN PART AND DENYING IN PART THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT (Docs. 21, 23)

This civil action is before the Court on the parties' cross motions for summary judgment (Docs. 21, 23) and the parties' responsive memos (Docs. 28, 30, 32, 33, 34).

I. STATEMENT OF THE CASE

Plaintiff Liberty Mutual Fire Insurance Company filed this action on May 31, 2013, seeking a declaratory judgment that it had no duty to defend or indemnify its insured, Defendant Ivex Protective Packaging, Inc., in a then-pending case in the Shelby County Court of Common Pleas. (Doc. 2). The underlying case, filed on March 27, 2013, was initiated against Ivex by a former employee for injuries suffered during the course of his employment. Liberty Mutual denied any duty to defend or indemnify Ivex because Liberty Mutual believed that all the claims were outside the scope of the insurance policy. The underlying case settled on July 15, 2014, and Ivex subsequently filed an amended counterclaim seeking a declaratory judgment that Liberty Mutual had a duty to defend and indemnify and asserting a counterclaim for breach of contract. (Doc. 19).

II. UNDISPUTED FACTS[1]

1. Ivex Protective Packaging, Inc. is a Delaware company with two plants in Sidney, Ohio that, among other things, manufacture and convert polyethylene foam and bubble-wrap material for use as protective packaging. (Doc. ¶ 21; Doc. 25 at 9-10, 167).

2. Liberty Mutual issued a Workers Compensation and Employers Liability Insurance Policy (the "Policy") to Ivex for a policy period of July 22, 2011 to July 22, 2012. (Doc. 2 at ¶ 5; Doc. 6 at ¶ 5).

3. The Policy provides in relevant part:

> **PART TWO – EMPLOYERS LIABILITY INSURANCE**
>
> **A. How This Insurance Applies**
> This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
> 1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
> . . . .
>
> **B. We Will Pay**
> We will pay all sums that you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.
>
> **C. Exclusions**
> This Insurance does not cover:
> . . . .
> 4. Any obligation imposed by a workers' compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;
> 5. Bodily injury intentionally caused or aggravated by you.
>
> **D. We Will Defend**
> We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this Insurance
> . . .

[1] Liberty Mutual objected to the use of deposition testimony from the Figley Action (Doc. 31), which the Court addresses below.

> We have no duty to defend a claim, proceeding or suit that is not covered by this Insurance. . . .
>
> **PART FOUR – YOUR DUTIES IF INJURY OCCURS**
>
> Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.
> 1. Provide for immediate medical and other services required by the workers compensation law.
> 2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
> 3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
>
> . . . .
>
> 6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

(Doc. 21, Ex. A at 3-4, 6).

4. On March 28, 2012, Fred M. Figley III worked for Ivex. (Doc. 25 at 166; Doc. 27 at 46).

5. That day, Figley was operating the Bubble Out Bag ("BOB") machine, which produces pouches from bulk rolls of bubble-wrap material. (Doc. 2 at ¶ 11; Doc. 25 at 31; Doc. 26 at 30-31; Doc. 27 at 102-03).

6. There was a front door on the BOB machine which, if closed, would prevent access to the interior of the machine while operating during production mode. (Doc. 25 at 86-88; Doc. 26 at 53).

7. The machine operators, including Figley, used the machine with the front door open at all times. (Doc. 26 at 53-55; Doc. 27 at 246-47).

8. Figley sustained serious injuries (crushing and burn injuries to his left hand from a heated knife apparatus, which eventually resulted in the loss of two fingers and a thumb) while clearing jammed materials from the machine. (Doc. 21, Ex. B at ¶¶ 7-9; Doc. 27 at 164-66, 182-83, 229-30).

9. The accident investigation discovered that there was an interlock device positioned on the front lower right side of the machine. (Doc. 25 at 107, 110-12; Doc. 26 at 74, 82-83).

10. When the front door was opened, the prong would then disengage from the interlock device, break an electrical circuit, and prevent the machine from operating. (Doc. 25 at 112-13).

11. At some time prior to Figley's injuries, an unknown person at an unknown time bypassed the interlock device. (*Id.* at 110-14, 146; Doc. 27 at 194-96).

12. While the door had to be open for Figley to access the interior of the BOB machine and clear the jam on the day he was injured, had the interlock device not been bypassed, the heated knife apparatus that crushed and burned Figley's hand would not have been functional while the door was open and, therefore, the accident would presumably not have occurred. (Doc. 25 at 113-15).

13. Figley has not worked since the accident. (Doc. 27 at 225-26, 230, 239-40).

14. On June 15, 2012, Ivex notified Liberty Mutual of Figley's injury, workers compensation and VSSR claims, and indicated it had no prior knowledge of any separate actions that might be pursued by Figley. (Doc. 23-2 at ¶¶ 5-6, Ex. B).

15. On March 27, 2013, Figley instituted *Fred M. Figley III v. Ivex Protective Packaging, Inc.*, Case No. 13-cv-62, in the Shelby County Court of Common Pleas (the "Figley Action"). (Doc. 21, Ex. B).

16. In the Figley Action's Complaint, Figley claimed that he was "an employee of and/or under the direction and control of [Ivex]" and was "working at [Ivex's] business location on Campbell Street, Sidney, Ohio." (*Id.* at ¶¶ 5-6).

17. The Figley Action alleged four claims: (1) workplace intentional tort under Ohio Revised Code § 2745.01; (2) common law tort; (3) civil battery; and (4) intentional infliction of serious emotional distress. (*Id.* at ¶¶ 4-50).

18. In Count I, Figley alleged that Ivex "deliberately removed, disabled, bypassed, eliminated or otherwise rendered or permitted to be and remain inoperable or unavailable for use one or more equipment safety guards, which resulted in this event and caused [Figley's] injuries and damages . . . includ[ing] a guard or safety door; a safety latch on said guard or safety door; and interlock or similar equipment, device or mechanism; wiring and control logic; emergency stop (E-Stop) equipment, device or mechanism; and/or other equipment, devices or mechanisms." (*Id.* at ¶¶ 10-11).

19. The Figley Action Complaint further alleged that these actions "are the equivalent of, or are tantamount to [Ivex's] deliberate removal of an equipment safety guard, such that [Figley] is entitled to a presumption that their removal was committed with intent to injure another as set forth in R.C. § 2745.01." (*Id.* at ¶ 16).

20. Count I also alleged that Ivex "acted with intent to injure another and/or with the belief that harm or injury was substantially certain to occur." (*Id.* at ¶ 15).

21. Ivex notified Liberty Mutual, sought coverage for the Figley Action under the Policy, and otherwise complied with conditions precedent to coverage for covered claims under the Policy. (Doc. 23-2, Ex. C).

22. On May 30, 2013, Liberty Mutual denied coverage for all claims asserted in the Figley Action, and specifically denied coverage for Count I because the Policy "excludes from coverage injury which is 'intentionally caused' by Ivex." (*Id.* at 2).

23. On October 2, 2013, Ivex notified Liberty Mutual about the decision in *Hoyle v. DTJ Ents., Inc.*, 994 N.E.2d 492 (Ohio App. 2013), *appeal allowed*, No. 2013-1405 (Ohio argued June 10, 2014), and outlined Ivex's view that it was entitled to coverage under the Policy. (Doc. 23-2 at ¶ 9; *id.*, Ex. D).

24. In the Figley Action, the parties conducted discovery, including depositions of Figley and Ivex personnel. (*Id.* at ¶ 10; *id.* Ex. A at 6-7).

25. Figley admitted that he had no evidence that Ivex intentionally injured him. (*Id.* at ¶ 11; *id.*, Ex. E at 12; Doc. 27 at 71-72).

26. On February 24, 2014, Ivex filed a motion for summary judgment in the Figley Action. (Doc. 23-2 at ¶ 12; *id.*, Ex. A at 5).

27. In his response to the summary judgment motion, Figley abandoned claims that Ivex intentionally caused him bodily injury, but maintained that Ivex was still liable under Ohio Revised Code § 2745.01(C)'s rebuttable presumption of intent to injure through the deliberate removal of an equipment safety guard. (*Id.* at ¶ 13; *id.*, Ex. F at 1).

28. Figley and Ivex settled the Figley Action and entered into a settlement agreement (the "Settlement Agreement") on July 15, 2014. (Doc. 21, Ex. C).

29. Pursuant to the Settlement Agreement, "Figley agrees that Ivex did not intentionally cause Figley's injuries and is not liable for the claims falling outside of R.C. 2745.01, but the Parties agree that a dispute remains in the [Figley Action] as to whether Ivex deliberately removed an equipment safety guard with Figley's injuries allegedly occurring as a direct result." (*Id.* at 1).

30. Ivex agreed to pay Figley $280,000 to resolve the Figley Action. (*Id.* at 1-2).

III. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (1986).

IV. ADMISSIBILITY OF DEPOSITION TESTIMONY

Liberty Mutual lodged self-styled *Lewis* objections to Ivex's citation to deposition testimony taken in the Figley Action. In reliance on *Lewis v. CSX Transp., Inc.*, 778 F. Supp. 2d 821 (S.D. Ohio 2011), Liberty Mutual argues that the Court should exclude this evidence because the depositions were taken in another action to which it was not a party, Ivex did not disclose the deponents as witnesses, and Ivex did not provide the deposition transcripts in its initial disclosures.

in *Lewis*, in opposing defendant's motion for summary judgment the plaintiff relied on depositions taken in separate actions against the defendant. *Lewis*, 778 F. Supp.

2d at 825. Plaintiff's counsel did not depose the witnesses in the various other cases and defendant had different counsel. *Id.* The court stated that "[plaintiff]'s production of the depositions in response to [defendant]'s motion for summary judgment too closely walks the line of ambush litigation" and that it "does not condone [plaintiff]'s litigation tactics." *Id.* Instead, the court urged that plaintiff "should have at least notified [defendant] during the discovery period of his intent to use those depositions." *Id.* However, the court ultimately denied defendant's motion to strike because the depositions "were taken in the context of litigation against" defendant and "the testimony is so general" that it would not affect the ruling on summary judgment. *Id.*

Liberty Mutual argues that the countervailing factors in *Lewis* are not present here and urges the Court to disregard the depositions because it was not a party to the Figley Action and did not receive notice of Ivex's intent to use the depositions. Liberty Mutual also asserts *Lewis* objections to a number of Ivex's proposed undisputed facts supported partially or entirely by evidence other than deposition transcripts. Further, Liberty Mutual submits that a number of the proposed facts "are of no consequence to this action." However, Liberty Mutual does not challenge the transcripts on the basis that the deponents lacked sufficient personal knowledge and does not cite any contradictory evidence to create a material factual dispute.

A party supporting or opposing a motion for summary judgment must support its factual assertions by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions,

interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). Rule 56(c)(2) provides that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." On a motion for summary judgment, "[t]he proffered evidence need not be in admissible *form*, but its *content* must be admissible." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997).

Numerous courts, including a court in this district, have concluded that depositions taken in a different action are admissible at the summary judgment stage as the evidentiary equivalent of an affidavit. *United States v. Atlas Lederer Co.*, 282 F. Supp. 2d 687, 695 (S.D. Ohio 2001). An affidavit "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Deposition testimony of a witness whom the opposing party did not have the opportunity to cross-examine is not admissible as a deposition, but the statements otherwise meet the requirements for an affidavit:

> Sworn deposition testimony may be used by or against a party on summary judgment regardless of whether the testimony was taken in a separate proceeding. Such testimony is considered to be an affidavit pursuant to Federal Rule of Civil Procedure 56(c), and may be used against a party on summary judgment as long as the proffered depositions were made on personal knowledge and set forth facts that were admissible in evidence.

Gulf USA Corp. v. Fed. Ins. Co., 259 F.3d 1049, 1056 (9th Cir. 2001) (citations omitted).[2]

[2] *See also RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 403 (8th Cir. 1995); *Ary Jewelers, LLC. v. IBJTC Bus. Credit Corp.*, 414 F. Supp. 2d 90, 95 n.6 (D. Mass. 2006);

Although Liberty Mutual was not a party to the Figley Action, this case is clearly related because Liberty Mutual filed this declaratory judgment action for the sole purpose of obtaining a declaration that it did not have a duty to defend Ivex in the Figley Action. Further, Liberty Mutual cannot argue it was unaware the depositions were taken because the public docket reflects that they were filed in the Figley Action, albeit under seal, and Liberty Mutual signed a joint filing updating this Court of the progress of discovery in the Figley Action. (Doc. 15; Doc. 23-2, Ex A at 6-7). Accordingly, the deposition transcripts (Docs. 25, 26, 27) are admissible as affidavits.

V. ANALYSIS

In their cross motions for summary judgment, the parties seek a determination of whether Liberty Mutual had a duty to defend Ivex in the Figley Action and a duty to indemnify Ivex for the Settlement Agreement. The parties agree that the dispositive issue is whether Figley's claim for an employer intentional tort that sought to invoke the rebuttable presumption of intent to injure in § 2745.01(C) is necessarily outside the scope of coverage in the Policy, which excludes coverage for "bodily injury intentionally caused or aggravated by" Ivex.[3]

A. Insurance Contracts

An insurance policy is a contract and is construed in accordance with the same rules applicable to other written contracts. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*,

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McGovern v. Deutsche Post Global Mail, Ltd., No. Civ. 04-60, 2004 WL 1764088, at *11 n.7 (D. Md. Aug. 4, 2004).

[3] There is no dispute that Ohio law governs in this diversity action.

597 N.E.2d 1096, 1102 (Ohio 1992). If the terms of an insurance policy are clear and unambiguous, then a court must give effect to the parties' intentions. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 714 N.E.2d 898, 900 (Ohio 1999). "The mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 652 N.E.2d 684, 686 (Ohio 1995). Instead, "[a] court must give undefined words used in an insurance contract their plain and ordinary meaning." *Id.*

"Ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 896 N.E.2d 666, 669 (Ohio 2008). However, "a court cannot create ambiguity in a contract where there is none." *Id.* "[I]n determining whether an insurance policy provision is ambiguous, a court must consider the context in which the provision is used." *Sauer v. Crews*, __ N.E.3d __, 2014-Ohio-3655, at ¶ 14. This requires an examination of the policy as a whole, including the policy's overall purpose and intended scope, rather than examining words in isolation. *Id.* at ¶¶ 13, 15. If the overall context reveals that terms are ambiguous, then "they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.* 519 N.E.2d 1380, 1383 (Ohio 1988). In particular, "an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded." *Hybud Equip. Corp.*, 597 N.E.2d at 1102.

"In an insurance policy, an insurer promises to both indemnify the insured for losses incurred by the insured that arise out of the occurrence of a risk identified in the policy and defend the insured in an action arising because of that occurrence." *Owners*

Ins. Co. v. Nationwide Ins. Co., 854 N.E.2d 1120, 1123 (Ohio App. 2006). "An insurer's duty to defend is broader than and distinct from its duty to indemnify." *Sharonville v. Am. Emp'rs Ins. Co.*, 846 N.E.2d 833, 837 (Ohio 2006).

"The duty to defend arises when a complaint alleges a claim that could be covered by the insurance policy." *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 875 N.E.2d 31, 33 (Ohio 2007). Even if "the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim." *City of Willoughby Hills v. Cincinnati Ins. Co.*, 459 N.E.2d 555, 558 (Ohio 1984). Further, the duty to defend "may arise at a point subsequent to the filing of the complaint." *Id.* at 557. If the insurer has a duty to defend because a claim in the complaint is potentially or arguably within the policy coverage, then the insurer "must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage." *Sharonville*, 846 N.E.2d at 837. Conversely, an insurer has no duty to defend when the claim is "clearly and indisputably outside the contracted policy coverage." *CPS Holdings, Inc.*, 875 N.E.2d at 33.

An insurer's violation of its duty to defend constitutes a material breach of the insurance contract and "relieves the insured of the duty to seek the insurer's assent to and participation in a proposed settlement." *Sanderson v. Ohio Edison Co.*, 635 N.E.2d 19, 23 (Ohio 1994). If the insurer refuses to defend, "the insureds are at liberty to make a reasonable settlement without prejudice to their rights under the contract" and the insurer

"will not be heard to complain concerning the resolution of the action in the absence of a showing of fraud, even if liability is conceded by the insureds as a part of settlement negotiations." *Id.* at 23-24.

B. Employer Intentional Tort

Ohio law provides that an employer is liable to an employee for an intentional tort only in limited circumstances:

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
> (C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

§ 2745.01. This dispute centers on whether there was any scenario in which Figley could recover from Ivex, based on the rebuttable presumption in § 2745.01(C), without triggering the Policy exclusion for "bodily injury intentionally caused or aggravated by" Ivex.

The development of Ohio law governing the common-law cause of action for an employer intentional tort, and the General Assembly's several attempts to curtail the scope of such claims, is too extensive to detail here. *See Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 927 N.E.2d 1092, 1099-1111; *Kaminski v. Metal & Wire*

Prods. Co., 927 N.E.2d 1066, 1071-89 (Ohio 2010). Under the previous common law standard, an employee did not need to demonstrate that the employer had "specific intent to injure." *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 983 N.E.2d 1253, 1256 (Ohio 2012) (quoting *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046, 1051 (Ohio 1984)). Instead, the employee needed to prove either "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." *Id.* (quoting *Jones*, 472 N.E.2d at 1051). This was subsequently refined to require the following elements:

> (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
> (2) knowledge by the employer that if the 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
> (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Id. at 1257 (quoting *Fyffe v. Jeno's, Inc.*, 570 N.E.2d 1108, 1112 (Ohio 1991)).

The Supreme Court of Ohio upheld the most recent enactment of § 2745.01, which "significantly limits lawsuits for employer workplace intentional torts." *Stetter*, 927 N.E.2d at 1100. Although the statute retained the standard that the employer must act with an "intent to injure another or with the belief that the injury was substantially certain to occur," it defined "substantially certain" to mean that "an employer acts with deliberate intent to cause an employee to suffer an injury." § 2745.01(B). As aptly observed:

> This is a statute at war with itself: Subsection A provides for liability where the employer acted "with the intent to injure another *or* with the belief that the injury was substantially certain to occur," but subsection B then defines "substantially certain" as a "deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death," thereby essentially eviscerating the phrase after "or" in subsection A. In other words, using the definition of "substantially certain" provided in subsection B, subsection A limits liability to circumstances where the employer acts "with the intent to injure another" or "with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." So what appears at first glance as two distinct bases for liability is revealed on closer examination to be one and the same.

Rudisill v. Ford Motor Co., 709 F.3d 595, 602-03 (6th Cir. 2013).

In *Kaminski* and *Houdek*, the court noted that the legislature intended "to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, *subject to* subsections (C) and (D)." *Houdek*, 983 N.E.2d at 1258 (quoting *Kaminski*, 927 N.E.2d at 1079) (emphasis supplied). The facts presented in those cases did not implicate subsection (C), so the court did not expound on the impact of the rebuttable presumption.

In *Hewitt v. L.E. Myers Co.*, 981 N.E.2d 795 (Ohio 2012), the court examined what constitutes "deliberate removal" and "equipment safety guard" for purposes of triggering the rebuttable presumption in subsection (C). The court held that an "'equipment safety guard' means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Id.* at 797. A "'deliberate removal' of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine." *Id.* at 801-02. The court also noted that "'removal' may encompass more than physically removing

a guard from equipment and making it unavailable, such as bypassing or disabling the guard." *Id.* at 801. The facts involved failed to satisfy these definitions, so the court again did not reach the impact of the rebuttable presumption.

The trial court and appellate court in *Hewitt* did address the effect of the presumption. The case proceeded to a jury trial and the employer moved for a directed verdict as to liability under § 2745.01. *Hewitt*, 981 N.E.2d at 798. The trial court "concluded that there was insufficient evidence to demonstrate a direct intent to harm as required by R.C. 2745.01(A) and (B)" and "limited the plaintiff's theory of recovery to R.C. 2745.01(C), according to which the employer's deliberate removal of an equipment safety guard creates a rebuttable presumption of an intent to injure." *Id.* However, the employer failed to call any witnesses to attempt to rebut the presumption of intent to injure and the jury returned a verdict for the employee on § 2745.01(C). *Id.* The trial court also denied the employer's motion for judgment notwithstanding the verdict. *Id.* The appellate court affirmed, concluding that the evidence presented "established a rebuttable presumption under R.C. 2745.01(C) of an intent to injure [the employee], and [the employer] had presented no evidence to rebut the presumption." *Id.* The employer's failure to present any evidence to rebut the presumption supported the judgment for the employee because "[w]hen a rebuttable presumption exists, such presumption prevails until rebutted by evidence to the contrary." *Hewitt v. L.E. Myers Co.*, 2011-Ohio-5413, at ¶ 35 (Ohio App. 2011).

The employer prevailed on appeal because the Supreme Court of Ohio determined that the employee failed to establish the basic facts necessary to create a rebuttable presumption of intent. *Hewitt*, 981 N.E.2d at 802. In setting forth the procedural history, the Supreme Court noted that the trial court ruled that the employee "presented insufficient evidence of a direct intent to injure necessary to recover under R.C. 2745.01(A) and (B), and the court limited the plaintiff's theory to the presumption of intent in R.C. 2745.01(C)" and that "[t]he issue of direct intent is not before us." *Id.* at 799 n.2. When examining what the legislature intended by the phrase "equipment safety guard," the court held that "[a] broad interpretation of the phrase does not comport with the General Assembly's efforts to restrict liability for intentional tort by authorizing recovery '*only* when an employer acts with specific intent.'" *Id.* at 801 (quoting *Stetter*, 927 N.E.2d at 1100). The employee can make this requisite showing through either presenting "evidence to demonstrate a direct intent to harm as required by R.C. 2745.01(A) and (B)" or "establish[ing] a rebuttable presumption under R.C. 2745.01(C) of an intent to injure." *Hewitt*, 981 N.E.2d at 798. Regardless of which method is utilized, the result is that the employee has demonstrated that the "employer acts with the specific intent to cause an injury." *Houdek*, 983 N.E.2d at 1258.

C. Policy Coverage

The parties focus on two cases that reached divergent holdings on the issue of whether an insurance policy covered a claim under § 2745.01(C). In *Irondale Indus. Contractors, Inc. v. Virginia Sur. Co.*, 754 F. Supp. 2d 927 (N.D. Ohio 2010), the court concluded that an insurer had no duty to defend or indemnify an insured for a claim

brought under § 2745.01. The insurance policy provided coverage very similar to Liberty Mutual's Policy, including an exclusion for "bodily injury intentionally caused or aggravated by you, or bodily injury resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur." *Id.* at 930. The court rejected the position that the employer could be found liable by way of § 2745.01(C) "without intending to cause injury" because the presumption merely serves as a way to prove intent:

> Subsection (C) creates a rebuttable presumption that an employer's removal of certain safety equipment *is* evidence of intent to injure. Subsection (A) defines an intentional tort, and later Subsections (B) and (C) refine that definition. Subsection (C) is not a separate tort, it merely provides a legally cognizable example of "intent to injure."

Id. at 933. Accordingly, the court determined that the employer was not entitled to coverage because the only way for the employee to recover was by proving intent to injure, which was specifically excluded from coverage. *Id.*

In *Hoyle v. DTJ Ents., Inc.*, 994 N.E.2d 492 (Ohio App. 2013), *appeal allowed*, No. 2013-1405 (Ohio argued June 10, 2014), an Ohio appellate court reached the opposite result and concluded that an insurer could have a duty to indemnify its insured for an employee's claim under § 2745.01(C).[4] An endorsement to the policy provided coverage for "'bodily injury' sustained by your 'employee' in the 'workplace' and caused by an 'intentional act' to which this insurance applies." *Id.* at 494. The policy defined an "intentional act" as "an act which is substantially certain to cause 'bodily injury'" and

[4] The insurer accepted the defense of the case and only disputed its duty to indemnify. *Id.* at 493.

provided coverage if three conditions were met, which mirrored the elements for proving "substantially certain" intent to injure under the former common law standard. *Id.* However, the policy excluded from coverage "liability for acts committed by or at the direction of an insured with the deliberate intent to injure." *Id.* at 494-95.

The Supreme Court stated that to recover on his claim through the presumption of intent to injure in § 2745.01(C), the employee "would need to only prove the deliberate removal of a safety guard. The *burden of proof* would then shift to [the employer] to rebut the presumption." *Hoyle*, 994 N.E.2d at 498 (emphasis supplied). If the employer failed to rebut the presumption, then the employee "could prevail on his claim without actual proof of deliberate intent to injure." *Id.* The court then proceeded to hold that "[a]lthough the deliberate intent to injure may be presumed *for purposes of the statute* where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to 'deliberate intent' *for the purposes of the insurance exclusion*." *Id.* The court concluded that the terms of the insurance policy, which proved coverage for a specifically-defined "intentional act" but not for an act committed with "deliberate intent to injure," created a situation in which the employer could be held liable under the statute for an act that was also covered by the policy:

> [W]e cannot conclude that an 'intentional act' under the policy, which is specifically covered as set forth above, includes an act committed with a 'deliberate intent' to injure, which is specifically excluded. Based upon the presumption of deliberate intent under R.C. 2745.01(C), there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting 'deliberate intent' to injure under the terms of the policy.

Id.

Upon consideration of the respective insurance policies and the analysis in *Irondale Indus. Contractors* and *Hoyle*, the Court concludes that the Figley Action did not present claims covered by the Policy. The holding in *Hoyle* is unpersuasive and distinguishable for two reasons.

First, the court misapprehended the effect of a rebuttable presumption by stating that after the employee establishes the presumption, "[t]he *burden of proof* would then shift to [the employer] to rebut the presumption." *Id.* at 498 (emphasis supplied). The court appears to have conflated the burden of proof with the burden of production based on a block quotation explaining the effect of a presumption. The quoted language accurately provides that a "presumption shifts the evidentiary burden of producing evidence, *i.e.*, the burden of going forward, to the party against whom the presumption is directed. *See* Weissenberger, Ohio Evidence (2001) 44." *Id.* at 497 (quoting *Minor v. Nichols*, 2002-Ohio-3310, at ¶ 14 (Ohio App. 2002)). However, the *Minor* court omitted a crucial portion of the sentence from its original source, which reads: "a presumption shifts the evidentiary burden of producing evidence, *i.e.*, the burden of going forward, to the party against whom the presumption is directed; it does not effect the burden of proof, which remains the same throughout the case. *See* Weissenberger, Ohio Evidence (2001) 44." *Horsley v. Essman*, 763 N.E.2d 245, 249 (Ohio App. 2001).

As Ohio Rule of Evidence 301 provides:

> [A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Stated otherwise, "a presumption is not to have the effect of shifting the burden of proof onto the opposite party, but merely imposes a 'burden of going forward with the evidence to rebut or meet the presumption.'" *Evans v. Nat'l Life & Acc. Ins. Co.*, 488 N.E.2d 1247, 1250 (Ohio 1986) (quoting Ohio R. Evid. 301). The effect of a presumption, if not rebutted, is a finding that the party has met its burden of proof regarding the presumed fact:

> [U]nless an established presumption is rebutted, it creates a mandatory inference or a legally required rule of reasoning. If reasonable minds must necessarily find the underlying facts and if the consequent presumed fact remains unrebutted, the court should direct that the presumed fact has been established as a matter of law.

Adamson v. May Co., 456 N.E.2d 1212, 1216 (Ohio App. 1982). Further, "a presumption afforded by statute, in the absence of any evidence to the contrary, is sufficient to sustain a judgment in a civil case." *Bishop v. City of Dayton*, No. 11634, 1990 WL 10632, at *3 (Ohio App. Feb. 5, 1990) (Grady, J., concurring).

In the context of § 2745.01, "[t]he whole point of division (C) is to presume the injurious intent required under divisions (A) and (B)." *Fickle v. Conversion Techs. Int'l, Inc.*, 2011-Ohio-2960, at ¶ 32 n.2 (Ohio App. 2011). If the employee conclusively establishes a "[d]eliberate removal by an employer of an equipment safety guard" and that "an injury . . . occurs as a direct result," then the statute "creates a rebuttable presumption that the removal . . . was *committed with intent to injure another*." § 2745.01(C) (emphasis supplied). The presumption tracks the language in subsection (A), which provides the burden of proof the employee must meet to recover: "the

employer shall not be liable unless the plaintiff proves that the employer *committed the tortious act with the intent to injure another*." § 2745.01(A). If the employer fails to produce any evidence to rebut the presumption, then the effect of the presumption is that the employee "proves that the employer committed the [removal] with the intent to injure another." *Id.* In other words, "the presumed fact [that the employer committed the tortious act with the intent to injure another] has been established as a matter of law." *Adamson*, 456 N.E.2d at 1216.

It is true that the employee "could prevail on his claim without actual proof of deliberate intent to injure." *Hoyle*, 994 N.E.2d at 498. However, "that is the point of a rebuttable presumption." *Rudisill*, 709 F.3d at 608. "Once the rebuttable presumption has been successfully invoked, the burden is on the defendant to rebut it by introducing evidence of the lack of an intent to injure." *Id.* If the employer fails to meet its "burden of presenting evidence to rebut a presumption of [intent to injure]," *Ferrando v. Auto-Owners Mut. Ins. Co.*, 781 N.E.2d 927, 949 (Ohio 2002), then the employee "proves that the employer committed the tortious act with the intent to injure another" and has carried his burden of proof necessary to recover. § 2745.01(A). Notwithstanding that the employee produced no "evidence of a direct intent to injure," *Hewitt*, 981 N.E.2d at 799 at n.2, the employee will have established that "the employer committed the tortious act with the intent to injure another." § 2745.01(A).[5]

[5] *See also* Ohio R. Rvid. 301 staff notes (stating that a presumption "requires a finding of an ultimate fact as a matter of law unless it is rebutted").

Second, the holding in *Hoyle* is distinguishable because the insurance policy provided different coverage. In *Hoyle*, the policy provided coverage for injury caused by an "intentional act" if it met the three elements for a "substantially certain" intentional tort under the former common law standard, but excluded coverage for acts committed with the "deliberate intent to injure." *Hoyle*, 994 N.E.2d at 498. The court stressed that "[a]lthough the deliberate intent to injure may be presumed *for purposes of the statute* where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to 'deliberate intent' *for the purposes of the insurance exclusion*." *Id.* (emphasis in original). Based on the terms of the policy, which provided coverage for certain intentional acts, "there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting 'deliberate intent' to injure under the terms of the policy." *Id.*[6]

Here, the Policy covers "bodily injury by accident" and excludes "bodily injury intentionally caused or aggravated by you." (Doc. 21, Ex. A at 3-4). This is similar to the exclusion in *Irondale*, which excluded from coverage "bodily injury intentionally caused or aggravated by you, or bodily injury resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur." *Irondale Indus. Contractors*, 754 F. Supp. 2d at 930. While the *Irondale* policy

[6] The court did not expressly acknowledge that the three conditions in the policy required to trigger coverage for an "intentional act" were identical to the elements of the "substantially certain" intentional tort. *Id.* at 495, 498. Nor did the court acknowledge that the effect of § 2745.01(B) is that an employer can never be held liable under the new statute for an act that meets, but does not exceed, the policy's definition of an "intentional act." This casts significant doubt on the court's conclusion that there was a situation in which the employee could recover under § 2745.01 for an act covered by the policy as an "intentional act," but that did not involve a "deliberate intent to injure." *Id.* at 498.

expressly excluded substantially certain acts, the policy in *Hoyle* expressly covered such acts. *Hoyle*, 994 N.E.2d at 498. Here, upon examination of the Policy as a whole, *see Sauer*, 2014-Ohio-3655, at ¶ 14, the exclusion for "bodily injury intentionally caused or aggravated by you" unambiguously shows the parties' intent to exclude coverage for all intentional torts. Unlike the policy in *Hoyle*, there is no potential middle ground in which Figley could recover under § 2745.01 without triggering the exclusion.

If Figley were to recover by way of the presumption of intent in § 2745.01(C), this would result in a finding that Ivex "committed the tortious act with the intent to injure another." § 2745.01(A). This is because a "presumption of law is a procedural device which takes the place of evidence in certain cases until the facts in lieu of which the presumption operates are shown. It is equivalent to a substantive rule of law of the effect that a particular fact must be assumed when another particular fact or group of facts exist." *Shepherd v. Midland Mut. Life Ins. Co.*, 87 N.E.2d 156, 161 (Ohio 1949). If the "particular . . . group of facts" in § 2745.01(C) were shown, then a "particular fact [that] must be assumed" is that "the employer committed the tortious act with the intent to injure another." *Id.*

The Court's conclusion that the Figley Action did not present a claim covered by the Policy is dispositive of Liberty Mutual's duty to indemnify. However, "[a]n insurer's duty to defend is broader than and distinct from its duty to indemnify." *Sharonville*, 846 N.E.2d at 837. Liberty Mutual had a duty to defend if "the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded." *City of*

Willoughby, 459 N.E.2d at 558. The lack of an authoritative interpretation by the Supreme Court of Ohio, the holding in *Hoyle*, and the significant analysis this Court has undertaken demonstrate the legal uncertainty of whether a claim seeking to invoke the rebuttable presumption in § 2745.01(C) was covered by the Policy. Instead, the Figley Action presented a claim that was "potentially or arguably within the policy coverage [and] there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded." *Id.*[7]

Accordingly, Ivex is entitled to judgment as a matter of law that Liberty Mutual had a duty to defend, whereas Liberty Mutual is entitled to judgment as a matter of law that it does not have a duty to indemnify.

VI. CONCLUSION

For these reasons, Plaintiff's Motion for Summary Judgment (Doc. 21) and Defendant's Motion for Summary Judgment (Doc. 23) are each **GRANTED** in part and **DENIED** in part. Specifically, the Court concludes that Liberty Mutual had a duty to defend Ivex in the Figley Action but did not have a duty to indemnify. The determination of Ivex's damages remains pending before the Court. Ivex shall evidence its damages by filing a verified pleading within twenty-one days, and Liberty Mutual shall respond in opposition within ten days of that filing. Ivex may reply within five days.

[7] Additionally, count II of the Figley Action, which alleged a common law negligence claim to the extent that Ivex was "determined not to be [Figley's] 'employer,'" could allege that Ivex was acting in a dual capacity. *See Schump v. Firestone Tire & Rubber Co.*, 541 N.E.2d 1040, 1044-45 (Ohio 1989). Such a claim could "potentially or arguably" be covered by the Policy provision for liability incurred "[b]ecause of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer." (Doc. 21, Ex. A at 4).

IT IS SO ORDERED.

Date: 11/26/14

s/ Timothy S. Black
Timothy S. Black
United States District Judge