

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE ESTATE OF JEFFREY K.
HEINTZELMAN, et al.

Plaintiff-Appellant,

v.

AIR EXPERTS, INC., et al.

Appellee

* CASE NO. 08-2173

On Appeal from the Delaware
County Court of Appeals, Fifth
Appellate District

*

Court of Appeals
Case No.: 07CAE09-0045

*

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS
IN SUPPORT OF APPELLANT, AMERICAN FAMILY INSURANCE COMPANY

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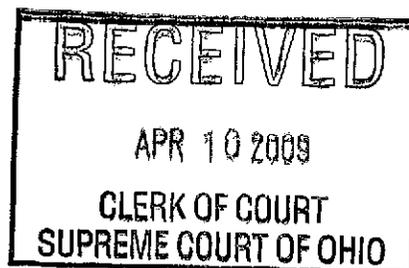
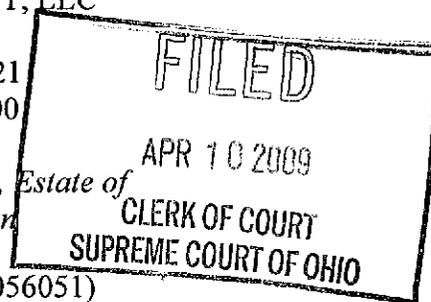


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STATEMENT OF FACTS

Jeffrey and Margaret Heintzelman hired Tom Martel, dba Martel Heating and Cooling (“Martel”) to install an attic air conditioner in their home. Heintzelman v. Air Experts, Inc. (Ohio App. 5th Dist.), 2008-Ohio-4883, ¶ 1. The air conditioner never worked properly, and Martel made several unsuccessful attempts to fix the problem. The Heintzelmans then hired Air Experts, Inc. to fix the air conditioner, but Air Experts was unable to repair it and the problems continued. Sometime later, Jeffrey Heintzelman went to the attic to attempt to fix a leak coming from the air conditioner. An exposed outlet providing power to the air conditioner electrocuted him, causing his death. Id. at 1-3.

A. Original Underlying Lawsuit Dismissed

Jeffrey Heintzelman’s estate and Margaret Heintzelman (“Heintzelman”) filed a complaint against Martel and Air Experts in the Delaware County Court of Common Pleas on December 10, 2002. Id. at 2. The complaint asserted claims for wrongful death and infliction of emotional distress in Case No. 02-CVH-12712. At the time of the original installation of the air conditioner, Martel was a named insured under an insurance policy issued by American Family Insurance Company (“American Family”). American Family reserved rights to deny coverage under its contract of insurance issued to Martel for several reasons, including, but not limited to, the fact that the policy had lapsed two years before Mr. Heintzelman’s death. Id. at 3. In addition to reserving all rights to deny coverage, American Family undertook the defense of Martel in that lawsuit. The plaintiffs thereafter voluntarily dismissed Case No. 02-CVH-12712 on March 16, 2003. Id.

B. The Declaratory Judgment Action

After that dismissal, American Family filed a declaratory judgment action in Delaware County Court of Common Pleas on December 4, 2003, seeking a judgment that it did not have a

duty to defend Martel for any damages sought in the Heintzelman case. Id. Martel was the named defendant, as the policyholder and named insured on the policy. At that time, Plaintiff herein, Heintzelman was not a judgment creditor and did not have a lawsuit pending against Martel.

Martel failed to answer the declaratory judgment complaint filed by American Family and, approximately one year later, on March 20, 2004, the trial court granted default judgment against Martel, finding specifically that American Family did not have a duty to defend or indemnify Martel for any of the claims asserted by the Heintzelmans. Id. at 3. Later, a motion to vacate the default judgment was filed on behalf of Martel through Heintzelman's lawyer, based on Civil Rule 60. Id. at 4. That motion to vacate was filed in March of 2007, approximately three years after the judgment was granted. On March 12, 2007, the trial court denied the motion and Martel did not appeal that ruling. Id.

C. The Underlying Lawsuit Is Refiled

The Heintzelmans refiled the original lawsuit against Martel on April 9, 2004, in Delaware County Common Pleas Court in Case No. 04-CVH-04-0233. Id. That case proceeded to trial on March 7, 2005, and the jury returned a verdict in the amount of \$3,664,186 against Martel. The jury awarded \$1,014,886 to the Estate on the wrongful death claim and \$2,650,000 to Margaret Heintzelman on her emotional distress claim. The jury rendered a defense verdict in favor of Air Experts. The plaintiffs appealed from that verdict and Martel cross-appealed. Id. at 4-5.

D. The Supplemental Complaint under 3929.06 Is Filed

While that appeal was pending, Heintzelman filed a "supplemental" complaint in this case against American Family seeking payment under Martel's policy with American Family. Id. Heintzelman alleged that the policy provided coverage for the damages caused by Martel's

actions. *Id.* at 5-6. American Family filed a motion for summary judgment on Heintzelman's supplemental complaint, seeking judgment in its favor on the grounds that, among other things, American Family was entitled to assert all coverage defenses, including the defense of res judicata and collateral estoppel because of the previous decision that American Family had no duty to indemnify the Heintzelmans in the lawsuit.

On August 6, 2007, the trial court in the underlying litigation reduced the amount of the plaintiffs' verdict based on the Delaware County Court of Appeals' ruling on the Heintzelman and Martel appeals from the jury verdict. On the same date, in this case and by separate entry, the trial court granted American Family's motion for summary judgment on the Heintzelmans' supplemental complaint. *Id.* The court held that the Heintzelmans were bound by the declaratory judgment already rendered against Martel in Case No. 03-CVH-12-0896 and that, therefore, American Family had no duty to indemnify Martel for any damages awarded against him in the Heintzelman litigation. *Id.* at 6-7. The trial court made that ruling based on recent amendments to R.C. 2721.12, Ohio's Declaratory Judgment Act, finding that the Heintzelmans were bound by the declaratory judgment even though they were not parties to the action. As a result, the trial court did not address the second prong of American Family's summary judgment pertaining to the availability of insurance coverage under the terms of the policy. *Id.*

The Heintzelmans appealed the judgment rendered in favor of American Family on their supplemental complaint. On September 24, 2008, the Court of Appeals for Delaware County, Fifth Appellate District, held that Heintzelman was not bound by the declaratory judgment issued against Martel in the dec action between American Family and Martel because the "holder of the policy" did not commence that lawsuit. As a result, the court held that the amendments enacted in House Bill 58 did not provide for any preclusive effect for a final judgment between an insurer and its insured where the insurer commenced the lawsuit. *Id.* at 18.

On October 3, 2008, American Family filed a motion with the Delaware County Court of Common Pleas to certify a conflict to the court and appealed that decision. The Ohio Supreme Court accepted jurisdiction and this matter is now for consideration before the Court.

SUMMARY OF ARGUMENT

The plain language of Ohio Revised Code § 2721.12 provides that a declaratory judgment entered by a court in a matter pending between an insurer and a holder of a liability policy is binding on third parties, including judgment creditors, under R.C. 3929.06. Moreover, the clear language of Ohio Revised Code § 3929.06(C)(1) provides that an insurer, in defense of a supplemental complaint, is entitled to assert all coverage defenses it would have against the holder of the policy, which defenses necessarily include all claims of res judicata.

The Court of Appeals incorrectly held that a conflict existed between statutes in this case, such that one statute had to be given effect over another, allowing the Court to ignore the language of specific provisions of the statute giving the insurer the right to assert the defense of res judicata. The paramount concern when construing any statute is to enforce the intent of the Legislature; the legislative intent in this case is clear. The purpose of the amendments to the various statutes was to overrule Broz v. Winland, such that decisions between an insurer and the policyholder were to be binding on third parties, including judgment creditors who filed supplemental complaints pursuant to R.C. 3929.06. The Court of Appeals decision ignores that legislative intent and attempts to reestablish the law as it existed before the 1999 amendments. Enforcing the statutes as written insures predictability and finality in coverage disputes by promoting decision-making processes between insurers and parties to the contract, while not allowing individuals with contingent or “possible” claims to relitigate coverage issues.

ARGUMENT

Proposition of Law: A final judgment entered in a declaratory judgment action between an insured and an insurer has binding, preclusive effect upon a judgment creditor of the insured in a later supplementary complaint under R.C. 3929.06.

The Court of Appeals held that a final judgment in a declaratory judgment proceeding between an insurer and its insured that decides an issue of coverage is not binding on judgment creditors if the insurer filed the declaratory judgment action. Heintzelman v. Air Experts, Inc. (Ohio App. 5th Dist.), 2008-Ohio-4883. The Court acknowledged that the declaratory judgment would be binding on a judgment creditor if the “insured” had initiated the dec action. In order for the Court of Appeals to make that distinction, the court first had to “construe” several statutes using a canon of construction that applies only where a conflict exists between two provisions of statutes.

The Court of Appeals incorrectly held that a conflict existed between statutes in this case, such that one statute had to be given effect over another so as to construe the two matters “in pari materia.” The Court of Appeals’ error lies in its determination that a conflict existed between the two statutes, and its alleged need to “construe” the clear and unambiguous language.

A. The Ohio General Assembly changed the standing requirements for declaratory judgment actions involving insurance companies and amended several statutes to make declaratory judgments between insurers and their insureds binding on third parties.

Approximately 14 years ago, the Ohio Supreme Court held that a determination in a declaratory judgment action between an insurance company and its insured did not bind persons injured by the insured’s negligence who were not parties to the declaratory judgment action. *See Broz v. Winland* (1994), 60 Ohio St.3d 521, 629 N.E.2d 395. In making its decision, the Ohio Supreme Court in Broz noted that the underlying dec action required the joinder of the claimant as a party because the version of the statute at that time mandated that no declaration would

prejudice the rights of any person not a party to that proceeding. Broz, 60 Ohio St.3d at 525.

The Court stated:

Thus, **according to the terms of the statute**, in order to bind the injured tort claimant to the declaratory judgment action, American States had to join the Brozes in that proceeding.

Id. (emphasis added.) No preclusive effect existed, because that version of the declaratory judgment statute mandated the joinder of all parties with potential interests and provided that the declaration would not affect those who were not parties. As a result, the declaratory judgment action commenced by the insurer did not prevent the judgment creditor from later attempting to relitigate the coverage issues.

In reaction to Broz and other cases, the Ohio General Assembly amended several statutes, including Ohio Revised Code §§ 2721.02 and 2721.12 relating to declaratory relief and R.C. 3929.06 relating to the filing of supplemental complaints, via House Bill 58. Ohio Revised Code § 2721.02 was amended to provide that tort claimants had no standing to seek declaratory relief under an insurance policy until a judgment was obtained. *See* R.C. 2721.02.

Ohio Revised Code § 2721.12 was amended to include subsection (B), which stated the following:

A declaratory judgment or decree that a court of record enters in an action or proceeding under this chapter between an insurer and a holder of a policy of liability insurance issued by the insurer and that resolves an issue as to whether the policy's coverage provisions extend to an injury, death or loss to person or property that an insured under the policy allegedly tortiously caused shall be deemed to have the binding legal effect described in division (C)(2) of section 3929.06 of the Revised Code and to also have binding legal effect upon any person who seeks coverage as an assignee of the insured's rights under the policy . . .

Ohio Revised Code § 2721.12(B). In addition, the Legislature amended 3929.06 relating to suits by judgment creditors against insurers, as follows:

(C) ...

- (1) In a civil action that a judgment creditor commences in accordance with divisions (A)(2) and (B) of this section against an insurer that issued a particular policy of liability insurance, the insurer has and may assert as an affirmative defense against the judgment creditor any coverage defenses that the insurer possesses and could assert against the holder of the policy in a declaratory judgment or proceeding under chapter 2721 of the Revised Code between the holder and the insurer.
- (2) If, prior to the judgment creditor's commencement of the civil action against the insurer in accordance with divisions (A)(2) and (B) of this section, the holder of the policy commences a declaratory judgment action or proceeding under chapter 2721 of the Revised Code against the insurer for a determination as to whether the policy's coverage provisions extend to the injury, death or loss to person or property underlying a judgment creditor's judgment and if the court involved in that action or proceeding enters a final judgment with respect to the policy's coverage or non-coverage of that injury, death or loss, that final judgment shall be deemed to have binding legal effect upon a judgment creditor for purposes of the judgment creditor's civil action against the insurer under divisions (A)(2) and (B) of this section. This division shall apply notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel.

R.C. 3929.06(C)(1) and (2).

In addition to those changes, the General Assembly specifically declared its intent to **supersede** the effect of the holding of the Ohio Supreme Court in Broz v. Winland relative to the lack of binding legal effect of a judgment or decree upon judgment creditors who were not parties to a declaratory judgment action between an insurer and the insured. Specifically, the General Assembly stated:

The General Assembly declares, in enacting new division (C) of section 2721.02, new division (B) of section 2721.02, and division (C) of the new section 3929.06 of the Revised Code in this Act and in making conforming amendments to division (A) of section 2721.12 of the Revised Code in this Act, it is the intent of the General Assembly to supersede the effect of the holding of the Ohio Supreme Court in Broz v. Winland (1994), 68 Ohio St.3d 521, and its progeny relative to the lack of binding legal effect of a judgment or decree upon certain persons who were not parties to a declaratory judgment action or proceeding between the holder of a policy of liability insurance and the insurer that issued the policy.

1999 H.B. 58 (eff. 9-24-99). Thus, the intent of the Legislature was clear. The amendments set forth in H.B. 58 were intended to overrule Broz v. Winland and make coverage decisions between an insurer and its insured binding on any claimant (or judgment creditor) who later asserted a claim for coverage under an insurance policy issued to the tortfeasor insured.

B. The Court incorrectly found the existence of a conflict between the amended statutes.

The Court of Appeals acknowledged the changes and the clear intent stated by the Legislature, but held that it had to “construe” the language of the provision despite acknowledging its duty to harmonize and give full application to all provisions “unless they are irreconcilable and in hopeless conflict.” Heintzelman v. Air Experts, Inc. (Ohio App. 5th Dist. 2008), 2008-Ohio-4883, ¶ 16. The Court’s error is that there is no need to employ statutory construction where the plain language of the statute is clear and where no conflict exists between provisions. Columbus Gas Transmission Corp. v. Levin (2008), 117 Ohio St.3d 122, 882 N.E.2d 400. The court essentially engaged in statutory construction and “interpretation” when the plain language of the statute, as amended, provides that a decision issued in a declaratory judgment action between an insurer and insured is binding on claimants who seek coverage later and that an insurer is entitled to raise **all** coverage defenses that may exist against the holder of the policy.

Unambiguous language in a statute does not require court interpretation or the application of rules of statutory construction. 4522 Kenny Road, LLC v. City of Columbus Board of Zoning Adjustment (Franklin Cty. 2003), 152 Ohio App.3d 526, 1789 N.E.2d 246. Where the language of a statute is plain and unambiguous, courts apply that plain and ordinary meaning of the words. Roxane Laboratories, Inc. v. Tracy (1996), 75 Ohio St.3d 125, 661 N.E.2d 1011.

The Court of Appeals relied upon R.C. § 1.51 as authority to ignore parts of the statutes in favor of others, finding that the only preclusive effect that can be applied under all of these statutes is where a policyholder files the initial action and not where an insurer files the initial action that is litigated to judgment. Ohio Revised Code § 1.51 states as follows:

If a general provision conflicts with a special or local provision, **they shall be construed, if possible, so that effect is given to both.** If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails.

R.C. § 1.51 (emphasis added); *see also*, Village Condominium Owners Assn. v. Montgomery County Board of Revisions (2005), 106 Ohio St.3d 223, 833 N.E.2d 1230.

Statutes do not conflict, such that specific statutes control over general, if they merely cover the same activity. Conflict exists only if they treat it diametrically differently. State v. King (1993), 63 Ohio Misc. 2d 190, 620 N.E.2d 306. The court is first required to construe, where possible, to give effect to both and only where a conflict is deemed irreconcilable should one provision prevail over another. United Telephone Co. of Ohio v. Limbach (1994), 71 Ohio St.3d 369, 643 N.E.2d 1129.

C. No conflict exists between the statutory provisions.

Ohio Revised Code § 3929.06 relates to the filing of supplemental actions. Under that provision, a judgment creditor, i.e., one who has already obtained a judgment against a

tortfeasor, is given the ability to file a lawsuit, 30 days after the entry of final judgment, against the insurer who issued a policy that insured the tortfeasor for liability against that injury. The judgment creditor is entitled to sue for the proceeds of that policy up to the limits of liability to satisfy the final judgment. *Id.* at 3929.06(A)(1). The suit filed by the judgment creditor results in an order requiring the insurer to pay the judgment, subject to the limits of its coverage.

Subdivision (C)(1) of 3929.06 provides that the insurer “has and may assert as an **“affirmative defense”** against the judgment creditor (i.e., against the demand for money judgment) any coverage defenses that the insurer possesses and could assert against the holder of the policy in a declaratory judgment action or proceeding under chapter 2721 of the Revised Code between the holder and the insurer.” R.C. 3929.06(C)(1). Thus, the rights provided to a judgment creditor under 3929.06 as defined in that statute are then directly limited by, and subject to, the rights of the original holder of the policy. Moreover, the insurer is given the right to assert all coverage defenses, as affirmative defenses, it has against the original holder of the policy.

The final provision of that statute, R.C. 3929.06(C)(2), states that if, **before** the commencement of the supplemental action, the holder of a policy commences a declaratory judgment under 2721 for coverage for the underlying claims and the court enters final judgment, that final judgment shall be deemed to have binding legal effect upon the judgment creditor for the purposes of the judgment creditor’s civil suit. The statute does not state that actions commenced by insurers are **not** entitled to preclusive effect. Rather, it only carves out those actions commenced by policyholders **before** the supplemental suit and notes they are binding.

Ohio Revised Code 2721.12 relates to declaratory judgment actions and determinations between insureds and their insurers. Specifically, subsection (B), which was part of the H.B. 58 amendment, states that:

A declaratory judgment or decree that a court of record enters in an action or proceeding under this chapter between an insurer and a holder of a policy of liability insurance issued by the insurer and that resolves an issue as to whether the policy's coverage provisions extend to an injury, death or loss to person or property that an insured under the policy allegedly tortiously caused shall be deemed to have binding legal effect described in division (C)(2), section 3929.06 of the Revised Code.

R.C. 2721.12(B). That section is clear and unequivocal. Declaratory judgments between an insurer and the policyholder are binding on tort claimants and have the same binding "effect" that is described in 3929.06(C)(2). There is no conflict; the two statutes provide that a decision in a dec action is binding on later claimants. One statute is simply more expansive than the other.

The binding nature of this language on tort claimants (or judgment creditors) has been acknowledged by the third District Court of Appeals, Allen County, in Indiana Ins. Co. v. Murphy (2006), 165 Ohio App.3d 812, 848 N.E.2d 889. In Murphy, the insurer filed a declaratory judgment action against its insured and did not name the claimant. The claimant then sought to intervene in the case. The Court of Appeals for Allen County held that the claimant was permitted to intervene because, under 2721.12(B), the declaratory judgment would be binding on the tort claimant even if it were not a party to that suit. Murphy, 165 Ohio App.3d at 820-21.

The Delaware County Court of Appeals declared that all of these provisions were "in conflict" and that, therefore, preclusive effect will only be given declaratory judgments that were initiated by policyholders but not by insurers. By doing so, the Court of Appeals effectively eliminated the provisions of subsection (B) of the declaratory judgment section and section (C)(1) of R.C. 3929.06 in favor of a limited reading of section 3929.06(C)(2).

D. The statutes contain complementary and overlapping descriptions of the scope of the preclusive effect.

As an initial matter, the two statutes do not conflict, i.e., the two provisions do not treat situations differently. Rather, both provisions state categorically that determinations in a declaratory judgment action between an insurer and an insured are binding on third parties. The statutes simply describe in different detail the scope of the preclusion. It should be noted that the decisive language used in R.C. 2721.02 makes reference to the binding **effect** referenced in R.C. 3929.06. That is, the Legislature, when it drafted this language, was aware that it was treating both situations the same but was merely extending the scope of the preclusive effect described in 3929.06(C)(2) to all declaratory judgment actions, whether filed by insurers or insureds.

Specifically, 2721.12(B) mandates that a declaratory judgment that is entered by a court under that chapter between an insurer and a holder of a policy of liability insurance has the binding legal “**effect**” described in division (C)(2) of section 3929.06 of the Ohio Revised Code. Thus, the Legislature specifically carved out of that section the res judicata effect but did not state that the section was to be applied **the same** as 3929.06(C)(2). The binding legal effect set forth in (C)(2) provides that judgment creditors are bound by the principles of res judicata or collateral estoppel. The binding legal effect described in 3929.06(C)(2) is that the judgment creditor is bound to a previous determination even if it was not made a party. That effect was then transferred by the language of R.C. 2721.12(B) to declaratory judgment actions in general and decisions between an insured and the insurer. This expansion would not only apply to potential judgment creditors, but also to other insurers, self-insured entities, or any other entity that wanted to relitigate coverage. It should be noted that 3929.06 sets forth a cause of action for a money judgment and does not describe or provide for declaratory relief. The provisions relating to declaratory relief are set forth in R.C. 2721.12.

The two statutes are merely complementary and apply to the same subject matter. One provides broader scope relating directly to declaratory judgment actions than the more narrow provisions of R.C. 3939.06. A conflict does not exist and the plain language of 2721.12(B) should prevail. *See Indiana Ins. Co. v. Murphy* (2006), 165 Ohio App.3d 812, 840 N.E.2d 889 (declaratory judgment filed by insurer against insured binds tort claimants under 2721.12(B)).

The complementary nature of these two statutes (and contrary to any contention that a conflict exists) is borne out by subdivision (C)(1) of 3929.06. That provision states that in a civil action that a judgment creditor commences under 3929.06, the insurer can assert as an affirmative defense **any** coverage defenses that the insurer possesses and could assert against the holder of the policy in a dec action or proceeding under section 2721 of the Revised Code. Clearly, that provision contemplates that the defense of res judicata of a previous coverage decision as an affirmative defense under the Civil Rules.

Originally, the Ohio Supreme Court held that “potential” judgment creditors or claimants had standing to file declaratory judgment actions against the insurers of “potential” tortfeasors because the injured person was an “interested party” under the insurance contract even before a tort judgment was obtained. *See Krejci v. Prudential Property & Cas. Ins. Co.* (1993), 66 Ohio St.3d 15, 1993-Ohio-190; *Broz v. Winland*, 68 Ohio St.3d 521. This “interest” was based on the statutory process for filing a supplemental complaint, i.e., giving the “potential” judgment creditor the right to file direct suits against the insurer for the proceeds of the policy. Because that “interest” was borne out of the statutory scheme for supplemental actions, the Legislature had the power to define interests that were granted under the statutes. In response to the decisions in *Broz* and *Krejci*, the Legislature amended these several statutes in 1999 to supersede the results of those decisions. Specifically, the Legislature provided that tort claimants did not have standing to file a declaratory judgment action until **after** judgment was obtained. R.C. §

2721.02(B). It made its intent clear: it was superseding Broz relative to the lack of binding effect on certain persons (including judgment creditors) who were not parties to the initial declaratory judgment action between the insurer and the insured.

E. The Legislature's intent was ignored by the Court of Appeals.

The Legislature enacted H.B. 58 to clarify, among other things, that the potential claimants are not interested parties for the purposes of declaratory judgments **until** they obtain a judgment and have a valid, direct interest in insurance proceeds under R.C. 3929.06. That intent was also clarified to note that any determination between an insurance company and its insured on coverage was binding on the "potential" judgment creditor when he does not have a judgment before the coverage determination. When construing any statute, the court's paramount concern is the enforcement of the legislative intent. State ex rel. U.S. Steel Corp. v. Zaleski (2003), 98 Ohio St.3d 395, 786 N.E.2d 39.

The purpose of the statutory effect is clear. Finality of coverage decisions between insurers, and their insureds and other parties to the insurance contract should be binding on subsequent claimants. Situations, such as in this case, where a determination on coverage is made and then a claim is asserted many years later, can hold open potential claims and reduce finality and predictability both in the claims and the law. It wastes judicial resources by forcing matters to be relitigated where a potential claimant exists of which the insurer may have no knowledge.

The words used in the statute are clear and unambiguous. A declaratory judgment entered into between an insurer and a policyholder that resolves an issue as to whether the policy's coverage extends to any specific injury, death or loss that an insured under the policy caused shall have binding legal effect on the judgment creditor. It is the binding legal "effect" that was incorporated into 2721.02 and later confirmed in 3929.06(C)(1). The Legislature

confirmed its intent to make these determinations binding on judgment creditors when it affirmatively stated its intent to supersede Broz. See 1999 H.B. 58 § 5 (effective 9-24-99).

F. The Court of Appeals decision essentially reinstates the holding of Broz despite being superseded by statute.

The facts in Broz are essentially identical to this case. In Broz, the insurer commenced the declaratory judgment action against the insured. Broz, 68 Ohio St.3d at 521. The insurance policy in that case prohibited coverage for unauthorized use. Id. The potential judgment creditor, i.e., the claimant, was not joined as a party to the declaratory judgment action. Id. The Supreme Court held that the decision in favor of the insurer did not bind the later judgment creditor who had not been a party to the dec action. Id. at 525.

By superseding Broz, the General Assembly specifically made it clear that it was seeking to make declaratory judgments between insurers and their policyholders binding on judgment creditors. The Delaware County Court of Appeals decision in this case effectively destroys the General Assembly's efforts and ignores its intent by returning the state of the law back to the way things existed at the time of Broz. That is, any and all **possible** judgment creditors (who have not litigated their case to judgment), must be included as parties to dec actions. The General Assembly recognized the difficulty and potential problems associated with trying to obtain and file suit to involve potential judgment creditors (many of whom may not want to be involved in another lawsuit). Rather, the General Assembly made it clear that those parties to the contract are the necessary parties for whom the dec action must proceed. The General Assembly provided that once a coverage decision is made between the parties to the contract, that declaratory judgment action will have preclusive effect on all others who claim proceeds under the policy and that the insurer is entitled to assert as a defense all coverage defenses, including

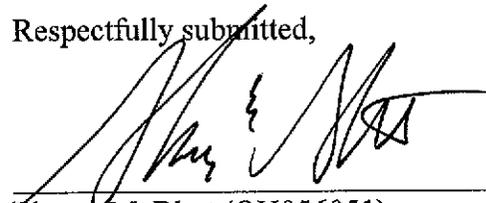
res judicata and collateral estoppel, it would have against the original policyholder. *See* R.C. 3929.06(C)(1).

No conflict exists between the provisions of 3929.06 and 2721.12 of the Ohio Revised Code. Those provisions are merely complementary and provide finality and predictability both to the law and to coverage decisions that are made under the law.

CONCLUSION

For the foregoing reasons, the Ohio Association of Civil Trial Attorneys urges the Court to reverse the Delaware County Court of Appeals decision and hold that the judgment creditor is bound by the declaratory judgment obtain in favor of American Family Insurance.

Respectfully submitted,



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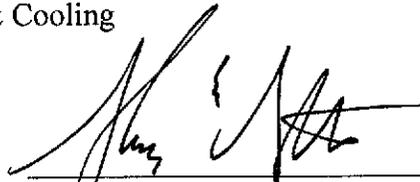
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 9 day of April, 2009, via regular U.S. mail, postage prepaid upon the following:

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A handwritten signature in black ink, appearing to read "Shawn M. Blatt", is written over a horizontal line.

Shawn M. Blatt