

IN THE SUPREME COURT OF OHIO

THE ESTATE OF JEFFREY K.	:	Case No.: 2008-2173
HEINTZELMAN, et al.,	:	
	:	
Plaintiff-Appellant,	:	
	:	
-vs-	:	
	:	Appeal from the Delaware
AIR EXPERTS, INC., et al.,	:	County Court of Appeals,
	:	Fifth Appellate District,
Defendant-Appellee.	:	Case No.: 07CAE09-0045

MERIT BRIEF OF APPELLANT AMERICAN FAMILY INSURANCE COMPANY

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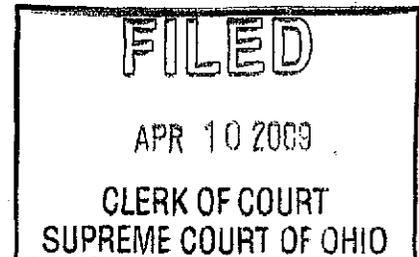


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STATEMENT OF FACTS

In August of 1999, Jeffrey and Margaret Heintzelman hired Martel, dba Martel Heating and Cooling (“Martel”), to install an attic air conditioner in their home. (Court of Appeals Sept. 24, 2009, Opinion @ para. 3, (2008-Ohio-4883)). The air conditioner never worked properly. (Id.) Martel attempted to fix the problem, but was unsuccessful. (Id.) In 2001, the Heintzelmans hired Air Experts to attempt to fix the air conditioner. (Id.) Air Experts were unable to repair the unit and the problems continued. (Id.) On July 15, 2002, Jeffrey Heintzelman went to the attic to stop the air conditioner from Delaware County, Case No. leaking through the ceiling. (Id.) An exposed outlet providing power to the condensation pump leading to the air conditioner electrocuted him. (Id.)

On December 10, 2002, the Heintzelmans (“Appellees”) filed a complaint against Martel and Air Experts in the Delaware County Court of Common Pleas, asserting wrongful death and infliction of emotional distress claims (Case No. 02-CVH-12712). (Id. @ 4). At the time of the air conditioner's installation, Martel was the named insured under a commercial insurance policy issued by Appellant American Family Insurance Company (Policy No. 34-X03305-01). (Id.) American Family defended Martel in the lawsuit. (Id.) On March 16, 2003, Appellees dismissed the action without prejudice. (Id.)

On December 4, 2003, American Family filed a declaratory judgment action (Case No. 03CVH12-0896) seeking a judgment that it did not have a duty to indemnify Martel for any damages award in the Heintzelman case. (Id. @ 6). American Family did not join the Heintzelmans as parties nor did the Heintzelmans seek to intervene. Martel did not respond to the action and American Family filed a motion for default judgment on March 4, 2004. (Id. @ 6 & 7).

On March 10, 2004, the trial court granted the default judgment, finding that Appellant did not have a duty to indemnify Martel. (Id. @ 7). Martel, now represented by the Heintzelmans' attorneys, subsequently sought to have the declaratory judgment vacated by filing an "Amended Motion to Vacate Void Default Judgment" in March 2007. (Id.) On March 12, 2007, the trial court denied the motion. (Id.) In its judgment entry, the trial court noted that Martel did not file a timely Civ. R. 60(B) motion for relief from judgment because the rule requires that such motion must be made not more than one year after the judgment was entered and this motion was filed three years post-judgment. (Id.) This entry was not appealed by Martel. (Id.)

On April 9, 2004, the Heintzelmans re-filed their original action against Martel and Air Experts (Case No. 04CVH04-0233). (Id. @ 8). Those claims proceeded to trial. (Id. @ 9). On March 7, 2005, a jury returned a verdict in the total amount of \$3,664,186 against Martel. (Id.) The jury awarded \$1,014,186 to the Estate on the wrongful death claim and \$2,650,000 to Margaret Heintzelman on her emotional distress claim. (Id.) The jury rendered a defense verdict in favor of Air Experts. (Id. @ 11).

Various appeals were taken from these verdicts. On May 10, 2005, while the appeal was pending, the Heintzelmans filed a supplemental complaint in Case No. 04CVH04-0233 alleging Martel's policy with American Family provided coverage for the bodily injury and property damage caused by Martel's actions. (Id. @ 14).

On October 6, 2005, American Family filed a motion for summary judgment on the Heintzelmans supplemental complaint arguing, among other things, that (1) the Heintzelmans could not collaterally attack the default judgment in favor of American Family and against Martel, Delaware County, Case No. 07CAPE09-0045, (2) Martel was not entitled to coverage

under the insurance policy, (3) Margaret Heintzelman's award for negligent infliction of emotional distress was not covered under the insurance policy, and (4) the Heintzelmans could not assert a cause of action for bad faith. (Id. @ 15). The Heintzelmans filed a memorandum in opposition and filed a cross-motion for summary judgment arguing the language of the insurance policy compels coverage. (Id.) Appellants conceded they were not asserting a bad faith claim at that time. (Id.) However, the trial court stayed the case pending the outcome of the appeal.

On September 14, 2006, the Delaware County Court of Appeals ruled on the appeals taken by the parties from the trial verdicts. (Id. @ 16). On August 23, 2006, Martel filed a separate complaint against American Family (Case No. 06CVH08-761) claiming bad faith regarding settlement negotiations, fraud in changing language in the policy, and failure to protect its insured. (Id. @ 17). On December 4, 2006, Martel filed an amended complaint in that case to include a claim for fraudulent misrepresentation regarding representations made over coverage under the policy and over the default judgment in the declaratory judgment action. (Id.) That case remains pending.

By separate entry on August 6, 2007, the trial court granted American Family's motion for summary judgment on the Heintzelman's supplemental complaint on the issue of the availability of insurance to cover any part of the judgment rendered against Martel. (Id.) The trial court held that the Heintzelmans were bound by the declaratory judgment rendered against Martel in Case No. 03CVH12-0896 and therefore, American Family had no duty to indemnify Martel for any damages awarded against him in the Heintzelman litigation. (Id.) The trial court reasoned that under recent amendments to R.C. 3929.06, Ohio's Declaratory Judgment Act, Appellants were bound by the declaratory judgment even though they were not parties to the action. (Id.) As a result, the trial court did not address the second prong of American Family's

summary judgment motion pertaining to the availability of insurance coverage under the terms of the policy. (Id.)

The Heintzelmans then appealed the trial court's decision granting American Family's Motion for Summary Judgment and denying the Heintzelman's cross motion for Summary Judgment. On September 24, 2008, the Delaware County Court of Appeals ruled that the Heintzelmans were in fact, not bound by the default judgment rendered in favor of American Family against Martel, primarily because that declaratory judgment action had been instituted by American Family and not Martel.

American Family then filed its Notice of Appeal and Memorandum in Support of Jurisdiction with this Court. This Court accepted the case by Entry dated February 18, 2009. American Family contends that the trial court correctly held that Ohio's statutory scheme prohibits a tort claimant from re-litigating coverage issues in a supplemental complaint when the issues were previously resolved by a declaratory judgment. American Family urges this Court to reverse the decision of the Court of Appeals and reinstate the decision of the trial court.

ARGUMENT

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 SUBSEQUENT SUPPLEMENTARY COMPLAINT ASSERTED AGAINST THE INSURER PURSUANT TO ORC §3929.06.

A. Appellees are bound by and cannot collaterally attack the declaratory judgment taken by American Family against Martel.

Appellant obtained a valid judgment against Martel declaring that it has no obligation to indemnify him as a result of Jeffrey Heintzelman's death. The Declaratory Judgment Act, ORC §2721 et seq, confirms the preclusive effect of this judgment in a supplemental action. Likewise, ORC §3929.06, the statute authorizing supplemental actions, allows an insurance company to assert any defense against a judgment creditor that it has against its insured, which would include *res judicata*, in response to a Supplemental Complaint.

ORC §3929.06 authorizes supplemental complaints. It reads:

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 action or proceeding under Chapter 2721 of the Revised Code between the holder and the insurer.

R.C. § 3929.06(C)(1)(emphasis added). According to this statute, Appellant may assert *res judicata* as an affirmative defense to the Supplemental Complaint since it is a valid defense against Martel. In essence, Appellees stand in the shoes of Martel and are subject to Appellant's judgment declaring it has no duty to indemnify in this case.

Ohio's Declaratory Judgment Act uses language similar to ORC §3929.06. The statutes enacted thereunder specifically allow an insurer to assert any defense against a judgment creditor

that it has against the policy holder. ORC §2721, et seq. The statutory scheme demonstrates that judgment creditors are subject to the same defenses as the policy holder.

ORC §2721.02 reads as follows:

2721.02 FORCE AND EFFECT OF DECLARATORY JUDGMENTS - ACTION OR PROCEEDING AGAINST INSURER.

(C) In an action or proceeding for declaratory relief that a judgment creditor commences in accordance with divisions (A) 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 an action or proceeding under this chapter between the holder and the insurer.

(emphasis added). This provision contains the same decisive language as R.C. §3929.06. The provisions taken together demonstrate clear legislative intent to streamline the adjudication of coverage disputes. Both provisions allow an insurer to assert “any” defense against the judgment creditor that could be used against the policy holder. Applying that in this case, Appelles are subject to the doctrine of collateral estoppel since it could be asserted against Martel.

Appellees argue that Appellant’s declaratory judgment does not have a binding legal effect on their supplemental complaint because they were not made a party to the declaratory judgment action. Appellees contend that ORC §2721.12(A) supports their position. Appellees ignore §2721.12(B), however, which plainly reveals they are incorrect.

2721.12 DECLARATORY JUDGMENT PROCEDURE.

(A) Subject to division (B) of this section, when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding. Except as provided in division (B) of this section, a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding...

* * *

(B) 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...

Paragraph (A) of ORC §2721.12 requires declaratory judgment plaintiffs to join interested parties in lawsuits seeking declaratory relief, and further initially specifies that a declaratory judgment will not bind a party unless that party was named in the declaratory judgment action. However, by the plain language of the statute, paragraph (A) of ORC §2721.12 is expressly subject to paragraph (B) of the statute. Paragraph (B) creates an exception both to the requirement of naming all persons who have or claim any interest in the action and to the preclusive effect of a declaratory judgment against those unnamed parties.

ORC §2721.12(B) states that a declaratory judgment will be binding where the declaratory action resolves an issue as to whether coverage extends to an injury, death, or loss allegedly tortiously caused by the insured. Thus, the exception in paragraph (B) applies here since the declaratory judgment obtained by Appellant resolved the issue of whether it was obligated to cover Martel for Mr. Heintzelman's death. Since the exception applies, the declaratory judgment is to be given the same "[b]inding legal effect described in division (C)(2) of Section 3929.06 of the Revised Code."

ORC §3929.06(C)(2) refers specifically to judgment creditors such as Appellees and describes the preclusive effect given to a declaratory judgment:

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 the 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 noncoverage of that injury, death, or loss, that final judgment shall be

deemed to have binding legal effect upon the 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.

ORC §3929.06(C)(2). Of note, however, ORC §2721.12(B) does not indicate that the specific unbending language and/or a narrow interpretation of the language of ORC §3929.06(C)(2) applies. Rather, ORC §2721.12(B) mandates that declaratory judgments between insureds and insurers will have the same *type* of "binding legal effect" (that is provided when an insured commences a declaratory judgment action). In other words, the statute clarifies that not only are declaratory judgments binding upon judgment creditors when their underlying suits are instituted by insureds (ORC §3929.06(C)), but such judgments are also binding upon judgment creditor when such suits are instituted by insurers.

Historical review of Ohio's Declaratory Judgment Act and ORC §3929.06 also supports Appellant's position. Under Ohio's current statutory scheme, an injured party is not permitted to assert a claim for declaratory judgment against an alleged tortfeasor's insurer in order to determine coverage until such time as a judgment is taken against the insured. ORC §2721.02(B). In the early 1990's, however, this provision did not exist and this Court approved direct actions by injured claimants to determine a liability insurer's obligation to indemnify. *See Krejci v. Prudential Prop. & Cas. Ins. Co.* (1993), 66 Ohio St.3d 15 (1993-Ohio-190); *Broz v. Winland* (1994), 68 Ohio St.3d 521 (1994-Ohio-529). In *Broz*, the Supreme Court found that an injured person was an "interested party" under the alleged tortfeasor's insurance policy even before a tort judgment was obtained. *Id.* at 525. To this effect, the court stated:

[t]he fact that the injured victim can initiate such an action is significant. R.C. 2721.03 provides that a declaratory judgment action is available to '[a]ny person interested' under a written contract of any nature for purposes of establishing rights and duties thereunder. Thus, even before judgment against the tortfeasor is

obtained, an injured victim is an interested party under the tortfeasor's insurance policy.

68 Ohio St.3d at 525. *Broz* also held that if injured tort claimants were not joined in declaratory judgment actions, they would not be bound by the proceedings. *Id.*

In response, the Legislature amended several statutes in 1999 to supersede the result of *Broz* and its progeny. Specifically, the amendment notes to H.B. 58 state that:

[t]he General Assembly declares that, in enacting divisions (A) and (B) of new section 3929.06 and new division (B) of section 2721.02 of the Revised Code in this act, in outright repealing existing section 3929.06 of the Revised Code in this act, and in making conforming amendments to sections 2721.03 and 2721.04 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 *Krejci v. Prudential Prop. and Cas. Ins. Co.* (1993), 66 Ohio St. 3d 15, *Broz v. Winland* (1994), 68 Ohio St. 3d 521, 524-525, and *Mezerkor v. Mezerkor* (1994), 70 Ohio St. 3d 304, 308,** that existing section 3929.06 of the Revised Code does not preclude the commencement of a civil action under that section or a declaratory judgment action or proceeding under Chapter 2721 of the Revised Code against an insurer that issued a policy of liability insurance until a court of record enters in a distinct civil action for damages between the plaintiff and an insured tortfeasor a final judgment awarding the plaintiff damages for the injury, death, or loss to person or property involved.

(as cited in *Taylor v. Covey* (Stark Cty. Ct. App. Dec. 23, 2002), 2002-Ohio-7221 (emphasis added)).

Thus, the Legislature enacted H.B. 58, *inter alia*, to clarify that injured persons are not interested parties for the purposes of the declaratory judgment act until they obtain a judgment. Following from that, a party bringing a declaratory judgment action does not need to name a tort claimant in the action in order for the parties to the insurance contract to resolve coverage issues.

Appellees' claims herein are essentially the same as the *Broz* claimants: (1) they should have been named in the declaratory judgment action, and (2) since they were not named, they are not bound by the determination of coverage. With the adoption of H.B. 58, these arguments are without merit. The amendment notes from H.B. 58 state in pertinent part:

The General Assembly declares that, in enacting new division (C) of section 2721.02, new division (B) of section 2721.12, and division (C) of 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 58, §§ 4 and 5, eff. 9-24-99.

Taylor, supra (emphasis added).

The Legislature's words are clear and unambiguous. A declaratory judgment is given binding legal effect against judgment creditors even though they were not parties to the action. Thus, Appellees were not required to be named to the declaratory judgment action between Appellant and Martel in order to be bound by any final judgment rendered therein. The language of ORC §2721.12(B) coupled with Legislature's comments above demonstrate that there is no such requirement.

Furthermore, paragraph (B) of ORC §2721.12, as enacted by H.B. 58, was an entirely new paragraph to the statute. A basic rule of statutory construction requires that words in statutes should not be construed to be redundant, nor should any words be ignored. *East Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299. Moreover, statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. *Proctor v. Orange Barrel Media, L.L.C.* (Franklin Cty. Ct. App. June 21, 2007), Case No. 06AP-762 (2007-Ohio-3218, at ¶16). No part should be treated as superfluous unless that is manifestly required, and courts should avoid that construction which renders a provision meaningless or inoperative. *State ex rel. Myers v. Bd. of Edn. of Rural School Dist. of Spencer Twp. Lucas Cty., Ohio* (1917), 95 Ohio St. 367, 372-373.

The Court of Appeals, in effect, takes the position that ORC §2721.12(B) has no effect on Appellees' Supplemental Complaint because ORC §3929.06(C)(2) requires the "holder of the policy" to commence the declaratory judgment in order for it to have binding legal effect. This analysis is flawed based upon the aforementioned rules of statutory construction as well as H.B. 58. The General Assembly plainly stated that H.B. 58 was enacted to supersede the effect of *Broz*. *Broz* arose out of a fatal auto accident caused by an unlicensed minor driver. *68 Ohio St. 3d at 522*. The insurance policy at issue in the case precluded coverage for unauthorized use. *Id.* The tortfeasor's insurance company argued that the minor driver did not have a reasonable belief she was authorized to drive the vehicle. *Id. at 521*. While the tort action was pending, the tortfeasor's insurance company filed a declaratory judgment action against its insureds seeking a determination of coverage. *Id.* The tort claimants were not joined as parties to the declaratory judgment action. *Id.* The Ohio Supreme Court held that the determination made in the declaratory judgment action between the insurance company and the insured did not bind the injured claimants who had not been parties to the declaratory judgment action. *Id. at 523*.

Significantly, in *Broz*, the declaratory judgment action was initiated by the insurance company and not the "holder of the policy." Thus, in superseding *Broz* the General Assembly wanted preclusive effect to be given to a declaratory judgment whether the action was initiated by the insurance company or the policy holder. There is nothing in the comments to H.B. 58 that suggests otherwise.

Given the clear message sent by General Assembly relative to the *Broz* decision, ORC §3929.06(C)(2) plainly complements subparagraph (C)(1) and insures that a declaratory judgment action commenced by the policy holder is likewise binding upon a judgment creditor. Since a majority of declaratory judgment actions are brought by the insurance company, it makes

sense that the General Assembly would seek to ensure that actions or proceedings brought by the “holder of the policy” were also deemed to have preclusive effect. Appellant posits that the language in §2721.12(B) that refers to “the binding legal effect described in division (C)(2) of section 3929.06 of the Revised Code” speaks to the part of (C)(2) which states that a declaratory judgment shall be binding “[n]otwithstanding any contrary common law principles of *res judicata* or adjunct principles of collateral estoppel.” This reading is consistent with the legislative history and amendment notes to H.B. 58.

The argument that a declaratory judgment is only binding on the judgment creditor when the policy holder brings the declaratory judgment, since the rights of a potential judgment creditor are protected, is also flawed. There is no guarantee in a suit brought by a policy holder that the potential judgment creditor’s interests are any more protected than in an action initiated by the insurer. No matter who commences a declaratory judgment action, it behooves the policy holder to vigorously argue in favor of coverage. There is no reason to limit the binding legal effect of a declaratory judgment only to circumstances where the policyholder brings suit. That result would defeat the effect of R.C. §3929.06(C)(1) and R.C. §2712.12(B). The statutory language supported by the amendment notes to H.B. 58, demonstrates that Appellees are bound by the declaratory judgment even though they were not parties to the action. They cannot collaterally attack the judgment in their supplemental action.

B. The Court of Appeals improperly resorted to and erroneously applied a rule of statutory construction.

The paramount goal in the construction or interpretation of a statute is to ascertain and give effect to the legislature's intent in enacting that statute. *Featzka v. Millcraft Paper Co.* (1980), 62 Ohio St.2d 245, 247. Stated differently, the primary and paramount rule in the construction of statutes is to arrive at and to determine, declare and give effect to the intention of

the Legislature to be gathered from all the provisions of a composite act in relation to the same matter, subject or object, and the design, system or scheme of the Legislature. *The Suez Co. v. Young* (Lucas 1963), 118 Ohio App. 415; *Brooks v. Ohio State Univ.* (Franklin 1996), 111 Ohio App.3d 342; *Ohio Bus Sales, Inc. v. Toledo Bd. of Edn.* (Lucas 1992), 82 Ohio App.3d 1.

Here, the Delaware County Court of Appeals seems to have made an effort to avoid this rule. It reversed the trial court based upon rules of statutory construction and by finding that when there are two competing statutes, one of which is more specific and the other being more general, the more specific pronouncement will apply. As an initial matter, the statutes cited by the Court of Appeals are neither ambiguous, nor do they conflict. When the language of a statute is unambiguous, Courts must apply the plain and ordinary meaning of the words. *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125. Unambiguous language in a statute does not require court interpretation or application of the rules of statutory construction. *4522 Kenny Rd., LLC v. City of Columbus Bd. of Zoning Adjustment* (Franklin 2003), 152 Ohio App.3d 526.

Furthermore, the Court of Appeals, reliance on ORC §1.51 is misplaced. That statute reads, in pertinent part:

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 prevail.

ORC §1.51 (emphasis added); *see also Village Condominiums Owners Assn. v. Montgomery Cty. Bd. of Revision* (2005), 106 Ohio St.3d 223. Here, ORC §2721.02(C) and ORC §3929.06(C)(2) as cited by the Court of Appeals, are not irreconcilable as explained above. Rather, those statutes are wholly consistent with one another and the remainder of H.B. 58 as enacted. As stated in *State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367:

The General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences. It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result.

Id. (syllabus); *State v. Tabbaa* (Cuyahoga 2003), 151 Ohio App.3d 353. Ironically, the statutes that the Delaware County Court of Appeals could not reconcile were both modified or enacted as part of H.B. 58! Nevertheless, its ruling creates the incongruent result that the Bill will be given effect only to insureds and not insurers. The distinction between what party asserts a declaratory action is a distinction without a legal difference.

CONCLUSION

For the reasons stated above, Appellant American Family Insurance Company respectfully requests that this Court reverse the decision of the Court of Appeals and reinstate the decision of the Trial Court granting its Motion for Summary Judgment in its favor.

Respectfully Submitted,



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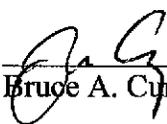
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following by regular U.S. mail on this 10th day of April, 2009:

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APPENDIX

IN THE SUPREME COURT OF OHIO

THE ESTATE OF JEFFREY K.
HEINTZELMAN, et al.,

Plaintiff-Appellant,

-vs-

AIR EXPERTS, INC., et al.,

Defendant-Appellee.

: Case No.: 08-2173
:
:
: On Appeal from the Delaware
: County Court of Appeals,
: Fifth Appellate District
:
:
: Court of Appeals
: Case No.: 07CAE09-0045

NOTICE OF APPEAL OF APPELLANT
AMERICAN FAMILY INSURANCE COMPANY

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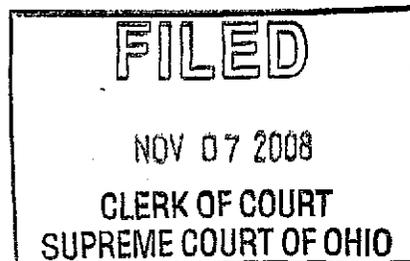
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Notice of Appeal of Appellee American Family Insurance Company

Appellee American Family Insurance Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Delaware County Court of Appeals, Fifth Appellate District, entered in The Estate of Jeffrey K. Heintzelman, et al., v. Air Experts, Inc, et al., Court of Appeals Case No. 07CAE09-0045 on September 24, 2008.

This case is one of public or great general interest.

Respectfully submitted,

CURRY, ROBY & MULVEY CO., LLC



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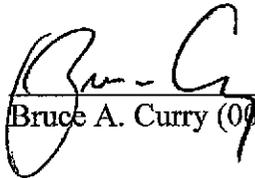
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following:

Rex H. Elliott
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by ordinary U.S. mail on this 7th day of Nov., 2008.



Bruce A. Curry (0052401)

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE ESTATE OF JEFFREY K.
HEINTZELMAN, ET AL.,

Plaintiffs-Appellants

-vs-

AIR EXPERTS INC., ET AL.,

Defendants-Appellees

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 07CAE090045

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas Case No. 04CVH040233

JUDGMENT:

Affirmed in part; Reversed in part and
Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2008 SEP 24 AM 10:24
JAN ANTONOPOLOS
CLERK

**Court of Appeals
Delaware Co., Ohio**

**I hereby certify the within be a true
copy of the original on file in this office.**
Jan Antonopoulos, Clerk of Courts
By DMC/Jan Deputy

Delaney, J.

{¶1} This is the third appeal before this Court relating to the claims of Plaintiff-Appellants Margaret Heintzelman, individually and as the administrator of the Estate of Jeffrey Heintzelman ("Appellants"), due to the negligence of Defendant-Appellee Thomas Martel ("Martel") in causing the death of Jeffrey Heintzelman.

{¶2} Appellants now appeal two post-remand entries of the trial court. The first is the granting of summary judgment to Defendant-Appellee American Family Insurance ("American Family") on Appellants' supplemental complaint pursuant to R.C. 3929.06, which sought recovery of insurance proceeds to satisfy a final judgment in favor of the Estate against Martel. The second is the denial of Appellants' "Motion to Enter Judgment Consistent with Jury Interrogatories or, in the Alternative; Motion for Relief from Judgment and Entry of Judgment or, in the Alternative, Motion for Additur or for a New Trial on Damages Only." Appellants filed this motion after a successful appeal by Martel on the individual claim of Margaret Heintzelman for negligent infliction of emotional distress.

FACTUAL BACKGROUND

{¶3} In August of 1999, Jeffrey and Margaret Heintzelman hired Martel, dba Martel Heating and Cooling, to install an attic air conditioner in their home. The air conditioner never worked properly. Martel attempted to fix the problem, but was unsuccessful. In 2001, the Heintzelmans hired Air Experts to attempt to fix the air conditioner. Air Experts were unable to repair the unit and the problems continued. On July 15, 2002, Jeffrey Heintzelman went to the attic to stop the air conditioner from

leaking through the ceiling. An exposed outlet providing power to the condensation pump leading to the air conditioner electrocuted him.

THE LAWSUITS

{¶4} On December 10, 2002, Appellants filed a complaint against Martel and Air Experts in the Delaware County Court of Common Pleas, asserting wrongful death and infliction of emotional distress claims (Case No. 02-CVH-12712). At the time of the air conditioner's installation, Martel was the named insured under a commercial insurance policy issued by American Family (Policy No. 34-X03305-01). American Family defended Martel in the lawsuit and turned down a settlement offer, allegedly without informing Martel of the offer. On March 16, 2003, Appellants dismissed the action without prejudice.

{¶5} On July 30, 2003, American Family sent a reservation of rights letter to Martel advising him that there was a dispute whether American Family should provide coverage for the July 15, 2002 Heintzelman accident. The letter further advised Martel that he might want to obtain private counsel.

{¶6} On December 4, 2003, American Family filed a declaratory judgment action (Case No. 03CVH12-0896) seeking a judgment that it did not have a duty to indemnify Martel for any damages award in the Heintzelman case. American Family did not join Appellants as parties nor did Appellants seek to intervene. Appellants claim they did not have notice of this action. Martel did not respond to the action.

{¶7} American Family filed a motion for default judgment on March 4, 2004. On March 10, 2004, the trial court granted the default judgment, finding American Family did not have a duty to indemnify Martel. Allegedly, American Family told Martel

not to worry about this default judgment. Martel subsequently sought to have the declaratory judgment vacated by filing an "Amended Motion to Vacate Void Default Judgment" in March 2007. On March 12, 2007, the trial court denied the motion. In its judgment entry, the trial court noted that Martel did not file a timely Civ.R. 60(B) motion for relief from judgment because the rule requires that such motion must be made not more than one year after the judgment was entered and this motion was filed three years post-judgment. This entry was not appealed by Martel

{¶18} On April 9, 2004, Appellants re-filed the original action against Martel and Air Experts (Case No. 04CVH04-0233).

{¶19} The Appellants' claims against Martel and Air Experts proceeded to trial. On March 7, 2005, a jury returned a verdict in the total amount of \$3,664,186 against Martel. The jury awarded \$1,014,186 to the Estate on the wrongful death claim and \$2,650,000 to Margaret Heintzelman on her emotional distress claim. Separate jury forms and interrogatories were submitted to the jury.

{¶10} In regards to the emotional distress claim, the verdict form is captioned, "VERDICT FOR PLAINTIFF AND AGAINST DEFENDANT MARTEL HEATING & COOLING (Emotional distress claim of Margaret Heintzelman)" and it is signed by seven jurors. In addition, the jurors also completed a separate form, which read: "DAMAGES AWARD Emotional Distress Claim of Margaret Heintzelman We, the Jury, being duly empanelled and sworn, do hereby award compensatory damages to the plaintiff, Margaret Heintzelman in the amount of \$2.65 million as decided in Interrogatory J." Specifically, Jury Interrogatory "J" states: "State the total amount of compensatory damages to Margaret Heintzelman without regard to the percentage of

negligence or implied assumption of the risk or both attributed to Jeff Heintzelman." The jury answered this question with the amount \$2,650,000.00.

{¶11} The jury rendered a defense verdict in favor of Air Experts.

{¶12} On March 25, 2005, the trial court filed a judgment entry journalizing the jury's verdict. The trial court later awarded prejudgment interest against Martel.

{¶13} Appellants appealed the jury verdict regarding Air Experts only. Appellants argued the trial court erred in overruling their motion for directed verdict against Air Experts and that the trial court should have granted their motion for judgment notwithstanding the verdict against Air Experts. They also argued the jury verdict in favor of Air Experts was against the manifest weight of the evidence. Martel filed a cross-appeal arguing the trial court should have granted his motion for directed verdict on Margaret Heintzelman's claim for negligent infliction of emotional distress. Martel also argued that the trial court should not have allowed Appellants to amend their complaint to name Martel as an individual rather than a corporation.

{¶14} On May 10, 2005, while the appeal was pending, Appellants filed a supplemental complaint in Case No. 04CVH04-0233 alleging Martel's policy with American Family provided coverage for the bodily injury and property damage caused by Martel's actions. Appellants alleged American Family must indemnify Martel from the judgment against him. Further, it appears Appellants brought a bad faith claim against American Family.

{¶15} On October 6, 2005, American Family filed a motion for summary judgment on Appellants' supplemental complaint arguing (1) Appellants could not collaterally attack the default judgment in favor of American Family and against Martel,

(2) Martel was not entitled to coverage under the insurance policy, (3) Margaret Heintzelman's award for negligent infliction of emotional distress was not covered under the insurance policy, and (4) appellants could not assert a cause of action for bad faith. Appellants filed a memorandum in opposition and filed a cross-motion for summary judgment arguing the language of the insurance policy compels coverage. Appellants conceded it was not asserting a bad faith claim at that time. The trial court stayed the case pending the outcome of the appeal.

{¶16} On September 14, 2006, this Court ruled in *Heintzelman, et al., v. Air Experts, et al.*, 5th Dist. No. 2005-CAPE-08-0054, 2006-Ohio-4832, ¶39, ("*Heintzelman I*") that " * * * the trial court erred as a matter of law in not directing the verdict in favor of Thomas Martel on the issue of negligent infliction of emotional distress claims." This Court reversed the trial court on this issue, but affirmed the trial court in all other respects. The case was remanded to the trial court "for further proceedings in accord with law and consistent with this opinion." *Id.* at ¶48.

{¶17} On August 23, 2006, Martel filed a separate complaint against American Family (Case No. 06CVH08-761) claiming bad faith regarding settlement negotiations, fraud in changing language in the policy, and failure to protect its insured. On December 4, 2006, Martel filed an amended complaint to include a claim for fraudulent misrepresentation regarding representations made over coverage under the policy and over the default judgment in the declaratory judgment action.

{¶18} On December 15, 2006, American Family filed a motion to dismiss Martel's complaint, claiming res judicata because of the declaratory judgment decision in Case No. 03CVH12-0896. By judgment entry filed February 1, 2007, the trial court

granted the motion and dismissed Martel's amended complaint. Martel appealed and this Court held in *Martel v. American Family Ins. Co.*, 5th Dist. No. 07CAE020012, 2007-Ohio-4819, that the trial court erred in granting American Family's motion to dismiss. This Court reasoned: "Given the strict standard imposed by a Civ.R. 12(B)(6) dismissal, we find *res judicata* is not applicable to these claims of failure to communicate and misrepresentation. Although appellee [American Family] assumed the representation of appellant [Martel] under a 'reservation of rights' designation, a valid contractual relationship existed. We note Appellee, having succeeded in the declaratory judgment action, could have withdrawn from the representation of appellant. Once Appellee became a volunteer to the action, Appellee assumed another duty to appellant." *Id.* at ¶19. We reversed and remanded the matter to the trial court.

{¶19} On February 7, 2007, the Supreme Court of Ohio declined jurisdiction of *Heintzelman I* and further denied a motion for reconsideration on March 28, 2007.

POST REMAND RULINGS

{¶20} On April 18, 2007, the trial court held a hearing to address the issue of damages in light of the remand by this Court in *Heintzelman I*. That same day, Appellants filed with the trial court a "Motion to Enter Judgment Consistent with Jury Interrogatories or, in the Alternative, Motion for Relief from Judgment and Entry of Judgment or, in the Alternative, Motion for Additur or for a New Trial on Damages Only."

{¶21} In the motion, Appellants argued that the trial court should enter judgment in favor of the Estate for \$3,664,186 that is the total amount of the original jury verdict, despite our reversal on the claim of negligent infliction of emotional distress. Appellants argued the jury's award should reflect compensation to the appellants for mental

anguish under the wrongful death claim in order to maintain consistency between the jury's general verdict in favor of Appellants and Jury Interrogatory "J" (as set forth above).

{¶22} By entry dated August 6, 2007, the trial court denied Appellants' motion, finding that: "[p]ursuant to the Fifth District Court of Appeals' decision, negligent infliction of emotional distress should not have been considered by the jury. Therefore, the Court determines that entering judgment consistent with the jury interrogatories requires entering judgment for \$1,014,186.00 in favor of the Estate of Jeffrey K. Heintzelman. The Court hereby DENIES the Plaintiffs' Motion...The Court hereby amends judgment in this case to an award of \$1,014,186.00."

{¶23} By separate entry on August 6, 2007, the trial court also granted American Family's motion for summary judgment on Appellants' supplemental complaint on the issue of the availability of insurance to cover any part of the judgment against Martel in amount of \$1,014,186.00. The trial court held that Appellants were bound by the declaratory judgment rendered against Martel in Case No. 03CVH12-0896 and therefore, American Family had no duty to indemnify Martel for any damages awarded against him in the Heintzelman litigation. The trial court reasoned that under recent amendments to R.C. 3929.06, Ohio's Declaratory Judgment Act, Appellants 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 motion pertaining to the availability of insurance coverage under the terms of the policy. Lastly, the trial court found the issue of negligent infliction of emotional distress was rendered moot by this Court's decision in *Heintzelman I*.

{¶24} Appellants now appeal both judgment entries filed August 6, 2007 and raise three Assignments of Error:

{¶25} "I. THE TRIAL COURT ERRED WHEN IT GRANTED A MOTION FOR SUMMARY JUDGMENT FILED BY APPELLEE AMERICAN FAMILY INSURANCE AFTER CONCLUDING APPELLANT WAS BOUND BY A DEFAULT JUDGMENT AMERICAN FAMILY OBTAINED AGAINST IT INSURED, THOMAS MARTEL."

{¶26} "II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AGAINST AMERICAN FAMILY REGARDING COVERAGE UNDER AMERICAN FAMILY'S INSURANCE POLICY."

{¶27} "III. THE TRIAL COURT ERRED WHEN IT FAILED TO ENTER JUDGMENT CONSISTENT WITH THE JURY INTERROGATORIES, TO GRANT RELIEF FROM JUDGMENT, ORDER ADDITUR, OR ORDER A NEW TRIAL ON DAMAGES ONLY."

{¶28} We will first address Appellants' third assignment of error regarding damages, followed by Appellants' first and second assignments of error regarding insurance coverage.

III.

{¶29} In the third assignment of error, Appellants argue that the trial court committed error when it "reduced" the jury damages award, pursuant to this Court's decision finding it to be error for the jury to consider the claim for negligent infliction of emotional distress.

{¶30} Specifically, Appellants argue *Heintzelman I* resulted in an inconsistency between the Jury Interrogatory "J," which awarded Margaret Heintzelman \$2,650,000

for emotional distress, and the verdict forms. Appellants reason that if the jury correctly followed the court's jury instructions, the jury must have intended to award Margaret Heintzelman mental anguish for the wrongful death of her husband; but the jury elected to award the damages under the emotional distress claim rather than the wrongful death claim. Since the verdict forms only refer to "emotional distress," as opposed to "negligent infliction of emotional distress claim," Appellants submit the trial court should have added \$2,650,000 to the wrongful death claim of \$1,014,186.00 to give effect to the jury's general verdict of \$3,664,186.00. Essentially, Appellants contend the amount of \$1,014,186 represents only economic damages and there would be no "mental anguish" damages to the Jeffrey Heintzelman's family under the successful wrongful death claim against Martel.¹ In the alternative, Appellants argue that the trial court should have granted them relief from judgment under Civ.R. 60(B)(4) or (5), granted additur, or a new trial on damages.

{¶31} We find Appellants' argument untenable. As noted earlier, the trial court filed a judgment entry journalizing the jury's verdict on March 25, 2005. The judgment entry states, "This case proceeded to trial before a jury, and a verdict was rendered on March 7, 2005. The Court hereby enters judgment on the jury's verdict against defendant Martel Heating & Cooling and in favor of the Estate of Jeffrey K. Heintzelman on the Estate's wrongful death claim for \$1,014,186.00 and in favor of plaintiff Margaret Heintzelman on *her claim for negligent infliction of emotional distress in the amount of \$2,650,000.00*. The total amount of the verdict against Martel Heating & Cooling is \$3,664,186.00. The jury further returned a verdict in favor of Air Experts, Inc. on

¹ Appellants' expert economist, Dr. John Burke, testified the Estate suffered an economic loss of \$1,014,186.00 due to the premature death of Jeffrey Heintzelman. Tr. at 636.

plaintiffs' claims, and the jury concluded that there was no comparative negligence on the part of Mr. Heintzelman. * * *." (Emphasis added).

{¶132} Appellants did not challenge or appeal the March 25, 2005 judgment entry in regards to the amount of damages awarded to either the Estate or Margaret Heintzelman in *Heintzelman I*. This final judgment entry was the time the issue of adequacy of damages for the Estate became ripe for appellate review. The final judgment entry clearly sets forth the jury's verdict of \$2,650,000 on the negligent infliction of emotional distress claim. Thus, our decision in *Heintzelman I* did not alter or affect the consistency between the jury verdict forms and interrogatories. In *Heintzelman I*, we sustained Martel's argument that the trial court should have sustained a directed verdict in favor of Martel on Margaret Heintzelman's separate and individual of emotional distress upon which the jury awarded \$2,650,000. On remand, the trial court correctly entered judgment consistent with the remaining jury interrogatories and verdict in favor of the Estate and eliminated the award for negligent infliction of emotional distress pursuant to our finding that the jury at trial should not have considered the claim.

{¶133} Based upon our review of the lower court proceedings in relation to our decision in *Heintzelman I*, we find the trial court did not err in denying Appellants' "Motion to Enter Judgment Consistent with Jury Interrogatories or, in the Alternative, Motion for Relief from Judgment and Entry of Judgment or, in the Alternative, Motion for Additur or for a New Trial on Damages Only."

{¶134} Appellants' third assignment of error is overruled.

I.

{¶35} Appellants' first assignment of error argues the trial court erred when it granted summary judgment in favor of American Family. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212.

{¶36} Civ. R. 56(C) states, in pertinent part:

{¶37} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶38} We are to review *de novo* the trial court's granting of summary judgment and its interpretation of a statute. *Williams v. American Suzuki Motor Corp.*, 5th App. No. 20076-CA-00172, 2008-Ohio-3123, ¶19, citation omitted. This requires us to make an independent review of the record and statute without any deference to the trial court's determination.

{¶39} It is based upon this standard that we review Appellants' first assignment of error. Appellants argue the trial court erred in granting summary judgment in favor of American Family based upon the March 10, 2004 judgment entry awarding declaratory judgment in favor of American Family, finding American Family did not have a duty to indemnify Martel for any damages awarded in the Heintzelman case. They argue that this decision was in error because under R.C. 3929.06(C)(2), Appellants as judgment creditors cannot be bound by a judgment in a declaratory action brought by an insurer against its insured because Appellants were not made parties to the action.

{¶40} Generally, when a party seeks declaratory relief under R.C. Chapter 2721, "all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." R.C. 2721.12(A). However, R.C. 2721.12(A) is subject to division (B), which provides:

{¶41} "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 in relation to the injury, death, or loss involved. This division applies whether or not an assignee is made a party to the action or proceeding for declaratory relief and notwithstanding any contrary common law

principles of res judicata or adjunct principles of collateral estoppel.”² (Emphasis added).

{¶42} In addition, R.C. 3929.06(C)(1) reads: “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 action or proceeding under Chapter 2721 of the Revised Code between the holder and the insurer.” (Emphasis added).

{¶43} In response, American Family argues the trial court correctly interpreted the statutes to find that it must enforce the declaratory judgment it obtained by default against Martel. Thus, Appellants’ supplemental complaint seeking satisfaction of the final judgment from American Family is barred under R.C. 2721.12(B) and R.C. 3929.06(C)(1).

{¶44} Appellants essentially argue that R.C. 2721.12(B) and R.C. 3929.06(C)(1) do not apply to their supplemental complaint because R.C. 3929.06(C)(2), as set forth below, requires the insured, Martel, to commence a declaratory action against the insurer, American Family, in order for the judgment to have binding legal effect against judgment creditors of the insured. Therefore, because American Family brought the declaratory judgment action against its insured before Appellants commenced their civil action against American Family, the judgment in that matter has no binding legal effect upon Appellants as to the availability of coverage.

² It is undisputed that Appellants are not assignees of Martel; they are judgment creditors.

{¶45} R.C. 3929.06(C)(2) states:

{¶46} “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 the 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 noncoverage of that injury, death, or loss, that final judgment shall be deemed to have binding legal effect upon the 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.” (Emphasis added).

{¶47} In order to address Appellants' arguments, we first need to examine the language used by the Ohio General Assembly in R.C. 2721.12(B) and 3929.06(C)(1) and (2), which were all enacted at the same time in 1999. “The first rule of statutory construction is to look at the statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms.” *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 882 N.E.2d 400, 2008-Ohio-511 at ¶19, citing, *Lancaster Colony Corp. v. Limbach* (1988), 37 Ohio St.3d 198, 199, 524 N.E.2d 1389. Courts may not delete words used or insert words not used. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77. “Whenever possible, well-recognized

principles of statutory construction requires us to read 'all statutes pertaining to the same general subject matter * * * in pari materia, and to construe potentially conflicting statutory provisions so as to give effect to both.'" *Perrysburg Twp. v. Rossford Arena Amphitheater Auth.* 175 Ohio St. 3d 549, 888 N.E.2d 440, 2008-Ohio-363 at ¶39, citing, *Zweber v. Montgomery Cty. Bd. of Elections* (Apr. 25, 2002), 2d Dist. No. 19305, 2002 WL 857857. "In pari materia" is a rule of statutory construction -- the meaning of which is that the General Assembly, in enacting a statute, is assumed to have been aware of other statutory provisions concerning the subject matter of the enactment. See *Meeks v. Papadopoulos* (1980), 62 Ohio St.2d 187, 190, 16 O.O.3d 212, 404 N.E.2d 159. Court must harmonize and give full application to all provisions "unless they are irreconcilable and in hopeless conflict." *Hughes v. Ohio Bar. Of Motor Vehicles* (1997), 79 Ohio St.3d 305, 681 N.E.2d 430, 1997-Ohio-387. To the extent that any conflict is perceived between the above statutes, the rules of statutory construction provide that when statutes conflict, the more specific provision controls over the more general provision. R.C. 1.51.³

{¶48} Because both R.C. 2721.12(B) and 3929.06(C) address declaratory judgment actions involving insurance coverage, they must be read *in pari materia* and harmonized together, if possible.

{¶49} As an aid in our exercise of statutory interpretation of R.C. 2721.12(B) and 3929.06(C), we will also look to R.C. 2721.02(C). R.C. 2721.02(C) describes the force

³ R.C. 1.51 states: "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."

and effect of declaratory judgments and specifically references judgment creditors in insurance actions. It states:

{¶150} "If, prior to the judgment creditor's commencement of the action or proceeding for declaratory relief, *the holder of the policy commences a similar action or proceeding 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 the 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 noncoverage of that injury, death, or loss, that final judgment shall be deemed to also have binding legal effect upon the judgment creditor for purposes of the judgment creditor's action or proceeding for declaratory relief against the insurer." (Emphasis added.)

{¶151} The emphasized language is the same as the language as R.C. 3929.06(C)(2). Further, the language in R.C. 2721.02(C) and 3929.06(C)(2) is the more specific language as applied to judgment creditors as opposed to the general language found in R.C. 2721.12(B) and 3929.06(C)(1). In this matter, we find the specific sections must prevail as mandated by R.C. 1.51. Thus, pursuant to R.C. 2721.02(C) and 3929.06(C)(2), we determine the following. In a declaratory judgment action involving a determination of coverage between an insurer and its insured, a final judgment in the declaratory judgment action will have binding legal effect on the judgment creditor if the holder of the insurance policy commences the action against its insurer before the judgment creditor commences its action against the insurer. This conclusion harmonizes the language R.C. 2721.12(B), which expressly references the binding legal effect described in 3929.06(C)(2). Our interpretation will therefore give

effect to the above-referenced declaratory judgment statutory provisions, as opposed to American Family's narrow reading of R.C. 2721.12(B) and 3929.06(C)(1), which would effectively render meaningless the specific language found in R.C. 2721.02(C) and 3929.06(C)(2).

{¶52} In the case *sub judice*, American Family filed its declaratory judgment action against its insured before Appellants commenced their civil action against American Family. Based on the clear and unequivocal language of R.C. 2721.02(C) and 3929.06(C)(2), we find that Appellants as judgment creditors are not bound by the March 10, 2004 declaratory judgment decision of the trial court in Case No. 03CVH12-0896, finding American Family did not have a duty to indemnify Martel for any damages awarded in the Heintzelman case.

{¶53} Appellants' first assignment of error is sustained.

II.

{¶54} Also in regards to coverage, Appellants argue in their second assignment of error that under the language of the insurance policy American Family issued to Martel, the policy provides coverage for "bodily injury" and "property damage" for underlying incident. Likewise, American Family urges this Court to affirm the trial court's decision granting summary judgment by addressing its alternate grounds for summary judgment.

{¶55} Because the trial court granted summary judgment based solely upon the finding that Appellants were bound by the declaratory judgment decision in favor of American Family and against Martel, it did not address whether coverage was available under the insurance policy. A similar procedural issue was addressed in *Young v.*

University of Akron, 10th App. No. 06AP-1022, 2007-Ohio-4663 wherein the Tenth District Court of Appeals stated: "Generally, appellate courts do not address issues which the trial court declined to consider." *Id.* at ¶22, citing *Lakota Loc. School Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 643, 671 N.E.2d 578, citing *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 89, 585 N.E.2d 384. See also, *Warner v. Uptown-Downtown Bar* (Dec. 20, 1996), Wood App. No. WD-96-024 (appellate court declined to review argument made in summary judgment motion but not addressed by trial court's decision); *Manda v. Stratton* (Apr. 30, 1999), Trumbull App. No. 98-T-0018 (noting that it would be premature for appellate court to address claims of common law negligence that were not addressed by trial court, where trial court resolved summary judgment only on strict liability claims); *Stratford Chase Apts. v. Columbus* (2000), 137 Ohio App.3d 29, 33, 738 N.E.2d 20 (appellate court's independent review of summary judgment decision should not replace trial court's function of initially determining propriety of summary judgment).

¶156 We therefore decline to consider the parties' coverage arguments for the first time on appeal and instead, remand this matter for the trial court to consider these arguments. Appellants' second assignment of error is overruled at this time.

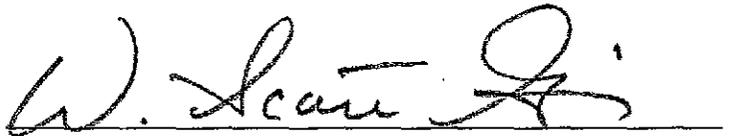
{¶57} Accordingly, the judgment of the Delaware County Common Pleas Court is affirmed in part, reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.







JUDGES

PAD:kgb 08/08

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THE ESTATE OF JEFFREY K.
HEINTZELMAN, ET AL.,

Plaintiffs-Appellants

-vs-

AIR EXPERTS INC., ET AL.,

Defendants-Appellees

JUDGMENT ENTRY

Case No. 07CAPE09-0045

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings in accordance with our Opinion and the law. Costs to be divided equally.

Catharine A. Patton

W. Scott G.

John W. ...

JUDGES

JAN ANTONOPLOS
CLERK

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED

1.51 Special or local provision prevails as exception to general provision.

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 prevail.

Effective Date: 01-03-1972

2721.02 Force and effect of declaratory judgments - action or proceeding against insurer.

(A) Subject to division (B) of this section, courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

(B) A plaintiff who is not an insured under a particular policy of liability insurance may not commence against the insurer that issued the policy an action or proceeding under this chapter that seeks a declaratory judgment or decree as to whether the policy's coverage provisions extend to an injury, death, or loss to person or property that a particular insured under the policy allegedly tortiously caused the plaintiff to sustain or caused another person for whom the plaintiff is a legal representative to sustain, until a court of record enters in a distinct civil action for damages between the plaintiff and that insured as a tortfeasor a final judgment awarding the plaintiff damages for the injury, death, or loss to person or property involved.

(C) In an action or proceeding for declaratory relief that a judgment creditor commences in accordance with divisions (A) 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 an action or proceeding under this chapter between the holder and the insurer.

If, prior to the judgment creditor's commencement of the action or proceeding for declaratory relief, the holder of the policy commences a similar action or proceeding 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 the 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 noncoverage of that injury, death, or loss, that final judgment shall be deemed to also have binding legal effect upon the judgment creditor for purposes of the judgment creditor's action or proceeding for declaratory relief against the insurer. This division shall apply notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel.

Effective Date: 09-24-1999

2721.12 Declaratory judgment procedure.

(A) Subject to division (B) of this section, when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding. Except as provided in division (B) of this section, a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding. In any action or proceeding that involves the validity of a municipal ordinance or franchise, the municipal corporation shall be made a party and shall be heard, and, if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard. In any action or proceeding that involves the validity of a township resolution, the township shall be made a party and shall be heard.

(B) 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 in relation to the injury, death, or loss involved. This division applies whether or not an assignee is made a party to the action or proceeding for declaratory relief and notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel.

Effective Date: 09-24-1999

3929.06 Satisfying final judgment.

(A)(1) If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury, death, or loss to the person or property of the plaintiff or another person for whom the plaintiff is a legal representative and if, at the time that the cause of action accrued against the judgment debtor, the judgment debtor was insured against liability for that injury, death, or loss, the plaintiff or the plaintiff's successor in interest is entitled as judgment creditor to have an amount up to the remaining limit of liability coverage provided in the judgment debtor's policy of liability insurance applied to the satisfaction of the final judgment.

(2) If, within thirty days after the entry of the final judgment referred to in division (A)(1) of this section, the insurer that issued the policy of liability insurance has not paid the judgment creditor an amount equal to the remaining limit of liability coverage provided in that policy, the judgment creditor may file in the court that entered the final judgment a supplemental complaint against the insurer seeking the entry of a judgment ordering the insurer to pay the judgment creditor the requisite amount. Subject to division (C) of this section, the civil action based on the supplemental complaint shall proceed against the insurer in the same manner as the original civil action against the judgment debtor.

(B) Division (A)(2) of this section does not authorize the commencement of a civil action against an insurer until a court enters the final judgment described in division (A)(1) of this section in the distinct civil action for damages between the plaintiff and an insured tortfeasor and until the expiration of the thirty-day period referred to in division (A)(2) of this section.

(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 action 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 the 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 noncoverage of that injury, death, or loss, that final judgment shall be deemed to have binding legal effect upon the 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.

Effective Date: 09-24-1999