ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2008-2173

RECEIVED
JUN 01 2009
CLERK OF COURT
SUPREME COURT OF OHIO

ESTATE OF JEFFREY K. HEINTZELMAN, *et al.*
Plaintiff-Appellees

-vs-

AIR EXPERTS, INC., *et al.*
Defendant-Appellants

On Appeal from the
Fifth Judicial District Court of Appeals, Delaware County
Case No. 07CAE09-0045

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION OF JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEES

Charles H. Cooper, Jr. (0037295)
Rex H. Elliott (0054054)
COOPER & ELLIOTT, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)
chipc@cooperelliott.com
Counsel for Appellee
The Estate of Jeffrey K. Heintzelman

Paul W. Flowers, Esq. (#0046625)
[Counsel of Record]
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Amicus Curiae Chairman,
Ohio Association of Justice

Bruce A. Curry (0052401)
CURRY, ROBY & MULVEY CO., LLC
8000 Ravine's Edge Court #103
Columbus, Ohio 43235
(614) 430-8885
(614) 430-8890 (Facsimile)
Counsel for Appellant American Family Insurance Co.

Shawn M. Blatt (0056051)
FREUND, FREEZE & ARNOLD
One Dayton Centre
1 South Main Street, Suite 1800
Dayton, Ohio 45402-2017
(937) 222-2424
(937) 222-5369 (Facsimile)
sblatt@ffalaw.com
Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

FILED
JUN 01 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICUS* INTEREST 1

ARGUMENT 2

PROPOSITION OF LAW NO. I: 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. 2

CONCLUSION 8

CERTIFICATE OF SERVICE 9

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

TABLE OF AUTHORITIES

Case Authorities

Adamsky v. Buckeye Loc. Sch. Dist., 73 Ohio St.3d 360, 361-362, 1995-Ohio-298, 653 N.E. 2d 212, 214 7
Canton v. Imperial Bowling Lanes (1968), 16 Ohio St. 2d 47, 242 N.E. 2d 566 2
Cerio v. Hilroc Condo. Unit Owner Ass'n., 8th Dist. No. 83309, 2004-Ohio-1254, 2004 W.L. 529106 8
Commonwealth Loan Co. v. Downtown Lincoln Mercury Company (1964), 4 Ohio App. 2d 4, 6, 211 N.E. 2d 57, 59 5
Crowe v. Owens Corning Fiberglass (October 29, 1998), 8th Dist. No. 73206, 1998 W.L. 767622 7
Estate of Heintzelman v. Air Experts, Inc., 5th Dist. No. 07CAE090045, 2008-Ohio-4883, 2008 W.L. 4356286 ..... 4, 5
Estate of Heintzelman, 2008-Ohio 04883 6
Hubbard v. Canton City School, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543 5
Kracht v. Kracht (July 21, 1994), 8th Dist. No. 65759, 1994 W. L. 385967 7
Levy v. Thompson, 2nd Dist. No. 20859, 2005-Ohio-6675, 2005 W. L. 3454305 7
Montalto v. Yeckley (1941), 138 Ohio St. 314, 34 N.E. 2d 765, 768 5
Sorrell v. Thevenier, 69 Ohio St.3d 415, 424-425, 1994-Ohio-38, 633 N.E.2d 502, 512 7
State ex rel. Overholser Bldrs. v. Clark Cnty. Bd. of Commrs. (2nd Dist. 2007), 174 Ohio App. 35 631, 636, 2007-Ohio 07230, 884 N.E. 2d 71, 75 6
State ex rel. Semetko v. Bd of Commrs. (6th Dist. 1971), 30 Ohio App. 2d 130, 283 N.E. 2d 648,651 5
State ex rel. Thompson v. Spon, 83 Ohio St. 3d 551, 555, 1998-Ohio-298, 700 N.E. 2d 1281, 1284 6
State v. Keenan, 81 Ohio St. 3d 133, 150, 1998-Ohio-459, 689 N.E. 2d 929, 946 7

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

STATEMENT OF *AMICUS* INTERESTS

This *Amicus Curiae* represents the interests of the Ohio Association for Justice ("OAJ"), formally known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately two thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The OAJ urges this Court to carefully consider the implications of R.C. § 2721.02 and §3929.06, as construed by Defendant-Appellees. As properly recognized by the Fifth District below, the controlling statutes must not be contorted in a manner which unjustly deprives those who have obtained civil judgments of their ability to reach the judgment debtor's available insurance coverage. Given that bankrupt, insolvent, and otherwise uncollectible judgment debtors usually lack the inclination and resources to contest an insurer's highly motivated and well-financed efforts to avoid payment, it is imperative that the judgment creditor must be allowed to be heard in a court of law before being bound by the coverage determination. No legitimate public good can be derived from any other construction of R.C. §2721.02 and §3929.06. The OAJ therefore urges this Court to affirm the Fifth District on this point.

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

ARGUMENT

PROPOSITION OF LAW NO. I: 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.

As directed in R.C. §1.47(c), a strong presumption exists against any construction of a statute which produces unreasonable or absurd consequences. *Canton v. Imperial Bowling Lanes* (1968), 16 Ohio St. 2d 47, 242 N.E. 2d 566, paragraph four of the syllabus. But the position being championed by Defendant-Appellant, American Family Insurance Company, does not even pass the giggle test. The insurer would have this Court bind judgment creditors to the results of declaratory judgment actions which were filed and pursued without their knowledge, let alone participation. It makes no difference in Defendant's view whether the potential judgment creditor's claim was known to the insurer or the judgment debtor actually made an effort to defend the case. Any time the insured tortfeasor is uncollectible due to carefully concealed assets, overseas operations, a discharge in bankruptcy, or simple insolvency, the insurer can escape any coverage obligation which is owed simply by pursuing the underhanded tactic which Defendant has pioneered against the disinterested policyholder. There is no longer any need to bother with litigating coverage with the party with the most to lose (*i.e.*, the judgment creditor).

Defendant's pursuit of the declaratory judgment against its policyholder reeks of chicanery. The Complaint for Declaratory Judgment was filed as a separate action on December 4, 2003 solely against Tom Martel ("Martel") and his unincorporated business. *Delaware* C.P. Case No. 03 CVH12-0896. No plausible explanation has been

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
leveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

offered for why Plaintiff was not joined as an additional defendant, or at least advised that the case had been commenced. No one disputes that Plaintiff would indeed be bound by a judgment rendered in any action in which she was a party. That would have been, by far, the most straightforward and expedient approach to handling the coverage dispute. Indeed, more reputable insurers regularly include the putative judgment creditor in their declaratory judgment actions in order to ensure that the ruling they envision receiving will be binding upon all concerned. Only a carrier which lacked confidence in its denial of coverage would feel compelled to conceal the litigation from a potential judgment creditor who is known to be suing the insured.

Despite Defendant's confusion over the timing of the filings,[1] a simple review of the pertinent dockets confirms beyond all debate that Plaintiff's first wrongful death lawsuit against Martel was indeed pending at the time that Defendant commenced the declaratory judgment action, and would remain so for the next three months.[2] *Delaware C.P. Case No. 02 CVH 12 0712*. Perhaps more significantly, an affidavit had been produced establishing that Martel had been assured by his insurer's representative, who owed him fiduciary responsibilities of utmost good faith and fair dealing, that there

---

[1] Defendant has represented that "On March 16, 2003, [Plaintiffs] dismissed the action without prejudice." *Merit Brief of Appellant, p. 1.* The Brief of *Amicus Curiae* Ohio Association of Civil Trial Attorneys contains the same faulty assertion. *Id., p. 1.* The *Amicus* has thus claimed that when declaratory relief was sought, Plaintiff "did not have a lawsuit pending against Martel" which was untrue. *Id., p. 2.*

[2] Defendant had been well aware of the first wrongful death action, as a defense had been furnished to Martel following the filing of the original Complaint on December 10, 2002. *Delaware C.P. Case No. 02 CVH 12 0712*. That action was not dismissed until March 16, 2004. *Id.* The wrongful death claim was refiled shortly thereafter on April 9, 2004. *Delaware C.P. Case No. 04 CVH 04 0233*. Undoubtedly at Defendant's considerable urging, the Fifth District mistakenly identified the date of dismissal as March 16, 2003 and thereby unwittingly perpetuated the illusion that the declaratory judgment action had to be filed separately because no wrongful death claim was pending. *Estate of Heintzelman*, 2008-Ohio-4883 ¶ 4. Fortunately, the error did not affect the court's ultimate holding. *Id.*, ¶ 40-53.

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
leveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

was no need for him to respond to the complaint and he could ignore the motion for default judgment.[3] It is deeply troubling that an insurance carrier doing business in this State could believe for a moment that its coverage obligations could be avoided, despite the substantial premiums which had been collected, through such shameless trickery.

The Fifth District's sound analysis of the pertinent statutes not only produces the most sensible result, but also adheres faithfully to the actual terminology utilized by the General Assembly. *Estate of Heintzelman v. Air Experts, Inc.*, 5th Dist. No. 07CAE090045, 2008-Ohio-4883, 2008 W.L. 4356286 ¶40-53. There is simply no dancing around the fact that R.C. §2721.02(C) and R.C. §3929.06(C)(2) only apply when "the holder of the policy commences a similar action or proceeding against the insurer ***."[4] The fact that both statutes utilize the same limited terminology is striking. In such situations, the policyholder most likely possesses both the resources and the motivation to vigorously pursue the coverage dispute with the carrier, or else the claim would not have been brought in the first place. But that is not what occurred here. Defendant commenced the declaratory judgment action against the policyholder (*i.e.*, Martel), who was an unsophisticated sole proprietor unlikely to put up much of a fight.

Only R.C. §2721.12(B) extends to declaratory judgment actions "between an insurer and a holder of a policy of liability insurance issued by the insurer ***." Although that section applies here, the only consequence is that the declaratory

---

[3] The affidavit of Thomas Martel was attached as the final exhibit to the Defendant's Motion to Vacate and Void Default Judgment which was filed on March 6, 2007. *Delaware C.P. Case No. 03CVH-12-896.*

[4] The only difference between the two statutes is that R.C. § 2721.02(C) refers to "similar action or proceeding" while R.C. § 3929.06(C)(2) uses the phrase "declaratory judgment action or proceeding under Chapter 2721. of the Revised Code[.]" They are referring to the same types of actions.

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

judgment rendered is "deemed to have the binding legal effects in division (C)(2) of section 3929.06 of the Revised Code ***." But all R.C. §3929.06(C)(2) accomplishes is imposing preclusive effect when the action has been brought by "the holder of the policy [.]" Even if the General Assembly intended a different result, a statute must be enforced in accordance with its plain and ordinary meaning. *Hubbard v. Canton City School*, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543 ¶ 14-17.

As the Fifth District correctly observed, Defendant's result-oriented construction of these statutes would strip the "holder of the policy commences" language found in both R.C. §2721.02(C) and R.C. §3929.06(C)(2) of any meaning. *Estate of Heintzelman*, 2008-Ohio-4883 ¶ 51. Preclusive effect would be afforded regardless of whether the insurer or the insured had sought the declaratory relief. R.C. 1.47(B) crates a presumption that the entire statute is "intended to be effective" and courts are thus required to afford positive meaning to each and every term. *State ex rel. Semetko v. Bd of Commrs.* (6th Dist. 1971), 30 Ohio App. 2d 130, 283 N.E. 2d 648,651. A law should never be interpreted in a manner which renders it a nullity. *Montalto v. Yeckley* (1941), 138 Ohio St. 314, 34 N.E. 2d 765, 768. In *Commonwealth Loan Co. v. Downtown Lincoln Mercury Company* (1964), 4 Ohio App. 2d 4, 6, 211 N.E. 2d 57, 59, the court reasoned that:

> It is the duty of a court called upon to interpret a statute to breathe sense and meaning into it; to give effect to all its terms and provision; and to render it compatible with other and related enactments whenever and wherever possible.

Defendant's concerns that the Fifth District's reasoning will actually render R.C. § 2721.12(B) "superfluous" are misplaced. *Merit Brief of Appellant, p. 10.* That subsection still excludes (for whatever reasons) declaratory judgments resolving

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

coverage from subsection (A)'s requirement that all potentially interested parties must be joined in the proceedings. *Estate of Heintzelman*, 2008-Ohio 04883, ¶ 51-52. When the action is commenced by the carrier instead of the policyholder, however, no preclusive effect is afforded in instances such as this. *Id.*

Any insurer which feels that this result is somehow unfair need only include the potential judgment creditors as defendants in the complaint for declaratory judgment. For this reason, there is no merit to the complaint of Defendant's *amici* that:

> 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 claim exists for which the insure may have no knowledge.

Brief of Amicus Curiae, Ohio Association of Civil Trial Attorneys, p. 14. As should have been obvious, the instant wrongful death action was filed nearly a year <u>before</u> the declaratory judgment complaint and <u>not</u> "many years later." *Id.* Furthermore, Defendant did indeed have "knowledge" of Plaintiff's claim against Martel, which the carrier had been vigorously defending at substantial expense. All that aside, the "situations" which the *amici* has described arise only when the potential judgment creditor is excluded from the declaratory judgment action. It should now be evident that the <u>sole</u> purpose of this appeal is to permit important coverage decisions to be quietly secured against policyholders who are unwilling or unable to offer much resistance.

If any further reference to rules of statutory construction is needed, then careful consideration should be given to the principle that statutes should be interpreted in a manner which avoids constitutional infirmities. *State ex rel. Thompson v. Spon,* 83

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

Ohio St. 3d 551, 555, 1998-Ohio-298, 700 N.E. 2d 1281, 1284; *State ex rel. Overholser Bldrs. v. Clark Cnty. Bd. of Commrs.* (2nd Dist. 2007), 174 Ohio App. 3d 631, 636, 2007-Ohio-7230, 884 N.E. 2d 71, 75 ¶ 17. "A court is bound to give a statute a constitutional construction, if one is reasonably available, in preference to one that raises serious questions about the statute's constitutionality." *State v. Keenan*, 81 Ohio St. 3d 133, 150, 1998-Ohio-459, 689 N.E. 2d 929, 946.

Due process of law has long guaranteed that notice and an opportunity must be afforded before a citizen may be bound by a judgment. *Levy v. Thompson*, 2nd Dist. No. 20859, 2005-Ohio-6675, 2005 W. L. 3454305 ¶ 40-48 (vacating trial court's attempts to bind a non-party to a judgment); *Kracht v. Kracht* (July 21, 1994), 8th Dist. No. 65759, 1994 W.L. 385967 (voiding judgment entries which were issued without proper notice to the defendant). Here, Defendant has made an unabashed plea for this Court to recognize that a "declaratory judgment is given binding legal effect against judgment creditors even though they are not parties to the action." *Merit Brief of Appellant, p. 10.* No due process concerns are implicated, however, by the Fifth District's common sense view of the pertinent statutes.

Furthermore, the guarantees of equal protection apply to each of these enactments. *Adamsky v. Buckeye Loc. Sch. Dist.*, 73 Ohio St.3d 360, 361-362, 1995-Ohio-298, 653 N.E. 2d 212, 214. Because fundamental interests such as a right to a remedy and due process of law are implicated, the "strict scrutiny" test applies. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 424-425, 1994-Ohio-38, 633 N.E.2d 504, 512; *Crowe v. Owens Corning Fiberglass* (October 29, 1998), 8th Dist. No. 73206, 1998 W.L. 767622.

It is difficult to fathom how Defendant's ill-conceived position could pass even the less rigorous "rational basis" test, given that judgment creditors – and only

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

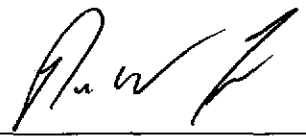
judgment creditors – would be bound to declaratory judgments without notice and an opportunity to be heard ever being extended to them. All other "persons who have or claim any interest that would be affected by the declaration" must still be included as defendants by R.C. §2721.12(A). See *e.g., Cerio v. Hilroc Condo. Unit Owner Ass'n.*, 8th Dist. No. 83309, 2004-Ohio-1254, 2004 W.L. 529106 ¶ 9-14.

What possible societal benefit is conferred by singling-out judgment creditors merely because they are a tax upon the liability insurance industry? No sensible person would suggest that an insurance carrier could be bound by a judgment absent notice and an opportunity to be heard, and thus they have no reason to complain when the same rudimentary rights are extended to all others. The Fifth District's eminently reasonable construction of the controlling statutes steers well clear of those constitutional quagmires and should be affirmed.

CONCLUSION

For the foregoing reasons, the *Amicus Curiae* Ohio Association of Justice hereby urges this Court to reject the Proposition of Law which has been devised and affirm the Fifth Judicial District Court of Appeals.

Respectfully submitted,



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS, CO., L.P.A.
Amicus Curiae Chairman, Ohio Association for Justice

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Brief** was served by regular U.S. Mail on this 29th day of May, 2009 upon:

Charles H. Cooper, Jr.
Rex H. Elliott
COOPER & ELLIOTT, LLC
2175 Riverside Drive
Columbus, Ohio 43221
Counsel for Appellee
The Estate of Jeffrey K. Heintzelman

Bruce A. Curry
CURRY, ROBY & MULVEY CO., LLC
8000 Ravine's Edge Court #103
Columbus, Ohio 43235
Counsel for Appellant American Family Insurance Co.

Shawn M. Blatt
FREUND, FREEZE & ARNOLD
One Dayton Centre
1 South Main Street, Suite 1800
Dayton, Ohio 45402-2017
Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
Amicus Curiae Chairman, Ohio Association for Justice

Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
216/344-9393
FAX 216/344-9395
pwf@pwfco.com