

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

REPLY BRIEF OF APPELLANT AMERICAN FAMILY INSURANCE COMPANY

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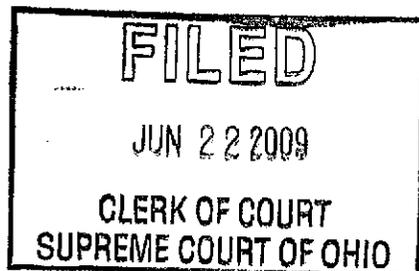
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The merit brief of Plaintiff-Appellees (hereinafter "Plaintiffs") as well as the Amicus Curiae briefs filled in support of their cause make certain unsubstantiated factual statements and improper legal assertions that shall be addressed by American Family.

I. THE FACT THAT AMERICAN FAMILY BROUGHT ITS DECLARATORY JUDGMENT ACTION AGAINST MARTEL WHEN PLAINTIFFS' ORIGINAL COMPLAINT WAS STILL PENDING DOES NOT CHANGE THE ANALYSIS OF THE RELEVANT STATUTES, R.C. 2721.12 AND R.C.3929.06.

Plaintiffs and their amici maintain that American Family acted surreptitiously in bringing its declaratory judgment action against Martel. They argue that American Family was aware of their claims against Martel yet purposely excluded them as parties to the declaratory judgment action. They further state that American Family dissuaded Martel from answering the declaratory judgment complaint and thereafter told him to ignore the default judgment taken against him. They culminate by claiming that there was a "secret default judgment action" and a "fraudulent default." (Amicus Brief of Thomas Martel @ p.5).

This hyperbole is not only untrue but is inconsequential to a determination of the legal issues before the Court. American Family has always denied the allegations put forth by Martel in his affidavit filed in support of his Motion to Vacate and Void Default Judgment filed on March 6, 2007.¹ Significantly, Mr. Martel's efforts to set aside the default judgment were unsuccessful. Nonetheless, American Family posits that any claims of impropriety by an insurer against its insured in that circumstance are properly raised by the insured in a bad faith action not by a judgment creditor in an action on a supplemental complaint. The law already provides a vehicle by which purportedly wrongful conduct by an insurer can be addressed without overturning valid declaratory judgments.

¹ By way of history, this affidavit was submitted after Plaintiffs' attorneys assumed representation of Martel in a bad faith action filed against American Family captioned 06-CVH 08761 in the Delaware County Court of Common Pleas. The action was voluntarily dismissed on 8/12/08.

As for timing of the declaratory judgment action, it is true that American Family filed its action while the original Heintzelman complaint was pending.² However, there was nothing covert about the filing of the action. The coverage issues to be litigated were between American Family and Martel involving a determination of whether an accident occasioned two years after the policy lapsed was covered. There is no question that the declaratory judgment is valid.

II. THE “BINDING LEGAL EFFECT” DESCRIBED IN R.C. 2721.12(B) APPLIES TO JUDGMENT CREDITORS NOTWITHSTANDING ANY COMMON LAW PRINCIPALS OF RES JUDICATA

There is no doubt that the General Assembly in amending R.C. 2721.12(B) sought to supersede the holding in *Broz v. Winland* (1994), 60 Ohio St.3d 521, 629 N.E.2d 395. The facts of this case and *Broz* are strikingly similar. Both are death cases in which the tortfeasor’s insurance company filed a separate declaratory judgment action while the tort action was pending to which the tort claimants were not joined as parties. *Id.* at 521. Ultimately, in both cases, the insurer got a declaratory judgment finding no coverage existed for the claims asserted against the insured. *Id.* Both judgment-creditors claimed that the declaratory judgment was not binding on them. In *Broz*, this Court agreed with the judgment creditor.

To specifically change the result of *Broz*, the General Assembly amended the declaratory judgment statute adding subsection (B). R.C. 2721.12(B) provides that:

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

² American Family erred, as did the Fifth District Court of Appeals, in stating that Heintzelman dismissed their original action on March 16, 2003 when the Complaint was dismissed on March 16, 2004. This error was inadvertent and there was no intent to mislead anyone.

R.C. 2721.12(B)(Emphasis added).

The key words in subsection (B) are “binding legal effect.” They direct the reader specifically to the part of R.C. 3929.06(C)(2) that reinforces the preclusive “effect” of a prior declaratory judgment “[n]otwithstanding any contrary common law principles of *res judicata* or adjunct principles of collateral estoppel.” In short, the “binding legal effect” in R.C. 3929.06(C)(2) that is referenced in 2721.12(B) is that part which states that a judgment creditor is bound by a previous determination even if he or she was not a party to that proceeding. Significantly, when amending R.C. 2721.12(B), the General Assembly did not state that a declaratory judgment shall have “binding legal effect” subject to the provisions of R.C. 3929.06(C)(2) nor did it incorporate all of R.C. 3929.06(C)(2). Rather, it only referenced that portion of the subsection that binds judgment creditors despite common law principles of *res judicata*. Therefore, to truly supersede the holding in *Broz*, R.C. 2721.12(B) must be read as to give preclusive effect to prior declaratory judgments regardless of (1) whether the judgment creditors were parties or not and (2) whether the insurer or insured brings the suit. If this Court adopts Plaintiffs’ position, then the General Assembly’s clear intent to supersede *Broz* will be completely disregarded and R.C. 2721.12 (B) rendered meaningless.³

III. THE CONSTITUTIONAL ARGUMENTS RAISED BY THE AMICUS BRIEF OF THE OHIO ASSOCIATION OF JUSTICE (“OAJ”) SHOULD NOT BE CONSIDERED SINCE THEY WERE NOT RAISED PREVIOUSLY AND THEREFORE WAIVED.

The OAJ argues that there are constitutional implications of due process and equal protection if this Court determines that final declaratory judgments are binding on judgment creditors. While American Family substantively disagrees with this position, as a preliminary

³ The Third District Court of Appeals in *Indiana Ins. Co. v. Murphy* (2000) 165 Ohio App.3. 812, 848 N.E.2d 889 agreed with American Family’s interpretation of the binding effect of RC 2721.12(B) on judgment creditors.

matter, it posits that such arguments have been waived. It is well-established that issues raised for the first time on appeal are not reviewable. See *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099. This includes constitutional arguments. See, *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶6, quoting *State v. Awan* (1996), 22 Ohio St.3d 120, syllabus

IV. RES JUDICATA IS A COVERAGE DEFENSE

R.C. 3929.06(C)(1) allows an insurer to assert any defense against a judgment creditor that it has against its insured. “Any defense” means just that and would include *res judicata*. Plaintiffs’ argument that a “coverage defense” is one that arises under the terms of the policy is inapposite to the use of the word “any” in this subsection. For the purpose of this statute, a judgment creditor stands in the shoes of the insured and is subject to any defense that coverage exists.

V. THE FIFTH DISTRICT FOUND THE STATUTES TO BE IN CONFLICT

The Fifth District stated that where two statutes conflict, the “more specific” provision must control over the “general” provision. *Estate of Heintzelman*, 2008-Ohio-4883, ¶47. The court then proceeded to apply what it considered the “more specific” language in R.C. 3929.06(C)(2) over that of R.C. 2721.12(B). Accordingly, the court implicitly held that the statutes are in “conflict.”

American Family maintains that in so finding, the Fifth District overlooked the paramount goal of statutory interpretation -- 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. The primary 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

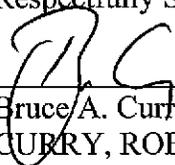
in relation to the same matter, subject or object, and the design, system or scheme of the Legislature. *The Suez Co. v. Young* (Lucas 1963), 118 Ohio App. 415; *Brooks v. Ohio State Univ.* (Franklin 1996), 111 Ohio App.3d 342; *Ohio Bus Sales, Inc. v. Toledo Bd. of Edn.* (Lucas 1992), 82 Ohio App.3d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

As an initial matter, the statutes cited by the Fifth District 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. Therefore, The Fifth District's reliance on R.C. 1.51 is misplaced. R.C. 2721.02(C) and R.C. 3929.06(C)(2) are not irreconcilable. Rather, those statutes are wholly consistent with one another and the remainder of H.B. 58 as enacted.

VI. CONCLUSION

For all of the reasons given by American Family and its Amici, this Court should reverse the Court of Appeals decision and find that a judgment creditor is bound by a prior final declaratory judgment.

Respectfully Submitted,



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I hereby certify that a true and accurate copy of the foregoing was served upon the following by regular U.S. mail on this 22nd day of June, 2009:

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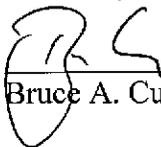
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