

IN THE SUPREME COURT OF OHIO

10-1576

| | | |
|----------------------|---|---------------------------------------|
| MARK SPICER, et al., | : | On Appeal from the Brown County |
| | : | Court of Appeals, Twelfth Appellate |
| Appellee., | : | District, Appellate District Court of |
| | : | Appeals Case No. 2009-12-046 |
| v. | : | |
| WILLIAM REDWINE, | : | |
| | : | |
| Appellant, | : | |
| and, | : | |
| STATE AUTO MUTUAL | : | |
| INSURANCE COMPANY, | : | |
| | : | |
| Appellee. | : | |

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT WILLIAM REDWINE

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EXPLANATION OF WHY THIS CASE RAISES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents the constitutional question of whether R.C. §2307.60, a supposedly remedial or procedural statute, is exempt from the protections of R.C. §1.48, and the threshold test pronounced in *Van Fossen v. Babcock* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, and if so, whether the trial court's application of R.C. §2307.60, as amended October 31, 2007, impaired appellant's substantive rights under the applicable law and insurance contract that was in effect when the cause of action accrued, in violation of Ohio Const. Art. II, §28, U.S. Const., Art. I, §10, and R.C. §1.48.

It is alleged that the assault which gave rise to this lawsuit occurred in June of 2004. At that time R.C. §2307.60 did not allow a trial court to give preclusive effect to the jury verdict finding appellant guilty of felonious assault in a subsequent civil action.

The version in effect provided that:

“No record of a conviction, unless obtained by confession in open court, shall be used as evidence in a civil action brought pursuant to division (A) of this section.”

In contrast, R.C. §2307.60, as amended October 31, 2007, allows a trial court to give preclusive effect to a jury verdict finding a defendant guilty of felonious assault when introduced into evidence in a subsequent civil action. R.C. §2307.60, as amended October 31, 2007, provides in relevant part:

“A final judgment of a trial court...entered after a trial...that adjudges an offender guilty of an offense of violence punishable by... imprisonment in excess of one year, when entered as evidence in any subsequent civil proceeding based on the criminal act, shall preclude the offender from denying in the subsequent civil proceeding, any fact essential to sustaining that judgment...”

A plain reading of the two statutory provisions establish that when Redwine proceeded to jury trial in the underlying criminal case in June 2006, the version of R.C. §2307.60 in effect guaranteed to him that a resulting criminal conviction would not be used to bar his claim of self defense in the pending civil suit. Moreover, under the applicable law in effect when Redwine proceeded to trial, a verdict of guilty in the criminal trial would not bar his claim of self defense in the civil case pursuant to the doctrines of res judicata or collateral estoppel. See Doc. 04/12/2007, JR# 347 #PG# 162 – Judgment Entry Denying Motion for Summary Judgment of Intervening Defendant, State Auto; see also *Breckler v. Martin* (N.D. Ohio 2002), No. 3:02CV7064, 2002 WL 1465761. (no preclusive effect given to criminal conviction in subsequent criminal conviction under the laws in effect when this cause of action accrued).

In a judgment entry dated April 12, 2007, the trial court initially denied State Auto's First Motion for Summary Judgment, finding that under then existing Ohio law, Redwine's conviction for felonious assault did not preclude him from introducing testimony and evidence to support his claim of self defense. Therefore, the trial court concluded that State Auto had a duty to defend and indemnify Redwine in these proceedings.

On October 31, 2007, R.C. §2307.60 was amended to allow Redwine's conviction for felonious assault to be admitted into evidence and given preclusive effect of any fact essential to sustaining that judgment in the pending civil case. In a judgment entry dated February 17, 2009, the trial court reconsidered and granted State Auto's Motion for Summary Judgment, finding that R.C. §2307.60, as amended October 31, 2007, precluded Redwine from asserting his affirmative defenses and counterclaims in this civil

action. Therefore, the trial court concluded, solely on the basis of R.C. §2307.60, as amended October 31, 2007, that State Auto no longer had a duty to defend or indemnify Redwine.

The facts of this case clearly establish that the trial court's application of R.C. §2307.60, as amended October 31, 2007, infringed upon Redwine's vested right under R.C. §2307.60 not to have his subsequent conviction "used as evidence in [this] civil action," eliminated all of the defenses that were available to Redwine when this cause of action accrued, and, in turn, infringed upon Redwine's substantive vested right coverage under the insurance policy in effect when the instant cause of action accrued.

Accordingly, Redwine timely appealed the decision granting State Auto summary judgment raising the following relevant assignments of error:

The trial court's application of R.C. §2307.60, as amended October 31, 2007, impaired appellant's substantive rights under the applicable law and insurance contract that was in effect when the cause of action accrued, in violation of Ohio Const. Art. II, §28, U.S. Const., Art. I, §10, and R.C. §1.48.

The assignment of error above clearly called upon this Court to determine whether R.C. §2307.60, "as applied," impaired Redwine's substantive rights under the applicable law and insurance contract in effect when the cause of action accrued. See *Ackison v. Anchor Packing Co.* (2008), 120 Ohio St.3d 228, 897 N.E.2d 1118. Instead of addressing the merits of Redwine's "as applied" assignment of error, the court of appeals overruled the assignment of error on the basis of *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115. Specifically, the court of appeals found that R.C. §2307.60 pertains to the admissibility of evidence, and as such is a remedial or procedural law which is exempt from the restrictions of R.C. §1.48 and Ohio Const. Art. I §28. See also

Kilbreath v. Rudy (1968), 16 Ohio St.2d 70; *State ex rel. Plavcan v. School Employees Retirement System of Ohio* (1994), 71 Ohio St.3d 240; and *State v. Hawkins* (1999), 87 Ohio St.3d 311.

The court of appeals interpreted this line of cases as excluding supposedly remedial or procedural statutes from the threshold test proscribed under R.C. § 1.48. But see, *Van Fossen v. Babcock*, *supra*, overruling *Wilfong v. Batdorf* (1983), 6 Ohio St.3d 100, 6 OBR 162, 451 N.E.2d 1185, which had held that a procedural or remedial statute should be applied to all actions which come to trial after the effective date of such statute where the cause of action arose before such effective date.

Assuming arguendo, that R.C. §2307.60, as amended October 31, 2007, is merely a remedial statute which is exempt from the statutory protections of R.C. §1.48, the trial court's application of the supposedly remedial statute in this case clearly impaired appellant's vested substantive rights under the applicable law and insurance contract in effect when the cause of action accrued, in violation of Ohio Const. Art. II §28. See *Ackison v. Anchor Packing Co.*, *supra*. Thus, the court of appeals erred by its failure to consider Redwine's "as applied" assignment of error on the merits.

In sum, this case presents the constitutional question of whether R.C. §2307.60, a supposedly remedial or procedural statute, is exempt from the protections of R.C. §1.48, and the threshold test pronounced in *Van Fossen v. Babcock* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, and if so, whether the trial court's application of R.C. §2307.60, as amended October 31, 2007, impaired appellant's substantive rights under the applicable law and insurance contract that was in effect when the cause of action accrued, in violation of Ohio Const. Art. II, §28, and U.S. Const., Art. I, §10.

STATEMENT OF THE CASE AND FACTS

On July 24, 2004, Mark and Kathy Spicer commenced the instant action against William Redwine. Spicer alleged that on June 1, 2004, he was assaulted by Redwine without provocation. (Doc. 07/24/2004). On August 25, 2004, Redwine filed an answer and counterclaim. Redwine denied Spicer's allegations, and asserted several affirmative defenses, including the claim that Redwine acted in self-defense. (Doc. 08/25/2004).

On September 26, 2005, Intervening Defendant, State Auto Mutual Insurance Company, moved for leave to intervene as a defendant in order to assert a Cross-Claim against Redwine. In its Cross-Claim, State Auto sought a declaratory judgment declaring that the policy of insurance issued by State Auto to Redwine does not provide coverage for the injuries to Mark Spicer; that State Auto has no obligation to provide any defense coverage to Redwine; and that State Auto has no obligation to indemnify Redwine for any damages that may be awarded in favor of Mark Spicer. (Doc. 09/26/2005).

I. Insurance Policy

It is undisputed that appellant was insured under a State Auto homeowner's insurance policy from March 11, 2004, to March 11, 2005 [hereinafter Policy], and this policy was in effect when the alleged bodily injury to Spicer occurred on June 1, 2004. (Doc. 04/12/2007, JR#347 PG#162)

The policy issued to appellant, a copy of which was attached to State Auto's Motion for Summary Judgment, states in pertinent part:

If a claim is made or suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

- 1) Pay up to our limit of liability for damages for which an “insured” is legally liable. Damages include prejudgment interest awarded against an “insured”:
and
- 2) Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent.

The Policy also contained the following coverage and exclusions:

e. Coverage

E. – Personal Liability and Coverage

F. – Medical Payments to Others

Coverage’s E and F do not apply to the following:

- 1) Expected or intended injury, “bodily injury” or “property damage” which is expected or intended by an “insured” even if the resulting “bodily injury” or “property damage”
 - a. Is of a different kind, quality or degree than initially expected or intended; or
 - b. Is sustained by a different person, entity, real or personal property, other than initially expected or intended.

Thus, the Policy issued to Mr. Redwine, and in effect when this cause of action accrued, guaranteed coverage for bodily injury which is expected or intended by the insured, so long as the bodily injury results from the insured’s use of reasonable force to protect persons or property. *i.e* self defense.

II. Summary Judgment before amendment of R.C. §2307.60

On October 10, 2006, Intervening Defendant State Auto moved for summary judgment seeking an order declaring that State Auto did not have any obligation to provide defense coverage or to indemnify Redwine in the action (Doc. 10/10/2006 & Doc. 02/28/2007). On April 12, 2007, the Brown County Court of Common Pleas issued a judgment entry denying State Auto’s motion for summary judgment. Specifically, the court found that under existing Ohio law, Redwine’s conviction for felonious assault did not have preclusive effect in the civil case.

(Doc. 04/12/2007, JR# 347 #PG# 162 – Judgment Entry Denying Motion for Summary Judgment of Intervening Defendant, State Auto).

III. Reconsideration granting Summary Judgment after October 31, 2007, amendment of R.C. §2307.60

On January 11, 2008, State Auto filed a Motion for reconsideration of the court's April 12, 2007 judgment denying State Auto's motion for summary judgment. In its motion for reconsideration, State Auto once again argued that Redwine's conviction in the criminal case for felonious assault, upon the jury's finding of guilt, precluded Redwine from introducing testimony and evidence in support his self-defense claim. This time, however, State Auto based their argument exclusively on the October 31, 2007 amended version of R.C. § 2307.60. (Doc. 01/11/2008 – Motion for reconsideration of Intervening Defendant, State Auto).

On February 17, 2009, the trial court entered summary judgment in favor of State Auto. The trial court found that R.C. §2307.60, as amended on October 31, 2007, is a remedial statute which can be constitutionally applied retroactively. Thus, the trial court determined that pursuant to R.C. §2307.60, as amended October 31, 2007, Redwine was precluded from relitigating his affirmative defense of self defense in this civil case, and therefore, State Auto had no duty to indemnify Redwine under the exception to the exclusionary clause of the policy in effect when this cause of action accrued. (Doc. 02/17/2009, JR# 389 PG# 917 – Judgment Entry).

IV. Denial of Appellant's First Motions for Reconsideration

On March 19, 2009, appellant sought reconsideration of the trial court's February 17, 2009 decision granting State Auto summary judgment. Initially, Redwine argued that the trial court erred by retroactively applying the amended version of R.C. §2307.60

without first determining whether the statute clearly proclaimed its retroactive application as required by R.C. §1.48. (Doc. 03/19/2009 – Defendant’s First Motion for Reconsideration).

On March 30, 2009, the trial court entered a judgment declining to reconsider its February 17, 2009 decision granting summary judgment. The court held that “this is a prospective application of amended Section 2307.60, which permits a consideration of past events, occurrences, or findings in determining §2307.60’s application to a trial conducted after its effective date, as expressly sanctioned in *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115. (Doc. 03/30/2009 – JR# 394 PG# 516 Journal Entry).

V. Denial of Appellant’s Second Motions for Reconsideration

On August 27, 2009, appellant once again sought reconsideration of the trial court’s February 17, 2009 decision granting State Auto summary judgment and rejecting appellant’s first motion for reconsideration. Redwine asserted that the trial court erred by concluding without analysis that amended R.C. §2307.60 is remedial or procedural, which would be considered prospective in operation when applied to a case pending prior to the provisions effective date. Specifically, appellant pointed out that he was entitled to present a complete defense at a subsequent civil trial when this cause of action accrued, but the trial court’s retroactive application of the amended provision would eliminate those defenses and, in turn, eviscerate appellant’s vested rights under the law and insurance policy in effect when the instant cause of action accrued. U.S. Const. Art. I §10; Ohio Const. Art. II §28; and R.C. §1.48. (Doc. 08/27/2009 – Defendant’s Motion for Reconsideration).

On October 28, 2009, the trial court denied Redwine's second motion for reconsideration of its decision granting State Auto summary judgment. The trial court, without elaboration, simply concluded that "The Defendant William Redwine's August 27, 2009 Motion for Reconsideration of Decision Granting Summary Judgment in favor of Plaintiff and Intervening Defendant is found to be without merit and is accordingly denied." The trial court also denied Redwine's request to issue a Civ. R. 54(B) certification in said entry. (Doc. 10/28/2009 – JR# 409 PG# 526 – Judgment Entry).

VI. Direct Appeal

Redwine timely appealed the decision granting State Auto summary judgment raising the following relevant assignments of error:

The trial court's application of R.C. §2307.60, as amended October 31, 2007, impaired appellant's substantive rights under the applicable law and insurance contract that was in effect when the cause of action accrued, in violation of Ohio Const. Art. II, §28, U.S. Const., Art. I, §10, and R.C. §1.48.

The assignment of error above clearly called upon this Court to determine whether R.C. §2307.60, "as applied," impaired Redwine's substantive rights under the applicable law and insurance contract in effect when the cause of action accrued. Instead of addressing the question as to whether "the application of" R.C. §2307.60, as amended October 31, 2007, operated to impair Redwine's substantive rights, the court of appeals limited its analysis to a mere determination that R.C. §2307.60 is a remedial or procedural law.

VI. App. R. 26(A) Application For Reconsideration

Redwine timely filed a App. R. 26(A) application for reconsideration, asserting that the court of appeals failed to consider whether the trial court's application of the

amended version of R.C. § 2307.60 to the facts of this case unconstitutionally infringed upon his substantive rights under the applicable law and insurance policy in effect when this cause of action accrued. See *Ackison v. Anchor Packing Co.* (2008), 120 Ohio St.3d 228, 897 N.E.2d 1118.

As of the filing of the instant appeal, the court of appeals has not rendered a decision on appellee's application for reconsideration.

Proposition of Law No. I: The trial court's application of R.C. §2307.60, as amended October 31, 2007, operated to impair appellant's substantive rights under the applicable law and insurance contract that was in effect when the cause of action accrued, in violation of Ohio Const. Art. II, §28, U.S. Const., Art. I, §10, and R.C. §1.48.

In *Van Fossen v. Babcock* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, syllabus, this Court held:

*100 1. The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply. Upon its face, R.C. 1.48 establishes a threshold analysis which must be utilized prior to inquiry under Section 28, Article II of the Ohio Constitution. (*Kiser v. Coleman* [1986], 28 Ohio St.3d 259, 262, 28 OBR 337, 339-340, 503 N.E.2d 753, 756, approved and followed; *Wilfong v. Batdorf* [1983], 6 Ohio St.3d 100, 6 OBR 162, 451 N.E.2d 1185; and *French v. Dwiggins* [1984], 9 Ohio St.3d 32, 9 OBR 123, 458 N.E.2d 827, to the extent inconsistent herewith, modified.)

2. The issue of whether a statute may constitutionally be applied retrospectively does not arise until there has been a prior determination that the General Assembly has specified that the statute so apply. R.C. 4121.80 contains the clearly expressed intent of the General Assembly that it be applied retrospectively.

3. Analysis of whether a statute is unconstitutionally retroactive in violation of Section 28, Article II of the Ohio Constitution requires an initial determination of whether that statute is substantive or merely remedial. While in some cases the line between substantive and remedial may be difficult to ascertain, these terms, as applied, provide readily distinguishable contours. (*Wilfong v. Batdorf* [1983], 6 Ohio St.3d 100, 6 OBR 162, 451 N.E.2d 1185, to the extent inconsistent herewith, overruled.)

The *Van Fossen* case expressly overruled *Wilfong v. Batdorf* (1983), 6 Ohio St.3d 100, 6 OBR 162, 451 N.E.2d 1185, to the extent that it was inconsistent therewith. An examination of both cases reveals that Van Fossen required a threshold analysis pursuant R.C. §1.48 prior to inquiry under Section 28, Article II of the Ohio Constitution, while Wilfong had held that that a procedural or remedial statute should be applied to all actions which come to trial after the effective date of such statute where the cause of action arose before such effective date.

In this case, neither the trial court nor the court of appeals conducted any analysis pursuant to R.C. §1.48. Instead, the trial court and the court of appeals essentially adhered to the overruled holdings of *Wilfong*, albeit under line of cases which supposedly exempt purely remedial or procedural statutes from the restrictions of R.C. §1.48 and Ohio Const. Art. II §28. See *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70; *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115; *State ex rel. Plavcan v. School Employees Retirement System of Ohio* (1994), 71 Ohio St.3d 240; and *State v. Hawkins* (1999), 87 Ohio St.3d 311.

Specifically, the court of appeals overruled Redwine's "as applied" assignment of error on the basis of *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115. The court found that R.C. §2307.60 pertains to the admissibility of evidence, and as such is a remedial or procedural law which is exempt from the restrictions of R.C. §1.48 and Ohio Const. Art. I §28.

The *Denicola* case however, is distinguishable from the instant case. For example, the appellants in *Denicola* conceded that the statutory provision challenged was procedural and in no way violated Section 28 of Article II of the Ohio Constitution. The

only contention argued by the appellants in *Denicola* was whether the application of R.C. 2743.43 violated R.C. 1.48. Such an argument clearly has no merit where the appellant's conceded that R.C. 2743.43 was purely procedural and, therefore, not subject to the restrictions of R.C. 1.48. See

In the instant case, however, appellant never conceded that R.C. §2307.60 is purely procedural, nor did appellant's assignment of error allege that the trial court's application of R.C. §2307.60 violated R.C. 1.48. Instead, Redwine unequivocally argued that where, as here, a trial court determines that a newly enacted statutory provision is remedial or procedural, and therefore exempt from the protections of R.C. 1.48, the court must then ensure that its application of the supposedly remedial statute will not impair any vested substantive rights which the defendant would otherwise have. Ohio Const. Art. II §28; See also, *In re Kirby*, Butler App. No. CA99-09-164, 2000 WL 1370955 (12th Dist.).

In support of this assignment of error, Redwine presented numerous examples demonstrating how the trial court's application of R.C. §2307.60, as amended October 31, 2007, operated to impair his substantive rights under the applicable law and insurance contract in effect when the cause of action accrued. Foremost, it is clear that when Redwine proceeded to jury trial in the underlying criminal case in June 2006, the version of R.C. §2307.60 in effect guaranteed that a resulting criminal conviction could not be used to bar his claim of self defense in the pending civil suit. Because the effective version of R.C. 2307.60 guaranteed Redwine the right to present his claim of self defense in the civil proceedings, State Auto had a duty under the Insurance Policy to provide a

defense and to indemnify Redwine in the civil proceedings notwithstanding the resulting guilty verdict in the criminal case.

Redwine submits that his right to re-litigate his claim of self defense under the version of R.C. § 2307.60 in effect when this cause of action accrued, and his right to coverage under the insurance policy in effect when the instant cause of action accrued, are substantive rights which are accorded the protections of R.C. §1.48 and Ohio Const. Art. II § 28. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 1261:

“An insurance policy is a contract. The freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry, so much so that the United States Constitution specifically protects against encroachment upon contracts. Clause I, Section 10, Article I, United States Constitution gives the United States Supreme Court the authority to overrule a state supreme court’s interpretation of a state statute that infringes upon the right to contract. *Piqua Branch of State Bank of Ohio v. Knoop* (1853), 57 U.S. (16 How.) 369, 14 L.Ed. 977. In *Piqua*, the United States Supreme Court found our interpretation of a bank charter unconstitutional. It wrote, “We have power only to deal with contracts under the tenth section of the first article of the Constitution, whether made by a State or and individual; if such contract be impaired by an act of the State such act is void, as the power is prohibited to the State.” *Id.* at 391, 14 L.Ed. 977.

The Ohio Constitution also protects the freedom of contract. “the general assembly shall have no power to pass *** laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intentions, defects, and errors, in instruments *** arising out of their want of conformity with laws of the state.” Section 28, Article II, Ohio Constitution. The Ohio Constitutional protection of contracts is coextensive with that of the federal Constitution. See *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 76, 697 N.E.2d 644.

Based upon the applicable case authority above, and the version of R.C. §2307.60 in effect when this cause of action accrued, the trial court initially ruled that preclusive

effect could not be given to appellant's criminal conviction in this civil action and that State Auto had a contractual duty to defend and indemnify appellant. Conversely, the trial court reconsidered its initial decision and concluded that appellant's criminal conviction could be given preclusive effect in this civil action solely on the basis of the October 31, 2007 amended version of R.C. §2307.60. The only basis upon which the trial court changed its decision in this case was the statutory provision that became effective over three years after this cause of action accrued. The trial court's application of amended R.C. §2307.60 in this case clearly precluded appellant from asserting his legally cognizable defense of self-defense, which, in turn, unconstitutionally infringed upon appellant's right to coverage under the insurance contract in effect when this cause of action accrued.

The fact that the trial court initially ruled that under the law in effect preclusive effect could not be given to appellant's criminal conviction in these proceedings so as to preclude insurance coverage, and thereafter ruled solely on the basis of the new statutory provision that preclusive effect would be given so as to preclude insurance coverage, establishes by clear and convincing evidence that the amended version of R.C. §2307.60, as applied in this case, unconstitutionally infringed on appellant's substantive rights under the applicable law and insurance contract in effect when the cause of action accrued. See *Ackison v. Anchor Packing Co.* (2008), 120 Ohio St.3d 228, 232, 897 N.E.2d 1118, 1124.

Because the trial court's application of R.C. §2307.60, as amended October 31, 2007, eliminated appellant's legally cognizable claim of self-defense, which, in turn, infringed upon his right to coverage under the Insurance Policy in effect when the cause

of action accrued, it is established by clear and convincing evidence that the application of R.C. §2307.60, as amended October 31, 2007, imposed new or additional burdens, duties, obligations, or liabilities in respect to the assault transaction already past, in violation of Ohio Const. Art. I, §28, U.S. Const., Art. I, §10, Clause 1.

CONCLUSION

For the reasons set forth above, this case involves matters of public or great general interest and a substantial constitutional question. The appellant requests that this Court accept jurisdiction in this claimed appeal as of right so that the important issues presented will be reviewed on the merits. i.e. whether R.C. 2307.60, as amended October 31, 2007, operated to impair his substantive rights under the applicable law and insurance contract in effect when the cause of action accrued?

Respectfully submitted,



William Redwine, pro se

APPELLANT, PRO SE

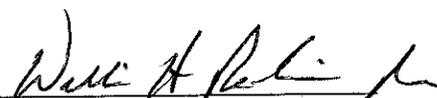
Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was sent by ordinary U.S. mail, this 7th day of September, to:

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APPENDIX

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

~~FILED
10 JUL 26 AM 10:00
TINA MERANDA
CLERK OF COURTS~~

MARK SPICER, et al.,

Plaintiffs-Appellees,

- vs -

FILED
COURT OF APPEALS

CASE NO. CA2009-12-046
(Accelerated Calendar)

JUDGMENT ENTRY

JUL 26 2010

WILLIAM REDWINE, et al.,

Defendants-Appellants.

TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2004-0549

{¶1} This is an accelerated appeal in which defendant-appellant, William H. Redwine, Jr., appeals the Brown County Common Pleas Court's decision granting partial summary judgment to plaintiffs, Mark Spicer and Kathy Spicer, (collectively the Spicers) and granting summary judgment to intervening defendant-appellee, State Auto Mutual Insurance Company (State Auto).¹

{¶2} Redwine's first assignment of error is overruled on the basis of *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115. The trial court did not err in applying the amendment to R.C. 2307.60, which allows admission of a trial court's final judgment for a criminal conviction for an offense of violence, to the proceeding as the amendment

1. Pursuant to Loc.R. 6(A), we have sua sponte assigned this appeal to the accelerated calendar.

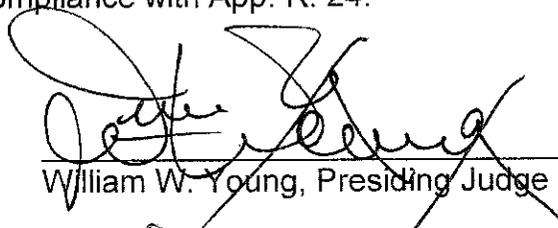
pertains to the admissibility of evidence, and as such is a remedial or procedural law. See *Denicola* at 117-18. See, also, *Standifer v. Arwood* (1984), 17 Ohio App.3d 241, 242-243. The trial court properly granted State Auto's summary judgment motion, because Redwine's policy with State Auto precludes coverage for intentional acts which was proven when he was criminally convicted of a felonious assault. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

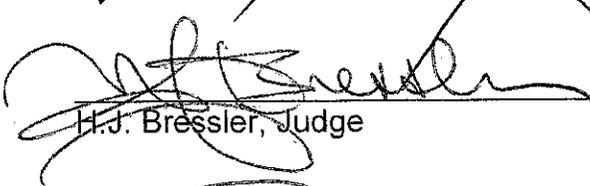
{¶3} Redwine's second assignment of error is overruled because when he voluntarily dismissed all claims against the Spicers, the summary judgment decision, in their favor which dismissed Redwine's defenses, was rendered a nullity and is subsequently not appealable. See *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596-97 1999-Ohio-128; *Beck v. Jones*, Cuyahoga App. Nos. 90120, 91056, 2008-Ohio-5343, ¶10-13; *Latronica v. Western Southern Life, Inc.*, Mahoning App. No. 04 MA 227, 2005-Ohio-2935, ¶19, 21-22.

{¶4} Judgment affirmed.

{¶5} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this judgment entry shall constitute the mandate pursuant to App.R. 27.

{¶6} Costs to be taxed in compliance with App. R. 24.


William W. Young, Presiding Judge


H.J. Bressler, Judge


Robert P. Ringland, Judge