[Cite as *Estate of Heintzelman v. Air Experts Inc.*, 2008-Ohio-4883.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE ESTATE OF JEFFREY K. HEINTZELMAN, ET AL.,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 07CAE090045
AIR EXPERTS INC., ET AL.,	:	
Defendants-Appellees	:	O P I N I O N

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:	September 24, 2008

APPEARANCES:

For Plaintiffs-Appellants:

CHARLES H. COOPER, JR.
REX H. ELLIOTT
2175 Riverside Drive
Columbus, Ohio 43221

For Defendant-Appellee American Family Insurance:

BRUCE A. CURRY
LISA C. HAASE
8000 Ravine's Edge Court
Columbus, OH 43235

For Defendant-Appellee Martel:

A. SCOTT NORMAN
400 S. Fifth St., Suite 301
Columbus, OH 43215

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

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

{¶9} 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).

{¶32} 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.

{¶33} 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."

{¶34} 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 Amphitheather 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. Papadopulos* (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:

{¶50} "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.)

{¶51} 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).

{¶56} 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.

S/L Patricia A. Delaney

S/L W. Scott Gwin

S/L John W. Wise

JUDGES

PAD:kgb 08/08

[Cite as *Estate of Heintzelman v. Air Experts Inc.*, 2008-Ohio-4883.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THE ESTATE OF JEFFREY K. HEINTZELMAN, ET AL.,	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
AIR EXPERTS INC., ET AL.,	:	
Defendants-Appellees	:	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.

_____
S/L Patricia A. Delaney

_____
S/L W. Scott Gwin

_____
S/L John W. Wise

JUDGES