IN THE SUPREME COURT OF OHIO

The Estate of Jeffrey K. Heintzelman, et al.,	:	
	:	**Case No. 08-2173**
Appellees,	:	
	:	**On Appeal from the**
v.	:	**Delaware County Court**
	:	**of Appeals, Fifth Appellate**
Air Experts, Inc., et al.,	:	**District, Case No. 07CAE09-0045**
	:	
Appellants.	:	

APPELLEES' RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION FILED BY APPELLANT AMERICAN FAMILY INSURANCE COMPANY

Bruce A. Curry (0052401)
Lisa C. Haase (0063403)
Curry, Roby & Mulvey Co., LLC
8000 Ravine's Edge Court, Suite 103
Columbus, Ohio 43235
(614) 430-8885
(614) 430-8890 (Facsimile)
bcurry@crmlaws.com

Attorneys for Appellant
American Family Insurance Company

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

Attorneys for Appellees
The Estate of Jeffrey K. Heintzelman and
Margaret Heintzelman

A. Scott Norman (0041935)
Mark S. Maddox (0029852)
Frost Maddox & Norman Co., L.P.A.
987 South High Street
Columbus, Ohio 43206
(614) 445-8888
(614) 445-0959 (Facsimile)
snorman@frostandmaddox.com

Attorneys for Appellee
Thomas B. Martel dba Martel Heating & Cooling

THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

Section 2, Article IV of the Ohio Constitution instructs that a judgment of an Ohio Court of Appeals shall serve as the ultimate and final adjudication of cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of public or great general interest. "Except in these exceptional circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 253-254 (emphasis added). A case does not present a question of public or great general interest if the issue is merely of interest primarily to the parties. *Id.* at p. 254. In short, this Court is not intended to be just another appellate court.

This civil case is not one of public or great general interest. There is no novel issue of law or procedure, and neither the facts nor the legal issues require guidance by this Court. Accordingly, there is no reason to review the appellate court's decision.

STATEMENT OF THE CASE AND FACTS

Although the facts of this case are undeniably tragic, this Court already has, by declining to accept jurisdiction in a previous appeal, implicitly concluded that the underlying events are not of public or great general interest. See *Estate of Heintzelman, et al. v. Air Experts, et al.*, 112 Ohio St.3d 1471, 2007-Ohio-388, 861 N.E.2d 145.

Jeffrey Heintzelman was electrocuted when he came in contact with an unprotected electrical outlet installed by Tom Martel d/b/a Martel Heating & Cooling ("Martel"). Margaret Heintzelman, Jeffrey's widow and the administrator of his estate, filed a wrongful death action on December 10, 2002. Martel's business was insured by appellant American Family Insurance

Company ("American Family"), and American Family provided Martel with counsel in the wrongful death action.

On June 30, 2003, more than six months after the wrongful death action was filed, American Family sent Martel a "reservation of rights" letter. The Delaware County Court of Common Pleas has determined that the letter, which was eventually forwarded to counsel for the Estate, misrepresented the pertinent language of the insurance policy.

In the reservation of rights letter, American Family denied that coverage existed for the claims against Martel. To obtain a declaration of its rights and obligations, American Family could have intervened in the *Heintzelman* wrongful death action. It did not. Instead, on December 4, 2003 American Family filed a separate declaratory judgment action against Martel styled *American Family Ins. Co. v. Martel*, Case No. 03CVH-12896. Although the Estate clearly had an interest in the outcome, American Family did not name it as a party to the action. In fact, American Family gave the Estate no notice whatsoever about the declaratory judgment action, even though American Family knew the name, address and telephone number of the Estate's counsel.

Martel did not answer the declaratory judgment complaint. American Family then quickly sought, and on March 10, 2004 obtained, a default judgment, again without providing any notice to the Estate or its counsel.

The wrongful death case proceeded to trial February 28, 2005 and resulted in a verdict in favor of the Estate. The Estate subsequently filed a supplemental complaint against American Family to recover the $500,000 limits of the policy issued to Martel. American Family filed a summary judgment motion in which it insisted that the Estate was bound by the default judgment rendered in the declaratory judgment action, even though the Estate was completely unaware of

the declaratory judgment action and did not participate in the matter. The Estate opposed American Family's motion and filed a cross-motion for summary judgment. In the cross-motion for summary judgment, the Estate presented the language of the American Family insurance policy and explained why the policy covers Martel's conduct. On August 6, 2007, the trial court granted American Family's summary judgment motion and denied the Estate's cross-motion for summary judgment.

On appeal, the Fifth District Court of Appeals unanimously reversed. The court of appeals examined R.C. 2721.12(B) and R.C.3929.06(C), and concluded that under the plain language of the statutes the Estate is not bound by the declaratory judgment American Family obtained by default against Martel.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW

Appellant asks this Court to accept review under a proposition of law that would re-write Ohio Rev. Code §3929.06. In its proposition of law, American Family asks the Court to conclude that "[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." (Emphasis added.) Appellant's proposition of law is carefully crafted to get past the plain language of R.C. 3929.06(C)(2).

Generally, a party that files a declaratory judgment action must join everyone who may be impacted by the judgment. R.C. 2721.12(A) states that "[s]ubject to division (B) . . . , when declaratory relief is sought . . . all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." The statute also makes clear that except under narrow circumstances a declaratory judgment will not bind a non-party,

stating "[e]xcept as provided in division (B) of this section, a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding." In short, unless division B applies, the Estate is not bound by the declaratory judgment obtained by American Family, because American Family purposely refrained from joining the Estate as a party in the declaratory judgment action.

Division B does not apply. It provides as follows:

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

R.C. 3929.06(C)(2) is straightforward. It states:

> (C)(2) I f, 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 that policy's coverage . . . that final judgment shall be deemed to have binding legal effect upon the judgment creditor . . . .

The Fifth District Court of Appeals correctly held that the language could not be plainer: in coverage disputes, a non-party judgment creditor is bound by a declaratory judgment only if the *policyholder* commences the action against the insurer. If the Ohio General Assembly had intended a non-party judgment creditor to also be bound when an *insurer* initiates a declaratory judgment action, it easily could have said so. It did not.

There is good reason why the statute is worded this way. An insured and his judgment creditor share the same interest: both seek to ensure coverage exists for the insured's tortious conduct. Therefore, when an insured initiates a declaratory judgment action against his insurer to determine coverage, two things are known: (1) the insured is present, and (2) the insured is actively seeking to make sure coverage exists for his wrongful conduct. Under these circumstances, the General Assembly has concluded that the interests of the tortfeasor's judgment creditor are adequately protected and it is fair for the creditor to be bound by the outcome. When, however, the *insurer* initiates the declaratory judgment action, there is no assurance that either (1) or (2) exist, and it is therefore unfair to bind a judgment creditor to the outcome.

This case proves the point. Had Martel initiated the declaratory judgment action, it would have demonstrated that he was aware of the coverage issues and was determined to pursue them, and the Estate would have been bound by the outcome. Instead, American Family filed the action and convinced Martel that he needn't be concerned about it. Martel was not there to advocate in favor of coverage, and American Family made certain the Estate was not there to do so either. Under R.C. 2721.12(B) and 3929.06(C)(2), the Estate is not bound by the resulting – and inevitable – default judgment.

American Family utilizes its jurisdictional memorandum to make the same arguments that were considered and rejected by the Fifth District Court of Appeals. It does not, however, explain why the narrow issue is of "public or great general interest." While it is clear that American Family disagrees with the way that R.C. 3929.06(C)(2) has been worded, disagreement with the way the Ohio General Assembly has worded a statute does not make the matter one of public or great general interest. Moreover, because the proposition of law, as

phrased by American Family, would require this Court to ignore the plain language of the statute and judicially re-write the legislation, as a matter of public policy the proposition of law cannot be accepted.

CONCLUSION

For the foregoing reasons, the Estate respectfully submits that this case does not present a matter of public or great general interest. Appellant's memorandum in support of jurisdiction reveals that this case merely reargues the points argued below and asks this Court to re-write the statute applicable to this case. In short, the issue presented is of interest only to the parties.

Respectfully submitted,

Charles H. Cooper, Jr. (0037295)
Rex H. Elliott (0054054)
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, Ohio 43215
(614) 481-6000
(614) 481-6001 (Facsimile)

Attorneys for Appellees
The Estate of Jeffrey K. Heintzelman and
Margaret Heintzelman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Appellees' Response to Appellant's Memorandum in Support of Jurisdiction was served on the following counsel, by regular U.S. mail, postage prepaid, this 26th day of November, 2008:

Bruce A. Curry, Esq.
Lisa C. Haase, Esq.
Curry, Roby & Mulvey Co., LLC
8000 Ravine's Edge Court
Suite 103
Columbus, Ohio 43235

Attorneys for Appellant
American Family Insurance Company

A. Scott Norman, Esq.
Mark S. Maddox, Esq.
Frost, Maddox & Norman Co., L.P.A.
987 South High Street
Columbus, Ohio 43206

Attorneys for Appellee
Martel Heating & Cooling