IN THE SUPREME COURT OF OHIO

ORIGINAL

THE ESTATE OF JEFFREY K. HEINTZELMAN, et al.,	:	**Case No. 08-2173**
Plaintiffs-Appellees,	:	**On Appeal from the Delaware County Court of Appeals, Fifth Appellate District**
v.	:	
AIR EXPERTS, INC., et al.,	:	**Court of Appeals Case No. 07CAE09-0045**
Defendants-Appellants.	:	

MERIT BRIEF OF APPELLEE THE ESTATE OF JEFFREY K. HEINTZELMAN

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STATEMENT OF FACTS

In August 1999, Tom Martel (doing business as Martel Heating and Cooling) negligently installed a central air conditioning unit in the attic of Jeffrey and Margaret Heintzelman's home. On July 15, 2002 Jeff went into the attic to determine why the unit was not working properly and was electrocuted when he came in contact with an unprotected electrical outlet Martel had installed. On December 10, 2002 Margaret Heintzelman, on her own behalf and on behalf of her husband's estate, filed a wrongful death action ("the *Heintzelman* case") against Martel and against Air Experts, a company that serviced the unit and failed to tell the Heintzelmans about the exposed electrical outlet.

When Martel installed the air conditioning unit he was insured under a $500,000 commercial insurance policy issued by American Family Insurance Company. As a result, when the *Heintzelman* case was filed American Family retained counsel to defend Martel. Six months after the complaint was filed, American Family sent Martel a "reservation of rights" letter. The trial court below concluded that in the letter American Family misrepresented the pertinent language of the insurance policy.[1]

American Family could have intervened in the *Heintzelman* case to resolve any disputes about coverage for Martel's activities, which would have enabled Margaret Heintzelman and the Estate to address any coverage issues. Instead, on December 4, 2003 American Family filed a declaratory judgment action against Martel, styled *American Family Insurance Company v. Tom Martel*, Case No. 03CVH-12896 (Delaware CP). Although the *Heintzelman* case was pending in

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[1] See "Judgment Entry Granting The Plaintiffs' Motion For Pre-Judgment Interest As To Defendant Martel," filed July 27, 2005 (granting prejudgment interest, after an evidentiary hearing, based in part on "the misrepresentation by Defendant Martel's attorney of AFI's coverage in a letter sent to the Plaintiffs' attorney. . . .")

the same court, when American Family filed the declaratory judgment complaint it did not indicate that a related case was pending. As a result, the declaratory judgment action was assigned to a different judge, and the *Heintzelman* plaintiffs were unaware of the lawsuit.

According to an affidavit Martel filed when he sought relief from the default judgment entered against him, a representative of American Family Insurance advised him not to respond to the declaratory judgment suit. When Martel did not file an answer to the complaint, American Family obtained a default judgment on March 10, 2004. According to Martel, a representative of American Family Insurance then told him that he need not worry about the default judgment entry because it would not have any impact on him.

The *Heintzelman* case was pending at the time American Family filed its declaratory judgment action and at the time American Family sought the default judgment. In an appellate brief filed with the Fifth District Court of Appeals, American Family mistakenly asserted that the *Heintzelman* case was dismissed without prejudice in March 2003 and re-filed in April 2004, creating the impression that the declaratory judgment action was filed and the default judgment sought during a time when the *Heintzelman* case was not pending. The *Heintzelman* case was dismissed without prejudice March 16, 2004 and re-filed a few weeks later on April 9, 2004. The Estate addressed American Family's mistake in a reply brief filed November 20, 2007, but the Fifth District Court of Appeals failed to catch the error and used the erroneous date in its opinion. Inexplicably, appellant and amicus curiae Ohio Association of Civil Trial Attorneys continue to perpetuate this mistake in their briefs to this Court, continuing to create the false impression that American Family commenced and concluded the declaratory judgment during a time when the *Heintzelman* case was not pending.

Although Margaret Heintzelman and the Estate clearly had an interest in the outcome in the declaratory judgment action, American Family did not join them and never notified them that the case had been filed. As a result, they did not learn of the suit until long after a default judgment had been entered.

The wrongful death case proceeded to trial February 28, 2005 and the jury returned a verdict against Martel and in favor of Margaret Heintzelman ($2,650,000 for negligent infliction of emotional distress) and the Estate ($1,014,186). Martel appealed the verdict rendered in favor of Margaret Heintzelman. Although she had discovered her husband's body around the time he was electrocuted, and although she came within feet of him before she sensed danger and retreated down the attic stairs to call for help, the Fifth District Court of Appeals held that she was not a "bystander" and was not within the "zone of danger" and vacated the award to her. Plaintiffs sought review, but this Court declined to review the case.

During the appeal, Margaret Heintzelman and the Estate filed a supplemental complaint against American Family to recover the $500,000.00 limits of the policy issued to Martel. American Family filed a summary judgment motion in which it insisted that the plaintiffs were bound by the default judgment rendered in the declaratory judgment action, even though they were never notified about the action or given an opportunity to participate.

On August 6, 2007, the trial court granted American Family's summary judgment motion. On September 24, 2008, the Fifth District Court of Appeals reversed. *Estate of Heintzelman v. Air Experts, Inc.*, 2008-Ohio-4883. American Family sought review by this Court, and jurisdiction was accepted February 18, 2009.

ARGUMENT

Appellant American Family urges this Court to adopt a proposition of law, and, more importantly, an interpretation of a statute, that appears to be based on nothing more than American Family's desire. The General Assembly has established that, where the holder of an insurance policy commences a declaratory judgment action against its insurance company to determine coverage, the final judgment has a binding legal effect upon a judgment creditor who later sues the insurer. Despite the statute, American Family advocates the polar opposite position – that where an insurance company commences a declaratory judgment action against its insured, the final judgment in that action binds a subsequent judgment creditor of the insured. The statute, of course, says no such thing, and the proposition of law put forth by American Family asks this Court to usurp the legislative role in a truly remarkable manner. This Court should refuse the invitation to completely disregard the language of the statute.

Simply stated, Appellant's proposition of law – 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" – misstates Ohio law and conflicts with the unambiguous language of R.C. 3929.06(C)(2). An accurate statement of law addressing the issue in this case would be as follows:

Proposition of Law: When a judgment creditor commences an action against an insurer in accordance with R.C. 3929.06(A)(2) and (B), the judgment creditor is bound by a previously issued final declaratory judgment determining insurance coverage only if the declaratory judgment action was commenced by the holder of the insurance policy.

This statement of law accurately reflects the plain language of R.C. 2721.02(C) and 3929.06(C)(2).

A. Under traditional principles of res judicata, the Estate is not bound by the default declaratory judgment obtained by American Family

Under prior decisions by this Court, the Estate's complaint against American Family is not barred under traditional principles of res judicata. In *Broz v. Winland* (1994), 68 Ohio St.3d 521, 629 N.E.2d 395, Broz sued Winland for injuries caused by an automobile accident. While Broz' lawsuit was pending, Winland's insurance company filed a separate declaratory judgment action against Winland and obtained a judgment declaring that it had no duty to indemnify Winland. Winland subsequently confessed judgment to Broz, but when Broz filed a complaint against Winland's insurance company the insurer insisted that Broz was collaterally estopped as a result of the declaratory judgment. Rejecting that argument, this Court held as follows:

> The concepts of *res judicata,* more specifically the doctrine of collateral estoppel, have no application to this matter. We have long held that mutuality of parties is a requisite to collateral estoppel.
>
> * * *
>
> The application of *res judicata* would deny appellants the right to litigate an issue they did not litigate in the declaratory action. They were not parties to this prior action nor were they in privity with the Winlands in the action. In fact, the Winlands and the appellants were adverse parties, at least in regard to the underlying tort action. The Winlands' primary concern is to insulate themselves from liability, whereas the appellants' concern is to obtain redress for their injuries. Thus, it cannot reasonably be found that the Winlands were adequate surrogates to protect the rights of the appellants. Thus, the appellants, who were neither engaged in the litigation of the declaratory judgment action nor in privity with the Winlands, cannot be bound by the decision reached in the prior action.
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> Id. at 523-524.

The Estate is in the same situation as Broz; it was not a party to the coverage declaratory judgment action and was not in privity with Martel. Therefore, the Estate is not bound by the default judgment under common law res judicata principles.

B. The legislative response to *Broz*

The Ohio General Assembly responded to *Broz* by amending various provisions of R.C. Chapter 2721. In language pertinent to this case, the General Assembly stated in 1999 H.B. 58 that the legislative changes were intended to supersede the effect of *Broz* and its progeny "relative to the lack of binding legal effect of a judgment or decree upon certain persons who were not parties to a declaratory judgment action or proceeding between the holder of a policy of liability insurance and the insurer that issued the policy." According to Section 5 of 1999 H.B. 58, the General Assembly carried this out by enacting "new division (C) of Section 2721.02, new division (B) of Section 2721.12, and division (C) of new Section 3929.06." Therefore, those provisions must be examined to determine whether the Estate's claim against American Family – which would not otherwise be barred under common law res judicata principles – is precluded.

C. R.C. 2721.02(C)

R.C. 2721.02 describes the force and effect of declaratory judgments. Division C, which addresses declaratory judgment actions by judgment creditors, like the Estate, and by policy holders, provides as follows:

> (C) In an action or proceeding for declaratory relief that a judgment creditor commences in accordance with divisions (A) 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 an action or proceeding under this chapter between the holder and the insurer.
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> 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. This division shall apply notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel.

It is clear that neither paragraph of division (C) applies to this case.

The first paragraph allows an insurer to assert affirmative defenses "in an action or proceeding for declaratory relief that a judgment creditor commences in accordance with divisions (A) and (B) of this section . . . ." The Estate – the judgment creditor in this dispute – did not commence "an action or proceeding for declaratory relief" "in accordance with divisions (A) and (B)" of R.C. 2721.02. The Estate's supplemental complaint asserted a single claim against American Family under R.C. 3929.06, not under R.C. 2721.02.

Nonetheless, even if this Court views the Estate's claim as having been commenced "in accordance with divisions (A) and (B)" of R.C. 2721.02, the first paragraph of division (C) still does not apply. This paragraph merely enables the insurer to assert any coverage defenses against the judgment creditor that it could assert if either the insurer or its insured filed a declaratory judgment action to determine coverage. It anticipates situations where a judgment creditor seeks payment of the judgment under an insurance policy but the insurer and its insured have not yet litigated coverage issues; the insurer need not litigate the coverage issues with its insured before asserting them against the insured's judgment creditor.

American Family suggests that "collateral estoppel" can be considered a "coverage defense." It is not. "Coverage defenses," as commonly understood, are defenses that arise under the terms of the policy, such as coverage exclusions or failure to timely notify the insurer of the claim as required by the policy. Moreover, collateral estoppel is not a "coverage defense" that could be asserted *in* a declaratory judgment action between an insurer and its insured; it is a defense that could be asserted only *after* such an action or proceeding between the insurer and its

insured has already taken place. Thus, the first paragraph of division (C) is also inapplicable because it plainly states that an insurer is merely entitled to assert against the judgment creditor coverage defenses that the insurer could assert against its policy holder "in an action or proceeding under this chapter," i.e., in a declaratory judgment action between the insurer and its insured. Collateral estoppel does not fit this description.

The second paragraph of division (C) also is inapplicable. It addresses situations in which a judgment creditor seeks declaratory relief after the holder of an insurance policy commences a similar action against the insurer for a determination of coverage. In such instances, the judgment creditor is bound by a final judgment rendered in the policy holder's coverage lawsuit "notwithstanding any contrary common law principles of res judicata or . . . collateral estoppel." In short, when a policy holder commences a declaratory judgment action to determine coverage, the policy holder's judgment creditor is bound by the coverage decision even if the creditor did not participate in the action.

Division (C) says nothing about a judgment creditor being bound by a declaratory judgment rendered in a case commenced by an *insurer* against a policy holder. The language is clear, narrow, and unambiguous; the judgment creditor is bound by the coverage decision only when the decision was rendered in a declaratory judgment action commenced by the policy holder. If the General Assembly had intended for judgment creditors to be bound by coverage decisions regardless of whether the coverage declaratory judgment action was commenced by the insurer or insured, it would have employed the very language used in the first paragraph of division (C), which refers to declaratory judgment actions "between the holder and the insurer." (Emphasis added.)

D. R.C. 2721.12

Declaratory judgments may be sought in a variety of situations. For example, a person may file a declaratory judgment action to construe rights under a will (R.C. 2721.03), to determine the validity of a statute or rule (id.), to construe a contract (R.C. 2721.04), or to determine the heirs of an estate (R.C. 2721.05). To ensure adequate protection of all individuals or entities whose rights may be affected by a declaratory judgment, R.C. 2721.12(A) states that, "subject to division (B) of this section, when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." American Family did not make the Estate a party to the declaratory judgment action against Martel. Therefore, under R.C. 2721.12(A), the Estate's rights cannot be prejudiced by the default judgment unless R.C. 2721.12(B) says otherwise.

The relevant portion of R.C. 2721.12(B) 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**[.][2]
>
> (Emphasis added.)

The default declaratory judgment American Family obtained against Martel fits this description. It was entered in a declaratory action (1) under R.C. Chapter 2721; (2) the action was between American Family, an insurer, and Martel, the holder of a policy of liability insurance issued by

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[2] R.C. 2721.12(B) also addresses the rights of assignees. The parties agree that the Estate is a judgment creditor of Martel, not an assignee. See *Estate of Heintzelman*, 2008-Ohio-4883, ¶41 n.2.

the insurer; and (3) the default judgment resolved an issue as to whether the policy's coverage extended to Margaret Heinzelman's injuries and/or Jeffrey Heintzelman's death, both of which were alleged to have been tortiously caused by Martel. Therefore, applying R.C. 2721.12(B), the declaratory judgment obtained by American Family "shall be deemed to have the binding legal effect described in division (C)(2) of section 3929.06 of the Revised Code[.]"

E. R.C. 3929.06(C)(2)

R.C. 3929.06(C)(2) contains virtually the same precise, narrow language found in R.C. 2721.02(C). It states as follows:

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

Again, the language could not be plainer: in a dispute over insurance coverage, a non-party judgment creditor is bound by a declaratory judgment that determines coverage only when the *policy holder* initiated the declaratory judgment 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. When the General Assembly intends for a provision to apply to situations where either the policy holder or the insurer commences an action to declare coverage, it says so, as it did in R.C. 2721.02(C)(referring to "an action or proceeding under this chapter between the holder and the insurer")(emphasis added) and in R.C. 3929.06(C)(1)(referring to "a declaratory judgment action or proceeding under Chapter 2721 of the Revised Code between the holder and the insurer")(emphasis added). This indicates that the

General Assembly carefully chose to limit the instances in which a judgment creditor of a policy holder is bound by a declaratory judgment rendered in an action in which he was not a party.

F. American Family's interpretation of the legislative history of the amendments to R.C. 2721.02, R.C. 2721.12 and R.C. 3929.06 cannot change the plain language of those statutes

American Family claims its position is supported by the legislative history of 1999 H.B. 58, arguing that the Ohio General Assembly *intended* to bind judgment creditors to a coverage declaratory judgment regardless of whether the coverage action was commenced by the insurer or the insured. However, both R.C. 2721.02(C) and R.C. 3929.06(C)(2) expressly limit the binding effect of coverage declaratory judgments to instances in which "the holder of the policy commences" the action. 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. The Court may not delete the phrase "the holder of the policy commences." Likewise, contrary to American Family's wishes, the Court may not insert words such that the amended phrase would read "the holder of the policy **or the insurer** commences . . . ."

"[T]he intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶11-12 (quoting *Slingluff v. Weaver* (1902), 66 Ohio St. 621 at paragraph two of the syllabus). "The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed[.]" Id. If the statute conveys a clear, unequivocal, and definite meaning, 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. The language the General Assembly used in R.C. 2721.02(C) and R.C. 3929.06(C)(2) is unambiguous.

G. The General Assembly attempted to strike a balance in R.C. 2721.02(C) and R.C. 3929.06(C)(2)

American Family notes that the General Assembly intended to supersede *Broz*, where this Court held that under traditional principles of res judicata a judgment creditor is not bound by a coverage declaratory judgment action between an insurer and its insured. It does not follow, however, that in superseding *Broz* the General Assembly intended to bind judgment creditors to all coverage declaratory judgment actions between insurers and their insureds. Rather, it appears that the General Assembly pursued a measured response, binding judgment creditors to prior coverage decisions but only when the coverage actions are initiated by the insured.

There are sound reasons for limiting the binding effect in this manner. When a policy holder commences a declaratory judgment action to determine coverage, a certain amount of protection is provided to the judgment creditor. After all, commencement of a declaratory judgment action by the policy holder indicates (a) the policy holder is aware of the significance of the underlying tort claim, (b) the policy holder is aware of the importance of insurance coverage and (c) the policy holder is aware that a potentially coverage-destroying dispute exists. In short, the judgment creditor's interests have some degree of protection. When, however, a coverage declaratory judgment action is initiated by the *insurer*, there is no assurance that any of above exist. To prevent insurance companies from taking advantage of a policy holder's confusion, which may, as here, allow an insurer to obtain a default judgment that is contrary to the policy holder's interests, the General Assembly carefully limited the binding effect of declaratory judgments issued in cases involving coverage disputes.

H. The Fifth District Court of Appeals did not find any of the pertinent statutory provisions to be in "conflict"

Both American Family and amicus curiae Ohio Association of Civil Trial Attorneys assert that the Fifth District Court of Appeals found R.C. 2721.12 and R.C. 3929.06 to be "in conflict" and improperly applied rules of statutory construction. To the contrary, the court of appeals found the statutory provisions to be "clear and unequivocal." *Estate of Heintzelman*, 2008-Ohio-4883 at ¶52. The appellate court merely observed "[t]o the extent that any conflict is perceived" between two statutes or their parts, the more specific provision controls over the more general. *Estate of Heintzelman*, 2008-Ohio-4883 at ¶47. Thus, in responding to American Family's argument that R.C. 2721.02(C) and R.C. 3929.06(C)(1) reserve to an insurer the right to assert "coverage defenses" (including, according to Appellant, the "coverage defense" of res judicata) when responding to a civil action by a judgment creditor, the court of appeals simply noted that to the extent there is a conflict these general provisions must give way to the specific language in R.C. 2721.02(C) and R.C. 3929.06(C)(2) stating that a judgment creditor is bound by a prior coverage declaratory judgment only when the judgment is rendered in an action commenced by the holder of the insurance policy at issue. *Estate of Heintzelman*, 2008-Ohio-4883 at ¶47-51.

CONCLUSION

The decision of the Fifth District Court of Appeals should be affirmed. Using straightforward language, the General Assembly has stated that when a judgment creditor sues an insurance company the creditor is bound by a prior coverage decision issued in a declaratory judgment action only if the declaratory judgment action was commenced by the policy holder. In this case, the Estate has sued American Family to satisfy part of a judgment obtained against American Family's insured, Martel. American Family cannot avoid liability for the Estate's

claim by arguing that coverage for that claim was "determined" by a default judgment rendered in a separate declaratory judgment case, because that declaratory judgment case was commenced by American Family, not Martel. To achieve the result American Family seeks, this Court would have to re-write two statutory provisions by either eliminating language that presently exists or inserting language that the General Assembly did not include. Historically, this Court has wisely resisted engaging in the type of judicial activism American Family and its amicus curiae seek, deferring to the General Assembly to legislate. The Court's policy of judicial restraint should be followed in this case as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee The Estate of Jeffrey K. Heintzelman was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 29th day of May, 2009:

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