Linda S. Crawford *Legislative Service Commission*

Sub. H.B. 58

123rd General Assembly
(As Passed by the General Assembly)

Reps. **Womer Benjamin, Taylor, Tiberi, Terwilleger, Olman, Buchy, Callender, Willamowski, Salerno, Mottley, Krupinski, Goodman, DePiero**

Sens. **Latta, Watts, Mumper, Gardner, White, Spada, Nein, Wachtmann**

Effective date: September 24, 1999

ACT SUMMARY

- Prohibits a court of record from awarding attorney's fees to any party on a claim for declaratory relief under the General Declaratory Judgments (GDJ) Law unless a statutory provision explicitly authorizes a court of record to award attorney's fees on a claim for declaratory relief under the GDJ Law or unless an award of attorney's fees is authorized by the Frivolous Conduct Law, by the Civil Rules, or by an award of punitive or exemplary damages against the party ordered to pay attorney's fees.

- Declares the General Assembly's intent in enacting the attorney's fees award prohibition provisions to supersede the effect of the holding in *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, and its progeny.

- Precludes injured parties or their legal representatives from commencing a declaratory judgment action based on liability insurance coverage against an insurer until a judgment for damages has been awarded against the insured tortfeasor.

- Specifies that a judgment rendered in a declaratory relief action between an insured and an insurer relative to the coverage of a liability insurance policy is deemed to have binding legal effect upon a judgment creditor for purposes of the judgment creditor's declaratory relief action against the insurer, notwithstanding any contrary common law res judicata or adjunct collateral estoppel principles.

- Specifies that a judgment rendered in a declaratory relief action between an insured and an insurer relative to the coverage of a liability insurance policy is deemed to have binding legal effect upon an assignee of the insured's rights under the policy whether or not made a party in the declaratory relief action, notwithstanding any contrary common law res judicata or adjunct collateral estoppel principles.

- Outright repeals section 3929.06 of the Revised Code prescribing procedures for a judgment creditor in a supplemental proceeding to have the money from an insurance contract between an insurance company and the defendant applied to the satisfaction of the judgment and substitutes similar procedures for a judgment creditor to have an amount up to the remaining limit of liability coverage applied to the satisfaction of the judgment.

- Specifies that a judgment rendered in a declaratory relief action between an insured and an insurer relative to the coverage of a liability insurance policy is deemed to have binding legal effect upon a judgment creditor for purposes of the judgment creditor's civil action against an insurer to have an amount up to the remaining limit of liability coverage applied to the satisfaction of the judgment, notwithstanding any contrary common law res judicata or adjunct collateral estoppel principles.

- Permits an insurer to assert against a judgment creditor in a declaratory relief action based on liability insurance coverage or in a civil action to have an amount up to the remaining limit of liability coverage applied to the satisfaction of the judgment any coverage defenses available against an insured in a declaratory relief action between the insurer and the insured.

- Declares the General Assembly's intent in enacting the declaratory relief provisions relative to judgment creditors and based on liability insurance coverage, the binding legal effect provisions relative to judgments in declaratory relief actions between an insurer and an insured tortfeasor, and the outright repeal of section 3929.06 of the Revised Code to supersede the effect of the holding in *Krejci v. Prudential Prop. and Cas. Ins. Co.* (1993), 66 Ohio St.3d 15, *Broz v. Winland* (1994), 68 Ohio St.3d 521, and *Mezerkor v. Mezerkor* (1994), 70 Ohio St.3d 304.

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CONTENT AND OPERATION

Awards of attorney's fees in declaratory judgment actions

Prior law

Nature of a declaratory judgment action--in general. Chapter 2721. of the Revised Code contains the General Declaratory Judgments (GDJ) Law (see **COMMENT** 1). Under the GDJ Law, courts of record *generally* are authorized to declare *rights, status, and other legal relations* whether or not further relief is or could be claimed. The judicial "declaration" may be affirmative or negative in nature and has the effect of a final judgment or decree. (Sec. 2721.02.)

The GDJ Law also authorizes three *specific types* of declaratory judgment actions. First, any person interested under a deed, will, or written contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule, municipal ordinance, township resolution, contract, or franchise may commence a declaratory judgment action for the resolution of associated construction or validity issues and to have a declaration of associated rights, status, or other legal relations. Second, a declaratory judgment action is authorized for the construction of a contract either before or after there has been a breach of the contract. Third, any person interested as or through an executor, administrator, trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or certain types of estates may commence a declaratory judgment action to ascertain the members of certain classes of persons, to direct the fiduciaries involved to do or abstain from

doing any particular act in their fiduciary capacity, or to determine any question arising in the administration of the estate or trust (e.g., questions of construction of wills and other writings). (Secs. 2721.03 and 2721.04 and sec. 2721.05--not in the act.)

The GDJ Law is statutorily declared to be a *remedial* law and is statutorily required to be liberally construed and administered (sec. 2721.13).

Awards of court costs. In any action or proceeding under the GDJ Law, the court may make an award of *court costs* "as is equitable and just" (sec. 2721.11).

Awards of attorney's fees. Prior GDJ Law did not expressly authorize a court of record to award reasonable attorney's fees to a prevailing party in a declaratory judgment action under that law. It did provide in section 2721.09 that, "whenever necessary or proper," a court of record could give "further relief based on a declaratory judgment or decree previously granted." The application for that relief had to be by "petition" (i.e., a complaint) filed in a court of record with jurisdiction to grant that relief. If the application was sufficient, the court (on reasonable notice) had to require any adverse party whose rights had been adjudicated by the declaratory judgment or decree to show cause why the further relief should not be granted.

In *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, the Ohio Supreme Court construed section 2721.09 and held in syllabus as follows:

> A trial court has the authority under R.C. 2721.09 to assess attorney fees based on a declaratory judgment issued by the court. The trial court's determination to grant or deny a request for fees will not be disturbed, absent an abuse of discretion.

See **COMMENT** 2 for the Court's rationale for this determination.

Changes made by the act

Awards of attorney's fees--codified law. The act supersedes the effect of the Supreme Court's holding in *Brandenburg* (see "***Uncodified law***" below) by enacting provisions in the GDJ Law specifically addressing awards of attorney's fees. In new section 2721.16, the act prohibits a court of record from awarding attorney's fees to any party on a claim for declaratory relief under the GDJ Law unless a statutory provision *explicitly authorizes* a court of record to award attorney's fees on a claim for declaratory relief under the GDJ Law or unless an award of attorney's fees is *authorized* by the Frivolous Conduct Law (see **COMMENT** 3), by the Civil Rules, or by an award of punitive or exemplary

damages against the party ordered to pay attorney's fees. References in another statutory provision to an "award of costs or expenses" incurred in connection with an action or proceeding does not authorize an award of attorney's fees for purposes of the act's provisions. (Sec. 2721.16(A).)

The act states that its attorney's fees award provisions are remedial in nature and apply in connection with (1) an action or proceeding for declaratory relief under the GDJ Law that is *commenced on or after* the act's effective date and (2) an action or proceeding for declaratory relief under the GDJ Law that was commenced *prior to* and is *pending on* the act's effective date in a court of record. The latter "application" provisions apply notwithstanding any statutory provision in existence on the day immediately prior to the act's effective date (e.g., existing sec. 2721.09), notwithstanding any judicial construction prior to the act's effective date of a statutory provision of that nature (e.g., *Brandenburg*), notwithstanding the holding in any Ohio court decision that authorized an award of attorney's fees to a party to a civil action or proceeding based on common law grounds rather than a statutory authorization of the General Assembly, regardless of the date upon which a cause of action accrued that pertains to an action or proceeding in which declaratory relief is sought under the GDJ Law, and regardless of who is the plaintiff or the defendant in an action or proceeding of that nature. (Sec. 2721.16(B).)

The act amends several Revised Code sections for "technical" purposes, including (a) the updating for consistency purposes of terminology throughout the GDJ Law (e.g., "*actions* and proceedings in which declaratory relief is sought"), (b) the modification of *existing* cross-references to the GDJ Law to reflect the enactment of section 2721.16 (i.e., by the substitution of references to "*Chapter 2721. of the Revised Code*" or "*this chapter*" for existing references to "sections 2721.01 to 2721.15"), and (c) the addition in the GDJ Law of "internal" cross-references to that law (i.e., by references to "declaratory relief sought *under this chapter*"). (Secs. 2721.01, 2721.06, 2721.07, 2721.08, 2721.10, 2721.11, 2721.13, 2721.14, 2721.15, 2907.36(A), and 3709.99(B).)

Awards of attorney's fees--uncodified law. The act states in uncodified law that the General Assembly declares that, in enacting section 2721.16 and in making conforming amendments in other statutes, it is the General Assembly's intent to do all of the following (Section 3):

(1) To supersede the effect of the Supreme Court's holding in *Brandenburg* and its progeny, including *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 342-343, that the "whenever necessary or proper" and "further relief" language in existing section 2721.09 reflects the General Assembly's conferral of

authority upon an Ohio trial court to award "attorney's fees based on a declaratory judgment issued by the court";

(2) To recognize the dissent's accurate construction in *Brandenburg* of the "whenever necessary or proper" and "further relief" language in section 2721.09 (see **COMMENT** 4);

(3) To recognize the holding of the Ohio Supreme Court in *Sorin v. Bd. of Edn*. (1976), 46 Ohio St.2d 177, and its progeny that Ohio follows the "American Rule" under which an award of attorney's fees to a prevailing party in a civil action or proceeding generally must be based on an express authorization of the General Assembly;

(4) To recognize, consistent with the American Rule, that authority to grant an award of attorney's fees in connection with an action or proceeding in which declaratory relief is sought under the GDJ Law must be expressly conferred by the General Assembly upon Ohio courts and has not been so conferred prior to the act's effective date.

Declaratory judgment action based on liability insurance coverage

Commencement of declaratory judgment action

The act states that the general authority of courts of record to declare rights, status, or legal relations under the GDJ Law and the first two specific types of declaratory judgment actions described above in "***Nature of a declaratory judgment action--in general***" are subject to the act's following provisions. The act prohibits a plaintiff who is *not* an insured under a liability insurance policy from commencing against the insurer that issued the policy an action or proceeding under the GDJ Law that seeks a declaratory judgment or decree as to whether the policy's coverage provisions extend to an injury, death, or loss to person or property that a particular insured under the policy allegedly tortiously caused the plaintiff or another person for whom the plaintiff is a legal representative to sustain, *until* a court of record in a distinct civil action for damages between the plaintiff and the insured tortfeasor enters a final judgment awarding the plaintiff damages for the injury, death, or loss. (Secs. 2721.02(A) and (B), 2721.03, and 2721.04.)

Defenses available to insurer

Under the act, in a declaratory relief action or proceeding that a judgment creditor commences as described above in "***Commencement of declaratory judgment action***" against an insurer that issued a particular liability insurance policy, 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 policyholder in a declaratory judgment action or proceeding between the policyholder and the insurer (sec. 2721.02(C)).

Effect of declaratory judgment or decree on judgment creditor

Under the act, if, prior to the judgment creditor's commencement of a declaratory relief action or proceeding, the policyholder commences a declaratory relief 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 in the policyholder's 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 is deemed to also have *binding legal effect* upon the judgment creditor for purposes of the judgment creditor's declaratory relief action or proceeding against the insurer. These provisions apply notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel (see **COMMENT** 5). (Sec. 2721.02(C).)

Effect of declaratory judgment or decree on insured's assignees

Under the continuing GDJ Law, when declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties to the proceeding ("mandatory parties provision"), and no judicial declaration prejudices the rights of persons who are not made parties to the proceeding ("nonprejudicial provision") (sec. 2721.12). The act retains these provisions in prior law but makes the mandatory parties provision subject to, and excepts from the nonprejudicial provision, the act's provisions described in this paragraph. Under the act, a declaratory judgment or decree that a court of record enters in a declaratory judgment action or proceeding under the GDJ Law between an insurer and a holder of a liability insurance policy 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 is deemed to have the *binding legal effect* described below in "***Civil action by judgment creditor for insurance money to be applied to judgment***" and to also have the *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. These *binding legal effect* provisions apply whether or not an assignee is made a party to the declaratory relief action or proceeding and notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel (see **COMMENT** 5). (Sec. 2721.12(B).)

Uncodified law

The act declares in uncodified law the General Assembly's intent in enacting the provisions described above regarding the binding legal effect of a declaratory judgment or decree and below in "***Civil action by judgment creditor for insurance money to be applied to judgment***" and in making conforming amendments to the GDJ Law to supersede the effect of the holding of the Ohio Supreme Court in *Broz v. Winland* (1994), 68 Ohio St.3d 521, 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 (Section 5). (See **COMMENT** 6.)

Civil action by judgment creditor for insurance money to be applied to judgment

Prior law

Under prior law, upon the recovery of a final judgment against any firm, person, or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, to tangible or intangible property of any person, firm, or corporation, on account of loss or damage to tangible or intangible property of any person, firm, or corporation, or to a person on account of bodily injury to one's spouse or minor child or children, if the defendant in that action was insured against loss or damage at the time the rights of action arose, the judgment creditor or the successor in interest was entitled to have the insurance money provided for in the insurance contract between the insurance company and the defendant applied to the satisfaction of the judgment. If the judgment was not satisfied within 30 days after it was rendered, the judgment creditor or the successor in interest could file a supplemental petition in the action in which the judgment was rendered to apply the insurance money to the satisfaction of the judgment. The insurer was made a new party defendant in that action, and service of summons upon the insurer was made and returned as in the commencement of an action at law. Thereafter the action proceeded as to the insurer as in an original action. (Sec. 3929.06.)

In *Krejci v. Prudential Prop. and Cas. Ins. Co.* (1993), 66 Ohio St.3d 15, *Broz v. Winland, supra*, at 523-525, and *Mezerkor v. Mezerkor* (1994), 70 Ohio St.3d 304, 308, the Ohio Supreme Court held that former section 3929.06 of the Revised Code did not preclude the commencement of a civil action under that section or a declaratory judgment action or proceeding under Chapter 2721. of the Revised Code (the GDJ Law) against an insurer that issued a policy of liability insurance until a court of record entered in a distinct civil action for damages

between the plaintiff and an insured tortfeasor a final judgment awarding the plaintiff damages for the injury, death, or loss to person or property involved.

Operation of the act

Codified law. The act outright repeals former section 3929.06 and substitutes the following provisions:

If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury, death, or loss to the person or property of the plaintiff or another person for whom the plaintiff is a legal representative and if, at the time of the accrual of the cause of action against the judgment debtor, the judgment debtor was insured against liability for that injury, death, or loss, the plaintiff or the plaintiff's successor in interest is entitled as judgment creditor to have an *amount up to the remaining limit of liability coverage* provided in the liability insurance policy applied to the satisfaction of the final judgment. If within 30 days after the entry of the final judgment the insurer that issued the liability insurance policy has not paid the judgment creditor an amount equal to the remaining limit of liability coverage provided in the policy, the judgment creditor may file in the court that entered the final judgment a *supplemental complaint* against the insurer seeking a judgment ordering the insurer to pay the judgment creditor the requisite amount. Subject to the coverage defenses provision and binding legal effect provision described in the following paragraph, the civil action based on the supplemental complaint proceeds against the insurer in the same manner as the original civil action against the judgment debtor. The act states that its authorization of a civil action based on the supplemental complaint does not authorize the commencement of a civil action against an insurer until a court enters the final judgment in the distinct civil action for damages between the plaintiff and an insured tortfeasor and until the expiration of the 30-day period referred to in this paragraph. (Sec. 3929.06(A) and (B).)

In a civil action that a judgment creditor commences against an insurer as described in the preceding paragraph, 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 policyholder in a declaratory judgment action or proceeding under the GDJ Law between the policyholder and the insurer. If prior to the judgment creditor's commencement of the civil action against the insurer as described in the preceding paragraph the policyholder commences a declaratory judgment 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 in the policyholder's action or proceeding enters a final judgment with respect to the policy's coverage or noncoverage of the injury, death, or loss,

that final judgment is deemed to have *binding legal effect* upon the judgment creditor for purposes of the judgment creditor's civil action against the insurer. The *binding legal effect* provisions apply notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel (see **COMMENT** 5). (Sec. 3929.06(C).)

Uncodified law. In uncodified law in the act, the General Assembly declares, in enacting the provisions described above in "***Commencement of declaratory judgment action***" and the second paragraph in "***Operation of the act***," in outright repealing former section 3929.06 of the Revised Code, and in making conforming amendments in the GDJ Law, its intent to supersede the effect of the holding of the Ohio Supreme Court in the cases specified above in "***Existing law***" that existing section 3929.06 of the Revised Code does not preclude the commencement of a civil action under that section or a declaratory judgment action or proceeding under Chapter 2721. of the Revised Code against an insurer that issued a policy of liability insurance until a court of record enters in a distinct civil action for damages between the plaintiff and an insured tortfeasor a final judgment awarding the plaintiff damages for the injury, death, or loss to person or property involved (Section 4).

COMMENT

1. Several Revised Code sections outside the GDJ Law authorize individuals to commence a declaratory judgment action in connection with particular subject matters. One example is section 2907.36, which authorizes a declaratory judgment action by prosecuting attorneys, other "chief legal officers," and certain individuals to obtain a determination of whether particular materials or performances are obscene or harmful to juveniles in violation of the Pornography Law. Another example is section 3709.99, which authorizes specified individuals under certain conditions to commence a declaratory judgment action for a determination of the reasonableness or lawfulness of a board of health "health-, disease-, or nuisance-related" regulation or order that the individuals allegedly have violated. Apparently, unless a statute outside of the GDJ Law prescribes a *distinct* procedure governing an authorized declaratory judgment action or proceeding, the procedure of the GDJ applies to the action or proceeding.

2. In *Brandenburg*, the Supreme Court explained the rationale underlying its syllabus as follows:

> In *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 556, . . . this court reaffirmed that in Ohio, an award of attorney fees must be predicated on

statutory authorization or upon a finding of conduct which amounts to bad faith. . . .

. . .

Appellants assert that regardless of the specific duties imposed upon an insurer and irrespective of the insurer's conduct, a trial court, as incidental to a declaration of an insurer's obligations to its insured, has the discretion under R.C. 2721.09 to permit a recovery of attorney fees by the insured. We agree with appellants.

R.C. 2721.09 provides in part that:

"*Whenever necessary or proper*, further relief based on a declaratory judgment or decree previously granted may be given. (Emphasis added.)

It is beyond dispute that questions concerning insurance policies are within the purview of R.C. Chapter 2721. . . . R.C. 2721.09 plainly permits a trial court, following a binding judicial interpretation of an insurance policy based upon a declaratory judgment action, to provide relief which the court deems "necessary or proper."

By its clear terms, the intent of R.C. 2721.09, affording further relief in declaratory judgment actions, is to provide a trial court with the authority to enforce its declaration of right. See, also, R.C. 2721.11 (In any proceeding under the Declaratory Judgment Act a trial court "may make such award of costs as is equitable and just."). Nowhere in R.C. Chapter 2721. is there any provision which narrows the broad authority conferred by R.C. 2721.09. Moreover, R.C. 2721.09 does not place any legal significance on the insurer's conduct nor is the operation of the section conditioned on which party actually prevails in the underlying action. Rather, the only limitation placed on the trial court is that the relief must be "necessary or proper." Hence, this court should not create a blanket limitation precluding an award of attorney fees based upon conduct of a party and/or who wins or who loses. This

> is even more apparent given the requirement under R.C. 2721.13 that "[s]ections 2721.01 to 2721.15, inclusive, of the Revised Code are remedial, and shall be liberally construed and administered."
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> 72 Ohio St.3d at 158-160.

3. The Frivolous Conduct Law, section 2323.51, generally authorizes a court, at any time prior to the commencement of the trial in a civil action or within 21 days after the entry of judgment in a civil action or at any time prior to the hearing in a specified type of appeal that is filed by an inmate or within 21 days after the entry of judgment in such an appeal (hereafter, "inmate-filed appeal") to award *court costs, reasonable attorney's fees, and other reasonable expenses* incurred in connection with the civil action or appeal to a party to the civil action or appeal who was adversely affected by frivolous conduct. The award may be assessed against a party, the party's counsel of record, or both. (Sec. 2323.51(B)(1) and (4).)

The court may make an award of court costs, reasonable attorney's fees, and other reasonable expenses upon the motion of a party to the civil action or the inmate-filed appeal or on the court's own initiative, but only after the court follows the notice and hearing procedures specified in division (B)(2) of section 2323.51. The amount of an award that represents reasonable attorney's fees cannot exceed, and may be equal to or less than, whichever of the following is applicable: (a) if the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis, or (b) in all other situations, the attorney's fees that were reasonably incurred by a party. An award of reasonable attorney's fees does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client. (Sec. 2323.51(B)(3) and (C).)

The Frivolous Conduct Law does not affect or limit the application of any provision of the Rules of Civil Procedure, the Rules of Appellate Procedure, or another court rule or section of the Revised Code to the extent that the provision prohibits an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal or authorizes an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal in a specified manner, generally, or subject to limitations. (Sec. 2323.51(D).)

4. The act's uncodified law refers to the "accurate" construction of section 2721.09 in the dissenting opinion of Justice Cook in *Brandenburg* (concurred in

by Justice Wright and Chief Justice Moyer). The dissenting opinion reads in part as follows:

> R.C. 2721.09 provides, "[w]henever necessary or proper, *further relief* based on a declaratory judgment or decree previously granted may be given. * * *" (Emphasis added.) The "further relief" in this and similar declaratory judgment statutes from other states allows a court to grant consequential or incidental relief such as a money judgment, injunction, specific performance, mandamus, and accounting; relief that is remedial in nature, not punitive. . . . The intent of the statute affording further relief in declaratory judgment actions is to grant the trial court the power to enforce its declaration of right. . . . The benefit of the statute is the judicial economy of implementing the declaration of rights without the necessity of filing a separate action.
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> The term "further relief" also appears in R.C. 2721.02. It reads in pertinent part: "Courts of record may declare rights, status and other legal relations whether or not *further relief* is or could be claimed." (Emphasis added.) The context in which "further relief" is used in R.C. 2721.02 supports the view that its use in R.C. 2721.09 does not relate to attorney fees.
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> Moreover, it is difficult to argue that R.C. 2721.09 is statutory authorization for the award of attorney fees where the statute does not use the words "attorney fees"; in no less than sixty-six other sections of the Revised Code that do authorize attorney fees, those specific words appear in the statutory grant. . . .
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> . . .
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> This rule of law prohibiting the award of attorney fees in declaratory judgment actions absent bad faith, fraud, or stubbornly litigious behavior has been routinely applied by Ohio courts. The appellate court in *Gen. Acc. Assur. Corp. v. Motorists Mut. Ins. Co.* (1965), 2 Ohio App.2d 234, 235-236 . . . held that "[t]he Declaratory Judgment Act does not provide for

recovery of attorney fees and expenses incidental to suit brought under the Act. The Legislature did not intend this relief to be available to the prevailing party. Only court costs may be awarded to the prevailing party by the court * * *." (Emphasis sic.) . . .

Former appellate judge, now federal district court judge Sam H. Bell, in *G.S.T. v. Avon Lake*, *supra*, at 89 . . . wrote, "[s]ubject to the limitation that the court must first find evidence of bad faith or fraud, or a stubborn propensity to needless litigation on the part of the defendant party, a court in its inherent power under R.C. 2721.09 may assess the opponents reasonable attorney fees and costs against him." Similarly, in *Chace v. Dorcy Internatl., Inc*. (1991), 68 Ohio App.3d 99, 114, . . . the appellate court ruled that "where an insurer resorts to delaying tactics, fails to defend and takes a litigious course of conduct that the insured hardly bargained for, the trial court has the discretion to allow expense, costs and attorney fees," citing *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41 . . . .

With the parties to this appeal acknowledging that the insurer's challenge to coverage was justifiable, and with courts eschewing R.C. 2721.09 as a independent ground for awarding attorney fees, the awarding of fees in this action is without legal support.

III

The majority's broad grant of authority for awarding attorney fees is not limited to insurance cases or even the unfair result that seems to have befallen the Brandenburgs. The syllabus of this case does not just extend the law of *Motorists Mut. Ins. Co. v. Trainor*, *supra*, to allow the recovery of fees in a declaratory judgment action where the insurer, acting in good faith, unsuccessfully challenges the insured's right to coverage. Rather, this case allows recovery of attorney fees in any declaratory judgment action. The only

> limitation is that a trial court, in its discretion, find that an award of attorney fees is necessary or proper.
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> With this state of the law, I can foresee creditor/debtor contracts, labor contracts, zoning rights issues, employment rights/contract issues, all being pursued as declaratory judgment actions with the expectation of (1) having the contract construed favorably, (2) applying and receiving the further relief necessary to enforce the declaration of rights, and (3) recovering the proper further relief of attorney fees for having prevailed on the declaration of rights. Any case involving a justiciable controversy as to contracts, rights, or legal status (R.C. 2721.02 and 2721.03) now may support an award of attorney fees . . . .
>
> . . . 72 Ohio St.3d at 161-163.

5. The Ohio Supreme Court in its syllabus in *Whitehead v. General Tel. Co*. (1969), 20 Ohio St.2d 108, stated the common law principles of res judicata and adjunct principles of collateral estoppel as follows:

> 1. A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is res judicata as between the parties or their privies. (Paragraph No. 1 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67, approved and followed.)
>
> 2. A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies. The prior judgment estops a

> party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action. (Paragraphs Nos. 2 and 3 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67, approved and followed.)

6. The Supreme Court stated the rationale for its holding in *Broz v. Winland*, *supra*, 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. *Whitehead v. Gen. Tel. Co. of Ohio* (1969), 20 Ohio St.2d 108 . . .; *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193 . . . . In *Goodson*, this court stated this general rule, and noted, "[a]s a general principle, collateral estoppel operates only where all of the parties to the present proceeding were bound by the prior judgment. * * * A prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action." *Id*. at paragraph one of the syllabus. The rationale for this general rule was articulated in *Goodson*:
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> "The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be 'heard' in the due process sense." *Id*. at 200-201 . . . .
>
> The application of res judicata would deny appellants [the injured persons] 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 [the insured] 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.
>
> 68 Ohio St.3d at 523-524.

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	01-20-99	pp.	94-95
Reported, H. Civil & Commercial Law	03-03-99	p.	259
Passed House (95-0)	03-17-99	pp.	309-311
Reported, S. Judiciary	05-13-99	p.	426
Passed Senate (33-0)	05-18-99	pp.	436-437

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