Circuit Court for Montgomery County
Case No. 482460V

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 749

September Term, 2022

JONATHAN SOLOMON, *et al.*

v.

THOMAS J. COTHREN

Wells,
Shaw,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: September 7, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This appeal involves a request for declaratory judgment. A former plaintiff in the case below—Jenny Solomon—received addiction treatment from a recovery facility in Montgomery County where she met the Appellee—Thomas J. Cothren. Upon discovering an inappropriate relationship between Mrs. Solomon and Cothren, Mrs. Solomon's brother-in-law—Appellant Joshua Solomon—reported Cothren to the facility, which subsequently fired him. Cothren suggested that he would file a defamation suit against Joshua Solomon and Mrs. Solomon's husband—Appellant Dr. Jonathan Solomon. In anticipation, the Appellants brought suit requesting a declaratory judgment that they had not defamed Cothren. Shortly thereafter, Cothren filed a lawsuit against the Appellants alleging defamation and other causes of action. Appellants then amended their complaint to request declaratory relief regarding Cothren's additional causes of action.

Cothren moved to dismiss, or in the alternative, for summary judgment on, the Appellants' counts for declaratory relief. The circuit court granted Cothren's motion regarding the various counts (13–22) in the Appellants' suit. The Appellants now appeal.

This appeal requires us to determine[1] whether the circuit court erred in dismissing the Appellants' declaratory judgment action in favor of Cothren's full-merits tort claim.

[1] The Appellants drafted the questions presented as

> 1. Did the Circuit Court err in finding that Counts 14–22 of the Solomon Plaintiffs' Amended Complaint were not first filed because the counts had been set forth for the first time in an amended complaint, even though the counts arose from the same set of facts and circumstances and turned on the same legal principles as the Solomon Plaintiffs' original

We conclude that it did not and, therefore, shall affirm the judgment of the Circuit Court for Montgomery County.

BACKGROUND

Dr. Jonathan Solomon's late wife—Jenny Solomon—received inpatient addiction treatment at Fresh Start Recovery, LLC ("Fresh Start"), an addiction treatment facility in Montgomery County, for several weeks in 2019. After her discharge, she continued to receive out-patient and aftercare services.

Thomas Cothren was an employee at Fresh Start during the time that Mrs. Solomon was a patient. The Appellants alleged that Cothren participated in his professional capacity in Zoom calls with Fresh Start alumni, including Mrs. Solomon. Cothren denied this allegation. Appellants also alleged that, while Mrs. Solomon was receiving outpatient services from Fresh Start, she and Cothren began communicating over the internet. At some point, the communications became romantic and sexual. The relationship was discovered at some time in April 2020.

---

declaratory judgment count in their Initial Complaint, which had indisputably been filed first?

2. Did the Circuit Court err by dismissing the Solomon Plaintiffs' first-filed count for declaratory judgment on the grounds that, given the existence of Mr. Cothren's later-filed defamation claim, it was not "proper" for them to seek a declaration that they had not defamed Mr. Cothren?

Appellant Josh Solomon—Dr. Solomon's brother—reported the relationship to Fresh Start. Fresh Start then fired Cothren, prompting Cothren to hire an attorney. According to the Appellants, the attorney threatened them with a defamation lawsuit for reporting Cothren's misconduct.

On June 15, 2020, the Solomons filed suit in the Circuit Court for Montgomery County against Cothren and Fresh Start.[2] Because of Mrs. Solomon's subsequent death, the causes of action asserted on her behalf have been dismissed. The original complaint contained one count, seeking declaratory judgment that neither of the Solomon brothers had defamed Cothren.[3]

On June 19, 2020, Cothren filed suit in the Circuit Court for Prince George's County, alleging not only defamation against the Appellants, but also tortious interference with a contract, tortious interference with an economic expectancy, unreasonable intrusion upon seclusion, and civil conspiracy. The Cothren case in Prince George's County has since been transferred to Montgomery County.

Several months later, on December 14, 2020, the Appellants filed an amended complaint in their case in Montgomery County. The amended complaint set forth ten declaratory judgment counts instead of the initial one. Specifically, it sought declaratory relief that neither of the Solomon brothers had (1) defamed Cothren, (2) tortiously

[2] This appeal involves the dismissal of only certain counts against Cothren and not Fresh Start.

[3] Appellants have alleged that Cothren attempted to evade service in their lawsuit. This is not material to our resolution of the appeal.

interfered with a contract, (3) tortiously interfered with an economic expectancy, (4) unreasonably intruded on Cothren's seclusion, and (5) committed civil conspiracy. There was one count for each declaration relating to Joshua Solomon and one for Jonathan.

Cothren moved to dismiss the Appellants' amended complaint. The circuit court granted the motion on June 15, 2021. In so granting, the hearing judge stated that "the law always prefers to have substantive claims go forward rather than declaratory judgment actions, particularly when they've been filed first." The Appellants moved for reconsideration, arguing that Cothren's tort suit had not been filed prior to the requests for summary judgment. Denying the motion, the judge acknowledged that he initially dismissed the declaratory judgment actions because he did not think they were included in the initial complaint. He then said that this was true of all the counts except for the declaratory judgment count regarding defamation, thus affirming his ruling on those counts. On the one involving defamation, he said "there's no basis for having declaratory judgment to determine whether Dr. Solomon defamed Thomas Cothren. I'm not even sure that's -- I'm not even sure that would be a proper claim to file, given there's an actual claim filed. So in any event, I don't believe at this point that declaratory judgment seeking the same relief, the identical relief, which is the relief being sought in the claim by the defendant against Dr. Solomon for defamation. So I'll deny the motion to reconsider[.]"

The Appellants timely appealed to this Court.

PARTIES' CONTENTIONS

The parties first dispute the proper standard of review for the circuit court's dismissal of a declaratory judgment action. The Appellants contend the standard is *de novo* while Cothren argues that it is abuse of discretion.

On the substance of the appeal, the Appellants claim that the circuit court erred in finding that some of their declaratory judgment counts were not filed before Cothren's claims. They insist that the additional declaratory judgment counts in their amended complaint relate back to the initial count filed in the original complaint. They also argue that the circuit court erred in holding that it was not proper for their declaratory judgment action to persist given that Cothren had filed a full-merits tort suit addressing those items. They aver that declaratory judgment actions may be brought defensively in anticipation of litigation and that they should not be dismissed at the pleadings state. They further assert that their action is in line with the purpose of declaratory judgment actions to terminate uncertainty regarding the parties' legal rights.

Cothren maintains that the circuit court correctly dismissed the Appellants' amended claims. He argues that it does not matter whether the Appellants' complaint was first-filed because the circuit court had discretion to dismiss it if it determined that declaratory relief was not appropriate. He further asserts that declaratory relief is not appropriate when requested by a putative tort defendant seeking a pronouncement of nonliability. Alternatively, he argues that, assuming it matters, the Cothren complaint was

filed first because service of process was completed first in that case and the Appellants' amended complaint did not incorporate their initial complaint.

STANDARD OF REVIEW

Resolution of this appeal largely rests on the proper standard of review. Although our Supreme Court[4] has "admonished trial courts that, when a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, the court *must* enter a declaratory judgment[,]" *Salamon v. Progressive Classic Ins. Co.*, 379 Md. 301, 308 n.7 (2004) (quoting *Jackson v. Millstone*, 369 Md. 575, 594 (2002)) (emphasis added), it has also said that it "generally review[s] a trial court's decision to grant or deny declaratory judgment under an abuse of discretion standard." *Sprenger v. Public Serv. Comm'n of Md.*, 400 Md. 1, 21 (2007).

The authority for a court to issue a declaratory judgment can be found in Subtitle 4 of Title 3 in the Courts & Judicial Proceedings Article. Md. Code (1974, 2020 Repl. Vol.) Cts. & Jud. Pro. ("CJP") §§ 3-401–415. The purpose of the subtitle "is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." CJP § 3-402. Moreover, its provisions are to be "construed in harmony" with federal law pertaining to declaratory judgments. *Carroll Cty. Ethics Comm'n v. Lennon*, 119 Md. App. 49, 58 n.4 (1998); CJP § 3-414. The U.S. Supreme Court has said that

[4] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. See Md. Rule 1-101.1(a).

federal "district courts possess discretion in determining whether and when to entertain an action under the [federal] Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995).

CJP § 3-409(a) indicates that declaratory judgments are a discretionary type of relief:

> [A] court *may* grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:
>
> (1) An actual controversy exists between contending parties;
>
> (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or
>
> (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

(Emphasis added.) Because the statute uses the word "may," "[i]t follows that 'declaratory judgment generally is a discretionary type of relief.'" *Sprenger*, 400 Md. at 20 (quoting *Converge Servs. Group v. Curran*, 383 Md. 462, 477 (2004)).

Our Supreme Court explained the scope of review in *Converge Services Group*:

> A court may grant a declaratory judgment; therefore, declaratory judgment generally is a discretionary type of relief. The refusal to grant a discretionary order will be reversed on appeal if the judge abused his or her discretion.
>
> We have admonished trial courts that, when a declaratory judgment is brought, and the controversy is appropriate for resolution by a declaratory judgment, the court must enter a declaratory judgment. We have found this

> standard instructive when reviewing appeals of declaratory judgment actions dismissed on pre-trial motions. Of equal importance, and more instructive in this case, is the logical converse, that is, when a declaratory judgment action is brought and the controversy is not appropriate for resolution by declaratory judgment, the trial court is neither compelled, nor expected to enter a declaratory judgment.

383 Md. at 477 (cleaned up). Similarly, this Court has said that "[g]enerally, in a civil case, the circuit court when requested *may but need not* grant a declaratory judgment." *Polakoff v. Hampton*, 148 Md. App. 13, 25 (2002), *cert. denied* 373 Md. 408 (2003).

Accordingly, the proper standard of review for the dismissal of a declaratory judgment action is for abuse of discretion. Although it is improper for a court to decline to issue a declaration defining the rights of the parties solely because it resolved the controversy against the plaintiff seeking the declaration, *see Harford Mut. Ins. Co. v. Woodfin Equities Corp.*, 344 Md. 399, 414–15 (1997), it is within the trial court's discretion to determine whether a declaratory judgment would be proper for the underlying controversy, *see Converge Servs. Group*, 383 Md. at 477.

DISMISSAL OF THE DECLARATORY JUDGMENT COUNTS

As described, the circuit court dismissed the Appellants' declaratory judgment counts on the basis that some of the counts were filed after Cothren's lawsuit and that the one filed before—involving defamation—was not appropriate for declaratory relief given Cothren's pending suit on the same matter.

In *Popham v. State Farm*, our Supreme Court opined on the propriety of dismissing a declaratory judgment action. It proclaimed that "[i]t is well-settled that the grant of a

motion to dismiss is 'rarely appropriate in a declaratory judgment action.'" *Popham v. State Farm Mut. Ins. Co.*, 333 Md. 136, 140 n.2 (1993) (quoting *Broadwater v. State*, 303 Md. 461, 465 (1985)). That is because, where a plaintiff presents a real controversy for resolution by declaratory judgment, he is entitled to a declaration of rights even if the ultimate declaration is not in his favor. *Id.* The Court went on to describe when a dismissal might be proper:

> A situation in which a motion to dismiss a declaratory judgment action is properly granted is where it challenges the legal availability or appropriateness of the remedy. We have held that an action for declaratory judgment is not available to resolve questions that have become moot or where a declaration would neither serve a useful purpose nor terminate a controversy.

Id. (cleaned up). An example is when the issues in a declaratory judgment action involve the same issues in another pending proceeding. *Id.* (citing *Haynie v. Gold Bond Bldg. Products*, 306 Md. 644, 649–50 (1986); *Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 449 n.1 (1983); *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 406 (1975)).

Accordingly, actions for declaratory relief may be properly dismissed where, despite the existence of a justiciable controversy, the action is collusive, *Reyes v. Prince George's County*, 281 Md. 279, 289 (1977), where a party pursues a common law action but then subsequently institutes a declaratory judgment action involving the same matter, *Haynie v. Gold Bond Building Products*, 306 Md. 644, 649–50 (1986), and where a tort defendant files a declaratory judgment involving an issue encompassed within the

plaintiff's previously filed suit, *Aetna Casualty & Surety Co. v. Kuhl*, 296 Md. 446, 449 n.1 (1983); *Brohawn v. Transamerica Insurance Co.*, 276 Md. 396, 405 (1975).

Cothren is correct that the propriety of entertaining a declaratory judgment action does not depend on which lawsuit is first-filed. In *Polakoff*, the Appellate Court considered whether the circuit court erred in dismissing declaratory judgment actions against three sets of prospective plaintiffs. 148 Md. App. at 17. One had already filed a prior action, another had not, and the last were vaguely described as anyone who could file claims in the future. *Id.* at 18–19. Among other conclusions, the circuit court determined "that no useful purpose would be served by allowing the declaratory judgment action to proceed." *Id.* at 21.

A large part of the *Polakoff* opinion dealt with the second group—those prospective plaintiffs who had not filed a tort action against the prospective defendant. It first noted that the general rule—that it is improper to entertain a declaratory judgment action when there is a pending action involving the same issues—does not make the converse—that declaratory judgment is appropriate whenever no action has been filed—true. *Id.* at 31–32. Instead, "[t]he Uniform Declaratory Judgments Act is an enabling statute that confers upon certain courts the power to grant equitable relief in the form of a declaration of rights; it does not require them to do so, however, and indeed spells out that they may exercise discretion not to do so." *Id.* at 32. "[T]he court has discretion to entertain or decline the declaratory judgment action based on an assessment of its usefulness or likeliness to

terminate the controversy. That is the case whether or not there is a pending action between the parties on the same issue." *Id.*

Concluding that the circuit court did not abuse its discretion by dismissing the action against prospective plaintiffs who had not yet filed a complaint, this Court found persuasive decisions interpreting the federal Act governing declaratory judgments, which "have concluded that, while a prospective tort defendant is not prohibited from bringing a declaratory judgment act defensively to establish nonliability, the practice is disfavored." *Id.* at 33. It similarly noted that "state appellate courts applying the Uniform Declaratory Judgments Act have held that ordinarily a declaratory judgment action is not properly brought by a putative tort defendant for the purpose of obtaining a declaration of nonliability." *Id.* at 35.

Ultimately, the *Polakoff* Court

> conclude[d] . . . that the factors relevant to whether a circuit court should exercise discretion to hear a declaratory judgment action by a putative tort defendant against a prospective tort plaintiff are whether the proceeding will terminate the controversy between the parties or will otherwise settle or clarify their conflicting legal positions; whether going forward with the declaratory judgment case will negatively affect the rights of any party, by permitting procedural fencing or other tactical strategies, including those designed to prevent the party who traditionally would be the tort plaintiff from choosing the time and place of suit, or wresting control of the prospective litigation from him; and whether the parties' controversy can be more effectively and efficiently decided by the alternate remedy of a common-law tort action.

Id. at 37. These factors likewise guide our analysis in the present case.

On the first factor, the *Polakoff* Court considered it relevant that resolution of the declaratory judgment action would not terminate the proceeding because, while a ruling in the prospective defendant's favor would probably terminate the action, further proceedings would be necessary if a declaratory judgment was entered favoring prospective plaintiffs. *Id.* at 37–38. That is true here as well. If the declaration goes in Appellants' favor, no further proceedings are necessary. But if the declaration were entered in favor of Cothren, claims for defamation and other torts would continue.

On the second factor, the Court commented that the declaratory judgment action "would give the appellants control over the timing of litigation, and its venue, forcing the . . . appellees into litigation they might otherwise delay filing (or that they might not bring at all)." *Id.* at 38. In this case, whether maliciously or not, the declaratory judgment action also wrested control from Cothren. As a potential tort plaintiff, he would traditionally be able to bring suit at the time and appropriate place of his choosing. Although his action was transferred to Montgomery County, the Circuit Court for Prince George's County noted that venue was proper in Prince George's County. In addition, the filing of the declaratory judgment action requires Cothren to litigate an issue he otherwise would have been able to elect when to litigate.

On the third and final factor, the Court decided that it would be more effective and efficient for the claim to be resolved in a traditional tort action rather than a declaratory judgment action because, in the tort action, "all the claims and all the defenses—and all the evidence necessary to their determination—can be presented and decided together."

Id. In the present case, the parties' controversy can be more effectively and efficiently decided by the actual tort actions filed by Cothren. This is evidenced by the changes to the pleadings. In the initial request for declaratory relief, the Appellants only requested a declaratory judgment that they had not defamed Cothren. When Cothren filed his complaint, it included the other torts of tortious interference, unreasonable intrusion upon seclusion, defamation, and civil conspiracy. Only after the filing of Cothren's complaint did Appellants request declaratory relief regarding torts other than defamation. This demonstrates how the actual tort action is preferable to the declaratory judgment action. Whereas the Appellants' complaint isolated only defamation, the Cothren complaint included all other causes of action for which Cothren seeks relief.

It is preferable for all claims, defenses, and facts to be decided together, which can only be assured by proceeding with the traditional tort cause of action. For instance, if the Appellants proceeded with all declaratory judgment counts currently in the complaint, but Cothren later asserts a cause of action which fits the factual allegations but was not included in the request for declaratory relief, the declaration may not bar Cothren's future claim. On the other hand, if Cothren's tort claim proceeds to resolution, the doctrine of res judicata requires him to bring all claims based upon the same set of facts that one would normally expect to be tried together. *See Gonsalves v. Bingel*, 194 Md. App. 695, 711 (2010) ("The transactional approach [to res judicata] effectively obligates a plaintiff to bring in a single action all claims 'based upon the same set of facts[,] and [that] one would [ordinarily]

expect . . . to be tried together.'") (citation omitted). Thus, Cothren's tort litigation will be the final termination of the controversy between the two parties.

On the balance of these factors, the circuit court did not abuse its discretion in declining to enter declaratory relief because such relief would not be appropriate. The issues presented are better handled in the Cothren action, which will definitively terminate the controversy between the parties.

CONCLUSION

The Circuit Court for Montgomery County properly exercised its discretion to dismiss the Appellants' request for declaratory judgment. The issues would be better resolved in the Cothren action. Thus, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY DISMISSING COUNTS 13–22 OF THE APPELLANTS' AMENDED COMPLAINT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.