Circuit Court for Anne Arundel County
Case No. C-02-CV-22-000064

UNREPORTED**

IN THE APPELLATE COURT

OF MARYLAND*

No. 1012

September Term, 2022

PASQUALE CARANNANTE, ET AL.

v.

STEUART PITTMAN, JR., ET AL.

Wells, C.J.,
Friedman,
Shaw,

JJ.

Opinion by Shaw, J.

Filed: May 23, 2023

*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 is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This is an appeal from an order of the Circuit Court for Anne Arundel County that denied Appellants' motion for summary judgment and granted Appellees' motion to dismiss a declaratory judgment action. Appellants filed a timely notice of appeal and present the following rephrased questions for our review:[1]

1. Did the Circuit Court err in finding the matter moot?

2. Did the Circuit Court err in finding that the public interest exception to the mootness doctrine did not apply?

3. Did the Circuit Court err in finding that the capable of repetition, yet evading review exception to the mootness doctrine did not apply?

For reasons discussed below, we conclude there was no error, and we affirm.

BACKGROUND

The COVID-19 pandemic emergency began in early 2020, and various measures were taken by the Maryland Governor and Legislature in response to grim statistics on the spread of the virus and the resulting deaths. A federal judge in Maryland presiding over a case concerning anti-COVID-19 measures stated, "The Court struggles to put into words the magnitude of COVID-19's devastation." *Seth v. McDonough*, 461 F.Supp.3d 242, 247

[1] The Appellants' original questions presented are as follows:

1. Did the trial court err in finding the matter moot, in contravention of *Jackson v. Millstone*, 369 Md. 575 (2002), when a dispute continues to exist between the parties?

2. Did the trial court err in finding that the public interest exception to the mootness doctrine did not apply?

3. Did the trial court err in finding that the "capable of repetition" exception to the mootness doctrine did not apply?

(D. Md. 2020). "Mandated vaccination, self-testing for the disease, masking, and 'social distancing' became commonplace and, on occasion, controversial." *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 351 (2022).

The Maryland Department of Health published its Notice of Face Covering Recommendation on July 1, 2021. The Notice provided:

> The Maryland Department of Health (MDH) strongly recommends, but does not require, that all individuals who are not fully vaccinated continue to wear face coverings in all indoor settings outside of their home and in outdoor settings when physical distancing cannot be maintained.

On December 30, 2021, Anne Arundel County Executive Steuart Pittman, Jr., Appellee, issued "Executive Order Number 56" (the "Executive Order"), requiring:

> [A]ll persons over the age of two years shall wear a face covering while indoors at any location or area where members of the public are generally permitted or while outdoors in public spaces when it is not feasible to maintain a physical distance of six feet from persons who are not members of the same household or residence.

The Executive Order was enacted because "the spread of COVID-19 within Anne Arundel County has increased dramatically in the last four weeks, necessitating additional restrictive measures to save lives and prevent further exposure to COVID-19[.]" The goal of the Executive Order was "to reduce the threat to human health caused by the transmission of COVID-19 in the County, and to protect and save lives."

Then Governor Lawrence J. Hogan, Jr. issued a "Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19" throughout the State of Maryland on January 4, 2022, due to the rapid resurgence of COVID-19 in Maryland. According to the Anne Arundel County Department of Health, between December 5, 2021

and January 5, 2022, hospitalizations in Anne Arundel County due to COVID-19 increased by 345%, and patients in intensive care increased by 245%. During that same time, the case rate in Anne Arundel County increased by 645%, and the percent positivity rate increased 391%. Additionally, from December 30, 2021 to January 6, 2022, the deaths in Anne Arundel County from COVID-19 increased 600%.

Pursuant to § 1-6-104 of the Anne Arundel County Code, an "executive order may not be effective for more than seven days unless authorized by ordinance enacted by the County Council." As a result, on January 7, 2022, the Anne Arundel County Council (the "County Council") held a virtual Emergency Legislative Session to vote on two emergency matters. Bill No. 622, "An Emergency Ordinance concerning: COVID-19 and the Use of Face Coverings," and Bill No. 722, "An Emergency Ordinance concerning: Extension of Proclamation of Civil Emergency." Both failed before the County Council.

The Executive Order requiring face coverings expired on January 7, 2022, and the County Council declined to extend it. That same day, Anne Arundel County Health Officer Dr. Nilesh Kalyanaraman, Appellee, issued an "Order for Public Safety – Face Coverings" (the "mask mandate") in response to a surge of the COVID-19 pandemic. The mask mandate, mimicking the language of the Executive Order, required that face coverings be worn under certain circumstances, specifically:

> [A]ll persons over the age of two years in Anne Arundel County and in the City of Annapolis shall wear a face covering while indoors at any location or area where members of the public are generally permitted or while outdoors in public spaces when it is not feasible to maintain a physical distance of six feet from persons who are not members of the same household or residence.

The mask mandate stated, "[t]his order for public safety is issued this 7th day of January 2022, and shall be effective as of 5:00 p.m. on January 7, 2022, and shall continue in effect until terminated by the Health Officer or January 31, 2022, whichever is earlier."

The Secretary of the Maryland Department of Health, Dennis R. Schrader, issued a letter, dated January 10, 2022, to the Honorable Brian A. Chisholm, Maryland House of Delegates (District 31B), in response to the Delegate's inquiry about the January 7, 2022 action by the Anne Arundel County Health Department. The letter stated:

> At this time, it is the health policy of the State of Maryland, and in line with the U.S. Centers for Disease Control and Prevention's guidance, that we strongly recommend, but do not require, that all individuals who are not fully vaccinated continue to wear face coverings in all indoor settings outside of their home and in outdoor settings when physical distancing cannot be maintained.
>
> The Maryland Department of Health takes no position on Anne Arundel County's recent action. Local jurisdictions and their governing authority may impose more stringent requirements based on local jurisdiction authority.

The letter also revealed that Dr. Nilesh Kalyanaraman consulted with Dr. Jinlene Chan, the Deputy Secretary of Public Health Services for the Maryland Department of Health, "on the evening of January 6, 2022, regarding this subject."

On January 14, 2022, Pasquale Carannante and James Zimmerer, Appellants, filed a complaint seeking a temporary restraining order to enjoin the enforcement of the mask mandate, an injunction, and a declaratory judgment. Appellant Pasquale Carannante is the owner of Bella Napoli Restaurant in Pasadena, Maryland, and Appellant James Zimmerer owns a fitness business in Annapolis, Maryland. The Appellant business owners claimed the mask mandate resulted in their respective businesses losing revenue. Appellants

asserted the County Health Officer had no authority to enter the mask mandate order, the act was unconstitutional violating the separation of powers doctrine, and as a result, the mandate was invalid, void, and *ultra vires*.

The Circuit Court denied the request for a temporary restraining order on January 19, 2022. Following a hearing on January 25, 2022, the court denied a motion for a preliminary injunction. Appellants filed an appeal on January 27, 2022. The mask mandate in question expired on January 31, 2022 and was not renewed. On February 28, 2022, this Court dismissed the appeal as moot, pursuant to Maryland Rule 8-602(c)(8).

Appellants filed a petition for writ of certiorari in the Supreme Court of Maryland[2] on February 9, 2022, seeking review of the Circuit Court's denial of the temporary restraining order and preliminary injunction. The Supreme Court denied the petition for writ of certiorari on April 25, 2022 and remanded the case to the Circuit Court to address the remaining declaratory relief requested in the complaint. Appellants filed a motion for summary judgment, and Appellees each filed a motion to dismiss based on mootness. Appellants filed their respective responses. Following a hearing, the Circuit Court granted Appellees' motions to dismiss, denied Appellants' motion for summary judgment, and dismissed the complaint as moot on August 2, 2022.

Appellants filed a timely notice of appeal.

[2] 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.

STANDARD OF REVIEW

A "declaratory judgment generally is a discretionary type of relief." *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 477 (2004). Appellate courts "generally review a trial court's decision to grant or deny declaratory judgment under an abuse of discretion standard." *Sprenger v. Pub. Serv. Comm'n of Maryland*, 400 Md. 1, 21 (2007). "[I]t is clear that the exercise of declaratory jurisdiction is within the sound discretion of the court." *Tanner v. McKeldin*, 202 Md. 569, 577 (1953).

"We review the grant of a motion to dismiss *de novo*." *Unger v. Berger*, 214 Md. App. 426, 432 (2013) (quotations omitted). "In reviewing the underlying grant of a motion to dismiss, we must assume the truth of the well-pleaded factual allegations of the complaint, including the reasonable inferences that may be drawn from those allegations." *Adamson v. Corr. Med. Servs., Inc.*, 359 Md. 238, 246 (2000). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Bobo v. State*, 346 Md. 706, 709 (1997). "In sum, because we must deem the facts to be true, our task is confined to determining whether the trial court was legally correct in its decision to dismiss." *Adamson*, 359 Md. at 246.

DISCUSSION

I. The Circuit Court did not err in granting Appellees' motion to dismiss.

Appellants argue the Circuit Court erred in declaring the mask mandate issue moot as there is an existing controversy regarding the power and authority of the Anne Arundel County Health Officer. Appellants assert alternatively, that if the matter is moot, both exceptions to the mootness doctrine apply. Specifically, Appellants argue this is a

recurring issue of great public importance. Appellants assert that without a final declaration in this matter, it is capable of repetition and there will continue to be a dispute regarding the power and authority of the Health Officer.

In opposition, Appellees argue the Circuit Court's decision was proper. Appellees argue there is no actual controversy between the parties because the mask mandate expired on January 31, 2022. Appellees contend that the exceptions to the mootness doctrine do not apply because the mask mandate was based on unique circumstances that are not likely to repeat and that any issues are capable of being reviewed in the future if necessary. Appellees contend the public interest exception does not apply because the public will not be harmed if the question is not immediately decided.

The Maryland Uniform Declaratory Judgments Act statute provides:

> (a) Except as provided in subsection (d), 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 litigations; 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.

Md. Code Ann., Cts. & Jud. Proc. § 3-409(a).

"Declaratory relief is inappropriate in the absence of a justiciable controversy." *Curran*, 383 Md. at 478 (citing *Md. State Admin. Bd. of Election Laws v. Talbot Cnty.*, 316 Md. 332, 339 (1989)). A "controversy is justiciable when there are interested parties

asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded." *Reyes v. Prince George's Cnty.*, 281 Md. 279, 288 (1977) (internal citations omitted). The justiciable controversy prerequisite to a declaratory action is an "especially important principle in cases seeking to adjudicate constitutional rights." *Hatt v. Anderson*, 297 Md. 42, 46 (1983).

"[T]he declaratory judgment process is not available to decide purely theoretical questions or questions that may never arise, or questions which have become moot, or merely abstract questions." *Hamilton v. McAuliffe*, 277 Md. 336, 340 (1976) (internal citations omitted). "The declaratory judgment process is therefore ill fitted as a vehicle to declare the rights of parties in future circumstances as yet unknown." *Id*. at 341. "[A]n action for declaratory relief lacks ripeness if it involves a request that the court declare the rights of parties upon a state of facts which has not yet arisen, or upon a matter which is future, contingent and uncertain." *Hickory Point P'ship v. Anne Arundel Cnty.*, 316 Md. 118, 130 (1989).

"Generally, appellate courts do not decide academic or moot questions." *Att'y Gen. v. Anne Arundel Cnty. Sch. Bus Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979). "A case is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effect remedy." *Stevenson v. Lanham*, 127 Md. App. 597, 612 (1999) (citing *Coburn v. Coburn*, 342 Md. 244, 250 (1996)). "Although there is no constitutional bar to this Court expressing its views on a moot issue, we rarely do so and usually dismiss the appeal without addressing the merits

of the issue." *Powell v. Maryland Dep't of Health*, 455 Md. 520, 540 (2017) (citing *Mercy Hosp., Inc. v. Jackson*, 306 Md. 556, 562 (1986)).

The mask mandate in question expired on its own terms on January 31, 2022. As of February 2022, there was no controversy as there was no mask mandate in effect and there was no contention that a new pandemic or virus variant was apt to occur in the immediate future. Appellants contend, nevertheless, that there is a likelihood of future global pandemics and variants of the virus, which may require mask mandates. They assert that the controversy still exists because the Health Officer may issue another mask mandate. Appellees argue this proposition is speculation.

We agree with Appellees. The mere possibility of future pandemics, variants, legislative action and/or executive orders cannot be the bases for an actual, justiciable controversy. The public health crisis prompting the mask mandate in 2022 no longer exists and a reemergence of those precise circumstances in the future is impossible to predict. The declaratory judgment process cannot be used to decide questions based on conjecture and speculation. As such, we hold this matter is moot.

It is clear that a court may address a matter that has become moot. However, a court's authority to do so is only to be exercised 'in rare instances which demonstrate the most compelling of circumstances.'" *Stevenson*, 127 Md. App. at 624 (quoting *Reyes*, 281 Md. at 297). There are two recognized exceptions to the mootness doctrine. They are "the capable of repetition yet evading review and the public concern exceptions." *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 352 (2019).

"We 'may address the merits of a moot case if we are convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct.'" *Green v. Nassif*, 401 Md. 649, 655 (2007) (quoting *Coburn*, 342 Md. at 250). With respect to the public importance exception, the Supreme Court of Maryland has explained:

> [T]he better considered and reasoned cases take the view that only where the urgency of establishing a rule of future conduct in matters of public concern is imperative and manifest, will there be justified a departure from the general rule and practice of not deciding academic questions. They hold that if the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight.

Reyes, 281 Md. at 300 (quoting *Lloyd v. Supervisors of Elections*, 206 Md. 36, 43 (1954)).

Appellants argue that this case is of great public importance because the County Health Officer may impose a mask mandate in the future. Appellants rely on *Jackson v. Millstone*, 369 Md. 575 (2002), for the proposition that a trial court can make a declaration regarding a matter of public importance in the absence of a justiciable controversy.

In *Jackson*, the plaintiffs sought a declaration regarding a specific regulation, COMAR 10.09.06.06C, dealing with preauthorization of a liver transplant, which appellants asserted violated federal law. *Id*. at 587. The Circuit Court for Howard County "assumed that the case was not moot[,]" yet dismissed the complaint for failure to state a claim. *Id*. at 585. On appeal, this Court held the matter was moot because the authorized

liver transplant was "already received[.]" *Id*. The Supreme Court of Maryland reversed, holding "Jackson's action challenging the validity of the Department's regulation is not moot." *Id*. at 586.

Appellees reliance on *Jackson* to support their claim that this matter raises issues of great public concern is misplaced. The Court specifically stated, "Jackson's action does not fall into that "rare" category of cases where we have addressed moot questions when the public interest clearly will be hurt if the question is not immediately decided[.]" *Id.* (internal quotation marks and citations omitted). Rather, the Court determined Jackson's action "represents a live controversy" "when a statute or a regulation . . . may adversely affect a plaintiff in the future, and when the plaintiff has standing to challenge the enactment[.]" *Id*. at 590.

Here, Appellants are not challenging the constitutionality or validity of a statute or regulation, but rather, whether in the future, a County Health Officer might act outside of his authority. The *Jackson* opinion is, thus, inapplicable. Future hypothetical public health measures to address unknown infectious disease outbreaks do not fall within the narrow public importance exception.

Appellants also argue this matter is capable of repetition. They contend the mask mandate's duration was not long enough to be fully litigated, and the same parties will be subjected to future litigation. They assert that the County Health Officer may implement another mask mandate due to new variants of COVID-19 and this possibility justifies their concerns.

The capable of repetition, yet evading review exception applies when "(1) the challenged action was too short in its duration to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *State v. Parker*, 334 Md. 576, 585-86 (1994).

Assuming, arguendo, that the present case presents a matter of public importance, we observe that the issue was litigated within 30 days. The mask mandate was ordered on January 7, 2022, Appellants filed a complaint for declaratory judgment, injunctive relief and a request for a temporary restraining order on January 14, 2022. The court resolved the TRO and motion for injunction in less than 30 days which was prior to the expiration of the order. Appellants then noted an appeal.

If this Court were to assume the matter was not fully litigated because the declaratory judgment action was not determined within 30 days, we hold nevertheless there is no reasonable expectation, under the same circumstances, that the parties would be subjected to the same public safety mandate in the future. We agree with the trial judge, who stated:

> Here, the complained of order expired on its own terms on January 31, 2022. In the months since, there has been no suggestion that it would be reissued. The order was its own unique instrument, drafted at a unique time during the COVID pandemic under unique circumstances. Thus necessarily an analysis of its property and authority is fundamentally fact driven by the unique facts of its issuance. As such, there is not reasonable expectation that the same complaining parties would be subjected to the same action again.

In sum, this case presents no justiciable controversy, there are no exceptions to the mootness doctrine, and no circumstances exist that warrant this Court's further examination and review.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.