IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LAWRENCE WALDMAN,	:	APPEAL NOS. C-150462 C-150501
and	:	TRIAL NO. A-1405560
WALDMAN & COMPANY, P.S.C.,	:	
Plaintiffs-Counterclaim-Defendants-Appellants,	:	*O P I N I O N.*
vs.	:	
KENNETH B. PITCHER,	:	
and	:	
MICHAEL ENDERS,	:	
Defendants-Counterclaim-Plaintiffs-Appellees.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed from is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 31, 2016

Denlinger Rosenthal & Greenberg Co. LPA and *Gary L. Greenberg,* for Plaintiffs-Counterclaim-Defendants-Appellants,

Bingham Greenebaum Doll LLP and *V. Brandon McGrath,* for Defendants-Counterclaim-Plaintiffs-Appellees.

CUNNINGHAM, Presiding Judge.

{¶1} In these consolidated appeals, plaintiffs-counterclaim-defendants-appellants Lawrence Waldman and Waldman & Company, P.S.C. (collectively "Waldman"), appeal from the trial court's dismissal of their declaratory-judgment action against defendants-counterclaim-plaintiffs-appellees Kenneth B. Pitcher and Michael Enders on grounds that there was no justiciable issue to resolve. Waldman intended to report Pitcher and Enders, tax specialist accountants and his former associates, to the Internal Revenue Service's Office of Professional Responsibility (the "OPR"). Waldman sought a declaration that the nondisparagement provision of a settlement agreement between Waldman, Pitcher, and Enders was unenforceable in light of public policy protecting the reporting of disreputable activities by tax practitioners. Because Waldman has asserted facts in their complaint which, when accepted as true for purposes of resolving a Civ.R. 12(C) motion, demonstrated that Waldman's ability to make a statement to the OPR was actively contested by Pitcher and Enders, an actual controversy of the requisite immediacy existed between the parties. We reverse.

The Nondisparagement Provision

{¶2} As we explained in *Pitcher v. Waldman*, 1st Dist. Hamilton No. C-160245, 2016-Ohio-5491, ¶ 2:

> The parties are the former owners of * * * an accounting firm. In 2009, Pitcher and Enders filed a lawsuit seeking a judicial dissolution of the firm. In October 2009, the parties entered into a settlement agreement in which Pitcher and Enders relinquished their ownership [in the firm]. The settlement agreement also contained a non-

> disparagement provision, which stated that 'Pitcher, Enders, Waldman * * * agree * * * not to make or publish any negative or disparaging statements or comments about one another[.]'

{¶3} The parties' irreconcilable differences continued despite the 2009 settlement agreement. To settle subsequent litigation, the parties entered into a second settlement agreement in 2012, which provided that the nondisparagement terms of the 2009 agreement would remain in effect unless modified by a later agreement.

{¶4} The differences between the former co-owners continued in both state- and federal-court litigation. For example, in March 2014, a federal district court held that Waldman had violated federal law by willfully issuing fraudulent tax documents to Pitcher and Enders. Both state and federal courts had entered protective orders restricting and limiting the use of tax information produced during the lawsuits. None of the protective orders had disturbed the nondisparagement provision of the 2009 agreement.

OPR Circular 230 and Waldman's Proposed Letters

{¶5} Pursuant to rule-making authority, the Secretary of the Treasury has published regulations governing tax practitioners' behavior in matters before the IRS. These regulations are published in pamphlet form as IRS Circular 230. *See* 69 Fed.Reg. 75839 and 75840. Circular 230 requires tax practitioners to be reputable and competent. They may be sanctioned for giving false and misleading information, willfully evading any assessment or payment of federal tax, or making false statements in practice before the IRS. *See* 31 C.F.R. 10.51(a). Circular 230 also provides that any person "may make an oral or written report of the alleged

violation" of the provisions of the circular to the OPR. But there is no provision in the circular mandating the reporting of contumacious behavior by a tax practitioner.

{¶6} On September 5, 2014, Waldman sent Pitcher and Enders a draft of a letter that they proposed to send to the OPR. In the detailed, nine-page letter, Waldman accused Pitcher and Enders of tax fraud and requested an IRS investigation into their conduct. They claimed that

> Pitcher & Enders [had] engaged in tax avoidance on their personal tax returns and their closely held corporation [returns] * * * for various tax years between 2009 [and 2012]. * * * Pitcher & Enders [had also given] false and misleading information to representatives of the Department of the Treasury, [to the OPR, and to the IRS auditors reviewing their related tax returns.] Also, they have made false complaints against me * * * in an attempt to intimidate me to withdraw my information tax report * * * and not make accurate reports to the IRS.

{¶7} Waldman stated that they were performing a public service in informing the OPR of facts that it could learn of in no other way. Waldman asserted that any term of the nondisparagement provision that would preclude the reporting of incompetent, disreputable, or dishonest activities by tax practitioners to the OPR was in violation of the public policy underlying Circular 230, and thus was invalid and unenforceable. The letter concluded by inquiring whether Pitcher and Enders agreed with this position.

{¶8} They did not agree. In a September 9, 2014 letter, Pitcher and Enders' counsel asserted that if Waldman's action in sending the proposed letter violated "any of the various agreements," they would "take appropriate action as necessary to

protect their rights." Nonetheless, Waldman filed, under seal, a complaint, and then a first amended complaint, seeking a declaration that sending the proposed OPR letter would not violate the nondisparagement provision of the 2009 settlement agreement and the subsequent protective orders.

{¶9} Six months later, in March 2015, Waldman filed a second amended complaint and attached a second version of the letter they proposed to send to the OPR. In the second letter, Waldman again requested an investigation of Pitcher and Enders under Circular 230. But Waldman had withdrawn allegations that Pitcher and Enders had made false and misleading statements to the IRS and had attempted to intimidate him. Nonetheless, Waldman continued to allege that "Pitcher & Enders [had] engaged in tax avoidance" on their personal tax returns and their closely held corporation tax returns between 2009 and 2012. Waldman did not send either letter to the OPR.

{¶10} Pitcher and Enders answered the amended complaint, asserting that Waldman was barred by the express terms of the nondisparagement provision from making the proposed statements to the OPR. They also asserted a counterclaim seeking to enjoin Waldman from sending the proposed OPR letter.

{¶11} Waldman then moved for judgment on the pleadings, under Civ.R. 12(C), again arguing that enforcement of the nondisparagement provision was in violation of public policy. Pitcher and Enders also moved for judgment on the pleadings, asserting that Waldman had failed to raise a justiciable controversy ripe for judicial review. They argued that Waldman was merely seeking an advisory opinion from the trial court conferring permission to breach the nondisparagement agreement. Pitcher and Enders contended that Waldman was seeking "absolution" for the hypothetical, contingent act of making a disparaging statement in a letter to

the OPR. Pitcher and Enders also argued, in the alternative, that if Waldman had alleged sufficient facts to invoke the court's jurisdiction, they be granted a permanent injunction preventing Waldman from sending the proposed OPR letter.

The Trial Court's Ruling: No Case in Controversy

{¶12} The trial court granted Pitcher and Enders' motion for judgment on the pleadings and dismissed "this matter * * * in its entirety," granting no other relief to either party. In its July 8, 2015 opinion letter, the trial court explained that:

> [Waldman] is seeking this Court's blessing to send a letter to the Internal Revenue Service. [Pitcher and Enders dispute] the accuracy of the * * * proposed letter [and] believe that [Waldman] is asking for an advisory opinion.
>
> * * *
>
> [Pitcher and Enders'] Motion for Judgment on the Pleadings is granted. There is simply no case in controversy here. I have no idea as to the accuracy of the proposed letter. I do not know why it needs to be sent over three years after the settlement agreement was executed.
>
> * * *
>
> [Waldman] is free to send [the] proposed letter or not. I take no position as to whether this action would be appropriate or not. If a case arises, then that case will be litigated and decided either in State or Federal Court.

{¶13} Waldman brought these consolidated appeals challenging the trial court's order dismissing their complaint. *See* R.C. 2505.02(B)(2); *see also Gen.*

Accident Ins. Co. v. Ins. Co. of N. Am., 44 Ohio St.3d 17, 540 N.E.2d 266 (1989), paragraph two of the syllabus.

{¶14} In their first assignment of error, Waldman argues that the trial court erred in concluding that there was no justiciable case in controversy between the parties. Because their legal right to send the proposed OPR letter was actively contested by Pitcher and Enders, Waldman argues that an actual controversy existed. Therefore, Waldman was not required to send the letter prior to seeking a declaration of their contested rights from the court. Pitcher and Enders maintain that Waldman was seeking an advisory opinion based on the hypothetical, future action of sending a letter to the OPR.

An Abuse-of-Discretion Standard of Review

{¶15} A trial court ruling on a Civ.R. 12(C) motion for judgment on the pleadings must accept all material allegations in the nonmoving party's complaint as true, must construe all reasonable inferences in that party's favor, and can only grant a dismissal if it appears beyond doubt that the nonmoving plaintiffs cannot prove any set of facts entitling them to the requested relief. *See Corporex Dev. & Constr. Mgt. Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, ¶ 2. Ordinarily, we review de novo a trial court's ruling on a Civ.R. 12(C) motion for judgment on the pleadings. *See Chase Home Fin., LLC v. Literski*, 1st Dist. Hamilton Nos. C-130404 and C-130433, 2014-Ohio-615, ¶ 10. But where the trial court has resolved the motion by concluding that no justiciable controversy exists, our standard of review changes.

{¶16} In *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13, the Ohio Supreme Court reviewed a trial court's decision to dismiss a

declaratory-judgment action under Civ.R. 12(B)(6) due to the lack of a justiciable controversy. It held that the appropriate standard of review for the trial court's justiciability determination was an abuse-of-discretion standard. *See id.*; *see also Fulton RR. Co. v. City of Cincinnati*, 1st Dist. Hamilton No. C-150373, 2016-Ohio-3520, ¶ 7; *McQueen v. Dohoney*, 1st Dist. Hamilton No. C-130196, 2013-Ohio-2424, ¶ 16.

{¶17} A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. *See Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 752 N.E.2d 267 (2001). The bases for dismissing a complaint under the two types of motions are sufficiently analogous that we now extend the holding of *Arnott* to cases resolved by a Civ.R. 12(C) motion. Thus we review the trial court's decision resolving a Civ.R. 12(C) motion on the basis of justiciability under an abuse-of-discretion standard. *Compare Mallory v. Cincinnati*, 1st Dist. Hamilton No. C-110563, 2012-Ohio-2861, ¶ 9 (reviewing de novo a similar motion regarding justiciability in a declaratory-judgment action in a decision released before *Arnott*). Reversal is therefore warranted only if the trial court's decision regarding justiciability was unreasonable, arbitrary, or unconscionable. *See AAAA Ent., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). An unreasonable decision is one that is not supported by a sound reasoning process. *See id.*

The Actual-Controversy Requirement

{¶18} Ohio's Declaratory Judgment Act is "remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Radaszewski v. Keating*, 141 Ohio St. 489, 496, 49 N.E.2d 167 (1943) (interpreting former G.C. 12102-12). *Accord Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142. Thus, a declaratory judgment may relieve parties from acting at their own peril in order to establish their legal rights. *See Mid-Am. Fire & Cas. Co.* at ¶ 8.

{¶19} In R.C. Chapter 2721, the General Assembly provided that any person interested under a written contract, or other writing constituting a contract, may bring a declaratory-judgment action to have a court determine any question of construction or rights arising under the contract, "either before or after there has been a breach of the contract." R.C. 2721.03 and 2721.04; *see Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 111, 507 N.E.2d 1118 (1987); *see also Weckel v. Cole + Russell Architects*, 2013-Ohio-2718, 994 N.E.2d 885, ¶ 20 (1st Dist.) (holding that a settlement agreement is a contract).

{¶20} But the Declaratory Judgment Act does not authorize a court to render an advisory opinion. The Ohio Constitution mandates that the subject-matter jurisdiction of the common pleas courts is limited to "justiciable matters." Ohio Constitution, Article IV, Section 4(B); *see McQueen*, 1st Dist. Hamilton No. C-130196, 2013-Ohio-2424, at ¶ 13. Thus a declaratory-judgment action must, like any action, satisfy a threshold requirement of justiciability. *Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, at ¶ 10; *see Mid-Am. Fire & Cas. Co.* at ¶ 9.

{¶21} The Ohio Supreme Court has interpreted "justiciable matter" to mean the existence of an actual controversy, a genuine dispute between adverse parties.

State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas, 74 Ohio St.3d 536, 542, 660 N.E.2d 458 (1996). The dispute must be "more than a disagreement; the parties must have adverse legal interests." *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 10. Thus a justiciable controversy exists for purposes of a declaratory-judgment action when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *See Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973); *see also Mallory*, 1st Dist. Hamilton No. C-110563, 2012-Ohio-2861, at ¶ 10.

{¶22} The United States Supreme Court has adopted a similar standard, holding that "the question in each [declaratory-judgment] case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy * * * of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007). While not bound by the United States Supreme Court's interpretation of federal case-or-controversy jurisprudence, "Ohio courts have generally chosen to voluntarily follow justiciability doctrines developed by federal courts." Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 Clev.St.L.Rev. 531, 555 (2004).

{¶23} In *MedImmune*, the Supreme Court held that in a declaratory-judgment action, while the party suing need not have sustained a cognizable loss, he or she must face a set of circumstances that exhibits the imminent threat of loss to present a justiciable controversy. *MedImmune* at 127. A patent licensee had sought a declaratory judgment as to whether a certain patent was invalid or unenforceable before the licensee had even breached the relevant licensing agreement. Prior to

seeking declaratory relief, the licensee had received a letter from the patent holder stating a "clear threat" to enforce specific patent rights if the patentee failed to make royalty payments under the parties' license agreement. *Id.* at 122.

{¶24} The Supreme Court found that the correspondence demonstrated the parties' "adverse legal interests" in a justiciable infringement dispute. *See id.* at 127 and 137. It noted that federal courts and state courts "interpreting declaratory judgment acts requiring 'actual controversy' " have long accepted jurisdiction in cases where "the plaintiff's self-avoidance of imminent injury is coerced by threatened enforcement action of a *private party* * * * ." (Emphasis in the original.) *Id.* at 130. The rule that a plaintiff must "bet the farm" and risk monetary damages before seeking a declaration of its contested legal rights is not supported by actual-controversy jurisprudence. *See id.* at 134.

{¶25} Here, Waldman had asserted facts in their complaint, which when accepted as true by the trial court for purposes of resolving a Civ.R. 12(C) motion, demonstrated that they believed they were free to report Pitcher and Enders' activities to the OPR. The nondisparagement provision of the settlement agreement provided penalties for making that report absent a public-policy exception. And Pitcher and Enders' September 9, 2014 letter, stating that they would "take appropriate action" to pursue their legal rights under the nondisparagement provision, placed the parties' legal rights in dispute.

{¶26} But Pitcher and Enders challenge the genuineness, immediacy, and reality of the dispute between the parties. For an actual controversy to exist, the danger or dilemma facing the plaintiff must not be contingent on "the happening of hypothetical future events." *See Mid-Am. Fire & Cas.* Co., 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, at ¶ 9, quoting *League for Preservation of Civil Rights*

v. Cincinnati, 64 Ohio App. 195, 197, 28 N.E.2d 660 (1st Dist.1940), and Borchard, *Declaratory Judgments*, 40 (1934). Thus a question of ripeness is inherent in determining whether a future event constrains justiciability. *See Thomson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist Franklin No. 09AP-782, 2010-Ohio-416, ¶ 7.

{¶27} Pitcher and Enders first assert that the changing language of the two proposed OPR letters demonstrated the hypothetical nature of the relief requested by Waldman. The differing versions of the proposed letter provided a moving target for the trial court's resolution. *See R.A.S. Entertainment v. City of Cleveland*, 130 Ohio App.3d 125, 131-132, 719 N.E.2d 641 (8th Dist.1998) (holding that the nature of live exotic dance routines were subject to subtle yet significant variations during each performance, and thus were too hypothetical for resolution by declaratory judgment).

{¶28} But here, the gravamen of the dispute was fixed in the text of the letters. As Pitcher and Enders concede in their appellate brief, the second version of the OPR letter, attached to Waldman's amended complaint, "still essentially accused [them] of tax fraud." The textual changes to the two letters had little import for the controversy at bar: whether Waldman had alleged facts in their pleadings establishing that an actual controversy existed between the parties. The content of the letter was set with specificity. The reaction of the OPR was irrelevant; the mere sending of the letter would constitute breach of the nondisparagement provision absent a public-policy exception.

{¶29} Even if the terms of the dispute, as here, were fixed, Pitcher and Enders argue that any danger or dilemma facing Waldman was contingent on the hypothetical future event of the letter being sent to OPR. *See Mid-Am. Fire & Cas. Co.*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, at ¶ 9. For example, in

Fulton RR. Co. v. City of Cincinnati, 1st Dist. Hamilton No. C-150373, 2016-Ohio-3520, ¶ 10-11, this court affirmed the trial court's dismissal of the plaintiffs' complaint seeking a judgment declaring city noise regulations unconstitutional. Since their complaint had not alleged that they had been subject to any adverse conduct by the city, or that their own conduct exceeded the permissible sound levels, we held that any "danger or dilemma" to plaintiffs was contingent on the city's hypothetical future action of issuing a noise-ordinance citation. *See id.*

{¶30} Similarly, in *Mallory*, we reversed the trial court's granting of a motion for judgment on the pleadings and held that there was no justiciable controversy between the mayor and the city. The mayor had not been subject to any adverse conduct by the city because the city had not yet treated the mayor's car allowance and health-insurance benefits as compensation. Nor did the mayor allege in his complaint that the city had ever indicated that it intended to treat those benefits as compensation. *See Mallory*, 1st Dist. Hamilton No. C-110563, 2012-Ohio-2861, at ¶ 14; *see also State ex rel. Bolin v. Ohio EPA*, 82 Ohio App.3d 410, 612 N.E.2d 498 (9th Dist.1992); *Kincaid*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, at ¶ 17.

{¶31} But here, in their September 9, 2014 letter, Pitcher and Enders have stated their clear intention to enforce their legal rights if Waldman sends the letter to the OPR. *See MedImmune*, 549 U.S. at 122, 127 S.Ct. 764, 166 L.Ed.2d 604. Waldman need not "bet the farm" and risk money damages before seeking a declaration of their contested legal rights. *See id.* at 134. The remaining future events presented in the pleadings, thus, are not "merely possible or remote." *See Mid-Am. Fire & Cas. Co.*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, at ¶ 9. They are imminent and clearly established.

{¶32} Here, Waldman had asserted facts in their complaint, which when accepted as true for purposes of resolving a Civ.R. 12(C) motion, demonstrated that they believed they were free to report Pitcher and Enders' activities to the OPR. Pitcher and Enders' letter stating that they would "take appropriate action" to pursue their legal rights under the nondisparagement provision was a clear threat of action. Since Waldman's right to send the proposed OPR letter was actively contested by Pitcher and Enders, an actual controversy of the requisite immediacy existed between the parties.

{¶33} Despite these facts, the trial court dismissed the action for lack of a justiciable controversy. The trial court's attention was directed to concerns about the accuracy of Waldman's assertions. But here, where the trial court was required initially to review whether the facts alleged demonstrated a genuine dispute of sufficient immediacy and reality, we hold that the trial court's decision was not supported by a sound reasoning process. *See AAAA Ent., Inc.*, 50 Ohio St.3d at 161, 553 N.E.2d 597. The first assignment of error is sustained.

No Trial-Court Ruling on the Public-Policy Issue

{¶34} In their second assignment of error, Waldman maintains that the trial court erred in denying their motion for judgment on the pleadings on grounds that their right to file the proposed OPR letter was protected by public policy, notwithstanding the nondisparagement provision of the settlement agreement.

{¶35} Here, the trial court's July 8, 2015 opinion letter clearly indicates that the matter was resolved on the basis that no case in controversy existed and therefore the court lacked subject-matter jurisdiction. The trial court made no ruling on Waldman's public-policy argument. It expressly declared that "I take no position

on whether [sending the OPR letter] is appropriate or not." The error being asserted, an adverse ruling on Waldman's public-policy argument, is not, as it cannot be, demonstrated in this record. Therefore, we overrule the second assignment of error on this basis alone.

Conclusion

{¶36} Having sustained Waldman's first assignment of error, the trial court's July 10, 2015 entry dismissing the matter "in its entirety" on grounds that Waldman had failed to raise a justiciable controversy is reversed. The cause is remanded for proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

MOCK and **STAUTBERG, JJ.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.