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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 10/25/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

GARRY KIRSTEN; D.C.; SVETLANA ) 1 CA-CV 10-0397  
PEDENKO, M.D.; QUIRINO VALEROS, )  
M.D.; MICHAEL SHOWAH, D.C.; and ) DEPARTMENT D  
MIDTOWN MEDICAL GROUP INC. dba )  
PRIORITY MEDICAL CENTER, )  
 ) **MEMORANDUM DECISION**  
 ) (Not for Publication -  
Plaintiffs/Appellants/ ) Rule 28, Arizona Rules of  
Cross-Appellees, ) Civil Appellate Procedure)  
 )  
v. )  
 )  
STEVEN D. SMITH; CAVANAGH LAW )  
FIRM; STATE FARM MUTUAL )  
AUTOMOBILE INSURANCE COMPANY, )  
 )  
Defendants/Appellees/ )  
Cross-Appellants. )  
 )

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-017811

The Honorable Joseph B. Heilman, Retired Judge

**VACATED**

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P O R T L E Y, Judge

¶1 We are asked to decide whether the trial court erred when it granted a declaratory judgment to Drs. Garry Kirsten, Svetlana Pedenko, Quirino Valeros, Michael Showah, and their employer, Midtown Medical Group, Inc. d/b/a Priority Medical Center (hereinafter collectively designated as "PMC") against Steven D. Smith, Esq., The Cavanagh Law Firm, and State Farm Mutual Automobile Insurance Company (hereinafter collectively designated as "Smith"). Because we find there was no justiciable controversy to give the court jurisdiction over the action, we vacate the grant of declaratory relief.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 PMC filed a declaratory judgment action in 2008 against Smith. PMC sought a permanent injunction and a declaration that if any of the doctors or chiropractors then employed by PMC or in the future is listed as an expert in a lawsuit being defended by Smith, the doctors or chiropractors must receive "reasonable expert fees" for the time they spend responding to discovery, pursuant to Arizona Rule of Civil Procedure 26(b)(4)(A) and (C).

¶3 According to the complaint, the lawsuit was part of a continuing battle between PMC and Smith over the payment of reasonable fees to its doctors and chiropractors for depositions. Some eight years earlier, in *Pena v. State Farm*

*Mut. Auto. Ins. Co.*,<sup>1</sup> Maricopa County Superior Court Cause No. CV-1999-16698, PMC secured a declaratory judgment against Smith which provided, in relevant part:

The court hereby declares, pursuant to its authority under A.R.S. § 12-1831, *et seq.*, that when the [P]laintiffs are identified as a party's expert pursuant to Rule 26(b)(4)(A) of the Arizona Rules of Civil Procedure, the Plaintiffs are entitled to reasonable expert fees for the time they spend responding to discovery, including the deposition.

The court further declares that, when the [P]laintiffs are not identified as experts by a party pursuant to [R]ule 26(b)(4)(A), and their depositions are noticed as "ordinary fact witnesses" pursuant to [R]ule 30, they are not entitled to such expert fees.

¶14 Smith complied with the *Pena* order. After the doctors who were the *Pena* plaintiffs left the employ of PMC, however, the complaint alleged that, regardless of whether a PMC doctor was listed as a plaintiff's expert, Smith would subpoena the PMC doctor for a deposition with a twelve-dollar check.

¶15 Smith answered the complaint. PMC subsequently filed a motion for summary judgment and Smith filed a motion to dismiss with its response to PMC's motion. PMC argued that the doctrine of offensive collateral estoppel or issue preclusion should apply to Smith. The trial court rejected the collateral

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<sup>1</sup> Smith and The Cavanagh Law Firm were also defendants in *Pena*. The plaintiffs, however, were one doctor and two chiropractors who are no longer employed by PMC.

estoppel argument, but "adopted" the *Pena* ruling and held that, "in matters assigned to this division, Defendants . . . are precluded from seeking the issuance of subpoenas for discovery or trial, accompanied by funds which pay only ordinary witness fees, to treating physicians [who] are designated as experts in this case . . . ." The court also stated that "Smith's continued use of non-conforming subpoenas . . . evince an element of bad faith on the part of Defendants, and . . . might be characterized as harassment of the plaintiffs." The court awarded attorney's fees and costs to PMC, but subsequently denied the fee request after it found that PMC failed to demonstrate that its fees were reasonable.

¶16 PMC filed a notice of appeal, and Smith filed a cross appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) and (A)(5)(b) (2011 Ariz. Sess. Laws, ch. 304, § 1 (1st Reg. Sess.)).

#### DISCUSSION<sup>2</sup>

¶17 The central and only issue we will decide is whether there was a justiciable controversy between the parties.

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<sup>2</sup> Because this case was summarily decided, we review the grant of "summary judgment *de novo*, both as to whether there are any genuine issues of material fact and as to whether the moving party is entitled to judgment as a matter of law." *Greenwood v. State*, 217 Ariz. 438, 442, § 13, 175 P.3d 687, 691 (App. 2008) (citing *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶¶ 13-14, 38 P.3d 12, 20 (2002)).

Although Smith argues that there is no justiciable controversy and PMC argues that the dispute evades review and thus is appropriate for declaratory relief, we find no justiciable controversy to give the trial court jurisdiction to resolve the dispute.

¶18 “[A] justiciable controversy exists if there is an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party.” *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 45, ¶ 10, 13 P.3d 785, 787 (App. 2000) (internal quotation marks omitted) (quoting *Samaritan Health Servs. v. City of Glendale*, 148 Ariz. 394, 395, 714 P.2d 887, 888 (App. 1986)). To determine whether the trial court has jurisdiction to resolve the matter, the complaint must “set forth sufficient facts to establish that there is a justiciable controversy.” *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972).

¶19 Although the declaratory judgment act is to be liberally interpreted, *Keggi*, 199 Ariz. at 45, ¶ 10, 13 P.3d at 787, it is not designed to furnish an additional remedy when an adequate one exists. *Merritt-Chapman & Scott Corp. v. Frazier*, 92 Ariz. 136, 139, 375 P.2d 18, 19-20 (1962) (holding that declaratory relief is inappropriate when the issue presented is already pending in another forum); *Land Dep’t v. O’Toole*, 154

Ariz. 43, 47, 739 P.2d 1360, 1364 (App. 1987). Moreover, declaratory relief is inappropriate to resolve future or theoretical rights. *Hunt v. Richardson*, 216 Ariz. 114, 125, ¶¶ 37-38, 163 P.3d 1064, 1075 (App. 2007). Declaratory relief, however, may be appropriate to "decide a moot question or abstract proposition if the issue is one of great public importance or one that is capable of repetition yet evading review." *Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210, 1215 (App. 1991) (internal quotation marks omitted) (citing *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 230, 696 P.2d 1376, 1379 (App. 1985)).

¶10 Here, after the complaint identified the parties and recited the *Pena* order, paragraph nine stated that Dr. Showah had not been served with any subpoena by Smith but could be subpoenaed if and "when he is listed as a plaintiff's expert." The next two paragraphs stated that Drs. Kirsten and Pedenko were served in *Mendoza v. Hunter*, Maricopa County Superior Court Cause No. CV-2007-015673, but that neither doctor received any check with the subpoena and Smith did not comply with Arizona Rule of Civil Procedure 30(a) as to Dr. Pedenko.

¶11 On its face, the complaint does not allege any justiciable issue between Smith and Dr. Showah. The complaint anticipates that there may be a conflict if and when Dr. Showah sees a patient who becomes a plaintiff and Smith wants to depose

the doctor. Declaratory relief cannot anticipate future events and acts. See *Hunt*, 216 Ariz. at 125, ¶ 38, 163 P.3d at 1075. Consequently, there was no justiciable controversy between Dr. Showah and Smith to warrant declaratory relief.

¶12 Similarly, Dr. Valeros is listed in the caption as a plaintiff and identified in an introductory paragraph as a current or former PMC employee. There are no facts alleged in the complaint that would create a justiciable controversy with Smith. In fact, in the rebuttal statement of facts supporting PMC's motion for summary judgment, Dr. Valeros was subpoenaed by Smith in 2006 and the matter was resolved when he received reasonable fees as a listed expert witness. Consequently, there was no justiciable controversy between Valeros and Smith at the time the complaint was filed to warrant declaratory relief.

¶13 Although Drs. Kirsten and Pedenko were subpoenaed in the *Mendoza* matter, both had, and exercised, a remedy in that case.<sup>3</sup> Dr. Pedenko successfully challenged her subpoena and it was quashed. Dr. Kirsten also challenged his subpoena after he was listed as the plaintiff's expert and Smith was required to pay his reasonable fees. The fact that the doctors had an adequate remedy in the *Mendoza* forum to challenge the subpoenas, and successfully did so, demonstrates that there was not a

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<sup>3</sup> The case was settled. A stipulated dismissal was filed on November 6, 2009, and the case was dismissed with prejudice the following month.

separate justiciable controversy that warranted the exercise of declaratory relief.

¶14 Finally, there is no allegation in the complaint that PMC has a justiciable dispute with Smith. Although PMC argued in its motion for summary judgment that it has an interest because doctors in its employment eventually leave its employment after receiving subpoenas without a check for their reasonable fees when they are listed as an expert witness pursuant to Rule 26(b)(4)(C), PMC did not allege a legal interest that it can assert which is being denied or can be denied by Smith. Consequently, there is no justiciable controversy between PMC and Smith.

¶15 PMC argues, however, that its disagreement with Smith about the interpretation of Rule 26(b)(4)(C) continues to be repeated and evades review because its doctors and chiropractors have to routinely hire a lawyer to file pleadings to get a superior court to order Smith to pay them reasonable fees when they have been listed as an expert. Long ago our supreme court, in *Board of Examiners of Plumbers v. Marchese*, stated that "whether an appellate court should pass upon the merits of a case which has become moot, to a great extent, is discretionary." 49 Ariz. 350, 352-53, 66 P.2d 1035, 1037 (1937). We have, however, stated that we need not exercise that discretion even if the case is capable of repetition but does



not evade review. See *Thomas*, 171 Ariz. at 74-75, 828 P.2d at 1215-16; *Contempo-Tempe Mobile Home Owners Ass'n*, 144 Ariz. at 230, 696 P.2d at 1379.

¶16 Although it is clear that the issue has been raised with different trial judges or arbitrators since *Pena*, each PMC doctor or chiropractor served with a subpoena and only a twelve-dollar check has a remedy under the Arizona Rules of Civil Procedure if he or she is listed as an expert and files a motion for a protective order. Moreover, as we learned during the appellate oral argument, PMC has always been successful in seeking fees. If, however, a trial court disagreed with the doctor or chiropractor, a petition for special action could be filed because the doctor or chiropractor does not have any remedy on appeal. Thus, although the issue is capable of repetition, it does not evade review. Consequently, because there is a remedy, there is no justiciable controversy to allow the trial court to exercise jurisdiction to grant declaratory relief.

¶17 Because there was no justiciable controversy, summary judgment was improvidently granted and the complaint should have been dismissed as a matter of law. We therefore vacate the ruling in its entirety.

¶18 PMC asks this court for attorneys' fees and costs. Because PMC did not prevail, the request is denied.

**CONCLUSION**

¶19 Based on the foregoing, the declaratory judgment is vacated in its entirety.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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JON W. THOMPSON, Presiding Judge

/s/

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JOHN C. GEMMILL, Judge