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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-618**

Sears, Roebuck and Co.,
Appellant,

vs.

Brooks Mall Properties, LLC, et al.,
Respondents.

Filed January 26, 2010

**Affirmed in part, reversed in part and vacated in part, and appeal dismissed in part
Lansing, Judge
Concurring in part and dissenting in part; Johnson, Judge**

Hennepin County District Court
File No. 27-CV-07-19931

Thomas P. Kane, Lewis J. Rotman, Hinshaw & Culbertson, LLP, Minneapolis,
Minnesota (for appellant)

Connie A. Lahn, David E. Runck, Seth J. Leventhal, Fafinski Mark & Johnson, P.A.,
Eden Prairie, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

LANSING, Judge

This litigation arises from a dispute between Sears, Roebuck and Co. and Brooks Mall Properties, LLC and its predecessor-in-interest, Talisman Brookdale, LLC, over

rights under a series of agreements and a declaration of covenants and restrictions executed with the City of Brooklyn Center in connection with an application for a Planned Unit Development. The district court granted summary judgment against Sears on its claims based on the agreements and the declaration, granted summary judgment against Brooks Mall on its tort claims, and granted summary judgment for Brooks Mall on its request for declaratory relief based on its contractual rights. On appeal, Sears and Brooks Mall challenge different sections of the district court's order, and Brooks Mall also asserts that Sears's claims are moot. We affirm in part, reverse in part and vacate in part, and dismiss in part.

F A C T S

Sears, Roebuck and Co. owns approximately thirteen acres within the Brookdale Shopping Mall. Brooks Mall Properties, LLC owns most of the remaining eighty-one acres comprising the mall complex. Beginning in 1960, Sears entered into several operating agreements with Brooks Mall's predecessors-in-interest. These agreements grant reciprocal rights to the common areas on their respective properties and, among other provisions, establish obligations and payment methods for maintaining the common area.

In 1963, Sears and Talisman Brookdale, LLC, Brooks Mall's predecessor, amended their operating agreement to require a minimum of 6.5 parking stalls for each 1,000 square feet of rentable building area. In 1999 Talisman submitted a proposal for a Planned Unit Development (PUD) to Brooklyn Center's city council. The municipal zoning in effect for the mall at that time required a 5.5 parking-stall ratio. The

development plan required the city to rezone all of the Brookdale Mall property, including Sears's property, to allow several changes, including a reduction in the minimum parking-stall ratio to 4.5 spaces for each 1,000 square feet of rentable space.

In connection with this proposal, Sears and Talisman negotiated an amendment to the 1960 and 1963 agreements. The amendment, referred to as the 1999 Operating Agreement, reinstated and confirmed the earlier agreements but amended the provisions relating to the common areas of both properties. The amended provisions confirmed that both parties agreed to the redevelopment site plan and reduced the required parking-stall ratio from 6.5 in their earlier agreement to 4.5 based on the PUD rezoning. The 1999 Operating Agreement expired on December 31, 2009.

The city approved the PUD but required Talisman to execute and record a declaration of covenants and restrictions, referred to as the 1999 Declaration, to provide express assurance that Talisman had sufficient property rights to ensure that all property owners subject to the PUD used their land in a way that did not deviate from the site plan approved by the city. Part, but not all, of the planned development occurred. In 2007 Brooks Mall submitted an amended PUD site plan to the Brooklyn Center city council. The city council approved the amended site plan over Sears's objections.

Sears sued Brooks Mall to stop the amended-site-plan development. Sears's complaint sought declaratory and injunctive relief and asserted four separate claims: (1) breach of Sears's right to consent to material changes to the mall common areas based on the 1999 Operating Agreement; (2) breach of the parking-stall ratio stated in the 1999 Operating Agreement and the 1999 Declaration; (3) breach of Sears's right to use the

common areas under the 1999 Operating Agreement through the new development's elimination of parts of the common area; (4) breach of Sears's right to approve amendments to the 1999 Declaration by changing the site plan without Sears's consent. Brooks Mall asserted four counterclaims: (1) slander of title, (2) tortious interference with contract and prospective business relations, (3) tortious interference with business expectancy, and (4) declaratory relief under its contracts with Sears or, alternatively, breach of contract for unreasonably withholding consent to the revised development.

Brooks Mall moved for summary judgment on all claims asserted by Sears, and Sears moved for partial summary judgment on the tort claims asserted by Brooks Mall. The first district court judge assigned to the case denied Brooks Mall's motion for summary judgment, granted Sears's motion for partial summary judgment, and concluded that Sears was a third-party beneficiary of the 1999 Declaration. Because not all claims were resolved, the order was not a final judgment for purposes of appeal. Ten days later, the case was reassigned to a second district court judge. In the intervening time, Brooks Mall and Sears attempted to negotiate stipulated findings of fact, conclusions of law and an order for judgment to facilitate appeal.

Brooks Mall and Sears were unable to agree on a stipulated judgment for purposes of appeal, and, instead, submitted new motions for summary judgment to the second district court judge. Shortly before the motion hearing, Brooks Mall's arrangements with the new developer fell through and Brooks Mall withdrew its amended PUD site plan. At the hearing, Brooks Mall argued that Sears's claims were moot because of the withdrawal of the amended site plan.

The district court concluded that the case was not moot. Because the prior order was not final, the second district court considered all of Sears's and Brooks Mall's claims and concluded as a matter of law that Sears was not a third-party beneficiary of the 1999 Declaration. It then granted summary judgment for Brooks Mall on Sears's first, third, and fourth claims. Sears voluntarily dismissed, without prejudice, the complaint's second count, which alleged a breach of the parking-stall ratio. The district court also granted summary judgment for Brooks Mall on its counterclaim for declaratory relief. The order reaffirmed the earlier district court order that dismissed Brooks Mall's tort claims.

Sears challenges the district court's order granting summary judgment to Brooks Mall on its first, third, and fourth claims and the favorable declaration of Brooks Mall's contractual rights. Brooks Mall filed a notice of review challenging the district court's determination that the case was not moot and also challenging the order granting summary judgment to Sears on its tort claims.

D E C I S I O N

I

We first address Brooks Mall's claims that the issues in this case are moot because it withdrew its amended PUD site plan. The existence of a justiciable controversy is essential to a court's power to adjudicate. *Izaak Walton League of Am. Endowment, Inc. v. State, Dep't of Natural Res.*, 312 Minn. 587, 589, 252 N.W.2d 852, 854 (1977). A declaratory action is a justiciable controversy if it (a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific

resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273-74 (Minn. App. 2001); see *State ex rel. Smith v. Haveland*, 223 Minn. 89, 92, 25 N.W.2d 474, 476-47 (1946) (defining justiciable declaratory action). The question in a case for declaratory judgment is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of declaratory judgment. *Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n of Minneapolis*, 271 N.W.2d 445, 448 (Minn. 1978) (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512 (1941)).

Mootness can be described as “the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation . . . must continue throughout its existence.” *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). The mootness doctrine requires a comparison between the relief demanded and the circumstances of the case at the time of decision to determine whether there is a live controversy that can be resolved. *In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). The issue of whether a cause of action is moot is a legal issue, which the court reviews de novo. *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). When an event makes an order for effective relief impossible or a decision on the merits unnecessary, the appeal should be dismissed as moot. *Minnegasco*, 565 N.W.2d at 710.

Brooks Mall argues that the case became moot when it withdrew its 2007 amended site plan and that the district court erred by failing to dismiss as moot Counts 1,

3, and 4 of Sears's complaint. Because each of these claims is based on different legal documents and different factual allegations, the claims must be analyzed individually to determine whether the claim was moot before the district court and whether it is moot on appeal. The documents at issue were executed by Talisman whose interests were later assumed by Brooks Mall. For clarity these entities are referred to collectively as Brooks Mall.

In Sears's first claim, it sought a declaratory judgment that it had the right to consent to material changes in the PUD site plan under the 1999 Operating Agreement. The district court's final order granted summary judgment to Brooks Mall, against Sears, on this claim. The order also granted Brooks Mall declaratory relief on its contractual rights under the 1999 Operating Agreement. The declaratory relief concluded that Sears's approval rights are limited to changes in the 1999 PUD site plan and do not extend to the 2007 amended PUD site plan. We agree with the district court that this claim was not moot when it decided the cross-motions for summary judgment. The agreement was in effect for over a year after the district court issued its order, and the 1999 Operating Agreement affected the parties' redevelopment planning process. We are not convinced, however, that the district court correctly interpreted the extent of Sears's approval rights when it concluded that the term "site plan" referred only to the site plan in the 1999 PUD application and not to later site plans.

Sears and Brooks Mall realized that the PUD site plan referred to in the 1999 Operating Agreement might change. The disputed provision granted Sears approval rights over two types of changes to the plan and stated that a final site plan would be

attached to the agreement. Brooks Mall relied on the 1999 Operating Agreement to make the 1999 Declaration required by the city to approve the PUD, and it relied on the approval of the 1999 PUD to amend the site plan in 2007. Because the parties contemplated changes to the PUD site plan when negotiating the 1999 Operating Agreement, because the site plan did change in 2007, and because these changes were part of the same PUD approved in 1999, the language of the agreement supports Sears's argument that it would continue to have the right to approve certain changes to the PUD site plan as set out in the 1999 Operating Agreement.

But we need not reach a definitive decision on that issue because the 1999 Operating Agreement expired on December 31, 2009. The rights declared by the district court in favor of Brooks Mall no longer exist as the agreement is no longer in effect. Consequently, the dispute over Sears's rights under this agreement is moot, and we dismiss this portion of Sears's appeal.

Sears's third claim was for declaratory judgment that Brooks Mall violated Sears's rights to use the common area on Brooks Mall's property under the 1999 Operating Agreement by creating an amended PUD site plan that eliminated parking spaces and an access point on Brooks Mall's land. This claim should have been dismissed as moot by the district court because, unlike the first claim, it depended on proving specific facts about the 2007 development plan. The 2007 amended PUD site plan had been withdrawn and any violation of Sears's right to use the common area became hypothetical. Even if this claim were not moot before the district court, it is moot on appeal as the 1999 Operating Agreement, which provided the right to use the common area, has expired.

We reverse the district court's conclusion that this claim was not moot at the time it decided the summary-judgment motions and vacate the portion of its summary judgment for Brooks Mall on Sears's third claim.

We agree with the district court's conclusion that Sears's fourth claim was not moot. Sears claimed it had the right to approve amendments to the PUD site plan as a third-party beneficiary to the 1999 Declaration. The 1999 Declaration recorded by Brooks Mall against its property—which includes its assurance that it has sufficient property rights in Sears's property to restrict development on all property to conform to the 1999 PUD site plan—has no expiration date. The city council planning commission relied on the 1999 Declaration when it recommended approval of the 2007 amended PUD site plan. Sears's rights under this document continue to be in dispute and could affect Brooks Mall's approach to renewed redevelopment plans and the city's ability to approve those plans based on the assurances in the 1999 Declaration. The withdrawal of the 2007 amended PUD site plan did not make this claim hypothetical because the claim addresses Sears's rights in the process of developing an amended site plan independent of the specific content of any particular plan.

We further conclude that this claim is not moot on appeal. No event has occurred that would make declaratory relief impossible or unnecessary. Additionally, if we did not review the merits of the district court's order determining the parties' rights under the 1999 Declaration, the legal conclusions and summary judgment against Sears's claim under this document could have the potential to be used by Brooks Mall to bind Sears in future litigation over new development plans. *See generally Ellis v. Minneapolis*

Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982) (discussing requirements for applying collateral estoppel). Because the district court granted Brooks Mall summary judgment against Sears's claimed rights and because nothing prevents Brooks Mall from pursuing other redevelopment plans and asserting this judgment against Sears, there is a justiciable controversy on appeal.

Having determined that Sears's first claim is moot on appeal along with its challenge to the corresponding declaratory relief granted to Brooks Mall, and its third claim was moot before the district court, only Sears's fourth claim and Brooks Mall's tort counterclaims remain justiciable. We now turn to the merits of these claims on appeal.

II

In its fourth claim, Sears sought a declaration that it is a third-party beneficiary of the 1999 Declaration and alleges that Brooks Mall breached its obligations under the 1999 Declaration by amending the PUD site plan without Sears's consent. The district court granted summary judgment to Brooks Mall on this claim, concluding that Sears was not a third-party beneficiary. Sears challenges this conclusion.

“On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law.” *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). When the material facts are not in dispute, we review the district court's application of law de novo. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007).

Minnesota has adopted the intended-beneficiary approach outlined in the Restatement (Second) of Contracts § 302 (1979). *Cretex Cos. v. Constr. Leaders, Inc.*,

342 N.W.2d 135, 139 (Minn. 1984). A third party may recover as an intended beneficiary by satisfying either the “intent to benefit” or “duty owed” test. *Id.* The planning commission’s information sheet reviewed by the full city council as part of Brooks Mall’s 2007 request to amend the PUD site plan refers to the 1999 Declaration as an “executed PUD agreement.” As such, the agreement is a form of contract between Brooklyn Center and Brooks Mall.

To establish a duty owed, the promisor’s performance under the contract must discharge a duty otherwise owed the third party by the promisee. *Id.* at 138. The city owed no duty to Sears, so the only possibility is that a duty owed to Sears by Brooks Mall was discharged by the city’s performance under the 1999 Declaration. Brooks Mall agreed to only pursue development in line with the 1999 site plan and ensure that the other property owners within the PUD did the same. In return, the property at Brookdale Mall was rezoned and Brooks Mall was able to obtain building permits. Brooks Mall owed a duty to Sears under its operating agreements in terms of maintaining and allowing access to the common area, but these duties were not discharged by the city’s act of rezoning the land. The city’s performance did not discharge a duty owed to Sears by Brooks Mall. Sears does not meet the duty-owed test.

To establish an intent-to-benefit, the circumstances must indicate that the promisee intends to give the beneficiary the benefit of the promise. *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 370 (Minn. 2005) (citing Restatement (Second) of Contracts § 302(1)(b) (1979)). If the contract does not express the intent to benefit a third party through performance, the third party is only an incidental beneficiary and cannot enforce

the contract. *Buchman Plumbing Co. v. Regents of the Univ. of Minn.*, 298 Minn. 328, 334-35, 215 N.W.2d 479, 483-84 (1974).

Sears argues that because its property was rezoned as part of the PUD and its property was specifically referred to in the 1999 Declaration, Brooks Mall and the city intended to benefit Sears. While Sears's property was implicated by the 1999 Declaration, the intent-to-benefit test requires that one of the parties intends to give Sears the benefit of its performance. Brooks Mall's performance, i.e., restricting development on its property to the PUD site plan and negotiating and enforcing agreements with other property owners to do the same, was for its own benefit—to receive building permits that would allow it to redevelop its land and bring in more revenue. The city's performance, i.e., rezoning the Brookdale Mall and issuing building permits for construction on Brooks Mall's land, was for its own benefit in the form of increased tax revenue, jobs, support to other commercial property in the area, etc. The record does not reflect either party's intent to give Sears the benefit of its performance. Although Sears might expect to benefit from increased foot traffic, this is incidental, not an express purpose of the 1999 Declaration. Because Sears does not meet either third-party beneficiary test, we affirm the district court's order granting summary judgment to Brooks Mall on Sears's fourth claim.

III

The district court reaffirmed the portion of the prior district court's order granting summary judgment to Sears on Brooks Mall's tort counterclaims. The basis for Brooks Mall's tort claims is Sears's recording of a notice of lis pedens, which prevented the

completion of the deal on which the 2007 amended site plan was based. Minnesota law authorizes filing a notice of lis pedens “[i]n all actions in which . . . any interest in . . . real property is involved or affected[] or is brought in question by either party.” Minn. Stat. § 557.02 (2008). To prevail in its slander-of-title action, Brooks Mall must show: (1) a false statement concerning its real property (2) published to others (3) maliciously, (4) causing it special damages. *Paidar v. Hughes*, 615 N.W.2d 276, 279-80 (Minn. 2000). Filing a notice of lis pedens can be the basis for a slander of title action if the notice contains false information and is done maliciously. *Bly v. Gensmer*, 386 N.W.2d 767, 769 (Minn. App. 1986). But a slander of title claim is not supported if a defendant acts in good faith and “does no more than file for record an instrument which he has a right to file.” *Kelly v. First State Bank of Rothsay*, 145 Minn. 331, 333, 177 N.W. 347, 347 (1920).

Similarly, Brooks Mall’s other tort claims against Sears also require evidence of bad faith. A claim for tortious interference with contractual relations requires: (1) existence of a contract, (2) defendant’s knowledge of the contract, (3) defendant’s intentional procurement of its breach, (4) without justification, and (5) resulting damages. *R.A., Inc. v. Anheuser-Busch, Inc.*, 556 N.W.2d 567, 570 (Minn. App. 1996), *review denied* (Minn. Jan. 29, 1997) (citing *Royal Realty Co. v. Levin*, 244 Minn. 288, 292, 69 N.W.2d 667, 671 (1955)). A defendant may avoid liability for the claim “by showing that his actions were justified by a lawful object that he had a right to pursue.” *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 32 (Minn. 1982). To prevail on a claim for tortious interference with business expectancy, a plaintiff must

prove defendant's wrongful and unjustified interference with plaintiffs' reasonable expectation of economic advantage or benefit, among other elements. *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 569 (Minn. App. 2001). Commencement of a bona fide lawsuit justifies interference with business expectancy. *Mendota Heights Assocs. v. Friel*, 414 N.W.2d 480, 484-85 (Minn. App. 1987) (stating "[t]he existence of probable cause to sue is a good defense to a claim for tortious interference with business expectancy" and stating probable-cause standard).

The record indicates that Sears did not submit its lawsuit in bad faith. Sears had good reason to believe that it had rights through the 1999 Operating Agreement and 1999 Declaration to approve certain changes in land use even if they occurred only on Brooks Mall's property based on the language and circumstances of both of these documents. Sears had probable cause to file suit and therefore can avoid liability. *Langeland*, 319 N.W.2d at 32; *Kelly*, 145 Minn. at 333, 177 N.W. at 347; *Mendota Heights Assocs.*, 414 N.W.2d at 484-85. The district court did not err in concluding that Brooks Mall's tort claims failed as a matter of law and granting Sears summary judgment on these claims.

Affirmed in part, reversed in part and vacated in part, and appeal dismissed in part.

JOHNSON, Judge (concurring in part, dissenting in part)

I concur in part III of the opinion of the court, but I respectfully dissent from part I. In my view, all claims for declaratory relief are moot and have been moot since September 2008.

Sears commenced this action shortly after Brooks Mall sought to redevelop part of the Brookdale property. Brooks Mall entered into an agreement with Wal-Mart Stores, Inc., providing for the purchase of 14 acres from Brooks Mall and the construction of a Walmart retail store. In July 2007, Brooks Mall sought the city's approval of an amended PUD that would allow the construction of the contemplated Walmart store. The city approved the amended PUD in late August 2007. Sears commenced this action in mid-September 2007. Its complaint seeks primarily declaratory relief and injunctive relief prohibiting Brooks Mall from going forward with the Walmart project. Brooks Mall's October 2007 answer includes a counterclaim seeking declaratory relief that "Sears has no rights . . . to interfere with the PUD and proposed Wal-Mart Development." Brooks Mall, however, abandoned the Walmart project a year later. Brooks Mall withdrew its application for an amended PUD in September 2008, approximately three weeks before the district court conducted a hearing on the parties' respective motions for summary judgment. Neither party amended its original pleadings. Yet the district court proceeded to grant summary judgment to Brooks Mall on Sears's claims for declaratory relief and on Brooks Mall's own claim for declaratory relief. There is no suggestion whatsoever that the Walmart project has been or will be revived.

Appellate courts “decide only actual controversies and avoid advisory opinions.” *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). To be justiciable, a case must “(1) involve[] definite and concrete assertions of right that emanate from a legal source, (2) involve[] a genuine conflict in tangible interests between parties with adverse interests, and (3) [be] capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.” *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617-18 (Minn. 2007). In this case, there are no “definite and concrete assertions of right,” and there is no “genuine conflict in tangible interests,” *id.*, because the redevelopment project that gave rise to this lawsuit was abandoned. The parties disagree about the meaning of the 1999 agreement and the 1999 declaration, but those disagreements are merely abstract in the absence of a specific, pending redevelopment project. The opinion of the court acknowledges the contingent nature of the parties’ disputes by stating, for example, that Sears’s rights under the 1999 declaration, if any, “could affect” Brooks Mall’s future plans concerning redevelopment of Brookdale. *See supra* at 9. The fact that the parties’ dispute relates to a potential, future controversy, rather than an actual, present controversy, should lead to the conclusion that the case is moot.

Furthermore, the record does not justify an exception to the mootness doctrine. The capable-of-repetition-yet-evading-review exception may apply if ““(1) the challenged action was in its duration too short 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.”” *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn.

2005) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975)). Sears cannot satisfy the second requirement because Sears makes only general statements that Brooks Mall is likely to pursue other redevelopment projects in the future. But there is nothing in the record concerning any specific redevelopment proposal or even the type of redevelopment project that might be proposed in the future. In the absence of a specific proposal, one can only speculate about the legal issues that might be raised by a future redevelopment project. At present, the parties are essentially in the same position they were in before Brooks Mall proposed the Walmart project.

Sears also cannot satisfy the first requirement of the capable-of-repetition-yet-evading-review exception. Sears has not explained why it would be unable to commence another legal action if and when another redevelopment project is proposed. In 2007 and 2008, Sears asserted claims against Brooks Mall in a timely manner and obtained judicial rulings before the redevelopment project was underway. There is no indication that Sears could not do so again, if and when necessary. Meanwhile, the judiciary should not expend its limited resources on issues that may or may not need to be resolved in the future. “[W]e will not issue ‘declarations upon remote contingencies or as to matters where the plaintiff’s interest is merely contingent upon the happening of some event in the future.’” *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 322 (Minn. App. 2007) (quoting *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 283, 290 N.W. 802, 805 (1940)).

The foregoing analysis should cause this court to vacate all orders issued by the district court concerning the parties’ claims for declaratory relief. As a general rule, it is proper for an appellate court to “vacate the lower court judgment in a moot case because

doing so ‘clears the path for future relitigation of the issues between the parties,’ preserving ‘the rights of all parties,’ while prejudicing none ‘by a decision which . . . was only preliminary.’” *Alvarez v. Smith*, 130 S. Ct. 576, 581 (2009) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40, 71 S. Ct. 104, 107 (1950)). “A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25, 115 S. Ct. 386, 391 (1994). In this case, vacatur of the district court’s orders would obviate the majority’s concern that Brooks Mall might, in the future, rely on those orders by asserting the doctrine of collateral estoppel against Sears. *See supra* at 9. Indeed, the orders of the district court should have no force or effect with respect to the parties’ claims for declaratory relief. The same is true of the opinion of this court.

In sum, I would dismiss Sears’s appeal to the extent that it concerns the parties’ claims for declaratory relief, and I would vacate the orders of the district court to the same extent.