IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KELLY FALCON, individually, d/b/a WILD HORSE NITE CLUB, a sole proprietorship,	)	**No. 26627-3-III**
	)	
	)	**Division Three**
Appellant,	)	
	)	
v.	)	**UNPUBLISHED OPINION**
	)	
SCOTTSDALE INSURANCE COMPANY, an Arizona company, ANDRE-ROMBERG INSURANE AGENCY, INC., a Washington Corporation; COCHRANE & COMPANY, a Division of COCHRANE AGENCY, INC., a Washington corporation,	)	
	)	
Respondents.	)	
	)	

Brown, J. ─ Kelly Falcon d/b/a Wild Horse Nite Club appeals the summary dismissal of his suit against Scottsdale Insurance Company. He asks for clarification of certain fire insurance clauses. But the parties agree no ambiguity exists and no other relief is sought. Mr. Falcon had previously been convicted of malicious use of fire in federal court where the insurance clauses were disputed. Now, Mr. Falcon believes a superior court interpretation of the clauses would assist him in his federal appeal. Mr.

Falcon appears to be asking for an advisory opinion or attempting to circumvent the federal court's prerogative in certifying state law questions. Under these circumstances, we, like the trial court, hold no justiciable controversy exists, and affirm the trial court's summary judgment dismissal of Mr. Falcon's suit.

FACTS

Under a lease, Mr. Falcon operated the Wild Horse Nite Club, situated in a building owned by Robert Evanson. Under the lease, Mr. Falcon purchased a fire insurance policy from Scottsdale. The named insured on the policy was "Wild Horse Saloon & Grill." Clerk's Papers (CP) at 231. Mr. Evanson was not named in the policy.

In April 2004, fire destroyed the club. Mr. Falcon was charged and convicted in federal court of malicious use of fire to damage property used in interstate commerce. He then sued Scottsdale in another case, alleging *inter alia* negligence and breach of contract. Mr. Falcon posits that Scottsdale could have or should have independently named or provided insurance proceeds to Mr. Evanson; this he speculates would have been helpful to him in the federal prosecution.

Next, Mr. Falcon sued Scottsdale in this case asking the court to declare "as a matter of law, . . . Scottsdale could pay the owner of the building directly for property losses resulting from a covered casualty, even if the owner is not listed as an 'additional named insured,' a 'loss payee,' or a 'mortgagee' under the Policy." CP at 24. And, to declare Scottsdale was "not authorized to pay Kelly Falcon anything

beyond his financial interest in the Covered Property." *Id.* Finally, Mr. Falcon asked the court to declare the Scottsdale policy did "not prevent a person from being an 'additional named insured' under the 'Building and Personal Property Coverage Form.'" *Id.* Scottsdale did not dispute the contract terms, but argued the policy was void based on fraud.

The parties successfully stipulated to consolidate the superior court cases. Because Mr. Falcon appealed his federal arson conviction and was seeking habeas corpus relief, the parties further stipulated that the declaratory judgment action could proceed, with all other claims being stayed pending resolution of Mr. Falcon's federal criminal case. Mr. Falcon argues a favorable ruling from the superior court would support his federal post-trial motions. But before any superior court ruling, the federal district court denied his habeas corpus petition. The Ninth Circuit Court of Appeals denied a certificate of appealability. And, the United States Supreme Court denied certiorari.[1]

After a limited relief from stay, Scottsdale successfully requested summary judgment dismissal of the declaratory judgment suit. The court decided "no justiciable controversy [existed] between the parties." CP at 435. Mr. Falcon appealed.

[1] The parties attach several documents relating to the federal court proceedings in the appendices of their briefs. These documents were not included in our record. Under RAP 10.3(a)(8), "[a]n appendix may not include materials not contained in the record on review without permission from the appellate court" unless the material is text from a statute, rule, jury instruction, or the like. *See also* RAP 10.4(c). The parties did not request permission to include these documents in the appendices of their briefs. Accordingly, these documents will not be considered in this appeal.

ANALYSIS

The issue is whether the trial court erred in granting Scottsdale's request for summary judgment on the grounds no justiciable controversy exists.

We review legal questions and an order of summary judgment de novo, performing the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). We consider the facts and all reasonable inferences from them "in the light most favorable to the nonmoving party." *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue [of material fact] and that the moving party is entitled to judgment as a matter of law." *Jones*, 146 Wn.2d at 300-01; CR 56(c). "A material fact is one upon which the outcome of the litigation depends." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The moving party's burden is to show no remaining material fact issues. *Id.* "The nonmoving party must set forth specific facts showing a genuine issue of material fact and cannot rest on mere allegations." *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); CR 56(e).

"'[B]efore the jurisdiction of a court may be invoked . . . there must be a justiciable controversy.'" *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973)). A justiciable controversy involves

> (1) . . . an actual, present and existing dispute, or the mature

> seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp., 82 Wn.2d at 815. The fourth requirement is our focus. Mr. Falcon is using state courts as a stepping stone for relief in federal court rather than a final and conclusive decision. "A declaratory judgment 'has no direct, coercive effect.'" *Brown v. Vail*, 169 Wn.2d 318, 334, 237 P.3d 263 (2010) (quoting 15 Karl B. Tegland, Washington Practice: Civil Procedure § 42:1 (2d ed. 2009)).

In *Brown,* death-row inmates requested a declaratory judgment that the Department of Correction's use of sodium thiopental to carry out the sentence of death was unlawful. The Court denied their request, holding, "[t]he Appellants have not established that any declaratory judgment in this matter would produce a final and conclusive determination. Such a judgment would look very much like an advisory opinion, which we issue only in rare circumstances." *Brown*, 19 Wn.2d at 334 (citing *To-Ro Trade Shows*, 144 Wn.2d at 416). Moreover, the federal courts may certify to the Washington Supreme Court questions on state law. Considering the federal court fully developed Mr. Falcon's insurance arguments at trial, it appears he is circumventing this federal prerogative in seeking declaratory relief in state court.

In any event, Mr. Falcon's issues are likely moot since there is no relief that this

court may provide in light of the Supreme Court's recent denial of his request for certiorari. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) ("A case is moot if a court can no longer provide effective relief.").

Based on *Brown* and *To-Ro Trade Shows*, Mr. Falcon fails to establish a justiciable controversy with Scottsdale. Therefore, the trial court did not have jurisdiction and properly dismissed Mr. Falcon's complaint in summary judgment.

Scottsdale requests costs on appeal. The party who substantially prevails on appeal is entitled to an award of costs. RAP 14.2. Because Scottsdale is the substantially prevailing party, its request is granted.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Korsmo, A.C.J.

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Sweeney, J.