No. 22799 - Glenna Griffith Cox and James F. Cox, Administrator and Personal Representative for the Estate of John Carl Cox v. Brian Keith Amick, et al.

Nationwide Insurance Company v. State Farm Mutual Automobile Insurance Company

Cleckley, concurring:

I am in wholehearted agreement with the excellent majority opinion of Chief Justice McHugh. Because I question the circuit court's granting of declaratory judgment in this case, I write separately only to underscore the discretionary nature of declaratory judgments.

The Declaratory Judgment Act, W. Va. Code, 55-13-1 (1941), empowers a circuit court to grant declaratory relief in a case of actual controversy. See generally Mongold v. Mayle, __ W. Va. __, 452 S.E.2d 444 (1994). To be clear, if there is no "case" in the constitutional sense of the word, then a circuit court lacks the power to issue a declaratory judgment. A declaratory judgment may not be used to secure a judicial determination of moot questions or where no controversy exists.

The Act does not itself mandate that circuit courts entertain declaratory judgments; rather, the Act makes available an added anodyne for disputes that come within the circuit courts' jurisdiction. It serves a valuable purpose. It is designed to enable litigants to clarify legal rights and obligations before acting upon

them. Because the Act offers a window of opportunity, not a guarantee of access, the courts, not the litigants, ultimately must determine when declaratory judgments are appropriate and when they are not. Consequently, circuit courts retain substantial discretion in deciding whether to grant declaratory relief. As we have stated in other contexts, the Declaratory Judgment Act neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants an entitlement to litigants to demand declaratory remedies. See Gentry v. Mangum, __ W. Va. ___, ___, ___ S.E.2d ___, ___ (No. 22845 12/__/95) (Slip op. at 15-16). In Wilson v. Seven Falls Co., __ U.S. ___, 115 S. Ct. 2137, 132 L.Ed.2d 214 (1995), the United States Supreme Court affirmed the uniquely discretionary nature of the federal Declaratory Judgement Act: It is "'an enabling Act, which confers a discretion on the courts rather

than an absolute right on the litigants.' When all is said and done . . . the propriety of declaratory relief in a particular case will depend on a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of . . . judicial power." __ U.S. at __, 115 S. Ct. at 2143, __ L.Ed.2d at __, quoting Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 241, 243, 73 S. Ct. 236, 240, 97 L.Ed. 291 (1952).

Because the granting of declaratory relief is not mandatory, circuit courts may limit its use. I believe that limiting the use of declaratory judgment actions serves important policies such as avoiding rendering opinions based on purely hypothetical factual scenarios, discouraging forum shopping, encouraging parties to pursue

the most appropriate remedy for their grievances, preserving precious judicial resources, and promoting comity.

This Court has not had occasion to speak directly to what factors are relevant in determining whether a declaratory judgment action should be heard and decided. I believe there are four factors that are significant. The first critical factor is whether the claim involves uncertain and contingent events that may not occur at all. The second important factor is the extent to which the claim is bound up in facts. Courts are more likely to find a claim is justiciable if it is of an intrinsically legal nature, see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 201, 103 S. Ct. 1713, 1720-21, 75 L.Ed.2d 752, __ (1983), and less

likely to do so if the absence of a concrete factual situation seriously inhibits the weighing of competing interests.

The third factor is the absence or presence of adverseness. The circuit court should ask "whether the facts alleged, under all circumstances, show there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L.Ed. 826, __ (1941). It would appear that the following is relevant: (1) where all affected parties are before the court and (2) where the issues as framed permit specific relief through a decree of a conclusive nature, as opposed from an opinion

advising what the law would be upon an hypothetical state of facts.

The fourth factor is the most important in my judgment. A circuit court should always ask whether granting the relief would serve a useful purpose, or put another way, whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest. The hardship prong turns on whether the

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[1] In West Virginia, we have created a practice of permitting declaratory judgment actions to go forward as a matter of right. This is especially true when an insurance company seeks to deny coverage. There is no doubt that an insurer is justified in its attempt to seek declaratory relief in insurance coverage cases. Indeed, the insurer complies with its duty to defend by seeking declaratory judgment from the circuit court on the issue of insurance coverage prior to the trial on the liability issue. Of course, these issues are important, but they do not compel a circuit court to entertain a declaratory judgment. There is clearly no support in

challenged action creates a real or immediate dilemma for the parties.

Thus, the factors discussed above must be not be applied mechanically but, rather, with flexibility. In granting declaratory relief, a circuit court should be reasonably convinced that allowing the case to proceed, here and now, would serve a useful purpose and would be of great practical assistance to all concerned. Not only should the utility of the decree be obvious, but the utility should have special force in the challenged and underlying action.

West Virginia jurisprudence for the position that an insurer in denying coverage must immediately file a declaratory judgment action. All that is required of the insurer is to seek a circuit court's determination on the coverage issue, instead of refusing to defend based solely upon its own determination of coverage. I suggest an

The standard of review that applies to a circuit court's discretionary decision to withhold a declaratory judgment is more problematic. Although I recognize that circuit courts have some discretion to grant or withhold declaratory relief, and that this discretion must be exercised cautiously when matters of either public or constitutional dimension are implicated, the decision ultimately must be based on a careful balancing of efficiency, fairness, and the interests of both the public and the litigants. As to whether to grant or withhold declaratory relief, our review must offer a blend of deference and independence. While appellate courts may review a

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independent declaratory judgment is not necessary to accomplish this objective.

circuit court's exercise of this wise judicial administration only for abuse of discretion, this review must be meaningful.

Some courts afford plenary review, but others affirm unless the circuit court's decision constitutes an abuse of discretion. Compare, e.g., Allstate Ins. Co. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990) (utilizing plenary review), and Gayle Mfg. Co. v. Federal Sav. & Loan Ins. Corp., 910 F.2d 574, 578 (9th Cir. 1990) (same), with, e.g., Christopher P. v. Marcus, 915 F.2d 794, 802 (2nd Cir. 1990) (utilizing abuse of discretion standard), cert. denied, 498 U.S. 1123, 111 S. Ct. 1081, 112 L. Ed. 2d 1186 (1991), and Kunkel v. Continental Cas. Co., 866 F.2d 1269, 1273 (10th Cir. 1989) (same).

I believe we should capture a middle ground, expressing our preference for a standard of independent review when passing upon a

circuit court's decision to eschew declaratory relief. This standard encourages the exercise of independent appellate judgment if it appears that a mistake has been made. See El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 492 (1st Cir. 1992); National R.R. Passenger Corp. v. Providence & Worcester R.R. Co., 798 F.2d 8, 10 (1st Cir. 1986). Thus, independent review invokes a standard more rigorous than abuse of discretion but less open-ended than de novo review.

As to rulings made on the merits of the declaratory judgment action, our review should be, as the majority opinion states on the ultimate question presented we will review de novo, but as to questions of fact we utilize Rule 52(a) of the West Virginia Rules of Civil Procedure and apply the clearly erroneous rule.

Considering what I discuss above, I have grave reservations whether the circuit court acted reasonably and wisely in entertaining this declaratory action. Nevertheless, I must respect the circuit court's discretion where error is not obvious, and, accordingly, I concur.