

NOTICE

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2015 IL App (4th) 140181-U
NOS. 4-14-0181, 4-14-0205 cons.
IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 11, 2015
Carla Bender
4th District Appellate
Court, IL

ST. JOHN'S HOSPITAL OF THE HOSPITAL)	Appeal from
SISTERS OF THE THIRD ORDER OF ST.)	Circuit Court of
FRANCIS,)	Sangamon County
Plaintiff-Appellant,)	No. 13MR66
v. (No. 4-14-0181))	
NATIONAL GUARDIAN RISK RETENTION)	
GROUP, INC.; EMERGENCY CONSULTANTS,)	
INC.; CENTRAL ILLINOIS EMERGENCY)	
PHYSICIANS, P.C.; ELIZABETH McDANIEL, D.O.;)	
AAMIR BANDAY, M.D.; JOHN BYRNES, M.D.;)	
PATRICIA FUGATE; and ROBERT FUGATE,)	
Defendants-Appellees.)	
-----)	
ST. JOHN'S HOSPITAL OF THE HOSPITAL)	
SISTERS OF THE THIRD ORDER OF ST.)	
FRANCIS,)	
Plaintiff-Appellee,)	
and)	
NATIONAL GUARDIAN RISK RETENTION)	
GROUP, INC.; AAMIR BANDAY, M.D.; JOHN)	
BYRNES, M.D.; and ELIZABETH McDANIEL, D.O.,)	
Defendants-Appellees,)	
v. (No. 4-14-0205))	
PATRICIA FUGATE and ROBERT FUGATE,)	
Defendants-Appellants,)	
and)	
EMERGENCY CONSULTANTS, INC.; and)	
CENTRAL ILLINOIS EMERGENCY PHYSICIANS,)	Honorable
P.C.,)	John P. Schmidt,
Defendants.)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, holding the trial court did not err in dismissing for lack of ripeness plaintiff's declaratory action regarding defendant insurance company's duty to indemnify where liability had not yet been established.

¶ 2 In January 2013, plaintiff, St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis (St. John's) filed a complaint for declaratory judgment against defendants, National Guardian Risk Retention Group, Inc. (National Guardian); Emergency Consultants, Inc.; Central Illinois Emergency Physicians, P.C. (CIEP); Patricia and Robert Fugate; and physicians Elizabeth McDaniel, D.O.; Aamir Banday, M.D.; and John Byrnes, M.D. The complaint sought the trial court's interpretation of the amount of liability coverage provided by an insurance policy and associated agreements as it related to a pending lawsuit.

¶ 3 In March 2013, National Guardian filed a motion to dismiss, which was later joined by other defendants. In September 2013, the trial court denied defendants' motion to dismiss but, in February 2014, following a hearing on defendants' motion to reconsider, the court reversed its decision and granted the motion to dismiss, finding St. John's lacked standing and that the issue was not yet ripe for adjudication.

¶ 4 St. John's and the Fugates appeal, arguing the trial court erred by dismissing St. John's complaint for declaratory judgment because (1) St. John's did not lack standing and (2) the issues were ripe for adjudication. The parties also assert the court erred by dismissing the complaint against defendant physicians, Emergency Consultants, and CIEP as part of National Guardian's motion to dismiss.

¶ 5 I. BACKGROUND

¶ 6 A. The Parties

¶ 7 St. John's is a hospital located in Springfield, Illinois. To staff its emergency room, St. John's entered into a contract with CIEP, a company that provides physician services to

medical facilities throughout Illinois. The agreement between CIEP and St. John's required CIEP to maintain professional-liability insurance coverage on behalf of its physicians in the amount of \$1 million per occurrence and \$3 million in the aggregate. CIEP obtained an insurance policy from Emergency Consultants, which was an agent of National Guardian. The insurance policy provided coverage in the amount of \$1 million per occurrence and \$3 million in the aggregate.

¶ 8 CIEP subsequently provided the services of Drs. Banday, Byrnes, and McDaniel to St. John's. As part of their placement with St. John's, defendant physicians all signed agreements to maintain insurance in the amount of \$1 million per occurrence and \$3 million in the aggregate.

¶ 9 B. The Underlying Case

¶ 10 In March 2011, Patricia and Robert Fugate filed a complaint against numerous defendants, including those relevant to this appeal: St. John's, Drs. McDaniel, Banday, and Byrnes, and Emergency Consultants (Madison County case No. 11-L-270). The complaint alleged defendants' failure to timely diagnose and treat Patricia's mastoiditis resulted in her developing a brain abscess that required surgery, and the surgery caused brain damage. Specifically, the Fugates alleged, while visiting the St. John's emergency room, (1) Dr. McDaniel was negligent in her care and treatment of Patricia on May 3, 2009; (2) Dr. Banday was negligent in his care and treatment of Patricia on May 4, 2009; and (3) Dr. Barnes was negligent in his care and treatment of Patricia on May 11, 2009.

¶ 11 C. Declaratory Action

¶ 12 1. *Complaint for Declaratory Judgment*

¶ 13 In January 2013, while the underlying case was in the discovery phase, St. John's filed a complaint for declaratory judgment in the present case. As part of this complaint, St. John's sought clarification of the insurance policy provided by National Guardian and the various agreements St. John's entered into with CIEP and defendant physicians.

¶ 14 As to National Guardian, St. John's asserted National Guardian was obligated to provide coverage in the amount of \$1 million per occurrence and \$3 million in annual aggregate for each defendant physician but instead declined to cover more than \$1 million total. Because of National Guardian's unwillingness to provide coverage in the amount of \$3 million, St. John's argued it would be vicariously liable for any amounts exceeding \$1 million, thus demonstrating an active controversy between the parties. Therefore, St. John's asked the trial court to interpret the insurance contract to determine whether National Guardian was required to provide \$1 million in coverage for each defendant physician's alleged negligence. Though St. John's was not a party to the contract between National Guardian and CIEP, St. John's asserted it had an interest and a stake in the determination of the declaratory-judgment action because it could be held vicariously liable for any judgment exceeding the policy limits.

¶ 15 As to Emergency Consultants, St. John's asserted Emergency Consultants, as an agent of National Guardian, was obligated to furnish \$1 million in coverage per occurrence with a \$3 million annual aggregate but failed to do so. Thus, St. John's asked the trial court to interpret the contract and find Emergency Consultants had breached its agreement for emergency-department-management services with St. John's by failing to provide the appropriate level of insurance.

¶ 16 As to CIEP and the defendant physicians, St. John's asserted they had breached their agreements for emergency-department-management services with St. John's by failing to maintain the appropriate levels of insurance.

¶ 17 St. John's also joined the Fugates as necessary parties due to their involvement in the underlying case.

¶ 18 *2. National Guardian's Motion To Dismiss*

¶ 19 In March 2013, National Guardian filed a motion to dismiss, asserting (1) the dispute was not ripe for adjudication and (2) the trial court lacked jurisdiction because the insurance policy specifically required all disputes to be settled in a Michigan forum under Michigan law. National Guardian argued St. John's failed to establish an actual controversy between the parties as required to provide the court with jurisdiction under section 2-701 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-701 (West 2012)), contending the issue raised by St. John's was not ripe for adjudication because liability had not yet been established in the underlying case. In May 2013, both Emergency Consultants and CIEP joined in National Guardian's motion to dismiss.

¶ 20 In June 2013, St. John's filed a response to National Guardian's motion to dismiss, asserting (1) National Guardian waived any objection to the forum by failing to file a motion to transfer venue, and (2) its complaint adequately stated a cause of action requesting the trial court's interpretation of the insurance policy. In July 2013, National Guardian replied, clarifying it sought dismissal under sections 2-615 and 2-619 of the Civil Code.

¶ 21 In September 2013, the trial court denied the motion to dismiss brought by National Guardian.

¶ 22 *3. The Motion To Reconsider*

¶ 23 In October 2013, National Guardian filed a motion to reconsider the trial court's order, asserting (1) St. John's lacked standing, (2) the issue was not ripe for adjudication, and (3) the court lacked jurisdiction where the policy specified disputes were subject to a Michigan forum.

¶ 24 Also in October 2013, CIEP filed a motion to dismiss pursuant to section 2-612 of the Civil Code (735 ILCS 5/2-612 (West 2012)), asserting the complaint for declaratory judgment failed to demonstrate an actual controversy between CIEP and St. John's. That motion was never ruled upon by the trial court.

¶ 25 In January 2014, Drs. Banday and Byrnes filed a joint motion to dismiss pursuant to sections 2-615 and 2-619, asserting St. John's complaint was not ripe for adjudication. Drs. Banday and Byrnes also adopted National Guardian's motion to reconsider. Later that month, Dr. McDaniel adopted the motions filed by her codefendants.

¶ 26 That same month, the trial court held a hearing on the motion to reconsider. In February 2014, the court entered a written order granting National Guardian's motion to reconsider, thus reversing its earlier decision. The court determined St. John's was neither a party to the insurance contract nor a third-party beneficiary, thus it lacked standing to pursue declaratory relief. Moreover, the court determined the issue raised by St. John's was not ripe for adjudication. Accordingly, the court dismissed St. John's complaint for declaratory relief as to all parties.

¶ 27 In March 2014, St. John's filed a notice of appeal, which we docketed as Appellate Court case No. 4-14-0181. The Fugates also filed a notice of appeal, which we docketed as Appellate Court case No. 4-14-0205. We have consolidated these cases for purposes of appeal.

¶ 28

II. ANALYSIS

¶ 29 On appeal, St. John's and the Fugates argue the trial court erred by dismissing St. John's complaint for declaratory judgment because (1) St. John's did not lack standing and (2) the issues were ripe for adjudication. The parties also assert the court erred by dismissing the complaint as to defendant physicians, Emergency Consultants, and CIEP as part of National Guardian's motion to dismiss. We note the Fugates have adopted St. John's briefs and offered no additional briefs, so we will refer to the appellants collectively as St. John's. Because we find that, even if St. John's had standing, the complaint for declaratory judgment was premature, we begin by addressing the issue of ripeness.

¶ 30

A. Standard of Review

¶ 31 The trial court ultimately granted National Guardian's motion to dismiss for lack of standing and ripeness, which would fall beneath subsection (a)(9) of the Civil Code (735 ILCS 5/2-619(a)(9) (West 2012)). "A motion for involuntary dismissal under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984. Our review of the trial court's dismissal is *de novo*. *Id.*

¶ 32

B. Dismissal as to National Guardian

¶ 33 St. John's argues the trial court erred in dismissing its complaint for declaratory judgment due to lack of ripeness. "The central purpose of declaratory relief is to allow the court to address a controversy one step sooner than normal after a dispute has arisen, but before the plaintiff takes steps that would give rise to a claim for damages or other relief." *Illinois State*

Toll Highway Authority v. Amoco Oil Co., 336 Ill. App. 3d 300, 305, 783 N.E.2d 658, 662 (2003).

¶ 34 A complaint for declaratory judgment is appropriate "only where an actual controversy exists and the party seeking relief has a tangible, legal interest in the controversy." *Id.* Thus, St. John's must demonstrate an actual controversy exists or, in other words, that the issue raised in the complaint for declaratory judgment is ripe for adjudication.

¶ 35 "An 'actual controversy' is 'a concrete dispute that admits of an immediate and definitive determination of the party's rights.' " *Id.* (quoting *Owner-Operator Independent Drivers Ass'n v. Bower*, 325 Ill. App. 3d 1045, 1050, 757 N.E.2d 627, 631 (2001)). To demonstrate an actual controversy, the plaintiff must show the issues raised in the declaratory action are not moot or premature. *Rockford Title Co. v. Staaf*, 275 Ill. App. 3d 476, 480, 654 N.E.2d 1106, 1109 (1995). Moreover, the court should not adjudicate a declaratory action where the plaintiff seeks an advisory opinion. *Young v. Mory*, 294 Ill. App. 3d 839, 844, 690 N.E.2d 1040, 1043 (1998).

¶ 36 In dismissing St. John's complaint for declaratory judgment, the trial court relied on *Weber v. St. Paul Fire & Marine Insurance Co.*, 251 Ill. App. 3d 371, 622 N.E.2d 66 (1993). In *Weber*, the plaintiff, the executor for the deceased's estate, filed a negligence action against a nursing home after the deceased, a patient, wandered away from the nursing home and died from exposure to the elements. *Id.*, 622 N.E.2d at 67. One count requested treble damages, as authorized by statute. *Id.* at 372, 622 N.E.2d at 67. The plaintiff filed a declaratory action to determine whether the insurance company, pursuant to the policy, would be required to pay treble damages if the nursing home was found liable. *Id.* at 371-72, 622 N.E.2d at 67. The insurance company argued that such a finding would be premature, as the underlying lawsuit was

still pending and liability had not yet been established. *Id.* at 372, 622 N.E.2d at 67. The trial court subsequently granted the plaintiff's complaint for declaratory action and found the insurance company would be required to pay treble damages if found liable in the underlying case. *Id.*

¶ 37 On appeal, the *Weber* court reversed the trial court's decision, holding the decision was not ripe for adjudication. *Id.* In reaching its holding, the *Weber* court distinguished between a duty to defend and a duty to indemnify, explaining issues regarding a duty to defend become ripe "soon after the occurrence giving rise to the claim," whereas a duty to indemnify is not ripe for adjudication "until an insured becomes legally obligated to pay damages in the underlying action." *Id.* at 373, 622 N.E.2d at 68. The *Weber* court thus concluded "a declaratory judgment action brought to determine an insurer's duty to indemnify its insured, brought prior to a determination of the insured's liability, is premature since the question to be determined is not ripe before adjudication in the underlying action." *Id.* at 373-74, 622 N.E.2d at 68. Numerous other Illinois cases discussed by the parties follow this same line of reasoning. See, e.g., *Batteast v. Argonaut Insurance Co.*, 118 Ill. App. 3d 4, 454 N.E.2d 706 (1983); *Stokes v. Pekin Insurance Co.*, 298 Ill. App. 3d 278, 698 N.E.2d 252 (1998); *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 811 N.E.2d 718 (2004); *Byer Clinic & Chiropractic, Ltd. v. State Farm Fire & Casualty Co.*, 2013 IL App (1st) 113038, 988 N.E.2d 670; and *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 127, 607 N.E.2d 1204, 1221 (1992).

¶ 38 St. John's asserts the trial court misplaced its reliance on *Weber*. St. John's distinguishes *Weber* based on the fact that the tort claimant in *Weber* brought the declaratory action, not the insured. However, as tort claimants have the same ability to challenge insurance coverage as the insured, we find that argument unpersuasive. See, e.g., *Skidmore v.*

Throgmorton, 323 Ill. App. 3d 417, 422, 751 N.E.2d 637, 641 (2001). St. John's also argues the coverage issue in *Weber* "concerned whether the insurer had a duty to indemnify the insured regarding a specific kind of statutory treble damages sought in the underlying tort action, which would necessarily have involved determination of matters substantially similar to the question of whether the insured was liable for such damages in the underlying action." In contrast, St. John's asserts that set of facts is distinguishable from the present case because an interpretation of the insurance policy afforded to each defendant physician "will in no way involve issues substantially similar to the issues to be determined in the underlying tort claim."

¶ 39 In support, St. John's points to *Murphy v. Urso*, 88 Ill. 2d 444, 456, 430 N.E.2d 1079, 1085 (1981), asserting a declaratory-judgment action is ripe for adjudication as long as the doctrine of collateral estoppel does not apply. Collateral estoppel applies where an identity of parties and issues precludes relitigation of the same issues in a separate proceeding. *Id.* at 456-57, 430 N.E.2d at 1085.

¶ 40 In *Murphy*, the passenger of a vehicle suffered injuries when the driver struck several cars while driving at an excessive rate of speed. *Id.* at 448, 430 N.E.2d at 1081. The passenger filed a lawsuit against both the driver and the owner of the vehicle, claiming the driver was acting as an agent of the owner. *Id.* The question for the supreme court was whether the owner's insurance company was precluded from denying coverage to the driver because it did not seek a declaratory judgment to challenge its duty to defend or indemnify the driver. *Id.* at 455, 430 N.E.2d at 1084. In reaching its decision, the supreme court noted, "[w]here the issues in an underlying suit and a declaratory judgment action are separable, deciding the question of coverage in a collateral proceeding prejudices no party." *Id.* The court then held a declaratory action would have been fruitless because to reach the issue of whether the insurance company

was required to indemnify the driver would have necessarily required the trial court to determine whether the driver was the owner's agent, a central issue in the underlying case. *Id.*

¶ 41 Relying on *Murphy*, St. John's contends its complaint for declaratory judgment is ripe for adjudication. According to St. John's, *Murphy* created an exception that allows a complaint for declaratory judgment to be considered ripe when the issues in the underlying suit and a complaint for declaratory-judgment action are separable. Given we find the analysis in *Murphy* inapplicable to the ripeness question in the matter before us, we need not examine whether the issues in the underlying suit and the complaint for declaratory judgment are separable. In our view, *Murphy* is simply a different ball of wax.

¶ 42 First, we point out *Murphy* concerned a garnishment action in which the supreme court retrospectively determined whether a declaratory-judgment action to resolve the insurer's duty to defend would have been appropriate under the circumstances. Moreover, the exception discussed in *Murphy* is an exception to the general rule of estoppel, not an exception to the long-standing general notion that litigation of the duty to indemnify is not ripe for adjudication prior to establishing liability. *Weber*, 251 Ill. App. 3d at 373, 622 N.E.2d at 68. The insurer in *Murphy* invoked the estoppel exception and was allowed to assert its policy defenses despite the insurer's failure to file a motion indicating it was defending under a reservation of rights. The exception to the general estoppel rule applied because of a conflict between the insurer and the putative insured, not because of an exception to the ripeness doctrine. As we see it, *Murphy* provides no guidance on the question of whether the requirement of ripeness is satisfied when a question as to the amount of coverage is raised prior to a finding of liability.

¶ 43 Therefore, we conclude the exception provided in *Murphy* is inapplicable to the present case.

¶ 44 In other cases factually similar to the matter before us, where the *Murphy* exception has been examined, it has also been found inapplicable. In *Stokes*, the plaintiff, who had been injured in an automobile accident, filed a declaratory action, asking the trial court to interpret whether an insurance-policy limit of \$100,000 for each person and \$300,000 for each accident entitled her to an amount of up to \$100,000 or \$300,000. *Stokes*, 298 Ill. App. 3d at 279-80, 698 N.E.2d at 253. The defendant filed a motion to dismiss, asserting the motion was premature while the underlying case was still ongoing. *Id.* at 280, 698 N.E.2d at 253. The trial court granted the motion to dismiss and the appellate court affirmed. *Id.* at 280, 285, 698 N.E.2d at 253, 257. In reaching its decision, the *Stokes* court specifically found *Murphy* inapplicable, stating, "[u]nless liability is determined to be greater than \$100,000, the result of the declaratory judgment action is nothing more than an advisory opinion. Therefore, the relevance of the declaratory judgment action is integrally related to the underlying suit of liability. Accordingly, we believe that these issues are inseparable, and therefore, the *Murphy* exception is inapplicable." *Id.* at 284, 698 N.E.2d at 256.

¶ 45 In *Czapski v. Maher*, 385 Ill. App. 3d 861, 867, 896 N.E.2d 394, 400 (2008), the appellate court considered whether the *Murphy* exception applied where the issue was the duty to indemnify. In rejecting the applicability of *Murphy*, the *Czapski* court held that finding "excess policies would be triggered in the event of a future judgment is premature and would serve merely as an advisory opinion, which this court lacks the authority to issue." *Id.*

¶ 46 Similarly, in *Certain Underwriters at Lloyd's, London v. Boeing Co.*, 385 Ill. App. 3d 23, 43, 895 N.E.2d 940, 958 (2008), the appellate court held a declaratory action was not ripe for adjudication where a party sought clarification of its duty to indemnify prior to liability being established in the underlying case. The court found *Murphy* to be applicable "only in regard to

its finding that a declaratory judgment is an unacceptable vehicle of litigation where the issues in the underlying suit and the declaratory judgment action are substantially the same." *Id.* at 44, N.E.2d at 959. Otherwise, the *Lloyd* court found *Murphy* distinguishable because it dealt with a duty to defend, not the duty to indemnify. *Id.*

¶ 47 Other cases cited by St. John's are unpersuasive and distinguishable. In *Illinois State Medical Insurance Services, Inc. v. Cichon*, 258 Ill. App. 3d 803, 807, 629 N.E.2d 822, 825 (1994), the appellate court held the *Murphy* exception applied where the declaratory action sought determination of whether the complaint's allegations of negligence against the defendant doctor were covered by the insurance policy, which was a separable issue from whether the doctor actually committed those acts. Thus, unlike the present case, *Cichon* addressed the existence of coverage, whereas the present case acknowledges the existence of coverage but disputes the amount.

¶ 48 In *Allianz Insurance Co. v. Guidant Corp.*, 355 Ill. App. 3d 721, 731, 839 N.E.2d 113, 120 (2005), the parties did not seriously dispute the applicable law or the facts but disputed only the application of the law to those set of facts. Here, several issues of fact remain regarding the liability of the 14 named defendants, particularly the defendant physicians and St. John's. Thus, to grant St. John's declaratory action and interpret the insurance policy would serve only as an advisory opinion based on the speculative liability of the parties. In *Flashner Medical Partnership v. Marketing Management, Inc.*, 189 Ill. App. 3d 45, 50, 545 N.E.2d 177, 181 (1989), the parties sought clarification as to Flashner's duty to defend or provide costs for the defense. Likewise, *Minnesota Lawyers Mutual Insurance Co. v. Larson*, No. 06-CV-074-WDS, 2007 WL 2688443, at *1 (S.D. Ill. 2007), also involved a duty to defend rather than the duty to indemnify.

¶ 49 Accordingly, we conclude the trial court did not err in dismissing St. John's complaint for declaratory judgment as unripe, as liability had not yet been established in the underlying case.

¶ 50 C. Dismissal as to Remaining Defendants

¶ 51 St. John's next asserts that, even if the trial court's dismissal was appropriate as to National Guardian, it was not appropriate as to the remaining defendants. However, St. John's fails to cite to any authority in support of its argument, and the issue is therefore forfeited. See *People v. Prinzing*, 389 Ill. App. 3d 923, 937, 907 N.E.2d 87, 100 (2009); See also Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Regardless, as discussed above, a determination of whether the remaining defendants breached their agreements with St. John's by failing to provide or maintain the agreed-upon coverage is premature, as liability has not yet been established in the underlying case. Until judgment has been entered in excess of \$1 million and National Guardian refuses to pay up to \$3 million, St. John's cannot establish an actual controversy between the parties that is ripe for adjudication. See *Jandeska v. Prairie International Trucks, Inc.*, 383 Ill. App. 3d 396, 398, 893 N.E.2d 673, 675 (2008) (the appellate court may affirm on any basis in the record).

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment.

¶ 54 Affirmed.