UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2056

September Term, 2014

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MOATAZ WARSHANNA, *et al.*

v.

HICKORY HOLLOW COMMUNITY ASSOCIATION, INC., *et al.*

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Woodward,
Berger,
Arthur,

JJ.

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Opinion by Arthur, J.

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Filed: January 12, 2016

The Circuit Court for Howard County granted summary judgment in favor of a homeowners association and its management company on a complaint for declaratory relief brought by two homeowners. The association and the management company asserted various grounds for dismissal or summary judgment, including mootness, but the circuit court did not specify the grounds on which it relied. Nor did the court declare the parties' rights.

The homeowners now appeal to this Court. We affirm the judgment in part, reverse in part, and remand this case for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

Moataz and Shareen Warshanna live in the Village of Hickory Ridge, in Columbia, Maryland. The Warshannas own a residential lot on East Wind Way, a road publicly maintained by Howard County. The road ends in a cul-de-sac next to the parking area that includes the Warshannas' carport.

As lot owners, the Warshannas are members of the Hickory Hollow Community Association, Inc. (the "Association"), a Maryland non-stock corporation. The Association has governed the community since 1979 under a "Declaration of Covenants, Conditions and Restrictions" and under by-laws adopted pursuant to that Declaration.

The Warshannas and other members pay assessments levied by the Association. Those assessments are to be "used exclusively within Hickory Hollow to maintain and provide common green areas, street and parking improvements as necessary, sidewalks, public safety, a street safety lighting system . . . , snow removal, other purposes and

functions permitted and sanctioned for exempt organizations . . . and to enforce the terms and provisions of the Declaration."

The Association owns the common areas, which include an open-space lot and other areas near the Warshannas' lot. Under the Declaration, the Association must "maintain all [common] areas in a neat and orderly condition," "provide all necessary grass mowing, snow removal and other similar needs," and "maintain all non-public ways, parking[] areas, including the floor of carport areas, and such portions of public streets, ways or roads as are not publicly maintained for any reason[.]" The By-Laws state that the Association's Board of Directors has a duty to "[c]ause the common area to be maintained in the best interests of the members of the Association." To carry out these and other obligations, the Association engaged a management company known as Tidewater Property Management, Inc. ("Tidewater").

On April 3, 2014, the Warshannas filed a complaint in the Circuit Court for Howard County, naming the Association and Tidewater as defendants. Their seven-count amended complaint was the operative pleading before the circuit court at the time of summary judgment.

In Count I, the Warshannas sought a declaration that Tidewater could not enforce a policy that prevented homeowners from inspecting the Association's books and records unless that inspection were recorded and supervised. In response, Tidewater and the Association argued that the policy was lawful and that the claim was moot because the Association had agreed to waive the policy.

In Count II, the Warshannas alleged that the Association had refused to remove snow from in front of their driveway during the previous winter. The Association contended that snow removal issue was moot because winter had ended. It also contended that the Association had no duty to remove snow from the area in question.

In Count III, the Warshannas alleged that the Association had a duty to trim the tree branches from the common area that were hanging over the Warshannas' property. The Association responded that Maryland recognizes no legal remedy, other than self-help, for trees encroaching from neighboring properties.

In Counts IV through VI, the Warshannas alleged that the Association had refused to repair a defective storm drain and resulting damage to a sidewalk, to repair defects in the surface of the Warshannas' parking pad, and to remove trash and debris in the common area. The Association responded that the business judgment rule categorically precluded the court from interfering with its decisions regarding maintenance.

The final count concerned the Association's alleged failure to enforce certain community parking regulations. The Association argued that the issue was moot because the specific violations no longer existed.

After a motions hearing on September 30, 2014, the court announced that it would take the matter under consideration. The court informed the parties that it expected to issue a written opinion. No opinion followed.

On November 12, 2014, the court entered an order granting the motion to dismiss or for summary judgment as to all seven counts. In addition, the court denied a Rule 1-341

motion for sanctions against the Warshannas. Despite the requests for declaratory relief, the court issued no declaration in favor of either party.

Thereafter, the Warshannas noted a timely appeal.

## QUESTIONS PRESENTED

In this appeal, the Warshannas present the following questions:

1. Did the Trial Court err by failing to provide a declaration of rights as requested in Appellants' Amended Complaint?

2. Did the Trial Court err by holding that the Appellants' claims were moot?

3. Did the Trial Court err by holding that the Appellees['] alleged conduct was protected by the business judgment rule?

4. Did the Trial Court err by dismissing Counts I - VII of the Amended Complaint on the merits of those counts?

## SCOPE OF REVIEW

The parties agree that this Court should review the circuit court's decision as an order for summary judgment because the parties presented materials outside the pleadings, which the court did not exclude. *See* Md. Rule 2-322(c). In an appeal from a grant of summary judgment, the appellate court conducts an independent review, considering the record and all reasonable inferences from the record in the light most favorable to the nonmoving party, to determine whether the parties generated any genuine disputes of material fact and, if they did not, whether the moving party was entitled to judgment as a matter of law. *See, e.g.*, *Windesheim v. Larocca*, 443 Md. 312, 326 (2015).

Ordinarily, the appellate court should not consider grounds other than the ones on which the trial court relied in granting summary judgment. *See, e.g.*, *Hamilton v. Kirson*,

439 Md. 501, 523 (2014). When a court grants summary judgment without stating its reasons, however, the appellate court will affirm the judgment if the record nonetheless shows that the court was legally correct in granting the motion. *See Smigelski v. Potomac Ins. Co. of Illinois*, 403 Md. 55, 61 (2008). Under those circumstances, the appellate court assumes that the trial court "carefully considered all of the asserted grounds . . . and determined that all or at least enough of them . . . were meritorious." *Fox v. Fid. First Home Mortg. Co.*, 223 Md. App. 492, 508 (2015) (quoting *Fischbach v. Fischbach*, 187 Md. App. 61, 77 (2009)) (quotation marks omitted).

Accordingly, our task is to consider the merits of all of the grounds that Tidewater and the Association asserted in support of their motion.

## DISCUSSION

The Warshannas primarily requested declaratory relief in each count of the complaint, but the court disposed of all counts without issuing a declaration.

As a general rule, "when a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, 'the court must enter a declaratory judgment, defining the rights and obligations of the parties'. . . and that judgment must be in writing and in a separate document." *Lovell Land, Inc. v. State Highway Admin.*, 408 Md. 242, 256 (2009) (quoting *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 363 Md. 106, 117 n.1 (2001)). The dismissal of a declaratory judgment complaint is rarely appropriate, and in most cases the trial court must declare the parties' rights even if the decision would be unfavorable to the party seeking the declaration. *See, e.g.*, *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309,

355-56 (2010). Similarly, even though the court may grant summary judgment to resolve matters of law in a declaratory judgment action, "'the trial court must still declare the rights of the parties.'" *See Lovell Land*, 408 Md. at 255-56 (quoting *Megonnell v. United Servs. Auto. Ass'n*, 368 Md. 633, 642 (2002)).

A court may dispose of a declaratory judgment action without declaring the parties' rights only when there is no justiciable controversy. *Broadwater v. State*, 303 Md. 461, 467 (1985) (collecting authorities); *see also Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 477 (2004) ("when a declaratory judgment action is brought and the controversy is not appropriate for resolution by declaratory judgment, the trial court is neither compelled, nor expected, to enter a declaratory judgment"). A justiciable controversy exists where "there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591 (2014) (quoting *Boyd Civics Ass'n v. Montgomery County Council*, 309 Md. 683, 690 (1987)) (internal quotation marks omitted) (emphasis removed).

In the instant case, the Association and Tidewater argued that some of the claims were not justiciable because the issues were moot. A declaratory judgment case is moot "'when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy.'" *Stevenson v. Lanham*, 127 Md. App. 597, 612 (1999) (quoting *Coburn v. Coburn*, 342 Md. 244, 250 (1996)). "If the issue raised in an action for declaratory judgment is truly moot, the action may properly be dismissed, for . . . the declaratory judgment process 'is not available for the decision of

purely theoretical questions which may never arise, [or] questions which have become moot[,] and abstract questions' and should not be used 'where a declaration would neither serve a useful purpose nor terminate a controversy.'" *Post v. Bregman*, 349 Md. 142, 159 (1998) (quoting *Reyes v. Prince George's County*, 281 Md. 279, 289 n.5 (1977)).

### A. Count I: Inspection of Records

The controversy in Count I first arose when the Warshannas asked to inspect the Association's books and records. Tidewater informed the Warshannas that its policy was to permit members to inspect the Association's records only if the inspection were recorded by audio and video and supervised by the property manager. The Warshannas did not consent to being recorded.

After the Warshannas filed suit to challenge the policy, Tidewater and the Association agreed to waive the policy for the Warshannas or, as an alternative, to furnish copies of any requested documents. Counsel for the Association affirmed the waiver in writing. But despite receiving the equivalent of the relief that they had originally sought, the Warshannas persisted, asking the court to declare the policy to be "void and unenforceable[.]"

Tidewater and the Association assert that the controversy over records inspection became moot when they offered to permit the Warshannas to inspect the Association's records without being recorded. There was certainly no factual dispute that Tidewater had agreed to waive the policy for the Warshannas. Nevertheless, the Warshannas argued that there were still "important issues to be decided" regarding whether the policy itself was enforceable.

Relying on *Carroll County Ethics Comm'n v. Lennon*, 119 Md. App. 49 (1998), the Warshannas contend that the decision to waive the policy, but not to abandon it altogether, does not render their claim moot. In *Lennon*, this Court recognized the existence of an "exception[] to the mootness doctrine that allow[s] a court to pass on questions that may, technically, be moot . . . where one party voluntarily withdraws from the challenged conduct." *Id.* at 57-58. We rejected the position that an alleged wrongdoer can avoid a final determination on the legality of his actions by ending or by promising to refrain from the challenged conduct. *Id.* at 61. To the contrary, the "'voluntary cessation of a challenged practice does not deprive a [court] of its power to determine the legality of the practice'" *Id.* (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)); *see also Stevenson*, 127 Md. App. at 621 ("the voluntary cessation of allegedly illegal or wrongful conduct will not render a declaratory judgment action to determine the illegality or impropriety of the conduct moot").

Tidewater and the Association suggest no basis for distinguishing *Lennon.* Instead, they rely on *Insurance Comm'r v. Equitable Life Assurance Society*, 339 Md. 596 (1995), a case that is procedurally and factually inapposite, because it involves judicial review of an administrative decision, not a declaratory judgment. *See id.* at 612-15. Simply put, a decision upholding an administrative finding of mootness under the highly deferential standards applicable to judicial review of an agency decision has little bearing on whether an alleged wrongdoer can moot an action for a declaratory judgment by promising to cease the allegedly wrongful conduct.

Under *Lennon*, neither the decision to waive its policy after the commencement of litigation nor the promises that the issue will never arise again between these parties is enough to moot the legal challenge to the policy. Tidewater has not yet abandoned the policy. In fact, Tidewater and the Association have made it clear that they expect the policy would continue to apply for homeowners other than the Warshannas. In these circumstances, the court could not dispose of the records inspection count on the ground that it is moot. *Lennon*, 119 Md. App. at 61.

As an alternative ground for a ruling in their favor, Tidewater and the Association argued that no statute prohibits the policy and that the policy reasonably protects the records without restricting access to them. By contrast, the Warshannas argue that the Tidewater and the Association can impose only two conditions on access to the records: they may charge a reasonable fee for copies (s*ee* Md. Code (1974, 2010 Repl. Vol.), § 11B-112(b) of the Real Property Article) and may require "a proper purpose for the inspection." *Parish v. Maryland & Virginia Milk Producers Ass'n*, 250 Md. 24, 88 (1968).

In *Hogans v. Hogans Agency, Inc.*, 224 Md. App. 563 (2015), a minority stockholder complained that a corporation conditioned his inspection rights upon the signing of a confidentiality agreement. *Id.* at 566-67. We explained that the right to inspect corporate records is not absolute, but remains subject to "'proper safeguards to protect the interests of all concerned.'" *Id.* at 573 (quoting *Wright v. Heublein*, 111 Md. 649, 658 (1910)). Consequently, "'[a] corporation may take reasonable measures . . . to protect the corporation against disclosure and misuse of confidential documents and information by the stockholder.'" *Hogans*, 224 Md. App. at 573 (quoting James J. Hanks, Jr., *Maryland*

*Corporation Law* § 7.18 (2014 Supp.)). Under the circumstances, we concluded that the terms of the confidentiality agreement advanced proper purposes and that imposing the requirement upon the minority shareholder was reasonable. *Hogans*, 224 Md. App. at 574.

In this case, Tidewater and the Association might well show that the recording policy is a reasonable safeguard to prevent persons from altering, destroying, or purloining the Association's documents. At this point in the proceedings, however, we have an insufficient basis to determine whether the Association was entitled to judgment. In contrast to *Hogans*, the record here includes only vague descriptions of the recording policy. It would be incorrect for this Court to hold that every such policy requiring monitoring for record inspection is reasonable as a matter of law.

In summary, we cannot affirm the judgment on either of the grounds advanced by the Association. On remand, if the parties develop a factual record that permits the court to evaluate the reasonableness of the policy, the court should determine whether the conditions imposed on records inspection meet the standards expressed in *Hogans*, 224 Md. App. at 573-74. If the material facts are undisputed, the court may make that determination on summary judgment. But regardless of whether the court decides the issue on summary judgment, it must issue a declaration as to whether the policy is permissible. *Lovell Land,* 408 Md. at 256.

### B. Count II: Snow Removal

In the second count, the Warshannas prayed for a declaration that the Association was required to remove snow from common areas in front of their driveway. Most of the relevant facts were undisputed.

In general, East Wind Way is publicly maintained by Howard County. On at least three occasions, beginning in the winter of 2013-2014, the County's contractor plowed the street, but left snow piles in the corner of the cul-de-sac, blocking the Warshannas' vehicle access. Management refused to clear the excess snow and told the Warshannas that their only recourse was to call the County for assistance. The essence of this controversy was whether the Association or the Warshannas themselves were responsible for maintaining the area between the street and their carport.

Before the circuit court, the Association contended that this claim was moot by the time the Warshannas commenced this action in April 2014. The Association asserted: "The snow contractor is not currently piling snow in front of Plaintiffs[']s access way because winter is over and there is no snow to plow." The Warshannas responded, succinctly, that "winter will come again." The Association conceded that "winter [was] coming," but speculated that the snow-removal problem might not recur in subsequent winters.

The Warshannas argue that their claim falls under a well-recognized "mootness doctrine exception for controversies that are 'capable of repetition, yet evading review[.]'" *Stevenson*, 127 Md. App. at 626; *see State v. Parker*, 334 Md. 576, 584 (1994) ("even if no controversy exists at the precise moment of review, a case will not be deemed moot if the controversy between the parties is 'capable of repetition, yet evading review'") (citations omitted). This exception applies "when (1) the challenged action was too short in its duration 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." *Hamot v. Telos Corp.*, 185 Md. App. 352, 364 (2009) (citing *Parker*, 334 Md. at 585).

As to the first criterion, the Warshannas argue that no court can resolve a case quickly enough that a decision would precede the melting of the snow piles. The Association counters that the Warshannas should not have waited until April to file suit and should have "requested a temporary restraining order and other expedited treatment" so that "the matter could have been resolved when there was still a controversy." Yet, even if the Warshannas had sought and obtained a temporary restraining order while the snow was still on the ground, some or all of the snow might well have melted before the court could decide a motion for preliminary injunction. *See* Md. Rule 15-504(c)(5) (generally, a temporary restraining order lasts ten days). It is implausible to expect a Maryland court, during a winter in central Maryland, to have resolved the entire case before the snow in front of the driveway had melted.

The Association contends that "there is no reasonable expectation that the [Howard County] contractor will pile snow in front of their access way in the future." The record does not support that assertion. According to the Warshannas, the County piled snow in front of their driveway on "at least three occasions" in the winter of 2013-2014, which affords a reasonable inference that the County's practice for plowing portions of East Wind Way had become standard. Without any evidence that the County had changed its alleged practice for the street in question, there was no reason to believe that the County would begin clearing all snow between the street and the carport.

In sum, the snow-removal controversy involved an issue that is capable of repetition, but will evade review. *See, e.g.*, *Parker*, 334 Md. at 585-86. The inherent time constraints would prevent a complete adjudication before the snow melted, and there was a reasonable expectation that the problem would recur. Accordingly, the court should not have dismissed the snow removal count as moot.

As an alternative argument on Count II, the Association argued that the Association had no duty to remove snow from the area in question. The Association's argument depends upon an inference that the area is on the publicly maintained portion of East Wind Way, and not (in the words of the Declaration) in "non-public ways, parking[] areas, including the floor of carport areas, and such portions of public streets, ways or roads as are not publicly maintained for any reason[.]"

The Warshannas' amended complaint alleges, however, that the area in question was "in front of their driveway" and in one of "the Common Areas[.]" In addition, a plat of the community indicates that at least some portions of the cul-de-sac are publicly maintained, but does not show that the public portion extends to the carports. Viewing the facts in the light most favorable to the Warshannas as the nonmoving parties, a factfinder could reasonably conclude that the snow piles might have been located in a non-public area under the Association's exclusive control.

Because it was not beyond all dispute that the County maintained, or had an obligation to maintain, the front of the driveway, the court erred in entering summary judgment against the Warshannas at this time. Nonetheless, we do not rule out the possibility that, on a more fully developed record, the court might be able to decide the

issue on summary judgment. Again, whether the court decides the issue on summary judgment or after a trial on the merits, it must declare the parties' rights. *Lovell Land,* 408 Md. at 256.

### C. Count III: Tree Trimming

In Count III of the amended complaint, the Warshannas requested a declaration concerning their right to cut tree branches that extended from the common area over their property. In moving for dismissal or summary judgment, the Association relied on *Melnick v. C.S.X. Corp.*, 312 Md. 511 (1988), which held that a landowner does not have a legal remedy against a neighbor when tree branches or leaves encroach or fall from the neighboring property. Instead, the landowner's exclusive remedy is to use self-help and to cut back encroaching vegetation to the property line. *Id.* at 514-21. "We have gotten along very well in Maryland, for over 350 years," the Court wrote, without authorizing legal actions "by neighbor against neighbor" whenever branches, roots, vines, or leaves encroach on one property from another. *Id.* at 520.

In this case, no one disputed that the Warshannas had the right to cut the branches back to their property line. In fact, no one disputed that the Association had authorized the Warshannas to do so. The Warshannas claimed to believe, however, that the existence of that right and even the express permission from the neighboring property owner to exercise that right were inadequate. Counsel for the Warshannas told the court that his clients desired to have a declaration in hand to confirm "that the *Melnick* case controls" before they began trimming the branches.

As stated in the amended complaint, the Warshannas feared that they "would be subject to a fine by the Association" if they damaged trees from the Association-owned common area. Referring to some excerpts from a homeowners' guide book, the Warshannas speculated that the Association might attempt to fine them for "harming or destroying Association property" if they acted on the authorization to cut the branches. The Warshannas insisted that this situation posed "an intractable dilemma," because of "the distinct probability of a fine."

These allegations do not amount to an actual controversy between the parties that a court decree could terminate. The alleged "controversy" had nothing to do with any actions or threatened actions by the Association. In fact, the Association affirmatively agreed to permit the Warshannas to exercise self-help, without making any explicit or implicit threats of consequences.

At best, the Warshannas were speculating as to what might happen if, hypothetically, the Association should decide to take some action that it has never taken, never threatened to take, and expressly disclaimed any intention of taking. It would be inappropriate for a court to declare the future rights in anticipation of a hypothetical scenario that might never occur. *See Hatt v. Anderson*, 297 Md. 42, 47 (1983) (reasoning that the mere existence of a regulation does not generate a justiciable controversy absent an allegation that "the regulation has been[] or is threatened to be interpreted or applied . . . in any particular way"); *see also State v. G & C Gulf, Inc.*, 442 Md. 716, 731 (2015) (holding that, to contest a statute through declaratory judgment action, litigant must allege a credible threat of prosecution under the statute). If the Association ever fines these

homeowners for exercising the right described in *Melnick*, a court can consider the appropriateness of that action at that time.

Under the circumstances, there is no justiciable controversy on the issue of tree trimming. In essence, to resolve their alleged fears about imagined future consequences that had never even been threatened, the Warshannas asked the court to confirm the existence of a right that their adversaries affirmatively agreed that they had. The circuit court was not required to issue a declaration on the non-controversy or on the hypothetical controversy. Because this claim was not appropriate for resolution by declaratory judgment, summary judgment was proper.

### D. Counts IV, V, and VI (Drainage Problems and Sidewalk Repairs; Asphalt Surface of Carport; Debris and Vermin)

In the fourth, fifth, and sixth counts of the amended complaint, the Warshannas requested declarations regarding the Association's obligations to maintain certain common areas under its exclusive control. The three counts alleged, respectively: that a defective storm drain in the Warshannas' carport had caused water damage to the sidewalk in front of their house; that defects on the surface of their parking pad collected water and ice; and that the Association's contractors had dumped trash bags in the open-space lot, which attracted vermin near the Warshannas' house. The Warshannas claimed that management refused requests to cure those allegedly hazardous conditions.

The Association responded that the business judgment rule categorically bars a court from interfering with the Association's decisions regarding maintenance. For support, the

Association relies on *Black v. Fox Hills North Community Ass'n, Inc.*, 90 Md. App. 75 (1992), and *Reiner v. Ehrlich*, 212 Md. App. 142 (2013).

In *Black*, 90 Md. App. at 77-83, this Court employed the business judgment rule to affirm the dismissal of a claim for a declaration that a community association had erroneously approved the construction of a fence. We explained that, absent a showing of fraud or bad faith, the business judgment rule generally precludes judicial review of a legitimate business decision made by a community association. *Id.* at 82. Even though the association's board may have approved the fence on the basis of an erroneous interpretation of the applicable covenants, the decision clearly "fell within the legitimate range of the association's discretion," where the association "followed the prescribed procedures in approving the fence," requested and obtained the advice of counsel, and "gave the entire matter due consideration." *Id*. at 82-83.

Similarly, in *Reiner v. Ehrlich*, 212 Md. App. at 155-56, we affirmed the grant of summary judgment against two homeowners who sought a declaration that a homeowners association had wrongly denied their request to install a roof with asphalt shingles, which the community's by-laws prohibited. Observing that the case fell "squarely within the purview of *Black*," we reasoned that the business judgment rule precluded a court from re-examining the association's decision. *Id.* at 156.

Unlike the associations in *Black* and *Reiner*, the Association has thus far failed to demonstrate the basic prerequisite for application of the business judgment rule. The business judgment rule applies to judgments, but the record contains no admissible

evidence that anyone exercised any judgment in allegedly failing to respond to the Warshannas' maintenance requests.

For example, the record includes no information to suggest that anyone evaluated the Warshannas' complaints and made a judgment that they did not merit immediate attention. Nor does the record include any information about maintenance policies or procedures, such as policies regarding routine or periodic maintenance of the common areas, or policies that might guide or inform the exercise of discretion about how and when to appropriate the Association's resources to remedy defects in the common areas. At present, the record does not even disclose who made any decisions, or how or why the decisions were made.

Only one portion of the record refers to maintenance: a defective affidavit from one of the directors[1] vaguely asserted that "[t]he Board of Directors will continue to investigate complaints as they arise and decide whether and when work needs to be performed based on the severity of the problem and the budget." At most, the affidavit established that the Association made some investigations of some complaints in the past and intended to do so in the future. The affidavit does not affirmatively state that the Association investigated the Warshannas' specific requests, let alone explain why the representatives had exercised their business judgment not to act. It suggests, but does not actually state, that the

[1] The affidavit is defective because, in violation of Md. Rule 2-501(c), it was not "made upon personal knowledge." *See Zilichikhis v. Montgomery County*, 223 Md. App. 179 (2015). In connection with an earlier motion, the Association and Tidewater submitted affidavits that appear to have been signed by counsel, rather than by the affiants. Those affidavits were defective as well. *See id.* at 180-81.

Association may have decided that the Warshannas had not complained of problems that were sufficiently severe to merit the immediate expenditure of resources at that time. The affidavit fell short of satisfying the Association's burden to demonstrate that its board members exercised their business judgment.

To obtain the benefits of the business judgment rule, a person must do more than simply invoke the rule: the person must show that he or she actually exercised business judgment or discretion in some ascertainable way. *See Reiner*, 212 Md. App. at 156 (the business judgment rule applies when a board has "rendered a decision"). Because the record contained insufficient information about the Association's actual decisions and processes, the Association was not entitled to summary judgment on the ground of the business judgment rule.

As with other issues (such as snow removal and the reasonableness of Tidewater's record-review policies), we do not rule out the possibility that, on a more fully developed record, the court might be able to decide the issue on summary judgment. In addition, whether the court decides the issue on summary judgment or after a trial on the merits, it must declare the parties' rights. *See Lovell Land*, 408 Md. at 255-56. [2]

[2] In *Black*, 90 Md. App. at 83, and *Reiner*, 212 Md. App. at 156, we emphasized that the homeowners failed to allege fraud or bad faith on the association's part. By contrast, the Warshannas alleged that the Association acted arbitrarily by refusing their requests while making comparable repairs to accommodate their neighbors. Mr. Warshanna's affidavit referred to "a series of disputes . . . over the years, which has caused ill will and a persistent pattern of harassment[.]" At the hearing, counsel for the Association stated that "[b]ad faith is alleged in an affidavit from the Plaintiffs," but went on to dispute the allegations of "harassment" by referring to matters outside the record. Without passing on whether these allegations arguably generate factual issues regarding bad faith, we note that the Warshannas have no burden to rebut the (continued…)

### E. Count VII: Selective Enforcement

In the final count, the Warshannas sought a declaration regarding alleged "selective enforcement" of parking regulations. As the only ground for dismissal of that count, the Association contended that the parking issues were moot.

The parties' contentions echo their arguments as to whether snow removal was a moot issue. The main difference is that the Association insists that the temporary nature of parking (rather than the changing of the seasons) should moot the issue. Once again, we agree with the Warshannas that, even if the precise problems no longer exist at the time of a court judgment, the issues were capable of repetition, but would evade review. *See, e.g.*, *Parker*, 334 Md. at 585-86. Other drivers would likely move their vehicles after a period of time long enough to aggrieve the Warshannas, but too short in duration to allow them to obtain legal relief. "Mootness" was not an appropriate ground for disposing of the final count of the complaint.[3]

The court, however, should have dismissed this claim for reasons other than mootness: even if parking violations persist, the selective enforcement count fails to

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business judgment defense by establishing bad faith until the Association first demonstrates the applicability of the presumption of good faith.

[3] In arguing for a conclusion of mootness, the Association emphasized what they called the "basic past tense wording of the amended complaint[.]" In written submissions to the circuit court and to this Court, the Association altered the wording of one key allegation from present tense to past tense, added emphasis to its own alteration, but did not bring the alteration to the reader's attention. Through the actual wording of the amended complaint, the Warshannas sufficiently alleged the existence of ongoing violations.

establish an actual controversy between these parties that could be resolved through a declaratory judgment.

For a court to grant relief under the Maryland Uniform Declaratory Judgments Act, there must be an actual controversy between the contending parties, antagonistic claims between the parties that indicate immediate or inevitable litigation, or an assertion of some legal relation, status, right, or privilege challenged or denied by an adversary. Md. Code (1974, 2013 Repl. Vol.), § 3-409(a) of the Courts and Judicial Proceedings Article ("CJP"). The basic justiciability of a declaratory judgment claim is a fundamental issue that an appellate court may raise even if the parties do not. *See Howard County v. Schultz*, 280 Md. 77, 80 (1977); *see also Utils., Inc. of Maryland v. Washington Suburban Sanitary Comm'n*, 362 Md. 37, 44 (2000) ("whether a case is or is not appropriate for a declaratory judgment is an issue which, on public policy grounds, this Court will ordinarily address *sua sponte*").

In Count VII, the Warshannas prayed for "a decree declaring that the Association has an affirmative duty to enforce its regulations in a non-selective manner and declaring that the Association must have a rational basis for granting exceptions to those regulations[.]" Even accepting that the proposed declaration includes a correct statement of an association's general legal obligations, we fail to see how such a decree would "serve to terminate the uncertainty or controversy giving rise to the proceeding[.]" CJP § 3-409(a). A court should dismiss a claim for declaratory relief if it presents a purely abstract question and will not serve any apparent tangible purpose or terminate a

controversy. *See Green v. Nassif*, 426 Md. 258, 293-94 (2012); *Converge*, 383 Md. at 485-86; *Stevenson*, 127 Md. App. at 613 (citing *Post v. Bregman*, 349 Md. at 159).

A declaration stating that a homeowners association cannot act arbitrarily towards its members would do little more than state a general proposition of law. The proposed declaration would give parties no guidance for applying that principle to the specific factual allegations in the complaint. The requested relief, most likely, would create more uncertainty than it could have resolved. "At best, a decision on this matter at th[is] stage would merely strengthen the negotiating position of one side or the other but would not serve to terminate an existing controversy." *Loveman v. Catonsville Nursing Home, Inc.*, 114 Md. App. 603, 614 (1996) (affirming dismissal of complaint for declaratory judgment).

The circuit court did not need to entertain a claim for declaratory relief that, by all indications, related solely to abstract propositions concerning a party's obligations. The Association was entitled to judgment as to the final count.

## CONCLUSION

To summarize, we affirm the judgment as to the two counts on which the Warshannas did not allege the existence of a justiciable controversy: Count III (Tree Trimming) and Count VII (Selective Enforcement). We reverse the entry of summary judgment on the remaining counts, without prejudice to the right of either side to reassert

a motion for summary judgment upon a more fully developed record. Finally, we reiterate that the circuit court must declare the parties' rights on the remaining counts.[4]

**JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED IN PART AND REVERSED IN PART. JUDGMENT AFFIRMED AS TO COUNTS III AND VII OF AMENDED COMPLAINT. JUDGMENT REVERSED AS TO COUNTS I, II, IV, V, AND VI OF AMENDED COMPLAINT. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EVENLY BETEWEEN APPELLANTS AND APPELLEES.**

[4] At oral argument, counsel for Tidewater and the Association made an oral motion for sanctions under Rule 1-341. In view of the disposition of the appeal, we deny the motion. In any event, an oral motion for fees and expenses does not comply with Rule 1-341(b)(1), because an oral motion cannot "include or be separately supported by a verified statement that sets forth the information" regarding costs and attorneys' fees that are required in subsections (b)(2) and (b)(3) of the rule.