

ORIGINAL

IN THE SUPREME COURT OF OHIO

Sara L. Rose, et al.,	:	14-1705
	:	
Appellants,	:	On Appeal from the
	:	Franklin County Court
v.	:	of Appeals, Tenth
	:	Appellate District
Primal Ability, Ltd., et. al,	:	
	:	
Appellee	:	Court of Appeals
	:	Case No. 14AP-114
	:	

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS, SARA ROSE AND CURTIS ROSE

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## EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This cause presents two critical issues that affect the future of the Declaratory Judgment Act: (1) whether the risk of unrecoverable economic loss establishes the need for speedy relief to fully protect a party's rights and interests; and (2) whether a court can deny a party's right to a declaratory judgment by relying solely on information not in evidence.

The court of appeals ruled that risk of payment of an opposing party's litigation expenses and attorney fees under a contract's indemnification clause does not establish a need for speedy relief to preserve the rights and interests of the plaintiff. The court of appeals ruled that the meaning, scope, and enforceability of the indemnification clause could be determined in a separate tort action, so speedy relief was unnecessary. The court of appeals also took judicial notice of pleadings in another case, and relied solely on those pleadings to deny a request for a declaratory judgment.

Declaratory judgment actions are authorized by R.C. 2721.01, et seq. The Declaratory Judgment Act provides that "any person interested under a written contract ... may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status, or other legal relations under it." R.C. 2721.03. The Act is to be liberally construed and administered, so uncertain or disputed obligations can be disposed of quickly and conclusively. R.C. 2721.13; *Mid-American Fire & Casualty Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 8; *Ohio Farmers Indemn. Co. v. Chames*, 170 Ohio St. 209, 213, 163 N.E.2d 367, 371 (1959).

Declaratory judgment actions are commonly used to "determine in advance the advisability of instituting or continuing the prosecution of negligence actions against the insured or others." *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc.2d 159, 163, 660

N.E.2d 755, 758 (C.P.1993), quoting *Ohio Farmers Indemn. Co. v. Chames*, 170 Ohio St. 209, 213, 163 N.E.2d 367, 371 (1959). See also *Mid-American Fire & Casualty Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 8. Their basic purpose is to relieve parties from ‘acting at their own peril in order to establish their legal rights.’” *Holshuh v. Bank One, Akron, N.A.*, 9<sup>th</sup> Dist. No. 18301, 97-LW-4425 (Nov. 12, 1997), quoting *Gray v. Willey Freightways, Inc.*, 89 Ohio App.3d 355, 362, 624 N.E.2d 755 (6<sup>th</sup> Dist. 1993).

A person is entitled to a declaration of rights “whether or not further relief is or could be claimed.” R.C. 2721.02. Likewise, Civ.R. 57 provides that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” *Roadway Services, Inc. v. Sponsler*, 138 Ohio Misc.2d 17, 24-25, 2006-Ohio-3765, 856 N.E.2d 326 (C.P.).

Case law encourages the use of declaratory judgments. *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc.2d 159, 163, 660 N.E.2d 755, 758 (C.P. 1993), but, courts look unfavorably on contract terms requiring one party to pay an opposing party’s attorney fees. See generally *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 8-9, and cases cited therein.

When requested to declare whether an indemnification clause was valid, the court of appeals refused to liberally construe the Act. Rather than quickly and conclusively disposing of the dispute over the application and interpretation of an indemnification clause, the court of appeals ruled that the meaning and enforceability of the clause should be litigated in a separate personal injury action. This decision ignores the legislature’s effort to provide quick and cost-effective resolution of contract disputes, violates the requirement to liberally grant declaratory judgments, and ignores a party’s right to a declaratory judgment even when other remedies are

available. The decision of the court of appeals unreasonably restricts access to declaratory judgments in the Tenth Appellate District and essentially guts the Declaratory Judgment Act.

The decision is a matter of public interest. The public's interest in quick and cost-effective resolution of questions regarding rights under written contracts is profoundly affected by a holding that declaratory judgments can be denied where risky and costly litigation is the only alternative. Such a rule would sabotage the purpose of the Declaratory Judgment Act and turn on its head Ohio's longstanding rule that a party pay its own litigation expenses.

This court has consistently set forth three elements for a plaintiff to establish a right to a declaratory judgment: (1) a real controversy exists between the parties; (2) the controversy is justiciable in nature; and (3) speedy relief is necessary to the preservation of rights that may otherwise be impaired or lost. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 148-49, 586 N.E.2d 80 (1992). The court of appeals erroneously ruled that a declaratory judgment was not appropriate when an indemnification clause exposes a party to liability for attorney fees and litigation costs, because no need for speedy relief exists.

This court has neither defined what constitutes "speedy relief" nor explained what "rights" need protected. As a result, lower courts have issued conflicting decisions. For example, the court of appeals decision directly conflicts with the decision in the Eighth District Court of Appeals in *Halley v. Ohio Co.*, 107 Ohio App.3d 518, 669 N.E.2d 70 (8<sup>th</sup> Dist. 1995), and with the Ninth District Court of Appeals in *Holshuh v. Bank One, Akron, N.A.*, 9<sup>th</sup> Dist. No. 18301, 97-LW-4425 (Nov. 12, 1997). Litigants in the Tenth District, which includes the state's capital, should not have different rights than those in the five counties of the Eighth and Ninth Districts.

If the court of appeals decision is allowed to stand, Ohio citizens will have different rights under the Declaratory Judgment Act depending on where they live or do business. This

urgently needs corrected by this court. Rights to declaratory judgments need restored in Franklin County and reaffirmed throughout Ohio.

Although no clear definition of “speedy relief” has been provided, when a need for speedy relief has been found, it is typically because the plaintiff stands to suffer an economic loss that can never be recovered. *Schaefer v. First Nat. Bank of Findlay*, 134 Ohio St. 511, 18 N.E.2d 263 (1938) (determination of validity of promissory note so plaintiff could refinance mortgage indebtedness); *American Life & Accident Ins. Co. of Kentucky v. Jones*, 158 Ohio St. 287, 89 N.E.2d 301 (1949) (right not to pay unemployment taxes for non-employees); *Burger Brewing Co. v. Liquor Control Commission*, 34 Ohio St.2d 93, 296 N.E.2d 261 (1973) (potential for economic loss due to price-setting law); *Herrick v. Kosydar*, 44 Ohio St.2d 128, 339 N.E.2d 626 (1975) (right not to pay taxes); *Williams v. City of Akron*, 54 Ohio St.2d 136, 374 N.E.2d 1378 (1978) (economic loss due to environmental regulations); *State, ex rel. Columbus Southern Power Co. v. Sheward*, 63 Ohio St.3d 78, 585 N.E.2d 380 (1992) (loss of revenue that could not be recovered). The risk of paying an opponent’s legal fees to determine whether one has a valid cause of action is an economic loss that can never be recovered. This court should accept this case and issue guidance on what circumstances establish the need for “speedy relief” under the Declaratory Judgment Act. This court should also declare that risking payment of an opponent’s legal fees in a personal injury case is not a fair substitute for a declaratory judgment because the plaintiff’s rights are not “fully protected.” *Schaefer v. First Nat. Bank of Findlay*, at 518.

Apart from these considerations which make this case one of great public interest, the decision of the court of appeals has broad general significance. If the court of appeals decision becomes binding precedent, unscrupulous individuals could draft invalid contracts, yet effectively prohibit anyone from challenging their rights under the contracts by inserting an

indemnity clause. Businesses and individuals offering any product or service that could harm a customer or employee could effectively avoid liability for negligent or even reckless conduct by including an indemnification clause in a contract and requiring anyone wanting to conduct business with them to sign the contract. From a practical standpoint, it would not matter whether the “contract” was printed and signed, posted in the business, or buried on a website. It also would not matter whether the indemnification clause was legally enforceable. The fear of paying the offender’s legal fees would dissuade most people from asserting their rights, even under a contract that appears invalid. The right to a declaratory judgment in such situations would solve this injustice.

Victims would include anyone who signs a contract, whether for employment, purchasing a product, gym membership, or recreational activities. Indemnification provisions are discouraged in the law, yet the court of appeals decision encourages them, thereby inviting negligent if not reckless behavior.

Given the choice between forgoing possible recovery for injuries or potentially having to pay the offender’s legal fees, the great majority of the public would forgo any recovery. As the dissent noted, declaratory judgments would help victims avoid this “Catch-22”, and would quickly and efficiently dispose of both invalid tort claims and invalid indemnification clauses.

Where the validity of a waiver and indemnification clause is in question, upon request, a court should determine whether the waiver legally bars specific causes of action. If, as a matter of law, certain causes of action are deemed waived, these claims would not be brought and the defendant would not need to defend against such claims; this would put a quick and efficient end to litigation. If certain causes of action are determined not waived and an indemnification clause is legally invalid, the potential plaintiff could proceed against the defendant without fear of

having to pay the defendant's legal fees. The entire premise of the Declaratory Judgment Act is null and void if a party must act at its own peril and risk payment of the opposing party's legal fees to determine whether they have any rights.

Finally, the court of appeals (as did the trial court) relied on information not in evidence in denying the request for declaratory judgment. Rules of evidence exist to ensure that only appropriate and accurate information is considered in every case. Here, the court of appeals took judicial notice of a personal injury complaint filed just before the statute of limitations was to run. The complaint was filed in a separate case, assigned to a different trial judge, and was never served on appellees. Nonetheless, the court of appeals based its entire opinion that appellants had no need for speedy relief on the existence of the complaint – which was never entered into evidence.

The entire court system depends on fairness and predictability. This court should accept jurisdiction and send a clear message to lower courts that the rules of evidence exist for a reason and may not be randomly ignored.

### **STATEMENT OF THE CASE AND FACTS**

Appellant Sara Rose (“Sara”) attended an introductory self-defense class operated by Appellee Primal Ability, Ltd. Primal Ability required Sara to sign a waiver prior to her participation in the class. The waiver contained an indemnification clause, purporting to require Sara to pay Primal Ability's legal fees if she sued the company. During that first class, another student (Appellee John Doe) flipped Sara to the ground with enough force to snap off the end of one vertebrae and to cause other severe injuries to her low back.

The written waiver, including the indemnification clause, is confusing, poorly worded, and potentially invalid. Rather than risk owing Primal Ability's legal fees and to save all parties

the time and expense of litigating potentially invalid causes of action, Sara and her husband, Appellant Curtis Rose (“Curtis”), filed a declaratory judgment action asking the trial court to construe the waiver and declare their rights and obligations. Specifically, the Roses sought a declaration whether the waiver barred a claim of: (1) recklessness, (2) negligence, (3) loss of consortium, or (4) any action against John Doe. The Roses also sought a declaration whether the indemnification section of the waiver was enforceable against any or all of the stated potential causes of action.<sup>1</sup> The Roses requested that the court issue a ruling on their rights and obligations before the statute of limitations ran on their underlying personal injury claims.

In the trial court, both parties recognized the issues could be quickly resolved and filed motions for judgment on the pleadings. While waiting for the trial court’s decision, the statute of limitations ran and appellants had no choice but to file a personal injury complaint. Four business days later, the trial court improperly took judicial notice of the personal injury complaint, denied appellants’ request for a declaratory judgment, and granted judgment on the pleadings in favor of Primal Ability. Although the personal injury complaint was assigned to a different judge, was never entered into evidence in the declaratory judgment action, and service on appellee was never obtained, the trial court relied on the complaint to find that the Roses lacked the required showing of immediacy. The trial court determined the Roses could litigate their rights under the waiver and indemnification clause in the personal injury action and were not entitled to a declaration of their rights otherwise.

The Roses timely appealed to the court of appeals, which also explicitly relied on the complaint in the personal injury action as the basis for denying the requested declaratory

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<sup>1</sup> The Roses also requested that the trial court grant a petition for discovery, which was denied. This issue was briefed to the court of appeals, but dismissed by the court as moot. If this court remands the case to a lower court and/or grants the motion for declaratory judgment, the Roses request a ruling on their petition for discovery as well.

judgment. Despite acknowledging that the only way the Roses could determine their rights under the contact was to risk paying Primal Ability's legal fees and expenses in the personal injury action, the court of appeals denied the request for a declaration of the parties' rights. The court of appeals erred in ruling that the risk of paying tens of thousands of dollars in legal expenses to a company whose potentially unlawful actions led to life-altering injuries to appellants was not a "right" worth protecting.

To support its position, appellants present the following argument.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: A need for speedy relief, as required to obtain a declaratory judgment, exists when a party is at risk for suffering unrecoverable economic loss, including potential exposure to payment of an opponent's litigation expenses and attorney fees.**

Appellee has asserted the waiver bars any personal injury action by appellants. Appellee also asserted that, if appellants file a personal injury action, they will become liable to appellee under the indemnification provision in the waiver. Appellants assert that the waiver does not bar some or all actions by them against appellees, and also assert that the indemnification provision in the waiver is inapplicable and/or invalid. The court's declaration of the parties' rights and obligations under the waiver would determine what claims appellants have against appellees; likewise, a declaration would determine whether appellees have a right of indemnification against appellants if any such claims are brought. The only reason the lower courts denied appellants' request for a declaratory judgment was because they found appellants had not established a need for speedy relief.

Speedy relief was and is necessary to fully preserve appellants' rights. The court's declaration of appellants' rights and obligations under the waiver would provide all parties with speedy relief, as it would clarify the claims each party has against the other party (i.e. appellants'

various tort claims and appellees' indemnification claim).

The trial court did not issue its decision before the statute of limitations ran on appellants' tort claims; this left appellants with two choices: (1) let the statute run and forfeit any recovery for their injuries, or (2) file a personal injury complaint against appellees and risk having to pay their attorney fees and expenses. The timing of the trial court's decision forced appellants to file a personal injury complaint they did not want to file, then inappropriately took judicial notice of that complaint and used it against appellants as the basis for denying their request for a declaratory judgment.

This case is directly on point with *Holshuh v. Bank One, Akron, N.A.*, 9<sup>th</sup> Dist. No. 18301, 97-LW-4425 (Nov. 12, 1997). Holshuh and Bank One entered into a settlement agreement, in which Holshuh agreed not to report certain practices of Bank One to the I.R.S. A controversy then arose whether the settlement agreement precluded Holshuh from reporting only Bank One's practices in his own account, or whether it also applied to Bank One's actions in others' accounts. Holshuh desired to pursue whistle-blower rewards by reporting the bank's practices in other customer's accounts, but Bank One threatened to sue for breach of the settlement agreement if he did so. Holshuh was therefore in a Catch-22: he could pursue the whistle-blower rewards and risk getting sued for breach of contract, or he could forego the whistle blower rewards and remain silent.

Holshuh brought a declaratory judgment action, asking the court to declare the parties' rights and obligations under the agreement. The court of appeals ruled that Holshuh was entitled to a declaration of his rights under the contract, noting that "if he pursues the reward without first determining his right to do so, he exposes himself to liability for breach of the settlement agreement. The Declaratory Judgment Act was created to avoid such uncertainty. Its basic purpose is to relieve parties from 'acting at their own peril in order to establish their legal rights.'" *Holshuh*, quoting

*Gray v. Willey Freightways, Inc*, 89 Ohio App.3d 355, 362, 624 N.E.2d 755 (6<sup>th</sup> Dist. 1993). See also *State of Ohio, ex rel. Thernes v. United Local School Bd. Dist. of Educ*, 7<sup>th</sup> Dist. No. 07CO45, 2008-Ohio-6922, ¶ 22, 28; *Travelers Ins. Co. v. Buckeye Union Cas. Co*, 160 N.E.2d 874, 879 (C.P. 1959), (quoting Sec. 4 of 16 O.J.2nd, p. 643).

The Eight District also found a need for speedy relief and granted a request for a declaratory judgment in circumstances similar to the one at bar. *Halley v. Ohio Co.*, 107 Ohio App.3d 518, 669 N.E.2d 70 (8<sup>th</sup> Dist. 1995). In *Halley*, plaintiffs were contemplating an action against their accountants for negligence, although the I.R.S. had not yet assessed a tax liability. The court ruled that the plaintiffs “have an immediate need for relief because the statute of limitations may run by the time a tax liability is assessed ... there is a need for speedy relief.” *Id.*, p. 526.

As in *Holshuh* and *Halley*, appellants do not believe the waiver bars them from proceeding against appellees on one or more legal theories. Appellee disagrees and has stated its intention to seek indemnification from appellants if they file a tort action. Appellants are therefore in a Catch-22: do they pursue the personal injury claims “at their own peril” due to the threat of indemnification, or do they forego the right to any recovery?

The lower courts found the impending expiration of the statute of limitations on a personal injury suit was not “the immediacy contemplated by the requirements of declaratory relief.” (Trial Court’s Decision, p. 4-5.) There is apparently little authority for what satisfies the often cited “speediness” requirement; in fact, the trial court cited none and the court of appeals cited only one. The court of appeals referred to *Peat Marwick Main & Co. v. Elliott*, 10<sup>th</sup> Dist. No. 90AP-921, 91-LW-1941 (Jan. 10, 1991), but that case is easily distinguishable from the case

at bar. First, there was no issue regarding indemnification in *Peat Marwick Main*, so the core issue in the case at bar was not an issue in the single case cited by the court of appeals.

Also, in *Peat Marwick Main*, the plaintiff asked the court to declare it was not negligent. Appellants are requesting the court to declare whether the waiver legally bars specific causes of action – not for a factual determination whether appellants should win on the merits of those claims. Even if the court declared the waiver did not bar appellants from suing for negligence and that the indemnification clause could not be legally enforced, appellants must still file a personal injury action in which they would have to prove the negligence, etc. of defendants. The benefit of the declaratory judgment action is to quickly decide points of law, so there would be no litigation over invalid claims, thereby saving both parties the time and expense of discovery and other costly litigation.

Appellants are entitled to a determination of their rights and obligations under the waiver, including a determination of whether the waiver bars an action for recklessness, negligence, and/or loss of consortium, as well as whether the indemnity clause is valid against any of these claims. As the dissent correctly stated, appellants' request for a declaratory judgment action "was a cost effective means to avoid wasting judicial and legal resources." Because the request for a declaratory judgment was denied, appellants "are now forced to incur significant litigation costs merely to determine if they have justiciable claims."

Appellants should not have to act at their own peril and risk the unrecoverable economic loss of having to pay their opponents' legal fees and expenses to determine appellant's rights and obligations under the waiver and indemnification clause. This risk of loss establishes the need for speedy relief; litigating in a personal injury action does not fully protect appellants' rights.

**Proposition of Law No. II: A trial court cannot deny a request for a declaratory judgment by inappropriately taking judicial notice of pleadings in another case.**

Appellants' personal injury complaint was never entered into evidence in the declaratory judgment action. Nonetheless, the trial court took judicial notice of the complaint and used that as the basis to deny appellants' request for a declaration of rights and obligations. The court of appeals followed suit when it ruled that "[g]iven the pendency of appellants' tort action against appellees, the trial court did not abuse its discretion..."

Both the trial court and the court of appeals erred in taking "judicial notice of prior pleadings either in its own court or another court, even when they are between the same parties. The rationale for this rule is that if a trial court takes judicial notice of [another] proceeding, the appellate court cannot review whether the trial court correctly interpreted the [other] case because the record of the [other] case is not before the appellate court." *Body Power, Inc. v. Mansour*, 1<sup>st</sup> Dist. No. C-130479, 2014-Ohio-1264, ¶ 19, (citations omitted).

The trial court and court of appeals not only improperly took judicial notice of appellants' personal injury complaint, but they used that as the central point in refusing to protect appellants' right to know their rights and obligations under the waiver and indemnification clause.

**CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest. The appellants request this court accept jurisdiction so the important issues presented will be reviewed on the merits.

Respectfully submitted,

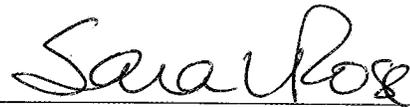
  
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by  
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# APPENDIX

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Received By:  
AUG 27 2014  
Sara L. Rose, LLC

Sara L. Rose et al., :  
Plaintiffs-Appellants, : No. 14AP-114  
v. : (C.P.C. No. 13CVH-8575)  
Primal Ability, Ltd. et al., : (ACCELERATED CALENDAR)  
Defendants-Appellees. :

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D E C I S I O N

Rendered on August 21, 2014

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*Sara L. Rose, LLC, and Sara L. Rose, for appellants.*

*Kooperman Gillespie Mentel, Ltd., and David R. Darby, for  
appellee Primal Ability, Ltd.*

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} Plaintiffs-appellants, Sara L. and Curtis Rose, appeal from a judgment on the pleadings entered against them by the Franklin County Court of Common Pleas on their declaratory judgment action against defendants-appellees, Primal Ability, Ltd., d.b.a. Ohio Krav Maga, Ohio KM & F, and Crossfit OKM ("Primal Ability"), and a John Doe defendant.

{¶ 2} Appellants assign two errors for our consideration as follows:

I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND IN GRANTING APPELLEE'S MOTION FOR JUDGMENT ON THE PLEADINGS.

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' PETITION FOR DISCOVERY.

{¶ 3} On January 28, 2012, appellant Sara L. Rose (individually "appellant") signed up for a self-defense class offered by Primal Ability. During class, appellant was flipped by a student in the class whose name she does not know. As a result of the flip, appellant injured her back.

{¶ 4} Before starting the class, appellant had signed a detailed release entitled "Intro class waiver" (hereinafter "waiver"). The waiver, if valid, barred appellant from suing Primal Ability for negligence. The document also stated that she would reimburse Primal Ability any attorney fees it expended in defending against such a lawsuit.

{¶ 5} On August 6, 2013, appellant and her husband filed a declaratory judgment action in the court of common pleas. The complaint filed by appellants included a copy of the waiver. Appellants requested the trial court to construe the validity of the waiver and its indemnification provision. Appellants sought a declaratory judgment that the waiver did not apply to shield appellees from a personal injury lawsuit for the injuries sustained by appellants. The complaint alleged potential claims for recklessness and loss of consortium, and also requested the trial court to declare that the waiver did not allow Primal Ability to collect attorney fees or costs if appellants sued for personal injuries as a result of alleged recklessness by appellees.

{¶ 6} At the same time, appellants also filed a petition for discovery requesting they be permitted to pursue discovery to determine the identity of the person who flipped appellant. The complaint alleged that John Doe recklessly flipped appellant after being asked not to engage in such conduct. In their answer, Primal Ability admits that it withheld the identity of the person who allegedly injured appellant due to concerns over that person's privacy, and that the individual in question is a minor.

{¶ 7} Primal Ability filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C). In response, appellants filed their own motion for judgment on the pleadings and a memorandum contra Primal Ability's motion for judgment on the pleadings.

{¶ 8} As the time for the expiration of the personal injury statute of limitations approached, appellants filed their personal injury lawsuit before receiving the answers

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they sought in the declaratory judgment action. The trial court apparently took judicial notice that appellants had filed a tort action against Primal Ability and John Doe in Franklin C.P. No. 14CV-788. On February 3, 2014, the trial court granted judgment on the pleadings in favor of Primal Ability, concluding as a matter of law that appellants had not established a need for speedy relief.<sup>1</sup>

{¶ 9} The trial court held in part:

Plaintiffs are seeking a ruling from the court that they can proceed with their personal injury lawsuit against Defendants without the risk of having the indemnification clause or the waiver enforced against them during the lawsuit. This is not the immediacy contemplated by the requirements of declaratory relief.

(February 3, 2014 Decision and Entry, 4.)

{¶ 10} Under the first assignment of error, appellants contend the trial court erred in granting appellees' motion for judgment on the pleadings based upon a determination that declaratory judgment was not appropriate. "[A]n appellate court reviewing a declaratory-judgment matter should apply an abuse-of-discretion standard in regard to the trial court's holding concerning the appropriateness of the case for declaratory judgment, i.e., the matter's justiciability, and should apply a de novo standard of review in regard to the trial court's determination of legal issues in the case." *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 1. With this standard in mind, we review the decision of the trial court.

{¶ 11} R.C. Chapter 2721 deals with declaratory judgments. R.C. 2721.02(A) provides as follows:

Subject to division (B) of this section, *courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed.* No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or

<sup>1</sup> Although not part of the record before the trial court, appellant represented in her brief and at oral argument that there was a failure of service and that subsequently she had dismissed her personal injury suit. Thus, her lawsuit was technically never commenced. However, this action has no bearing on our disposition of the appeal since declaratory relief is available regardless of whether other relief is or could be claimed.

negative in form and effect. The declaration has the effect of a final judgment or decree.

(Emphasis added.)

{¶ 12} The above section is read in conjunction with R.C. 2721.03, which provides in pertinent part:

Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

{¶ 13} The declaratory judgment act is remedial in nature and its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered. *Jones v. Greyhound Lines, Inc.*, 10th Dist. No. 11AP-518, 2012-Ohio-4409, ¶ 26. Declaratory judgment is not always available as an alternative remedy unless the trial court, within its discretion, finds that the action is consistent with the purposes of R.C. 2721.03 (Declaratory Judgment Act). *Mack v. Ohio State Dental Bd.*, 10th Dist. No. 00AP-578, (Mar. 30, 2001), citing *Schaefer v. First Natl. Bank of Findlay*, 134 Ohio St. 511, 519 (1938).

{¶ 14} "[D]eclaratory judgment is a remedy in addition to other legal and equitable remedies and is to be granted where the court finds that speedy relief is necessary to the preservation of rights which might otherwise be impaired." *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 186 (10th Dist.1987), citing *Herrick v. Kosydar*, 44 Ohio St.2d 128 (1975). *See also Schaefer* at 519 (the purpose of the Declaratory Judgment Act is to determine the construction or validity of a contract even in cases in which there is a remedy either in law or equity, if a speedy and immediate adjudication is essential to full protection of rights and interests).

{¶ 15} Here, the question we must answer is one of justiciability. Three elements are necessary to obtain declaratory judgment as an alternate to other remedies: (1) a real controversy must exist between adverse parties, (2) which is justiciable in nature, and (3) speedy relief is necessary to the preservation of rights that may otherwise be impaired or lost. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 148-49 (1992).

{¶ 16} By signing the waiver, appellant, "for [her]self, [her] personal representative, assigns, heirs and next of kin," agreed to "[h]ereby release, discharge, and covenant not to sue the Released Parties \* \* \* from all liability, claims, demands, losses, or damages on my account caused or alleged to be causes [sic] in whole or in part by the negligence of the Released Parties." (Complaint, exhibit A.) Given the language of the waiver, appellants sought to know what potential claims against Primal Ability may still exist, and the extent of the indemnification provision.

{¶ 17} The essence of declaratory relief is to dispose of uncertain or disputed obligations quickly and conclusively. *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶ 8. Resolving this type of uncertainty is at the heart of the Declaratory Judgment Act, R.C. 2721.01 et seq. Under R.C. 2721.04, "a contract may be construed by a declaratory judgment or decree either before or after there has been a breach of the contract." Moreover, R.C. 2721.02(A), quoted above, expressly authorizes the rendition of judgments whether or not further relief is or could be claimed. As the Supreme Court of Ohio stated: "The very purpose of [The Declaratory Judgment Act] is to determine the construction or validity of a contract even in cases in which there is a remedy either in law or equity, if a speedy and immediate adjudication is essential to full protection of rights and interests." *Schaefer* at 519. *See also* Civ.R. 57 ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.").

{¶ 18} If a declaratory judgment will not terminate the uncertainty or controversy under R.C. 2721.07, a court may refuse to render or enter a declaratory judgment or decree. In this case, any underlying tort action will not be resolved by the declaratory judgment action.

{¶ 19} Here, the trial court's decision focused on the third element. The court noted that the issues appellants raised in this declaratory judgment action (i.e., the

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meaning, scope, and enforceability of the waiver) would be raised and decided in the pending tort action between the same parties. Therefore, the trial court found that speedy relief afforded under the Declaratory Judgment Act was not necessary to preserve rights that might otherwise be impaired or lost.<sup>2</sup> This finding is not an abuse of discretion.

{¶ 20} Arguably, judicial interpretation of the waiver will determine whether appellants have waived the right to bring a personal injury action based on negligence or recklessness and a claim for loss of consortium against Primal Ability or John Doe. Depending on how the waiver is construed, appellants may be liable to Primal Ability for "litigation expenses, reasonable attorney fees, loss, liability, damage, or cost which any may incur as the result of such claim." (Complaint, exhibit A.) In its answer to the complaint, Primal Ability averred that appellants' claims were barred by the waiver. However, the fact that the tort action potentially exposes appellants to an obligation to pay Primal Ability's litigation expenses, including attorney fees, does not support a finding that the trial court abused its discretion. Potential exposure to litigation expenses and attorney fees does not establish a need for speedy relief to preserve rights that may otherwise be impaired or lost.

{¶ 21} As noted, an appellate court applies an abuse of discretion standard when reviewing a trial court's decision on the justiciability of a declaratory judgment action. *Arnott* at ¶ 1. Given the pendency of appellants' tort action against appellees, the trial court did not abuse its discretion when it found appellants' declaratory judgment action nonjusticiable. *See, e.g., Peat Marwick Main & Co. v. Elliott*, 10th Dist. No. 90AP-921 (Jan. 10, 1991) (plaintiff failed to demonstrate speedy relief is necessary to preserve its rights as sufficiency of its defenses to a negligence action can be tested in pending action).

{¶ 22} Accordingly, appellants' first assignment of error is without merit and is overruled.

{¶ 23} In their second assignment of error, appellants argue that the trial court should have granted their petition for pretrial discovery under Civ.R. 34(D) and R.C. 2317.48. As noted by the trial court, however, appellants will be able to pursue discovery in the course of their tort action and amend their complaint accordingly.

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<sup>2</sup> Apparently, appellants filed the tort action to avoid a statute of limitations bar. Appellants' complaint alleges that the statute of limitations on their tort claim would expire on January 28, 2014. (Complaint at ¶ 14.) The trial court granted appellees' Civ.R. 12(C) motion on February 3, 2014.

{¶ 24} The second assignment of error is therefore rendered moot.

{¶ 25} Based upon the foregoing, appellants' first assignment of error is overruled, the second assignment of error is rendered moot, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

KLATT, J., concurs.  
TYACK, J., dissents.

TYACK, J. dissenting.

{¶ 26} Being unable to agree with the majority, I dissent.

{¶ 27} The appellants' decision to bring a declaratory judgment action before filing their personal injury action was a cost effective means to avoid wasting judicial and legal resources. Prior to filing suit, appellants wanted judicial construction of the waiver. This would have allowed them to know what, if any, claims against Primal Ability existed and the extent of the indemnification provision. Depending on how the trial court construed the waiver they might have decided not to proceed with their tort action at all. Instead, they are now forced to incur significant litigation costs merely to determine if they have justiciable claims.

{¶ 28} Appellants needed the speedy relief provided by a declaratory judgment action. The trial court's failure to rule on the declaratory judgment action prior to the expiration of the statute of limitations placed the appellants into a "Catch-22" situation. Appellants had to file the personal injury action, allowing them to avail themselves of the savings statute if the trial court delayed its decision. Adjudication of the indemnification provision would have allowed appellants to know whether they were liable for Primal Ability's attorney fees before they pursued any tort action. While sometimes enforceable, Ohio law does not favor contract terms that require a party to pay the opposing party's attorney fees. *See generally Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, ¶ 8-9, and cases cited therein. Here, an early determination of the enforceability of the waiver was necessary to protect the rights and interests of appellants. Had the trial court resolved the dispute by a declaratory judgment, Primal Ability might not have needed to defend against a lawsuit at all.

{¶ 29} I believe the trial court overlooked the overall purpose of the Declaratory Judgment Act in finding that filing a personal injury lawsuit eliminated the need for declaratory relief. This is particularly true here because appellants never obtained service of process. The lawsuit was essentially a place holder to allow appellants to use the savings statute. The need for a determination of the parties' rights and obligations under the waiver remained regardless of the personal injury lawsuit. Therefore, I would find that the trial court abused its discretion in granting judgment on the pleadings in favor of Primal Ability.

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