UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1934

September Term, 2015

PHILEMON SWEENEY, ET AL.

v.

BRIAN E. FROSH, ET AL.

Krauser, C.J.,
Berger,
Thieme, Raymond, G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 7, 2016

Since 1995, the Maryland Sex Offender Registration Act ("MSORA"), Maryland Code (2001, 2012 Repl. Vol., 2015 Supp.) §11–701, *et seq*. of the Criminal Procedure Article ("C.P."), has required persons convicted of certain sexual offenses to register with an appropriate "supervising authority" for a prescribed period of time.[1] In *Doe v. Department of Public Safety & Correctional Services*, 430 Md. 535 (2013) ("*Doe I*"), the Court of Appeals held that the retroactive application of amendments to the MSORA that required the registration of individuals who had been convicted of certain sexual offenses that occurred prior to Maryland's adoption of the MSORA violated Article 17 of the Maryland Declaration of Rights.[2] *Id*. at 553.

Subsequently, Maryland courts have applied the Court's holding in *Doe I* in other cases, holding that the reclassification of individuals as a result of amendments to the MSORA, which either required individuals who had not been previously required to

[1] Individual registrants are required to register with different officials and for different periods of time depending on their status. The appropriate supervising authorities are listed in C.P. §11-701(n). The length of the registration term is provided in C.P. §11-707(a)(4). In addition to registration, the MSORA imposes numerous obligations, restrictions, and consequences upon its registrants, including re-registration on a set schedule, disclosure of personal information to supervising authorities, inclusion of the individual's name and photograph on the Maryland Sex Offender Registry ("MSOR"), dissemination of personal information to the public via the MSOR website, restrictions on the individual's right to enter school or daycare property. *See e.g*., C.P. §§11–706, 11-707, 11–717, 11-721, 11–722.

[2] Article 17 of the Maryland Declaration of Rights provides: "That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required."

register on the MSOR to register for the first time or that resulted in an increase in the length of an individual's period of registration, also violates Article 17's prohibition against *ex post facto* laws. *See e.g.*, *Maryland Dep't of Pub. Safety & Corr. Servs. v. Doe*, 439 Md. 201, 213 (2014) ("*Doe II*") (holding that retroactive application of MSORA amendments requiring the registration of an individual convicted of sexual offenses that occurred between 1994 and 1996, who the then applicable statute did not require to register at all, violated Article 17); *Sanchez v. State*, 215 Md. App. 42, 45, 49 (2013) (overturning convictions for non-registration, reasoning that retroactive application of amendments to MSORA to individual convicted of offense that did not require registration when he was convicted in 2002, violated the right to be free from *ex post facto* laws); *Del Pino v. Maryland Dep't of Pub. Safety & Corr. Servs*., 222 Md. App. 44, 63 (2015) (holding that the retroactive application of MSORA amendments to an individual convicted for offenses committed in 2000, which resulted in the increase of his registration period from ten years to twenty-five years, violated prohibition against *ex post facto* laws).

On May 14, 2015, Philemon Sweeney, Elvis Bridegroom, Kimberly Cordrey-McKinney, Charles Acker IV, Paul Whittington, Sean Fuller, and George Riegel (collectively "the appellants"), on behalf of themselves and those similarly situated, filed in the Circuit Court for Baltimore City, a class action complaint for declaratory and injunctive relief against twenty-nine executive and local law enforcement officials

responsible for the administration and enforcement of the MSORA.[3] Citing the decisions of this Court and the Court of Appeals in *Doe I*, *Doe II*, *Sanchez*, and *Del Pino*, the appellants alleged that provisions of the amended MSORA had been retroactively applied in a manner that violated the prohibition against *ex post facto* laws embodied in Article 17 of the Maryland Declaration of Rights. The appellants sought a judicial declaration that DPSCS had acted illegally by applying the amendments of the MSORA indiscriminately to all sexual offenders regardless of when those individuals had committed the offenses that led to their registration. The appellants further sought an injunction ordering the removal of their names and personal information from the MSOR or a reduction in their terms of registration to the terms in effect at the time they committed the relevant offenses. In conjunction with their complaint, the appellants filed a motion for class certification under Maryland Rule 2-231 and requested a hearing on the motion. The appellants filed an amended complaint on June 23, 2015.

The appellees did not file an answer to either the appellants' initial or amended complaints.[4] Instead, on September 2, 2015, the appellees filed a motion to dismiss and

[3] The named defendants included Brian E. Frosh, Attorney General of Maryland; Stephen T. Moyer, Secretary of the Department of Public Safety and Correctional Services ("DPSCS" or "the Department"); Elizabeth Bartholomew, Manager of the MSOR; J. Joseph Curran, Jr., Chairman of the Sexual Offender Advisory Board; Sam Abed, Secretary of the Department of Juvenile Services; and the commissioners, corporals, police chiefs, or sheriffs of the local law enforcement units in each of Maryland's twenty-three counties and Baltimore City (collectively, "the appellees"). The appellants subsequently voluntarily dismissed their claims against all of the law-enforcement defendants.

[4] The appellees sought -- and were granted -- motions to extend the time to file their response to the appellants' complaint and amended complaint.

for summary judgment asserting that after the appellants' class action complaint was filed, DPSCS had conducted a review of the named appellants' cases and removed the names of four appellants from the MSOR (Acker, Bridegroom, Fuller, and Riegel), and reduced the term of registration for two other appellants (Cordrey-McKinney and Whittington). As to appellant Sweeney, the appellees contended in their motion that his term of registration had been determined in accordance with the appropriate provisions of the MSORA and that his continued registration on the MSOR was proper. The appellants filed an untimely response to the appellees' motion to dismiss on September 30, 2015.

On October 13, 2015, the circuit court granted the appellees' motion to dismiss or for summary judgment. Noting that no timely response had been filed by the appellants, the court fully accepted the facts and legal reasoning presented by the appellees in their motion. As to appellants Bridegroom, Cordrey-McKinney, Acker, Whittington, Fuller, and Riegel, the court opined that these appellants' claims "present[ed] no justiciable controversy permitting the issuance of a declaratory judgment" because either the names of those appellants had been removed from the MSOR or their registration terms had been reduced to the ten-year term in effect when they committed the crimes that resulted in their placement on the MSOR. Accordingly, the court granted the appellees' motion to dismiss as to those appellants. As to appellant Sweeney, the court granted the appellees' motion for summary judgment, declaring that Sweeney's categorization as a Tier II sex offender, "is fully consistent with Maryland Law[,]" and that "Sweeney's registration requirements are also correct as a matter of law." On October 30, 2015, the appellants filed a motion for reconsideration of the court's ruling, which was denied on November 23, 2015.

The appellants noted the instant appeal on November 12, 2015. In their brief before this Court, the appellants raise two questions for our consideration:

> 1. Whether the Circuit Court for Baltimore City erroneously dismissed Appellants' Class Action Complaint as moot before Appellants were reasonably able to seek class certification.
>
> 2. Whether the Circuit Court for Baltimore City erroneously granted Appellees' motion for summary judgment as to Mr. Sweeney.

In the interim between the filing of the appellants' brief in the instant appeal and the filing of the appellees' brief, DPSCS conducted an additional review of the facts presented by the named appellants in this action. As a result of the additional review, DPSCS concluded that appellant Cordrey-McKinney should not have been required to register on the MSOR and that appellant Sweeney had been registered for longer than the ten-year period that was required at the time he committed the sexual offense that led to his registration. Consequently, DPSCS removed the names and personal information of appellants Cordrey-McKinney and Sweeney from the MSOR.

MOTION TO DISMISS THE APPEAL

The appellees have filed a motion to dismiss this appeal, asserting that appellants' claims are moot because the names of six of the seven named appellants have been removed from the MSOR and the registration term of the seventh named appellant has been reduced to the ten-year term that was in effect at the time he committed the offense for which he was required to register.

A case is moot when there is "no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant." *Suter v. Stuckey*, 402 Md. 211, 219–20 (2007) (citing, among other cases, *Dep't of Human Res. v. Roth*, 398 Md. 137, 143 (2007)). As a general rule, courts do not entertain moot controversies. *Suter*, 402 Md. at 219. There are, however, circumstances in which this Court will address the merits of a moot case. The first is where the controversy, even though moot at the time of judicial review, "is capable of repetition but evading review." *Sanchez v. Potomac Abatement, Inc*., 198 Md. App. 436, 443 (2011). The second exception "allows us to express our views on the merits of a moot case to prevent harm to the public interest." *Id*. at 443 (footnote omitted).

In this case, we must distinguish between the potential mootness of the questions presented in the appeal and the potential mootness of the appellants' claims in the underlying action before the circuit court. Having made this distinction, we shall grant, in part, the appellees motion to dismiss and deny, in part, the appellees motion to dismiss the instant appeal.

In their motion to dismiss this appeal, the appellees essentially concede that the circuit court erred by determining that appellant Sweeney had been properly classified as a Tier II sex offender and that the terms of his registration were correct. The appellees acknowledge that Sweeney, whose registration offense was committed in August of 1998, should not have been required to register on the MSOR for longer than the ten-year period that was required by the MSORA at that time. During the pendency of this appeal, DPSCS removed Sweeney's name and personal information from the MSOR. Thus, there is no

longer any justiciable issue presented regarding the propriety of the circuit court granting the appellees' motion for summary judgment as to Sweeney. We shall, therefore, grant the appellees' motion to dismiss the second issue presented by the appellants in the instant appeal.

There remains, however, the first question presented by the appellants regarding whether the circuit court erred by granting the appellees' motion to dismiss the appellants' class action complaint. Because nothing has occurred in the interim between the appellants filing of the instant appeal and the filing of this opinion to moot the appellants' challenge regarding the propriety of the circuit court's actions in dismissing their complaint, that question remains ripe for our review.[5] We shall, therefore, deny the appellees' motion to dismiss the first issue raised by the appellants.

ANALYSIS

I.

Preliminarily, we note that the circuit court's ruling on the appellees' motion to dismiss the appellants' class action complaint should be considered not as a motion to dismiss but as a motion for summary judgment. In rendering its decision on the appellees' motion, the circuit court necessarily considered facts outside the pleadings, *i.e*. seven affidavits executed by the administrator of the MSOR indicating that the named appellants'

[5] Going forth, we shall consider the claims of appellants Cordrey-McKinney and Sweeney in the same manner we consider the claims of the other named appellants. Though their names were removed from the MSOR after this appeal was filed, they still retain the same interest as the earlier removed appellants in resolving whether the circuit court properly dismissed their class action complaint.

registrations had been reviewed and their names removed or their registration terms adjusted as necessary. *See Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 12 (2005) ("If facts are necessary in deciding the motion, the court may consider affidavits or other evidence adduced during an evidentiary hearing." (citations omitted)). Maryland Rule 2–322(c) provides, in pertinent part, that on a motion to dismiss, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment[.]" Each of the administrator's affidavits were executed after the appellants filed their class action complaint and were attached as exhibits to the appellees' motion to dismiss. The circuit court's consideration of the affidavits, which were not part of the pleadings, rendered its determination a granting of summary judgment rather than a dismissal.

"Summary judgment may be granted when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Smith v. Rowhouses, Inc*., 223 Md. App. 658, 664 (2015), *aff'd*, 446 Md. 611 (2016); Md. Rule 2–501(f). This court reviews "a circuit court's grant of summary judgment for legal correctness under a non-deferential standard of review." *Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 443 Md. 199, 214–15 (2015) (citations omitted).

In this case, there is no dispute regarding the material facts and procedural history as set forth above. Thus, the only remaining question before this court is whether, as the circuit court concluded, the appellees were entitled to judgment as a matter of law.

II.

At the time they filed suit, each of the appellants was registered on the MSOR. As noted above, in their complaint and amended complaint, the appellants sought both declaratory and injunctive relief on behalf of themselves and all other similarly situated individuals. With their complaint, the appellants filed a motion for class certification, in which they requested a hearing. Ultimately, the circuit court granted the appellees' motion to dismiss or for summary judgment but failed to address the appellants' motion for class certification in any way.

Generally, this Court reviews a circuit court's order to grant or deny class certification for abuse of discretion. *See Frazier v. Castle Ford, Ltd*., 430 Md. 144, 155 (2013) (quoting *Creveling v. GEICO*, 376 Md. 72, 90 (2003) (recognizing "that the basis of the certification inquiry is essentially a factual one, and thus, deference is due.")). Where, however, there is a question regarding whether the circuit court applied the proper legal standard for certification, less deference is due, so we apply a *de novo* standard of review. *Id*.

Maryland Rule 2-231(c), addressing the procedure for certifying one or more classes in a class action case, provides in pertinent part:

> On motion of any party or on the court's own initiative, the court shall determine by order as soon as practicable after commencement of the action whether it is to be maintained as a class action. **A hearing shall be granted if requested by any party.** The order shall include the court's findings and reasons for certifying or refusing to certify the action as a class action.

(emphasis added). The plain language of the rule is mandatory; if any party requests a hearing, a hearing **shall** be granted. Md. Rule 2-231(c). *See Brownstones at Park Potomac Homeowners Ass'n v. JPMorgan Chase Bank, N.A.*, 445 Md. 12, 18 (2015) (citing *Woodfield v. West River Imp. Ass'n, Inc.*, 395 Md. 377, 388–89 (2006), for the proposition that "When a legislative body commands that something be done, using words such as 'shall' or 'must,' rather than 'may' or 'should,' we must assume, absent some evidence to the contrary, that it was serious and that it meant for the thing to be done in the manner it directed. In that sense, the obligation to comply with the statute (or rule) is both mandatory and directory." (citation omitted)).

In this case, despite the appellants' request for a hearing and in clear violation of the mandate provided in the Rule, the circuit court failed to conduct any hearing regarding the merits of the appellants' request for class certification before it granted the appellees' dispositive motion to dismiss or for summary judgment. Nor did the court issue any oral or written findings regarding the merits of the appellants' request for certification. By failing to follow the express requirements of Rule 2-231(c), the circuit court erred as a matter of law.

III.

In granting the appellees' motion to dismiss or for summary judgment, the circuit found that the appellants' claims "present[ed] no justiciable controversy permitting the issuance of a declaratory judgment" because either the names of the appellants had been removed from the MSOR or their registration terms had been reduced to the ten-year term in effect when they committed the crimes that resulted in their placement on the MSOR.

The appellants contend that the circuit court erred by granting the appellees' motion for summary judgment. The named appellants do not dispute that the removal of their names from the MSOR (or the reduction of their registration terms to those that were in effect at the time they committed the crimes for which they were required to register) has mooted their individual claims for declaratory and injunctive relief. They assert, however, that the claims of the unnamed class members are still extant and present a justiciable controversy.

In order to maintain an action for a declaratory judgment, a complaint must present a justiciable issue. *See* Md. Code (1957, 2013 Repl. Vol., 2015 Supp.) §3–409(a)(1) of the Courts and Judicial Proceedings Article ("C.J.") (authorizing declaratory judgments only when the complaint establishes that "[a]n actual controversy exists between contending parties"); *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 689 (1987) ("[U]nder the statute, the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action." (internal quotation marks and citations omitted)). Conversely, 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).

A controversy is justiciable when "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 *Boyds*, 309 Md. at 690) (emphasis and internal quotation marks omitted); *Reyes v. Prince George's County*, 281 Md. 279, 288 (1977). "To be justiciable the issue must

present more than a mere difference of opinion, and there must be more than a mere prayer for declaratory relief." *Hatt v. Anderson*, 297 Md. 42, 46 (1983) (internal citations omitted). A justiciable claim becomes moot if and when the claims of the parties are no longer mutually adverse. *See e.g.*, *Frazier v. Castle Ford, Ltd*., 430 Md. 144, 162-63 (2013) ("An issue is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy that the court can provide." (citing *Att'y. Gen. v. Anne Arundel Cnty. Sch. Bus Contractors Ass'n*, 286 Md. 324, 327 (1979)). We must be cautious, however, because the concept of mootness becomes more complicated in class action cases. *See Creveling v. GEICO,* 376 Md. 72, 83-87 n. 3 (2003) (noting that mootness is a "more flexible" concept in the context of class action litigation); *Pitts v. Terrible Herbst, Inc*. 653 F.3d 1081, 1087 (9th Cir. 2011) ("The distinction between issues that have become moot and parties whose interest in the issue may have become moot is especially visible in the context of class actions.")

Maryland courts generally avoid considering cases wherein no justiciable issue is presented. The consideration of cases that do not present justiciable issues places courts "in the position of rendering purely advisory opinions, a long forbidden practice in this State." *Hatt*, 297 Md at 46. *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").

In their initial and amended complaints, the appellants described three groups of individuals whose claims they sought to represent in the class action:

1. Plaintiffs whose criminal offenses, at the time they were committed, did not require registration but were retroactively placed on the registry and subject to registration requirements;

2. Plaintiffs whose criminal offenses, at the time they were committed, required registration for a set period of time but whose term of registration was retroactively increased and they were currently on the registry beyond the initial term and subject to registration requirements;

3. Plaintiffs whose criminal offenses, at the time they were committed, required registration with limited restrictions but whose registration requirements and restrictions have been retroactively increased beyond those required at their initial registration.[6]

The appellants filed their motion for class certification at the same time that they filed their complaint. During the four months that their motion for certification was pending, the appellants did not seek any discovery or request to schedule any depositions to assist the parties or the court in identifying the potential class members or the common issues to be addressed in the class action suit.

In Maryland, the defendants in a potential class action lawsuit cannot avoid litigation by "picking off" the named defendants. As the Court of Appeals held in *Frazier v. Castle Ford, Ltd*., 430 Md. 144 (2013), "a tender of individual relief to the

[6] We note that this Court has recently published an opinion impacting the validity of the third sub-class of potential class members identified by the appellants. In *Long v. Maryland State Department of Public Safety and Correctional Services*, ___ Md. App. ___, No. 2593, Sept. Term, 2014, (filed September 28, 2016), this Court held that the imposition of additional registration requirements that obligate MSOR registrants to provide detailed personal information that they were not previously required to provide, is non-punitive, and therefore, does not violate the prohibition against *ex post facto* laws under Article 17 of the Maryland Declaration of Rights.

putative class representative does not moot a class action if the individual plaintiff has not had a reasonable opportunity to seek class certification, including any necessary discovery." *Id*. at 161 (footnote omitted). The *Frazier* Court adopted the reasoning of the Ninth Circuit Court of Appeals in *Pitts v. Terrible Herbst, Inc*. 653 F.3d 1081 (9th Cir. 2011), wherein that Court decided:

> If the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the class certification issue. Then, if the district court certifies the class, ... the case may continue despite full satisfaction of the named plaintiff's individual claim because an offer of judgment to the named plaintiff fails to satisfy the demands of the class. Conversely, if the district court denies class certification, ... the plaintiff may still pursue a limited appeal of the class certification issue. Only once the denial of class certification is final does the defendant's offer—if still available—moot the merits of the case because the plaintiff has been offered all that he can possibly recover through litigation.

Frazier, 430 Md. at 159-60 (quoting *Pitts*, 653 F.3d at 1092 (citations omitted)). Explaining its holding, the *Frazier* Court opined that "[i]f all a defendant need do to defeat a class action is to satisfy the class representative's claim immediately after suit is filed, many meritorious class actions will never get off the ground." *Id*. at 157-58.

In granting the appellees motion to dismiss or for summary judgment, the circuit court concluded that the satisfaction of the named appellants' claims mooted the claims of all the potential class members the appellants sought to represent. As noted above, at no time prior to granting the appellees' dispositive motion did the circuit court conduct any hearings or make any findings regarding the merits of the appellants' request for class

certification. The court also made no findings regarding whether the appellants were afforded a reasonable opportunity to certify their proposed class.

We are persuaded that the circuit court erred by granting the appellees motion to dismiss or for summary judgment without addressing the appellants' timely filed motion to certify this case as a class action. On remand, the circuit court must determine whether the appellants had an adequate opportunity to seek class certification. "That determination will require a careful assessment by a trial court." *Frazier*, 430 Md. at 161. In our view, the appellants' opportunity to certify their proposed class should include a chance to conduct any necessary discovery, followed by a hearing on the merits of their certification motion as required by Md. Rule 2-231(c), after which, the circuit court should endeavor to articulate "findings and reasons" for granting or denying the class certification.

MOTION TO DISMISS APPEAL GRANTED IN PART AND DENIED IN PART. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.