VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of January, 2020.

Present: All the Justices

Flint Hill School, Appellant,

against Record No. 181678
Circuit Court No. CL-2018-1929

Alessia McIntosh, Appellee.

Upon an appeal from the judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that there is no reversible error in the judgment that is the subject of this appeal. Therefore, we affirm.

I. BACKGROUND

Flint Hill School (the School) is a private school located in Fairfax County, Virginia, educating students from junior kindergarten through 12th Grade. Alessia McIntosh (Alessia) and Roger McIntosh (Roger) enrolled their minor child at the School for the 2017-2018 academic year. The School presented Alessia and Roger with a contract relating to their child's enrollment (Enrollment Contract) for them to sign. Alessia and Roger signed the Enrollment Contract. Relevant to this appeal, the Enrollment Contract contained the following provision:

> We (I) agree to pay all attorneys' fees and costs incurred by Flint Hill School in any action arising out of or relating to this Enrollment Contract.

On February 6, 2018, Alessia filed a complaint against the School in the Circuit Court of Fairfax County seeking preliminary and permanent injunctive relief, as well as a declaratory judgment regarding the enforceability of the attorneys' fees provision in the Enrollment Contract. Alessia claimed that she wished to assert a claim against the School regarding harm to

her child at the School, but that the uncertainty concerning the enforceability of the contested attorneys' fees clause served as a practical bar to the claim she wished to bring, because of the potential financial liability that the clause might impose upon her.

In response, the School filed a demurrer and motion to dismiss for lack of subject matter jurisdiction. The circuit court denied the motion to dismiss, overruled the demurrer as to the declaratory judgment claim, and ordered the School to file an answer.[1]

On April 4, 2018, the School filed an answer. The School admitted that Alessia is the parent of a minor child attending the School and that she signed the Enrollment Contract on February 12, 2017, but denied most of the remaining allegations in the complaint. The School raised several affirmative defenses in its answer, including that there existed no actual controversy, that Alessia was seeking an advisory opinion, and that Alessia failed to name Roger as a necessary party. The School did not include a demand for attorneys' fees in its answer.

The School subsequently filed a plea in bar which rearticulated and elaborated upon its arguments that Alessia failed to name Roger as a necessary party and that the circuit court lacked jurisdiction because no actual controversy existed. Alessia filed a memorandum in opposition. On May 21, 2018, the circuit court entered an order denying the School's plea in bar.

On July 26, 2018, Alessia moved for summary judgment. She asserted that the attorneys' fees provision was unambiguous and the facts relevant to the contested provision were otherwise undisputed. She requested that the circuit court declare the attorneys' fees clause unconscionable and thus invalid and unenforceable as a matter of law. She asserted that the provision was "purposefully included to dissuade legal challenge for any action or conduct" by the School, and that she was entitled to declaratory relief "from the uncertainty and insecurity regarding her legal rights and responsibilities under the Enrollment Contract."

On August 14, 2018, the School filed a memorandum in opposition to Alessia's motion for summary judgment. It stated in its memorandum that it believed that several relevant facts were in dispute, and that Alessia's request for declaratory judgment was actually a request for an advisory opinion because she has yet to file an underlying claim arising out of or related to the Enrollment Contract.

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[1] The circuit court eventually denied the preliminary injunction and sustained the demurrer as to Alessia's claim regarding the permanent injunction. Alessia did not assign error to the circuit court's denial of the injunctions, and as such, they are not at issue in this appeal.

On September 17, 2018, the circuit court sent a letter opinion to the parties informing them of its holdings. The circuit court held that declaratory relief was appropriate because the claim was ripe for adjudication, presented an actual controversy, and the relief sought was the type contemplated by Code § 8.01-184.

The circuit court also concluded that Roger was not a necessary party because his presence was not an absolute necessity and that the court could proceed without him.

Next, the circuit court declared the attorneys' fees provision unconscionable because the contract is an adhesion contract, and the attorneys' fees provision requires Alessia to pay the School's attorneys' fees regardless of the success of the claim, which party brings the claim, or the reasonableness of fees. Additionally, the circuit court held the attorneys' fees provision was void as against Virginia public policy because it lacked a "reasonableness" or "results obtained" qualification on Alessia's obligation to pay attorneys' fees.

On October 9, 2018, the circuit court entered a final order granting summary judgment for Alessia, and declaring the attorneys' fees provision unenforceable.

The School appeals.

II. ANALYSIS

The School's nine assignments of error raise three issues on appeal: first, whether the circuit court had jurisdiction to render a declaratory judgment regarding the attorneys' fees provision; second, whether Roger was a necessary party to Alessia's declaratory judgment action; and third, whether the attorneys' fees provision is unenforceable.

A. Jurisdiction for Declaratory Judgment

The School argues that there is no actual controversy present, and therefore contends that the circuit court did not have authority to exercise jurisdiction over Alessia's declaratory judgment action. It asserts that Alessia's declaratory judgment action sought an advisory opinion regarding whether she would be liable for attorneys' fees in some "hypothetical future lawsuit." The School further argues that because the attorneys' fees provision only applies to claims "arising out of or relating to" the Enrollment Contract, Alessia failed to establish that an actual controversy existed because she did not show that she had an underlying claim which arose out of or was related to the Enrollment Contract.

We review issues of jurisdiction de novo. *Westlake Legal Grp. v. Flynn*, 293 Va. 344, 349 (2017). "In cases of actual controversy, circuit courts within the scope of their respective

jurisdictions shall have power to make binding adjudications of right . . . ." Code § 8.01-184. Therefore, "[i]f there is no actual controversy between the parties regarding the adjudication of rights, the declaratory judgment is an advisory opinion that the court does not have jurisdiction to render." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Supervisors*, 285 Va. 87, 98 (2013).

An actual controversy is "one that is justiciable, that is, where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment." *Id.* (citation and internal quotation marks omitted). Additionally, demonstrating an actual controversy requires showing "that [the plaintiff's] rights will be affected by the outcome of the case." *Id.* (alteration in original).

The Code specifically states that "[c]ontroversies involving the interpretation of deeds, wills, and *other instruments of writing* . . . may be so determined." Code § 8.01-184 (emphasis added). However, "[w]here a declaratory judgment as to a disputed fact would be determinative of issues, rather than a construction of definite stated rights, status, and other relations, commonly expressed in written instruments, the case is not one for declaratory judgment." *Green v. Goodman-Gable-Gould Co.*, 268 Va. 102, 107 (2004) (citation and internal quotation marks omitted). Further, "where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding, which is intended to permit the declaration of rights before they mature, is not an available remedy." *Board of Cty. Supervisors v. Hylton Enterprises, Inc.*, 216 Va. 582, 585 (1976).

The purpose of declaratory judgments "is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights." Code § 8.01-191. The statutes regarding declaratory judgments are "to be liberally interpreted and administered with a view to making the courts more serviceable to the people." *Id.*

In the insurance context, we have held that declaratory judgment actions are appropriate where insurers seek to determine their liability under insurance policies. *See Doctors Co. v. Women's Healthcare Assocs., Inc.*, 285 Va. 566, 576 (2013) (affirming a trial court's grant of declaratory judgment where a professional liability insurance company sought to establish that a pending action was not covered under the insurance policy); *see also Reisen v. Aetna Life and Cas. Co.*, 225 Va. 327, 335 (1983) (declaratory judgment deemed appropriate because "advance determination of the coverage question served to remove the clouds from the legal relations of

the parties"); *see also Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 47 (1978) (awarding declaratory judgment for the appellant-insurer and concluding there was no duty to defend); *see also Criterion Ins. Co. v. Grange Mut. Cas. Co.*, 210 Va. 446, 448-49 (1970) (reversing and remanding a trial court's dismissal of a declaratory judgment action because the Court found there was a justiciable controversy because two insurance companies sought to determine their obligations under their respective policies).

In *Reisen*, an accident occurred between Reisen and a driver insured by Aetna. *Reisen*, 225 Va. at 329-30. If coverage existed, Aetna had an obligation to attempt to negotiate a settlement, on behalf of its insured, with Reisen within policy limits. *Id.* at 335. If coverage did not exist, Aetna had no such obligation. *Id.* Aetna filed a declaratory judgment action seeking a declaration of its obligations, if any, under the insurance policy. *Id.* at 330.

In response, Reisen argued that because Aetna's insured's liability had not been established, there was no actual controversy. *Id.* at 331-32. Reisen further argued that Aetna "merely sought an advisory opinion on the question: If a judgment is entered against [its driver], will [Aetna] be obligated to pay?" *Id.* at 332. Our Court concluded that there was an actual controversy and that Aetna was not seeking an advisory opinion because "[t]he circumstances of the incident gave rise to a real probability that Aetna did not owe coverage . . . ." *Id.* at 335. We held that *Reisen* presented "a classic case where declaratory judgment is appropriate to guide parties in their future conduct in relation to each other." *Id.* (citation and internal quotation marks omitted).

We further noted in *Reisen,*

> Professor Borchard, co-draftsman of the Uniform Declaratory Judgments Act, has observed that when an adjudication of non-liability is sought by a litigant, a few courts have mistakenly concluded that such a claim does not present a 'cause of action' for judicial relief. But, [Borchard] notes . . .
>
> > that even a potential claim, such as the probable claim of an injured person against the insured and the insurance company, is sufficient to cause fear and jeopardy and thus to warrant the institution of an action for a declaration of non-liability.
>
> Some courts have erroneously assumed, contrary to overwhelming authority, that the issue between the company and the injured person is not ripe for adjudication because no judgment has yet been obtained by or against the insured or because there is only a 'contingent future possibility of disputes.' [However] . . .

> [i]f there is human probability that danger or jeopardy or prejudice impends from a certain quarter, a sufficient legal interest has been created to warrant a removal of the danger or threat. Naturally, some perspicacity is required to determine whether such danger is hypothetical or imaginary only or whether it is actual or material.

Id. at 334-35 (citations and internal quotation marks omitted).

Endorsing the foregoing views, in *Reisen* we held that the facts illustrated the wisdom of allowing a declaratory judgment to be entered. We conclude similarly here.

We find there is an actual controversy appropriate for declaratory judgment in the present case because the contested attorneys' fees provision has created a threat of imposition of liability for the School's attorneys' fees and costs if Alessia files and maintains a cause of action against the School for the injury she claims that her child already suffered as a student there. It is transparent that the alleged injury is related to the Enrollment Contract. Alessia and the School disagree concerning the enforceability of the attorneys' fees provision. That controversy concerns rights under the Enrollment Contract.

This case is highly unusual because a specific and anomalous clause of the contract, if applied as written, would have the practical effect of foreclosing litigation on the contract itself. The parties' rights under the contract will be affected by the outcome of the declaratory judgment action. The actual objective in the declaratory judgment proceeding is not the resolution of the issue, arising out of and related to the Enrollment Contract, of whether Alessia's child was actually harmed by the actions of the School, but rather an adjudication of the parties' rights under the contract regarding the payment of attorneys' fees if that lawsuit is filed. Moreover, the claim asserted concerning attorneys' fees has not fully matured and the alleged wrong has not already been suffered,[2] so a declaratory judgment proceeding, which is intended to permit declaration of rights before they mature, is an available remedy. It is worth noting that, to conclude, as the School would have us do, that Alessia needed to file a merits claim for there to be an actual controversy concerning the attorneys' fees provision, would prevent her from determining her rights prior to her reaching the point at which the dispute concerning the provision would have already ripened. Alessia's action for declaratory judgment, similar to

[2] The School has waived its right to claim attorneys' fees in this declaratory judgment action.

Aetna's in *Reisen*, seeks to declare her non-liability under the Enrollment Contract *before* she is placed in a position in which she incurs such obligations. The circuit court had the jurisdiction to consider Alessia's declaratory judgment action, and the circuit court did not err in doing so.

B. Necessary Party

The School argues that because Roger is also a signatory to the Enrollment Contract, that he is a necessary party to Alessia's declaratory judgment action.

"Whether a party is a necessary party to a particular claim is a question of law that we review de novo." *Synchronized Const. Servs., Inc. v. Prav Lodging, LLC*, 288 Va. 356, 363 (2014). We have previously defined a necessary party in the following manner:

> Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.

Id. at 364 (citation and internal quotation marks omitted); *see also Marble Techs., Inc. v. Mallon*, 290 Va. 27, 32 (2015).

Here, Roger was not a necessary party to Alessia's declaratory judgment action. Alessia's declaratory judgment action related to a contract provision in the Enrollment Contract, which Roger happened to also sign, but, Roger is not a necessary party because his interest or claim was not likely to be either "diminished or defeated" by Alessia's claim. Alessia and Roger each had individual rights and obligations under the Enrollment Contract. Further, "[n]o action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties . . . ." Code § 8.01-5(A). The remedy for a necessary party's absence in a case is not to dismiss the claim, but instead to add the necessary party. If the School believes it is in any way prejudiced by not having Roger joined as a party, it had the opportunity to move to add Roger in the circuit court, but elected not to do so. The circuit court did not err in failing to dismiss the complaint because Roger was not named as a party by the plaintiff.

C. Unconscionability of Attorneys' Fees Provision

The School argues that the attorneys' fees provision is not unconscionable because any attorneys' fees would be limited by reasonableness. The School explains that this means that a court could determine its reasonable attorneys' fees to be zero dollars, which in turn means Alessia would not have to pay anything for its attorneys' fees.

We review questions of contract interpretation de novo. *Uniwest Const., Inc. v. Amtech Elevator Servs., Inc.*, 280 Va. 428, 440 (2010). Courts may void a contract provision that is unconscionable. *Smyth Bros.-McCleary-McClellan v. Beresford*, 128 Va. 137, 170 (1920). We have previously defined "an inequitable and unconscionable bargain" as "one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other." *Id.* (citation and internal quotation marks omitted). For there to be unconscionability, the "inequality must be so gross as to shock the conscience." *Id.*

In determining whether a contractual provision is unconscionable, a relevant factor to consider is whether the contract was an adhesion contract. *See* Restatement (Second) of Contracts § 208, cmt. a. (1981); *see also* 8 Richard A. Lord, Williston on Contracts § 18:13, at 135-42 (4th ed. 2010). An adhesion contract is a "standard-form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms." Black's Law Dictionary 403 (11th ed. 2019).

The Enrollment Contract is a classic example of an adhesion contract. The School prepared the contract and presented it to Alessia and Roger for their signatures. While Alessia had time to read the contract in its entirety before signing, she did not have any meaningful choice regarding the terms.

The School's assertion that the provision is not unconscionable because any attorneys' fees will be limited by reasonableness fails because the School misunderstands the issue. The issue is not whether the amount of attorneys' fees would be unconscionable; the issue is whether the *obligation* to pay the School's attorneys' fees as stated in the provision is unconscionable. We find that it is and that the circuit court did not err in ruling that the provision is void and unenforceable.

No one with his or her senses "and not under delusion" would agree to this particular attorneys' fees provision because it is overly broad. It requires the signatory to pay "*all* attorneys' fees *and costs* incurred by [the School] in *any action* arising out of or relating to" the Enrollment Contract. Placing the burden of attorneys' fees for the School on the signatories, especially stated so broadly, creates an inequality so gross that it shocks the conscience. Especially considering, under the attorneys' fees provision, the signatories (the parents of students) would have to pay the School's attorneys' fees even if the School was the one to

initiate a proceeding eventually found to be without merit. Therefore, the circuit court did not err in ruling that the attorneys' fees provision is unconscionable and thus void and unenforceable.[3]

III. CONCLUSION

Accordingly, for the above reasons, we affirm the judgment of the circuit court.

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: 

Deputy Clerk

[3] Because we find that the circuit court did not err in finding the attorneys' fees provision to be unenforceable due to unconscionability, the circuit court's finding that the attorneys' fees provision was void as to public policy need not be addressed.