IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ARTHUR ZITRIN, et al,	)	
Plaintiffs/Petitioners,	)	
	)	
v.	)	**CIVIL ACTION FILE**
	)	**NO. 2005CV103905**
GEORGIA COMPOSITE STATE BOARD	)	
OF MEDICAL EXAMINERS, et al,	)	
Defendants/Respondents.	)	
	)	

FINAL ORDER GRANTING DEFENDANTS/RESPONDENTS' MOTION TO DISMISS AND DENYING PLAINTIFFS/PETITIONERS' CLAIMS

This action was filed seeking a declaratory judgment and also appealing a decision by the Respondent State Board of Medical Examiners (the "Board"). According to the record, the various Plaintiffs/Petitioners are doctors practicing in and outside of Georgia.[1] On June 1, 2005, they filed a Request for Investigation with the Board and various district attorneys in the state, pursuant to O.C.G.A. § 43-34-37(d), based upon other physicians' participation in executions. On or about June 22, 2005, the Board responded and notified the Plaintiffs that it refused to conduct an investigation as it found no violation of the Georgia Medical Practices Act. This action was then filed.

In this action, Plaintiffs seek first a declaratory judgment under O.C.G.A. §§ 9-4-2 and 9-4-3 that participation of a licensed physician in an execution is not required under Georgia law. They also seek a declaratory judgment that, under the relevant American Medical Association ("AMA") guidelines and Georgia statutes, such participation is actually barred. Finally, Plaintiffs also seek to appeal the June 22, 2005 decision by the Board not to open an investigation. In the Complaint, they claim that they are "aggrieved" by the decision by the

1 Only three of the seven Plaintiffs actually reside and work in Georgia. The remainder are from New York (2),

Board and that it is a final decision subject to appeal. The Defendants answered and denied all material allegations. They also filed a motion to dismiss. This action then appeared before this Court for argument on the Defendants' motion to dismiss and on the underlying issues in the action, and it is ripe for decision.

In their motion to dismiss, Defendants argue that Plaintiffs' claims for declaratory judgment are subject to dismissal because there is no actual controversy and because Plaintiffs' are not interested parties with standing to sue. In a supplemental brief, Defendants also assert that declaratory judgment is not appropriate because the reading of the statutes and administrative rules urged by Plaintiffs would constitute an impermissible delegation of authority and would render other statutes in the Medical Practices Act void. In regard to Plaintiffs' appeal, Defendants contend that the appeal of the Board's June 22, 2005 decision is also subject to dismissal because this was not a "final" decision, because Plaintiffs are not "aggrieved" parties and because this was not a "contested" case under the meaning of the Administrative Procedure Act ("APA"). Finally, Defendants also addressed Plaintiffs' references to mandamus and injunctive relief raised in the Complaint.

Plaintiffs responded to the motion and argued against dismissal. Briefly, they contend that their declaratory judgment action is appropriate because Georgia physicians are governed by the AMA, which regulates the conduct at issue. Moreover, they argue that they have standing to pursue this action because they are practicing physicians placed in a position of uncertainty regarding their ability or inability to participate in executions.[2] Finally, Plaintiffs argue that their

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Ohio (1) and Colorado (1).

2 Amnesty International also filed an *amicus* brief paralleling the same arguments which were raised and well-argued by Plaintiffs' counsel.

appeal of the Board's decision is not ineffective because it was a "final" decision and they are "aggrieved" parties.

(1) Mandamus and Injunctive Relief

Initially, this Court notes that, in the Complaint, Plaintiffs alleged that this Court had jurisdiction over this matter also under O.C.G.A. § 9-5-1 (relating to injunctive relief), as well as O.C.G.A. §§ 9-6-20, 9-6-23 and 9-6-25 (relating to actions for mandamus). (Complaint, ¶ 1). Even under the broadest reading of the Complaint it is apparent, however, that Plaintiffs did not actually bring any claims for injunctive relief or mandamus, and they do not argue these claims in their response to the motion to dismiss. It appearing that no allegations or relief are being sought under these statutes, the Defendants' motion to dismiss these claims should be and hereby is GRANTED.

Even assuming, arguendo, that Plaintiffs do seek a writ of mandamus or injunctive relief, such claims would still be subject to dismissal. First, the law is long settled that an extraordinary writ of mandamus will not lie unless the petitioner seeking it has a clear legal right to have the act performed. Lansford v. Cook, 252 Ga. 414, 415 (1984). The law must not only authorize the act be done, but must require its performance. Gwinnett County v. Blaney, 275 Ga. 696 (2002); Cleveland v. Skandalakis, 268 Ga. 133 (1997). Under the express language of O.C.G.A. § 43-34-37(d), the executive director of the Board is vested with the authority to make such investigations "as he or she, or the board, ... may deem necessary or advisable ..." Because the authority to make investigations is clearly discretionary, mandamus would not lie in this case.[3]

3 Additionally, this Court notes that while mandamus is the remedy for official inaction, see Moreton Rolleston, Jr. Living Trust v. Glynn Cty. Bd. of Tax Assessors, 228 Ga. App. 371 (1997), it is not the proper remedy to compel "the undoing of acts already done or the correction of wrongs already perpetrated, and this is so, even though the

Similarly, injunctive relief also would not be proper in this case. In Georgia, the purpose of an interlocutory injunction is to preserve the status quo and balance the conveniences of the parties pending final adjudication of the issues. Byelick v. Michel Herbelin USA, Inc., 275 Ga. 505 (2002); Atlanta Dwellings v. Wright, 272 Ga. 231 (2000); West v. Koufman, 259 Ga. 505 (1989); Benton v. Patel, 257 Ga. 669 (1987); MARTA v. Wallace, 243 Ga. 491 (1979). In this action, however, Plaintiffs do not seek to maintain the status quo; rather, they seek affirmative relief in the form of requiring the Board to open an investigation. Such affirmative relief is not appropriate in an injunction. Wiggins v. Bd. Commissioners of Tift Cty., 258 Ga. App. 666, 668 (2002) ("courts cannot restrain that which has already been done, and where it appears from all the allegations of the petition that the acts complained of were fully consummated an injunction does not lie.").

For these reasons, Defendants' motion to dismiss any claims for mandamus or injunctive relief which may have been asserted by Plaintiffs in their Complaint is hereby **GRANTED**, and those claims are **DISMISSED**.

(2) Declaratory Judgment

As to Plaintiffs' claims for declaratory relief, this Court finds that these claims are subject to dismissal, even assuming that Plaintiffs' allegations are true, because as a matter of law there is no justiciable controversy and Plaintiffs lack standing to pursue these claims.

In Georgia, claims for declaratory judgment are generally governed by O.C.G.A. § 9-4-2, which provides, *inter alia*:

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action taken was clearly illegal. [Cits.]." Hilton Const. Co., Inc. v. Rockdale County Bd. of Ed., 245 Ga. 533, 540 (1980).

> In cases of actual controversy, the respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

O.C.G.A. § 9-4-2(a). Additionally, subsection (b) permits declaratory judgment actions in any civil case where "it appears to the court that the ends of justice require that the declaration should be made ...". The purpose of this Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, statutes, and other legal relations." Agan v. State, 272 Ga. 540, 542 (2000). These rules governing declaratory judgments still apply even where the action is brought under the APA and O.C.G.A. § 50-13-10. See, e.g., D.O.T. v. Peach Hill Prop., Inc., Case No. S06A0727 (decided June 12, 2006), 2006WL1584432 (Ga.,2006); Bd. of Natural Resources v. Monroe Cty., 252 Ga. App. 555 (2001).[4]

In this case, the Plaintiffs have not alleged sufficient facts to demonstrate any justiciable controversy, as a matter of law. In order to demonstrate a justiciable controversy sufficient to gain declaratory relief, a plaintiff must show that he is in a position of uncertainty or insecurity because of a dispute and that he is required to take some future action which, without direction from the court, might reasonably jeopardize his interests. Cramer v. Spalding Cty., 261 Ga. 570 (1991); Patterson v. State, 242 Ga. App. 131 (2000). Where it appears, however, that the plaintiff is merely seeking judicial advice, or where there is merely a difference of opinion without any "adverse" claims or actual controversy, then a declaratory judgment will not lie. West v. Judicial Council of Ga., 184 Ga. App. 894 (1987).

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4 Plaintiffs' Complaint does not specifically state that its declaratory judgment claims are brought under O.C.G.A. §50-13-10; however, a fair reading of the Complaint reveals that Plaintiffs seek to determine the validity and interaction of various rules of the AMA and Board in conjunction with Georgia statutes. Therefore, this Court views

In this case, it is apparent that Plaintiffs seek only judicial advice as to the meaning of Georgia law and AMA rules. The Complaint contains numerous assertions regarding the AMA rules, the Board's regulations, and state statutes governing the practice of medicine and executions. Nowhere in the Complaint, however, is it alleged that any of the Plaintiffs is in a position of uncertainty regarding a contemplated future action. Rather, the Complaint alleges that "*Respondent* physicians" who choose to be involved in executions "have repeatedly violated [AMA] standards and Georgia law" and are subject to discipline. (Complaint, ¶¶ 56, 60; emphasis added). Additionally, there is a complete absence of any allegation that any of the Plaintiffs are subject to, or may become subject to, any investigation or discipline as a result of the alleged conflict between the AMA standards and Georgia law. The Plaintiffs' obviously have a difference of opinion regarding the ethical propriety of physicians' participating in executions; however, under the clear weight of authority, this is insufficient to create a justiciable controversy.

For these reasons, even construing the facts in a light most favorable to the Plaintiffs, this Court finds that a declaratory judgment action is not permitted based upon the facts alleged, and the Defendants' motion to dismiss is GRANTED on this ground.

Even assuming the presence of a justiciable issue, this Court further finds that the Plaintiffs lack standing to pursue this declaratory action. Georgia law is clear that in order for a plaintiff to have standing to pursue a declaratory judgment action, there must be an effort "to apply the opinion to a plaintiff's particular case ..." West, supra (citing, *Borchard on Declaratory Judgments*, p. 53); see also, Pilgrim v. First Nat. Bank of Rome, 235 Ga. 172

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this Code section as applicable.

(1975); Bd. of Natural Resources v. Monroe Cty., 252 Ga. App. at 559; Davis & Shulman's *Ga. Practice and Proc.* § 26:2 (2005) ("[f]or a controversy to justify the making of a declaration, it must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute."). In other words, to establish a legal interest sufficient for standing in a declaratory judgment action, a party must show that his rights are in *direct* issue or jeopardy. Burton v. Composite State Bd. of Med. Examiners, 245 Ga. App. 587 (2000).

It is undisputed in this case that *none* of the Plaintiffs, most of whom are not even practicing physicians in this state, have participated or are intending to participate in executions. Nor is there any allegation that the Respondents are threatening discipline against the Plaintiffs for any participation in an execution. In contrast, Plaintiffs' chief complaint in this action is that the Board actually refuses to discipline *other* Georgia physicians for this activity. While the allegations in the Complaint may raise an abstract issue, they do not include any right claimed by Plaintiffs which is denied by the Respondents.[5] Because Plaintiffs' have completely failed to allege in their Complaint any direct, legal issue causing them risk, this Court finds that they have no standing, as a matter of law.

Therefore, this Court finds that the Plaintiffs' action for declaratory judgment is also subject to dismissal for lack of standing, and the Respondents' motion on this ground is GRANTED, as well.

Finally, assuming *arguendo* that the Plaintiffs have standing and that a justiciable issue exists, this Court further finds that a declaratory judgment would not be warranted as a matter of

5 In fact, this Court notes that Plaintiffs concede that they cannot be forced to participate in executions; a fact agreed

law. At issue in this case is the Plaintiffs' inability to reconcile the relevant AMA standards and O.C.G.A. § 43-34-37(a)(7) and (10) with the Defendants' stated position that participation in an execution is not the practice of medicine and not subject to discipline.

Under O.C.G.A. § 43-34-37(a)(7) and (10), the Board has the authority to discipline any physician who has either "[e]ngaged in any ... unethical ... conduct or practice harmful to the public ..." including the prescribing or use of drugs or other treatments which are detrimental to the patient. Similarly, under subsection (a)(10), the Board may discipline any physician who violated a "law, rule, or regulation" of either the State, the Board, or "any other lawful authority." In furtherance of this authority, the Board is vested with discretion to open an investigation on any matter relating to the enforcement of these provisions. O.C.G.A. § 43-34-37(d).

Plaintiffs contend that because the participation in executions violates the AMA standards, E-206, and the Board's own Rule 360-3-.02(5), and because both the AMA and the Board govern the actions of physicians in this state, then all physicians who participate in executions must be subject to discipline. This Court does not agree.

First, it is apparent that the AMA does provide useful guidelines for the conduct and standards of care to be employed by physicians, generally. In fact, this Court notes that numerous Georgia decisions have looked to the AMA for guidance on a number of topics. E.g., Printpack, Inc. v. Crocker, 260 Ga. App. 67 (2003) (AMA guidelines specifically used in workers' compensation cases); Ketchup v. Howard, 247 Ga. App. 54 (2000) (AMA standards on informed consent evaluated); Dominy v. Shumpert, 235 Ga. App. 500 (1998) (AMA guidelines on duty to report impaired colleagues); Sutton v. Quality Furn. Co., 191 Ga. App. 279 (1989)

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to by the Respondents.

(workers' compensation). The AMA, however, is not the governing body for physicians in this state. Instead, it is the sole province of the Board to govern the licensure, practice and discipline of physicians in the state of Georgia. Importantly, the Board is barred from delegating such functions to any medical association, and any attempt to delegate its authority wholesale to the AMA would be unlawful, void and *ultra vires*. O.C.G.A. § 43-34-24.1(j).[6]

Moreover, the regulation of capital punishment is through state and federal laws. Under the Georgia statutes, participation by a physician in an execution may not be compelled, but it is authorized. O.C.G.A. §§ 17-10-38(d); 17-10-41; 17-10-42.[7] Further, when enacting the new legislation regarding capital punishment, the Georgia legislature specifically declared that:

> Notwithstanding any other provision of law, prescription, preparation, compounding, dispensing, or administration of a lethal injection authorized by a sentence of death by a court of competent jurisdiction shall not constitute the practice of medicine or any other profession relating to health care which is subject by law to regulation, licensure, or certification.

O.C.G.A. § 17-10-38(c). Based upon these Code sections, and in light of its regulatory authority, the Board determined that participation in an execution was not the practice of medicine and exercised its authority to refuse to open an investigation.

In light of the express language of the particular statutes in this state regulating the practice of medicine and the conduct of capital punishment, this Court is compelled to find that, as a matter of law, Plaintiffs are not entitled to a declaratory judgment that participation in

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6 That Code section provides:
The board, through the executive director, shall hire such personnel as it deems necessary to carry out its functions under this chapter and may appoint professionally qualified persons to serve as members of peer review committees; *provided, however*, that no licensing, investigative, or disciplinary duties or functions of the board may be delegated to any medical association or related entity by contract or otherwise. (Emphasis added).

7 The majority of states utilizing capital punishment appear to follow this same rule. See, Comment, *Conflict of Duty Capital Punishment Regulations and AMA Medical Ethics*, 26 J. Legal Med. 261, 264 (2005).

executions is prohibited by Georgia law. For these reasons, this Court must DENY the declaratory relief sought by Plaintiffs in this action.

(3) Appeal from Board's June 22, 2005 letter

Finally, Plaintiffs contend that they are entitled to appeal the Board's decision, as expressed in its June 22, 2005 letter, not to open an investigation. It is undisputed that this portion of Plaintiffs' action is brought pursuant to the APA, specifically, O.C.G.A. § 50-13-19(a), which provides, *inter alia*: "[a]ny person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. " The Board disputes Plaintiffs' ability to appeal its June 22, 2005 letter on the bases that (1) Plaintiffs are not "aggrieved" parties, (2) the June 22, 2005 letter was not a "final" decision, and (3) the request to open an investigation was not a "contested" case.

Initially, this Court finds that Defendants' argument as to the finality of the decision is not persuasive. The letter from the Board to the Plaintiffs clearly states that its decision is a "final" decision. This Court is persuaded that this could operate to trigger appellate review, assuming the other criteria under § 50-13-19 are met.

However, this Court further finds that the Plaintiffs are not "aggrieved" persons under the meaning of the APA. In determining who an "aggrieved" party is, Georgia courts have adopted the rule that appellant must show an interest in the agency decision which has been "specially and adversely affected." Georgia Power Co. v. Campaign For a Prosperous Georgia, 255 Ga. 253 (1985); Thebaut v. Georgia Bd. of Dentistry, 235 Ga. App. 194 (1998). In other words, the appellant must demonstrate a form of injury which is special to him or herself, not merely

damage which is common to all other persons of similar status. Georgia Power Co. v. Campaign For a Prosperous Georgia, 255 Ga. at 258.[8]

Applied to the case at bar, it is evident that the Plaintiffs suffer no "special" damages. Although they contend that the Board's decision impacts them because it permits physicians to violate their ethical obligations by participating in executions, such injury is merely to the reputation or status of physicians, generally. There is a complete absence of any showing of any particularized injury to the Plaintiffs, themselves. Therefore, this Court finds that they are not "aggrieved" persons under Georgia law and may not appeal the June 22, 2005 decision by the Board not to open an investigation.

Equally importantly, this Court finds that the request for an investigation was not a "contested" case under the meaning of the APA. A "contested case" is defined under O.C.G.A. §50-13-2(2) as a proceeding in which "the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." In a recent decision, the Court of Appeals expressly decided that an agency's actions in an investigatory proceeding does not determine legal rights, duties or privileges of any party and is not a "contested" case. Federated Dept. Stores, Inc. v. Georgia P.S.C., 278 Ga. App. 239 (2006). Applied to this action, it is apparent that the Board's refusal even to open an investigation, which is far less intrusive than the Georgia PSC's actions in the Federated Dept. Stores decision, does not amount to a "contested" case. Therefore, this Court finds that the Plaintiffs have no right to appeal under the APA and O.C.G.A. § 50-13-19, as the Board's refusal to open an investigation does not amount to a "contested" case, as a matter of law.

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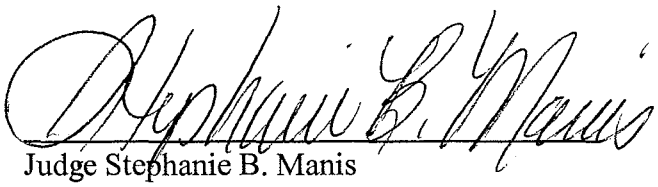
8 This issue was one of first impression in this state when the Georgia Power Co. Court reviewed the issue, and it

For all of these reasons, this Court finds that Plaintiffs may not seek judicial review of the June 22, 2005 letter from the Board refusing to open an investigation. The Defendants' motion to dismiss this appeal should be and hereby is GRANTED, and, alternatively, the Plaintiffs' claims for judicial review are DENIED.

In conclusion, this Court finds that Plaintiffs' may not, as a matter of law, pursue their claims under the Declaratory Judgment Act and that there is no basis for appeal of the Board's June 22, 2005 letter under the Administrative Procedures Act. The Defendants' motion to dismiss is **GRANTED** in *toto*, and the Plaintiffs' claims in this action are **DENIED**.

SO ORDERED, this 28 day of July, 2006.



Judge Stephanie B. Manis
Superior Court of Fulton County
Atlanta Judicial Circuit

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developed this rule by analogizing to zoning cases and by looking to other states.