

IN THE SUPREME COURT  
STATE OF GEORGIA

ARTHUR ZITRIN, et al.,           \*  
  \*  
          Appellants,               \*  
  \*  
v.                                   \*    CASE NO. S07A0318  
  \*  
GEORGIA COMPOSITE STATE       \*  
BOARD OF MEDICAL               \*  
EXAMINERS, et al.,             \*  
  \*  
          Appellees.             \*

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BRIEF ON BEHALF OF THE APPELLEES THE COMPOSITE STATE BOARD OF  
MEDICAL EXAMINERS AND LASHARN HUGHES

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PART I

STATEMENT OF THE CASE

Appellants Arthur Zitrin, M.D., and other physicians (the "Appellants") appeal from a final order of the Superior Court of Fulton County granting the Composite State Board of Medical Examiners' (the "Board") and LaSharn Hughes' (the "Appellees") motion to dismiss as to all claims raised in Appellants' complaint. Because the Appellants failed to seek discretionary review under O.C.G.A. § 5-6-35(a) as required by law, this appeal should be dismissed. Alternatively, the Court should affirm the trial court's ruling.

On July 22, 2005, Appellants filed a complaint in the Superior Court of Fulton County requesting, among other things,

declaratory and injunctive relief and further seeking to "appeal" the Appellee Board's decision not to investigate and discipline certain physicians who had participated in state ordered executions by lethal injection. (R. 3). Appellants sought a declaratory judgment that participation of licensed physicians in an execution is not required under the Georgia law. (R. 28-1). Appellants also sought a declaratory judgment that, under the relevant American Medical Association ("AMA") guidelines and Georgia statutes, such participation is barred. (R. 28-1). On August 26, 2005, the Appellees filed a motion to dismiss, a supporting brief and an answer. (R. 9, 10, and 28-2). Appellees argued that the complaint failed to state a claim upon which relief may be granted and that the superior court lacked jurisdiction. (R. 9, 10). On July 31, 2006, the trial court granted the Appellees' motion to dismiss in toto and denied the Appellants' claims. (R. 28). Appellants filed a motion for reconsideration which was denied on August 11, 2006. (R. 29, 30).

Appellants filed a notice of appeal on August 28, 2006, asserting that this Court has jurisdiction pursuant to Article 6, Section 6, Paragraph 2 of the Georgia Constitution. (R. 1). Appellants later filed an amended notice appeal. (R. 2). Appellees submit that the Court should dismiss the instant appeal because the underlying subject matter of the appeal is

one for which an application for discretionary appeal is required, and Appellants have failed to file such an application. Appellees further submit that the Court should affirm the trial court's ruling.

## PART II

### STATEMENT OF THE FACTS

The trial court found the following facts:

[Appellants] are physicians who practice in and outside of Georgia. Only three of the seven [Appellants] actually reside and work in Georgia. On June 1, 2005, [Appellants] 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 [Appellee] Board responded and notified the [Appellants] that it had refused to conduct an investigation as it found no violation of the Georgia Medical Practices [sic] Act.

(R. 28-1).

## PART III

### ARGUMENT AND CITATION TO AUTHORITY

A. THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

Appellees submit that the Court should dismiss the appeal because the Court lacks jurisdiction due to the Appellants' failure to file an application for discretionary appeal. "It is the duty of this Court to raise the question of its jurisdiction in all cases in which there may be any doubt as to the existence

of such jurisdiction." Powell v. City of Snellville, 275 Ga. 207, 208 (2002). Because the Appellants were required to file an application for a discretionary appeal pursuant to O.C.G.A. § 5-6-35(a) and failed to do so, this Court is without jurisdiction and should dismiss the instant appeal.

Appellees submit that because the underlying subject matter of the instant appeal involves the decision of a state administrative agency, Appellants were required to file an application for discretionary appeal. In Rebich v. Miles, 264 Ga. 467, 469 (1994), this Court held that the "underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal." If the underlying subject matter of the appeal is covered by the discretionary appeal statute, O.C.G.A. § 5-6-35, an application for appeal is required. Id.

In the instant case, the underlying subject matter is covered by O.C.G.A. § 5-6-35(a)(1). Under subparagraph (1) of O.C.G.A. § 5-6-35(a), an application for appeal is required in cases of "[a]ppeals from decisions of the superior courts reviewing decisions of . . . state and local administrative agencies[.]" Clearly, the Appellee Board is a state administrative agency. O.C.G.A. § 43-34-24.1. Also, it is plain that the "underlying subject matter" of the Appellants' appeal is the administrative decision by the Appellee Board to

decline to investigate and discipline certain licensed physicians. To further support the conclusion that this appeal concerns the decision of an administrative agency, two of the four of Appellants' enumerated errors refer to the Georgia Administrative Procedure Act. (Appellants' Brief, p. 2). Consequently, Appellants were required to file an application for appeal. Appellees submit that due to Appellants' failure to file such an application, this Court should dismiss the appeal.

Appellants assert in their brief that this Court has jurisdiction pursuant to Article 6, Section 6, Paragraphs (3) and (5) of the Georgia Constitution, as a case in equity and a case involving extraordinary remedies. (Appellants' Brief, p. 2). Appellees do not dispute that that Appellants' complaint includes claims under O.C.G.A. § 9-5-1 (relating to injunctive relief) and O.C.G.A. §§ 9-6-20, 9-6-23, and 9-6-25 (relating to actions for mandamus). However, this Court has consistently rejected the notion that the requests for relief contained in a complaint or the trial court's judgment on those requests controls the determination of the proper appellate procedure.

Appellees submit that the outcome of the instant case is controlled by this Court's decision in Ferguson v. Composite State Bd. of Medical Examiners, 275 Ga. 255 (2002). In that case, the appellant attempted to appeal directly to this Court the superior court's denial of the appellant's petition for

mandamus which requested that the trial court require the Board to reinstate the appellant's license to practice medicine. This Court characterized the appellant's case as one "in which the trial court issued a judgment listed in the direct appeal statute (mandamus), concerning subject matter that is covered under the discretionary appeal statute (administrative agency review)." Ferguson, 275 Ga. at 256. In Ferguson, this Court reiterated its holding in Rebich and concluded that, "[w]here both the direct and discretionary appeal statutes are implicated, it is **always** the underlying subject matter that will control whether the appeal must be brought pursuant to O.C.G.A. § 5-6-34 or O.C.G.A. § 5-6-35." (emphasis added) Ferguson, 275 Ga. at 257. This Court further stated this rule is "true even where the order being appealed from concerns a trial court's ruling on mandamus relief." Id. See also, Ladzinske v. Allen et al., 280 Ga. 264 (2006) (where court dismissed appeal despite claims for mandamus raised below). Consequently, in Ferguson, this Court dismissed the appeal. Ferguson, 275 Ga. at 258. Appellees submit that this Court should similarly dismiss the instant appeal because the underlying subject matter of the instant appeal involves the decision of an administrative agency and such an appeal requires an application pursuant to O.C.G.A. § 5-6-35.

Whether this case involves equitable relief or not does not

go to the question of whether Appellants have the right to pursue an appeal. Rather the question of whether equity is involved in this case goes only to the issue of whether this appeal should be heard by this Court or the Court of Appeals, assuming Appellants have a right to appeal in the first place. Appellees submit that Appellants have no such right.

Even assuming that Appellants rely on the existence of equitable relief as the basis for a right of appeal to this Court, their argument still lacks merit. In Warren et al. v. Board of Regents of the Univ. System of Georgia et al., 272 Ga. 142, 143 (2000), the appellant argued that this Court had jurisdiction pursuant to Article VI, Section VI, Paragraph III of the Georgia Constitution which provides for jurisdiction over "equity cases." The appellants in Warren had sought an accounting and an injunction, and trial court had ruled that the appellants lacked standing to pursue such relief. Warren, 272 Ga. at 142. In Warren, this Court held, "If there is no substantive issue regarding the propriety of the equitable relief granted or rejected, then the appeal does not lie in this Court." See also, Saxton v. Coastal Dialysis & Medical Clinic, Inc., 267 Ga. 177, 178 (1996) ("[O]ur appellate jurisdiction under Art. VI, Sec. VI, Par. III (2) does not attach simply because the pleadings in a case contain a prayer for an injunction [.]"). Appellees submit that the instant appeal does

not involve any substantive issues regarding the propriety of equitable relief. As the trial court has found, Appellants "did not actually bring any claims for injunctive relief or mandamus." (R. 28-3). Moreover, Appellants have not enumerated as error the trial court's ruling regarding any claim for injunctive relief. Appellees submit that the propriety of equitable relief is not an issue in the instant appeal, and that neither this Court nor the Court of Appeals has jurisdiction in this case. Accordingly, the instant appeal should be dismissed.

Appellees further submit that the dismissal and denial of Appellants' claims for declaratory relief do not authorize this Court or the Court of Appeals to hear the instant appeal. In the trial court, Appellants alleged claims for declaratory relief pursuant to O.C.G.A. §§ 9-4-2 and 9-4-3 and the trial court also construed the complaint as further requesting a declaratory ruling under the Administrative Procedure Act ("APA"). (R. 28-5). This makes no difference in Appellants' case. It is well-established Georgia law that an action for a declaratory judgment is not an equitable action and neither is an action for a declaratory ruling under the APA an equitable action.

In Miller v. Georgia Dept. of Public Safety, 265 Ga. 62, 63 (1995), the appellant had requested a declaratory judgment under APA; the appellant argued that an agency rule and applicable



statute were unconstitutional and that the agency's suspension of the appellant's driver's license should be set aside. The appellee moved to dismiss the appeal, and this Court granted the motion and held that in determining whether an application for discretionary appeal is required, the rule announced in Rebich applies even in cases where the appellant requested a declaratory judgment under the APA. In Miller, this Court explained that because the appellant was using the declaratory judgment action as a method by which to challenge the administrative agency's decision to suspend his driver's license, the appellant was required to follow the discretionary appeal procedure found in O.C.G.A. § 5-6-35. Miller, 265 Ga. at 65. Appellees submit that the holding in Miller controls the instant case, and regardless of Appellants' request for a declaratory judgment, Appellants were required to follow the discretionary appeal procedure. Because Appellants have failed to do so, this Court should dismiss the appeal.

B. THE TRIAL COURT PROPERLY RULED THAT APPELLANTS LACKED STANDING UNDER MOORE V. ROBINSON.

Appellees submit that the trial court properly ruled that Appellants lacked standing under Moore v. Robinson. In the trial court, Appellants filed a motion for reconsideration based on the trial court's failure to cite to this Court's decision in

Moore v. Robinson, 206 Ga. 27 (1949). In the order denying the Appellants' motion for reconsideration, the trial court stated, "[T]his Court notes that its failure to cite to the Moore v. Robinson decision was intentional, as it was not necessary or relevant to the Court's decision in this matter." (R. 30). Appellees submit that the trial court properly concluded that the decision in Moore v. Robinson was irrelevant and inapplicable to the instant case and properly concluded that Appellant's lacked standing.

In Moore v. Robinson, 206 Ga. at 36, the Court held that the plaintiffs below, Georgia licensed chiropractors, had a right to maintain an action for injunctive relief to prevent the Board of Chiropractic Examiners from issuing licenses to persons who did not meet the qualifications required by law. In Moore, 206 Ga. at 37, the plaintiffs alleged that the chiropractic board was acting beyond the scope of its authority under the law. Based on those alleged facts, the Court affirmed the trial court's decision that the plaintiffs had standing to maintain an action for injunctive relief.

No similarity exists between Moore and this case. The facts of Moore are inapposite to the facts of the instant case, and the holding in Moore has no application in the present circumstance. Here, Appellants contend that the decision in Moore supports the conclusion that Appellants have standing to

pursue declaratory relief. However, the Court in Moore ruled on the standing issue only with respect to the plaintiffs' request to stop the board from committing allegedly unlawful acts.

Unlike the plaintiffs in Moore, Appellants here seek to force the Appellee Board to take action. In the absence of some action by the Appellee Board, Appellants have not possible standing. Consequently, the decision in the Moore case is not applicable and the trial court properly concluded that Appellants lacked standing.

C. THE TRIAL COURT PROPERLY RULED THAT APPELLANTS WERE NOT "AGGRIEVED" WITHIN THE MEANING OF THE APA.

Appellees submit that the trial court properly ruled that Appellants were not "aggrieved" within the meaning of the APA. O.C.G.A. § 50-13-19(a) provides, "Any 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." In determining whether Appellants were "aggrieved" within the meaning of the APA, the trial court referred to this Court's decision in Georgia Power Co. v Campaign for a Prosperous Georgia, 255 Ga. 253 (1985). (R. 28-10). The trial court concluded that to show that they are "aggrieved" within the meaning of the APA, under Campaign, Appellants must show an interest in the agency's decision which

has been specially and adversely affected. (R. 28-10). The trial court concluded that Appellants had not suffered any "special damages" or any "particularized injury" resulting from the Appellee Board's decision not to investigate and discipline certain physicians who had participated in executions. (R. 28-11).

Appellees submit that the trial court used the proper standard in determining whether Appellants were "aggrieved" within the meaning of APA and properly concluded that Appellants lacked standing under the APA to attempt to appeal the Board's decision not to conduct an investigation and not to discipline physicians who had participated in executions. Appellants argue that they are "aggrieved" because they may suffer economic injury as a result of the Appellee Board's decision, because the Georgia physicians are unsure of the applicability of the AMA standards in Georgia, and because the Appellee Board's decision devalues the Appellants' ethical standards as set by the AMA. Appellees submit that Appellants have failed to explain how they might suffer economic injury as a result of the Appellee Board's decision. Appellants do not allege that their licenses have been sanctioned by the Board in any way. Appellants' bare assertion that they may at some point in the future suffer some type of economic injury as a result of the Appellee Board's decision is insufficient to demonstrate that they are

"aggrieved" within the meaning of the APA. Appellees further submit Appellants' assertion that they lack certainty of whether the AMA standards are applicable in Georgia is also insufficient to demonstrate that they are "aggrieved" within the meaning of the APA. Indeed, there is no allegation that any of the Appellants has attempted to participate in a state ordered execution or intends to participate in a state ordered execution such that use of their licenses has been restricted or limited in some way. Appellants still have failed to demonstrate that they suffer any damage or injury. Therefore, Appellants are not "aggrieved" within the meaning of the APA. Similarly, Appellees submit that Appellants' mere statement of opinion that the Appellee Board's decision devalues their ethical standards as set by the AMA is also insufficient to demonstrate the damage or injury required to have standing under the APA. Appellees submit that Appellants have failed to identify any concrete factual details that demonstrate that they are "aggrieved" under the APA. Accordingly, Appellees submit that this Court should affirm the trial court's ruling that Appellants were not "aggrieved" within the meaning of the APA.

D. THE TRIAL COURT PROPERLY RULED THAT THE CASE WAS NOT A "CONTESTED CASE" WITHIN THE MEANING OF THE APA.

Appellees submit that the trial court properly ruled that

the case was not a "contested case" within the meaning of the APA. As stated above, O.C.G.A. § 50-13-19(a) provides, "Any 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." Under the APA, a "contested case" is defined as "a proceeding, including, but not restricted to, rate making, price fixing, and licensing, 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." O.C.G.A. § 50-13-2(2).

The trial court concluded that the holding in Federated Dept. Stores, Inc. V. Georgia P.S.C., 278 Ga. App. 239 (2006), applied to the instant case and further concluded that the Appellee Board's decision not to investigate was not a "contested case" within the meaning of the APA. (R. 28-11). In Federated, 278 Ga. App. at 241, the Court of Appeals of Georgia concluded that an investigatory docket proceeding before the Public Service Commission ("PSC") was not a "contested case" within the meaning of the APA. In Federated, 278 Ga. App. at 240, the PSC had used the investigatory docket proceeding only to gather information to be used in any future rate proceedings. The Court in Federated explained that "the [investigatory docket] proceeding did not determine the legal rights, duties,

or privileges of any party" and that the PSC had not made any determination or issued any order affecting the parties. Federated, 278 Ga. App. at 241. Consequently, the Court in Federated, 278 Ga. App. at 241, concluded that the investigatory docket proceedings before the PSC did not constitute a "contested case" within the meaning of the APA and the trial court properly concluded that the plaintiffs were not entitled to judicial review.

In this case, the Appellee Board did not take any action that could be construed as determining the legal rights, duties, or privileges of a party. In the instant case, the Appellee Board declined to investigate or gather any information in response to Appellants' request. Accordingly, in the range of possible actions by the Appellee Board, the Appellee Board took less action than the PSC in Federated. Therefore, Appellees submit that the trial court properly concluded that the instant case did not constitute a "contested case" within the meaning of the APA.

Appellees submit that the trial court here properly concluded that Appellants' Request for Investigation did not constitute a "contested case." Appellants argue that the trial court should have applied the holding in Payday Cash Advance Centers v. Oxendine, 262 Ga. App. 632 (2003). However, Appellees submit that Payday is inapplicable to the instant

case. Appellees submit that the Court in Payday did not make any determination regarding whether there existed a "contested case" within the meaning of the APA. Instead, the Court in Payday concluded that the trial court had properly granted summary judgment to the defendants and had properly dismissed their claims for declaratory and injunctive relief due to the plaintiffs' failure to exhaust their administrative remedies. Payday, 262 Ga App. at 635. Accordingly, Appellees submit that the trial court properly concluded that Appellants had failed to demonstrate the existence of a "contested case" within the meaning of the APA.

E. APPELLANTS' FOURTH ENUMERATION OF ERROR IS DEEMED ABANDONED DUE TO APPELLANTS' FAILURE TO PROVIDE SUPPORTING ARGUMENT AND CITATION TO AUTHORITY.

Appellants asserted as their fourth and final enumerated error that the trial court erred in ruling on the merits because Georgia law does indeed incorporate AMA standards, including the AMA standard which prohibits physicians from participating in executions. (Appellants' Brief, p. 2). However, Appellants failed to support this enumerated error with any argument or citation to authority. Pursuant to Rule 22 of the Rules of the Supreme Court of Georgia, "Any enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned." Consequently, due to Appellants' failure to support



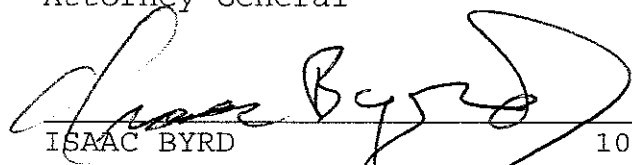
their fourth enumerated error with argument or citation to authority, the Court should deem Appellants' fourth enumerated error as abandoned and decline consider this issue.

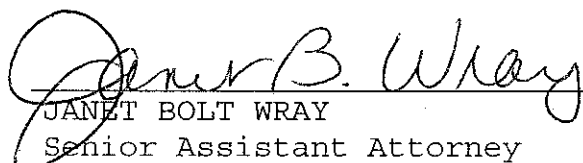
CONCLUSION

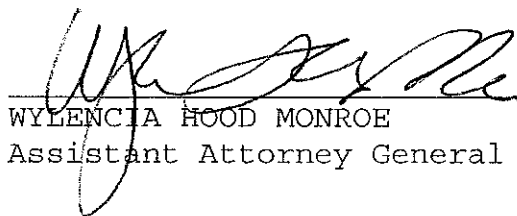
For the foregoing reasons, the Appellees request that this Court dismiss the appeal or, alternatively, affirm the trial court's order.

Respectfully submitted,

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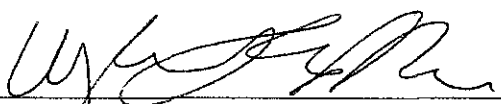
CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed, upon:

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This 12 day of December, 2006.

  
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