

COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR BRIEFS OR MOTIONS

July 10, 2015

To: Steven B. Schwarz, M.D., 400 Ralph McGill Boulevard • Apartment 9-F, Atlanta, Georgia 30312

Docket Number: A15A1765 **Style:** Steven B. Schwartz, MD v. Georgia Medical Board

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18. **Other: The above referenced appeal is pending in your name before this Court. The appeal was docketed in the September 2015 Term and a decision must be rendered by the Court by the end of the January 2016 Term which ends on or about July 16, 2016.**

Your Brief was already filed on June 4, 2015.

FILED IN OFFICE

JUL 18 2015

IN THE COURT OF APPEALS
STATE OF GEORGIA

CLERK, COURT OF
APPEALS OF GEORGIA

Steven B. Schwarz, MD
Appellant

v.

Georgia Medical Board
Appellee

*
*
* Civil Action No.
* A15A1765
*
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RECEIVED IN OFFICE
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CLERK COURT OF APPEALS OF GEORGIA

APPLICATION FOR APPELLATE REVIEW

Steven B. Schwarz, MD, applicant, applies to this Court to issue an Order granting the applicant an appeal from the Final Order of the Superior Court of Fulton County, Honorable Robert C. McBurney presiding, in the case styled Steven B. Schwarz, MD, Plaintiff v. Georgia Medical Board, Defendant, Case No. 2014CV246620. This Final Order of the Fulton Superior Court granted summary judgment on the MOTION TO DISMISS by the Attorney General representing the Georgia Medical Board. Copies of all pertinent documents have been attached to this application as exhibits including copies of the FINAL ORDER being appealed, the MOTION TO DISMISS which led to the Final Order being appealed, the Appellant's RESPONSE BRIEF to the Motion to Dismiss, the Appellant's MOTION FOR RECONSIDERATION, and the NOTICE OF APPEAL.

This Court has jurisdiction of this appeal, since this appeal is about discrimination in physician licensing, and appeals of such cases are not reserved to the Supreme Court of Georgia pursuant to Article VI, Section V, paragraph III of the Constitution of the State of Georgia. The enumeration of errors is as follows:

1. The Court erred when it did not interpret the law on the Americans with Disabilities Act.
2. The Court erred when it did not interpret the law on Article VI, Clause 2 in the United States Constitution on federal preemption of state statutes.
3. The Court erred when it did not interpret the law on O.C.G.A. 43-34-6(h) on a statutory requirement for judicial review of a final decision of the Georgia Medical Board in Fulton Superior Court.

4. The Court erred when it did not interpret the law on O.C.G.A. 50-13-22 which states that the Georgia Administrative Procedures Act should not limit the constitutional rights or repeal additional requirements of any other statute.

The Applicant respectfully requests that this Application for Appellate Review being filed more than 30 days after the entry of the Final Order granting summary judgment and otherwise known as an "out-of time" discretionary application be granted. The applicant suggests that this Court has jurisdiction in this matter for the following reasons supported by the arguments below:

The case of *B.R.F., a child v. Juvenile Court* was a civil case recently decided by the Georgia Court of Appeals on April 14, 2015 (*In the Interest of B.R.F., a child v. Find Law*). This case concerned the termination of a teenage mother's parental rights to her minor child, B.R.F., and the mother's right to file an "out of time" discretionary appeal of a trial court's order terminating her parental rights. ". . . the mother in this case, acting pro se, timely filed a direct appeal from the juvenile court's order (terminating her parental rights), but the juvenile court dismissed the notice of appeal due to the mother's failure to follow the discretionary appeals procedure . . . The mother, with the assistance of new counsel, filed an out of time application for discretionary appeal" ([www.In the Interest of B.R.F., a child/Find Law](#), page 1). In deciding the question of whether an appellate court has jurisdiction to grant an "out of time" discretionary appeal from termination of a parent's rights, the Court of Appeals cited *Gable v. State*: "The court recognized, however, that an appellate court may, at its discretion, permit an out-of-time discretionary appeal where a constitutional right is at stake. Indeed, in *Gable*, the Supreme Court of Georgia held that 'Georgia courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning the appeal . . . The parent, acting pro se, filed the wrong document in taking her appeal application to this Court (of Appeals) after her court appointed trial attorney erroneously notified her that she had no right to court appointed counsel for appeal. As a remedy for this due process violation, we acknowledge that we have jurisdiction of the discretionary appeal and, as determined previously in

granting the application, we proceed to review the appeal on the merits” ([www.In the Interest of B.R.F., a child/Find Law](#), pages 2-3). Hence, the Court of Appeals agreed to accept the “out of time” discretionary appeal of the parent and agreed to review this civil case and decide it on the merits. Although the Court eventually affirmed the trial court’s decision, the question of jurisdiction in this civil case involving an out-of-time discretionary application was decided in favor of the Appellant in order to avoid violating the Appellant’s constitutional right to due process. “We conclude that under the circumstances of this case, this Court has jurisdiction to grant an out-of- time application for discretionary appeal. . . .” ([www.In the Interest of B.R.F., a child v/Find Law](#), page 1). In *Evitts v. Lucey*, the United States Supreme Court concluded that “the procedures used in deciding appeals must comport with the demands of the due process and equal protection clauses of the Constitution” ([www.In the Interest of B.R.F., a child v/Find Law](#), page 2). In *Douglas v. California*, 372 US 353, the United States Supreme Court stated “Due process emphasizes fairness between the State and the individual dealing with the state.”

The Appellant’s case is similar to the case of *B.R.F., a child v. Juvenile Court* in that the Appellant’s attorney , Allan E. Alberga, ESQ, failed to file a discretionary application for appeal and, instead, filed a direct appeal. The Appellant is now compelled to file an out-of-time discretionary application in this civil case similar to the mother in *B.R.F., a child v. Juvenile Court*. The Appellant requests that the Court will grant this out-of-time application for discretionary appeal as in the case of *B.R.F., a child v. Juvenile Court*.

“In *McAuliffe v. Rutledge*, 231 Ga 745 (204 SE 2d*873(41)(1974), this (Supreme) Court determined that a criminal defendant was entitled to effective assistance of counsel on appeal.

“An attorney who through negligence, ignorance or misrepresentation of the law. . . fails to perform routine duties resulting in dismissal of his client’s appeal, thereby denying such client a right of review after conviction cannot be said to be rendering effective assistance. The result is the same as no assistance at all ([www.Roland v. State , 264Ga 872-Court Listener.com](#))

Attorney Allan E. Alberga is an attorney in good standing with the Georgia Bar Association (www.Gabar.org/MemberDirectorySearchDetail.com). The Appellant had no reason to believe that through “negligence, ignorance, or misinterpretation of the law,” his attorney would erroneously sign a direct appeal instead of doing an application for discretionary appeal. Deficiencies in attorney representation and advice in the civil case B.R.F., a child v Juvenile Court could have caused the mother in this case to lose her appeal rights were it not for the fact that the Court of Appeals agreed to grant her late or “out-of-time” discretionary application. In the present case, the Appellant requests that the Court grant his “out-of-time” discretionary application, also, in order that the Appellant not lose his appeal rights due to attorney deficiencies in representation.

In cases where the filing of a discretionary appeal is required, the Georgia Supreme Court ruled in *Gable v. The State* that “Georgia Courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning the appeal” (<http://law.findlaw.com/GaSupremeCourt/1582744.html>)(2011). “In *Roberts v. Caldwell*, this (Supreme) Court, after finding that the criminal defendant had been denied appellant counsel, ordered that counsel be appointed and an appeal. . . be filed and prosecuted with benefit of counsel even at this late date (approximately 20 months after conviction). This ‘out-of-time appeal’ is granted where the deficiency involves not the trial, but the denial of the right of appeal” (*Roberts v Caldwell* 230 Ga 223). “In *Roland*, our court explained that because a criminal defendant has a constitutional right to the effective assistance of counsel for his first right of appeal, a trial court has the authority to excuse the untimely filing of a notice of appeal caused by defense counsel’s ineffective representation by granting an out-of-time direct appeal (*Rowland v The State* 264 Ga 874-876, 452SE2d756). This procedure avoids the constitutional violation that would otherwise arise if deficient representation caused the defendant to lose his first appeal of right” see *Evitts v. Lucey*, 469U.S.387,395-797 ([www.Gable v. The State/FindLaw,pp.1-2](http://www.Gable.v.The.State/FindLaw,pp.1-2)).

“While, as a matter of state and federal constitutional law, a criminal defendant is entitled to effective assistance of counsel in pursuing his appeal of right, the ineffectiveness of appellate counsel can result in dismissal of an appeal of right without violating the defendant’s right of due process as long as the defendant’s due process right of appeal is protected by a ‘remedy for frustrated right of appeal’ (www.Roland v. State, 264Ga872(1995)-CourtListener.com, page 5). “This Court and more often the Court of Appeals have employed several methods when faced with a represented criminal defendant’s appeal that is procedurally deficient. . . Most recently, the Court of Appeals dismissed without prejudice and remanded to the trial court a timely filed criminal appeal in which the appellate counsel had failed to file a brief and enumeration of error despite having been ordered to do so (Mitchel v. State, 214 Ga App 69 (447 SE 2d 140); quoted from www.Roland v. State 264 Ga 872 (1995)-Court Listener.com, pages 4-5).

In the Appellee’s MOTION TO DISMISS, page 3, the Appellee cites O.C.G.A. 5-6-35(a)(1) in support of the Appellee’s opinion that “The appeal should be dismissed because the Appellant failed to file an application for discretionary appeal. . . “ However, in *Citizens & C. National Bank v. Royce* (246 Ga 727 (1980), the Georgia Supreme Court gave an interpretation of O.C.G.A. 5-6-35 (a)(1) which indicates that a discretionary application is not required due to the fact that this was never adjudicated at the tribunal level and never reviewed by the Superior Court. This interpretation is as follows:

“The clear intent of Section 5-6-35(a)(1) was to give the appellate courts (particularly the Court of Appeals which has jurisdiction of worker’s compensation cases not involving the constitutionality of a law) the discretion not to entertain an appeal where the Superior Court had reviewed a decision of certain specified lower tribunals (ie., two tribunals had already adjudicated the case) (www.Citizens & C. National Bank v. Rayle, Georgia Supreme Court, State Courts, Court Case.com, page 4).

However, the Appellant's case was never reviewed by any tribunal. The tribunal in the Appellant's case was the Georgia Medical Board, and the Medical Board never did a hearing on this case and, therefore, never adjudicated this case. The Appellant was only allowed to make an Appearance before the Board, and not allowed to argue his case in a full-fledged hearing with subpoenaed witnesses. In addition, the Superior Court refused to review this case citing "no right to contest" in the Georgia Administrative Procedures Act. The two required conditions in O.C.G.A. 5-6-35(a)(1) of prior adjudication by a tribunal and prior review by a Superior Court were not met in this case. Therefore, this court is not required to exercise its discretion to dismiss this appeal pursuant to O.C.G.A. 5-6-35(a)(1).

In *Sprayberry v. Dougherty County* (273 Ga 503(1)543 SE 2d 29 (2001), a property zoning dispute, the question arose as to whether an Appellant should be required to do a discretionary appeal in a case where there was no hearing at the administrative or tribunal level, since the Supreme Court interpreted O.C.G.A. 5-6-35(a)(1) to mean that a case must first be brought before a tribunal or administrative agency and reviewed by the Superior Court before a discretionary application is required. In *Sprayberry v. Dougherty County*, the question was whether the applicant may have had standing at the administrative level, yet purposely "opted out" so as to obtain a direct appeal from a writ of mandamus. However, this "opting out" did not happen in the present case, either, when there was no opportunity for a hearing at the administrative level, since the Georgia Medical Board did not consider this a "contested case." The conclusion in the *Sprayberry* case was that the Appellants could have been "excused from the discretionary application requirements, since there was no hearing at the administrative level" (*Ferguson v. Composite State Bd.*, 564 SE 2d 715 Ga 255, pages 606-8).

The Appellee cites *Ferguson v. Composite State Board of Medical Examiners* (275, Ga 255 2002) in the Appellee's MOTION TO DISMISS, pages 4-6. Ferguson filed both a discretionary application and a direct appeal, and his discretionary application was denied on its merits: "Appellant David Ferguson has filed a direct appeal and a discretionary application from the Superior Court's denial of mandamus relief seeking to reverse the decision of the Georgia Composite State Board of Medical Examiners to deny reinstatement of his medical license. We have previously reviewed Ferguson's application to appeal, and denied it on the merits" (*Ferguson v. Composite State Bd.*, 564 SE 2d 715, 275 Ga 255-Court Listener.com, page 3). However, in the Ferguson case, there were no constitutional issues which makes the Ferguson case fundamentally different from the Appellant's case. The Appellant's case was filed under the Americans with Disabilities Act, and does have constitutional issues. The precedent here is *Hasan v. California Medical Board* (2002) which, like the Appellant's case, was filed under the Americans with Disabilities Act. The Hasan case was dismissed in the trial court with California citing sovereign immunity, but reversed in an appeals court citing the abrogation of sovereign immunity by the Americans with Disabilities Act. The Hasan case, not the Ferguson case, should be the controlling precedent here.

The Appellant submits that if this Honorable Court declines the Appeal of this matter, and the trial court's ruling will be permitted to stand, such would be a miscarriage of justice. The Appellant spent 15 years in training to earn an M.D. degree, and another 30 years doing 40 hours of Continuing Medical Education every 2 years to renew a permanent medical license. The Georgia Medical Board suspended the Appellant's license after he suffered an episode of bipolar depression and cited a "mental or physical disability" as the reason for suspension in direct violation of the Americans with Disabilities Act. The Medical Board then revoked the Appellant's license when he appropriately sought psychiatric treatment for his depression during a vulnerable period of recovery in violation of O.C.G.A. 43-34-8(12) in the Medical Practice Act. When the Appellant applied for reinstatement of his license and provided medical documentation of his recovery and legal certification by the DeKalb

Probate Court that his mental competency had been completely restored, the Medical Board refused to acknowledge his restoration and reinstate his medical license citing only a near-passing score of 72 on a re-licensing examination required of less than 15% of candidates (statistics available).

There are constitutional issues in this case discussed in the Appellant's Brief relating to federal preemption and the abrogation of sovereign immunity by the Americans with Disabilities Act which the Appellee has conceded by default by neglecting to file a reply brief. To date, the Appellee has filed only a motion to dismiss, and not a reply brief. If this case were to be remanded to the Superior Court, then a hearing on some of these constitutional issues, including handicap discrimination, could be done. If this case were to be docketed by the Superior Court, then an effort to settle this case could be done with a court-appointed mediator through the Office of Alternative Dispute Resolution in the Fulton Superior Court in the Justice Center Building.

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Apt 9-F
Atlanta, GA 30312
Phone: 404-304-3428



Steven B. Schwarz, MD
Pro Se

IN THE COURT OF APPEALS
STATE OF GEORGIA

Steven B. Schwarz, MD
Appellant

V.

Georgia Medical Board
Appellee

*
*
* Civil Action No.
* A15A1765
*
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CERTIFICATE OF SERVICE

I certify that I have served the Attorney of Record for the Georgia Medical Board a copy of the APPLICATION FOR APPELLATE REVIEW by certified mail to the following address:

Wylencia Hood Monroe, ESQ
Snr. Asst. Attorney General
40 Capitol Square, SW
Atlanta, GA 30334

Respectfully submitted this 8th day of June, 2015.

400 Ralph McGill Boulevard
Apt 9-F
Atlanta, GA 30312
Phone: 404-304-3428



Steven B. Schwarz, MD
Pro Se

IN THE COURT OF APPEALS
STATE OF GEORGIA

Steven B. Schwarz, MD
Appellant

V.

Georgia Medical Board
Appellee

*
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* Civil Action No.
* A15A1765
*
*
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CERTIFICATE OF SERVICE

I certify that I have served the Georgia Medical Board a copy of the APPLICATION FOR APPELLATE REVIEW by certified mail to the following address:

Georgia Medical Board
2 Peachtree Street, 36th Floor
Atlanta, GA 30303

Respectfully submitted this 8th day of June, 2015.

400 Ralph McGill Boulevard
Apt 9-F
Atlanta, GA 30312
Phone: 404-304-3428



Steven B. Schwarz, MD
Pro Se

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|------------------------|---|-----------------------|
| STEVEN SCHWARZ, M.D., | § | |
| | § | Judicial Review |
| Petitioner, | § | Case No. 2014CV246620 |
| | § | |
| v. | § | |
| | § | |
| GEORGIA MEDICAL BOARD, | § | |
| | § | |
| Respondent. | § | |

RESPONDENT GEORGIA MEDICAL BOARD'S
MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW

COMES NOW, Respondent, the Georgia Medical Board ("Board"), by and through counsel, the Attorney General for the State of Georgia, Samuel S. Olens, and files this motion to dismiss petition for judicial review, by showing and stating as follows.

1.

On or about May 20, 2014, Petitioner filed a petition for judicial review, attempting to challenge the Board's denial of Petitioner's application for reinstatement of his license to practice medicine.

2.

The Board submits that the Court should dismiss Petitioner's petition for judicial review because Petitioner is not entitled to challenge the denial of his application for reinstatement as the denial of a reinstatement application is not a contested case and reinstatement of a license is within the sole discretion of the Board.

3.

The law provides for judicial review for any person "who is aggrieved by a final decision in a contested case," and who has exhausted all administrative remedies. O.C.G.A. § 50-13-19(a).

The Board submits that in the instant case there is no final decision in a contested case that Petitioner is entitled to challenge on judicial review.

5.

In the Administrative Procedure Act, "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).

6.

The Board submits that while the law provides an opportunity for a hearing in cases where the Board pursues disciplinary action against a licensee, there is no such right to a hearing where an applicant is denied reinstatement of his/her license. The law states, in part,

Neither the issuance of a private reprimand nor the denial of a license, certificate, or permit nor the denial of a request for reinstatement of a revoked license, certificate, or permit nor the refusal to

issue a previously denied license, certificate, or permit shall be considered to be a contested case within the meaning of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act"; notice and hearing within the meaning of said chapter shall not be required, but the applicant or licensee, certificate holder, or permit holder shall be allowed to appear before the board if he or she so requests.

O.C.G.A. § 43-34-8(b)(3) (emphasis added). The Board submits that the instant case clearly involves the denial of Petitioner's application for reinstatement, as described above, and such action is not considered a contested case that entitles a person to judicial review. See also, O.C.G.A. § 43-1-19(j).

7.

Similarly, the law specifies which proceedings constitute "contested case" proceedings and which do not. Under O.C.G.A. § 43-34-9, "Proceedings before the board wherein a licensee's . . . right to practice . . . is terminated, suspended, or limited or wherein a public reprimand is administered shall require prior notice to the licensee and an opportunity for hearing[,] and such proceedings shall be considered contested cases." In contrast, the denial of an application is not a contested case proceeding. The same statute further states, "Neither refusal of a license . . . nor a private reprimand . . . shall be considered a contested case . . . , and notice and hearing . . . shall not be required; provided, however, that the applicant

shall be allowed to appear before the board, if the applicant so requests [.]” O.C.G.A. § 43-34-9.

8.

Moreover, the law provides that the decision of whether to reinstate a license to practice medicine is a decision within the sole discretion of the Board. As stated in O.C.G.A. § 43-34-8(c), “In its discretion, the board may restore and reissue a license, certificate, or permit issued under this chapter or any antecedent law and, as a condition thereof, may impose any disciplinary or corrective measure provided in this chapter.” See also, O.C.G.A. § 43-1-19(g). The Board submits that, even though Petitioner is not entitled to judicial review of the Board’s decision to deny his reinstatement application, such decision was properly based on Petitioner’s failure to demonstrate that he has maintained current knowledge, skill and proficiency in the practice of medicine as required in Board Rule 360-2-.07(2). Board Rule 360-2-.07(2), states, in part,

In order to reinstate a license to practice medicine, an applicant must be able to demonstrate to the satisfaction of the Board that he or she has maintained current knowledge, skill and proficiency in the practice of medicine and that he or she is mentally and physically able to practice medicine with reasonable skill and safety.

This same rule also authorizes the Board to, in the context of an application for reinstatement, require passage of a

MCB
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
AUG 14 2014
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

In an Application by:) Restoration of Medical License
)
STEVEN B. SCHWARZ,) FILE NO: 2014CV246620

✓
GEORGIA MEDICAL
BOARD

REPLY TO RESPONDENT'S MOTION
TO DISMISS PETITION FOR JUDICIAL REVIEW

COMES NOW Petitioner to oppose Respondent's Motion to Dismiss his Petition for
Judicial Review, and shows as follows:

1.

Respondent's contention that judicial review is available to Petition only if its denial of
Petitioner's reinstatement of his license is a "contested" case, is contrary to due process.

2.

There can be no doubt that Petitioner was aggrieved by the Respondent's decision and
was prevented from expressing this to the Respondent, which, as Respondent admits, had
a discretion to exercise when considering applications to pursue a profession.

3.

To suggest that a discretion can be properly exercised when the applicant has no
opportunity for a hearing is contrary to the law, common sense, and natural justice.

4.

Respondent cites OCGA 43-34-8(b)(3) and OCGA 43-34-9. It cites the former to show
that when the matter is not a "contested case", there is no right to a judicial review.
Assuming this to be true, the application by Petitioner is not for reinstatement after the
revocation for disciplinary reason(s). This section is not therefore applicable here.

The latter subsection defines applications for the lifting of a suspension as a “contested case” requiring “prior notice to the licensee and an opportunity for hearing”.

5.

It must be borne in mind that Petitioner’s license was voluntarily surrendered by his brother who was appointed guardian at a time when Petitioner’s health had deteriorated. The license was never revoked. Petitioner’s application should never have been treated as an application to restore a revoked license for any violation. The Respondent Board’s authority in this case was simply to determine whether the condition which caused the surrender (mental incompetency) had ceased, and to reissue the license subject to monitoring –as was recommended by the evaluations submitted to the Board.

6.

The record shows that Petitioner was bi-polar before 1983, when he obtained a license to practice medicine, and until his breakdown in 2009, his proficiency as a physician was never challenged. After the finding was made by the Dekalb Probate Court that he was in need of a guardian, his brother was appointed. Shortly thereafter, this brother signed a document prepared by the Respondent headed “Voluntary Surrender” which purported to be signed with Petitioner’s permission.

7.

A close examination of the wording of that “Voluntary Surrender” document, prepared by the Respondent Board, reveals an inaccurate interpretation of the law empowering the Board. It describes Petitioner’s suspension as a revocation, requiring reinstatement at the sole discretion of the Board. In fact, Petitioner’s license was not revoked for disciplinary, or any other reason. He had simply gone on “sick leave”. Moreover, it was improper for

his brother to represent that Petitioner was aware of the contents of that document before he (the brother) signed it.

8

On his official return to competency, Petitioner simply asked for the license that he had voluntarily placed in suspension. He submitted medical evaluations from well qualified personnel, but the Respondent demanded that he subject himself to tests that were unnecessary and expensive. Despite the submission to the Respondent of recommendations from the individuals and centers who had treated him between 2009 and 2013 at great expense, Petitioner was being asked to again subject himself to the same evaluation, again at great expense.

9.

Petitioner is an individual, diagnosed 35 years ago as being bi-polar, before qualifying as a physician, and protected by the American Disabilities Act (ADA). This protection prohibits the Medical Board from insisting that he prove that he is qualified to practice his profession, when he had done so for several years before his chronic condition worsened. While admitting that the Board had a duty to protect the public from unqualified practitioners, it should not impose a heavier burden on a disabled practitioner than it would on an able individual. Petitioner had been treated for the nearly five years on "sick leave" and had submitted proof that he had been returned to what he was for 25 years before he suffered his breakdown.

10.

Respondent's contention that it had the sole discretion to deny a restoration in such circumstances, that Petitioner had no standing to challenge such a position, either

administratively or judicially, is unsustainable and in clear violation of Petitioner's due process rights.

WHEREFORE, Petitioner prays:

- (a) that Respondent's Motion to Dismiss be denied;
- (b) that his Petition for restoration of his medical license be granted;
- (c) that he be awarded reasonable legal expenses, including attorney's fees and court costs;
- (d) that he be awarded such further and other relief as is just.

Dated the ^{14th} day of August 2014.



Allan E. Alberga
Georgia Bar No. 007450

175 Trinity Avenue
Atlanta, Georgia 30303
(404) 523 6300

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Petitioner's Opposition to Respondent's Motion to Dismiss to Respondent's attorney of record addressed as follows:

Wylencia Hood Monroe, Esq.
Snr. Asst. Attorney General
40 Capitol Square, SW
Atlanta, Ga 30334

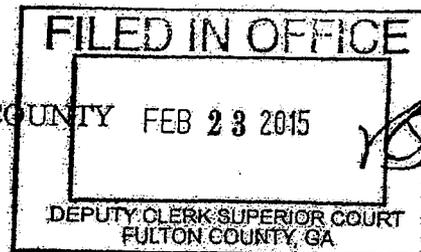
This ^{14th} day of August 2014.



Allan E. Alberga

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY FEB 23 2015
STATE OF GEORGIA



STEVEN B. SCHWARZ, M.D.,
Petitioner

vs.

GEORGIA MEDICAL BOARD,
Respondent

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CIVIL ACTION 2014CV246620

JUDGE MCBURNEY

FINAL ORDER ON MOTION TO DISMISS

Petitioner, Steven B. Schwarz, is a psychiatrist who was licensed to practice medicine in the State of Georgia. Petitioner has been diagnosed as bipolar. On 8 January 2009, Respondent summarily suspended Petitioner's license to practice medicine. On 8 May 2009, Petitioner was declared incompetent by the Probate Court of DeKalb County; Petitioner's brother, Ronney Schwarz, was appointed as his guardian and Ann J. Herrera was appointed as his conservator. On 5 June 2009, Ronney Schwarz, as Petitioner's guardian, voluntarily surrendered Petitioner's license to practice medicine.

On 9 January 2013, the DeKalb Probate Court found that Petitioner had been restored to competency and the guardianship and conservatorship were dissolved. Petitioner subsequently sought the reinstatement of his medical license. On 1 May 2014, Respondent denied the application for reinstatement and on 20 May 2014 Petitioner filed the instant appeal.

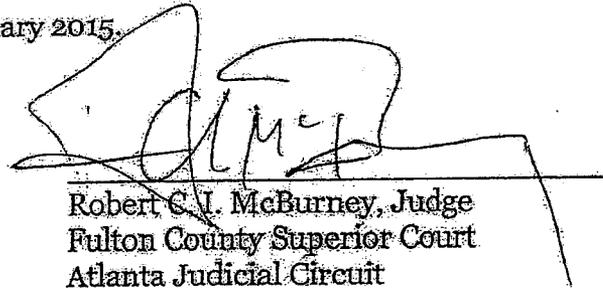
Respondent has moved this Court to dismiss the appeal, contending that its denial of Petitioner's application for reinstatement is not subject to judicial review. Judicial review is appropriate when a person is "aggrieved by a final decision in a contested case." O.C.G.A. § 50-13-19(a). A decision by the Georgia Medical Board on an application for

¹ "Contested case" means 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).

reinstatement is explicitly excluded by statute as a "contested case", with no right to a hearing and therefore no right of judicial review.² Petitioner argues that his license was not revoked but rather voluntarily surrendered and that a distinction should be made; however, his voluntary surrender states that it shall "have the same effect as a revocation of my license".

Respondent's motion to dismiss accordingly is **GRANTED**.³ The Clerk of Court shall close this file.

SO ORDERED this 23rd day of February 2015.



Robert C. I. McBurney, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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² "Neither the issuance of a private reprimand nor the denial of a license, certificate, or permit nor the denial of a request for reinstatement of a revoked license, certificate, or permit nor the refusal to issue a previously denied license, certificate, or permit shall be considered to be a contested case within the meaning of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act"; notice and hearing within the meaning of said chapter shall not be required, but the applicant or licensee, certificate holder, or permit holder shall be allowed to appear before the board if he or she so requests." O.C.G.A. § 43-34-8(b)(3) (emphasis added).

³ The recent decision in *Georgia Peace Officer Standards & Training Council v. Hodges*, 767 S.E.2d 286 (Ga. Ct. App. 2014), reconsideration denied (Dec. 3, 2014), does not change this finding.