IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

JOHN DOE, an individual man, Plaintiff/Appellant, v. ARIZONA MEDICAL BOARD, an agency of the State of Arizona; and LISA WYNN, its Executive Director, Defendants/Appellees.	)	1 CA-CV 10-0512 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-018060

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

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D O W N I E, Judge

¶1 John Doe[1] appeals from an order denying his motion for summary judgment on his claim for declaratory judgment and granting judgment to the Arizona Medical Board and its Executive Director, Lisa Wynn (collectively, "the Board"). He also challenges the superior court's refusal to award him attorneys' fees. For the following reasons, we affirm.

BACKGROUND[2]

¶2 Doe graduated from medical school and began post-graduate training as a medical resident. Pursuant to Arizona law, the Board may issue a one-year, renewable training permit to a person participating in a residency program that allows him or her to practice medicine in the supervised setting of the program. Ariz. Rev. Stat. ("A.R.S.") § 32-1432.02(A).

¶3 During Doe's second year of residency training, his program placed him on administrative leave for inappropriate use

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[1] The superior court allowed plaintiff to prosecute this action under a fictitious name to protect his identity and professional reputation.

[2] The Board's Statement of Facts and Controverting Statement of Facts both relied on the affidavit of Lisa Wynn, which was purportedly attached as an exhibit to those documents; the copies in the record do not include attachments. Because Doe did not object to the absence of the attachments in the superior court and included them in his appendix on appeal, we presume they were part of the superior court record. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (stating appellate court's review is limited to the record before the trial court and it may not consider evidence that was not part of the record when the trial court ruled).

of the Internet; he later resigned from the program during a disciplinary process. The following year, the program agreed to re-admit Doe as a second year resident. He applied for a second year resident permit from the Board and disclosed the circumstances under which he left the program the previous year. The Board opened an investigation and learned that Doe suffered from a sexual compulsion for which he had undergone treatment. After reviewing reports from Doe's mental health providers, the Board proposed to grant Doe a training permit, but place him on probation and require him to adhere to treatment, reporting, and other conditions.

¶4 Doe filed suit in superior court, seeking a writ of mandamus directing the Board to issue a training permit, or, alternatively, an injunction compelling it to do so. He also requested a declaratory judgment that the Board lacked authority to deny or condition a training permit if an applicant has complied with statutory registration requirements and paid the applicable fee.

¶5 Eight days after Doe's lawsuit was filed, the parties reached a settlement. The Board granted Doe a training permit, and Doe signed a Stipulated Health Agreement that required him to attend therapy for one year and submit reports of those sessions to the Board. Doe argued he had prevailed in the superior court action and sought an award of attorneys' fees

pursuant to A.R.S. §§ 12-2030 and -348(A). The court denied the request. Doe then filed a motion for summary judgment on his declaratory judgment claim, seeking a declaration that the Board must issue a training permit once the conditions set forth in A.R.S. § 32-1432.02(A) are satisfied. The Board moved to dismiss the declaratory judgment claim, or in the alternative, for summary judgment on the claim because it was moot. It also argued A.R.S. § 32-1432.02(A) allows the Board to impose regulatory conditions on post-graduate permittees.

¶6 The superior court ruled that, due to the parties' settlement, no present case or controversy existed, and the matter was moot. It denied Doe's motion and granted the Board's cross-motion for summary judgment. Doe timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶7 A court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). We view the evidence in the light most favorable to Doe, against whom judgment was entered, and "determine *de novo* whether there are genuine issues of material fact and whether the trial court erred in its application of the law." *Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999).

A. Doe's Declaratory Judgment Claim is Moot.

¶8 Doe argues the superior court should have considered his declaratory judgment claim because his right to a training permit remains in controversy. He contends he will be required to apply for permits in the future and fears the Board will deny his requests or impose conditions that exceed its authority under A.R.S. § 32-1432.02(A).

¶9 Arizona courts generally will not consider a petition for declaratory judgment unless there is a justiciable controversy between the parties. *Am. Fed'n of State, County & Mun. Employees, AFL-CIO, Council 97 v. Lewis*, 165 Ariz. 149, 152, 797 P.2d 6, 9 (App. 1990). Courts will not hear cases that seek an advisory judgment or answer moot or abstract questions. *Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210, 1215 (App. 1991). "Declaratory relief should be based on an existing state of facts, not facts that may or may not arise in the future." *Id.*

¶10 Here, there is no present controversy requiring judicial determination. Doe asked the court to compel the Board to issue a training permit for his second year residency. That relief is no longer necessary. Although Doe may apply for permits in the future, and the Board might deny his requests or impose conditions, declaratory relief at this time based on such theoretical possibilities is inappropriate. *See id.* Therefore,

the superior court properly ruled that Doe's declaratory judgment claim is moot.

¶11 Doe argues that even if a present controversy does not exist, the court erred by not resolving his declaratory judgment claim on the merits because it presents significant questions of public importance that are likely to recur, yet evade judicial review. We conclude otherwise.

¶12 A court may decide a moot question if it is one of great public importance or "capable of repetition yet evading review." *Id.* (citation omitted). In *In re MH-2008-000867*, for example, we decided the appeal of a mental health patient who had been involuntarily committed, even though the commitment order had expired. 222 Ariz. 287, 290, ¶ 15, 213 P.3d 1014, 1017 (App. 2009), *vacated on other grounds*, 225 Ariz. 178, 236 P.3d 405 (2010). We deemed it likely other orders would be entered under similar circumstances that would become moot by the time they could be challenged, given the relatively short duration of commitment orders. *Id.* Unlike in *MH-2008-000867*, though, the controversy in this case is not a question that is likely to evade review. If the Board refuses to grant an unconditional training permit, an applicant may seek a judicial declaration of his or her rights at that time.[3] And although the

[3] We note that in this case, the superior court was prepared to hold an evidentiary hearing on Doe's request for injunctive

Board's regulatory authority is a matter of importance, the proper interpretation of A.R.S. § 32-1432.02(A), which applies only to those applying for training permits, is not an issue of such public significance that it was reversible error for the superior court to decline to decide a moot question.

B. Doe Was Not Entitled to Attorneys' Fees.

¶13 Doe contends that even if his declaratory judgment claim was moot, the superior court erred in denying his request for attorneys' fees under A.R.S. § 12-2030 because he was the prevailing party on his mandamus claim.[4] Pursuant to § 12-2030(A), a court shall award fees and other expenses to a party who prevails "by an adjudication on the merits in a civil action brought by the party against the state, any political subdivision of this state or an intervenor to compel a state officer or any officer of any political subdivision of this state to perform an act imposed by law as a duty on the officer." Section 12-2030 pertains to actions in mandamus, which seek to compel an officer of the state or a political subdivision to perform a mandatory duty. *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 545, ¶ 45, 96

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relief within eight days of the complaint's filing.

[4] Doe also states he was entitled to fees pursuant to A.R.S. § 12-348(A)(4), but makes no independent argument concerning that statute.

P.3d 530, 543 (App. 2004). The superior court's interpretation of the statute is a question of law that we review *de novo*. *Id*.

¶14 The parties settled the mandamus claim by agreeing the Board would issue a training permit if Doe signed a Stipulated Health Agreement and complied with the conditions stated therein. The settlement occurred before the court made any rulings and before the Board even answered the complaint. There was no "adjudication on the merits," as § 12-2030(A) requires for an award of fees. The superior court properly denied Doe's request for attorneys' fees under § 12-2030.[5]

[5] Doe points out that in *4501 Northpoint LP v. Maricopa County*, 212 Ariz. 98, 99, ¶ 1, 128 P.3d 215, 216 (2006), the court held that a party who accepts an offer of judgment pursuant to Arizona Rule of Civil Procedure 68 has prevailed by an adjudication on the merits and is therefore eligible for a fee award under A.R.S. § 12-348(B). We find that case, which involved different considerations under Rule 68, inapposite.

CONCLUSION

¶15 For the foregoing reasons, we affirm the judgment of the superior court. We deny Doe's request for attorneys' fees and costs on appeal because he is not the prevailing party.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
JON W. THOMPSON, Judge