NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CW 0554

SPINE DIAGNOSTICS CENTER OF BATON ROUGE, INC.

VERSUS

LOUISIANA STATE BOARD OF NURSING THROUGH THE LOUISIANA DEPARMENT OF HEALTH AND HOSPITALS AND AUGUST J. RANTZ, III

Judgment rendered: DEC 2 8 2006

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On writ of certiorari from the Nineteenth Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Suit Number: 536,009
Honorable Janice Clark, Judge

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BEFORE: KUHN, GUIDRY AND PETTIGREW, JJ.

J. P. Pettigrew, J. Concurs

GUIDRY, J.

In the instant writ application, plaintiff seeks review of the trial court's denial of its request for a preliminary injunction. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On March 24, 2005, August J. Rantz, III, a certified registered nurse anesthetist ("CRNA"), submitted a petition for an advisory opinion to the Louisiana State Board of Nursing ("the LSBN"), which requested a response to the following query:

> Whether it is within the scope of practice for a CRNA to perform procedures involving the injection of local anesthetics, steroids and analgesics for pain management purposes, including, but not limited to, peripheral nerve blocks, epidural injections (62310), and spinal facet joint injections (64470 & 64472) when the CRNA can document education, training and experience in performing such procedures.

After considering Rantz's petition, the LSBN's practice committee submitted a recommendation to the LSBN that it was within the scope of practice for CRNAs to perform such procedures under the direction and supervision of a physician.

Prior to the LSBN's consideration of the practice committee's recommendation, Spine Diagnostics Center of Baton Rouge, Inc. ("Spine Diagnostics") filed a Petition for Injunctive Relief and For Declaratory Judgment, seeking to enjoin the LSBN from adopting the committee's recommendation, to prevent Rantz from practicing interventional pain management, and to prevent Rantz from performing anesthesia-related management unless by physician order and under the direct and immediate supervision of a physician. Additionally, Spine Diagnostics prayed that the trial court issue a declaratory judgment finding that the practice of "pain management" constitutes the "practice of medicine."[1]

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[1]The Louisiana Society of Anesthesiologists has intervened in the litigation praying for the same relief sought by Spine Diagnostics.

Although the petition was filed prior to the LSBN's consideration of the issue at its December 7, 2005, board meeting, the petition was not served until nearly a month after the LSBN's meeting.[2] At the meeting, the LSBN amended the recommendation of the practice committee, and adopted the following statement:

> That it is within the scope of practice for the CRNA to perform procedures under the direction and supervision of the physician involving the injection of local anesthetics, steroids and analgesics for pain management purposes, peripheral nerve blocks, epidural injections and spinal facet joint injections when the CRNA can document education, training and experience in performing such procedures and has the knowledge, skills and abilities to safely perform the procedures based on an order from the physician.

The statement was subsequently published on the LSBN's website as well as in its quarterly publication, *The Examiner*.

Following the LSBN's adoption of the above statement, Spine Diagnostics filed a First Supplemental and Amending Petition for Injunctive Relief and for Declaratory Judgment contending the LSBN was attempting to promulgate a "rule" within the meaning of the Louisiana Administrative Procedure Act ("LAPA") that "has not been properly adopted and promulgated and should be declared invalid."[3] Thereafter, at Spine Diagnostics' request, the Louisiana State Board of Medical Examiners ("the LSBME") issued an Advisory Opinion regarding interventional pain management by CRNAs. In its opinion, the LSBME indicated that CRNAs could provide anesthetics for acute pain associated with surgery, but opined that the procedures at issue for interventional pain management purposes constituted the practice of medicine that could only be performed by a physician.[4]

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[2] The LSBN had notice that the petition had been filed insofar as Spine Diagnostics' counsel was present at the hearing and informed the LSBN of the pleading.

[3] We note it was not necessary that Spine Diagnostics exhaust all administrative remedies prior to seeking injunctive relief in connection with its action for declaratory judgment. See La. R.S. 49:963(E).

[4] In the opinion, the LSBME noted, in pertinent part, as follows:

> ...the injection of local anesthetics, steroids, and analgesics, peripheral nerve blocks, epidural injections and spinal facet joint injections, when used for

The LSBN does not dispute that it did not follow the procedures set forth in the LAPA for adopting a rule, but contends the statement at issue is an advisory opinion that did not require it to follow these procedures. Additionally, it argues the statement does not authorize a CRNA to "practice medicine" insofar as the CRNA is working under the direction and supervision of a physician based on an order from the physician.

After a two-day hearing on Spine Diagnostics' request for injunctive relief, the trial court took the matter under advisement. The court subsequently denied the request for injunctive relief, but noted that the request for declaratory judgment would proceed *via ordinaria* in accordance with the case management order. Thereafter, Spine Diagnostics filed the instant writ application seeking review of the judgment.[5] We granted certiorari for the limited purpose of reviewing the judgment denying Spine Diagnostics' request for injunctive relief, insofar as it alleged it had shown the LSBN has promulgated a "rule" within the intendment of the LAPA without following the procedural requirements therein.[6]

DISCUSSION

Louisiana jurisprudence recognizes the right of a taxpayer to enjoin unlawful action by a public body. Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board, 586 So.2d 1354, 1357 (La. 1991). A taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode that would increase

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> interventional pain management of patients suffering from chronic pain, constitutes the practice of medicine and may only be performed in this state by a physician licensed to practice medicine in Louisiana.

[5] The American Society of Anesthesiologists and the American Society of Interventional Pain Physicians have each filed an *Amicus Curiae* brief with this Court in support of Spine Diagnostics' position.

[6] In addition to requesting reversal of the trial court's judgment, Spine Diagnostics also prayed for declaratory judgment that the LSBN statement was an invalid "rule" under the LAPA due to procedural non-compliance with the LAPA. However, we note this issue is not properly before us, since the only judgment at issue is the denial of Spine Diagnostics' request for injunctive relief. That judgment contains no ruling relative to the request for declaratory judgment.

the burden of taxation or otherwise unjustly affect the taxpayer or his property. Proof of an increased tax burden is not the only way a taxpaying citizen may seek judicial authority to *restrain* a public body from alleged unlawful action. Louisiana Associated General Contractors Inc., 586 So.2d at 1358. A citizen seeking to *restrain* unlawful action by a public entity is not required to demonstrate special or particular interest distinct from the public at large. Therefore, taxpayer plaintiffs seeking to *restrain* action by a public body are afforded a right of action upon a mere showing of an interest, however small and indeterminable. Louisiana Associated General Contractors Inc., 586 So.2d at 1358. In the underlying matter, the LSBN asserts that Spine Diagnostics filed the instant suit for monetary reasons insofar as they will be negatively impacted if CRNAs are allowed to perform the procedures at issue. Therefore, it is clear that Spine Diagnostics does have a real and actual interest in the action.

Furthermore, the Louisiana Supreme Court has stated that the interest of "health and welfare" is sufficient to confer standing to enjoin unlawful action by a public body. Alliance for Affordable Energy v. Council of City of New Orleans, 96-0700, p. 7 (La. 7/2/96), 677 So.2d 424, 429. Spine Diagnostics asserts that patient safety is of paramount importance herein insofar as allowing CRNAs to perform the procedures can lead to very serious consequences for those being treated.

The issuance of a preliminary injunction addresses itself to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. Concerned Citizens for Proper Planning, LLC v. Parish of Tangipahoa, 2004-0249, 2004-0270, p. 5 (La. App. 1st Cir. 3/24/05), 906 So.2d 660, 663. Generally, a party seeking the issuance of a preliminary injunction must show: (1) that he will suffer irreparable injury, loss, or damage, if the injunction does not issue; and (2) entitlement to the relief sought by making a prima facie

showing that he will prevail on the merits of the case. See La. C.C.P. art. 3601; Concerned Citizens, 2004-0249 at p. 6, 906 So.2d at 664. Prima facie evidence is evidence sufficient to establish a given fact and which, if not rebutted or contradicted, will remain sufficient. Ciolino v. Castiglia, 446 So.2d 1366, 1370 (La. App. 1st Cir. 1984). "Irreparable injury" is considered to be a loss sustained by an injured party that cannot be adequately compensated in money damages or for which such damages cannot be measured by a pecuniary standard. Star Enterprise v. State, Through Department of Revenue and Taxation, 95-1980, p. 13 (La. App. 1st Cir. 6/28/96), 676 So.2d 827, 834, writ denied, 96-1983 (La. 3/14/97), 689 So.2d 1383.

The LSBN contends that Spine Diagnostics is unable to show that it will suffer irreparable injury if a preliminary injunction is not issued. However, irreparable injury is a requirement for injunctive relief only when the conduct sought to be enjoined is lawful. No showing of irreparable harm is required if the conduct is illegal. This Court has held that a plaintiff need not show irreparable injury to obtain injunctive relief against the enforcement of a state agency rule that was illegally adopted. Star Enterprise, 95-1980 at p. 13, 676 So.2d at 834. Therefore, since it is undisputed that LSBN did not comply with the requirements of the LAPA, if Spine Diagnostics made out a *prima facie* showing that the statement at issue was a "rule," it was entitled to injunctive relief without any necessity of a showing of irreparable harm.

The Nurse Practice Act sets forth the duties and powers of the LSBN in La. R.S. 37:918, which provides, in pertinent part, as follows:

> The board shall:
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> (12) Adopt and revise rules and regulations necessary to enable the board to implement this Part in accordance with the Administrative Procedure Act ....

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(16) Have the authority to:

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(d) Promulgate rules and regulations in accordance with the Administrative Procedure Act to implement the provisions of this Paragraph.

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(18) Develop, adopt, and revise rules and regulations governing scope of practice for advanced practice registered nurses, including but not limited to prescriptive authority, the receipt and distribution of sample drugs and prepackaged drugs, and prescribing of legend and certain controlled dangerous drugs.

Louisiana Revised Statute 49:953 sets forth the procedure for adoption of rules and requires an agency to publish its notice of intent to adopt, amend, or repeal any rule in the Louisiana Register at least one hundred days prior to the date the agency will take action on the rule. La. R.S. 49:953(A)(1)(b)(i). The agency must also afford all interested persons reasonable opportunity to submit data, views, comments, or arguments, orally or in writing, in response to the proposed rule. La. R.S. 49:953(A)(2)(a). No rule is valid unless it is adopted in substantial compliance with the rule-making requirements of the LAPA. La. R.S. 49:954. See Star Enterprise, 95-1980 at p. 7, 676 So.2d at 831.

The LAPA defines "rule" in La. R.S. 49:951(6) to mean:

> [E]ach agency statement, guide, or requirement for conduct or action, exclusive of those regulating only the internal management of the agency and those purporting to adopt, increase, or decrease any fees imposed on the affairs, actions, or persons regulated by the agency, which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency. "Rule" includes, but is not limited to, any provision for fines, prices or penalties, the attainment or loss of preferential status, and the criteria or qualification for licensure or certification by an agency. A rule may be of general applicability even though it may not apply to the entire state, provided its form is general and it is capable of being applied to every member of an identifiable class. The term includes the amendment or repeal of an existing rule but does not include declaratory rulings or orders or any fees. (Emphasis added.)

Further, the LAPA defines "rulemaking" in La. R.S. 49:951(7) to mean:

> [T]he process employed by an agency for the formulation of a rule. Except where the context clearly provides otherwise, the procedures for adoption of rules and of emergency rules as provided in R.S. 49:953 shall also apply to adoption of fees. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render the same a rule within this definition or constitute specific adoption thereof by the agency so as to be required to be issued and filed as provided in this Subsection.

While it is undisputed that the LSBN did not meet the statutory requirements set forth in the LAPA, the LSBN contends its statement is an advisory opinion that need not meet the requirements set forth in the LAPA. The LSBN has authority to issue declaratory orders and advisory opinions under La. R.S. 49:962, which provides as follows:

> Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders and rulings as to the applicability of any statutory provision or of any rule or order of the agency. Declaratory orders and rulings shall have the same status as agency decisions or orders in adjudicated cases.

Furthermore, the Administrative Code, in addressing the authority of the LSBN to render declaratory statements and advisory opinions on nursing issues, specifically provides as follows:

> The board may issue a declaratory ruling in accordance with the Administrative Procedure Act. These include a declaratory statement or an advisory opinion, in the form of a ruling which has the same status as boar [sic] decisions in adjudicated cases, in response to a request for clarification of the effect of rules and regulations or of R.S. 37:911 et seq. Advisory opinions as a statement of the board's ruling. [sic]. They are generally rendered in cases which relate to specific situations. Declaratory statements contain the board's ruling relative to the petition, with the principles and rationale which support the ruling. Declaratory statements are generally rendered in situations which relate to widespread situations. Neither an advisory opinion nor a declaratory statement has the binding force of law, but they represent the board's expert opinion relative to the matter in question.

La. Admin. Code 46:XLVII.3321(A).

Therefore, if the LSBN's statement serves an "interpretive" function without substantive effect, then the statement was not a rule and the LSBN was not

required to comply with the rulemaking procedures set forth in the LAPA; however, if the LSBN's statement has general applicability and implemented or interpreted substantive law or policy regarding CRNAs' scope of practice, then it was a rule and the LSBN was required to meet the rulemaking requirements set forth in the LAPA. See La. R.S. 49:951(6); Liberty Mutual Insurance Company v. Louisiana Insurance Rating Commission, 96-0793, p. 6 (La. App. 1st Cir. 2/14/97), 696 So.2d 1021,1026-1027, writs denied, 97-2062 & 97-2069 (La. 12/19/97), 706 So.2d 451-52. In that situation, a failure to follow the LAPA requirements would mean the rule was unlawfully adopted and unenforceable. See Star Enterprise, 95-1980 at p. 10, 676 So.2d at 832.

Louisiana Revised Statute 37:930(A) provides that CRNAs are authorized to administer local anesthetics under the direction and supervision of a physician.[7] In 2004, the Legislature statutorily recognized the importance of CRNAs in providing anesthetics to Louisiana residents when it added paragraph (G) to La. R.S. 37:930. This provision provides, in pertinent part, as follows:

(1) The Louisiana Legislature hereby finds that:

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[7] La. R.S. 37:930(A) provides as follows:

> No registered professional nurse shall administer any form of anesthetic to any person under their care unless the following conditions are met:
>
> (1) The registered nurse has successfully completed the prescribed educational program in a school of anesthesia which is accredited by a nationally recognized accrediting agency approved by the United States Department of Health, Education, and Welfare.
>
> (2) Is a registered nurse anesthetist certified by a nationally recognized certifying agency for nurse anesthetists following completion of the educational program referred to in Paragraph (1) of this Subsection and participates in a continuing education program of a nationally approved accreditation agency as from time to time required which program shall be recognized as the Continuing Education Program for Certified Registered Nurse Anesthetists; and
>
> (3) Administers anesthetics and ancillary services under the direction and supervision of a physician or dentist who is licensed to practice under the laws of the state of Louisiana.

(a) Certified Registered Nurse Anesthetists (CRNAs) have been selecting and administering anesthesia in Louisiana and the United States for over one hundred years.

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(e) Nurse anesthetists receive rigorous clinical and academic training, requiring a bachelor's degree from an accredited school of nursing and one year of professional experience in an acute care setting prior to being considered for entrance to an accredited twenty-four to thirty six month nurse anesthesia education program.

(f) CRNAs administer the majority of anesthetics in Louisiana and all of the anesthetics in multiple parts of the state.

(g) Many studies have demonstrated that CRNAs are safe, accessible, and cost-effective providers of anesthetics.

(h) CRNAs are critical providers of quality anesthesia services in the health care system in this state.

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(n) CRNAs are trained and legally authorized to administer all types of anesthetics in all settings while AAs [anesthesiologist associates] are limited to the type of anesthetics that they can administer and the settings in which they are authorized to perform their services.

While conceding that CRNAs are essential in acute care settings, Spine Diagnostics contends the LSBN's statement is not limited in scope and expands CRNA practice into the interventional pain management field, an area in which CRNAs have never practiced in Louisiana. At the hearing, Dr. Mack A. Thomas, a clinical professor of surgery and anesthesiology at the Louisiana State University Health Sciences Center who has taught and worked with CRNAs, testified that although CRNAs can perform certain procedures in the acute pain context, they have not been involved in chronic pain management. Dr. Thomas testified that the pathophysiology and pathology between acute pain and chronic pain is much different, noting that chronic pain involves a history and the use of multiple modalities of diagnosis to ensure that the patient has had the proper diagnostic workup. Dr. Thomas also indicated that epidural steroid injections and spinal facet injections are beyond the scope of what CRNAs have done in the past.

Dr. John Michael Burdine, a board certified interventional pain specialist and owner of Spine Diagnostics, testified that the statement issued by the LSBN is an expansion of CRNA practice. Dr. Burdine also differentiated between treatment provided for chronic and for acute pain.

Spine Diagnostics further contends the LSBN placed the statement at issue on its website under the heading "CRNA Scope of Practice" without any qualifying language, so that all CRNAs statewide can rely on this statement in the performance of their nursing duties. Spine Diagnostics notes the statement was published by the LSBN in *The Examiner*, a quarterly magazine sent to all registered nurses statewide, and was not presented in the form of a letter to a specific individual, nor couched in hypothetical terms. Given these circumstances, Spine Diagnostics argues CRNAs can rely upon the statement as authority to perform interventional pain management procedures. Thus, based on the testimony that CRNAs have not previously performed such procedures in this state, Spine Diagnostics contends the LSBN has attempted to substantively expand the scope of practice of CRNAs by adopting a rule under the guise of an "advisory opinion."

In opposition, the LSBN avers that Rantz's request merely sought clarification of his role as a CRNA in a specific, hypothetical situation, i.e., the administration of local anesthetics and other medications for the purpose of pain management. It contends this required interpretation of the scope of practice of a CRNA as it applied to the hypothetical situation presented. The LSBN argues its statement does not expand CRNAs' scope of practice, but interprets the scope of practice as presently defined. Additionally, it contends the placement of its opinion in its magazine and website does not change the nature of the opinion or mislead the public as Spine Diagnostics suggests, since the statement was published in the advisory opinions section in the same manner as numerous other

such opinions, none of which contain limiting language outside of the opinions themselves.

In support of its contention that the LSBN statement was a rule, Spine Diagnostics relies on this Court's opinion in Star Enterprise, 95-1980, 676 So.2d 827, wherein three oil refineries commenced an action against the Department of Revenue and Taxation ("Department") seeking injunctive and declaratory judgment relief to preclude the Department from enforcing the provisions of a letter which substantially changed the method of valuation for computing the use tax owed by those companies on the use of refinery gas and coke-on-catalyst. The formula to compute the tax at issue was originally provided for by statute and later adopted by the Department in accordance with the rule-making requirements of the LAPA. The Department also published a subsequent notice of intent in the Louisiana State Register noting that it would collect the tax at issue in accordance with the statute and the rule the Department had previously adopted. However, in a subsequent letter dated April 18, 1995, the Department informed the companies that it intended to collect the taxes at issue in accordance with a different formula than the one previously provided by statute, adopted via the rule-making procedures set forth in the LAPA, and published in the notice of intent in the Louisiana State Register. In determining that the letter constituted a rule within the meaning of the LAPA and rejecting the Department's argument that the letter was simply a clarification of established Department policy, this Court stated:

> The action taken by the Department on April 18, 1995, falls squarely under the LAPA's definition of a "rule." It contains a directive to the affected taxpayers to disregard the Department's previous rules, regulations and correspondence governing the valuation of refinery gas and coke-on-catalyst. It is of general applicability to all manufacturers of refinery gas and coke-on-catalyst. Furthermore, it contains the Department's interpretation of a substantive law, namely, the application of the term "cost-price" to the taxable transactions at issue therein, and also has the effect of implementing the substantive use tax law.

> Particularly with respect to refinery gas, the April 18, 1995 action constitutes the repeal of the Department's rule governing the method to be employed in valuing refinery gas for use tax purposes. The Department did not rescind LAC 61:I.4401(C)(2), which set forth the method of computing the taxable value of refinery gas.
>
> Because the April 18, 1995, letter adopted an entirely new method of computing the taxes at issue, it can hardly be said to constitute a mere clarification of the Department's position regarding the proper method of valuing the by-products. Rather, the directive to oil refineries to employ a new method of valuation of refinery gas and coke-on-catalyst constitutes a "rule" falling under the clear language of La. R.S. 49:951(6) subjecting it to the LAPA's rule-making procedural requirements.
> (Emphasis added.)

Star Enterprise, 95-1980 at pp. 9-10, 676 So.2d at 832. See also Liberty Mutual, 96-0793 at p. 6, 696 So.2d at 1026-27. In view of this rationale, Spine Diagnostics argues the statement issued by the LSBN relative to the scope of practice for CRNAs must be considered a rule as defined in the LAPA and, thus, must be adopted in accordance with the procedural requirements set forth in that act.

The LSBN statement at issue herein allows CRNAs to administer anesthetics and perform other procedures for chronic or interventional pain management purposes under the direction and supervision of a physician based on an order from the physician. The testimony of Drs. Burdine and Thomas indicates these procedures, as they relate to chronic or interventional pain management, are beyond the scope of what CRNAs in Louisiana have traditionally done in the past.

Additionally, the LSBME has opined that the performance of the procedures at issue in an interventional pain management context constitutes the practice of medicine. Although the LSBME's opinion focuses on whether the LSBN's statement allows CRNAs to practice medicine, when considered in light of the testimony of Drs. Burdine and Thomas, it reflects that the statement issued by the LSBN is not merely "interpretive" and without substantive effect. See Liberty Mutual, 96-0793 at p. 8, 696 So.2d at 1027. Rather, the LSBN's statement has the effect of both interpreting and implementing substantive law regarding CRNAs'

scope of practice, since there is no indication that the LSBN has ever previously utilized its ruling making power to authorize CRNAs to perform such procedures. Thus, Spine Diagnostics has made a *prima facie* showing that the LSBN statement substantively expands the scope of practice for CRNAs into an area where they have not traditionally practiced, i.e., chronic or interventional pain management. Such a substantive expansion of the scope of practice clearly constitutes a rule within the meaning of La. R.S. 49:951(6). Further, although the LSBN contends the statement is limited in scope, the actual language of the statement approved by the LSBN does not limit its application to Rantz alone, and is capable of being applied to every CRNA who has the requisite knowledge, skills, and abilities to perform the procedures at issue. CRNAs are able to freely access the statement insofar as it was published in *The Examiner* and on the LSBN's website.

Given these circumstances, we find Spine Diagnostics has made a prima facie showing that the statement adopted by the LSBN insofar as it relates to chronic or interventional pain management is a rule within the meaning of the LAPA. Since it is undisputed that the requirements of the LAPA were not met, Spine Diagnostics is entitled to a preliminary injunction enjoining enforcement of the statement adopted by the LSBN at its December 7, 2005, board meeting, and enjoining Rantz from practicing chronic or interventional pain management procedures pursuant to the authority of that statement. See Star Enterprise, 95-1980 at pp. 13-14, 676 So.2d at 834-35.[8]

Although the LSBN contends the opinion rendered by the LSBME prohibiting physicians from delegating the procedures at issue to CRNAs renders the LSBN's statement moot, we note that the LSBN statement has been published and is freely accessible by CRNAs in this state. On the other hand, there is no evidence to indicate that the LSBME's opinion has been published such that

[8] We make no findings as to whether the procedures at issue herein fall within CRNAs' scope of practice or whether they constitute the "practice of medicine."

physicians across Louisiana will rely upon it. Additionally, we find that conflicting statements issued by two autonomous boards will only serve to confuse the medical community and potentially could result in inconsistent practices throughout Louisiana. Accordingly, we do not find Spine Diagnostics' writ application to be moot.

Spine Diagnostics has further requested that this Court order the LSBN to remove the statement from its website and its quarterly magazine, and to issue a retraction of that statement on both its website and in its publication. Basically, Spine Diagnostics is seeking a mandatory injunction, which is an injunction ordering a party to take specific action. See City of New Orleans v. Board of Directors of Louisiana State Museum, 98-1170, p. 11 (La. 3/2/99), 739 So.2d 748, 756. The burden of proof required for a mandatory injunction is greater than the *prima facie* showing normally required for obtaining a preliminary injunction. The party seeking a mandatory injunction must show by a preponderance of the evidence that it is entitled to the preliminary injunction. See City of New Orleans, 98-1170 at p. 11, 739 So.2d at 756. Further, since illegal conduct is not at issue with respect to the publication of the statement on LSBN's website and in its quarterly magazine, Spine Diagnostics is required to establish that it will suffer irreparable harm if injunctive relief ordering the removal and retraction of the statement is not granted. Spine Diagnostics has not met this burden of proof.

Finally, Spine Diagnostics also requested that the LSBN be taxed with costs pursuant to La. R.S. 49:965.1. This provision authorizes the assessment of reasonable litigation expenses against a state agency in certain instances when a small business prevails in an action seeking judicial review of the validity of an agency rule. However, it clearly is not applicable at this juncture in the present proceeding, since it only applies when the position of the small business with respect to the agency rule is maintained in the final disposition of the matter. See

La. R.S. 49:965.1B. In this case, there has not yet been any final disposition of Spine Diagnostics' request for a declaratory judgment that the LSBN statement is an improperly adopted rule.

CONCLUSION

For the above and foregoing reasons, we conclude the trial court abused its discretion in denying Spine Diagnostics' request for injunctive relief. Spine Diagnostics has met its burden of making a *prima facie* showing that the statement of the LSBN was a rule that required compliance with the procedural requirements of the LAPA. Therefore, the judgment of the trial court is reversed to the extent that it denied Spine Diagnostics' request for injunctive relief. It is hereby ordered that a preliminary injunction is issued in favor of Spine Diagnostics enjoining the LSBN from enforcing the "statement" approved by it on December 7, 2005, in response to the request filed by August J. Rantz, III, relative to the scope of practice for CRNAs, and enjoining August J. Rantz, III, from practicing any form of interventional pain management in reliance on the authority of that statement. This matter is remanded to the trial court for further proceedings consistent with this opinion.

WRIT GRANTED. JUDGMENT REVERSED AND RENDERED.