

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 1598

JANICE HERBERT BARBER; JOHN H. FAIRBANKS, M.D.;  
PIERCE D. NUNLEY, M.D.; JOHN H. LOGAN, M.D.;  
JOHN FAULKNER; DARRELL CORMIER; PEGGY EDWARDS;  
JOAN SAVOY; KARIN FRIERSON; AND VANESSA ARNOLD

VERSUS

LOUISIANA WORKFORCE COMMISSION; THE LOUISIANA OFFICE OF  
WORKERS' COMPENSATION; CHRISTOPHER RICH, M.D.; WES  
HATAWAY; AND CURT EYSINK

Judgment Rendered: JUN 02 2016

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Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Suit Number C621071

Honorable Donald R. Johnson, Presiding

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

## **GUIDRY, J.**

In this action seeking declaratory and injunctive relief regarding amendments to the Louisiana Workers' Compensation Act and its implementing regulations, defendants, Louisiana Workforce Commission, the Louisiana Office of Workers' Compensation (OWC), Christopher Rich, M.D., Wes Hataway, and Curt Eysink, appeal from a judgment granting a preliminary injunction in favor of plaintiffs, Janice Hebert Barber, Jennifer Barber Valois, John H. Fairbanks, M.D., Pierce D. Nunley, M.D., John H. Logan, M.D., John Faulkner, Darrell Cormier, Peggy Edwards, Joan Savoy, Karin Frierson, and Vanessa Arnold. For the reasons that follow, we reverse in part, affirm in part, and remand.

### **FACTS AND PROCEDURAL HISTORY**

In 2009, the Louisiana Legislature enacted La. R.S. 23:1203.1, which completely revised the workers' compensation system for injured workers to obtain medical treatment. The revision was a product of the combined endeavor by employers, insurers, labor, and medical providers to establish meaningful guidelines for the treatment of injured workers. Church Mutual Insurance Company v. Dardar, 13-2351, p. 5 (La. 5/7/14), 145 So. 3d 271, 275.

As such, rather than injured workers being entitled to medical expenses that are reasonably necessary for treatment of a medical condition caused by a work injury, medical care, services, and treatment due pursuant to La. R.S. 23:1203.1 by the employer to the employee are now governed by a medical treatment schedule. La. R.S. 23:1203.1(I).

Louisiana Revised Statute 23:1203.1, as amended by 2010 La. Act 619, § 1, became effective June 25, 2010, and instructs the Director of the OWC (Director) to "promulgate rules in accordance with the Administrative Procedure Act, R.S. 49:950 et seq., to establish a medical treatment schedule." La. R.S. 23:1203.1(B). To this end, the Director is tasked with appointing a medical advisory council, to

be comprised of a medical director and at least one representative from eight enumerated areas of medical practice. La. R.S. 23:1203.1(F). The council, with the assistance of the medical director, is directed to develop guidelines to be established and promulgated as the medical treatment schedule. La. R.S. 23:1203.1(E) and (G). These guidelines must meet specific criteria outlined in the statute. La. R.S. 23:1203.1(E) and (G). Once the medical treatment schedule is promulgated, the Director and the medical advisory council are charged with reviewing and updating the schedule no less often than once every two years. La. R.S. 23:1203.1(H). Church Mutual Insurance Company, 13-2351 at p. 6, 145 So. 3d at 276-277.

The medical treatment schedule was subsequently promulgated and became effective in June 2011. See LR 37:1631; LAC 40:I.2001, et seq.

Thereafter, on April 29, 2013, plaintiffs filed a petition for declaratory and injunctive relief challenging the constitutionality of certain provisions of La. R.S. 23:1203.1, its implementing regulations found at LAC 40:I.2715, and certain provisions of La. R.S. 23:1020.1.<sup>1</sup> Defendants responded by filing exceptions raising the objections of no cause of action, no right of action, prematurity, and vagueness or ambiguity. Particularly, with regard to their exception raising the objection of no right of action, the defendants asserted that Janice Hebert Barber, Jennifer Barber Valois, John H. Fairbanks, M.D., John H. Logan, M.D., and Pierce D. Nunley, M.D., who are attorneys and/or physicians, failed to allege that their own constitutional rights had been affected as a result of the challenged statutes and regulations.<sup>2</sup>

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<sup>1</sup> Jennifer Barber Valois was added as an additional plaintiff on October 7, 2013.

<sup>2</sup> Janice Hebert Barber and Jennifer Barber Valois are attorneys who alleged in their petition that they regularly practice workers' compensation law and they have clients who have been adversely affected by the defendants' application of the statutes and regulations at issue. John H. Fairbanks, M.D., John H. Logan, M.D., and Pierce D. Nunley, M.D. are physicians who alleged in their petition that they treat injured workers who have been adversely affected by the defendants' application of the statutes and regulations at issue.

Plaintiffs subsequently filed a motion for preliminary injunction, which was set for hearing. Pamela Vicknair, an injured worker, filed a petition of intervention, adopting the petition for declaratory judgment and injunctive relief, motion for preliminary injunction, and memoranda filed by the plaintiffs, which the trial court granted. Following a hearing on the preliminary injunction request, wherein the trial court also took up defendants' exception raising the objection of no right of action, the trial court signed a judgment sustaining the defendants' exception of no right of action as to Janice Hebert Barber, Jennifer Barber Valois, John H. Fairbanks, M.D., John H. Logan, M.D., and Pierce D. Nunley, M.D. and overruling the exception as to the remaining plaintiffs. The trial court also found that the plaintiffs had made a prima facie showing that they are entitled to the relief sought as a matter of law and that they will likely prevail on the merits of the case. As such, the trial court granted plaintiffs' motion for preliminary injunction and ordered that the defendants be enjoined from applying and/or enforcing LAC 40:I.2715(E)(2); LAC 40:I.2715(H); and LAC 40:I.2715(L). The trial court also ordered that the defendants be enjoined from applying and/or enforcing statutes and regulations, which establish the system for the administrative determinations of Form 1009 claims for medical benefits for injured workers by a medical director employed by the OWC of the Louisiana Workforce Commission and administrative appeals therefrom to OWC judges, including: La. R.S. 23:1203.1(J)(1), (K), and (M); La. R.S. 23:1314(D) and (E)(1), inclusive; LAC 40:I.2715(B)(3)(d), (e), and (f); and LAC 40:I.2715(E)(2), (F), (H), (I), (J), (K), and (L).

Defendants filed a motion for suspensive appeal to the Louisiana Supreme Court, invoking the supreme court's appellate jurisdiction pursuant to La. Const. art. V, § 5(D) on the ground that the trial court declared certain provisions of the medical treatment schedule contained in the Louisiana Workers' Compensation

Act to be unconstitutional.<sup>3</sup> In Barber v. Louisiana Workforce Commission, 15-1700, p. 1 (La. 10/9/15), 176 So. 3d 398, 398, the supreme court found the constitutional issue was not properly raised in the trial court, since a court may not declare a statute unconstitutional in the context of a summary proceeding such as a preliminary injunction hearing. Furthermore, the court noted although the trial court's ruling, which was purportedly incorporated by reference in the judgment, discusses unconstitutionality, the judgment itself does not contain any formal declaration of unconstitutionality. Barber, 15-1700 at p. 2 n.1, 176 So. 3d at 398 n.1. Accordingly, because it lacked appellate jurisdiction over the case, the supreme court transferred the appeal to this court for review of the judgment granting the preliminary injunction. Barber, 15-1700 at p. 2, 176 So. 3d at 398.

On appeal, the defendants assert that the trial court erred in granting the preliminary injunction restraining the execution or enforcement of certain provisions under La. R.S. 23:1203.1 and its implementing regulations. Additionally, the plaintiffs answered the appeal, seeking reversal of the trial court's sustaining of defendants' exception raising the objection of no right of action as to Janice Hebert Barber, Jennifer Barber Valois, John H. Fairbanks, M.D., John H. Logan, M.D., and Pierce D. Nunley, M.D.

## DISCUSSION

### Preliminary Injunction

A preliminary injunction is essentially an interlocutory order issued in summary proceedings incidental to the main demand for permanent injunctive

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<sup>3</sup> The trial court issued a ruling on June 24, 2015, in conformity with the written judgment. However, in its ruling, the trial court additionally expressed the opinion that: LAC 40:I.2715(E)(1)(e)(2)(a) and LAC 40:I.2715(H) are unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Louisiana Constitution Article I, Section 2; LAC 40:I.2715(L) is unconstitutionally vague and violates the Due Process Clauses of the Federal and State Constitutions; the statutory and administrative system is unconstitutional as the system violates both substantive and procedural due process; and the workers' compensation system implemented by the OWC unconstitutionally violates the separation of powers doctrine.

relief. It is designed to and serves the purpose of preventing irreparable harm by preserving the status quo between the parties pending a determination on the merits of the controversy. Concerned Citizens for Proper Planning, LLC v. Parish of Tangipahoa, 04-0270, p. 6 (La. App. 1st Cir. 3/24/05), 906 So. 2d 660, 664; Freeman v. Treen, 442 So. 3d 757, 763 (La. App. 1st Cir. 1983).

Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury if the injunction does not issue and must make a prima facie showing that he will prevail on the merits of the case. La. C.C.P. art. 3601; CDI Corp. v. Hough, 08-0218, p. 6 (La. App. 1st Cir. 3/27/09), 9 So. 3d 282, 286-287. However, a showing of irreparable injury is not necessary when the act sought to be enjoined is unlawful or when a deprivation of a constitutional right is involved. Farmer's Seafood Company, Inc. v. State, Department of Public Safety, 10-1746, p. 5 (La. App. 1st Cir. 2/14/11), 56 So. 3d 1263, 1267. The party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional. Farmer's Seafood Company, Inc., 10-1746 at p. 5, 56 So. 3d at 1267.

An appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction. La. C.C.P. art. 3612. However, appellate review of a trial court's issuance of a preliminary injunction is limited. The issuance of a preliminary injunction addresses itself to the sound discretion of the trial court and will not be disturbed on review absent a clear abuse of discretion. Concerned Citizens for Proper Planning, LLC, 04-0270 at p. 5, 906 So. 2d at 663.

In the instant case, plaintiffs sought a preliminary injunction against the defendants on the basis that certain provisions of La. R.S. 23:1203.1, its implementing regulations found at LAC 40:I.2715, and certain provisions of La. R.S. 23:1020.1 are unconstitutional and sought to enjoin their application and/or

enforcement. The statutory and regulatory scheme complained of by the plaintiffs, however, had been in place since 2011, when the medical schedule was promulgated and became effective. Accordingly, the status quo at the time that plaintiffs sought a preliminary injunction was La. R.S. 23:1203.1, its implementing regulations, and La. R.S. 23:1020.1. Therefore, though styled as a preliminary injunction, what the plaintiffs really seek is not to maintain the status quo but a change in the workers' compensation system. As such, a preliminary injunction is not appropriate, and the trial court abused its discretion in so ordering. See Reasonover v. Lastrapes, 09-1104, p. 8 (La. App. 2nd Cir. 5/11/10), 40 So. 3d 303, 309.

### **No Right of Action**

Plaintiffs filed an answer to the appeal, asserting that the trial court erred in sustaining the defendants' exception raising the objection of no right of action as to Janice Hebert Barber, Jennifer Barber Valois, John H. Fairbanks, M.D., John H. Logan, M.D., and Pierce D. Nunley, M.D. In so, ruling, the trial court found that these plaintiffs, who are attorneys and physicians, lacked standing to challenge the constitutionality of the subject statutes and regulations.

Louisiana Code of Civil Procedure article 1872 provides that “[a] person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder.” Additionally, among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise a constitutional challenge. In re Melancon, 05-1702, pp. 7-8 (La. 7/10/06), 935 So. 2d 661, 667.

“[A] litigant not asserting a substantial existing legal right is without standing in court.” In re Melancon, 05-1702 at p. 8, 935 So. 2d at 667 (quoting

State v. Board of Supervisors, Louisiana State University & Agricultural & Mechanical College, 228 La. 951, 958-959, 84 So. 2d 597, 600 (1955). The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. In re Melancon, 05-1702 at p. 8, 935 So. 2d at 667 (citing Greater New Orleans Expressway Commission v. Olivier, 04-2147, p. 4 (La. 1/19/05), 892 So. 2d 570, 573-574).

Standing does not refer simply to a party's legal capacity to appear in court; rather, standing is gauged by the specific statutory or constitutional claims that the party presents and his or her relationship to such claims. In re Melancon, 05-1702 at p. 9, 935 So. 2d at 668. "[T]he standing inquiry requires careful judicial examination of ... whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." In re Melancon, 05-1702 at p. 10, 935 So. 2d at 668 (citing Allen v. Wright, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325, 82 L. Ed. 2d 556 (1984)).

When facts alleged in the petition provide a remedy to someone, but the plaintiff who seeks the relief for himself is not the person in whose favor the law extends the remedy, the petitioner lacks standing. In re Melancon, 05-1702 at p. 10, 935 So. 2d at 668. An exception raising the objection of no right of action is appropriate in some cases to assert a lack of standing in a declaratory judgment action. In re Melancon, 05-1702 at p. 10, 935 So. 2d at 668; see also Cox Cable New Orleans, Inc. v. City of New Orleans, 624 So. 2d 890, 895-896 (La. 1993).

A trial court's ruling sustaining an exception raising the objection of no right of action is reviewed de novo on appeal because the issue of whether a party has standing or a right of action is a question of law. See Randy Landry Homes, LLC

v. Giardina, 12-1669, p. 4 (La. App. 1st Cir. 6/7/13), 118 So. 3d 459, 461; see also McPherson v. Foster, 03-2696, pp. 12-13 (La. App. 1st Cir. 10/29/04), 889 So. 2d 282, 291.

In the instant action, Janice Hebert Barber and Jennifer Barber Valois, both attorneys, generally alleged in their petition that they regularly practice workers' compensation law and that their clients have been adversely affected by the defendants' application of the complained of statutes and regulations. Barber and Valois also generally alleged, without any supporting detail, that they have also been adversely affected. Likewise, John H. Fairbanks, M.D., John H. Logan, M.D., and Pierce D. Nunley, M.D. alleged in their petition that they are physicians who treat injured workers who have been adversely affected by the application of the complained of statutes and regulations. Dr. Fairbanks, Dr. Logan, and Dr. Nunley also generally alleged that they have also been adversely affected. Other than these general assertions, the petition focuses on the unconstitutionality of the statutes and regulations at issue as applied to the injured workers.

Furthermore, we do not find that the evidence presented at the hearing on the preliminary injunction, wherein the trial court also took up defendants' exception raising the objection of no right of action, establishes that these plaintiffs have standing to challenge the constitutionality of the statutes and regulations at issue. At the hearing, plaintiffs introduced the testimony of Valois, who stated that when she appears at a hearing regarding the denial of medical treatment, the statutory scheme no longer provides for penalties and attorney's fees. However, La. R.S. 23:1201 remained unchanged after the 2009 revision and continues to provide for penalties and attorney fees for failure to provide payment of medical benefits. Valois acknowledged this fact in her testimony, and clarified that she has not yet been able to recover penalties or attorney fees after the new workers' compensation system was adopted. However, she did not explain why she has

been unable to recover penalties or attorney fees or how that inability is a result of a constitutional defect in the application of the statutes and regulations at issue to her.

Additionally, plaintiffs introduced the deposition testimony of Dr. Fairbanks, Dr. Logan, and Dr. Nunley, who all generally alleged that the statutes and regulations at issue significantly impair their ability to treat their injured workers' compensation patients as they deem appropriate. Dr. Fairbanks and Dr. Nunley, however, acknowledged that the application of the statutes and regulations has not changed how they practice medicine. Dr. Logan and Dr. Nunley also asserted that the new system implemented by the subject statutes and regulations is onerous for their staff, who must expend time and resources to complete all of the necessary paperwork. But the fact that the doctors' staff has to perform additional work does not rise to the level of a constitutional defect in the application of the statutes and regulations.

As such, from our review of the plaintiffs' allegations in their petition and the evidence presented at the hearing, we find that Janice Hebert Barber, Jennifer Barber Valois, John H. Fairbanks, M.D., John H. Logan, M.D., and Pierce D. Nunley, M.D. lack standing to challenge the constitutionality of the subject statutes and regulations.

### **CONCLUSION**

For the foregoing reasons, we reverse that portion of the trial court's judgment granting a preliminary injunction in favor of the plaintiffs, we affirm that portion of the trial court's judgment sustaining defendants' exception raising the objection of no right of action, and we remand this matter to the trial court for a trial on the merits of plaintiffs' request for a permanent injunction and declaratory

judgment. All costs of this appeal in the amount of \$4,432.50 are to be borne equally by the parties.

**REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.**