

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Dr. Trudy Bond,)	Case No. 11 CV 004711
Mr. Michael Reese,)	
Rev. Colin Bossen,)	Judge L. Beatty
Dr. Josephine Setzler,)	
)	MEMORANDUM CONTRA OF
Petitioners,)	PETITIONERS TO
)	RESPONDENT'S MOTION TO
v.)	DISMISS FILED MAY 18, 2011
)	
Ohio State Board of Psychology,)	
)	
Respondent.)	
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Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler, Relators herein, by and through counsel, set forth their opposition to the Motion to Dismiss brought by Respondent Ohio State Board of Psychology. For the below reasons, this court should deny the Respondent's Motion to Dismiss.

STATEMENT OF THE CASE AND FACTS

On April 13, 2011, Relators sought a Writ of Mandamus against the Ohio State Board of Psychology because of its failure to carry out its clear duty to enforce the laws and rules of the psychology profession in the State of Ohio with regard to a complaint brought against Dr. Larry James in July 2010. Complaint at ¶¶ 1-2, *Trudy Bond et al. v. Ohio State Board of Psychology*,

Case No. 11 CV 004711 (April 13, 2011) (hereinafter “Compl.”). Dr. James is a psychologist licensed in Ohio and Dean of Wright State University’s School of Professional Psychology. Compl. at ¶ 1. Relators have here alleged that the Board has provided no evidence that it meaningfully investigated the allegations of grave violations of Ohio laws and rules by Dr. James, compl. at ¶¶ 8-9, which were supported by substantial evidence of his involvement in the torture and exploitation of minors and adults detained at a U.S. military prison at Guantánamo Bay, Cuba. Compl. at ¶¶ 2-5, 37-40. Specifically, the July 2010 complaint contained evidence, including Dr. James’s own admissions, indicating that Dr. James had overseen a team of mental health professionals who used their professional skills to identify and exploit prisoners’ vulnerabilities for interrogation purposes. Compl. at ¶¶ 30-40. Relators provided documentation that while Dr. James was Chief Psychologist of the intelligence command, men and boys in the prison were threatened with rape and death for themselves and their family members; sexually, culturally, and religiously humiliated; forced naked; deprived of sleep; subjected to sensory deprivation, over-stimulation, and extreme isolation; shackled into painful, stress positions for hours; and physically assaulted. Compl. at ¶ 38. Relators alleged in the July 2010 Complaint that Dr. James and those under his command and authority caused prisoners debilitating physical and psychological harm by advising and training interrogators on how to enhance and exploit detainees’ disorientation, shock, and fear, including by evaluating detainee behavior, monitoring interrogations, and suggesting abusive interrogation techniques. Compl. at ¶ 37. In addition to these allegations, Relators’ July 2010 complaint to the Board alleged that Dr. James had violated Ohio laws and rules governing confidentiality and misrepresentation, and that those violations could be proven through examination of his own writings and publicly available government

records. Compl. at ¶¶ 3, 30. The July 2010 Complaint was further supported by a report submitted by an expert in psychological ethics. This report concluded that if the allegations contained in the July 2010 Complaint are factually true, the conduct described constituted the most serious and far-reaching ethical breaches that the expert had ever encountered in his career as a psychologist. Compl. at ¶ 50. Relators have here also alleged that the Board has failed to explain its reasons for dismissing the complaint against Dr. James or for declining to hold a hearing in the matter, despite having been presented with ample evidence of egregious ethical violations on the part of a licensee over whom they have jurisdiction. Compl. at ¶¶ 8-9.

The General Assembly created the Board to regulate the profession by upholding and enforcing ethical standards to protect the public from the harmful practice of psychology. Compl. at ¶¶ 18-19. The Board's own statements and guidelines clearly provide that its mission is to protect the public welfare and ensure licensees' compliance with the laws and rules governing the profession in the state, including through licensing oversight. Compl. at ¶¶ 6, 18, 20. The Board is responsible for screening its applicants and monitoring its licensees, including those employed by the military. *See* Compl. at ¶ 22.¹ The Board recognizes the importance of receiving complaints from the public as well as the duty of psychologists to report ethical violations of others in their profession. Compl. ¶ 23.

Four Ohioans, including one psychologist licensed by the Board, brought the July 2010 complaint against Dr. James.² Each has a personal stake in ensuring that the Board properly

¹ *See* 10 U.S.C. § 1094(a)(1), (e)(1)(A) (2006); Department of Defense Directive 6025.13 § 5.2.2.2 (May 4, 2004).

² Dr. Bond previously reported evidence of Dr. James's alleged misconduct to the Louisiana State Board of Examiners and to the State Board of Psychology in Ohio in 2008, when Dr. James's application before that Board was pending. The Louisiana Board dismissed on that

enforces its standards. Compl. at ¶¶ 12, 64-68. On September 30, 2010, Relators and their counsel met with the Board with the intent to provide the Board with additional information. The Board did not ask a single question of the Relators or their counsel relevant to the July 2010 complaint. Relators nevertheless presented additional information. Although Relators and their counsel offered to answer questions or address concerns of the Board on several occasions, the offers were declined. Compl. at ¶¶ 53-54. Other Ohio residents shared with the Board their concern about the alleged misconduct and its potential implications for people in Ohio. These residents included licensed psychologists, ethicists, veterans, and faith leaders. Compl. at ¶ 51. On January 26, 2011, seven months after filing their complaint, the Relators received a short letter from the Board, stating obliquely that it would be “unable to proceed to formal action in this matter” and citing no reason for its inaction.

On April 13, 2011, Relators filed a Verified Complaint for Writ of Mandamus and a Memorandum of Law in Support of the Verified Complaint. The Verified Complaint does not seek to compel the Board to issue a specific sanction. Rather, it seeks to compel the Board to perform its duties to monitor psychologists’ conduct by undertaking, in this case, an appropriate, good faith investigation and a formal hearing on the evidence. Alternatively, Relators seek to compel a full explanation with detailed reasoning for the basis of its dismissal and actions to date. Respondent filed a Motion to Dismiss on May 18, 2011.

basis that it had not been timely filed; the Ohio Board dismissed without specifying a reason. Compl. at ¶ 70. The July 2010 complaint is different in kind from those previous complaints and was brought by Dr. Setzler, Rev. Bossen, Mr. Reese, and Dr. Bond. It contains new allegations and documentation, including evidence from government investigations and reports that were unavailable at the time of the earlier filings. It also includes information from a memoir published by Dr. James while his application for an Ohio license was still pending. The memoir includes, among other things, admissions about his exploitation of minors. Compl. at ¶¶ 30, 37-38.

SUMMARY OF ARGUMENT

Respondent's Motion to Dismiss should be denied because Relators have standing and have sufficiently alleged that the Board violated their rights and abrogated its duties to monitor and discipline the behavior of its licensees, which is an abuse of its discretion that merits review by this court. While the Board exercises discretion in some areas of its disciplinary duties, the Board abdicates its clear legal duty to uphold the standards of profession by not enforcing the state's laws and rules in this case without a reasonable, good faith justification. The integrity of the regulatory regime will be undermined if the Board is permitted to stand idle in a case where egregious ethical violations are pled and supported by extensive evidence, including allegations based on admissions by the very psychologist in question. Cases alleging misconduct as serious as this warrant particularly careful attention and review by the Board. When the Board ignores its responsibilities and refuses to act, it is the judiciary's role to compel performance of its legislatively mandated duty. Courts' power to review agency conduct for abuse of discretion exists precisely for these reasons, to ensure that the General Assembly's intent to protect the people of Ohio is respected. Thus, this court should deny the Respondent's Motion to Dismiss and proceed to discovery in this matter.

Relators have two independent bases for standing. First, they have private beneficial interests in this case as individuals whose complaint was arbitrarily dismissed by the Board. Each also has further particularized harms resulting from the Board's failure to carry out its duties as established by the General Assembly, including the duty to monitor the conduct of psychologists. For example, Dr. Trudy Bond has a beneficial interest in protecting the value of her license from the injury caused by the Board's disregard for its responsibility to regulate the

profession and to uphold the integrity of its enforcement mechanisms. Second, Petitioners have standing based on the public action standing doctrine, which is available when the relief requested involves a matter of great public import related to public duties of a government body, and where resulting injury to the public would be serious. Respondent failed to address this well-established doctrine in its Motion to Dismiss, but each element of the public action doctrine is met in the current matter. Although not every case against the Board will implicate a public right, this case, because of the extraordinary gravity and credibility of the allegations presented to the Board, coupled with the Board's stark unwillingness to act or explain the reasons for its dismissal, certainly does.

In addition to meeting the standing requirements, Relators stated a claim for mandamus by alleging that the Board abused its discretion and violated its clear legal duties, thereby violating Relators' corresponding legal rights. Relators have also alleged, and the Board has not disputed, that they lack a plain and adequate remedy in the ordinary course of the law. The Verified Complaint makes well-supported allegations that the Board's actions in handling the complaint against Dr. James were arbitrary and an abuse of discretion. Although Respondent asserts in parts of its Motion to Dismiss that it has boundless discretion in how it responds to evidence of serious misconduct, Respondent's Motion to Dismiss at 8, Respondent does concede that "abuse of discretion" is a proper standard for review in a mandamus action. *Id.* at 11. This review for abuse of discretion is well-established. *See, e.g., State ex rel. Lee v. Montgomery* (2000), 88 Ohio St.3d 233, 235. Truly boundless discretion could give agencies room to thwart the very intent of the General Assembly to create regulatory regimes that protect the public. Respondent's interpretation would render this particular regulatory regime devoid of meaning.

See State ex rel. Selected Properties v. Gottfried (1955), 163 Ohio St. 469, 471; *Thomas v. Mills* (1927), 117 Ohio St. 114, 123. The Board has, at a minimum, a clear legal duty to do more than nothing. Merely perfunctory review of a complaint of this magnitude and gravity is inappropriate where, in a situation such as this, the supporting evidence has been provided to the Board. The Verified Complaint alleges that the Board's short letter stating simply that it could not proceed, sent on the heels of persistent refusals to ask questions or accept offers of witnesses or more information, shows, on its face, that the Board abdicated its core function of monitoring the profession and licensure in this case.

While the Board may dispute, as a factual matter, the question of whether its actions were adequate, the allegations in the complaint, taken as true, indicate that they were not. There is no indication that the Board has investigated the allegations in the complaint in any meaningful way, and it has provided no reasons for declining to proceed to formal action despite admissions by Dr. James of ethical violations, over one thousand pages of supporting evidence, and an expert ethics report concluding that the allegations, if factually true, constituted the most serious and far-reaching ethical breaches the expert had ever encountered in his career as a psychologist. Thus, Relators have shown through their allegations that despite ample evidence supporting a *prima facie* case against Dr. James for serious violations, the Board failed to exercise its duties and responsibilities as mandated by the legislature. To fulfill its duties would require a good faith investigation, a formal hearing, or at a minimum an adequate explanation from the Board as to why inaction is appropriate in this particular case.

This case is ultimately about: whether the Board, an agency tasked with protecting the public from the unsafe practice of psychology can essentially ignore documented, credible

allegations that one of its psychologists used his professional skills to torture and exploit people; whether it can refuse to bring charges against that psychologist, even when he has written a book in which he breaches confidentiality obligations to young patients and then admits to exploiting them; and whether it can do nothing while the psychologist, who has misrepresented his experience in Guantánamo, oversees the education of dozens of future psychologists in this state.

Relators have alleged that the Board cannot refuse to act: that the legislature did not give the Board the right to choose inaction in a case like this, much less to do so without needing to justify its decision in fact or law. Our justice system is not designed to permit the Board to work in secrecy to avoid accountability for its decisions. Just as this Court will rule publicly and provide reasons for its actions, the Board should do the same.

That the conduct at issue took place in Guantánamo surely makes its adjudication politically sensitive, but that in no way lessens the need for the Board to perform its duties. Psychologists employed by the military are not exempt from the laws and rules governing psychologists in this state; on the contrary, the military expressly relies on state licensing boards to control the quality of their licensees' services. The Board has a clear legal duty to enforce its norms fairly, whether the psychologist is working in Guantánamo or an Ohio prison or an Ohio school. Failure to do so in this case is an abdication of its duty to protect the public, and demeans the value of an Ohio psychology license and undermines professional standards in this state.

In light of Relators' having properly alleged and supported their claim for mandamus, this Court should deny the Respondent's Motion to Dismiss and proceed to discovery.

ARGUMENT

I. The Allegations in the Complaint Must be Taken as True and Warrant Denying the Motion to Dismiss and Permitting the Case to Proceed to Discovery

A motion to dismiss for failure to state a claim or for lack of standing can only be granted when it appears “beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *Cleveland Elec. Illum. Co. v. Public Util. Comm.* (1996), 76 Ohio St.3d 521, 524 (citing *O’Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245). Further, the factual allegations of the complaint as well as all reasonable inferences derived therefrom must be taken as true when addressing a motion to dismiss pursuant to Civ. R. 12(B)(6). *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280. In resolving a motion to dismiss for failure to state a claim, a trial court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. A trial court may not use the motion to summarily review the merits of the cause of action. *State ex. rel. Martinelli v. Corrigan* (1994), 68 Ohio St.3d 362, 363.

Respondent recognizes that this is the correct standard, recognizing that “the court . . . must construe all material allegations in the petition and all reasonable inferences drawn from them in favor of the party against whom the motion is made.” Respondent’s Motion to Dismiss at 11 (citing *Perez v. Cleveland* (1993), 66 Ohio St.3d 397 and other cases). While Respondent may argue that its response to the evidence presented was adequate, the allegations of Board inaction and abdication of its responsibility to carefully probe the serious allegations and initiate formal action suffice to overcome the Motion to Dismiss in an action for mandamus. The complaint alleges with specificity Relators’ clear legal rights, as well as the Board’s clear legal duties and its abuse of discretion. Relators also allege specific harms they experienced and thus

have standing. They also state clearly, and Respondent does not dispute, the want of a plain or adequate alternative remedy at law. This Court should therefore deny the Motion to Dismiss and allow the matter to proceed to discovery.

II. Relators Have Both Private and Public Standing to Seek Enforcement of the Board's Legal Duties

Relators have two independent grounds for standing in this case. First, they have personal, beneficial interests in the matter because they have been injured by the Board's abdication of its legal duties and abuse of discretion. Their complaint was arbitrarily dismissed by the Board in violation of their right to have their complaint meaningfully reviewed. Moreover, as a psychologist, mental health advocate, reverend, and disabled veteran, each has real interests in the Board's sanctioning of Ohio psychologists who commit grave ethical breaches. Second, Relators have standing based on the public action standing doctrine because the case involves an issue of great importance and public interest; gross dereliction of duty by the Board in fulfilling its core function to protect the public affects the citizenry as a whole; and a failure to remedy this wrong could lead to serious public injury. Respondents' Motion to Dismiss fails to mention this established and relevant standing doctrine, which is applicable in this matter, which significantly implicates public interests, duties, and rights. Relators' Verified Complaint and supporting legal memorandum alleged facts that established their standing to seek enforcement through mandamus of the Board's duties to protect the public and to enforce compliance with professional standards. *See* Compl. at ¶¶ 11-12, 18, 20, 27-29, 51, 61-68, 71, 73, 78; Memorandum of Law in Support of Verified Complaint at 3.

A. Relators Have a Beneficial Interest in the Outcome of This Case

To establish standing for private litigants seeking mandamus, Relators must show that they have a “beneficial interest” in the requested act. *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St.3d 224, 226, 1997-Ohio-344 (citing R.C. 2731.02). A real party in interest has a personal stake in the outcome of the case, which is more than a mere interest in the action. *State ex rel. Village of Botkins v. Laws* (1994), 69 Ohio St. 3d 383, 387, 1994-Ohio-518; *State ex rel. Skilton v. Miller* (1955), 128 N.E.2d 47, 50 (distinguishing private interest from one shared with the general public); *see also State ex rel. Ohio Academy of Trial Lawyers et al. v. Sheward* (1999), 86 Ohio St.3d 451, 469-70, 715 N.E.2d 1062. The policy underlying the standing doctrine is to ensure that courts operate within their appropriate role in the democratic system of government. *See Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (holding that courts must decide “actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect”); *Sheward*, 86 Ohio St.3d at 469 (explaining that establishing a personal stake is required to “ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution”).

The matter before this Court is indisputably an actual controversy between two adversaries. On the one side, Relators allege an abuse of discretion by the Board regarding a complaint to that Board supported by *prima facie* evidence of grave ethical misconduct by an Ohio psychologist. On the other, the Board defends its actions, as well as its unbounded discretion and powers to dismiss a complaint, for any reason or for no reason at all. Relators have also alleged specific and concrete injuries caused by the actions of the Board, which are capable of redress by this Court. *See Bourke v. Carnahan* (Ohio Ct.App 2005), 163 Ohio

App.3d 818, 824, 840 N.E.2d 1101 at ¶ 10 (explaining that standing requires injury in fact connected to disputed conduct which is likely to be redressed by decision).³

Relators' complaint demonstrated the particularized way in which each Relator has been individually injured by the Board's actions. Compl. ¶¶ 12, 65-68. Dr. Bond has a property interest in her Ohio psychology license because she relies on its validity and legitimacy for her livelihood. Her license is directly affected by the actions of the body that monitors it and that of other psychologists. An important goal of professional licensure is to protect the public from psychologists who have crossed ethical boundaries and caused others serious harm.

The Board's decision to arbitrarily dismiss the complaint against Dr. James and to continue to license him, without explanation and in apparent disregard for the well-substantiated allegations of serious misconduct, undermines the credibility of the Board's licensing practices and the value of Dr. Bond's psychology license. Reasonable people might understand the Board's inaction to indicate that the Board believes Dr. James's conduct does not violate the laws and rules of the profession in this state, and/or does not render a psychologist unfit to practice in Ohio. Under either interpretation, the Board has compromised its integrity as a monitoring and enforcement agency and compromised the value of Dr. Bond's license. Trust is the cornerstone of the psychology profession. At a minimum, Dr. Bond needs and legitimately expects potential and actual patients and clients to view her Ohio psychology license as a certification that she will care for vulnerable people and not exploit them. The Board's failure to

³ General allegations of injury are sufficient to withstand a motion to dismiss. *Bourke v. Carnahan*, 163 Ohio App.3d at 823 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, the court will presume that general allegations embrace those specific facts that are necessary to support a claim.").

investigate in good faith or to hold a hearing on Dr. James's conduct devalues Dr. Bond's own Ohio psychology license, as well as her ability to earn the trust and respect of her patients.⁴

In addition, Ohio laws and rules not only specifically grant Dr. Bond the authority to file this complaint; they oblige her to do so, recognizing that as a psychologist, she is particularly well-equipped to recognize misconduct. This duty reinforces the direct and concrete harm that she suffered when Relators' complaint against Dr. James was arbitrarily dismissed.⁵

⁴ Dr. Bond's reliance on the Ohio Board for the legitimacy of her license is one of the many factors that clearly distinguish this case from *Bond v. Louisiana State Board of Examiners*. See Respondent's Motion to Dismiss at 5-6 (inaccurately describing *Bond v. LSBEP* as "essentially the exact same case"). Unlike in Louisiana, the public body whose duty Dr. Bond seeks to compel in this case is her own professional board, the very same board that not only authorizes, but *requires* Dr. Bond to report professional misconduct by other licensees. Ohio Adm. Code 4732-17-01(J)(4). Furthermore, while Dr. James held an active license in Louisiana at the time, he was not practicing psychology in that state. Rather, he was and still is, acting as a psychologist and overseeing a professional psychology school here in Ohio, where Dr. Bond also resides and practices. Respondent also ignores that the Louisiana Court of Appeals decision is based primarily on a reading of the Louisiana Administrative Procedure Act, a statute that is not relevant to the question before this Court. Nor does, to Relators' knowledge, Louisiana have a public action doctrine of standing similar to the one long recognized by Ohio courts.

⁵ Respondent fails to address the other Relators, but each also has standing based on particularized injuries because the Board has compromised the integrity of the system that regulates the profession of psychology in this state. See Compl. at ¶¶ 66-68. Dr. Setzler works as an advocate for her brother and others who suffer mental illness in Ohio, including those held in correctional institutions. If the Board is permitted to avoid serious examination of this complaint, or at least to justify its decision, Ohio correctional authorities are free to use the Board's decision to pressure psychologists to disregard their ethical obligations when dealing with prisoners and others for whom Dr. Setzler advocates. Rev. Bossen's duties as minister to his congregation include referring vulnerable congregants to Ohio-licensed psychologists when they need mental health treatment. Without a clear signal that the Board will protect Ohioans from psychologists who use their professional skills and authority to exploit those in their care, Rev. Bossen's ability to perform his duty and refer those in need of psychological assistance is impaired. Finally, Mr. Reese, a disabled veteran who suffers from chronic illnesses, receives regular treatment at Ohio Veteran Affairs (VA) hospitals. He is more likely than most in the general population to receive care from active-duty and retired military health professionals. If the Board's failure to enforce its laws and rules in this case is based on the fact that the violations occurred while Dr. James was employed by the military, Mr. Reese cannot rely on their license as certification that they are practicing ethically and subject to meaningful licensure monitoring.

All Relators have a personal stake in the outcome of this action that is clearly distinguishable from that of the public at large. Although others in Ohio share Relators' interest in ensuring that the Board prevents torturers from treating patients in this State, see Compl. at ¶ 51, Relators are the only individuals who filed the complaint at issue. Through the Board's arbitrary dismissal, Relators suffered a specific injury different in degree and kind than that of other Ohio citizens. Their legal right to bring a complaint was rendered meaningless by the Board's failure to adequately investigate or adjudicate their claims. It is this special interest that provides Relators with additional grounds for standing to bring an action to compel the Board to perform, in this case, its core function of regulating the profession to protect the public. The Board's actions to date indicate that it has no intention of enforcing its rules against Dr. James, leaving Relators no other recourse than to seek redress in this Court through a mandamus action. The Board's failure to enforce its own rules despite the extraordinary gravity of the violations alleged and the extraordinary amount of credible evidence offered in support is so egregious that, without redress, it risks seriously compromising the integrity of the regulatory system governing the profession of psychology in Ohio. If this Court compels the Board to meaningfully investigate and adjudicate the claims against Dr. James or provide an explanation for its decisions, each Relator will benefit in a greater degree and manner distinct from the general population.

B. The “Public-Right” or “Public-Action” Doctrine of Standing Also Applies Here and Provides an Independent Ground for Standing in This Case

Relators have a second independent basis for standing in this matter based on the “public action” doctrine. For more than one hundred years, Ohio courts have explicitly recognized that

there are circumstances where the lack of standing based on a private right does not foreclose litigation. Courts are to apply the “public action rule of standing” in circumstances “where the alleged wrong affects the citizenry as a whole, involves issues of great importance and interest to the public at large, and the public injury by its refusal would be serious.” *Bowers v. Ohio State Dental Bd.* (Ohio App. 10 Dist., 2001), 142 Ohio App.3d 376, 381. Respondents fail to mention even once this well-established doctrine in their Motion to Dismiss. The omission is notable as this matter implicates each prong of the public action standing test. The Board abdicated its core functions and failed to explain its reason for inaction, thereby abandoning its public duty to uphold the integrity of the psychology profession and monitor licensing as directed by the General Assembly. The Board has a clear duty to enforce professional psychological norms in the public interest of receiving safe and proper treatment. Not reviewing the abuse of discretion by the Board would threaten to undermine the regulatory system, thereby causing a serious public injury. The serious injury of an important public interest is what defines this standing doctrine, and thus on this independent ground, Relators have standing to bring this writ of mandamus.

1. The Public Action Standing Doctrine Confers Standing Where, As Here, the Object of Mandamus Is to Procure the Enforcement of A Public Duty

Under the “public action” theory of standing, “where the question is one of public right and the object of the mandamus is to procure the enforcement of public duty, the people are regarded as the real party and the relator need not show that he has any * * * special interest in the result, since it is sufficient that he is interested as a citizen or taxpayer in having the laws executed and the duty in question enforced.” *State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4, 215 N.E.2d 592, 595 (quoting 35 Ohio Jurisprudence 2d 426, Section 141). The

Supreme Court affirmed this principle in *Sheward*, in a decision that struck down Ohio’s tort reform statute. *Sheward*, 86 Ohio St.3d at 471-72.

In *Sheward*, the State asserted that the Ohio Academy of Trial Lawyers, as plaintiff, lacked standing based on a private right. *Id.* at 473-74. However, it did find standing based on a “public right.” *Id.* at 474-75. Given the public interest aspects of the case, the Court noted that States have unique powers to make their own standing determinations on matters of state law:

[T]he federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands. “Unlike the federal courts, state courts are not bound by constitutional strictures on standing; with state courts standing is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.”

Sheward at 470 (quoting 59 American Jurisprudence 2d (1987) 415, Parties, Section 30) (footnote omitted).

In *Sheward*, the Court carefully traced the long-standing history of the public action standing doctrine: courts have “long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties.” *Sheward* at 471. The Court cited a long line of decisions dating to 1878 to support the conclusion that there are cases where a plaintiff “may maintain a proper action predicated on his citizenship relation to such public right.” *Id.* at 473 (quoting from *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 150-151, 122 N.E.2d 105, 107); *see also State v. Brown* (1882), 38 Ohio St. 344, syll. ¶ 1 (mandamus to compel sheriff to give notice of judicial election may be brought by any citizen pursuant to

interest in administration of justice); *State ex rel. Meyer v. Henderson* (1883), 38 Ohio St. 644, 648-649 (“sufficient to show that [relator] is a citizen, and, as such, interested in the execution of the laws” for writ of mandamus to compel city clerk to advertise for bids on public works); *State ex rel. Trauger v. Nash* (1902), 66 Ohio St. 612, syll. ¶ 1, 615, 64 N.E. 558 (mandamus by private citizen to compel Governor to appoint Lieutenant Governor); *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 322-323, 631 N.E.2d 1048, 1054-55 (mandamus by taxpayer to enforce public right to services of improperly removed public official).

2. *The Public Action Standing Doctrine Applies to This Case*

This case implicates the public action standing doctrine because the alleged wrong involves issues of great importance and interest to the public at large, affects the citizenry as a whole, and the public injury caused by its refusal would be serious. In the instant matter, the governmental system is threatened because Respondent (an administrative body with quasi-judicial powers) has failed to carry out its core agency functions as established by the General Assembly. The Board cannot, through its inaction, thwart the General Assembly’s intent to create a regulatory scheme to protect the public. To do so would be tantamount to the Board overruling the wishes of the branch of government tasked with creating a legislative framework.

The application of the public action standing test in *Bowers* and *Sheward* demonstrates that, when a core governmental function is at stake, a public right is implicated and thus standing exists. In *Bowers*, two dentists attempted to compel their regulatory board to specify through its regulations (rather than through its policy statements) which entrance examination tests were required for Ohio licensure. *Bowers* at 381. The Franklin County Court of Appeals declined to apply the “public-action” standing doctrine in that case because “the duty sought to be compelled

[was] not in any meaningful sense for the benefit of the public as a whole,” was “not of great importance and interest to the general public,” and the alleged injury to the public was not deemed “serious.” *Id.* The court made clear that the board’s obligation to create this specific rule “designating which [specific] exams prospective dentists must take” did not rise to the level of a public duty, and thus no core governmental function was implicated. *Id.*

In contrast, *Sheward* dealt with actions by the General Assembly that threatened the judiciary branches’ traditional judicial review functions. *See Sheward* at 474-75; *see also* Part II.B.1 (discussing historic line of public action decisions). The *Sheward* Court found standing because a public interest existed where the General Assembly’s tort reform statute would overrule several important procedural determinations the courts had made in recent years. The Court held that “the people’s interest in keeping the judicial power of the state in those in whom they vested it” clearly rose to the level of a public right. *Sheward* at 474 (finding it “difficult to imagine a right more public in nature than one whose usurpation has been described as the very definition of tyranny”). Critically, the Court noted that if the General Assembly’s action were not reviewable, “the whole power of the government would at once become absorbed and taken into itself by the legislature.” *Id.* (quoting *Bartlett v. State* (1905), 73 Ohio St. 54, 58, 75 N.E. 939, 941).

This mandamus request implicates similarly important public interests on a number of fronts. First, the complaint filed before the Board contained substantial *prima facie* evidence of numerous grave ethical violations, specifically of involvement in the torture and psychological exploitation of people, including children and adolescents, in Dr. James’s custody and care. The weight of the evidence and the seriousness of the harm are of great importance and interest to the

people of this State. The Board's own statements and guidelines acknowledge its duty to protect the public from the unsafe practice of psychology. Yet, here, the Board has failed to act on credible allegations that a licensee intentionally inflicted physical and psychological harm—conduct that clearly implicates public health and safety. The existence of and reliance by the Board on citizen complaints further demonstrates that the citizenry have an important public right and stake in this institution and the monitoring of licenses and misconduct by psychology professionals.

Second, the public interest warrants judicial review here because of the Board's abdication of its public duty to enforce compliance with the norms of the profession, an abdication that affects the citizenry of this State as a whole. This case involves a question of great public consequence: whether a psychologist who allegedly engaged in and promoted torture and other forms of exploitation, breached confidentiality, and then intentionally misled the public and the Board as to his actions, should be permitted to treat patients in Ohio. Finally, the public injury caused by the Board's refusal to act would be serious. When there is no indication that the Board investigated the matter, and when the Board refuses to explain its decision not to hold a hearing, despite significant and credible evidence, the Board has derogated its core responsibilities as established by the legislature. To allow the Board to ignore its delegated responsibilities compromises the very integrity of the governmental system in which an administrative agency must carry out its duties as outlined by the legislature. Furthermore, in asserting boundless discretion beyond the review of this Court, the Board would usurp the well-established power of the judiciary to provide a safeguard against abuse of discretion. Indeed, the Relators' particularized harms discussed above illustrate the diversity of interests and injuries

that citizens of Ohio experience when the integrity of the monitoring and licensure system is undermined severely as in this case.

Ultimately, like in *Sheward*, the workings of government are at stake here, thus making public action standing appropriate and warranting judicial review. Not every case against the Board will implicate the public right established in *Sheward*. This case, however, does because of the extraordinary level of gravity and credibility of the allegations presented to the Board, coupled with the Board's complete unwillingness to act or even explain its dismissal.

III. Relators State a Claim for Mandamus

Relators meet all the elements necessary to state a claim for a writ of mandamus. First, Relators have a clear legal right to file a disciplinary complaint against Dr. James and have it meaningfully considered. Second, the Board has a clear legal duty to enforce compliance with the ethical standards of the profession by meaningfully investigating serious allegations of abuse and holding evidentiary hearings when *prima facie* violations have taken place, such as here. At a minimum, the Board has a duty to communicate the basis for its decision not to proceed. By refusing to investigate Relators' well-substantiated complaint of multiple and grave violations of the state's professional norms or explain its action, the Board abused its discretion and abrogated its duties and Relators' corresponding rights. The lack of a plain and adequate ordinary remedy at law is undisputed, and thus, mandamus in this Court is Relators' only legal recourse.

A. The Board Has Clear Legal Duties to Enforce Licensees' Compliance with the Laws and Rules Governing the Profession of Psychology in Ohio

The Board has a clear legal duty to ensure that Ohio-licensed psychologists comply with professional norms by reviewing and acting on credible allegations of serious violations and by communicating the basis for its actions. Though the Board's various duties are mandatory, some

aspects of them involve the exercise of discretion. *See* Relators' Memorandum of Law, Parts I and II. The fact that the Board enjoys some discretion in how to exercise some of these functions, however, does not vitiate its legal duties, nor grant the Board freedom to do nothing at all. The Board must exercise its discretion within the bounds of the laws and rules of the state, and always toward its fundamental duty to protect the public.

The Board's enforcement and protection duties derive from the Board's fundamental duty to protect the public from the unsafe practice of psychology. *See In re Barnes* (1986), 31 Ohio App.3d 201, 206; 510 N.E.2d 392, 398 (noting, in discussing State Board of Psychology, that "[o]ne of the obvious purposes of the regulation of professions is to prevent damage * * * before any person in the general public is damaged"); 2004 Ohio Op. Att'y. Gen. No. 20, at 7 (concluding, in opinion issued to State Board of Psychology, that "the purpose of statutory licensing schemes * * * [is] protection of the public and those whom practitioners serve"). The Board must implement its overarching public duty through its core function of regulating the profession. *Id.* at 8 ("[the Board's] ability to investigate and discipline a licensee * * * protects the public safety and welfare, and prevents future harm to those who might seek out the licensee's professional services"). The Board's regulatory duties include setting professional standards, ensuring that applicants and licensees meet those standards, and—when these are violated—enforcing the standards through disciplinary measures. For example, the Board must admit psychologists into licensure, but only those who meet defined professional standards. *See, e.g.* R.C. 4732.10(A) ("[the Board] shall appoint an entrance examiner who shall determine the sufficiency of an applicant's qualifications for admission to the appropriate examination"); R.C. 4732.091(B) ("[the Board] shall not grant a license to an applicant for an initial license unless the

applicant complies with [R.C. 4776.01-4776.04].”); R.C. 4732.10(B)(2) (“[r]equirement for admission to examination for a psychologist license shall be that the applicant * * * is of good moral character”). Similarly, the Board must discipline psychologists for misconduct as defined by statutory and regulatory norms. *See* Ohio Adm. Code 4732-19-01 (“[I]icensed psychologists * * * governed by [R.C. 4732] and by these rules shall be disciplined in accordance with [R.C. 4732 and R.C. 119] for violation of these rules.”).

These enforcement and protection duties necessarily encompass additional duties to undertake good faith efforts to investigate well-substantiated reports of misconduct and, where there is evidence of a likely violation, to take action against the licensees by proceeding to a hearing or consent agreement. The Board acknowledges that it is expected to fulfill its “primary mission of providing protections for the public and for consumers of psychological services, through examination and licensing, regulatory compliance monitoring, investigation of complaints regarding the professional conduct Ohio’s Psychologists, and levying of sanctions for violations.” *See* State Psych. Bd, Guidelines for Disciplinary Actions and Corrective Orders, at 2. For example, the Board cannot meet its obligation to discipline without information on professional misconduct. Thus, it has a duty to create mechanisms whereby it receives such information. It has done so here by imposing on Ohio psychologists a legal duty to report violations, *see* Ohio Adm. Code 4732-17-01(J)(4), and by affording professionals and all concerned citizens a legal right to file misconduct complaints. *See, e.g.*, ORC 4732.171 (assuming existence of complaint mechanism); State Bd. of Psychology, Regulatory Compliance Handbook, at ¶1 (explaining that “[a]n initial complaint may be received * * * from another professional (psychologist, physician, lawyer, etc.) or from a concerned citizen”). When the

Board receives complaints that meet the threshold requirements specified by the Board, the Board has a duty to evaluate and investigate the evidence presented. *See* State Bd. of Psychology, Regulatory Compliance Handbook, at ¶¶ 1-3, 6; State Bd of Psych., Guidelines for Disciplinary Actions, *supra*, at 2; 2004 Ohio Atty. Gen. Ops. No. 20, *supra*, at 8. When the evidence indicates that a serious violation is likely to have occurred, the Board has a presumptive duty to take formal action, in accordance with its duty to enforce professional standards in order to protect the public. *See* State Bd. of Psychology, Regulatory Compliance Handbook, at ¶ 7.

The Board would have this Court rule that the General Assembly, by its usage of the term “may” in some provisions of the Revised Code, has granted it the discretion to essentially ignore substantial, credible evidence of serious ethical violations that implicate public safety; to refuse action for any reason, regardless of legitimacy or even legality; and to keep such reasons secret, protected from the scrutiny not just of the complainant, the victim, and the general public, but also of the courts. By stating that the Board “may issue a reprimand, or suspend or revoke the license of any licensed psychologist” on any of the enumerated grounds, the General Assembly cannot mean that the Board has discretion to simply decide to stop reviewing and acting on evidence of violations by its licensees altogether. *See* R.C. 4732.17(A). Such a reading would be contrary to the Board’s recognized duty to protect the public safety and welfare. Yet, that is precisely Respondent’s position. *See* Respondent’s Motion to Dismiss at 8 (“R.C. 4732.06 *allows* the Psychology Board to establish procedures to conduct investigations and hearings, *if necessary.*”) (emphasis added). Nor does the law afford Respondent the discretion to set up a process that is by design or application arbitrary in its enforcement. The Board itself has acknowledged this. *See, e.g.,* State Bd. of Psych., Guidelines for Disciplinary Actions and

Corrective Orders, *supra*, at 2 (acknowledging that Board’s obligation to public and licensees includes providing for “optimal levels of consistency and fairness in the determination of sanctions for a given violation”). Indeed, courts have recognized that a regulatory scheme cannot be read to endow an agency with limitless discretion. *See Gottfried*, 163 Ohio St. at 471; *Mills*, 117 Ohio St. at 123. The more reasonable interpretation of this discretionary language is that the Board’s mandatory legal duties to enforce compliance and protect the public include a duty to undertake good faith disciplinary efforts. Such efforts, like all public duties that involve an element of discretion, are subject to an abuse of discretion review where there is evidence that the Board has acted in an arbitrary, unreasonable, or unconscionable manner. Relators have presented such evidence here.

B. Relators Alleged and Adequately Supported a Showing of Abuse of Discretion

The performance of legal duties that involve the exercise of discretion can be reviewed for abuse of discretion. Though Respondent implicitly asserts that mandamus cannot issue when a duty involves discretion, it ultimately concedes that “abuse of discretion” is the standard of review in mandamus cases such as this one. Resp. Br. at 11 (citing *State ex rel. Lee v. Montgomery* (2000), 88 Ohio St.3d 233, 235, 2000-Ohio-316). The case law clearly supports the position that review of performance of legal duties for abuse of discretion is appropriate. *See, e.g., Lee*, 88 Ohio St.3d at 235; *State ex rel. Village of Botkins v. Laws* (1994), 69 Ohio St.3d 383, 386, 1994-Ohio-518; *State ex rel. Browning v. Fayette Cty. Commrs.* (App.1993), 14 Ohio Law Abs 529, 529 (“It is a principle of law thoroughly established not only in this state but in other jurisdictions that discretionary acts will be controlled when the discretion is abused.”).

Without such court review, the Board would be permitted to arbitrarily, unreasonably, or unconscionably dismiss cases, including those involving allegations of serious violations supported by substantial evidence, like the case against Dr. James. The Board asserts the right to take no action at all—that investigations and hearings are always optional. Resp. Br. at 8. Such an interpretation would render the actions of the Board beyond review in all cases, and in doing so, render the statute and rules meaningless. *See Gottfried*, 163 Ohio St. at 471; *Mills*, 117 Ohio St. at 122-23. This cannot be what the General Assembly intended in creating the legislative framework. This interpretation is also contrary to the case law, which clearly establishes that performance of legal duties, even those involving broad discretion, can be reviewed for abuse. Finally, dismissal on a Motion to Dismiss is particularly inappropriate in this case given the fact-intensive nature of assessing abuse of discretion. *See, e.g., Gosney v. Board of Elections* (March 30, 1989), Seventh App. Dist. No. 88-C-54, 1989 Ohio App. Lexis at 2 (indicating existence of record about agency actions that allowed assessment of whether discretion was reasonable or abused); *Talwar*, 104 Ohio St.3d 290, 292, 2004-Ohio-6410 (basing assessment of Medical Board’s actions on board’s stated reasons for not taking further action, which were contained in the record).

Respondent relies substantially on cases involving prosecutorial discretion or the discretion of other professional boards to assert that Respondent’s actions are not reviewable on the merits. Resp. Br. at 9-12. However, the case law, including decisions relied on by the Respondent, indicates clearly that even when prosecutors and boards perform duties that involve elements of discretion, their actions are still reviewable for abuse of that discretion. In *State ex rel. Murr v. Meyer*, for example, the Supreme Court reviewed an appeals court decision to deny

mandamus because the decision to prosecute was discretionary. Although the Court affirmed the lower court's decision to deny the writ, it began its decision by unequivocally acknowledging that "doubtless, a prosecuting attorney's discretion concerning prosecution is subject to some limits." The Court then proceeded to examine whether the prosecutor in that case had abused his discretion. *State ex rel. Murr v. Meyer* (1987), 34 Ohio St.3d 46, 46. The Court upheld this line of reasoning again a decade later, when it reviewed police and prosecutorial conduct for abuse of discretion. *See State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 27 ("[p]rosecuting attorney will not be compelled to prosecute a complaint *except when failure to prosecute constitutes an abuse of discretion*") (emphasis added).⁶ Other boards' actions merit the same scrutiny. *See, e.g., Talwar*, 104 Ohio St.3d at 292 (reviewing the Medical Board's conduct for abuse of discretion as part of the determination of whether mandamus was proper). Thus, the law is clear that even when prosecutors and boards are granted discretion on when to bring charges, that discretion is not limitless.

When a court finds an abuse of discretion by a public official or agency, it can issue a writ of mandamus to "compel performance" of the public body's official duties, even when those duties involve the exercise of discretion. *See, e.g., Village of Botkins*, 69 Ohio St. at 389; *Browning*, 14 Ohio Law Abs at 529. Courts have distinguished between controlling discretionary outcomes and compelling an agency to exercise its discretion within the bounds of

⁶ Respondent's reliance on lower court cases in other districts to posit a principle that discretion is unreviewable is misplaced, unpersuasive, and out of step with Supreme Court precedent. *See Gosney*, Seventh App. Dist. No. 88-C-54 (concluding, without citing case law for support, that "where the performance of a duty is not mandatory but is discretionary, a writ of mandamus will not issue"); *Pierce v. Court of Common Pleas* (8th Dist. 1992), 1992 Ohio App. Lexis 2015 *6 (citing *Meyer* in determining that "the decision to prosecute is clearly discretionary" but fundamentally misreading it by concluding that "by virtue of its discretion," the decision "cannot impose a clear legal duty on the part of the county prosecutor to perform the requested act").

the law. *See, e.g., Village of Botkins*, 69 Ohio St. at 387; *Browning*, 14 Ohio Law Abs at 529. In *Botkins*, a case involving payment of services to prosecutors, the Court held:

[R]elator is entitled to a limited writ of mandamus to compel respondents to exercise their discretion pursuant to R.C. 1901.34(C) in determining a reasonable amount of compensation due Evans for the additional services already rendered, which claims he has assigned to relator. In exercising their discretion, respondents are under no duty to award all sums requested, *i.e.*, they are not bound by the amount that relator determined was proper in paying its village solicitor. Nevertheless, their decision should be based upon the evidence submitted to relator concerning the reasonable value of these services.

Botkins, 14 Ohio Law Abs at 389. *Botkins* relied on *Browning* to illustrate the principle that the Court could compel performance. *Id.* at 386 (discussing *Browning* and stating writ would issue “where the county commissioners abused their discretion in allowing only one dollar to a city solicitor for his services in state cases before the municipal court pursuant to G. C. 4307. It determined that the commissioners had abused their discretion where they had ‘no knowledge as to the nature or extent of the work and * * * no investigation whatever [was made] as to what the services would reasonably be worth.’”). Thus, while courts may hesitate to dictate to agencies specific outcomes or actions, or how precisely to use their discretion, courts can and will order agencies to compel performance of a legal duty that does involve discretion. *See, e.g., Village of Botkins*, 69 Ohio St. at 387, 389; *see also Lee*, 88 Ohio St. 3d at 235.

Here, despite Respondent’s attempt to frame otherwise, Relators have asked the Court to compel the board to perform its mandatory, core legal duties of enforcement and discipline, and to exercise its discretion legitimately within the bounds of the law. As relief, Relators do not ask the Court to specifically control the Board’s discretion by forcing a particular sanction from the Board. Rather, Relators ask that the Board perform its investigatory and disciplinary duties with

regard to their complaint, and that it do so reasonably, fairly, in good faith and in accordance with its mandate to protect the safety and welfare of the people of Ohio. The Board has not adequately examined, investigated, or acted on the evidence showing that its licensee had engaged in gross misconduct. Nor has the Board offered evidence that the information provided to it was deficient in any way. *See* Compl. at ¶¶ 2-10, 29-71; Memorandum of Law, Parts I-III. The Board has refused to offer, even to this Court, any explanation for its inaction. Compl. ¶¶ 8-9. These facts as alleged in the Verified Complaint suffice to state a claim that the Board, on its face, has not met its legal obligations. Thus, this Court, like others, has the authority to compel performance of the Board's legal obligations even though they do include elements of discretion.

In addition, dismissal at this stage would be especially premature given the factual inquiry needed to determine if the Board has abused its discretion. The cases on which Respondent relies, as well as others demonstrate that judicial inquiries into abuse of discretion are fact-intensive and require more fully developed records of the officials' actions. *See, e.g., Botkins* at 383-385, 388-389; *State ex rel. Squire v. Taft* (1994), 69 Ohio St.3d 365, 632 N.E.2d 883; *Talwar v. State Medical Board of Ohio* (10th Dist. 2004) 156 Ohio App.3d 485, 488-89, 204-Ohio-1301 (citing that record indicated that Medical Board had investigated and issued report on its findings); *Gosney*, Seventh App. Dist. No. 88-C-54 at 2 (citing affidavit provided by Respondent prosecutor detailing steps of his investigation and the absence of any rebutting affidavits or documentation from Relator). In contrast to both *Gosney* and *Talwar*, the record here is void of any evidence that the Respondent carried out its duties in good faith through investigation or otherwise.⁷ Additionally, Relators, unlike *Gosney*, have supplied the Court with

⁷ Respondent's persistent silence during the complaint process, despite Relators' repeated

evidence of inaction as well as substantial supporting evidence of serious ethical violations. This evidence includes admissions of ethical violations by Dr. James, as well as a vast number of supporting documents, including a report from an expert concluding that the alleged conduct, if proven true, would constitute the worst case of professional misconduct he had encountered in his career. *See* Compl. at ¶50. These facts state a claim and thus this Court should deny the Motion to Dismiss.

CONCLUSION

Relators have standing and have sufficiently stated a claim involving abuse of discretion by the Board of its legal duties to enforce compliance of the Ohio ethical code. The Board's ongoing inaction coupled with its persistent reluctance to disclose the reasons for its dismissal should be reviewed by this Court. Thus, this Court should deny Respondent's motion to dismiss.

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inquiries as to whether they might resolve any doubts or concerns on the part of the Board, coupled with the Board's continued refusal to disclose their reasons for dismissal, even to the Court as part of this action, suggests it has not operated in good faith.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of Petitioners to Respondent's Motion to Dismiss Filed May 18, 2011" was sent by me via regular U.S. mail, postage prepaid this 20th day of July, 2011 to Roger F. Carroll, Esq., Assistant Attorney-General, 30 East Broad St., 26th floor, Columbus, OH 43215-3400.

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