

ORIGINAL

IN THE SUPREME COURT OF OHIO

W. DAVID LEAK, M.D.,	:	CASE NO.
Appellant,	:	
vs.	:	REGULAR Calendar
STATE MEDICAL BOARD OF OHIO,	:	Appeal from Court of Appeals
Appellee.	:	Case No. 09-AP-001215

11-1113

**MOTION FOR EXPEDITED RELIEF AND ORAL ARGUMENT FOR
APPELLANT, W. DAVID LEAK, M.D.**

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 SUPREME COURT OF OHIO

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STATE MEDICAL BOARD OF OHIO,	:	Appeal from Court of Appeals
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MOTION FOR EXPEDITED RELIEF AND ORAL ARGUMENT FOR APPELLANT, W. DAVID LEAK, M.D.

William David Leak, M.D. (“Dr. Leak”), Appellant, by and through counsel, hereby moves this Court pursuant to Supreme Court Rule of Practice 2.2(A)(3)(a) and 14.4(A) to Expedite as an Emergency his Motion For Stay, filed with this Court on June 27, 2011. Further, Appellant Dr. Leak moves this Court pursuant to Supreme Court Rule of Practice 9.2(A) and 14.4(A) for an oral argument or informal conference to discuss his Motion For Stay .

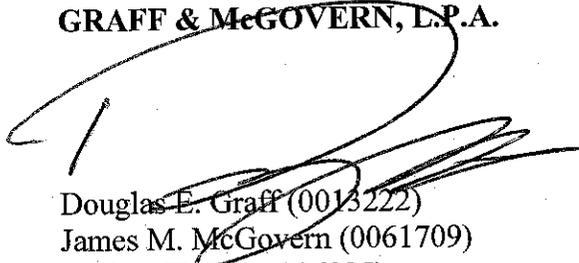
Dr. Leak believes an oral argument on his Motion For Stay is required to address the following issues. First, as outlined in the Motion For Stay filed with this Court, the Court of Common Pleas granted a stay during the pendency of the administrative appeal before it, and renewed the stay without interruption during the pendency of appeal before this Court. Judge Reece specifically found that Dr. Leak would suffer an unusual harm and the health, safety and welfare of the public would be threatened by **not** granting a stay of the Medical Board’s Order. Dr. Leak requests an emergency oral hearing to more adequately explain the circumstances of his practice that require the continued protection of the courts.

Second, Appellant and Appellee are in fundamental disagreement regarding the effect of this Court’s Judgment Entry filed on May 25, 2011. See Attached, Memorandum in Response at 10-11 (attachments omitted). Appellant, Dr. Leak believes he is permitted up to 30 days in

which to close his medical practice following the termination of stay. Appellee, Medical Board assert that Dr. Leak is limited to 6 days, and any further patient involvement will constitute the unauthorized practice of medicine. If the shorting time period is applied Dr. Leak will be subjected to further civil and criminal liability regarding the closing of his practice. Therefore Dr. Leak requests an oral conference where he may more fully express the correct legal standard that should be applied to his situation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certified that a copy of the foregoing Emergency Motion To Expedite and Request For Oral Hearing was served via regular U.S. Mail; postage prepaid this 27 day of June 2011, and via fax at (614) 466-6090 upon counsel for Appellee, State Medical Board of Ohio to:

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IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

W. DAVID LEAK, M.D.,

Appellant,

v.

STATE MEDICAL BOARD OF OHIO,

Appellee.

Case No. 09APE-1215
REGULAR CALENDAR

On Appeal from the Court
of Common Pleas of Franklin
County, Ohio Case No. 08CVF-012288

STATE MEDICAL BOARD'S MEMORANDUM IN RESPONSE TO
APPELLANT'S JUNE 2, 2011 MOTION FOR STAY OF EXECUTION OF JUDGMENT
DURING APPEAL, AND
MEMORANDUM IN RESPONSE TO APPELLANT'S JUNE 6, 2011 MOTION TO
EXPEDITE AND REQUEST FOR ORAL HEARING

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APPELLEE'S MEMORANDUM CONTRA TO
APPELLANT'S MOTION FOR STAY
OF ADMINISTRATIVE ORDER

Appellant, W. David Leak, M.D., has moved this Court for an order staying the execution of the State Medical Board of Ohio's (hereinafter "Board") August 13, 2008 order permanently revoking his certificate to practice medicine and surgery in the State of Ohio. The Board voted to impose this sanction after finding that Dr. Leak committed numerous violations of the *Medical Practices Act*, including practice below the standard of care on several patients in violation of R.C. 4731.22(B)(6). These violations occurred during the course of Dr. Leak's medical practice and involved ordering and administering useless medical tests for many patients. Dr. Leak's case before the Board involved twenty-four (24) specified patients and this is just a sampling of hundreds of patients who may have been treated in the same manner.

Dr. Leak appealed the Board's order to the Franklin County Court of Common Pleas pursuant to R.C. 119.12 on August 25, 2008. Judge Reece of the Franklin County Court of Common Pleas granted a stay of the Board's order on September 9, 2008. That order stayed the order for the duration of the appeal to the common pleas court, or the expiration of fifteen (15) months, whichever occurred first. Upon a motion to extend the stay filed on November 19, 2009, Judge Reece issued a second stay in this matter after the fifteen (15) month period had expired. A decision on the merits came shortly after on December 15, 2009, affirming the Board's order of permanent revocation of Dr. Leak's license. Dr. Leak appealed the decision to the Tenth District Court of Appeals on December 31, 2009. Once again Dr. Leak sought a stay and Judge Reece issued an order on January 13, 2009 staying the Board's order pending the appeal to the Tenth District

Court of Appeals. The Board has objected and filed memorandums contra to each request for stay in this matter. The Tenth District issued a decision on the merits on May 24, 2011. The order of the Board is now finally in effect and Dr. Leak's license is permanently revoked.

The Board opposes Dr. Leak's motion for stay of its order. Dr. Leak has avoided the revocation of his license for almost three years. The Board thought that his practice was below minimum standards and dangerous to the public. That is why they issued the most severe sanction, permanent revocation of license. In addition, Dr. Leak has failed to show that an unusual hardship will result if the Board's order is not stayed, as required by R.C. 119.12. Two, the safety and welfare of the public will not be protected if a stay of the Board's order is issued.

I. THE MEDICAL BOARD'S CASE AGAINST DR. LEAK

By letter dated August 9, 2006, the State Medical Board of Ohio (hereinafter "Board") notified Appellant, David Leak, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board charged Dr. Leak with violating R.C. 4731.22(B)(6) in that his patient care was "[a] departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established" for his treatment of 24 enumerated patients.

The record in this matter reveals that Dr. Leak routinely runs hundreds if not thousands of patients through his "program" at Pain Control Consultants, Inc., a program which consists of subjecting patients to many useless and medically meaningless tests, injecting them with steroids and finally prescribing narcotic pain medications. There is

no apparent attempt to actually heal these patients through exercise and/or rehabilitation. As the State's two experts, Dr. Katirji and Dr. Chelimsky testified, many of these tests ordered by Dr. Leak were worthless from a diagnostic standpoint. The Selective Tissue Conductance test (STC) and the Somatosensory Evoked Potential (SSEP) are two examples which were routinely ordered, performed, and billed for by Dr. Leak, even though the tests and the way they were administered had no medical value.

Each patient was subjected to the same barrage of tests regardless of pain symptoms, which the state's experts found to be a deviation from the standard of care. The testing ordered and conducted by Dr. Leak lacked any documentation in the medical records as to the reasoning or medical judgment behind ordering the tests. There was also no follow up or mention of the test results, begging the question of why the tests were performed. In essence, no clinical thought process is documented in the medical records. It was as if these STC tests and SSEPs were being ordered just for the sake of doing a test. **There was simply no medical indication for these tests to be ordered.**

An administrative hearing was conducted by the Board which stretched over four weeks in May and June of 2007. Not only did this hearing concern the medical practice of Dr. Leak, but two of his colleagues, Dr. Hoogendoorn, a podiatrist, and Dr. Griffin were also charged by the Board in a consolidated matter. Dr. Hoogendoorn and Dr. Griffin had both worked under the supervision of Dr. Leak at Pain Control Consultants, Inc.

At hearing, detailed testimony was presented before the Board's hearing examiner to support the Board's allegations concerning Dr. Leak, Griffin and Hoogendoorn. The Hearing Examiner filed three separate Reports and Recommendations on July 7, 2008.

Prior to rendering its Order at the August 13, 2008 Board meeting, the Board reviewed the entire record that had been established at hearing. The Board found that Dr. Leak's practice was below the standard of care, in violation of R.C. 4731.22(B)(6). At the end of its deliberations, the Board voted to approve the recommendation of the hearing examiner to permanently revoke Dr. Leak's license. That order was mailed and states that it will become effective 30 days after mailing, which occurred on August 15, 2008. The State respectfully requests this motion for suspension of agency order be denied.

II. **THE MOTION FOR SUSPENSION OF THE BOARD'S ORDER SHOULD BE DENIED.**

R.C. 119.12 sets forth very specific standards which must be met before the Court may grant a suspension of a Medical Board order:

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. *** In the case of any appeal from the state medical board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending the termination of the appeal, and the health, safety and welfare of the public will not be threatened by suspension of the order.***

R.C. 119.12. (Emphasis added.)

This statutory provision essentially means that: (1) a suspension of an adjudication order should not be granted perfunctorily; (2) the appellant has the burden of establishing not just hardship but "unusual" hardship arising from immediate implementation of the adjudication order; and (3) the court must decide whether the continued, unsupervised and unrestricted practice of the physician poses a potential danger to the health, safety or welfare of the public.

A. **Dr. Leak Has Not Shown That He Will Suffer An "Unusual" Hardship If The Board's Order Is Not Stayed**

The language of R.C. 119.12 makes clear that an appellant must show more than the financial hardship inherent and expected in losing his professional license; the statute requires that the appellant prove that he will suffer an unusual hardship. As explained by Judge John W. Reece of the Summit County Court of Common Pleas in *State Medical Board vs. Alsteben* (Mar. 17, 1980), Summit Co. C.P. Case No. CV80-3-0614, unreported:

There is a dearth of authority in Ohio defining what constitutes 'unusual hardship'. However, some reasonable analysis may be helpful. The very term itself presupposes that the legislature foresaw that there would be a hardship in every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective 'unusual' was included. That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.

Id. at p. 1-2. Unusual hardship also means more than the loss of the right to practice medicine:

While it can hardly be denied that the loss of one's license to practice his chosen profession constitutes hardship, it is equally clear that something more and unusual is required to satisfy the statute.

Id. at p. 2-3.¹ As Judge Frye recently recognized, courts throughout Ohio have repeatedly held that the mere denial of the right to practice medicine is not an 'unusual' hardship as contemplated by the General Assembly. *Randall Leuvoy v. State Medical Board* (October 10, 2006), Franklin C.P. Case No. 06CVF10-1247, unreported (Frye, R.).

The rulings of the Franklin County Common Pleas Court in similar cases support this conclusion. See, e.g. *Benjamin Gill, D.O. v. State Medical Board of Ohio* (September 14, 2007), Franklin Co. C.P. Case No. 07CVF09-11839, unreported (Brown, E.) (loss of income, property, clients, employees, and reputation are inherent results of

¹ Copies of all unreported decisions cited in this memorandum are included in Exhibit A attached hereto.

loss of license and do not constitute unusual hardship); *Dolce v. State Board of Chiropractic Examiners* (March 10, 1993), Franklin Co. C.P. Case No. 92CVF11-9231, unreported (Sheward, J.) (loss of practice, building and equipment does not constitute "unusual hardship"); *Hazem S. Garada, M.D. v. The State Medical Board of Ohio* (July 9, 1998), Franklin C.P. Case No. 98CVF06-4873, unreported (Sadler, J.). (loss of practice does not constitute "unusual hardship"); *Roy v. State Medical Board of Ohio* (August 9, 1993), Franklin Co. C.P. Case No. 93CVF05-3734, unreported (McGrath, J.) ("unusual hardship' means more than the loss of the right to practice medicine"); *Hoffman v. State Medical Board of Ohio* (December 29, 1993), Franklin Co. C.P. Case No. 93CVF09-6881, unreported (Sheward, J.) ("This Court accepts the argument that the foreseeable financial hardship from losing one's license to practice medicine does not rise to the level of 'unusual hardship'"); *Williams v. State of Ohio Department of Insurance* (January 12, 1994), Franklin Co. C.P. Case No. 93CVF08-5808, unreported (Reece, J.) ("That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one"); *Roland v. Ohio State Dental Board* (June 6, 1994), Franklin Co. C.P. Case No. 94CVF-05-3308, unreported (Pfeiffer, J.) ("Something more unusual needs to be established rather than simply not being able to practice dentistry"); *Essig v. State Medical Board* (November 2, 1994), Franklin Co. C.P. Case No. 94CVF10-7097, unreported (Sheward, J.) ("The Court is not persuaded that Appellant's claim of injury to his practice and loss of income constitutes 'unusual hardship' as contemplated in R.C. 119.12"); *Wu v. State Medical Board* (October 8, 1996), Franklin Co. C.P. Case No. 96CVF09-7055, unreported (Sheward, J.) (the threat to the public outweighs the financial loss to the physician); *J. Philip Davidson, D.P.M. v.*

State Medical Board (January 16, 1997), Franklin Co. C.P. Case No. 96CVF12-9486, unreported (Pfeiffer, J.); *Douglas S. Goldman, C.T. v. State Medical Board* (June 20, 1997), Franklin Co. C.P. Case No. 97CVF06-5968, unreported (Fais, J.); *Herman Dreskin, M.D. v. State Medical Board* (October 22, 1997), Franklin Co. C.P. No. 97CVF-09-8830, unreported (McGrath, J.).

Dr. Leak has failed to show unusual hardship as required under the first prong of the test set forth in R.C. 119.12, therefore, his motion for a stay of the Board's order should be denied.

B. Dr. Leak's Continued Practice Would Threaten The Public Health, Safety And Welfare

As noted above, R.C. 119.12 contains a mandatory two-part test which a movant must meet in order to be granted a suspension of an agency order. Since Dr. Leak has not demonstrated that he will suffer an "unusual" hardship if the Board's order is not stayed, it is not necessary to even consider the health and safety of the public part of the R.C. 119.12 test. *Essig v. State Medical Board of Ohio, supra*. However, even if it were necessary to reach this part of the test, Dr. Leak could not demonstrate that his continued practice would not pose a danger to the public.

The Board's order and accompanying Report and Recommendation clearly show that Dr. Leak's continued practice is a threat to the public health, safety and welfare. The record in this matter shows that Dr. Leak repeatedly engaged in substandard patient care, and he has demonstrated a pattern of abusing his position as a physician by ordering inappropriate and unnecessary tests upon his patients.

The patients involved in these cases are presenting to Dr. Leak for pain management. Rather than help these patients by putting them through rehabilitation so

they can actually resolve their pain issues, Dr. Leak puts all his patients through the same program and identical tests, regardless of pain symptoms or presentation. Patients are eventually prescribed narcotic pain medications, and often subjected to the same worthless barrage of tests on multiple occasions. The record even reflected a coercive nature in that some patients did not want to undergo the tests, but Dr. Leak would not prescribe medications unless they submitted to the testing. In addition, Dr. Leak would often prescribe potentially dangerous and addictive narcotic drugs to patients who demonstrated signs of abusing the medications. Some patients showed patterns of "losing" prescriptions or taking medications incorrectly, and Dr. Leak continued to prescribe the medications.

The bottom line in this matter is that Dr. Leak used his position as a physician to gain trust of these patients and then he subjected them to testing with no medically acceptable reason before prescribing them narcotic pain medication. The Board carefully reviewed the record and they were convinced that this practice by Dr. Leak was far below the standard of care and voted to **permanently revoke** his license.

While Dr. Leak seeks yet another stay pending his discretionary appeal in this matter, the potential for abuse is just too great. Keeping Dr. Leak in a position where he still has access to patients is not acceptable. He has managed to postpone the Board's order for almost three years at this point, continuing to practice and put patients in danger. The State Medical Board of Ohio has reviewed the evidence presented at hearing and has issued an order of permanent revocation, and deference should be given to the Board. This case has also been reviewed by the Common Pleas Court of Franklin County and most recently this Court issued a unanimous decision affirming the Board's order.

To allow Dr. Leak any practice privileges at this time would be placing the public at risk.

Ensuring public safety in the medical profession is one of the main reasons why the State Medical Board of Ohio exists. A crucial element of the Board's charge is to protect the public from physicians such as Dr. Leak. By failing to meet the minimal standard of care with the patients at issue, Dr. Leak has demonstrated that he cannot be trusted to safely practice medicine. The Board cannot simply hope that Dr. Leak will deal with his patients in a professional manner in the future. Given his track record, the Board has to take a proactive stance to protect the public. The order permanently revoking Dr. Leak's license is a prudent measure that will ensure public safety. Therefore, the Board respectfully requests that the Court deny the motion to stay the Medical Board's order pending the process of this discretionary appeal.

**MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION TO
EXPEDITE AND FOR ORAL HEARING**

After filing a request for a stay on June 2, 2011, Dr. Leak filed a motion on June 6, 2011, to expedite, and to request an oral argument or informal conference. The Board submits that no oral hearing is necessary, as Appellant's motion and the state's response provide sufficient information for the Court to issue a decision.

As to the application of the Board's order, the Board's original order, mailed on August 15, 2008, states that it "shall become effective thirty days from the date of mailing" of the Board's Order. The thirty days began to run on the date of mailing, August 15, 2008. Dr. Leak obtained a stay of the Board's Order on September 9, 2008, thus, twenty-four days had run before the Board's Order was stayed. In accordance with R. C. 119.12, the Court's entry of September, 9, 2008 stated that the stay would expire fifteen months after the filing of the notice of appeal, or when the common pleas court

issued its decision, whichever came first. The notice of appeal was filed on August 25, 2008, and the fifteen-month period required by statute expired on November 25, 2009. On November 23, 2009, the common pleas court extended the stay over the Board's objections that the statute did not permit extension of the stay.

The common pleas court issued a decision on the merits on December 15, 2009, affirming the Board's Order permanently revoking Dr. Leak's license. Dr. Leak appealed to this Court and filed a request for a stay pending appeal with the common pleas court. The common pleas court issued an entry granting the motion on January 13, 2010. This Court's entry was issued on May 25, 2011, following a unanimous decision affirming the Board's Order. No stay is in effect at this time.

As discussed above, twenty-four days passed between the original mailing of the Board's Order and the common pleas court's first stay. Further, more than six days have passed since the expiration of the common pleas court's most recent stay. Thus, the thirty-day period provided in the Board's Order has already expired, and there is no need for oral argument on this issue.

III. CONCLUSION

Based on the foregoing, the Board respectfully requests this Court deny Dr. Leak's motion for a conditional stay of the Board's August 13, 2008 order which permanently revoked his certificate to practice medicine and surgery in Ohio. To allow Dr. Leak the ability to practice during the duration of this appeal would endanger the public. Moreover, the Board asks this Court to deny Dr. Leak's motion for oral argument. If the Court finds that argument would be helpful, however, the Board certainly will participate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Memorandum Contra to Appellant's Motion for Stay of Administrative Order* was served via regular United States mail, postage prepaid this 7th day of June, 2011, to Douglas E. Graff, Esq., 604 East Rich Street, Columbus, Ohio 43215, counsel for W. David Leak, M.D.

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